No. 07-22-00179-CV
Court of Appeals of Texas, Seventh District, Amarillo

Estate of Campbell v. Campbell

Decided May 11, 2023

07-22-00179-CV

05-11-2023

IN THE MATTER OF THE ESTATE OF MARY NELL CAMPBELL v. SAMMYE L. CAMPBELL, ET AL.

Alex L. Yarbrough Justice

On Appeal from the 108th District Court Potter County, Texas Trial Court No. 110871, Honorable Douglas Woodburn, Presiding

Before PARKER and DOSS and YARBROUGH, JJ.

MEMORANDUM OPINION

Alex L. Yarbrough Justice

Appellant, Patria Osuoha, proceeding pro se, challenges the trial court's order dismissing her suit against Appellees, Sammye L. Campbell, Glenn C. Campbell, Thomas C. Campbell, Bruce W. Campbell, Jermall L. Campbell, Sr./Others, regarding the estate of her mother, Mary Nell Campbell. Osuoha presents six issues asserting the following:

1. Did the trial court err when it granted judgment as a matter of law in favor of Defendants because of lack of authority or jurisdiction?

2 *2

2. Did the trial court err when it granted a dismissal in favor of the Defendant[s] violate the rights of the plaintiff by denying a fair trial?

3. Should this have been an acquittal for the plaintiff being that two defendants did not show up for trial court?

4. Why would Honorable Judge Douglas Woodburn make a rash decision just based on administration?

5. Why did I not receive effective assistance of counsel?

6. Did Judge Woodburn have time for a preliminary hearing before this case was called to trial?

For the reasons expressed herein, we affirm the *Order of Dismissal.*

Background

Osuoha asserts she is the only daughter of the decedent, Mary Nell Campbell. By her original petition and several amended petitions filed in the 108th District Court of Potter County, Texas, she contends Appellees are also "legal heirs." She asserts that an affidavit of heirship and gift deeds were filed but the decedent's estate has not been apportioned.

At a brief hearing at which Osuoha and some, but not all, of Appellees appeared, the trial court simply recited "the case really is one for the establishment of an administration - - a request for an administration. That file has to be filed in the Probate Court and so I don't have any authority over it." An order dismissing the suit for lack of jurisdiction was signed and Osuoha filed a pro se notice of appeal. She filed an original and later an amended brief after the original one did not comply with briefing rules. Appellees did not favor us with a brief.

3 *3

Applicable Law

All probate proceedings must be filed and heard in a court exercising original probate jurisdiction. TEX. EST. CODE ANN. § 32.001.[1] Under section 25.0003 of the Texas Government Code, any statutory county court has original probate jurisdiction unless otherwise provided.

[1] A "probate proceeding" includes a petition regarding an estate administration. Tex. Est. Code Ann. § 31.001(4).

Potter County has two statutory county courts. TEX. GOV'T CODE ANN. § 25.1901. Except for a county with a statutory probate court, a statutory county court has "concurrent with the county court, the probate jurisdiction provided by general law for county courts." TEX. GOV'T CODE ANN. § 25.0003(d).

Analysis

Osuoha's suit is a "probate proceeding" by which she sought adjudication of assets and liabilities through her mother's estate. She also asked to be appointed independent administrator of the estate. As such, jurisdiction was not proper in the 108th District Court of Potter County. The trial court correctly dismissed the suit for lack

4 of jurisdiction.[2] *4

[2] In the Arguments section of her amended brief, Osuoha simply recites, "None present." Without any argument, her issues are subject to waiver. Tex.R.App.P. 38.1(i) (requiring "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"). Pro se litigants are not exempt from rules of procedure. *See Mansfield State Bank v. Cohn,* 573 S.W.2d 181,18485 (Tex. 1978). *See also Li v. Pemberton Park Community Ass'n*, 631 S.W.3d 701, 705 (Tex. 2021).

Conclusion

The trial court's *Order of Dismissal* is affirmed.

No. 05-22-00585-CV
Court of Appeals of Texas, Fifth District, Dallas

Harlow v. Harlow

Decided May 3, 2023

05-22-00585-CV

05-03-2023

DONNA HARLOW, Appellant v. LESLIE HARLOW, TRUSTEE OF THE HALEY HARLOW, JR. TRUST, Appellee

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ERIN A. NOWELL JUSTICE

On Appeal from the 15th Judicial District Court Grayson County, Texas Trial Court Cause No. CV-21-1495

Before Justices Reichek, Nowell, and Garcia

MEMORANDUM OPINION

ERIN A. NOWELL JUSTICE

This declaratory judgment action involves an inter vivos trust established for the benefit of Haley Harlow, Jr. Appellant Donna Harlow claims an ownership interest in certain property allegedly owned by the trust. The trial court granted appellee Leslie Harlow's motion to dismiss pursuant to Texas Rule of Civil Procedure Rule 91a based on res judicata and collateral estoppel. In a single issue, Donna argues the trial court erred by granting the motion to dismiss because Grayson County Court at Law No. 1 did not have subject matter jurisdiction to adjudicate claims related to the inter vivos trust in the underlying probate proceeding. We *2
2 reverse the district court's order granting the motion to dismiss and remand for further proceedings.

Background

In reviewing a motion to dismiss under Rule 91a, a trial court is required to take the allegations in the plaintiff's petition as true. *See* Tex. R. Civ. P. 91a.1. Donna's first amended petition alleges the following facts:

Haley Harlow, Sr. and Ruth Harlow were Haley Harlow, Jr.'s parents. On December 30, 1993, they (as Grantors) established the Haley Harlow, Jr. Trust. It was an inter vivos trust. From December 30, 1993 through December 30, 1999, Grantors made a series of irrevocable assignments of their interest in the Trust to Harlow, Jr. These gifts cumulatively equaled one hundred percent of Grantors' interest in the Trust so that effective December 30, 1999, Harlow, Jr. was the sole beneficiary of the Trust. He eventually became the successor Trustee.

Harlow, Jr. and Donna married on November 4, 2003, and remained married until his death. During their marriage, they acquired ten acres of real property, which Harlow, Jr. insisted be divided into two tracts: one acre with a home and nine acres with commercial storage units. The deed to the home tract provides that the

purchaser-grantee is "Haley Harlow Jr. and Donna Armstrong Harlow." The storage unit deed reflects the purchaser-grantee as the "Haley Harlow Jr. Trust." Donna and Harlow, Jr. jointly operated a storage rental business known as Harlow's RV and Boat Storage on the nine acres. *3

On May 13, 2011, Harlow, Jr. and Donna refinanced the storage unit tract with Landmark Bank for $135,000 and the home tract for $50,000. Landmark structured the loans separately, each secured by the respective property and individually guaranteed by Harlow, Jr. and Donna. Harlow, Jr. and Donna made all monthly loan payments from community property bank accounts, and there is no evidence any payments were made by the Trust. They paid off both Landmark loans in full on June 27, 2014.

Harlow, Jr. died intestate on April 1, 2017. His estate was probated in cause no. 2017-1-125P in Country Court at Law No.1 in Grayson County. In that proceeding, County Court at Law No. 1 determined the Storage Unit Tract was not included as property of decedent's estate.

On November 22, 2021, Donna filed her original petition for declaratory judgment in the 15th Judicial District Court of Grayson County. Leslie Harlow, as trustee of the Haley Harlow, Jr. Trust, filed an answer and motion to transfer venue to Grayson County Court at Law No. 1 because the county court had "already heard an entire trial of the claims made in this case, including all facts and circumstances, all claims made, all witnesses, and all pleadings providing the Judge in court 1 an understanding and awareness of the facts and people involved." Leslie then filed a Rule 91a motion to dismiss Donna's original petition for declaratory judgment because it had no basis in law or fact. He attached ten exhibits to his motion and argued res judicata and collateral estoppel barred her entire suit. *4

Donna filed her first amended petition for declaratory judgment on March 3, 2022, asserting the district court had jurisdiction pursuant to civil practice and remedies code sections 37.003(c) (Power of Courts to Render Judgments) and 37.005 (Declarations Relating to Trust or Estate) and property code section 115.001 (Jurisdiction) because the proceedings involve an inter vivos trust. Donna requested the following declaratory relief pertaining to the Trust:

1. Declaring the 1993 Trust did not exist on December 2, 2005;

2. Declaring that the 1993 Trust did not own the Storage Unit Tract Property;

3. Declaring that if an express trust did not exist on December 2, 2005, such trust was a resulting trust created for the benefit of Donna Harlow;

4. Awarding Donna an undivided one-half fee simple interest in the Storage Unit Tract;

5. Awarding Donna reimbursement for payment of loan principal used to purchase and improve the Storage Unit Tract;

6. Awarding Donna for economic contributions to Harlow's Boat and RV Storage business and the Storage Unit Tract property for which she was never compensated; and

7. Awarding Donna her reasonable attorney's fees and costs pursuant to the Texas Civil Practice and Remedies Code and the Texas Property Code.

Donna asserted any rulings by County Court at Law No.1 regarding the construction, applicable law, powers, beneficiaries, or trustee duties of the Haley Harlow, Jr. Trust were void because only a district court has jurisdiction to make such determinations in Grayson County. She further stated res judicata was not a valid

defense because *5 Leslie could not establish the first element of the defense: an earlier judgment rendered by a court of competent jurisdiction.

The trial court held a hearing on April 20, 2022. On June 2, 2022, the trial court signed an order granting Leslie's motion to dismiss. This appeal followed.

Standard of Review and Applicable Law

Rule 91a provides a mechanism for early dismissal of a claim that has no basis in law or fact. *See* Tex. R. Civ. P. 91a.1. A cause of action has no basis in law "if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.* A cause of action has no basis in fact "if no reasonable person could believe the facts pleaded." *Id.* Except under circumstances not presented here, the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted under the rules. Tex.R.Civ.P. 91a.6.

We review the merits of a Rule 91a motion de novo "because the availability of a remedy under the facts alleged is a question of law and the rule's factual-plausibility standard is akin to a legal-sufficiency review." *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016). We construe pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings to determine if the cause of action has a basis in law or fact. *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.-Houston [14th Dist.] 2014, pet. denied). *6

When, as here, a defendant alleges an affirmative defense as the basis for a motion to dismiss under Rule 91a, the court may examine the defendant's answer to determine whether the defense is properly before the court. *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020); *Sw. Airlines Pilots Ass'n v. Boeing Co.*, No. 05-21-00598-CV, 2022 WL 16735379, at *4 (Tex. App.-Dallas Nov. 7, 2022, pet. filed) (mem. op.). However, in determining whether sufficient facts support an affirmative defense and demonstrate that a cause of action "has no basis in law," the court may consider only the plaintiff's petition "together with any pleading exhibits permitted by Rule 59." Tex.R.Civ.P. 91a.6. "Of course, some affirmative defenses will not be conclusively established by the facts in a plaintiff's petition. Because Rule 91a does not allow consideration of evidence, such defenses are not a proper basis for a motion to dismiss." *Bethel*, 595 S.W.3d at 656.

Discussion

Leslie pleaded two affirmative defenses: res judicata and collateral estoppel. "The party asserting res judicata must prove: (i) a prior final determination on the merits by a court of competent jurisdiction, (ii) identity of parties or those in privity with them, and (iii) a second action based on the same claims as were raised or could have been raised in the first action." *TRO-X, L.P. v. Eagle Oil & Gas Co.*, 608 S.W.3d 1, 11 (Tex. App.-Dallas 2018), *aff'd*, 619 S.W.3d 699 (Tex. 2021). *7

The doctrine of collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that it previously litigated unsuccessfully. *Reynolds v. Quantlab Trading Partners US, LP*, 608 S.W.3d 549, 556 (Tex. App.-Houston [14th Dist.] 2020, no pet.). The party asserting collateral estoppel bears the burden of proving that (i) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (ii) those facts were essential to the judgment in the first action; and (iii) the parties were cast as

adversaries in the first action. *Id.* at 557. Like res judicata, "essential issues of fact determined by *a court of competent jurisdiction* are binding in a subsequent action between the parties." *Bacon v. Jordan*, 763 S.W.2d 395, 396 (Tex. 1988) (emphasis added).

For Leslie to obtain dismissal under Rule 91a because Donna's declaratory action lacked a basis in law, Donna's petition needed to allege facts supporting the three elements of res judicata, or alternatively, the three elements of collateral estoppel. *See, e.g.*, *Sw. Airlines Pilots Ass'n*, 2022 WL 16735379, at *7. On appeal, Donna only challenges the trial court's order on the basis that County Court at Law No. 1 was not a court of competent jurisdiction to decide issues related to the Trust. Accordingly, we likewise limit our discussion.

Subject-matter jurisdiction is essential to a court's authority to decide a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). Subject-matter jurisdiction is never presumed and cannot be
8 waived. *Id.* at 443-44. *8

Texas Property Code section 115.001(a) provides, in relevant part, that "a district court has original and exclusive jurisdiction over all proceedings by or against a trustee and all proceedings concerning trusts." Tex. Prop. Code Ann. § 115.001(a). Subsection (d), however, states "The jurisdiction of the district court is exclusive except for jurisdiction conferred by law on: (1) a statutory probate court; . . . or (5) a county court at law." *Id.* § 115.001(5).

Texas Estate Code section 31.002 defines the scope of statutory jurisdiction for county courts of law in "matters related to probate proceedings." The statute defines those "matters related to probate proceedings" for counties in which (a) there is not a statutory probate court or county court at law, (b) there is not a statutory probate court but there is a county court at law, and (c) there is a statutory probate court. *See* Tex. Estates Code Ann. §31.002(a)-(c). Subsection (b)(3) provides that a county court at law has exclusive jurisdiction regarding "the interpretation and administration of an inter vivos trust created by a decedent whose will has been admitted to probate in the court." *Id.* § 31.002(b)(3).

Donna alleged Grayson County does not have a statutory probate court; however, she acknowledged County Court at Law No. 1 has jurisdiction over certain probate and probate-related issues. Thus, section 31.002(b)(3)
9 provides the parameters of the county court's jurisdiction for "matters related to probate proceedings." *Id.* *9

Donna pleaded the Trust is an inter vivos trust; however, she stated Harlow, Jr. did not create it. Rather, his parents established the Trust. She pleaded Harlow, Jr. died intestate; therefore, there was no will to probate. In describing the estate proceeding in County Court at Law No. 1, she pleaded the following:

> In the Estate proceeding, Judge Henderson determined that the Storage Unit Tract was not an asset of the decedent's Estate. On the surface, his jurisdiction to make such a determination appears obvious. However, Defendant strenuously argued in the Estate proceeding that the Storage Unit Tract property could not be owned by the Estate, because it was owned by the Haley Harlow Jr. Trust.
>
> That necessarily required the County Court at Law determine specific issues pertaining to the existence, administration, and termination of the Haley Harlow Jr. Trust.

Accepting these allegations as true, section 31.002(b)(3) does not confer jurisdiction on County Court at Law No. 1 because the Trust is not "an inter vivos trust created by a decedent whose will has been admitted to probate in the court." *See* Tex. R. Civ. P. 91a.6; Tex. Estates Code Ann. §31.002(b)(3); *Wooley*, 447 S.W.3d at 76. County Court at Law No. 1 did not have subject matter jurisdiction to make any findings regarding the Trust. Thus, the judgment was not a prior final determination on the merits by a court of competent jurisdiction.

Because Donna's pleading negates an essential element of both res judicata and collateral estoppel- a prior final determination of the merits by a court of competent jurisdiction- Leslie's affirmative defenses fail at this stage of the proceedings. *See TRO-X, L.P.*, 608 S.W.3d at 11 (res judicata); *Reynolds*, 608 S.W.3d at 556 (collateral estoppel). Accordingly, the trial court erred by granting Leslie's motion to dismiss pursuant to *10 Rule 91a on the ground that Donna's action lacked a basis in law based on res judicata or collateral estoppel. *See, e.g.*, *Sw. Airlines Pilots Ass'n*, 2022 WL 16735379, at *7.

