NO. 01-23-00362-CV

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS
HOUSTON, TEXAS

Candace Louise Curtis,
Appellant

V.

Carl Henry Brunsting, Individually & As Independent Executor of The Estates of Elmer H. Brunsting & Nelva E. Brunsting
Appellees

On Appeal from Probate Court No. Four
Harris County, Texas
C.A. No. 412249-401
The Honorable James Horowitz, Judge Presiding

Appellees' Reply Regarding the Lack of Appellate Jurisdiction

Oral Argument is not Necessary

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To the Honorable Justices of the First Judicial District Court of Appeals:

On June 6, 2024, Justice Guerra ordered Appellees to reply to Appellant's/Curtis' Brief on Appellate Court Jurisdiction. The principles of appellate court jurisdiction are straightforward. This appeal should be dismissed because even in the face of a jurisdictional challenge to a trial court's jurisdiction, an appellate court does ***not*** have jurisdiction over an allegedly void order absent a timely-filed notice of appeal.

Introduction to Reply to Curtis' Brief on Appellate Court Jurisdiction

Curtis correctly states that "***the appellate court's jurisdiction to consider the merits has lapsed***."[1] Yet, Curtis' Notice of Appeal specifically identifies two orders from which Curtis appeals: (1) a February 14, 2019 Order Denying Curtis' Plea to the Jurisdiction; and (2) a February 25, 2022 order granting summary judgment in favor of the Co-Trustees. Curtis also purports to appeal "any other rulings subsumed within Cause No. 412249-401[.]" Curtis asserts these orders are void for lack of trial court jurisdiction and requests that this Court ignore the untimeliness of Curtis' Notice of Appeal. *See, e.g.*, Curtis' Response at 2.

However, this Court and its sister courts have consistently held that appeals

[1] *See* Appellant's Brief on Appellate Court Jurisdiction at Page 1 (Emphasis Added).

of attacks on void judgments must be timely filed, and if not timely filed, then the appellate court lacks jurisdiction to consider the trial court's jurisdiction. Curtis' untimely Notice of Appeal failed to invoke this Court's jurisdiction, thereby requiring dismissal of this appeal.

Argument in Reply

Simply put, if a party wishes to appeal an allegedly void judgment, it must be done timely. If not, this Court's jurisdiction has not been invoked.[2, 3] Here, Curtis appeals a February 2019 order and a February 2022 order, but the deadlines to do so ran in March 2019 and March 2022, respectively.[4] This appeal, Curtis' second, was not filed until April 2023.

Curtis urges this Court to ignore the untimeliness of her appeal by asserting that a void order can be challenged anytime, anywhere. In short, Curtis argues that because Curtis is attacking what she asserts are void orders, no time constraints

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[2] Appellees incorporate their opening brief here, particularly, but not limited to, Section II's discussion about the untimeliness of Appellant's appeal. Moreover, nothing in this Reply should be construed as Appellees' agreement that the challenged orders are void.

[3] *See PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 271-72 (Tex. 2012); *Regalado v. Guerra*, No. 13-07-00526-CV, 2010 Tex. LEXIS 6425, **8-10 (Tex. App.—Corpus Christi Aug. 10, 2010, pet. denied) (Yanez, J.) (mem. op. on reh'g).

[4] "[A] notice of appeal must be filed within 30 days . . . ." TEX. R. APP. P. 26.1. As for Appellant's reference to "any other rulings subsumed within C.A No. 412249-401," the "any other rulings" phrase is too vague to identify which orders, whether they were final, and when a notice of appeal was due. Appellant's failure to identify which orders are part of "any other rulings" and whether those were appealable is fatal to Appellant's attempt to appeal those orders, whatever they may be.

apply. However, Curtis' underlying premise, *i.e*. the challenged orders are void and can be challenged at any time, is defective, and her arguments are unsupported, inaccurate statements of the law.

This Court's jurisdiction to consider whether a trial court lacked jurisdiction can only be invoked by a timely notice of appeal, regardless of whether the attack is direct or collateral. As shown below, Curtis is making a direct attack, and presumably knowing this, attempts to conflate the requirements concerning a direct attack with issues sometimes relevant in a collateral attack made in a lower court. In doing so, Curtis suggests this Court must first rule on the merits of the appeal over which this Court lacks jurisdiction, before recognizing the alleged lack of jurisdiction. There is no such requirement in this appeal. Whether direct or collateral, Curtis' appeal is untimely and must be dismissed.

