State of New Hampshire
Supreme Court

NO. 2015-0064

2015 TERM

OCTOBER SESSION

Estate of Dan T. Buckless

RULE 7 APPEAL OF FINAL DECISION OF THE
BRENTWOOD PROBATE COURT

BRIEF OF RICHARD MIGLIACCI

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QUESTIONS PRESENTED

I. Did the court err in not re-opening the estate of Dan T. Buckless and distributing the appropriate portion to Richard Migliacci as a pretermitted heir, when although incarcerated at the time, upon learning of his father's death Richard Migliacci petitioned as expeditiously as possible to share in the estate?

PRESERVED: PETITION TO REOPEN PROBATE OF THE ESTATE OF DAN T. BUCKLESS DUE [TO] LACK OF NOTICE PROVIDED TO MR. RICHARD MIGLIACCI, HEIR AT LAW (Aug. 18, 2014).

II. Did the court err not apprising the parties in its scheduling order that the November 3, 2014 hearing would be for the purpose of taking evidence?

Preserved: *Mot.Hrg*. at 4, 5, 7, 47.

III. Did the court err in not allowing as evidence photographs and DNA testing which would have proved Richard Migliacci is Dan Buckless's heir?

Preserved: PETITIONER'S OBJECTION TO RESPONDENT'S REQUEST FOR ATTORNEY FEES AND CLARIFICATION OF HIS MOTION TO REOPEN AND MOTION TO EXHUME FOR DNA TESTING (Sept. 3, 2014); *Mot.Hrg*. at 6-7, 37.

STATEMENT OF FACTS

In 1972 Diana Migliacci, then 17 years old, was in high school in Saugus, Massachusetts. She knew Dan Buckless, then 21, from school and town. He was her only romantic partner, and in September she got pregnant. *Mot.Hrg*. (Nov. 3, 2014) at 9-10, 15-16, 32; AFFIDAVIT OF DIANA MOORE ¶2 (Aug. 12, 2014), *Appx*. at 25. They discussed the coming child, who she named Richard Migliacci, but they broke up in December. *Mot.Hrg*. at 10, 16-17.

Diana[1] knew the child was Dan's, *Mot.Hrg*. at 9, 16-17, 24; AFFIDAVIT OF DIANA MOORE ¶1; AFFIDAVIT OF RICHARD MIGLIACCI ¶1 (Aug. 13, 2014), *Appx*. at 27, and tried to involve him in her pregnancy and childbirth, but he refused. AFFIDAVIT OF DIANA MOORE ¶2. There is no father listed on the birth certificate because "[i]t wasn't allowed in those years." *Mot.Hrg*. at 24; AFFIDAVIT OF DIANA MOORE ¶2; BIRTH CERTIFICATE OF RICHARD MIGLIACCI (June 6, 2014), *Appx*. at 1. When Richard was an infant, the former couple had a meeting with both sets of parents at a lawyer's office in Saugus, but it ended with Dan's father threatening to besmirch Diana's reputation. *Mot.Hrg*. at 4, 17-18, 25; AFFIDAVIT OF DIANA MOORE ¶3. Over the next three years, Diana attempted to contact Dan, both directly and through his older brother Kenny, but Dan refused to acknowledge his role. *Mot.Hrg*. at 4, 19-20, 22-23; AFFIDAVIT OF DIANA MOORE ¶3.

In 1978 Diana got married (acquiring her current surname, Moore), and moved to Florida. Although her husband did not adopt Richard, he supported the child. *Mot.Hrg*. at 22, 25-26. Thus, Diana never pursued Dan for child support nor sought to establish paternity, and raised Richard with no emotional, financial or other assistance from Dan. *Mot.Hrg*. at 21-22, 25.

[1]Because of shared cognomen, all parties are referred to herein by their forenames. No disrespect is intended.

Over the years Richard approached Dan several times in an attempt to create a relationship, by going to Dan's home in Saugus and by talking to a mutual acquaintance, but was rebuffed. At most, Dan offered Richard a job, which he was not seeking. *Mot.Hrg*. at 4; AFFIDAVIT OF DIANA MOORE ¶4; AFFIDAVIT OF RICHARD MIGLIACCI ¶2; ORDER ON MOTION TO REOPEN ESTATE (Dec. 23, 2014) at 4, *Appx*. at 48. Richard never sought to establish paternity, *see* RSA 561:1, because he felt it would be odd for a grown man to file a paternity suit, and thought taking Dan to court would antagonize the emotional bond he sought. *Mot.Hrg*. at 53-54.