To the extent Leslie asks this Court to take judicial notice of the probate proceeding referenced in his motion to dismiss, supported with attached exhibits, we reject his invitation. To consider whether the same facts were previously litigated in County Court at Law No. 1 would require us to improperly take judicial notice of the proceedings. Rule 91a.6 expressly prohibits the consideration of evidence and requires that the motion be decided based solely on the plaintiff's pleading of the cause of action. *See* Tex. R. Civ. P. 91a.6; *see also Reynolds*, 608 S.W.3d at 557 (explaining a party may not rely on judicial notice in a Rule 91a proceeding because judicial notice is a "matter of evidence").

Finally, we reject Leslie's claim that "When, as here, it is difficult to tell whether or not the parties have satisfied the requisites of a particular statute, it seems perverse to treat a judgment as perpetually void merely because the court or the parties made a good-faith attempt in interpreting the law." Neither the court nor the parties' "good-faith effort interpreting the law" influences the existence of subject matter jurisdiction. *See, e.g.*, *Tex. Ass'n of Bus.*, 852 S.W.2d at 443-44 ("Subject-matter jurisdiction is never presumed and cannot be waived."). We sustain Donna's sole issue on appeal. *11

Conclusion

We reverse the trial court's order granting appellee Leslie Harlow's motion to dismiss. We remand this matter to the district court for further proceedings. *12

JUDGMENT

In accordance with this Court's opinion of this date, the trial court's June 2, 2022, order of dismissal is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant DONNA HARLOW recover her costs of this appeal from appellee LESLIE HARLOW, TRUSTEE OF THE HALEY HARLOW, JR. TRUST.

Judgment entered.

No. 03-19-00485-CV
Court of Appeals of Texas, Third District, Austin

Goepp v. Comerica Bank & Trust, N.A.

Decided Jul 9, 2021

03-19-00485-CV

07-09-2021

Robert Goepp, Heidi M. Goepp-Schurman Appellant//Cross-Appellant, v. Comerica Bank & Trust, N.A.; Heidi M. Goepp-Schurman; and Myra J. Goepp, Comerica Bank & Trust, N.A.; Robert Goepp; and Myra J. Goepp Appellees//Cross-Appellees,

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Melissa Goodwin, Justice

FROM THE PROBATE COURT NO. 1 OF TRAVIS COUNTY NO. C-1-PB-18-001903, THE HONORABLE GUY S. HERMAN, JUDGE PRESIDING

Before Justices Goodwin, Kelly, and Smith

MEMORANDUM OPINION

Melissa Goodwin, Justice

Robert C. Goepp (Bob) and Heidi Goepp-Schurman each appeal from the probate court's order denying Heidi's plea to the jurisdiction and motion to abate or dismiss the case; overruling Bob's reimbursement request; and granting Comerica's petition for settlement of trustee's final account and for an order of no liability. For the following reasons, we affirm.

BACKGROUND

Bob, Heidi, and Myra Goepp are the children of Robert A. and Iraida P. Goepp.[1] During their lifetimes, Robert and Iraida established the Robert A. Goepp Marital Trust and the Iraida P. Goepp Living Trust with their children as the ultimate beneficiaries. After Robert *1 passed away, a Travis County guardianship proceeding for Iraida was initiated in 2011, and a guardian was appointed. The children also began serving as co-trustees of the Goepp Trusts. After conflicts arose, however, the children entered into a family settlement agreement (the FSA) in 2014 that provided for a corporate successor trustee, and Comerica filled that role. The FSA also provided that Bob would receive a parcel of real property (the Kilbourn Property); that Heidi and Myra would receive preferential cash distributions based on a Kilbourn Property appraisal; and that Myra or Bob "may pay incidental expenses relating to Iraida Goepp's care" and "submit those payments for reimbursements" to the "the Successor Trustee." Iraida passed away in 2015, and the next year the probate court signed an order admitting a copy of Iraida's will and appointing Comerica as dependent administrator. In April 2018, Comerica filed its final account and application to close Iraida's estate and to discharge the administrator.

[1] Because the parties share similar last names, we will refer to them by their first names and, consistent with the parties' appellation, refer to the father Robert A. Goepp as "Robert" and the son Robert C. Goepp as "Bob."

In October 2018, Comerica, as trustee of the Goepp Trusts, filed a First Amended Petition for Settlement of Trustee's Final Account and Order of No Liability (the Trustee's Petition). Bob "object[ed]" to the Trustee's Petition, complaining about the timing of certain preferential distribution payments, about the calculations of interest on the distributions, and that he "has yet to be reimbursed the monies owed to him for out of pocket expenses of durable medical equipment purchased on behalf of Iraida." Heidi, initially acting pro se, filed an answer in December raising various complaints. Later that month, Heidi's lawyer filed an amended answer entering a general denial. In January 2019, Myra filed a general denial.

The probate court conducted a bench trial on the Trustee's Petition in June 2019. In its opening remarks, the probate court stated "that there is a plea to the jurisdiction and some other pleading" that "is being filed as we speak over with the clerk" and that "we're not going to proceed until the filer of that document, which I
2 understand is maybe Heidi Goepp, is back with *2 her pleading and then we can get our announcements." At that time, Heidi, acting pro se at the trial, was filing a "Plea to the Jurisdiction, Motion to Vacate All Orders and Abate or Dismiss Case" (the Plea). When Heidi returned, the probate court stated, "You should have filed that with the clerk before today," and, "We'll take another recess." After the recess, Heidi testified as to the Plea on voir dire. Following Heidi's testimony, the probate court orally denied the Plea. The trial then proceeded with Heidi, Myra, and Bob testifying along with Comerica's witness.

Following the trial, the probate court entered an order denying Heidi's Plea and granting the Trustee's Petition. In the order, the probate court concluded that it had jurisdiction and that venue was proper; that Comerica administered the Goepp Trusts in accordance with the terms of the instruments and with Texas law; that Comerica is entitled to court settlement and release of liability as to the Goepp Trusts; that Heidi and Myra were each entitled to preferential distributions of $128,865.29 pursuant to the FSA; and that Bob's reimbursement requests are denied as "either barred by the Statute of Limitations" or "controlled by the FSA."

In this appeal, Bob challenges both the legal and factual sufficiency of the evidence supporting the amount for preferential distributions and the denial of his request for reimbursement. Heidi also appeals, challenging the probate court's denial of her Plea and the no liability ruling.

DISCUSSION

Jurisdiction

As a threshold matter, Heidi challenges the probate court's jurisdiction over the case, raising three arguments: the probate court lacked subject matter jurisdiction over the case because "a statutory probate court cannot take
3 jurisdiction of an inter vivos trust" and "exclusive *3 jurisdiction is in District Court under Tex. Prop. Code Section 115 and Tex. Est. Code Chapter 32"; an Illinois court has exclusive jurisdiction by the express language of the Living Trust; and an Illinois court acquired dominant jurisdiction over the case thereby depriving the Texas probate court of jurisdiction.[2] We consider each argument in turn.

> [2] These arguments were raised in four issues: whether the probate court committed reversible error by denying Heidi's Plea; whether the court erred by assuming subject matter jurisdiction over the Goepp Trusts; whether the court erred by applying Texas law in violation of the Goepp Trusts; and whether the trust lawsuit was ancillary to or related to any pending estate matter when filed.

Heidi did not raise her first argument regarding the probate court's subject matter jurisdiction in her Plea. Nevertheless, "[s]ubject matter jurisdiction is an issue that may be raised for the first time on appeal." *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). Although subsection 115.001(a) of the Texas Property Code grants a district court "original and exclusive jurisdiction over all proceedings by or

against a trustee and all proceedings concerning trusts," that subsection is prefaced with "[e]xcept as provided by Subsection (d) of this section." Tex. Prop. Code § 115.001(a). Subsection (d)(1) states, "The jurisdiction of the district court is exclusive except for jurisdiction conferred by law on: (1) a statutory probate court[.]" *Id.* § 115.001(d)(1). And jurisdiction is conferred by law on a statutory probate court by section 32.006 of the Texas Estates Code: "In a county in which there is a statutory probate court, the statutory probate court has jurisdiction of" both "an action by or against a trustee" and "an action involving an intervivos trust, testamentary trust, or charitable trust." Tex. Est. Code § 32.006(1), (2); *see Johnson v. Johnson*, No. 04-19-00500-CV, 2020 WL 214762, at *3 (Tex. App.—San Antonio Jan. 15, 2020, no pet.) (mem. op.) (noting jurisdiction of "statutory probate courts is broad"). It is undisputed that the Goepp Trusts are intervivos trusts
4 and that Comerica, as trustee, brought the underlying suit in a statutory probate *4 court in Travis County. *See* Tex. Gov't Code § 25.2291(c) ("Travis County has one statutory probate court, the Probate Court No. 1 of Travis County."). Thus, in light of section 32.006 of the Texas Estates Code, section 115.001 of the Texas Property Code did not deprive the probate court of subject matter jurisdiction over the underlying case.[3]

[3] In her fourth issue, Heidi asserts that the "trust matter is not 'incident to or ancillary to' any pending estate matter in probate court." Heidi argues that section 115.001(d) of the Texas Property Code "is limited to matters '*incident to an estate*' and apply only when a probate proceeding relating to such estate is actually '*pending*' in the probate court," citing *Baker v. Baker*, No. 02-18-00051-CV, 2018 WL 4224843, at *1-2 (Tex. App.—Fort Worth Sept. 6, 2018, no pet.) (mem. op.), and that "[t]o trigger a statutory probate court's exclusive subject-matter jurisdiction over a cause 'related to the probate proceeding,' a probate proceeding must be pending." But *Baker* concerned a statutory probate court's jurisdiction under section 32.005 of the Texas Estates Code, not section 32.006, and is therefore not applicable here. *See id.* (citing Tex. Est. Code § 32.005(a) (providing statutory probate court with "exclusive jurisdiction of all probate proceedings" and related causes of action unless its jurisdiction "is concurrent with the jurisdiction" of "any other court")). Section 32.006 concerns a statutory probate court's independent jurisdiction, not its jurisdiction over causes related to the probate proceeding. *See Lee v. Lee*, 528 S.W.3d 201, 213 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) ("Our conclusion that a statutory probate court has jurisdiction over 'an action involving an inter vivos trust, testamentary trust, or charitable trust' as unambiguously stated in Texas Estates Code section 32.006, is unaffected by the authorities Susan cites concerning proceedings 'appertaining to or incident to an estate.' The authorities on which Susan relies deal with conditions in which a court exercising original probate jurisdiction can exercise jurisdiction over related or ancillary matters; they do not address a statutory probate court's independent jurisdiction over trust actions.").

In Heidi's next argument, she argues that an Illinois court has exclusive jurisdiction under section 10.16 of the Living Trust:

> 10.16 Controlling Law. The validity and effect of each trust and the construction of this instrument and of each trust shall be determined in accordance with the laws of Illinois. The original situs and original place of administration of each trust shall also be Illinois, but the situs and place of administration of any trust may be transferred at any time to any place the trustee determines to be for the best interests of the trust.

Contrary to Heidi's position in her appellate briefing, however, section 10.16 does not implicate the probate
5 court's subject matter jurisdiction. As to section 10.16's first sentence, a "foreign *5 choice-of-law provision" does not prevent Texas courts from exercising jurisdiction over the case. *IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 598 (Tex. 2007); *see Dubai Petrol. Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000) (noting "longstanding principle that subject-matter jurisdiction is a power that 'exists by operation of law only, and cannot be conferred upon any court by consent or waiver'" (quoting *Federal Underwriters Exch. v. Pugh*, 174 S.W.2d 598, 600 (Tex. 1943))). Regarding section 10.16's second sentence, Heidi asserts, without citing any authority, that "[t]he Texas Estates Code makes the situs of administration of the trust during the preceding four years the

location for subject matter jurisdiction." Presumably, Heidi is referring to section 115.002(c) of the Texas Property Code, which provides that "the venue of an action under Section 115.001" when there is a corporate trustee shall be the county in which either "the situs of an administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed" or "any corporate trustee maintains its principal office in this state." Tex. Prop. Code § 115.002(c). But "[v]enue pertains solely to where a suit may be brought and is a different question from whether the court has 'jurisdiction of the property or thing in controversy, '" and "unlike subject-matter jurisdiction . . . venue may be waived if not challenged in due order and on a timely basis." *Gordon v. Jones*, 196 S.W.3d 376, 383 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (first quoting *National Life Co. v. Rice*, 167 S.W.2d 1021, 1024 (Tex. [Comm'n Op.] 1943); then citing Tex.R.Civ.P. 86(1); *Massey v. Columbus State Bank*, 35 S.W.3d 697, 700 (Tex. App.—Houston [1st Dist.] 2000, pet. denied)). Because it is undisputed that Heidi filed an answer and that her attorney filed a general denial approximately six months before filing the Plea, Heidi waived any objections to the alleged improper venue. *See In re OSG Ship Mgmt., Inc.*, 514 S.W.3d 331, 337 (Tex. App.— Houston [14th Dist.] 2016, orig.
6 proceeding) ("[U]nless venue is challenged by a motion to *6 transfer venue filed before or concurrently with the defendant's answer, any objection to venue is waived." (citing *Lui v. Cici Enters. L.P.*, No. 14-05-00827-CV, 2007 WL 43816, at *2 (Tex. App.—Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.))); *see also* Tex.R.App.P. 33.1(a) (requiring as prerequisite to presenting complaint for appellate review that complaint was made to trial court by timely request, objection, or motion); Tex.R.Civ.P. 86(1) ("An objection to improper venue is waived if not made by a written motion filed prior to or concurrently with any other plea, pleading or motion except a special appearance motion provided for in Rule 120a.").

Turning to Heidi's dominant jurisdiction argument—the primary argument raised in her Plea—"[t]he general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts." *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 294 (Tex. 2016) (orig. proceeding) (quoting *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974)); *see In re Puig*, 351 S.W.3d 301, 305 (Tex. 2011) (orig. proceeding) (per curiam) (noting that "filing a dilatory plea in abatement is the proper method for drawing a court's attention to another court's possible dominant jurisdiction"). Heidi argues that dominant jurisdiction applies because "[t]he Cook County [Illinois] Circuit Court has reopened its prior filed 2014 case involving the same parties and trusts." However, dominant jurisdiction applies to suits filed in different counties within Texas; the doctrine "does not apply to suits filed in other states because 'every state is entirely sovereign and unrestricted in its powers.'" *In re Old Am. Cty. Mut. Fire Ins.*, No. 03-12-00588-CV, 2012 WL 6699052, at *1 (Tex. App.—Austin Dec. 20, 2012, orig. proceeding) (mem. op.) (quoting *Ashton Grove L.C. v. Jackson Walker L.L.P.*, 366 S.W.3d 790, 794 (Tex. App.—Dallas 2012, no pet.)). Instead, states apply a "general rule" based on "state-to-state comity, which, while not a constitutional obligation, is 'a
7 principle of mutual convenience whereby one state or jurisdiction will give *7 effect to the laws and judicial decisions of another'"; namely, "[w]hen a matter is first filed in another state, the general rule is that Texas courts stay the later-filed proceeding pending adjudication of the first suit." *In re AutoNation, Inc.*, 228 S.W.3d 663, 670 (Tex. 2007) (orig. proceeding) (quoting *Gannon v. Payne*, 706 S.W.2d 304, 306 (Tex. 1986)). In this situation, "the proper course of action is for the first-filing party to seek a stay, rather than seeking relief through a plea in abatement," and "we should consider whether the later-filed case should be stayed under the doctrine of comity." *Old Am.*, 2012 WL 6699052, at *1-2. However, "the mere pendency of a previously filed action in one state does not, in itself, mandate abatement or dismissal in another state," *AutoNation*, 228 S.W.3d at 670, and "[b]eing voluntary and not obligatory, the application of comity vests in the sound discretion of the trial court," *Ashton Grove*, 366 S.W.3d at 794. We therefore "examine the pleadings filed in the cases and ask whether the trial court abused its discretion in refusing to grant the stay [in] the later-filed action" by making a

decision "so arbitrary and unreasonable that it amount to a 'clear and prejudicial error of law'" or by "misappl[ying] the law to the facts." *Old Am.*, 2012 WL 6699052, at *2 (quoting *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992) (orig. proceeding)).

