Rel: September 17, 2021

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2021

1200282

Karen Wheeler, as administrator of the Estate of Eugene Drayton, deceased

v.

Kristin Marvin

Appeal from Montgomery Probate Court
(No. 19-675)

SELLERS, Justice.

Karen Wheeler, as administrator of the estate of Eugene Drayton, deceased, appeals from a judgment of the Montgomery Probate Court declaring that Kristin Marvin is the biological child of Drayton and is

therefore an heir of Drayton for purposes of intestate succession. We affirm the probate court's judgment.

Drayton died intestate in November 2019. The probate court appointed Wheeler, who is Drayton's daughter, as the administrator of Drayton's estate. In her filings with the probate court, Wheeler identified herself and her brother as Drayton's only heirs. Marvin, however, later filed a petition with the probate court in which she claimed to also be a biological child of Drayton. She requested that the probate court consider the results of a DNA test allegedly showing that Drayton's half brother is Marvin's uncle and, therefore, indicating that Marvin is Drayton's daughter.

The probate court held a trial, at which it considered the DNA test result, testimony, and other evidence. After the trial, the probate court entered a judgment setting forth findings of fact and declaring that Marvin is Drayton's daughter and is therefore due to inherit from his estate. Wheeler appealed pursuant to § 12-22-21(4), Ala. Code 1975, which allows an appeal to this Court "[b]y a legatee or person entitled to

distribution, on the decision of the [probate] court, in proceedings instituted to compel the payment of a legacy or distributive share."

Section 43-8-48, Ala. Code 1975, provides:

> "If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:
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> > "(1) An adopted person is the child of an adopting parent and not of the natural parents except that adoption of a child by the spouse of a natural parent has no effect on the right of the child to inherit from or through either natural parent;
> >
> > "(2) In cases not covered by subdivision (1) of this section, a person born out of wedlock is a child of the mother. That person is also a child of the father, if:
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> > > "a. The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or
> > >
> > > "b. The paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, but the paternity established under this paragraph is ineffective to qualify the father or his kindred to inherit from or

> through the child unless the father has openly treated the child as his, and has not refused to support the child."

(Emphasis added.)

There is no transcript of the trial in the record. Accordingly, pursuant to Rule 10(d), Ala. R. App. P., Wheeler prepared a statement of the evidence. It appears that Marvin did not object to that statement, and the probate court approved it.

According to Wheeler's statement of the evidence, Drayton's half brother, Curtis Drayton, testified that he had babysat Marvin when she was a child and that Drayton had told him that Marvin was Drayton's child.[1] Like Curtis, Marvin testified that Drayton was her father. She also presented the probate court with a copy of a "memento" birth certificate issued by the hospital where she was born, which identifies Drayton as her father. She also testified that Drayton had visited her at

[1]Curtis and Drayton shared the same mother but had different fathers. According to Wheeler's statement of the evidence, Curtis testified that Drayton "had another brother and two half brothers." It is not entirely clear, but Wheeler appears to suggest that the "two half brothers" are in addition to Curtis. There are no other details regarding these additional siblings.

her mother's house when she was young and that she had visited Drayton's mother's house. In addition, Marvin submitted multiple "family" photographs depicting her with Drayton. Marvin also testified that Drayton gave her a $2,500 check to help her buy a house, and she submitted a copy of the check to the probate court. She also submitted a copy of a letter from the United States Department of Veterans Affairs indicating that she had made a request for benefits as Drayton's daughter. According to Marvin, while he was in the hospital shortly before he died, Drayton had given Marvin the keys to his house. Finally, Marvin submitted a copy of Drayton's obituary, which had been written by Wheeler, identifying Marvin as someone "special" to Drayton.

After Drayton died, Curtis and Marvin provided saliva samples at the office of Marvin's attorney. The samples were placed in separate containers and envelopes. Curtis and Marvin testified that they separately traveled alone to a post office and mailed their respective samples to a laboratory in Vancouver, British Columbia, for DNA testing. The test resulted in a conclusion that, as to "the Putative Uncle, Curtis J. Drayton and [the] Putative Nephew/Niece, Kristin Marvin, the probability

of relatedness is 99.6% as compared to an untested, unrelated random individual." For her part, Wheeler presented the testimony of an expert witness, who criticized the DNA test result because the DNA samples were collected and submitted by Marvin and Curtis and not by "disinterested" parties.