After a first marriage, in 1981 Dan met his second wife, Kathryn Buckless. They dated, and were married for 27 years until Dan's death in March 2012, but did not have any children together. *Mot.Hrg*. at 31, 38. Kathryn claims she never learned of Diana or Richard from Dan, *Mot.Hrg*. at 38, 42, through third persons, *Mot.Hrg*. at 34-35, 42, or in documents or pictures, *Mot.Hrg*. at 36-37, and had no knowledge that Dan had fathered a son. *Mot.Hrg*. at 41, 43; ORDER ON MOTION TO REOPEN ESTATE at 3.

In July 2010 Richard was involved in a motorcycle accident in which his girlfriend died. He plead guilty to vehicular homicide, and in November 2011 was sentenced to "a term not exceeding 4 yrs or less than 3 yrs," which he served at the Pondville prison in Norfolk, Massachusetts. *Mot.Hrg*. at 26-28; AFFIDAVIT OF DIANA MOORE ¶5; AFFIDAVIT OF RICHARD MIGLIACCI ¶3; *Motorcycle Crash Kills 1, Injures Another*, BOSTON GLOBE, July 11, 2010 (not contained in the record), *Appx*. at 65; *Commonwealth v. Migliacci*, Middlesex County Docket Report No. 1181CR00073 (not contained in the record), *Appx*. at 66, 68.

While Richard was incarcerated, Dan died. CERTIFICATION OF DEATH (Mar. 2, 2012), *Appx*. at 9. In February 2012 Dan's obituary appeared in the *New Hampshire Union Leader* and

in a Londonderry, New Hampshire newspaper, and also on the Massachusetts Carpenter's Union *Facebook* page. OBJECTION TO PETITION TO REOPEN ¶14 (Aug. 28, 2014), *Appx*. at 28.

But in jail in Massachusetts Richard had no entry to the internet, no regular access to New Hampshire newspapers, and no phone connection without pre-arrangement by jailors, and therefore no way of learning of Dan's death. *Mot.Hrg*. at 26-27, 29; AFFIDAVIT OF DIANA MOORE ¶5; AFFIDAVIT OF RICHARD MIGLIACCI ¶4; *see Beard v. Banks*, 548 U.S. 521 (2006) (jails may constitutionally restrict access to newspapers).

Diana heard about Dan's death from a friend probably in November 2013. *Mot.Hrg*. at 20-21, 26, 30; ORDER ON MOTION TO REOPEN ESTATE at 3. It is unknown when Richard heard about it; Diana told him, but it appears she was lackadaisical about it, mentioning it at some point later when Richard called her from prison. *Mot.Hrg.* at 21, 26.

Meanwhile, the language of Dan's will, dated in 2006, *Mot.Hrg.* at 44, 46, says "I am married to Kathryn Buckless. We have no children." LAST WILL AND TESTAMENT ¶1.1 (Aug. 15, 2006), *Appx*. at 2. The will leaves Dan's entire estate to Kathryn. It does not mention Richard. *Id; see* RSA 551:10.

STATEMENT OF THE CASE

Beginning in April 2012, as executrix of Dan's estate, Kathryn probated his will. In May the court found the will was self-proved, and closed the estate. In June, Kathryn notified known legatees, not including Richard. The estate's assets, valued at more than $7 million, were then distributed. LEGATEES AND DEVISEES - ESTATE WITH WILL (Apr. 18, 2012), *Appx*. at 13; LETTER OF APPOINTMENT (May 1, 2012), *Appx*. at 15; PETITION FOR ESTATE ADMINISTRATION (May 1, 2012), *Appx*. at 10; NOTICE TO SURVIVING SPOUSE, LEGATEES, HEIRS AT LAW (June 6, 2012), *Appx*. at 18; NOTICE OF DECISION (May 30, 2013), *Appx*. at 19; OBJECTION TO PETITION TO REOPEN ¶¶ 1-4, 23.[2]

After learning of Dan's death and finding a lawyer while incarcerated, in August 2014 Richard filed a petition to reopen the estate, claiming he was among Dan's issue though not mentioned in the will, and that therefore he should inherit a portion of the estate. PETITION TO REOPEN PROBATE OF THE ESTATE OF DAN T. BUCKLESS DUE [TO] LACK OF NOTICE PROVIDED TO MR. RICHARD MIGLIACCI, HEIR AT LAW (hereinafter PETITION TO REOPEN) (Aug. 18, 2014), *Appx*. at 20.