Assuming Heidi's Plea requesting abatement based on dominant jurisdiction could be construed as a motion to stay based on comity, we conclude that the probate court did not abuse its discretion in denying the request for a stay. "To show its entitlement to a stay, the party must generally show 'that the two suits involve the same cause of action, concern the same subject matter, involve the same issues, and seek the same relief.'" *Id.* (quoting *Griffith v. Griffith*, 341 S.W.3d 43, 54 (Tex. App.—San Antonio 2011, no pet.)). Heidi's Plea referenced the following order as reopening the Cook County suit: "June 5, 2019 Order of Cook County, Illinois Court re-opening this case for dominant jurisdiction of the Goepp family trusts." But *8 Heidi did not attach the Cook County order to her Plea and admitted in her testimony that "it wasn't included in [the Plea]."[4] At trial, counsel for the parties disputed whether there was pending litigation in Cook County, Illinois, and when Bob's counsel stated that there had been a filing in Cook County the day before, Comerica's counsel argued that Comerica had not received any notice of any filing in Cook County. The probate court expressed confusion and asked whether Comerica's counsel would like to take Heidi on voir dire. On voir dire, Comerica's counsel asked whether Heidi had the document from the Illinois court. When Heidi tried to show a document on her telephone, Comerica's counsel responded that he needed to "see the document." And when Heidi requested to print the document, Comerica's counsel responded, "I don't think there is any way to print it" and "even if you printed it, it wouldn't be a certified document. It would be a copy of a purported certified copy." Heidi also testified that she and Bob had filed suit against Comerica with "Judge Brennan in Chicago" and that Judge Brennan "left [the case] open." But Comerica's counsel objected "to any testimony about what Judge Brennan did without seeing the certified document," and the probate court sustained the objection. Finally, when asked if she filed something in Cook County in the last six months, Heidi said "No" but "I know that something was filed. The contents of the filing, I do not know." On this record, we conclude that the probate court's denial of Heidi's request for a stay—to the extent her Plea could be construed as such—was not an abuse of discretion. *See id.*; *Ashton Grove*, 366 S.W.3d at 794. *9

[4] Although Heidi was acting pro se at trial, pro se litigants "are held to the same standard as parties represented by counsel to avoid giving unrepresented parties an advantage over represented parties." *Stewart v. Texas Health & Hum. Servs. Comm'n*, No. 03-09-00226-CV, 2010 WL 5019285, at *1 n.1 (Tex. App.—Austin Dec. 9, 2010, no pet.) (mem. op.) (citing *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184-85 (Tex. 1978)).

Accordingly, we overrule Heidi's first four issues addressing the probate court's jurisdiction.

No Liability Order

In her fifth and final issue, Heidi argues that the probate court "abus[ed] [its] discretion in issuing an order of 'no liability' . . . to extinguish [Heidi's] claims for breach of trust and breach of fiduciary duty in violation of the law." Heidi does not challenge the sufficiency of the evidence supporting the order; rather, she argues that the probate court "cannot rule that Comerica . . . has no liability or attempt to adjudicate this claim, which would have a preclusive effect on further litigation elsewhere." Heidi's argument is not exactly clear. To the extent Heidi is challenging the order on the jurisdictional grounds raised in her first four issues, we have overruled those issues. And if Heidi is raising a nonjurisdictional ground to challenge the issuance of the "no liability" order, she did not preserve error as to this issue by making this complaint to the probate court and obtaining a ruling on the complaint. *See* Tex.R.App.P. 33.1(a). We therefore overrule Heidi's fifth and final issue.[5] *10

5 In her appellate reply brief, Heidi raises for the first time arguments related to the Uniform Enforcement of Foreign Judgments Act, the Full Faith and Credit Clause of the United States Constitution, and the doctrine of res judicata, and she attaches various documents to her reply brief that were not included in the record. Because these arguments were not raised in her opening brief, we do not consider them. *See* Tex.R.App.P. 38.3 ("The appellant may file a reply brief addressing any matter in the appellee's brief."); *McFadden v. Olesky*, 517 S.W.3d 287, 293 n.3 (Tex. App.—Austin 2017, pet. denied) ("Ordinarily, an argument asserted for the first time in a reply brief is waived and need not be considered by an appellate court."). Nor do we consider the documents that were not properly presented to the probate court and included in the record on appeal. *See* Tex.R.App.P. 34.1, 38.1(g); *Save Our Springs All., Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 892 (Tex. App.—Austin 2010, pet. denied) ("We are limited to the appellate record provided."); *Burke v. Insurance Auto Auctions Corp.*, 169 S.W.3d 771, 775 (Tex. App.—Dallas 2005, pet. denied) (explaining that documents that are cited in brief and attached as appendices may not be considered by appellate courts if they are not formally included in record on appeal).

Interest Calculations

Having overruled Heidi's issues, we now turn to Bob's two appellate issues. In his first issue, Bob claims that the trial court "erred in ordering a distribution in the amount of $128,865.29 be made, each, to Heidi and Myra" because "[t]he only evidence to support any distribution was that such amount should be $126,572.88."

The FSA provides that "Heidi and Myra shall be entitled to preferential distributions upon Iraida's death from the Iraida Goepp Trust equivalent to the value of the Kilbourn [Property] appraisal" and that "[t]he preferential distributions shall also accrue simple interest of 3.5% from the date that the deed transferring the Kilbourn [Property] to [Bob] is executed until the date the preferential distributions are completed." It is undisputed on appeal that the principal amount for the preferential distributions was $560,000; that the interest rate was 3.5%; that the relevant time frame for interest accrual was February 10, 2015, through May 31, 2019; that on May 25, 2018, the balance of principal and interest had accrued to $624,438.36 ($64,438.36 in accrued interest and $560,000 as principal); and that on May 25, 2018, Comerica made a $500,000 payment from the estate trust to Myra and to Heidi as a partial payment.

11 *11 At trial, Comerica submitted exhibit 5, which calculated a $126,572.88 total balance due as of May 31, 2019. Exhibit 5 applied the $500,000 partial payment made on May 25, 2018, to the principal alone and calculated interest going forward on the remaining $60,000 outstanding principal amount.[6] However, Myra's attorney cross examined Comerica's representative as to the calculations on exhibit 5, asking, "Isn't the normal procedure on a loan to charge a payment against interest first?" Comerica's representative said she did not know if that is true. The probate court stated, "I can tell you from paying a mortgage that some of that is princip[al], some of that is interest." Myra's attorney continued, "So if you charge that $500,000 first to the earned interest at that point, would . . . it increase the amount that is due to Heidi and Myra?" Comerica's representative said that she believed so, that the calculation could be easily made, and that her estimate is that it would amount to "a few thousand" more for Myra and Heidi. At the close of trial, the probate court asked Comerica's attorney: "I would like one last exhibit .... And that is an exhibit from your client. Because they answered some questions to [Myra's attorney] that the[re] may be a different calculation as to what is owed if you take the payment made to interest first, princip[al] second." Comerica submitted exhibit 12; the exhibit is included in the reporter's record on appeal, and the appellate record does not indicate any objection to the exhibit. In exhibit 12, Comerica applied the $500,000 partial payment to pay off first the interest that had accrued as of May 25, 2018, and then the principal amount. Thus, the remaining principal amount for exhibit 12 is higher than on exhibit 5. Exhibit 12 then shows the calculated interest on the remaining principal amount from May 26, 2018, through May 31, 2019, and a total balance due on May 31, 2019, of $128,865.30.

6 Specifically, the exhibit calculated interest on the $60,000 principal amount from May 26, 2018, through May 31, 2019, for an additional $2,134.52, which equaled $66,572.88 in total interest due when combined with the outstanding interest of $64,438.36 as of May 26, 2018. Adding the total interest due to the remaining $60,000 principal balance created a $126,572.88 total balance due on May 31, 2019.

After the probate court made the request for exhibit 12, Bob's attorney asked to address that point, stating, "That's not what the [FSA] says. It's not structured as a loan." The probate court asked, "Which way should it come?" Bob's attorney said, "The cheapest way to my client[.]" On appeal, however, Bob challenges only the legal and factual sufficiency of the evidence; he does not address how the FSA structures how a partial payment would apply to the preferential distribution. In its order, the probate court concluded that the FSA
12 "required preferential distributions with interest to Heidi [] and Myra [] related to Kilbourn Property and *12 the remaining amount of unpaid preferential distributions (including accrued interest) as of May 31, 2019 are $128,865.29 to Heidi [] and $128,865.29 to Myra[.]" When, as here, no findings of fact or conclusions of law are filed or requested following a bench trial, it is implied that the trial court made all the necessary findings to support the judgment. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992). Because the appellate record includes the reporter's record and clerk's record, these implied findings are not conclusive and may be challenged on appeal for legal and factual sufficiency. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). We review sufficiency challenges under well-established standards of review. *See City of Keller v. Wilson*, 168 S.W.3d 802, 811 (Tex. 2005) (describing standard for reviewing legal sufficiency challenges); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam) (describing standard for reviewing factual sufficiency challenges).

On appeal, Bob argues that "Comerica's Exhibit 12 reflects nothing more than a document with numbers" and that "[t]here is no testimony to support its accuracy." But exhibit 12 is not merely "a document with numbers"; it expressly lists the principal amount, the interest rate, the number of days for monthly time frames, and the interest due for each monthly time frame. And on appeal Bob does not identify any inaccuracies on exhibit 12. Additionally, exhibit 12 is consistent with the testimony of Comerica's representative that her estimate would be that the balance due to Myra and Heidi would be "a few thousand" more than the amount listed in exhibit 5. Accordingly, we conclude that exhibit 12 and the testimony of Comerica's representative constitute legally and factually sufficient evidence to support the probate court's judgment as to this issue and overrule Bob's first
13 issue. *13

Reimbursement Claim

In his second issue, Bob challenges the legal and factual sufficiency of the evidence to support the denial of his "request for reimbursement of amounts that he expended on behalf of his mother and which were clearly reimbursable under the terms of the [FSA]." Section 11 of the FSA provides:

> 11. *Payment of Iraida's Care Expenses*. . . . Nothing in this Agreement changes the fact that John Crane, as guardian of Iraida Goepp's Estate, or Debbie Pearson, as guardian of Iraida Goepp's person, has the proper authority to make health-care decisions for Iraida Goepp, including changes to her care that may result in greater expenses. Any of Myra or Robert may pay incidental expenses relating to Iraida Goepp's care and submit those payments for reimbursements to the Guardian of the Estate or the Successors Trustee.

At trial, Bob submitted an exhibit requesting $31,272.32 for reimbursement and attaching various agreements, invoices, and copies of checks related to that reimbursement request. Comerica's representative testified that she saw this reimbursement request for the first time the day before trial and that she was never presented with

any of the bills before the day of the hearing. She also testified that many of those charges were made before the FSA was executed in February 2014 and that most of the expenses concerned hyperbaric chamber treatment. When Comerica's counsel asked Bob whether Iraida received any of the hyperbaric chamber treatments, Bob responded, "I don't know." And Heidi asked Bob on cross examination, "Why didn't our mother receive the hyperbaric treatments?" Bob responded that the court made a ruling that "while I was still validly medical power of attorney that there could be no changes to her care." In its final order, the probate court ordered, "All other claims for reimbursement made by [Bob] at the hearing on June 6th, 2019, are either barred by the Statute of Limitations or are controlled by the [FSA] and are therefore DENIED." *14

As the party requesting affirmative relief, Bob bore the burden of proof as to his entitlement to reimbursement. *See TRO-X, L.P. v. Anadarko Petrol. Corp.*, 548 S.W.3d 458, 465-66 (Tex. 2018) (noting "well accepted postulate of the common law" that civil litigant asserting affirmative claim for relief has burden of proof (quoting *Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 482 (Tex. 1984))). When, as here, the appellant is attacking the sufficiency of the evidence supporting an adverse implied finding on an issue for which it had the burden of proof, we sustain a legal sufficiency challenge if the appellant "demonstrate[s] on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue" and a factual sufficiency challenge if the appellant "demonstrate[s] on appeal that the adverse finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam).

We conclude that Bob did not meet his appellate burden. First, section 11 of the FSA provides that Bob "*may pay* incidental expenses" and "submit *those* payments for reimbursements." (Emphases added.) The FSA therefore authorizes future payments and reimbursement for those payments; it does not authorize reimbursement for payments already made at the time the FSA was signed.[7] Thus, there was sufficient evidence supporting the trial court's conclusion that Bob was not entitled to reimbursement for expenses paid prior to the FSA. Second, the payments must be "incidental expenses relating to Iraida Goepp's care." The remaining expenses were related to the hyperbaric chamber treatments. But there was sufficient evidence of a court ruling in place that prevented changes to Iraida's care to provide such *15 treatment and that Iraida did not receive any such care; thus, those payments were not "relat[ed] to Iraida Goepp's care." Accordingly, we overrule Bob's second issue.

[7] Section 7 of the FSA provided for reimbursement of already paid "Trust expense[s]": "7. *Expense Reimbursement*. Bob, Myra and Heidi shall each receive $650,000 in Trust expense reimbursement and pre-death estate planning distributions from the Iraida Goepp Trust."

CONCLUSION

Having overruled Heidi's and Bob's issues on appeal, we affirm the probate court's final order.

Affirmed *16

No. 06-20-00030-CV
Court of Appeals Sixth Appellate District of Texas at Texarkana

Pense v. Bennett

Decided Oct 8, 2020

No. 06-20-00030-CV

10-08-2020

CRAIG HARLAN PENSE, AN INCAPACITATED PERSON, AND VIRGINIA PETTY, AS NEXT FRIEND, Appellants v. WALTER MARK BENNETT AND ALISA ANN BENNETT, Appellees

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Memorandum Opinion by Chief Justice Morriss

On Appeal from the 62nd District Court Hopkins County, Texas
Trial Court No. CV43957 Before Morriss, C.J., Burgess and Stevens, JJ.

2 *2 MEMORANDUM OPINION

The dispute before us involves a 73.375-acre tract (Tract 7) of real property in Hopkins County, Texas, originating from a guardianship created in 2004 for Craig Harlan Pense, an incapacitated person, for which Irvin Pense (Irvin), Craig's father, serves as guardian.

The guardianship was created by the Hopkins County Court at Law (the Guardianship Court) and is styled, *In the Guardianship of Craig Harlan Pense*, *an Incapacitated Person*, No. G04-00061 (the Guardianship). When created, the Guardianship owned, among other properties, Tract 7.

In 2007, the Guardianship Court ordered the creation of the Craig Harlan Pense Management Trust (the Trust), with Irvin as trustee and transferred Guardianship property to the Trust. In 2016, Tract 7 and other real property were transferred from the Trust to Pense Ranch Properties, LLC (PRP), as nominee for the Trust. PRP is a Texas corporation wholly owned by Irvin. In 2018, PRP conveyed Tract 7 to Walter Mark Bennett and Alisa Ann Bennett (collectively Bennett) for $210,000.00 in cash.

As a result of these transfers, Pense, joined by his mother, Virginia Petty, as next friend, sued Bennett in the 62nd Judicial District Court of Hopkins County to quiet title to Tract 7. Pense argued that PRP's claim to Tract 7 was based on a fraudulent and ineffective conveyance of Tract 7 from the Trust to PRP. Pense therefore alleged that the title claimed by Bennett was a cloud on the property he legally owned.

Irvin and PRP intervened, claiming that the transfers were authorized by the instrument creating the Trust (the
3 Trust Instrument), which permitted PRP to manage the transferred *3 property.[1] Irvin further claimed that he—through PRP—had loaned more than one million dollars to the Guardianship for Pense's benefit. Irvin claimed that these funds were used to remodel Pense's house; to pay off the loan Pense received for his original purchase of Tract 7; to pay the ad valorem property taxes on the Trust property; and to purchase insurance, furniture, barns, fences, pens, chutes, cow ponds, and pasture treatments. Despite these investments, the cattle

operation never became profitable. As a result, and seeking to raise money for the Trust, Irvin sold Tract 7 in a private sale to Bennett. Irvin claimed that the proceeds from the sale were credited against Guardianship debt owed to Irvin for loans to the Guardianship for Pense's care and maintenance.[2]

[1] PRP owned and managed Tracts 2 through 5 separate and apart from the Trust.

[2] At or near the time of these events, Petty appeared in the Guardianship Court and requested that she be appointed successor trustee. The Guardianship Court restored Pense to full legal capacity over his person and estate on October 18, 2019.

