IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

JOSEPH WHITE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF ESTATE OF DONALD MARKS AND DARLA HALL,
Appellants,

v. Case No. 5D20-1378

NICOLE LYN MARKS,

Appellee.

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Opinion filed April 1, 2021

Appeal from the Circuit Court for Marion County, Mary Hatcher, Judge.

John J. Pankauski, Robert J. Hauser, B.C.S., and Andrew Kwan of Pankauski Hauser Lazarus PLLC, West Palm Beach, for Appellants.

Denise VanNess, of VanNess & VanNess, P.A., Crystal River, and Alexander S. Douglas ll, and Loren M. Vasquez of Shuffield, Lowman & Wilson, P.A., Orlando, for Appellee.

COHEN, J.

In this probate case, Appellants seek reversal of summary judgment in favor of Ms. Nicole Marks, which determined her standing to contest Mr. Donald Marks' will.

Mr. Marks passed away in 2018, and his will was submitted to probate. The will devised his estate to Joseph White and Darla Hall in equal shares and expressly did not provide for Ms. Marks, stating: "I have also intentionally made no provision under this will for my adopted daughter Samantha Nicole Marks,[1] although it is my desire that Joseph White make appropriate provisions for her."

Ms. Marks petitioned for revocation of probate and for intestate administration of the estate, alleging that the will was the product of undue influence and that she was a legal heir to the estate. Ms. Marks claimed to be the daughter of Mr. Marks, asserting that Mr. Marks had acknowledged paternity in writing. However, two facts are immutably true: (1) Ms. Marks was not the biological daughter of Mr. Marks and (2) she was never adopted by him. Ms. Marks' mother, Lynda Vitale, had conceived Ms. Marks with the assistance of a sperm donor and was pregnant at the time she and Mr. Marks

[1] Ms. Marks' legal name is Nicole Lyn Marks, but neither party disputes that the reference was to her.

met. Despite the fact that Mr. Marks was not her biological father, his name was entered on Ms. Marks' birth certificate. Ms. Marks' mother had explained to her that to avoid the social stigma attached to out-of-wedlock births where the father was listed as "unknown," Mr. Marks had agreed to be listed as the father.

Ms. Vitale and Mr. Marks never married, and their relationship lasted less than three years. Following that brief period, Mr. Marks and Ms. Marks met on only two occasions, once when she was in her early twenties, and again decades later when the decedent was in hospice, immediately before his death.[2] Although present during her infant years, Mr. Marks never supported Ms. Marks financially or otherwise. However, he did pay for her flight and hotel during her visit to him on that final occasion.

Ms. Marks moved for summary judgment on her claim that as Mr. Marks' daughter she had standing to contest the will. She relied upon the appearance of his name on her birth certificate and references to her as an adopted daughter in the decedent's will and in a notation within a pocket planner. In response, Appellants argued that the applicable statute of limitations raised as an affirmative defense, barred her claim that she was

[2] The meeting during her early twenties was incidental to a brief and unsuccessful attempt at reconnecting between Ms. Vitale and Mr. Marks.

Mr. Marks' daughter, and she therefore lacked standing to bring a proceeding to revoke probate and for intestate administration of the estate. Alternatively, Appellants argued that the written documents relied upon were insufficient to establish acknowledgement of paternity by Mr. Marks.

The trial court granted summary judgment, determining that Ms. Marks had standing as a matter of law because the three writings were acknowledgments of paternity under section 732.108(2)(c), Florida Statutes (2018). In finding for Ms. Marks, the trial court ruled against Appellants on their statute of limitations affirmative defense. This appeal followed.

As an initial matter, we address this Court's jurisdiction to review the order on appeal. Florida Rule of Appellate Procedure 9.170(b)(5) provides:

> (b) Appealable Orders. Except for proceedings under rule 9.100 and rule 9.130(a), appeals of orders rendered in probate and guardianship cases shall be limited to orders that finally determine a right or obligation of an interested person as defined in the Florida Probate Code. Orders that finally determine a right or obligation include, but are not limited to, orders that:
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> . . . .
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> (5) grant heirship, succession, entitlement, or determine the persons to whom distribution should be made[.]