The estate objected, on the grounds of insufficient proof that Richard is Dan's son, that Kathryn administered the estate properly, and that the statute of limitations had run for reexamining probate. OBJECTION TO RICHARD MIGLIACCI'S PETITION TO REOPEN PROBATE OF THE ESTATE OF DAN T. BUCKLESS DUE TO LACK OF NOTICE (Aug. 28, 2014), *Appx*. at 28. In a subsequent filing Richard refined his claim to make it based solely on equitable rather than

[2]Kathryn petitioned for estate administration and to be named executrix of Dan's estate, but did not request waiver of full administration pursuant to RSA 553:32. PETITION FOR ESTATE ADMINISTRATION ¶ 9 (May 1, 2012), *Appx*. at 10 (box "no" checked by Kathryn). The court nonetheless *sua sponte* waived full administration. *Id*. at 2 (box "Petition for Waiver of Full Administration is granted" checked by court).

statutory considerations. He also motioned the court for an order allowing exhumation of the body for DNA testing, to which the estate objected. PETITIONER'S OBJECTION TO RESPONDENT'S REQUEST FOR ATTORNEY FEES AND CLARIFICATION OF HIS MOTION TO REOPEN AND MOTION TO EXHUME FOR DNA TESTING (Sept. 3, 2014), *Appx*. at 27; RESPONSE TO PETITIONER'S OBJECTION TO RESPONDENT'S REQUEST FOR ATTORNEY FEES AND OBJECTION TO PETITIONER'S CLARIFICATION OF MOTION TO REOPEN AND MOTION TO EXHUME FOR DNA TESTING (Sept. 15, 2014), *Appx*. at 40.

The court issued a notice of hearing, which apprised the parties that "Matters to be considered" would be "Motion to Reopen; Objection; Objection; Response." The notice provided one hour for the hearing, and did not apprise that its purpose was to take evidence. NOTICE OF HEARING (Sept. 18, 2014), *Appx*. at 47.

In November 2014, the court held a hearing.

Richard's lawyer began with an offer of proof, to which Kathryn's lawyer immediately objected. *Mot.Hrg.* at 4. The court then asked Richard's lawyer: "Are you going to offer any testimony?" Richard's lawyer replied that "I didn't know we were having an evidentiary hearing today. It was just on motions." *Mot.Hrg.* at 5. He told the court that the hearing notice did not specify it was for taking evidence, but that it said it was for motions, and asked for a continuance. *Mot.Hrg.* at 7. Later he reiterated that "I did not realize it was going to be an evidentiary hearing," and asked the court to hold the record open for further evidence. *Mot.Hrg.* at 47. The court denied Richard's lawyer's request for remedies. And the court repeatedly and exclusively used the word "motion" rather than "petition" both orally and in its order, to refer to Richard's *Petition* to Reopen. *Mot.Hrg.* at 3, 7, 13, 14, 15, 47, 48; ORDER ON MOTION TO REOPEN ESTATE at 1, 2, 4, 5.

Consequently, Richard's lawyer offered, but was disallowed from entering into evidence, DNA evidence showing Richard was related to Dan's family, and side-by-side photographs of Richard and Dan. *Mot.Hrg.* at 6-7, 37. The court took evidence from the only then-available witnesses, Diana and Kathryn. *Mot.Hrg.*, *passim*.

Had Richard's lawyer understood the purpose of the hearing, he would have presented additional evidence – the lawyer with whom the parties met in 1973 whose office is still in Saugus, a DNA expert, the DNA results, Dan's brother Kenny with whom Richard's DNA was compared and who had tried to help Diana connect with Dan after the pregnancy was discovered, and third parties who had information about Diana's attempts to involve Dan when they were young. *Mot.Hrg.* at 5, 7, 20, 25, 34-35, 47, 52, 59. The DNA results would have compared Richard's genetics to that of Dan's brother Kenny, and would have disclosed that "the probability of relatedness is 99.9%." DNA Diagnostics Center, DNA TEST REPORT (Oct. 16, 2014) (not contained in the record), *Appx*. at 56. In addition, because Richard's jail term was nearing completion, had there been a continuance or no *sua sponte* waiver of full estate administration, he also would have presented Richard's face – his visage and countenance – which, from the photo that could not otherwise be authenticated, *Mot.Hrg.* at 37, conspicuously resembles Dan's. TWO PHOTOGRAPHS (dates unspecified), *Appx*. at 54, 55.