Irvin and PRP thereafter filed a motion for summary judgment claiming that Irvin acted within his powers as trustee when he conveyed Tract 7 to PRP and subsequently conveyed Tract 7 to Bennett. Irvin and PRP sought judgment that (1) declared proper the sale and transfer of the real property at issue, (2) declared Bennett the true and rightful fee simple owner of Tract 7, and (3) dismissed the plaintiffs' claims with prejudice.

Pense responded to the motion for summary judgment, claiming that Irvin's sale of Tract 7 exceeded his power under the Trust and Texas law and was a violation of his fiduciary duties under the Trust.[3] This, he claims, was
4 evidenced by Irvin's sale of Tract 7 for purposes of *4 reclaiming amounts he allegedly loaned to the estate, exemplified by the commingling of funds from the sale of Tract 7 with PRP's property such that they could no longer be distinguished. Aside from these actions, Pense responded that Irvin did not keep accurate records and did not file annual accountings of his alleged loans to the Guardianship. Pense thus claimed that he raised genuine fact issues regarding the validity of the transfer of Tract 7 to PRP and the subsequent sale of that property to Bennett as fraudulent, illegal, and a breach of Irvin's fiduciary duties.

[3] It should be noted that Pense never asserted in this case any cause of action against Irvin or PRP for breach of fiduciary duty, but merely raised that argument in response to the motion for summary judgment.

The trial court granted Irvin and PRP's motion for summary judgment. In its order, the court explained that the Trust Instrument effectively transferred Tract 7 from the Guardianship into the Trust;[4] Irvin, in his capacity as
5 trustee, was authorized by the Trust and by the Texas *5 Trust Code to sell Tract 7 to Bennett; Irvin acted within the Trust's authority when he, in his capacity as trustee, conveyed Tract 7 to PRP, as nominee of the Trust; Tract 7 was fully, effectively, and validly conveyed to PRP; and Tract 7 was thereafter fully, effectively, and validly conveyed to Bennett. The trial court specifically left open the question—to be resolved by the Guardianship Court—of whether the sale of Tract 7 to Bennett amounted to a breach of Irvin's fiduciary duties as trustee. The final summary judgment dismissed with prejudice Pense's effort to quiet title against Bennett.

[4] The trial court specifically stated that,

1. The Order Creating Management Trust and the Craig Harlan Pense Management instrument creating the Craig Harlan Pense Management Trust (the"Trust"), effectively transferred the 73.375 acres in the Joseph H. Simpson Survey, Hopkins County, Texas, situated on CR 4808 E.S., and being more thoroughly described in the hereinafter referenced Warranty Deed With Vendor's Lien dated February 27, 2018[,] and in the hereinafter referenced the Affidavit of Correction as to Recorded Original Instrument dated April 19, 2019, effective as of February 27, 2018[,] ("Tract 7") from the Guardianship into the Trust;

2. The Order Creating Management Trust, the Trust instrument, and the Texas Trust Code did provide Irvin D. Pense as Trustee with broad powers to manage Craig Harlan Pense's property, including the power and authority to sell Tract 7 to Walter Mark and Alisa Ann Bennett;

3. Irvin D. Pense, acting in his capacity as Trustee of the Trust, was acting within the Trust's authority when Irvin D. Pense conveyed the Property to Pense Ranch Properties, L.L.C., Nominee of the Craig Harlan Pense Management Trust, via a Warranty Deed dated March 23, 2016, and recorded March 24, 2016, as Instrument No. 20161477, in the Real Property Records of Hopkins County, Texas, and later corrected by Affidavit of Correction as to Recorded Original Instrument dated April 19, 2019, effective as of March 23, 2016, and recorded April 30, 2019, as Instrument No. 20191979, in the Real Property Records of Hopkins County, Texas;

4. Pursuant to the aforementioned Warranty Deed dated March 23, 2016[,]and the Affidavit of Correction as to Recorded Original Instrument dated April 19, 2019, effective as of March 23, 2016, Title to Tract 7 was fully, effectively, and validly conveyed to Pense Ranch Properties, L.L.C., Nominee of the Craig Harlan Pense Management Trust.

5. Irvin D. Pense, acting in his capacity as Trustee of the Trust, was acting within the Trust's authority when Irvin D. Pense conveyed Tract 7 from Pense Ranch Properties, L.L.C., Nominee of the Craig Harlan Pense Management Trust, to Defendants, Walker Mark Bennet [sic] and Alisa Ann Bennett, via the Warranty Deed With Vendor's Lien dated February 27, 2018, and recorded March 12, 2018, as Instrument No. 20181312, in the Real Property Records of Hopkins County, Texas, and later corrected by the Affidavit of Correction as to Recorded Original Instrument dated April 19, 2019, effective as of February 27, 2018, and recorded April 30, 2019, as Instrument No. 20191978, in the Real Property Records of Hopkins County, Texas;

6. Pursuant to the aforementioned Warranty Deed With Vendor's Lien dated February 27, 2018[,] and the aforementioned Affidavit of Correction as to Recorded Original Instrument dated April 19, 2019, effective as of February 27, 2018, Title to Tract 7 was fully, effectively, and validly conveyed to and now rests in Walter Mark Bennett and Alisa Ann Bennett as fee simple owners of said Tract 7, free of all clouds to title; and,

7. The Court makes no findings or determinations in this case with respect to whether Mr. Irvin Pense's transfer of Tract 7 to Walter Mark Bennett and Alisa Ann Bennett was a breach of fiduciary duty to Craig Harlan Pense, but leaves that question for the jury to consider in Cause No. G04-00061, styled *In the Guardianship of Craig Harlan Pense*, *an Incapacitated Person*, pending in the County Court at Law of Hopkins County, Texas.

On appeal, Pense claims that the summary judgment is void because the 62nd Judicial District Court did not have subject-matter jurisdiction. Alternatively, he claims that the trial court erred in granting summary judgment because Irvin breached his fiduciary duties in effecting the transfer of Tract 7, and as a result, the
6 transfer was not lawful. Because we find that *6 (1) the trial court had subject-matter jurisdiction and (2) the trial court did not err in granting summary judgment on this limited question, we affirm the trial court's judgment. *I. The Trial Court Had Subject-Matter Jurisdiction*

In his initial point of error, Pense claims that the trial court did not have subject-matter jurisdiction to hear the underlying lawsuit and, as a result, the summary judgment order is void. Subject-matter jurisdiction "refers to the court's power to hear a particular type of suit." *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996) (orig. proceeding). Lack of subject-matter jurisdiction renders any judgment that a court may render void. *State ex rel. Latty v. Owens*, 907 S.W.2d 484, 485 (Tex. 1995). Because "[s]ubject matter jurisdiction is essential to the authority of a court to decide a case . . . [it] is never presumed and cannot be waived." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993). The absence of subject-matter jurisdiction may be raised at any time. *Carroll v. Carroll*, 304 S.W.3d 366, 367 (Tex. 2010) (citing *Tex. Air Control Bd.*, 852 S.W.2d at 445). As a result, the fact that Pense filed his lawsuit in the district court does not preclude our de novo review of the question of whether the trial court had subject-matter jurisdiction to hear this case.[5] *Id.*

[5] In his brief, Pense stated that he had erroneously filed the underlying lawsuit in the 62nd Judicial District Court of Hopkins County.

In support of his claim that the trial court lacked subject-matter jurisdiction, Pense argues that (1) the case was properly defined as a guardianship proceeding pursuant to Section 1021.001 of the Texas Estates Code, (2) Section 1022.001 of the Texas Estates Code requires that guardianship proceedings must be heard in a court exercising original probate jurisdiction, and (3) because Hopkins County does not have a statutory probate
7 court but does have a county court *7 at law, the county court at law had original probate jurisdiction over this case. This set of conditions, Pense claims, denies the trial court subject-matter jurisdiction.

District courts in Texas have jurisdiction over claims for title to land and for declaratory relief, like the claims in the underlying case. TEX. CONST. art V., § 8; TEX. GOV'T CODE ANN. §§ 24.007-.008; *Estate of Giddens*, No. 06-17-00077-CV, 2018 WL 792273, at *4 (Tex. App.—Texarkana 2018, pet. denied) (mem. op.) (district court has general jurisdiction over all matters unless exclusive jurisdiction given to another court or administrative body); *see In re Amoco Fed. Credit Union*, 506 S.W.3d 178, 183 (Tex. App.—Tyler 2016, orig. proceeding) (district courts have jurisdiction over all claims for declaratory relief); *Hudson v. Sweatt*, No. 08-12-00334-CV, 2014 WL 6634422, at *2 (Tex. App.—El Paso Nov. 21, 2014, no pet.) (mem. op.).

Section 1022.005 of the Texas Estates Code confers on a statutory probate court "exclusive jurisdiction of all guardianship proceedings." TEX. ESTATES CODE ANN. § 1022.005(a).[6] Therefore, "[a] cause of action related to a guardianship proceeding of which the statutory probate court has exclusive jurisdiction . . . must be brought in the statutory probate court . . . ." TEX. ESTATES CODE ANN. § 1022.005(b). Although Hopkins County does not have a statutory probate court, it does have one statutory county court, the County Court at Law of Hopkins County. TEX. GOV'T CODE ANN. § 25.1141. Because Hopkins County does not have a statutory probate court, "the county court at law exercising original probate jurisdiction and the county court
8 have concurrent original jurisdiction of guardianship proceedings, unless otherwise *8 provided by law." TEX. ESTATES CODE ANN. § 1022.002(b). Consequently, the County Court at Law of Hopkins County has original jurisdiction of guardianship proceedings in Hopkins County. *See* TEX. ESTATES CODE ANN. § 1022.002(a).

6 A "statutory probate court" is defined as "a court created by statute and designated as a statutory probate court under Chapter 25" of the Texas Government Code. TEX. ESTATES CODE ANN. § 1002.008(b).

The County Court at Law of Hopkins County does not, however, have exclusive jurisdiction of matters related to guardianship proceedings. *See* TEX. ESTATES CODE ANN. § 1022.002(a); *cf.* TEX. ESTATES CODE ANN. § 1022.005(a) (statutory probate court has exclusive jurisdiction of all guardianships and most causes of action related to guardianship proceedings); *In re Puig*, 351 S.W.3d 301, 305 (Tex. 2011) (orig. proceeding) (disavowing notion that "a county court sitting in probate attains exclusive jurisdiction over matters appertaining and incident to the estate once administration is opened there," stating, "[W]e have never explicitly reached such a conclusion."). Because there is no court in Hopkins County with *exclusive* jurisdiction over guardianship proceedings, the 62nd Judicial District Court of Hopkins County had subject-matter jurisdiction of Pense's declaratory judgment action. *See Giddens*, 2018 WL 792273, at *4 (although county court in which estate was pending would have had jurisdiction to hear suit to quiet title, the county court's jurisdiction was not exclusive); *Amoco Fed. Credit Union*, 506 S.W.3d at 183-84; *Gordon v. Jones*, 196 S.W.3d 376, 382 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (district court had subject-matter jurisdiction over land
9 title dispute despite ongoing probate proceeding in county court). *9

We conclude that, because the 62nd Judicial District Court of Hopkins County had subject-matter jurisdiction to hear the underlying case, the summary judgment is not void. We overrule this point of error.[7]

7 In a related issue, Pense claims that, even if the district court had subject-matter jurisdiction, the County Court at Law of Hopkins County had dominant jurisdiction. *See Puig*, 351 S.W.3d at 305 (when jurisdiction of county court sitting in probate and district court are concurrent, issue is one of dominant jurisdiction). Because Pense did not raise the issue of dominant jurisdiction in the trial court, the error, if any, has not been preserved for appellate review. *See* TEX. R. APP. P. 33.1; *Liberty Mut. Ins. Co. v. Transit Mix Concrete & Materials Co.*, No. 06-12-00117-CV, 2013 WL 3329026, at *13 (Tex. App.—Texarkana, June 28, 2013, pet. denied) (mem. op.). Pense's complaint that the district court did not have dominant jurisdiction would also be barred on estoppel grounds because he chose to file his lawsuit in the district court. *See Howell v. Mauzy*, 899 S.W.2d 690, 698 (Tex. App.—Austin 1994, writ denied) (plaintiff chose to pursue litigation in Travis County while aware of pendency of suit in different county). We also note that the presiding judge in the Guardianship Court sat by assignment in the district court to hear the motion for summary judgment.

(2) The Trial Court Did Not Err in Granting Summary Judgment on this Limited Question

"The grant of a trial court's summary judgment is subject to de novo review by appellate courts." *Brown v. CitiMortgage, Inc.*, No. 06-14-00105-CV, 2015 WL 2437519, at *2 (Tex. App.—Texarkana May 22, 2015, no pet.) (mem. op.) (citing *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003)). "In making the required review, we deem as true all evidence which is favorable to the nonmovant, we indulge every reasonable inference to be drawn from the evidence, and we resolve any doubts in the nonmovant's favor." *Id.* (citing *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)).

"The party moving for traditional summary judgment bears the burden of showing no genuine issue of material fact exists and it is entitled to judgment as a matter of law." *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009) (citing TEX. R. CIV. P. 166a(c)). "After the [movant] produces evidence entitling it to summary judgment, the burden shifts to the [nom-movant] to present evidence creating
10 a fact issue." *Walker v. Harris*, *10 924 S.W.2d 375, 377 (Tex. 1996) (citing *'Moore' Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936-37 (Tex. 1972)). When, however, the non-movant's "evidence raises only a mere suspicion or surmise of a fact in issue, no genuine issue of material fact exists to defeat summary

judgment." *Selz v. Friendly Chevrolet, Ltd.*, 152 S.W.3d 833, 837 (Tex. App.—Dallas 2005, no pet.) (citing *Wiggins v. Overstreet*, 962 S.W.2d 198, 200 (Tex. App.—Houston [14th Dist.] 1998, writ denied); *see Alford v. Thornburg*, 113 S.W.3d 575, 588 (Tex. App.—Texarkana 2003, no pet.).

In his motion for summary judgment, Irvin claimed that (1) the trust order and the Trust Instrument transferred the Guardianship assets to the Trust, (2) the Trust Instrument authorized the transfer of Tract 7 from the Trust to PRP, (3) the Trust Instrument authorized the transfer of Tract 7 from PRP to Bennett, (4) the affidavits of correction executed with respect to transfers (2) and (3) corrected any inaccuracies in the deeds accomplishing those transfers, and (5) he was therefore entitled to judgment declaring proper the sale and transfer of Tract 7 to Bennett as the rightful fee simple owner of Tract 7. The trial court agreed that the evidence presented in support of these claims entitled Irvin to summary judgment on his declaratory judgment action.

In our examination of the propriety of the trial court's action, we look to the summary judgment record to determine whether title to Tract 7 was validly conveyed to Bennett. We begin our analysis with the Guardianship. On May 6, 2004, the Guardianship Court entered an Order Appointing Permanent Guardian of the Person and Estate of Pense. The inventory, appraisement, and list of claims filed by Irvin, in his capacity as
11 guardian, listed Tract 7 as property belonging to the Guardianship Estate. *11

Three years later, in his capacity as guardian, Irvin filed an application in the Guardianship Court for the creation of a management trust. On May 17, 2007, the Guardianship Court entered an Order Creating Management Trust authorizing the creation of the Craig Harlan Pense Management Trust, Irvin D. Pense, trustee. On May 30, 2007, the Craig Harlan Pense Management Trust was created in accordance with the Guardianship Court's order. The following language in the Trust Instrument funded the Trust with the assets and properties comprising the Guardianship Estate:

> Settlor[8]. . . does by these presents convey, transfer, and assign unto the Trustee all of the assets and properties comprising the Guardianship Estate . . . . Such assets and properties shall be held, administered and distributed as a management trust, subject to the provisions hereof, and the provisions of the Code, for the uses and purposes hereinafter set out.

As a result, Tract 7—as an asset of the Guardianship Estate—became a Trust asset at the time the Trust Instrument was executed. Irvin was named trustee of the Trust and signed the Trust Instrument in his capacity as guardian of the person and estate of Craig Harlan Pense, an incapacitated person, settlor, and as trustee of the Trust.