Although phrased in terms of standing, the trial court determined that the writings qualified as acknowledgments of paternity. That determination

effectively entitled Ms. Marks to recover the entirety of the intestate estate should she succeed in setting aside the will, as Mr. Marks was unmarried and had no children. See §§ 732.103(1), .108(2)(c), Fla. Stat. (2018). Accordingly, we find that because the order was a determination of heirship, it is reviewable on appeal. See § 731.201(20), Fla. Stat. (2018) ("'Heirs' or 'heirs at law' means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent."); see also Wallace v. Watkins, 253 So. 3d 1204 (Fla. 5th DCA 2018).

This Court also has jurisdiction to review the trial court's granting of summary judgment on Appellants' statute of limitations affirmative defense. While it is true that resolving the statute of limitations defense was not a literal determination of Ms. Marks' heirship, it was part and parcel of that decision. See Blackburn v. Boulis, 184 So. 3d 565, 567 (Fla. 4th DCA 2016) ("[A]n appeal from a final order calls up for review all necessary interlocutory steps leading to that final order, whether they were separately appealable or not." (quoting Saul v. Basse, 399 So. 2d 130, 133 (Fla. 2d DCA 1981))).

Regarding the merits, Appellants argue that because Ms. Marks was born out of wedlock, she is time-barred from establishing Mr. Marks' paternity because the four-year statute of limitations period extinguished in 1992.

Alternatively, even if her claim was not time-barred, the birth certificate, the will, and the pocket planner do not qualify as written acknowledgments of paternity. We agree.

There is a four-year statute of limitations, beginning when the individual reaches the age of majority, to any "action relating to the determination of paternity." § 95.11(3)(b), Fla. Stat. (2018). Multiple courts have determined that the statute of limitations applies to actions in probate brought under sections 732.108(2)(a) and (b).[3] See, e.g., Thurston v. Thurston, 777 So. 2d 1001, 1004 (Fla. 1st DCA 2000) (addressing § 732.108(2)(a)); In re Est. of Smith, 685 So. 2d 1206, 1209 (Fla. 1996) (addressing § 732.108(2)(b)).

While there appears to be no case directly addressing the applicability of the statute of limitations to section 732.108(2)(c),[4] which was the provision under which Ms. Marks claimed relief, section 95.11(3)(b) provides that the statute of limitations applies to any "action relating to the determination of

[3] In 2009, subsequent to the opinion in Est. of Smith, the Florida Legislature amended section 732.108(2)(b), such that the statute of limitations no longer applies to that provision. See Ch. 2009-115, Laws of Fla. However, Ms. Marks sought relief under section 732.108(2)(c).

[4] The authorities Ms. Marks relies upon, Knauer v. Barnett, 360 So. 2d 399 (Fla 1978), and Holmen v. Holmen by Rahn, 697 So. 2d 866 (Fla. 4th DCA 1997), do not address the applicability of the statute of limitations to claims made pursuant to section 732.108(2)(c).

paternity." (emphasis added). Ms. Marks is hard-pressed to assert that her action does not relate to the determination of paternity, considering that section 732.108(2)(c) requires a written acknowledgment of paternity and she seeks to inherit from the estate as Mr. Marks' daughter. § 732.108(2)(c), Fla. Stat; see also Est. of Smith, 685 So. 2d at 1209 (determining that statute of limitations applies to any paternity action regardless of purpose for which it is brought). In both Est. of Smith and Thurston, the decedent was listed on the birth certificate of the putative heir, yet the claimants were found to be time-barred.[5] Additionally, this Court in King v. Est. of Anderson, 519 So. 2d 68, 68 (Fla. 5th DCA 1988), did not differentiate between sections 732.108(2)(a), (b), or (c) when it determined that the appellant was time-barred in establishing his entitlement to the estate as an illegitimate heir. Accordingly, we find that the statute of limitations applies to Ms. Marks' claim, and because she was born in 1970, her claim was extinguished prior to her initiating the instant action.