A. Direct Attack Must be Timely Filed

Curtis brings a direct attack on two judgments which Curtis alleges are void.[5] A direct attack "must be brought within a definite time period after the judgment's rendition."[6] In fact, "Texas courts have consistently held that a party cannot attack a void judgment in an untimely direct appeal."[7] For that reason, "Texas courts have

[5] *See PNS Stores*, 379 S.W.3d at 271 (noting an appeal is a direct attack).

[6] *See PNS Stores PNS Stores*, 379 S.W.3d at 271-72; *see* TEX. R. APP. P. 26.1.

[7] *Tafoya v. Green Tree Servicing, LLC*, No. 03-14-00391-CV, 2014 WL 7464321, * 2 n.2

held that an appellate court in an untimely direct appeal may not adjudicate a party's arguments as to why a judgment or order is void."[8] "Untimely appealed orders" like these that directly attack an allegedly void judgment "are simply not before this Court" and dismissal of this appeal is proper.[9]

B. Curtis Does Not Bring a Collateral Attack

Curtis suggests that a void order can be challenged anytime, anywhere, but the law is more nuanced. A *direct* attack must be timely filed, whether filed in the trial court or the appellate court.[10] Whether a *collateral* attack in the trial court has the same time constraints is not at issue here because none of the at-issue motions are collateral attacks or could even be considered collateral attacks.

"A collateral attack is accomplished through initiating a new case under a different cause number that challenges the effect of the original judgment."[11]

(Tex. App.—Austin Dec. 30, 2014, no pet.) (mem. op.) (citing *Kenseth v. Dallas County.*, 126 S.W.3d 584, 596-97 (Tex. App.—Dallas 2004, pet. denied); *Royal I.S.D. v. Ragsdale*, 273 S.W.3d 759, 766 n.7 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *In re Estate of Courvier*, No. 04-07-00469-CV, 2007 WL 2935809, at *1 (Tex. App.—San Antonio Oct. 10, 2007, no pet.) (mem. op.); *Standifer v. Cepeda*, No. 05-05-00725-CV, 2005 WL 2212291, at *1 (Tex. App.—Dallas Sept. 13, 2005, no pet.) (mem. op.); *Rollins v. Beaumont*, No. 05-04-01859-CV, 2005 WL 2100278, at *2 (Tex. App.—Dallas Sept. 1, 2005, no pet.) (mem. op.); *Thompson v. Beyer*, 91 S.W.3d 902, 905 (Tex. App.— Dallas 2002, no pet.).

[8] *TXDPS v. Tran*, 672 S.W.3d 806, 813 (Tex. App.—Houston [14th Dist.] 2023, no pet.) (citations omitted).

[9] *Kenseth*, 126 S.W.3d at 597.

[10] *PNS Stores*, 379 S.W.3d at 271-72, n.7.

[11] *In re Thompson*, 569 S.W.3d 169, 172 (Tex. App.—Houston [1st Dist.] 2018, orig.

Motions filed in the same lawsuit, giving rise to the judgments being attacked, are direct challenges, not collateral attacks.[12]

Curtis' motions, giving rise to the orders under appellate review, were all filed in the same lawsuit giving rise to those judgments. Thus, Curtis' motions are "direct attack[s], not [] collateral attack[s] on the judgment[s]."[13, 14]

C. Even a Collateral Attack Must be Timely Appealed

Even if Curtis' motions could be considered collateral attacks, Curtis failed to timely appeal the judgments of which she now complains. "To invoke an appellate court's jurisdiction over an appeal, . . . the appellant must give timely and proper notice of appeal."[15] An appellant must properly invoke the appellate court's jurisdiction by filing a timely notice of appeal before the appellate court can consider the jurisdiction of the trial court.[16] "An untimely notice of appeal fails to invoke the

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proceeding) (Brown, J.) (citing *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 863 (Tex. 2010)).

[12] *See id.* at 175 (citing *Joachim*, 315 S.W.3d at 863; *Browning v. Prostock*, 165 S.W.3d 336, 345-46 (Tex. 2005)).

[13] *Id.* (citations omitted).

[14] Notable, at least one Texas appellate court has declined to convert a direct appeal into a collateral attack. *Cadle Co. v. Lobingier*, 50 S.W.3d 662, 672 (Tex. App.—Fort Worth 2001, pet. denied).

[15] *State v. Rodriguez-Gomez*, No. 04-23-00157-CR, *4, 2024 WL 590425 (Tex. App.—San Antonio Feb. 14, 2024, no pet.) (quoting *Woods v. State*, 68 S.W.3d 667, 669 (Tex. Crim. App. 2002)).