> 8 The Trust Instrument listed Irvin, guardian of the person and estate of Craig Harlan Pense as settlor, for the creation of the management trust.

On March 23, 2016, Irvin, in his capacity as guardian of the estate and person of Craig Harlan Pense, executed a warranty deed conveying Tract 7, among other properties, to PRP. On April 19, 2019, Irvin executed an affidavit of correction to the March 23, 2016, deed in accordance with Section 5.028 of the Texas Property Code,[9] to be effective as of March 23, 2016. The affidavit included the following corrections or clarifications to
12 the original deed: *12

> 9 Section 5.028 of the Texas Property Code provides, in relevant part:

> (a) A person who has personal knowledge of facts relevant to the correction of a recorded original instrument of conveyance may prepare or execute a correction instrument to make a nonmaterial change that results from a clerical error, including:
>
> . . . .
>
> (2) an addition, correction, or clarification of:
>
> (A) a party's name, including the spelling of a name, a first or middle name or initial, a suffix, an alternate name by which a party is known, or a description of an entity as a corporation, company, or other type of organization.

TEX. PROP. CODE ANN. § 5.028(a)(2)(A); *see Myrad Props., Inc. v. LaSalle Bank, N.A.*, 300 S.W.3d 746, 750 (Tex. 2009) ("a correction deed may be used to correct a defective description of a grantor's capacity" and relates back to the date of the deed it corrects). The affidavits of correction, having corrected the capacity of the grantor and grantee in the March 23, 2016, deed, were properly executed in accordance with Section 5.028 of the Texas Property Code.

> The reference in the Original Instrument to my capacity as Irvin D. Pense, Guardian of the Estate and Person of Craig Harlan Pense is correct, but I am also the Trustee of the Craig Harlan Pense Management Trust. Accordingly, the Original Instrument is hereby corrected and clarified to reflect my capacity as Trustee of the Craig Harlan Pense Management Trust in addition to my capacity as Guardian, as follows: **"Irvin D. Pense**, **Guardian of the Estate and Person of Craig Harlan Pense**, **an incapacitated person**, **and Trustee of the Craig Harlan Pense Management Trust."**
>
> The reference in the Original Instrument to the grantee, Pense Ranch Properties, L.L.C. is correct, but Pense Ranch Properties, L.L.C. is the Nominee of the Craig Harlan Pense Management Trust and serves in such capacity. Accordingly, the Original Instrument is hereby corrected and clarified to reflect the capacity of the grantee, Pense Ranch Properties, L.L.C., as Nominee, acting on behalf of the Craig Harlan Pense Management Trust, as follows: "Pense Ranch Properties, L.L.C., Nominee of the Craig Harlan Pense Management Trust."

On February 27, 2018, PRP executed a warranty deed, signed by Irvin, conveying Tract 7 to Bennett in consideration of $210,000.00. On April 19, 2019, Irvin executed an affidavit of correction to the February 27, 2018, deed in accordance with Section 5.028 of the Texas Property *13 Code, to be effective as of February 27, 2018. The affidavit included the following corrections or clarifications to the original deed:

13

> The reference in the Original Instrument to the grantor, Pense Ranch Properties, L.L.C. is correct, but Pense Ranch Properties, L.L.C. is the Nominee of the Craig Harlan Pense Management Trust and serves in such capacity. Accordingly, the Original Instrument is hereby corrected and clarified to reflect the capacity of the grantor, Pense Ranch Properties, L.L.C. as Nominee, acting on behalf of the Craig Harlan Pense Management Trust, as follows: **"Pense Ranch Properties**, **L.L.C.**, **Nominee of the Craig Harlan Pense Management Trust."** [10]

[10] The affidavit of correction, having corrected the capacity of the grantor in the February 27, 2018, deed, was properly executed in accordance with Section 5.028 of the Texas Property Code.

We conclude that the transfers of Tract 7, as outlined above, resulted in the transfer of fee simple title of Tract 7 to Bennett. The Trust Instrument imbued the trustee with broad powers, among which was the authority to sell Trust properties. Article VIII of the Trust Instrument lists the powers of the trustee. And, "[w]here the language of the trust instrument is unambiguous and expresses the intentions of the maker, the trustee's powers are conferred by the instrument and neither the court nor the trustee can add or take away such power." *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.); *see Dallas Servs. For Visually Impaired Children, Inc. v. Broadmoor II*, 635 S.W.2d 572, 576 (Tex. App.—Dallas 1982, writ ref'd n.r.e.) (executors had power to sell real property under provision of will that gave them same rights and powers to control, manage and dispose of estate that would have been given to trustees under Texas Trust Act).

As pertinent here, the Trust Instrument authorized the trustee to:

- "[P]artition, exchange, release, convey or assign any right, title or interest of the trust in any real estate or personal property owned by the trust";

14 *14

- "[S]ell, exchange, alter, mortgage, pledge or otherwise dispose of trust property";

- "[E]xecute and deliver any deeds, conveyances, assignments, leases, contracts, stock or security transfer powers, or any other written instrument of any character appropriate to any of the powers or duties herein conferred on the Trustee"; and

- "[H]old title to investments in the name of the Trustee or a nominee."

In addition to these powers specified in the Trust Instrument, the Texas Trust Code authorizes "a trustee [to] exercise any powers . . . that are necessary or appropriate to carry out the purpose of the trust." TEX. PROP. CODE ANN. § 113.002. Those powers include the power to "contract to sell, sell and convey, or grant an option to sell real or personal property at public auction or private sale for cash or for credit or for part cash and part credit, with or without security." TEX. PROP. CODE ANN. § 113.010.

Yet, Pense claims that the trial court erred in granting summary judgment because he raised a fact issue regarding Irvin's breach of fiduciary duty in the transfer of Tract 7, resulting in an unlawful transfer of Tract 7
15 to Bennett.[11] A review of the record and the trial court's order resolves this issue. *15

11 Pense claimed that the transfer of Tract 7 violated Section 113.053(a) of the Texas Property Code, which provides:

> (a) Except as provided by Subsections (b), (c), (d), (e), (f), and (g), a trustee shall not directly or indirectly buy or sell trust property from or to:
>
> (1) the trustee or an affiliate;
>
> (2) a director, officer, or employee of the trustee or an affiliate;
>
> (3) a relative of the trustee; or
>
> (4) the trustee's employer, partner, or other business associate.

TEX. PROP. CODE ANN. § 113.053(a).

The petition in intervention focused on the title claim to Tract 7. It alleged that (1) Tract 7 was conveyed to the Trust and was held by Irvin as trustee; (2) The Trust Instrument authorized Irvin, as trustee, to convey Tract 7 to PRP to hold nominally for the benefit of the Trust; (3) PRP, as nominee of the Trust, was authorized to convey Tract 7 to Bennett; and (4) Bennett is the rightful fee simple owner of Tract 7. The Intervenor's motion for summary judgment therefore sought judgment declaring Bennet the fee simple owner of Tract 7 and dismissing, with prejudice, Pense's quiet title claims.

In response to the motion for summary judgment, Pense claimed that Irvin breached his fiduciary duty as trustee and that he violated Section 113.053 of the Texas Property Code as a result of the transfer of Tract 7.[12] He therefore claimed that this fact issue precluded the grant of summary judgment. The trial court did not, however, consider the issue of whether Irvin's alleged breach of fiduciary duty raised a fact issue sufficient to overcome Irvin's motion for summary judgment. This is clear from the summary judgment itself, which stated,

> The Court makes no findings or determinations in this case with respect to whether Mr. Irvin Pense's transfer of Tract 7 to Walter Mark Bennett and Alisa Ann Bennett was a breach of fiduciary duty to Craig Harlan Pense, but leaves that question for the jury to consider in Cause No. G04-00061, styled *In the Guardianship of Craig Harlan Pense, an Incapacitated Person*, pending in the County Court at Law of Hopkins County, Texas.

The trial court did not consider this issue because the same issue was then pending in the Guardianship Court.
16 Pense has never contended otherwise. And Pense has made no complaint *16 in this Court that the trial court erred in failing to consider the issue of whether the alleged breach of fiduciary duty was sufficient to raise a fact issue to overcome summary judgment. Instead, Pense complains only that he raised a fact issue based on the alleged breach of fiduciary duty—a matter plainly not considered by the trial court. Pense was aware, not only at the time of the summary-judgment hearing, but also at the time the order was issued, that the trial court did not consider the alleged breach of fiduciary duty issue. Pense has not complained on appeal that the trial court erred in its refusal to consider that issue.[13] As a result, we may not address it. *See San Jacinto River Auth. v. Duke*, 783 S.W.2d 209, 209-10 (Tex. 1990) (per curiam).

Because the trial court did not consider the breach of fiduciary duty issue, and because Pense did not object, on appeal, to that lack of consideration, Pense has offered nothing to contest the validity of the transfers as previously outlined. The trial court correctly concluded that Irvin was entitled to summary judgment as a matter of law. *See Mann Frankfort Stein & Lipp Advisors, Inc.*, 289 S.W.3d at 848; *Walker*, 924 S.W.2d at 377.

[12] Because Section 113.053(a) of the Texas Property Code prohibits self-dealing with respect to property held in trust, its violation amounts to a breach of fiduciary duty. *See Snyder v. Cowell*, No. 08-01-00444-CV, 2003 WL 1849145, at *2 (Tex. App.—El Paso Apr. 10, 2003, no pet.) (mem. op.). In essence, Pense urged that the fiduciary duty claim was based, among other things, on a violation of Section 113.053(a). TEX. PROP. CODE ANN. § 113.053(a). Pense further claimed that the affidavits of correction did not dispel the conflict of interest that Irvin created.

[13] To the extent that Pense complains of the trial court's failure to file findings of fact and conclusions of law, we overrule that issue. "[F]indings of fact and conclusions of law have no place in a summary judgment proceeding." *Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103 (Tex. 1994); *see Stephens v. City of Reno*, 342 S.W.3d 249, 253 (Tex. App.—Texarkana 2011, no pet.); *Simmons v. Healthcare Ctrs. of Tex., Inc.*, 55 S.W.3d 674, 679-80 (Tex. App.—Texarkana 2001, no pet.).

We affirm the trial court's judgment.

Josh R. Morriss, III

Chief Justice Date Submitted: October 5, 2020
Date Decided: October 8, 2020

NO. 14-19-00716-CV

State of Texas in the Fourteenth Court of Appeals

In re Estate of Nicholas

Decided Mar 26, 2020

NO. 14-19-00716-CV

03-26-2020

IN THE ESTATE OF RHOGENA ANN NICHOLAS, DECEASED

Margaret "Meg" Poissant Justice

On Appeal from the Probate Court No. 1 Harris County, Texas
Trial Court Cause No. 474728-401

MEMORANDUM OPINION

John Nicholas, Temporary Administrator of the Estate of Rhogena Nicholas, and Jo Ann Nicholas, Rhogena Nicholas's mother (collectively, "Petitioners"), filed a petition to take pre-suit depositions. Tex. R. Civ. P. 202. The City of Houston appeals an order denying its plea to the jurisdiction. We affirm. *2

I. Background [1]

[1] The facts asserted are taken from the Petition filed on July 25, 2019. When a plea to the jurisdiction challenges the pleadings, we take allegations in the pleadings as true. *See Westbrook v. Penley*, 231 S.W.3d 389, 405 (Tex. 2007); *see also Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

Rhogena Nicholas and her husband Dennis Tuttle lived at 7815 Harding Street, in Houston, Texas. On January 28, 2019, armed members of Narcotics Squad 15 with the City of Houston ("the City") Police Department ("HPD") conducted a raid on the residence ("the Harding Street Incident"). During the course of the raid, Narcotics Squad 15 fired several rounds, killing Rhogena and Tuttle, and their dog. Five members of Narcotics Squad 15 also were injured during the raid.

In the City's public narrative about the Harding Street Incident, City officials and police command staff described a ferocious assault by both Rhogena and Tuttle on a "hero," Gerald Goines, when he led Narcotics Squad 15 into a well-known black tar heroin "drug house" with residents so dangerous the entry into the house required a "no-knock" forced entry.[2]

[2] The raid was conducted under the authority of a warrant authorizing a "no-knock" procedure by which the squad may execute the search warrant without notifying the occupants before entering the premises.

Petitioners maintain there were no documented confidential informant "significant meeting" records in the HPD files to support the raid on the Harding Street home.

After the Harding Street Incident, the City did not contact Petitioners and did not respond to Petitioners' request to publicly correct or retract what Petitioners contended were factually incorrect statements. For example, Rhogena's neighbor provided a cell phone video that suggested a different account of what happened at the
3 Harding Street home than that set forth by the City. The City has resisted *3 efforts by Petitioners to secure the 911 records related to the Harding Street Incident. Moreover, HPD has refused to disclose what physical materials may have been removed from the scene.

Petitioners retained an independent forensic investigator to conduct an independent investigation at the Harding Street home. After analyzing the scene, the investigator concluded that HPD failed to conduct a full ballistic recovery and left significant forensic materials untouched and unrecovered, preventing a full reconstruction of the incident. Petitioners' investigator made preliminary findings as to the firing position of the fatal bullets to Rhogena and to Tuttle. Petitioners contend materials collected, documentation, and lab testing during HPD's control of the Harding Street home are important to confirm or modify the preliminary findings. Additionally, Petitioners contend that full scene reconstruction requires comparison with statements of persons present during the Harding Street Incident. According to Petitioners, there are indications that the City's story does not line up with the physical facts at the scene, which provides sufficient basis to order the depositions requested, in order to investigate the wrongful death, violation of civil rights, and other claims arising from the Harding Street Incident.

Petitioners further assert that in a "legitimate police operation," there is never any doubt about the identity of confidential informants ("CIs"). Pursuant to an internal HPD order, the identity of CIs offering specific information about criminal activities (called "significant meetings") is required to be documented and readily accessible to police managers. Petitioners contend that the policy of identifying CIs to police managers is a "basic safeguard to maintain the integrity of the department and the individual officers and ensure accountability." Here, however, Petitioners allege that HPD's managers knew from the beginning that there
4 were no documented CI significant meeting records in its files supporting the *4 assault on the Harding Street home. Nevertheless, while HPD managers searched for a non-existent CI related to the Harding Street Incident, the City, in press conferences continued to repeat the justification for the raid as a "black tar heroin drug house."

According to Petitioners, overseeing practices that allow officers such as Gerald Goines to make up CIs, or to fabricate a criminal activity used to justify warrants, would violate the Fourth Amendment to the United States Constitution. Petitioners further plead that local news media revealed that in the last 109 cases filed by Gerald Goines based on a sworn affidavit in support of a search warrant: "In every one of those cases in which he claimed confidential informants observed guns inside, no weapons were ever recovered, according to evidence logs Goines filed with the court." On this basis, Petitioners request the depositions of the two HPD managers responsible for oversight of Gerald Goines in the HPD Narcotics Division.

Finally, Petitioners contend the depositions are necessary to investigate the HPD practices that led to the Harding Street Incident, because HPD's investigations of past officer-involved shooting incidents indicates that for years HPD found 100% of the intentional shootings of persons by its officers "justified."

On July 25, 2019, Petitioners filed a sworn petition for an order authorizing the taking of pre-suit depositions pursuant to Rule 202 of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 202. The Petitioners seek to investigate potential claims against the City, including those available under the Texas Wrongful Death / Survival Statute, Tex. Civ. Prac. & Rem. Code § 71.021, and potential claims as applied through 42 U.S.C. §§ 1983, 1988 on behalf of the Estate, as well as Jo Ann Nicholas as a legal heir. Petitioners also seek to

investigate potential claims arising from the alleged violation of Rhogena's rights under the Fourth *5 Amendment of the United States Constitution (wrongful search and seizure; excessive force) enforced pursuant to 42 U.S.C. § 1983. Further, Petitioners seek to investigate a potential claim under the Texas Tort Claims Act as a result of the misconduct of agents, managers, and representatives of the City, leading to the Harding Street Incident, and the deaths of Rhogena and Tuttle.

