Rel: March 26, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190963

Ex parte Tutt Real Estate, LLC, d/b/a Tutt Land Company

PETITION FOR WRIT OF MANDAMUS

(In re: Matthew Smith

v.

Mark H. Smith et al.)

(Hale Circuit Court, CV-15-900099)

SELLERS, Justice.

Tutt Real Estate, LLC, doing business as Tutt Land Company ("Tutt"), petitions this Court for a writ of mandamus directing the Hale Circuit Court ("the circuit court") to vacate its July 14, 2020, order awarding Tutt a smaller commission than it claims it is entitled to under a real-estate contract ("the exclusive-listing agreement") that Tutt executed with Ellen Berry-Pratt, the purported conservator for the estate of Harriet Cobbs Smith ("Mrs. Smith"). The case was purportedly removed to the circuit court from the Hale Probate Court ("the probate court"). However, the removal was not accomplished in accordance with § 26-2-2, Ala. Code 1975, and, thus, the circuit court never acquired subject-matter jurisdiction. Therefore, we grant the petition and issue the writ.

I. Facts and Procedural History

Mrs. Smith is the mother of three adult children -- Matthew Smith, Mark H. Smith, and Jessica Smith Kimbrough. In March 2015, Matthew filed a petition in the probate court, alleging that Mrs. Smith was incapacitated and requesting the appointment of a guardian and a conservator for her benefit; the proceeding commenced by that petition is

referred to as "the probate action." The probate court entered an order appointing attorney Jamee York as guardian ad litem for Mrs. Smith and directing that Mrs. Smith undergo a medical examination. The physician who evaluated Mrs. Smith submitted a report indicating that Mrs. Smith was impaired by vascular dementia and that it was unsafe for her to make "medical, legal, and financial decisions" for herself. Mrs. Smith's children disputed who should be appointed as guardian of Mrs. Smith's person and as conservator of her estate.

In November 2015, while the probate action was pending in the probate court, Matthew filed a complaint in the circuit court against Mark and Jessica, seeking declaratory and injunctive relief; the proceeding commenced by that complaint is referred to as "the civil action." In the civil action, Matthew alleged that the probate court had suspended a February 15, 2015, power of attorney that Mrs. Smith had executed in favor of Mark but that, despite that suspension, Mark had continued to execute legal documents on behalf of Mrs. Smith. Matthew requested that the circuit court, among other things, enter a temporary restraining order enjoining further use of the power of attorney, declaring

that the power of attorney was void, and declaring that certain legal documents executed pursuant to the power of attorney were void. Matthew also requested that the circuit court stay the probate action pending resolution of the civil action.

On April 27, 2016, the circuit court entered an order in the civil action, granting Matthew's request for a temporary restraining order pending a hearing, enjoining Mark from using the power of attorney for any purpose, and staying the probate action pending resolution of the civil action. The circuit court subsequently entered an order lifting its stay of the probate action for the limited purpose of "allowing the Probate Court to appoint Jamee York as guardian and conservator." Consistent with the circuit court's directive, the probate court entered an order appointing York as Mrs. Smith's guardian and conservator. Matthew appealed that order to the circuit court pursuant to § 12-22-20, Ala. Code 1975.

In August 2016, Mark and Jessica petitioned the circuit court to remove the probate action from the probate court to the circuit court pursuant to § 26-2-2; that petition states:

> "1. Petitioners, Mark Smith and Jessica Kimbrough are the children of [Mrs. Smith].
>
> "2. There has been no final resolution of the matters pertaining to [Mrs. Smith]. Further, [Matthew] has filed an appeal of the ruling of the probate court with [the circuit court].
>
> "3. There are currently two actions pending regarding [Mrs. Smith] -- one in Circuit Court and one in Probate Court. These matters have substantially overlapping issues and efficiency would best be served by removing [the probate action] and consolidating it with the pending [civil action]."