[16] *See In re K.L.L.*, 506 S.W.3d 558, 560 (Tex. App.—Houston [1st Dist.] 2016, no pet.) ("Without a timely filed notice of appeal, this Court lacks jurisdiction over the appeal.") (citing

appeals court's jurisdiction and requires dismissal of the appeal."[17] Moreover, appellate courts do not have authority "to alter the time for perfecting an appeal in a civil case."[18] None of the authorities cited by Curtis support arguments to the contrary.

The analysis and citations presented by Curtis cannot be relied upon. Frankly, it is not possible to address both the substance of the appellate jurisdiction issue, and all of Curtis' incorrect citations and confusing discussions of even her correct citations in the 2,500 word limitation required by the Court. But by way of example, and not as a limitation, some examples of the authoritative problems with Curtis' Response are as follow:

1. A case called *Pappas v. Shamoun & Norman LLP* is cited for the proposition that an appellate court has jurisdiction to vacate a void judgment and dismiss the trial court proceeding.[19] If such a case exists and so holds, it would no doubt have been decided in the context of a timely

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Tex. R. Civ. P. 25.1); *see also Rodriguez-Gomez*, No. 04-23-00157-CR at *6, 2024 WL 590425 (noting that by timely filing notice of appeal, "the State properly invoked, at a minimum, our jurisdiction to determine our jurisdiction and to determine the county court's jurisdiction"); *see also In re Estate of Jefferson*, No. 06-18-00100-CV, *3 (Tex. App.—Texarkana July 12, 2019, no pet.) (mem. op.) (concluding failure to timely appeal failed to invoke appellate court's jurisdiction to consider jurisdiction of trial court).

[17] *Gantt v. Gantt*, 208 S.W.3d 27, 29 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (citations omitted); *see also In re K.L.L.*, 506 S.W.3d at 560.

[18] TEX. R. APP. P. 2.

[19] Appellant's Response at 1.

appeal and, thus, distinguishable from the case before this Court. Nevertheless, the citation presented is incorrect and cannot be used to locate such a case. Nor can a different citation be found in Curtis' Table of Authorities because the case is not listed. Appellees were also unable to find such a case when searching by name.

2. Curtis includes sections which confuse her own erroneous recitations of legal principles with quotations from cases through the use of italicized sections which include both, making it difficult to distinguish Curtis' incorrect statements of the law from actual legal authority. Curtis claims appellate deadlines do not apply when challenging a void order even though the cases cited for that proposition do not actually say that. This is done by providing a quote from a case discussing the need to distinguish between void and voidable judgments, without specifying the context, followed by Curtis' own misstatement of the law claiming a challenge to a judgment alleged to be void is not encumbered by appellate deadlines, both of which are contained within the same italicized section.[20]

3. The same section described above is also an example of Curtis' conflation of direct and collateral attacks.[21] As discussed herein, Curtis' appeal is not

[20] Appellant's Response at 3.

[21] Appellant's Response at 3-4.

a collateral attack. The *PNS Stores* case cited by Curtis to support her incorrect proposition that the rules concerning appellate deadlines can be ignored is really a review of a collateral attack. *PNS Stores* analyzed a collateral attack in a lower court and says nothing to support Curtis' assertion that appellate deadlines need not be followed in this case.

In short, the absence of a timely appeal means Curtis failed to invoke this Court's jurisdiction at the outset, which also means this Court cannot consider the lower court's jurisdiction. Curtis' appeal must be dismissed for want of jurisdiction.

D. The Court Should Disregard Curtis' "Full Faith & Credit" & Closed Estate Arguments

Curtis argues that a federal court's 2013 preliminary injunction continues to govern this case,[22] and, therefore, under the Full Faith and Credit Clause, the Texas courts should accept as enforceable a January 2013 Fifth Circuit opinion that federal jurisdiction continues to exist.[23]

By way of reminder, the federal court remanded this case to state court ***at Curtis' request***.[24] (Emphasis added). The mere fact that the probate court accepted

[22] *See* Appellant's Response at 12.

[23] *See* by way of example, but not limitation, Appellant's Brief on Appellate Court Jurisdiction at Page 4 (… Curtis' lawsuit was filed in federal court and not transferred or remanded to the probate court).

[24] Appellees' Brief at 14-15.

the federal court's preliminary injunction as an order of the probate court, ***also at Curtis' request***[25] (emphasis added), does not mean the federal court retained jurisdiction. The preliminary injunction exists only because the probate court says it exists, which further means the preliminary injunction is subject to being terminated at any time by the probate court.