Petitioners requested authorization to depose designated representatives of the City of Houston (Police Department Narcotics Division), Captain Paul Q. Follis, and Lieutenant Marsha Todd. Petitioners seek deposition testimony from a designated representative or representatives of the City regarding:

> (1) the alleged reason(s) for targeting the Harding Street home for a "no knock" warrant execution;
>
> (2) the policies and practices for enrollment and supervision of confidential informants, including handling of money and drugs with such persons;
>
> (3) the policies and practices for investigation of officer-involved shootings; and
>
> (4) Audits, if any, of the Narcotics Division (specifically including audit of the use of CI's; documentation of CI work and "significant meetings"; affidavits filed in support of warrants, and the use of no-knock warrants by Gerald Goines or in Narcotics) in the past 3 years.

Additionally, Petitioners assert that Follis and Todd oversaw the HPD Narcotics Division, including Gerald Goines and Narcotics Squad 15. Petitioners seek deposition testimony from both as to the following:

> (1) the alleged reason(s) for targeting the Harding Street home for a "no knock" warrant execution;
>
> (2) the supervision of Narcotics Squad 15, including Gera[l]d Goines and Stephen Bryant;
>
> (3) the supervision and monitoring of applications for warrants by Narcotics Squad 15; [and]

*6

> (4) the supervision and monitoring of use of confidential informants by Narcotics Squad 15, including tracking of money and drugs with such persons.

The City filed a plea to the jurisdiction, asserting that Petitioners' Rule 202 petition fails as a matter of law because: (a) the court, Probate Court No. 1, lacks statutory subject-matter jurisdiction; (b) the petition is devoid of any facts establishing waiver of the City's immunity under the Texas Tort Claims Act; (c) Petitioners lack standing to assert a § 1983 claim; and (d) the probate court is not a proper court for a Rule 202 proceeding because any claim asserted pursuant to 42 U.S.C. § 1983 is subject to removal. Thus, the City requested dismissal for lack of subject matter jurisdiction. Petitioners filed a response to the City's plea, rebutting each of its points.

After holding a hearing, the trial court denied the City's plea to the jurisdiction from the bench, and on September 16, 2019, signed an order denying the City's request. This interlocutory appealed followed.[3]

[3] Tex. Civ. Prac. & Rem. Code § 51.014(a)(8).

II. Analysis

The City raises one issue on appeal: whether the probate court erred in denying the plea to the jurisdiction when that court has "no express statutory jurisdiction" to consider the Rule 202 petition.

A. Standard of Review

"A party may contest a trial court's subject matter jurisdiction by filing a plea to the jurisdiction." *Texas Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). We review a trial court's order granting or denying a plea to
7 the jurisdiction *de novo*. *Hoff v. Nueces County*, 153 S.W.3d 45, 48 (Tex. 2004). *7

A plea to the jurisdiction challenges a trial court's authority to determine the subject-matter of the cause of action, but without defeating it on the merits. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The purpose of the plea is not to preview or delve into the merits of the case, but to establish the reason why the merits of the underlying claims need not be reached. *Id.*

The plaintiff bears the burden of alleging facts affirmatively showing that the trial court has subject-matter jurisdiction. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). When, as here, a plea to the jurisdiction challenges the pleadings, we take allegations in the pleadings as true and construe the pleadings liberally in favor of the plaintiff. *See Westbrook*, 231 S.W.3d at 405; *Miranda*, 133 S.W.3d at 226. We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.* at 228. "'Whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction is a question of law reviewed *de novo*.'" *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 502 (Tex. 2010) (quoting *Miranda*, 133 S.W.3d at 226); *TRST Corpus, Inc. v. Financial Ctr., Inc.*, 9 S.W.3d 316, 320 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

B. Harris County Statutory Probate Court's Subject Matter Jurisdiction

Probate Court No. 1 of Harris County is a statutory probate court. Tex. Gov't Code § 25.1031(c). "A court may exercise only the jurisdiction accorded it by the constitution or by statute." *See Goodman v. Summit at W. Rim, Ltd.*, 952 S.W.2d 930, 933 (Tex. App.—Austin 1997, no pet.). Our analysis begins, therefore, with a review of
8 the jurisdiction accorded to a statutory probate court. *8

1. Exclusive Jurisdiction of Probate Proceeding in a County with Statutory Probate Court

Section 32.005 of the Texas Estates Code provides that a "statutory probate court has exclusive jurisdiction of all *probate proceedings*, regardless of whether contested or uncontested." Tex. Est. Code § 32.005(a) (emphasis added). In a county in which there is a statutory probate court, "a claim brought by a personal representative on behalf of an estate" is also a claim "related to [a] probate proceeding." *See* Tex. Est. Code § 31.002(a)(3), (c)(1)-(2) (defining "matters related to a probate proceeding").

2. Concurrent Jurisdiction with District Court

In addition, Section 32.005(a) recognizes that the Estates Code provides for concurrent jurisdiction over some causes of action related to a probate proceeding.[4] Specifically, the statutory probate court has concurrent jurisdiction with district courts in actions enumerated in Section 32.007. Tex. Est. Code § 32.005(a); *see also* Tex. Est. Code § 32.007. Section 32.007 of the Texas Estates Code provides that a statutory probate court has concurrent jurisdiction with a district court over several types of actions, including "a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a personal representative." *See id.* § 32.007(1).

4 "A cause of action related to the probate proceeding must be brought in a statutory probate court unless the jurisdiction of the statutory probate court is concurrent with the jurisdiction of a district court as provided by Section 32.007 or with the jurisdiction of any other court." Tex. Est. Code § 32.005(a).

C. Rule 202

Texas Rule of Civil Procedure 202 provides a mechanism for requesting court authorization of pre-suit depositions to either (1) perpetuate or obtain testimony for use in an anticipated lawsuit, or (2) investigate a
9 potential claim or *9 suit. Tex. R. Civ. P. 202.1. It is undisputed that this case involves the investigation of a potential claim or suit. In such cases, we must construe Petitioners' Rule 202 petition liberally. *See Houston Indep. Sch. Dist. v. Durrell*, 547 S.W.3d 299, 305 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

Rule 202 does not require a petitioner to plead a specific cause of action; instead, it requires only that the petitioner state the subject matter of the anticipated action, if any, and the petitioner's interest therein. *See In re Emergency Consultants, Inc.*, 292 S.W.3d 78, 79 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding). Requiring a Rule 202 petitioner to plead a viable claim "would eviscerate the investigatory purpose of Rule 202 and essentially require one to file suit before determining whether a claim exists" and would place "counsel in a quandary, considering counsel's ethical duty of candor to the court and the requirements of [rule 13]." *Id.* Thus, the nature of Rule 202 as an investigatory tool necessitates some breadth of pleading and dictates that we liberally construe the petition.

Rule 202 depositions, however, are not intended for routine use. *In re Jorden*, 249 S.W.3d 416, 423 (Tex. 2008) (orig. proceeding). "There are practical as well as due process problems with demanding discovery from someone before telling them what the issues are." *Id.* Accordingly, courts must strictly limit and carefully supervise pre-suit discovery to prevent abuse of the rule. *In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011) (orig. proceeding).

Rule 202 does not authorize a party to obtain otherwise unobtainable discovery. *See In re Wolfe*, 341 S.W.3d at 933 (noting that petitioner "cannot obtain by Rule 202 what it would be denied in the anticipated action"). Indeed, Rule 202 expressly limits the scope of discovery in pre-suit depositions to "the same as if the
10 anticipated suit or potential claim had been filed." Tex. R. Civ. P. *10 202.5. Rule 202, like all the rules of civil procedure, was fashioned by the Texas Supreme Court as a means of "obtain[ing] a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law." *City of Dallas v. Dallas Black Fire Fighters Ass'n*, 353 S.W.3d 547, 554 (Tex. App.—Dallas 2011, no pet.) (citing Tex. R. Civ. P. 1).

A Rule 202 petition must "be filed in the proper court of any county . . . ." Tex. R. Civ. P. 202.2(b). This court has previously held that "[a] proper court to entertain a Rule 202 petition is a court that would have subject-matter jurisdiction over the underlying dispute or anticipated lawsuit; thus, we must look to the substantive law of the underlying dispute or anticipated action to determine jurisdiction." *See Durrell*, 547 S.W.3d at 305 (citations omitted). The *Durrell* holding follows that of the Supreme Court. In *In re Doe (Trooper)*, the Supreme Court analyzed the antecedents to and history of Rule 202 before determining the "proper court" to entertain a Rule 202 petition:

> While Rule 202 is silent on the subject, we think it implicit, as it has always been, that the court must have subject-matter jurisdiction over the anticipated action. The rule cannot be used, for example, to investigate a potential federal antitrust suit or patent suit, which can be brought only in federal court.

444 S.W.3d 603, 608 (Tex. 2014) (orig. proceeding).[5] Thereafter, in 2016, the Supreme Court squarely held that a Rule 202 proceeding is proper if the trial court has subject-matter jurisdiction over the anticipated action. *See City of Dallas*, 501 S.W.3d 71, 73-74 (Tex. 2016) (orig. proceeding) (holding case must be remanded *11 to determine if the amount in controversy exceeded the jurisdictional limits of the county court at law); *see also In re DePinho*, 505 S.W.3d 621, 624-25 (Tex. 2016) (orig. proceeding) (per curiam) (holding trial court would lack subject-matter jurisdiction because petitioner's claims were not ripe; thus, Rule 202 depositions not allowed). In summarizing its prior holdings, the court in *City of Dallas* observed that "for a party to properly obtain Rule 202 pre-suit discovery, 'the court *must* have subject-matter jurisdiction over the anticipated action.'" *See City of Dallas*, 501 S.W.3d at 73 (citing *In re DePinho*, 505 S.W.3d at 623) (citing *In re Doe (Trooper)*, 444 S.W.3d at 608) (emphasis in original).

[5] Because the issue in *In re Doe (Trooper)* was whether the appellee was subject to the trial court's *personal* jurisdiction rather than whether the lawsuit fell with the trial court's *subject matter* jurisdiction, its holding as to subject matter jurisdiction falls under judicial dictum. Notwithstanding, the Supreme Court's analysis and judicial dictum warrants being "followed unless found to be erroneous." *Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388, 399 (Tex. 2016) (citation omitted).

Thus, we must look to the substantive law of the underlying dispute or anticipated action to determine jurisdiction. *See In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011) (per curiam).

D. The Statutory Probate Court has Jurisdiction Over the Potential Claims

The City contends that the trial court erred by denying its plea to the jurisdiction because a Rule 202 proceeding is not contemplated by the Estates Code—the code that defines a statutory probate court's jurisdiction—as a matter over which such a court has jurisdiction. Specifically, the City argues that Petitioners' Rule 202 proceeding is not a "probate proceeding" because it is not included in any of the specific actions listed in Section 31.001 of the Estates Code,[6] which defines the term. Additionally, the City says, this proceeding is not a "matter related to a probate proceeding." *Id.* § 31.002. Thus, the City concludes the probate court does not have jurisdiction under the Estates Code. We disagree. *12

[6] The term "probate proceeding" is defined as probate of a will, issuance of letters testamentary and of administrations, determination of heirship, action regarding the probate of a will or estate administration, a claim arising from an estate administration, settling the account of an estate, a will construction suit, or a will modification or reformation proceeding. Tex. Est. Code § 31.001(1)-(8).

"All probate proceedings must be filed and heard in a court exercising original probate jurisdiction." Tex. Est. Code § 32.001(a). "The court exercising original probate jurisdiction also has jurisdiction of all matters related to the probate proceeding as specified in Section 31.002 for that type of court." *Id.* Relevant here, matters "related to a probate proceeding" include "any cause of action in which a personal representative of an estate pending in the statutory probate court is a party in the representative's capacity as personal representative." *Id.* § 31.002(c). According to the City, a Rule 202 proceeding is not "related to a probate proceeding" because a Rule 202 petition is not a "cause of action." *See Combs v. Tex. Civil Rights Project*, 410 S.W.3d 529, 534 (Tex. App.—Austin 2013, pet. denied). But the question is not whether the Rule 202 request is related to a probate proceeding; the question is whether the probate court has jurisdiction over the *potential claims* Petitioners seek to investigate. *City of Dallas*, 501 S.W.3d at 73; *Durrell*, 547 S.W.3d at 306. If the court lacks jurisdiction over the anticipated action, then the court lacks jurisdiction over the Rule 202 proceeding. *Id.*

The claims Petitioners seek to investigate include survival claims. "A personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person." *See* Act of May 4, 1895, ch. 89, 1895 Tex. Gen. Laws 143 (codified at Tex. Civ. Prac. & Rem. Code § 71.021(b)). The personal representative of Rhogena's estate is the proper party to bring a survival claim to recover damages Rhogena suffered before her death. *See Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 850 (Tex. 2005). Thus, the personal representative of Rhogena's estate, John Nicholas, would be a party to the anticipated action. Accordingly, the potential survival claims Petitioners seek to investigate by the Rule 202 proceeding are matters "related to a
13 probate proceeding" and therefore *13 fall within a statutory probate court's subject matter jurisdiction. *Id.* § 31.002(c); *see Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 620 (Tex. 2005) (statutory probate court had jurisdiction over survival action under predecessor statute).

Moreover, Estates Code section 32.007 provides separately that a statutory probate court has concurrent jurisdiction with the district court in, among other lawsuits, "a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a personal representative." Tex. Est. Code § 32.007(1). Jo Ann Nicholas is alleged to be Rhogena's mother and has explained in the Rule 202 petition her desire to investigate, and her interest in, a potential wrongful death claim against the City. An action to recover damages for the wrongful death of a decedent is for the exclusive benefit of the surviving spouse, children, and parents of the deceased. Tex. Civ. Prac. & Rem. Code § 71.004(a).

For these reasons, the statutory probate court has subject matter jurisdiction over the anticipated action under the Estates Code. Hence, the trial court did not err in denying the City's plea to the jurisdiction regarding the Rule 202 proceeding. *See City of Dallas*, 501 S.W.3d at 73; *Gonzalez*, 159 S.W.3d at 620; *Durrell*, 547 S.W.3d at 306.

The City's issue is overruled.

III. Conclusion

The probate court's order denying the City's plea to the jurisdiction is affirmed.

/s/ Margaret "Meg" Poissant

Justice Panel consists of Justices Wise, Jewell, and Poissant.

No. 04-19-00500-CV
Fourth Court of Appeals San Antonio, Texas

Johnson v. Johnson

Decided Jan 15, 2020

No. 04-19-00500-CV

01-15-2020

Mary Ann JOHNSON, Appellant v. Chandler Elizabeth JOHNSON and Mary M. Johnson, Appellees

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Opinion by: Beth Watkins, Justice

MEMORANDUM OPINION

From the Probate Court No. 2, Bexar County, Texas
Trial Court No. 2017PC0180
Honorable Veronica Vasquez, Judge Presiding Opinion by: Beth Watkins, Justice Sitting: Sandee Bryan Marion, Chief Justice Rebeca C. Martinez, Justice Beth Watkins, Justice REVERSED AND RENDERED

This is an appeal from a probate court order granting a motion to dismiss under the Texas Citizens Participation Act ("TCPA"). Because we conclude the probate court lacked subject matter jurisdiction to consider the underlying claims, we reverse its order and render judgment dismissing the claims of appellant Mary Ann Johnson ("Mary Ann") for business disparagement and intentional infliction of emotional distress for lack of subject matter jurisdiction. *2

2

BACKGROUND

Bradley Keith Johnson ("Bradley") was found dead in his apartment on January 10, 2017. Mary Ann is Bradley's widow, appellee Chandler Elizabeth Johnson ("Chandler") is his adult daughter from a previous marriage, and appellee Mary M. Johnson ("Mary") is Bradley's mother. Mary Ann and Bradley were divorcing when he died, but their divorce was not final so that cause was mooted by his death. Bradley died intestate, and it is undisputed that Mary Ann and Chandler were his only heirs.

On January 17, 2017, Chandler filed an application for dependent administration, letters of administration, and declaration of heirship ("the dependent administration") in Bexar County Probate Court Number 2. The next day, Mary Ann filed an opposition to Chandler's application, as well as her own application for determination of heirship and letters of administration. Mary Ann's application claimed that during their marriage, Bradley defrauded her separate estate and "'wasted' or depleted the community estate." In 2017, the probate court appointed a dependent administrator of Bradley's estate and signed an order approving the inventory, appraisal, and list of claims in the dependent administration.