Wheeler testified that she was unaware that Drayton had any children other than herself and her brother. She asserted that no one, including Drayton, had ever stated to her that Marvin was Drayton's child. Wheeler claimed to have met Marvin for the first time at a funeral held after the death of Drayton's mother, but, she said, Drayton did not introduce them. Wheeler also suggested that Drayton was "upset" that Marvin had taken his house keys when he was in the hospital shortly before he died. Finally, Wheeler claimed that she described Marvin as "special" to Drayton in his obituary only because someone, she could not remember whom, had told her she should.

On appeal, Wheeler argues primarily that the probate court erred in considering the DNA test result. Section 36-18-30, Ala. Code 1975, provides:

> "Expert testimony or evidence relating to the use of genetic markers contained in or derived from DNA for identification purposes shall be admissible and accepted as evidence in all cases arising in all courts of this state, provided, however, the trial court shall be satisfied that the expert testimony or evidence meets the criteria for admissibility as set forth by the United States Supreme Court in Daubert, et. ux., et. al., v. Merrell Dow Pharmaceuticals, Inc., decided on June 28, 1993."

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the United States Supreme Court identified the following factors relevant to deciding whether expert scientific evidence is sufficiently reliable to be admitted into evidence:

> "In assessing reliability, trial courts should look to several guiding factors, including: (1) whether the 'theory or technique ... has been ... tested'; (2) whether the 'theory or technique has been subjected to peer review and publication'; (3) whether the technique's 'known or potential rate of error ... and ... standards controlling the technique's operation' are acceptable; and (4) whether the theory or technique has gained 'general acceptance' in the relevant scientific community."

Turner v. State, 746 So. 2d 355, 359 (Ala. 1998) (quoting Daubert, 509 U.S. at 593-94).[2]

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[2]Expert scientific evidence must also be "relevant." Turner, 746 So. 2d at 359. Wheeler, however, does not seriously contend that a DNA test purportedly showing that Marvin is the niece of Drayton's half brother is

Wheeler's primary attack on the DNA test is that the DNA samples were collected not by disinterested parties but by Marvin and Curtis, who then mailed them outside the presence of disinterested parties. Wheeler asserts that "there is a possibility that the samples were switched because they were in the exclusive possession of interested parties prior to being mailed to [the laboratory that performed the test]." She points out that the test result itself disclaims any responsibility for how the samples were collected and is based on the assumption that they were collected correctly.

"Only if a party challenges the performance of a reliable and relevant technique and shows that the performance was so particularly and critically deficient that it undermined the reliability of the technique, will evidence that is otherwise reliable and relevant be deemed inadmissible." Turner, 746 So. 2d at 361. Wheeler acknowledges that her expert witness "agreed that, if the samples in this case were returned to [the laboratory] as testified to by Curtis Drayton and [Marvin], ... the

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not relevant to the issue whether Marvin is Drayton's daughter.

results do indicate a familial relationship between the two." Thus, Wheeler's criticism of the DNA test is in essence an attack on Curtis's and Marvin's credibility. In other words, the probate court was presented with testimony that, if believed, indicated that the result of the DNA test was reliable. Wheeler has not presented this Court with any authority suggesting that the probate court could not admit and consider the DNA test if it believed the testimony of Curtis and Marvin describing how the DNA samples were collected and submitted. Accordingly, she has not shown that the probate court erred in considering the DNA test result based on how the samples were collected and submitted.