[5] The birth certificate was referenced only in the First District's opinion of In re Est. of Smith, 640 So. 2d 1152, 1153 (Fla. 1st DCA 1994); it was not mentioned by the Supreme Court. See Est. of Smith, 685 So. 2d at 1207 (Supreme Court); Est. of Smith, 640 So. 2d at 1153 (First District). At the trial court, the putative heir proceeded on two theories, that she was the natural daughter of the decedent and that the decedent acknowledged paternity in writing. See Est. of Smith, 640 So. 2d at 1153. The Thurston court specifically referenced the birth certificate in its decision. 777 So. 2d at 1002.

Even if Ms. Marks' claim was not time-barred, under the unique circumstances of this case, the three alleged acknowledgments of paternity do not qualify as such under section 732.108(2)(c).[6] Under the prior version of the statute, codified as section 731.29(1), every illegitimate child was an heir of "the person who, in writing, and in the presence of a competent witness, acknowledge[d] himself to be the father." § 731.29(1), Fla. Stat. (1973). In interpreting the prior version, the Florida Supreme Court found that an informal writing was sufficient to meet the statute, provided the acknowledgment "directly, unequivocally and unquestionably acknowledges the paternity of the illegitimate child, in such terms and under such circumstances as may 'be construed as a formal acknowledgment of parenthood.'" In re McCollum's Est., 88 So. 2d 537, 540 (Fla. 1956) (quoting In re Horne's Est., 7 So. 2d 13 (Fla. 1942)).

Ms. Marks has conceded on appeal that the trial court erred in finding the birth certificate constituted a written acknowledgment of paternity. The birth certificate was not signed by Mr. Marks and without the accompanying

[6] There are three ways for an individual born out of wedlock to be treated as a descendant of his or her father: (a) the natural parents participated in a marriage ceremony, (b) the father's paternity was established by an adjudication, or (c) the father acknowledged his paternity in writing. § 732.108(2)(a)–(c), Fla. Stat.

required written consent, could not qualify as written acknowledgment under the statute.[7] Consequently, Ms. Marks is forced to rely upon the will and pocket planner where Mr. Marks referred to her as his adopted daughter. We find that neither constitute an acknowledgment of his paternity.

Ms. Marks readily admits that Mr. Marks was neither her biological nor adoptive father. Mr. Marks was well aware that he was not her biological father, as Ms. Vitale was pregnant before they met, which presumably explains why he referred to Ms. Marks as his adopted daughter, rather than his daughter. Because it is undisputed that an adoption did not occur, the references in the will and pocket planner are only understandable as descriptive, rather than direct, unequivocal acknowledgments of paternity. See McCollum's Est., 88 So. 2d at 540.

It is undisputed that Mr. Marks did not undertake parental responsibilities during Ms. Marks' life. Although Mr. Marks dated Ms. Vitale while Ms. Marks was an infant, he and Ms. Marks did not meet again until she was in her twenties. Nor did Mr. Marks provide her with any financial assistance throughout her life. Such behavior is consistent with the testimony

[7] Because Ms. Marks has conceded on appeal that her birth certificate was not a written acknowledgment of paternity, our holding related to the statute of limitations does not address the circumstance where an alleged written acknowledgment was executed prior to the limitations period ending.

of Ms. Marks that Mr. Marks agreed to have his name placed on the birth certificate to avoid having “unknown” listed as the father.

Further, Ms. Marks’ name was misstated under the will, and Mr. Marks directed that she not receive any devise from the estate. When considered with the lack of contact and emotional and financial support, the equivocal nature of the references becomes apparent. Accordingly, we find that the references are insufficient to create a legal relationship.

In summation, we find the trial court erred in granting summary judgment on Ms. Marks’ claim of standing, rejecting the Appellants’ statute of limitations affirmative defense and in finding that Mr. Marks acknowledged his paternity under section 732.108(2)(c). Accordingly, we reverse and remand.

REVERSED AND REMANDED.

LAMBERT, J., and SEGAL, R., Associate Judge, concur.