The court deferred decision on the pre-hearing motions regarding exhumation and DNA. *Mot.Hrg.* at 59-60. On the evidence it allowed itself to hear, the court then denied the "motion" to reopen probate. ORDER ON MOTION TO REOPEN ESTATE (Dec. 23, 2014), *Appx*. at 48. This appeal followed.

SUMMARY OF ARGUMENT

Richard Migliacci first argues that his lack of notice of Dan's death was by happenstance and not his fault, and that therefore the estate should be reopened to treat him as a pretermitted heir. He then suggests his lawyer should have been allowed to proceed in accord with the notice of hearing, which indicated there would first be a hearing on motions, and later an opportunity to make evidentiary proof. Finally, he suggests the court was in error for not allowing him to present the best evidence of his blood relationship to the deceased – photographs and DNA.

ARGUMENT

I. Visiting the Iniquity of the Fathers Upon the Children[3]

The probate court has authority to reopen a probated will. *In re Lund's Estate*, 118 N.H. 180 (1978); *Knight v. Hollings*, 73 N.H. 495 (1906).

> But the power is equitable in nature. It is not exercised upon the mere asking, nor for the sole purpose of overriding rules of law that stand in the way of maintaining proceedings at law. To entitle the plaintiffs to the relief they seek, there must be some substantial ground, such as fraud, accident, or mistake, which renders it against conscience to execute the decree they attack, and of which they were prevented from availing themselves by fraud, accident, or mistake, unmixed with any fraud or negligence on their part.

Knight v. Hollings, 73 N.H. at 502. Those entitled to participate in probate include "those who take by reason of blood relationship." *In re Estate of Kelly*, 130 N.H. 773, 778 (1988).

Here, Dan's will was probated in June 2012.[4] Diana learned of Dan's death in November 2013, and at some point later told Richard. Richard filed a petition to reopen the estate in August 2014. From the time the will was probated until the time Richard filed, a total of two years and two month elapsed, about 20 months beyond the statute of limitations.[5] During that period, Diana apparently felt no imminence. After Richard learned of Dan's death, from prison he had to find and meet with an attorney. Being in jail in another state, with no regular or timely way to learn of Dan's death, the time that passed was neither long nor unreasonable. Delay was due to detention, not dawdling.

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[3]Exodus 34:7.

[4]Had the court not *sua sponte* waived full administration, Kathryn would have had to follow full probate procedure, including an inventory and accounting, thereby increasing both the level of scrutiny into the estate and the amount of time for its probate. During such procedure, there might have been more opportunity for Kathryn to discover Richard's existence, and Richard to discover Dan's death.

[5]RSA 552:7 provides a 6-month statute of limitations to petition to have a will reexamined.

In *Lund*, the parties seeking to set aside probate were timely notified of the probate proceeding, yet took no action until two years later. *Lund's Estate*, 118 N.H. at 186. In *Knight*, those attacking probate waited more than 12 years, and as this Court noted, "[t]hey do not say that they were ignorant of the fact" of the decedent's demise. *Knight v. Hollings*, 73 N.H. at 503. Thus, neither *Knight* nor *Lund* address the situation here – an heir who could not know of the death, yet took action as expeditiously as possible.

Knight suggests the probate court should exercise its equitable authority upon "some substantial ground," and then lists matters "*such as* fraud, accident, or mistake." *Knight v. Hollings*, 73 N.H. at 502 (emphasis added). *Knight* is not, however, *limited* to fraud, accident or mistake, and there is no requirement that there be a such a finding.

The equitable authority of the probate court is for precisely this situation – when by no fault of his own a pretermitted heir is prevented from learning about his inheritance, a modest time passes, and then the heir takes all steps possible to make his claim. Accordingly, this Court should reverse the probate court, order the estate reopened, allow Richard to present proof that he is Dan's legitimate pretermitted heir, and if so, order the probate court to award him an intestate share of Dan's estate. *See* RSA 551:10; *Estate of Fischer*, 152 N.H. 669, 670 (2005) (reversal where probate court erred as matter of law).

II. Ambiguous Notice of Hearing Prevented Richard From Exercising His Rights

Litigants have a right to be apprised of the purpose of court proceedings and hearings. *Douglas v. Douglas*, 143 N.H. 419, 426 (1999). "A fundamental requirement of the constitutional right to be heard is notice of the impending action that affords the party an opportunity to protect the interest through the presentation of objections and evidence." *In re New Hampshire Fireworks, Inc.*, 151 N.H. 335, 338 (2004) (quotations and citations omitted). "[A]dequate notice is that which is reasonably calculated to give the parties actual notice of the issue or issues to be decided at the hearing." *In re Hiscoe*, 147 N.H. 223, 227 (2001).