On August 24, 2016, the circuit court entered an order purporting to remove the probate action to the circuit court. The circuit court thereafter entered an order approving a settlement agreement in which the parties agreed, among other things, to the appointment of Ellen Berry-Pratt as Mrs. Smith's guardian and as the conservator of Mrs. Smith's estate. Pursuant to the settlement agreement, the circuit court, among other things, purported to issue letters of conservatorship to Berry-Pratt and to order an accounting and inventory of the conservatorship estate.[1] In April

[1]In April 2017, the circuit court entered an order purporting to appoint Matthew as successor guardian of Mrs. Smith's person, while Berry-Pratt continued to serve as conservator of her estate.

2017, the circuit court entered an order granting Berry-Pratt's request to sell from the conservatorship estate property referred to as the Smith Farm ("the farm"). Berry-Pratt thereafter entered into the exclusive-listing agreement with Tutt in which Tutt agreed to market and sell the farm for $1,625,800, with a 5% commission, subject to court approval. The exclusive-listing agreement provided that Mrs. Smith's grandson, Miller Smith, would have until November 7, 2018, to make an offer that would be excluded from Tutt's exclusive right to sell and claim a commission. On November 23, 2018, Miller offered to purchase the farm for $1,314,000. Tutt then presented a contract from a buyer offering to purchase the farm for $1,611,200, and Miller subsequently raised his initial offer to $1,535,000. The circuit court entered an order approving the sale of the farm to Miller and reserving the right to award a commission to Tutt under the exclusive-listing agreement. Tutt thereafter moved to intervene and requested payment of its commission on either the offer it presented or Miller's final offer. On July 14, 2020, the circuit court entered an order holding, in relevant part, that Tutt was entitled to $11,750 as a

commission, which it could "claim against the estate of [Mrs. Smith] for consideration by the court at final distribution."

Tutt seeks a writ of mandamus directing the circuit court to vacate its July 14, 2020, order on the basis that the circuit court never acquired subject-matter jurisdiction over the probate action and, thus, that the order is void.

II. Standard of Review

> " 'Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.'
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> "Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995). The question of subject-matter jurisdiction is reviewable by a petition for a writ of mandamus. Ex parte Flint Constr. Co., 775 So. 2d 805 (Ala. 2000)."

Ex parte Huntingdon Coll., 309 So. 3d 606, 609-10 (Ala. 2020).

III. Analysis

Probate courts have general and original jurisdiction over petitions for the appointment of guardians and conservators for incapacitated

persons. § 12-13-1(b)(6) and (b)(7), Ala. Code 1975. The filing of a petition for the removal of such an action to a circuit court pursuant to § 26-2-2, and the entry of an order of removal by the circuit court are prerequisites for the circuit court to acquire jurisdiction. Beam v. Taylor, 149 So. 3d 571 (Ala. 2014). Moreover, a circuit court does not acquire subject-matter jurisdiction over such an action unless the statutory requirements of § 26-2-2 have been met. Id. Section 26-2-2 provides:

> "The administration or conduct of any guardianship or conservatorship of a minor or incapacitated person may be removed from the probate court to the circuit court, at any time before the final settlement thereof by the guardian or conservator of any such guardianship or conservatorship or guardian ad litem or next friend of such ward or anyone entitled to support out of the estate of such ward without assigning any special equity, and an order of removal must be made by the court or judge upon the filing of a sworn petition by any such guardian or conservator or guardian ad litem or next friend for the ward or such person entitled to support out of the estate of such ward, reciting in what capacity the petitioner acts and that in the opinion of the petitioner such guardianship or conservatorship can be better administered in the circuit court than in the probate court."

(Emphasis added.)