Wheeler also asserts that she "had no opportunity to cross examine the person or persons who performed the DNA tests at [the laboratory]." First, we note that the record does not demonstrate that Wheeler ever argued to the trial court that she had a right to "confront" the person or persons who conducted the DNA test. In any event, in support of this argument, Wheeler points to precedent involving DNA tests in criminal proceedings, the admissibility of which had been challenged under the Confrontation Clause of the Sixth Amendment to the United States

Constitution, which by its own language applies in criminal matters. Wheeler has not established that such precedent applies in this civil matter. See generally Alabama State Pers. Bd. v. Miller, 66 So. 3d 757, 761 (Ala. Civ. App. 2010) (noting that, although the Confrontation Clause is not applicable in civil cases, there can be a due-process right to confront "an accuser" in a civil proceeding, but also noting that "the right to confront an accuser [in a civil matter] is not an absolute right"). Moreover, Wheeler does not explain how she was, in fact, precluded from obtaining the testimony of a representative of the laboratory that performed the DNA test. See Miller, 66 So. 3d at 762 (holding that the appellant in a civil matter had waived any right he may have had to confront a witness because he had failed to subpoena that witness).[3]

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[3]Wheeler also claims that the DNA test result was not properly authenticated or supported by sufficient predicate. She does not, however, support that assertion with a convincing discussion of legal authority. She provides the following brief quotation from Ex parte Phillips, 962 So. 2d 159, 162 (Ala. 2006): "We agree with the Court of Criminal Appeals that the two laboratory tests relied upon by [two expert witnesses] lacked the appropriate predicates for admission into evidence so that the admission of their testimony regarding the results of those tests over Phillips's objection was error." Wheeler has the burden on appeal. Johnson v. Life Ins. Co. of Alabama, 581 So. 2d 438, 444 (Ala. 1991). She has not

Marvin was required to establish paternity through "clear and convincing proof." § 43-8-48(2)b., Ala. Code 1975. That said, "[t]he judgment of a trial court based on ore tenus evidence is presumed correct, and its findings on such evidence 'will not be disturbed on appeal unless they are palpably wrong, manifestly unjust, or without supporting evidence.' " Samek v. Sanders, 788 So. 2d 872, 876 (Ala. 2000) (quoting McCoy v. McCoy, 549 So. 2d 53, 57 (Ala. 1989)). Wheeler points out that the DNA test result, if admissible, established merely that Marvin is Curtis's niece but not conclusively that she is Drayton's daughter. Wheeler asserts that Drayton "had another brother and two half-brothers who could potentially be the biological father of [Marvin]."

Wheeler's statement of the evidence provides that Drayton had another unnamed "brother," who by implication would also be a half brother of Curtis. Regarding two other "half-brothers" of Drayton mentioned in the statement of the evidence, there is no express indication

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established that the trial court erred in considering the DNA test result because it was not sufficiently authenticated or because a sufficient predicate was not established.

that Curtis is also related to them. Thus, at most, the record supports the proposition that Marvin could possibly be the child of Drayton's other brother, but not necessarily his other half brothers. There is no other evidence indicating that Marvin's father is Drayton's brother or other half brothers.

It is not this Court's role to reweigh the evidence. The DNA test result, combined with the additional evidence accepted by the probate court, is sufficient to support its judgment. Although Wheeler challenges the persuasiveness of the evidence submitted, she has not established that the probate court was plainly and palpably wrong in determining that there was clear and convincing proof that Marvin is Drayton's daughter. Accordingly, we affirm the probate court's judgment.[4]

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[4]Wheeler relies on Reid v. Flournoy, 600 So. 2d 1024 (Ala. Civ. App. 1992), in which the Court of Civil Appeals affirmed a trial court's judgment declaring that a petitioner was not a child of a decedent. But the decision in Reid, like the decision in the present case, was based on the deference afforded trial courts in ore tenus proceedings. Indeed, the court in Reid specifically noted that the evidence presented to the trial court in that case would have, if believed by the trial court, supported a judgment that the petitioner was the decedent's child. Id. at 1026 ("Evidence was offered which, if believed, was necessary to prove [the petitioner's] case; however, the trial court heard and saw the witnesses

AFFIRMED.

Parker, C.J., and Wise and Stewart, JJ., concur.

Bolin, J., concurs in the result.

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and had the opportunity to judge their demeanor and credibility."). Like the court in Reid, we defer to the probate court that heard the evidence ore tenus in the present case.