Moreover, after remand, that same federal court found that it no longer had jurisdiction to enforce the preliminary injunction. Per its May 2019 order, the federal district court stated:

ORDER FOLLOWING TELEPHONE SCHEDULING CONFERENCE HELD ON May 8, 2019 at 9:15 AM

Appearances: Candace Curtis (*pro se*)
(Court Reporter: J. Sanchez)
(No appearance by the defendants)

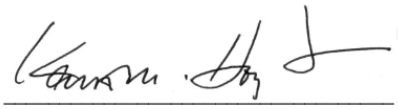
The following rulings were made:

Before the Court is the *pro se* plaintiff's, Candace Curtis, motion for an order directed to certain defendants to show cause why they should not be held in contempt for violating the Court's Preliminary Injunction entered on April 19, 2013.

The Court is of the opinion that, having transferred the case to the Harris County Probate Court, it no longer has jurisdiction of the case. Therefore, the relief requested is Denied.

It is so ORDERED.

SIGNED on this 8th day of May, 2019.



Kenneth M. Hoyt
United States District Judge

[25] Appellees Brief at 15.

On June 21, 2021, the Fifth Circuit affirmed the federal district court's order of transfer to the probate court, a transfer made at Curtis' request, and confirmed the federal district court lacked further jurisdiction over the federal case.[26] More specifically, the Fifth Circuit said:

> It is true that in 2014, the district court should have dismissed without prejudice instead of ordering a remand to state court. ***Nevertheless, the court did exactly what Curtis's attorney requested***. Further, the district court's amendment and remand orders resulted in further proceedings in state court, allowing the case to proceed in the same manner as would have occurred after a proper dismissal without prejudice. (Emphasis added).

This means if jurisdiction of Curtis' claims existed anywhere, it could have only been in state court, where it is now — before this Court on an untimely appeal.

Therefore, Curtis either: (1) had a federal lawsuit that ended when the Fifth Circuit's mandate issued in 2021; or (2) had a state court lawsuit that ended when Curtis failed to timely appeal the judgments Curtis now attacks. Either way, the Full Faith and Credit Clause does not apply and should be ignored as inapplicable.

Curtis also incorrectly asserts that the probate court lacked jurisdiction because certain claims were not initiated until after the probate proceedings had been "closed."[27] This Court must also disregard this assertion.

Not only do Curtis' arguments address the merits of her appeal, which even

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[26] *See Curtis v. Brunsting*, 860 Fed. App'x 332, 336 (5th Cir. 2021) (Per Curiam).

[27] *See* Appellant's Brief On Appellate Court Jurisdiction at Page 4.

Curtis recognizes this Court cannot do, but Curtis' arguments are also contrary to law.

The removal of a probate case from an active docket (C.R. 257) is not closure of the case. To permanently close a probate case or a trust-related lawsuit, the probate court must enter an order under TEX. EST. CODE, Ch. 362, and/or TEX. PROP. CODE § 112.054, neither of which occurred. Nor could closure occur because the injunction requiring the probate court's approval of financial transactions made by the Co-Trustees was still in place, and remains in place as of the filing of this reply brief. As such, the probate court had jurisdiction and has never lost it. Therefore, Curtis' substantive arguments fail.

Conclusion & Prayer

This untimely filed appeal is an attempt to reverse orders that can no longer be attacked and to return the matters pending in C.A. No. 412249-401 to a federal court that no longer has jurisdiction. Curtis cannot return to the federal court system she voluntarily left because three different federal district court judges, in three different federal court proceedings, and two opinions from the U.S. Court of Appeals for the Fifth Circuit have already said there is no claims to support federal court jurisdiction.

For the reasons set forth in Appellee's Response Brief and this Reply Brief, Curtis' appeal is untimely, this Court has no jurisdiction, and, therefore, this appeal

must be dismissed for want of jurisdiction.

Respectfully submitted:

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Certificate of Service

I certify that a true and correct copy of **APPELLEES' REPLY ON THE LACK OF APPELLATE JURISDICTION** has been forwarded to the attorneys of record, via this Court's electronic filing system, email, and/or certified mail, return receipt requested on June 28, 2024.

// s // Stephen A. Mendel

Stephen A. Mendel

Certificate of Compliance

I certify that **APPELLEES' REPLY ON THE LACK OF APPELLATE JURISDICTION** complies with the typeface and word count requirements set forth in the Texas Rules of Appellate Procedure. This Brief has been prepared using Microsoft Word, in 14-point Times New Roman font for the text and 12-point Times New Roman font for footnotes.

This Brief contains 1,713 words, determined by the word count feature of Microsoft Word, and excluding those portions exempted by TEX. R. APP. P. 9.4(i)(1).

This reply brief does not exceed the 2,500-word limit imposed by this Court in its June 6, 2024, order requesting this reply brief.

// s // Stephen A. Mendel

Stephen A. Mendel