Here, there was ambiguity in the notice, such that one could – as Richard's attorney did – misunderstand the "issue or issues to be decided at the hearing."

Richard properly filed a "Petition" to reopen probate, and later a "Motion" for exhumation. The hearing notice apprised, however, that a "motion" would be heard. The notice nowhere contains the word "evidence," "testimony," nor any variants. The notice said only an hour was provided, suggesting a relatively abbreviated non-evidentiary proceeding. There was a motion for exhumation and DNA testing then pending, lending credence to Richard's attorney's understanding that the purpose of the hearing was to hear that motion.

In the hearing record it is apparent, from the very beginning, that Richard's lawyer thought he was there to argue a motion, and that he understood that evidence on the actual Petition to Reopen would come later. He opened with an offer of proof, and when confronted with the court's differing intent as to the nature of the proceeding, immediately told the court he did not know the "motion hearing" was the only opportunity to present evidence on the Petition. *Mot.Hrg.* at 5.

The court used the word "motion" rather than "petition" everywhere – orally during the hearing, in the caption of the transcript, in the caption of its order, and throughout its order.

Among the court's very first words were: "We're here on a *motion* to reopen the estate." *Mot.Hrg.* at 3 (emphasis added). The court never uttered or wrote the word "Petition."

Thus it is apparent the court's understanding of the purpose of the hearing was different from Richard's lawyer's.

When he realized the differing understandings, Richard's lawyer first requested a continuance and then allowance to hold the record open. His request was not an empty grasp – he had real evidence to offer, including photographs showing the likeness of Richard's and Dan's faces, DNA testing showing the connection of Richard's genetics with Dan's family, and persons present when Richard was an infant showing that Diana attempted to prevent Dan's avoidance of responsibility.

Allowing the court's ruling to abide puts anyone trying to reopen any type of proceeding in an impossible situation. The court should have first decided the exhumation motion which Richard's attorney reasonably understood was the subject of the "motion hearing" so that evidence could be developed, and then later should have heard that evidence on the underlying Petition to Reopen. At the least, the court should have allowed a continuance so that Richard's attorney could have come to the hearing prepared to present the evidence he had.

Because of the constitutional importance of adequate notice, ambiguities should be construed in favor of those holding the right. *State v. Adams*, 717 P.2d 212, 214 (Or. App. 1986) (where possible to read notice of license suspension two ways, due process requires it be treated as not having provided adequate notice). Accordingly, this Court should find that the hearing notice erroneously created Richard's attorney's understanding that the hearing would be limited to a non-evidentiary offer of proof on the need for exhumation and DNA testing, and that the probate court was in error for demanding the evidentiary standard for reopening before acting on those motions.

III. Court Should Have Accepted Photographic and DNA Evidence

The court disallowed Richard from offering photographic and DNA evidence which would have proved Richard is Dan's progeny. Its action put Richard in a circular dilemma – he could not present evidence to reopen probate without the court acting on his motion and allowing the pictures and DNA evidence, but could not present the evidence without reopening.

Although "[t]he admissibility of evidence is a matter within the trial court's broad discretion," this Court reverses evidentiary rulings when they are "clearly untenable or unreasonable to the prejudice of [the party's] case." *State v. Warren*, 143 N.H. 633, 636 (1999) (reversing trial court's ruling on evidentiary completeness).

Because disallowance of the photographic and DNA evidence completely prevented Richard from proving he was Dan's heir, it was untenable and the ruling should be reversed.

CONCLUSION

In life, Dan was able to avoid responsibility for Richard, first by the grace of Diana's husband in assuming responsibility for the child, and then by the humility of Richard in trying to preserve the possibility of an adult relationship with his biological father. In death Dan should not be allowed again to avoid that responsibility by the happenstance of Richard being restricted from reading his obituary.

REQUEST FOR ORAL ARGUMENT

Richard Migliacci requests oral argument because this case gives this Court the opportunity to construe the equitable authority of the probate court where a claimant is non-negligent in time nor deed, and because this Court has not before clarified the extent to which ambiguity in a hearing notice prejudices litigants.

Respectfully submitted,

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By his Attorney,

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Dated: October 30, 2015

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CERTIFICATION

I hereby certify that the decision being appealed is addended to this brief. I further certify that on October 30, 2015, copies of the foregoing will be forwarded to Jay Surdukowski, Esq.

Dated: October 30, 2015

Joshua L. Gordon, Esq.

ADDENDUM