On January 8, 2019, Mary Ann filed an original petition in the probate court under the same cause number as the dependent administration, asserting claims of business disparagement and intentional infliction of emotional distress against Chandler and Mary ("the tort case"). In the tort case—which forms the basis for this appeal—Mary Ann alleged that after Bradley died, Chandler and Mary falsely reported to the Bexar County

Medical Examiner that Mary Ann "was complicit in [Bradley's] death" and requested an autopsy on that basis. She also alleged that the false accusations resulted in the "economic devaluation of her nursing license" because she was "required to disclose any and all 'alleged' misconduct to her supervisor and [the] Board of Nursing for the State of Texas." She did not: allege any claims against Bradley himself or his estate; include *3 the dependent administrator of Bradley's estate as a party; allege that Chandler and Mary had acted as personal representatives of Bradley's estate; argue that the causes of action she asserted would have any bearing on the collection or distribution of Bradley's estate; or contend that her asserted causes of action affected the court's previous order approving the inventory, appraisal, and list of claims.

On February 5, 2019, Chandler and Mary filed a plea to the jurisdiction, arguing the probate court lacked jurisdiction to consider Mary Ann's claims in the tort case for three reasons:

> 1. "The estate has been admitted to probate and a dependent administrator appointed. The Court has already made its heirship findings and determination. The Court has approved the Inventory, Appraisement, and List of Claims of the Estate."
>
> 2. "None of the events relevant to Plaintiff's Cause of Action affect the Estate of the deceased. Neither the deceased, nor the estate, nor the Administrator are defendants."
>
> 3. "All actions alleged by Plaintiff occurred, if at all, after the decedent died. All actions alleged by Plaintiff occurred, if at all, personally and not in any representative capacity."

Mary Ann did not file a response to the plea to the jurisdiction, and the record does not reflect that the plea was ever brought to the probate court's attention.

On March 5, 2019, Chandler and Mary filed a motion to dismiss the tort case under the TCPA. Mary Ann responded that the TCPA did not apply to her claims and that she had established a prima facie case for each required element of those claims. As evidentiary support, she included her own affidavit contending that Chandler and Mary knew that Bradley had "robbed [her] of [her] separate property moneys" and that they falsely accused her of involvement in his death "so [she] could not urge those claims against his estate." However, as noted above, Mary Ann's previously filed application for determination of heirship and letters of administration in the dependent administration asserted her claims that Bradley had defrauded her separate property estate and *4 wasted their community property. There is nothing in the appellate record showing whether Mary Ann filed a claim against Bradley's estate for the alleged fraud or waste.

After a hearing, the probate court signed an order dismissing the tort case under the TCPA and awarding Chandler and Mary $19,375 in attorney's fees and $500 in sanctions. Mary Ann appealed the probate court's order and raised several substantive arguments. The parties' original briefs did not address the jurisdictional issues raised in Chandler and Mary's plea to the jurisdiction. This court asked the parties to be prepared to discuss the probate court's jurisdiction at oral argument. Thereafter, Mary Ann filed supplemental briefing arguing that the probate court lacked jurisdiction and asking us to remand the tort case to the probate court with instructions to transfer it to the district court.

ANALYSIS

An appellate court is required to consider the existence of subject matter jurisdiction, even if the parties do not raise that issue on appeal. *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013). As a result, before we consider the merits of Mary Ann's arguments on appeal, we must determine whether the probate court had

subject matter jurisdiction to consider the tort case. *See id*.

Standard of Review

Whether a trial court had subject matter jurisdiction to decide a dispute is a question of law this court reviews de novo. *Estate of Matthews*, 510 S.W.3d 106, 113 (Tex. App.—San Antonio 2016, pet. denied). The pleader bears the burden to allege facts that affirmatively demonstrate the trial court's jurisdiction to hear the case. *In re J.P.L.*, 359 S.W.3d 695, 708 (Tex. App.—San Antonio 2011, pet. denied). When reviewing subject matter jurisdiction, this court construes the petition in favor of the pleader, and, if necessary, reviews the entire record to determine if any evidence supports the trial court's exercise of jurisdiction. *Fin. Comm'n of Tex. v. Norwood*, 418 *5 S.W.3d 566, 582 n.86 (Tex. 2013). If the trial court lacked jurisdiction, then the reviewing court only has jurisdiction to set the judgment aside and dismiss the cause. *Chimp Haven, Inc. v. Primarily Primates, Inc.*, 281 S.W.3d 629, 632 (Tex. App.—San Antonio 2009, no pet.).

Applicable Law

The jurisdiction of Bexar County's statutory probate courts is broad, but it is not unlimited. TEX. GOV'T CODE ANN. §§ 25.0021, 25.0173; TEX. EST. CODE ANN. §§ 31.002, 32.001, 32.005, 32.006, 32.007; *In re Estate of Aguilar*, No. 04-16-00504-CV, 2018 WL 1176649, at *2 (Tex. App.—San Antonio Mar. 7, 2018, no pet.) (mem. op.). Because the probate court that decided this case is a statutory probate court, it "has exclusive jurisdiction of all probate proceedings." TEX. EST. CODE § 32.005(a); *see also id*. at §§ 32.006, 32.007 (listing matters not at issue here over which a statutory probate court has exclusive jurisdiction or concurrent jurisdiction with the district court). Additionally, all courts exercising general probate jurisdiction, including statutory probate courts, have "jurisdiction of all matters related to the probate proceeding as specified in Section 31.002 for that type of court." *Id*. § 32.001(a); *see also id*. § 31.002. Section 31.002 specifies nine enumerated types of "matters related to a probate proceeding" that fall within a statutory probate court's jurisdiction, most of which involve claims brought by or against an estate's personal representative. *Id*. § 31.002. Because the statute uses the word "includes," however, section 31.002's list is not exhaustive. TEX. GOV'T CODE ANN. § 311.005(13). "The former probate code conferred probate jurisdiction over matters 'incident to an estate'; but the statutory change to 'matters related to a probate proceeding' in the current estates code is not a substantive difference." *Estate of Puckett*, No. 02-18-00349-CV, 2019 WL 3492396, at *4 n.5 (Tex. App.—Fort Worth Aug. 1, 2019, no pet.) (mem. op.). Under the former Probate Code, the Texas Supreme Court held that "a cause of action is appertaining to or incident to an estate if the Probate Code explicitly defines it as such or if the controlling issue in the suit is the settlement, partition, or distribution of *6 an estate." *In re SWEPI, L.P.*, 85 S.W.3d 800, 805 (Tex. 2002) (internal quotation marks omitted); *see also In re Kholaif*, No. 14-18-00825-CV, 2018 WL 5832899, at *2 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (applying the "'controlling issue' test" after the codification of the Estates Code).

A probate court may also "exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy." TEX. EST. CODE § 32.001(b). "Typically, probate courts exercise pendent and ancillary jurisdiction when a close relationship exists between the non-probate claims and the claims against the estate." *Narvaez v. Powell*, 564 S.W.3d 49, 57 (Tex. App.—El Paso 2018, no pet.). In reviewing a probate court's exercise of pendent and ancillary jurisdiction, "the fundamental question . . . is whether there was a close relationship between [the non-probate claims and the probate proceeding] such that the probate court's exercise of jurisdiction will aid it in the efficient administration of the [estate]." *Schuchmann v. Schuchmann*, 193 S.W.3d 598, 603 (Tex. App.—Fort Worth 2006, pet. denied). A probate court has jurisdiction "to resolve

ancillary claims against third parties only to the extent that such claims were necessary to resolve claims within its original jurisdiction." *Goodman v. Summit at W. Rim, Ltd.*, 952 S.W.2d 930, 934 (Tex. App.—Austin 1997, no pet.) (applying the predecessor to Texas Estates Code section 32.001(b)).

Application

Mary Ann's petition in the tort case does not explicitly plead a statutory basis for the probate court's subject matter jurisdiction over her claims. Nor does it assert any claims against Bradley's estate or the dependent administrator of the estate, challenge the probate court's determination of heirship or order approving the inventory of Bradley's estate, or contend that the tort case will affect the distribution of Bradley's estate. For these reasons, Chandler and Mary *7 argued in their plea to the jurisdiction that the probate court lacked jurisdiction to consider Mary Ann's tort case.

We conclude that the probate court lacked subject matter jurisdiction over the tort case and, consequently, lacked jurisdiction to dismiss those claims and award attorney's fees and sanctions under the TCPA. Mary Ann's claims in the tort case do not fall within any of the Estates Code's enumerated "matters related to probate proceeding." TEX. EST. CODE § 31.002. Furthermore, nothing in the record indicates that "the controlling issue [in the tort case] is the settlement, partition, or distribution of [Bradley's] estate." *See In re SWEPI*, 85 S.W.3d at 805. The tort case does not challenge the validity of any documents filed in the dependent administration, question Chandler's status as one of Bradley's heirs, assert a claim for money owed by Bradley or Bradley's estate, or make any claims about how Bradley's estate should be distributed. *See id*. Instead, it asserts intentional torts against Chandler and Mary individually, and any damages to which Mary Ann might be entitled in the tort case would be paid by Chandler and Mary individually, not by the estate. Additionally, Mary Ann has not measured her damages in the tort case based on the amount she claims she is entitled to inherit in the dependent administration.

Further, nothing in Mary Ann's allegations of business disparagement and intentional infliction of emotional distress puts her claims against Bradley for alleged fraud and waste directly at issue in the tort case. Mary Ann has not alleged that the damages she seeks from Chandler and Mary should be measured by the amount of money she contends Bradley improperly took from her. While Mary Ann argues that Bradley's alleged waste of the community estate is relevant to the falsity element of her business disparagement claim, she has not sought any damages from his estate in the tort case. For these reasons, we conclude Mary Ann's tort case is not a "matter related to" the dependent administration. TEX. EST. CODE § 31.002; *In re SWEPI*, 85 S.W.3d at 805. *8

For similar reasons, the record does not support a conclusion that the tort case falls within the probate court's pendent and ancillary jurisdiction. TEX. EST. CODE § 32.001(b). Mary Ann has not presented any argument or evidence showing that it will promote judicial economy for one heir to sue another heir (and a third-party non-heir) for damages that will not be paid by the estate and will not alter the administration or distribution of the estate. *Id*.; *see Milton v. Herman*, 947 S.W.2d 737, 741 (Tex. App.—Austin 1997, orig. proceeding). Nor is there any evidence that the tort case will "have direct bearing on collecting, assimilating, or distributing [Bradley's] estate." *Burns v. Burns*, 2 S.W.3d 339, 344 (Tex. App.—San Antonio 1999, no pet.).

Because Mary Ann's tort case is not a "matter related to" the dependent administration and does not fall within the probate court's pendent and ancillary jurisdiction, it is outside the subject matter jurisdiction of the statutory probate court. TEX. GOV'T CODE §§ 25.0021, 25.0173; TEX. EST. CODE §§ 31.002, 32.001, 32.005, 32.006, 32.007; *see Shell Cortez Pipeline Co. v. Shores*, 127 S.W.3d 286, 292-95 (Tex. App.—Fort Worth 2004, no pet.) (applying the former Probate Code). Because "[s]ubject matter jurisdiction is essential to a

court's authority to decide a case," the probate court lacked jurisdiction to dismiss the tort case under the TCPA and to award Chandler and Mary attorney's fees, sanctions, and court costs under that statute. *See Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018).

In her supplemental briefing and at oral argument, Mary Ann conceded that the probate court lacked subject matter jurisdiction over her claims and asked us to remand this case with instructions to transfer it to the district court. However, the statute upon which she relied for this request applies only when "the judge of a statutory probate court *that has jurisdiction over a cause of action* appertaining to or incident to an estate pending in the statutory probate court determines that the court *no longer has* jurisdiction over the cause of action." TEX. GOV'T CODE ANN. § 25.00222(b) (emphasis added). Because we have concluded that the probate court never had *9 jurisdiction over the tort case, we hold that it also lacks jurisdiction to transfer those claims to the district court under section 25.00222(b). *See id.*; *see also State v. Morales*, 869 S.W.2d 941, 949 (Tex. 1994) ("When a court lacks jurisdiction, its only legitimate choice is to dismiss."). As a result, our only option is to set aside the probate court's TCPA order and dismiss the tort case. *See Chimp Haven*, 281 S.W.3d at 632. In light of our disposition of the jurisdictional issues, we need not consider the parties' remaining arguments. TEX. R. APP. P. 47.1.

CONCLUSION

We reverse the probate court's order granting the TCPA motion filed by appellees Chandler Elizabeth Johnson and Mary M. Johnson and render judgment dismissing appellant Mary Ann Johnson's business disparagement and intentional infliction of emotional distress claims for lack of subject matter jurisdiction.

Beth Watkins, Justice

No. 02-17-00410-CV
Court of Appeals Second Appellate District of Texas at Fort Worth

In re Estate of Stegall

Decided Nov 21, 2019

No. 02-17-00410-CV

11-21-2019

ESTATE OF RANDALL CROSS STEGALL, DECEASED

Memorandum Opinion by Justice Kerr

On Appeal from Probate Court No. 1 Tarrant County, Texas
Trial Court No. 2013-PR00717-2-1-A Before Kerr, J., and Gonzalez, J.[1]

2 *2

[1] The Honorable Ruben Gonzalez, Judge of the 432nd District Court of Tarrant County, sitting by assignment of the Chief Justice of the Texas Supreme Court pursuant to Section 74.003(h) of the Government Code. *See* Tex. Gov't Code Ann. § 74.003(h).

Justice Mark T. Pittman was a member of the original panel but has since resigned. Therefore, the two remaining justices decided the case. *See* Tex. R. App. P. 41.1(b).

MEMORANDUM OPINION

When Priscilla Stegall's husband died in 2013, she was appointed independent executor of his estate. In that capacity, she sold her late husband's law firm, which included a title company, to the two attorneys who had been working at the firm when he died. After the sale, Priscilla continued to work at the law firm as its office manager and as an escrow officer. The firm's new owners fired her several months later, and she sued them, the law firm, and the attorneys who had represented her and the estate in the sale of her late husband's firm. The probate court granted summary judgment against her on all claims and entered a take-nothing judgment. In five issues, Priscilla challenges the probate court's subject-matter jurisdiction and the propriety of its summary-judgment rulings. We will reverse and remand in part and affirm in part.

I.

Background

Priscilla was married to Randall Cross "Randy" Stegall, an attorney and the sole manager and member of The Stegall Firm, PLLC. The Stegall Firm had offices in Southlake and Flower Mound and operated both a law firm and a fee office for a title company. Priscilla, a nonlawyer, worked for the Stegall Firm as its office manager and as an escrow officer. According to her, most of the Stegall Firm's revenue came from the its title business. Attorneys Matthew Schultz and Dustin Kellar started working for the Stegall Firm shortly before they
3 became licensed in November 2012. *3

On February 27, 2013, Randy died unexpectedly. His will named Priscilla as the estate's executor and sole beneficiary. Tarrant County Probate Court Number Two appointed Priscilla as the independent executor of Randy's estate.

On Randy's death, his estate became the Stegall Firm's sole member. But because Priscilla is not an attorney, no ownership interest in the firm could pass to her. In her independent-executor capacity, she approached Schultz and Kellar about buying the Stegall Firm; they expressed interest, and the parties began discussing sale terms and how the business would operate moving forward.

The parties agreed on a purchase price of $50,000, plus all proceeds from the planned sale of the firm's Flower Mound office, in exchange for the estate's ownership interest in the Stegall Firm. But according to Priscilla, the firm was actually valued at about $1,000,000 because of her pending closings, book of business, experience, skill, and contacts. She claimed that an accountant advised her that it would save her and the firm significant tax liability if part of the purchase price was paid to her as salary for her continued employment. She thus intended to use an employment agreement to "capture the value of the title business and firm."

During the sale negotiations, the parties discussed an employment agreement to be entered into between Priscilla and the firm. Priscilla claims that in March 2013, everyone agreed to a ten-year employment agreement, with Priscilla being a "silent partner" receiving an annual salary of $150,000 plus a percentage of the monthly title premiums and escrow fees. *4

In early May 2013, Priscilla hired Dustin Sparks, an attorney with Geary, Porter, and Donovan, P.C., to represent her individually and as executor of Randy's estate in the sale of the Stegall Firm to Schultz and Kellar. Schultz and Kellar retained their own counsel, Phil Ruais.