In other words, § 26-2-2 provides that, without assigning any special equity, a petition for removal may be filed by only a "guardian or

conservator or guardian ad litem or next friend for the ward or such person entitled to support out of the estate of such ward." In this case, the petition for removal did not comply with the first two requirements of § 26-2-2, because the petition was unsworn and did not recite in what capacity Mark and Jessica were acting.[2] First, in order for a removal petition to meet the requirement of being "sworn," a petitioner must make a declaration under oath that he or she believes, and has made sufficient inquiry to confirm, that the contents of the petition are accurate. Such a declaration must be properly acknowledged by a notary public or a judge. The mere filing of an unsworn petition does not comply with § 26-2-2 because that statute requires anyone petitioning under that statute to fully appreciate the significance and seriousness of his or her actions by swearing under oath and thus invoking penalties for perjury should the

[2]The third requirement of § 26-2-2 -- a statement or allegation that, "in the opinion of the petitioner such guardianship or conservatorship can be better administered in the circuit court than in the probate court" -- is subjective in nature and does not require any magic or specific words on the part of the petitioner. It appears that the allegation in the petition in this case satisfied the third requirement.

allegations in the petition be knowingly false.[3] Next, in seeking removal, Mark and Jessica were required to state in what capacity they were acting. It is undisputed that neither Mark nor Jessica was Mrs. Smith's guardian, conservator, or guardian ad litem; nor was there any allegation that they were entitled to support out of her estate while she was alive. Furthermore, the fact that Mark and Jessica alleged in the petition that they were Mrs. Smith's children does not qualify them as next friends with standing to seek removal under § 26-2-2. This Court has made clear that a recitation of capacity is still required even if the petitioner has a blood relationship or is the next of kin to the protected person. See Hoff v. Goyer, 107 So. 3d 1085 (Ala. 2012) (rejecting grandson's argument that his blood relationship qualified him as next friend with standing to seek removal of proceeding to circuit court pursuant to § 26-2-2); and McNairy v. McNairy, 416 So. 2d 735, 736 (Ala. 1982) (holding that petition for

[3]The term "sworn" as used in § 26-2-2 is not statutorily defined. However, the term "swear," from which "sworn" stems, is defined in Black's Law Dictionary 1749 (11th ed. 2019) as "[t]o take an oath." An "oath" is defined as "[a] solemn declaration ... that one's statement is true ...." Black's Law Dictionary 1289 (11th ed. 2019).

removal filed by protected person's sister did not meet the requirements of § 26-2-2 because the petition was unsworn and "did not recite in what capacity the [sister] was acting"). The removal petition in this case, being unsworn and failing to recite in what capacity Mark and Jessica were acting, is fatally defective and thus did not confer jurisdiction upon the circuit court.

IV. Conclusion

For the foregoing reasons, Tutt has demonstrated a clear legal right to the relief it seeks. Therefore, we grant the petition and issue the writ of mandamus directing the circuit court to vacate its July 14, 2020, order concerning Tutt's commission under the exclusive-listing agreement. We further direct the circuit court to vacate its August 24, 2016, order purporting to remove the probate action to the circuit court. We note that, because the circuit court never obtained jurisdiction over the probate action, jurisdiction over that proceeding remains in the probate court.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Mendheim, and Stewart, JJ., concur.

Mitchell, J., concurs specially.

MITCHELL, Justice (concurring specially).

When this Court interprets a statute, our job is to determine the meaning of the words as written by the Legislature. DeKalb Cnty. LP Gas Co. v. Suburban Gas, Inc., 729 So. 2d 270, 275 (Ala. 1998). Because "[w]ords change meaning over time, and often in unpredictable ways," it is important to give words in statutes the meaning they had when they were adopted to avoid changing what the law is. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, § 7, at 78 (Thomson/West 2012) (explaining the fixed-meaning canon of interpretation); see also New Prime Inc. v. Oliveira, 586 U.S. ___, ___, 139 S. Ct. 532, 539 (2019). To do otherwise would inappropriately expand the judicial power. See Ala. Const. 1901 (Off. Recomp.), Art. III, § 42; Blankenship v. Kennedy, [Ms. 1180649, May 29, 2020] ___ So. 3d ___, ___ (Ala. 2020). Accordingly, whenever we use dictionaries to help us interpret statutes, it is critical to use dictionaries of the proper vintage to

better understand the meaning of relevant terms at the time of their adoption.[4]

Dictionaries are important -- but imperfect -- tools that can be used to determine the meaning of statutory terms. One reason why they are imperfect is because they "tend to lag behind linguistic realities." Scalia & Garner, Reading Law, Appendix A, at 419. Thus, it may be entirely proper to consult a dictionary published many years after the enactment of a statutory text. Id. But consulting a dictionary too far removed from the date of enactment can allow the distortions of semantic drift to taint the interpretive analysis. See id. at 78 (illustrating the dangers of semantic drift through Queen Anne's complimentary description of St. Paul's Cathedral as "awful, artificial, and amusing"). This linguistic-

[4]There are other important considerations when consulting a dictionary. Those include an examination of how scholarly the dictionary is; whether one should use a general English-usage dictionary or a dictionary written for a technical audience, such as Black's Law Dictionary; and whether the use of a dictionary is appropriate at all. See Scalia & Garner, Reading Law, Appendix A, at 415-19; Alabama Dep't of Revenue v. CSX Transp., Inc., 575 U.S. 21, 34-35 (Thomas, J., dissenting).

calibration conundrum demonstrates why, when possible, multiple dictionaries should be consulted. Id., Appendix A, at 417.[5]

In this case, footnote three of the main opinion uses the 2019 version of Black's Law Dictionary to define the terms "swear" and "oath." ___ So. 3d at ___ n.3. The past participle of the former -- "sworn" -- appears in the text of the statute that is key to the Court's holding: § 26-2-2, Ala. Code 1975. Although § 26-2-2 was relocated during the state's recodification process in the 1970s and amended as recently as 1987, the relevant portion here -- "upon the filing of a sworn petition" -- has been in the statute since it was adopted in 1923. Compare Ala. Code 1923, § 8102, with § 26-2-2, Ala. Code 1975. And when a statute is recodified, its original meaning persists unless the Legislature adds new language that clearly changes the meaning of that portion of statute. See Scalia & Garner, Reading Law, § 40, at 256 (explaining the reenactment canon).

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[5]To provide guidance, the late Justice Antonin Scalia and lexicographer Bryan Garner compiled a list of authoritative English-language and legal dictionaries grouped by period. This list, found in the first appendix of their seminal treatise Reading Law: The Interpretation of Legal Texts, is a great place for any practitioner to start.

Therefore, it would be more appropriate to consider dictionaries closer to 1923 than the 2019 edition of Black's, which was published almost a century after the Legislature enacted the statute.

Fortunately, the definition of the word supplied by the main opinion does not materially differ from those found in dictionaries published closer to the time of the statute's enactment. See, e.g., Black's Law Dictionary 1692 (3d ed. 1933) (defining "swear" as "[t]o take an oath; to become bound by an oath duly administered"). Nor does its relevant definition differ between legal dictionaries like Black's and general English-language dictionaries like Webster's Second.[6] See, e.g., Webster's New International Dictionary 2546 (2d ed. 1935) (defining "swear" in the legal

[6] While, as a general rule, the ordinary meaning of a term governs, there are instances where context indicates that a technical sense applies. See Ex parte Dan Tucker Auto Sales, Inc., 718 So. 2d 33, 36 (Ala. 1998) ("Words used ... will be given their ordinary, plain, or natural meaning where nothing appears to show they were used in a different sense or that they have a technical meaning."); Scalia & Garner, Reading Law, § 6, at 73. "And when the law is the subject, ordinary legal meaning is to be expected, which often differs from common meaning." Scalia & Garner, Reading Law, § 6, at 73. The distinction between ordinary and technical meaning, however, does not affect this case because the general and legal dictionaries are in accord.

context as "[t]o take oath"). But such agreement among different dictionaries across time and editorial viewpoint may not exist when we interpret other words and phrases in future cases. Practitioners seeking to guide this Court in interpreting statutes should accordingly proceed with caution when reaching for a dictionary.