Sparks and Ruais worked together to prepare the sale documents, and they discussed a possible employment agreement for Priscilla. But as the May 28, 2013 closing date approached,[2] the employment agreement's terms remained in flux, and Priscilla claims that on closing day, the parties agreed to reduce the employment agreement's duration to a five-year term. The sale closed as scheduled, but Priscilla and the firm—now known as Schultz and Kellar, PLLC (the SK Firm)—never signed an employment agreement. Even so, Priscilla continued to work there.

[2] According to the parties, the Stegall Firm's operating agreement required the sale to close within 90 days of Randy's death. The operating agreement is not in the appellate record.

By September 2013, Priscilla was unhappy with the way Schultz and Kellar were running the firm. Worried that she could be fired, Priscilla met with Sparks that month regarding the employment agreement. Sparks advised her that because there was no written employment agreement, she was free to work elsewhere, but Priscilla decided to stay at the SK Firm.

Six months later, in March 2014, the SK Firm fired Priscilla. A little over a year later, Priscilla—in her individual capacity only—sued Schultz, Kellar, and the SK Firm *5 (collectively, the SK Defendants) in Tarrant County District Court for claims arising from her termination and from the sale of the Stegall Firm to Schultz and Kellar.

The SK Defendants' answer included a verified denial challenging Priscilla's ability to recover in her individual capacity and an affirmative defense challenging her standing to sue. The SK Defendants also specially excepted to Priscilla's pleadings, and the district court ordered her to amend her petition to "set forth distinctively the claims and damages [she was] asserting against Defendants in her individual capacity and the claims and

damages [she was] asserting against [them] as the Execut[or] of the Estate of Randall Stegall." In response, Priscilla amended her pleadings to assert claims against the SK Defendants also in her capacity as executor of Randy's estate: breach of contract, fraudulent inducement, fraud, negligent misrepresentation, and breach of informal fiduciary duty. Specifically, Priscilla-as-executor alleged that Schultz and Kellar used the promise of an employment agreement to induce her to sell the Stegall Firm to them for less than its fair market value and that the estate was thus injured.

The SK Firm then counterclaimed against Priscilla in her capacity as executor for breach of contract and conversion, claiming that the estate had failed to deliver all the assets that the SK Firm had purchased from the Stegall Firm. In June 2016, the SK Defendants successfully moved to transfer the case to Tarrant County Probate Court Number Two, the court in which Randy's will was probated. *6

Meanwhile, in March 2016, Priscilla, individually, sued Sparks and the Geary Porter firm (collectively, the GPD Defendants) in Dallas County District Court for legal malpractice in representing her in the sale of the Stegall Firm. In July 2016, Priscilla amended her petition to also sue the GPD Defendants in her estate-executor capacity, claiming that they were also negligent in representing the estate in the sale. Priscilla then successfully moved to transfer the legal-malpractice case from Dallas County District Court to Tarrant County Probate Court Number Two and to consolidate it with the case against the SK Defendants. Soon after, the presiding judge of Tarrant County Probate Court Number Two recused herself on her own motion, and the consolidated case was assigned to Tarrant County Probate Court Number One.

In December 2016, the SK Firm filed an amended pleading abandoning its counterclaims against Priscilla in her capacity as executor. *See* Tex. R. Civ. P. 62, 65. The following month, Priscilla amended her petition for the eighth time. Individually and in her capacity as executor, she alleged (1) a breach-of-contract claim against the SK Defendants; (2) claims against Schultz and Kellar for fraudulent inducement, fraud by nondisclosure, fraud by partial disclosure, negligent misrepresentation, and breach of informal fiduciary duty; and (3) a legal-malpractice claim against the GPD Defendants.

The GPD Defendants and the SK Defendants all moved for summary judgment. The GPD Defendants moved for summary judgment on limitations, *7 arguing that the two-year statute of limitations barred Priscilla's legal-malpractice claim because that claim accrued in either May or September 2013 but Priscilla did not sue until March 2016, well after limitations had run. The SK Defendants moved for summary judgment only on Priscilla's breach-of-contract claim, arguing that there was no valid and enforceable employment agreement because the parties never had a meeting of the minds on its material terms and, alternatively, the alleged agreement was unenforceable under the statute of frauds. The probate court granted both motions without stating the grounds on which it relied for its rulings.

Priscilla then amended her petition for the ninth time to seek a declaration that she rather than the estate owned "all claims, property, assets[,] and anything of value that was formerly owned by Randy Stegall or his Estate" and that "she individually is the proper party to assert any and all claims that could have ever belonged to the estate or Randy Stegall as the sole devisee of his Last Will and Testament."

After that last amendment, Schultz and Kellar moved for summary judgment on Priscilla's remaining claims: fraudulent inducement, fraud by nondisclosure, fraud by partial disclosure, negligent misrepresentation, and breach of informal fiduciary duty. With respect to the fraud-based and negligent-misrepresentation claims, Schultz and Kellar argued that Priscilla unjustifiably relied on their representations. They also argued that no informal fiduciary relationship existed. The trial court granted the motion, found that Priscilla's declaratory-judgment action was thereby moot, and signed a final take-nothing judgment against her. *8

Priscilla has appealed and raises five issues: (1) the probate court lacked jurisdiction over the case when it transferred the case from district court; (2) even if the probate court had jurisdiction at the time of transfer, it lost jurisdiction when the SK Firm nonsuited its claims against the estate; (3) the trial court erred by granting the GPD Defendants' summary-judgment motion on their limitations defense; (4) the trial court erred by granting summary judgment for the SK Defendants on Priscilla's breach-of-contract claim; and (5) the trial court erred by granting summary judgment for Schultz and Kellar on Priscilla's remaining tort claims.

II.

Appellate Jurisdiction

Before we address Priscilla's appellate complaints, we must consider our jurisdiction. The GPD Defendants have moved to dismiss this appeal, arguing that we lack jurisdiction because Priscilla's notice of appeal was untimely filed. The GPD Defendants contend that Priscilla's appellate deadline ran from August 16, 2017—the date the trial court signed an order granting Schultz and Kellar summary judgment on Priscilla's last remaining claims—because that order was a final judgment. Priscilla responds that her deadlines started to run from August 29, 2017—the date the trial court signed its final judgment—because that judgment modified the August 16 order. *See* Tex. R. Civ. P. 329b(h).

In its August 16, 2017 "Order Granting Defendant's Motion for Partial Summary Judgment on All Remaining
9 Claims," the trial court recited that it had *9 reviewed "all timely filed pleadings, the Motion, Plaintiff's Response, and the evidence and arguments of counsel" and dismissed with prejudice the "remaining causes of action for fraudulent inducement, fraud by nondisclosure and partial disclosure, negligent misrepresentation[,] and breach of informal fiduciary duty." The order stated that "[t]his is a final judgment and disposes of all parties and all claims and is appealable." *See In re Elizondo*, 544 S.W.3d 824, 827-28 (Tex. 2018) (orig. proceeding) (concluding that an order or judgment not following a trial on the merits is final if it disposes of all pending claims and parties or if it clearly and unequivocally states that it does).

On August 29, 2017, the trial court signed a "Final Judgment." In this order, the trial court recited that it had granted the SK Defendants' two summary-judgment motions. The trial court also found that Priscilla's only remaining claim, for a declaratory-judgment, was moot because the trial court had dismissed her other claims with prejudice. The trial court ordered a take-nothing judgment, and the judgment closed by stating that "[t]his JUDGMENT is final, disposes of all claims and parties, and is appealable" and by ordering execution to issue.

A trial court retains plenary power to vacate, modify, correct, or reform its judgment for 30 days after it signs the judgment. Tex. R. Civ. P. 329b(d). If the trial court modifies, corrects, or reforms the judgment "in any respect" during that time, "the time for appeal shall run from the time the modified, corrected, or reformed
10 judgment is signed." Tex. R. Civ. P. 329b(h). "[A]ny change, whether or not material *10 or substantial, made in a judgment while the trial court retains plenary power, operates to delay the commencement of the appellate timetable until the date the modified, corrected or reformed judgment is signed." *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988); *see Arkoma Basin Expl. Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 391 (Tex. 2008) ("Thus, appellate deadlines are restarted by an order that does nothing more than change the docket number or deny all relief not expressly granted."); *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 313 (Tex. 2000) ("[A]ny change made by the court under subpart (h) prior to losing jurisdiction, even a clerical change, will restart the appellate timetable.").

The trial court's August 29 judgment—signed during the trial court's plenary power—modified the August 16 judgment by expressly finding Priscilla's declaratory-judgment claim moot and dismissing it with prejudice, as well as by expressly entering a take-nothing judgment and ordering execution to issue. *See* Tex. R. Civ. P.

329b(d). The August 29 judgment thus restarted the appellate timetable.[3] *See* Tex. R. Civ. P. 329b(h); *see also* Tex. R. App. P. 4.3(a); *Arkoma Basin Expl.*, 249 S.W.3d at 391; *Lane Bank Equip.*, 10 S.W.3d at 313; *Check*, 758 S.W.2d at 756. On September 27, 2017, Priscilla timely moved for a new trial, *see* Tex. R. Civ. P. 329b(a), thereby extending *11 her deadline to file her notice of appeal to November 27, 2017, *see* Tex. R. App. P. 26.1(a)(1). Priscilla timely filed her notice of appeal on November 13, 2017. *See id.*

3 The only time Rule 329b(h) does not operate to reset the appellate timetable is in a case "in which the face of the record reveals that the trial court entered the new order *for the sole purpose* of extending the appellate timetable." *Mackie v. McKenzie*, 890 S.W.2d 807, 808 (Tex. 1994) (emphasis added). From the face of this record, that does not appear to be the case. *See id.*

Because Priscilla timely filed her notice of appeal, we hold that we have jurisdiction over this appeal. *See id.* We therefore deny the GPD Defendants' dismissal motion.

III.

The Probate Court's Jurisdiction

In her first and second issues, Priscilla argues that the probate court lacked subject-matter jurisdiction when it transferred the SK Defendants' case from district court to itself and that even if the probate court had jurisdiction at the time of transfer, it lost jurisdiction when the SK Firm nonsuited its breach-of-contract and conversion claims against the estate.

A. The probate court's transfer power

In parts of her first two issues, Priscilla challenges the probate court's transferring her suit against the SK Defendants to itself.[4]

4 On Priscilla's motion, the probate court transferred her suit against the GPD Defendants from Dallas County District Court to itself. Because she makes no argument regarding whether venue was proper in the probate court as to those claims, we do not address the issue.

1. Applicable law

The SK Defendants moved to transfer venue from Tarrant County District Court to Tarrant County Probate Court Number Two in accordance with Estates *12 Code Section 34.001. *See* Tex. Est. Code. Ann. § 34.001. A transfer under this section is "essentially a specialized form of venue transfer for matters relating to a probate proceeding pending in a probate court." *In re Estate of Aguilar*, 435 S.W.3d 831, 833 (Tex. App.—San Antonio 2014, no pet.); *see Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 622 (Tex. 2005) ("The transfer of a case [under former Probate Code Section 5B [5]] pertains to venue, not jurisdiction."). Section 34.001 provides that a statutory probate court[6] may transfer to itself from a district court (1) "a cause of action related to a probate proceeding pending in the statutory probate court" or (2) "a cause of action in which a personal representative of an estate pending in the statutory probate court is a party."[7] Tex. Est. Code. Ann. § 34.001(a). Priscilla contends that the probate court improperly transferred the case under Section 34.001 because Randy's estate was closed at the time the SK Defendants moved to transfer the case, and thus there was neither a probate proceeding nor an estate *13 pending in the probate court. *See In re John G. Kenedy Mem'l Found.*, 159 S.W.3d 133, 144 (Tex. App.—Corpus Christi-Edinburg 2004, orig. proceeding) (determining that "[t]he word 'pending' does not describe a closed estate" and concluding that an estate must be pending to trigger a probate court's transfer power under former Probate Code Section 5B).

5 The legislature redesignated former Probate Code Section 5B as Estates Code Section 34.001. *See* Act of May 2, 2013, 83rd Leg., R.S., ch. 161, § 6.009, sec. 5B, 2013 Tex. Gen. Laws 623, 635-36 (current version at Tex. Est. Code Ann. § 34.001).

6 Tarrant County's two probate courts are statutory probate courts. Tex. Gov't Code Ann. § 25.2221(c) (stating that Tarrant County's two probate courts are statutory probate courts); *see* Tex. Est. Code Ann. § 22.007(c) (stating that a "statutory probate court" is a court created by statute and designated as a statutory probate court under Government Code Chapter 25).

7 Section 34.001(a) also permits a statutory probate court to "consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to that estate." Tex. Est. Code. Ann. § 34.001(a).

2. Analysis

A probate court's jurisdiction attaches at the time the application for the probate of a will is filed. *In re Blankenship*, 392 S.W.3d 249, 257 (Tex. App.—San Antonio 2012, no pet.). Once the probate court's jurisdiction attaches, it continues until the estate is closed. *Id*.

As noted, Priscilla filed an application to probate Randy's will and was appointed independent executor of his estate, which succeeded Randy as the Stegall Firm's sole member upon his death. Because Priscilla is not an attorney, she could not own an interest in or share in the profits from the Stegall Firm. *See generally* Tex. Disciplinary Rules Prof'l Conduct R. 5.04, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9). Randy's will allowed Priscilla, as executor, to sell estate property for the purpose of administering the estate.[8] *See generally* Tex. Est. Code Ann. §§ 356.002 ("Power of Sale Authorized by Will"),
14 *14 402.052 ("Sale of Estate Property Generally"). As part of her administration of the estate, Priscilla, as executor, sold the firm to Schultz and Kellar.[9] *Cf.* Tex. Disciplinary Rules Prof'l Conduct R. 5.04(d) ("A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit if . . . a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold stock or interest of the lawyer for a reasonable time during administration[.]"). Priscilla's claims against the SK Defendants and the GPD Defendants arise from her sale (in her capacity as the estate's executor) of the Stegall Firm to Schultz and Kellar.

8 As a practical matter, it appears that Priscilla, as a nonlawyer, had to sell the firm during the estate administration in order to distribute the value of Randy's ownership interest in the firm to herself as sole beneficiary of Randy's estate.

9 To effect the Stegall Firm's ownership transfer to Schultz and Kellar, Priscilla signed an "Assignment and Redemption of Membership Interest" and a "First Amendment to the Company Agreement of the The Stegall Firm, PLLC" in her capacity as executor. The sale was seller-financed, and the Stegall Firm (as owned by Schultz and Kellar) executed a secured purchase-price promissory note and a secured revolving-line-of-credit note payable to Randy's estate.

"Traditionally, independent estate administrations have not been formally closed in Texas." 2 Thomas M. Featherstone, Jr., et al., *Texas Practice Guide Probate* § 13:1 (2018-19 ed.), Westlaw (database updated Nov. 2018). The Estates Code, however, allows an independent executor to formally close an estate by filing a closing report or a notice to close the estate after

> [a]ll of the debts known to exist against the estate have been paid, or when they have been paid so far as the assets in the independent executor's possession will permit, when there is no pending litigation, and when the independent executor has distributed to the distributees

15 *15

> entitled to the estate all assets of the estate, if any, remaining after payment of debts . . . .

Tex. Est. Code Ann. § 405.004. But an independent executor is not required to close the administration by filing a report or notice. *See id*. § 405.012. In the absence of a formal estate closing, an independent administration is considered closed when all debts and claims against the estate have been paid, the estate's assets have been distributed, and there is no need for further administration. *See Blankenship*, 392 S.W.3d at 257-58; *In re Estate of Rowan*, No. 05-06-00681-CV, 2007 WL 1634054, at *3 (Tex. App.—Dallas June 7, 2007, no pet.) (mem. op.); *Tex. Commerce Bank-Rio Grande Valley, N.A. v. Correa*, 28 S.W.3d 723, 729 (Tex. App.—Corpus Christi-Edinburg 2000, no pet.).

Here, Priscilla never formally closed the estate, although while the SK Defendants' venue-transfer motion was pending, she filed a notice to close the estate pursuant to Estates Code Section 405.006. *See* Tex. Est. Code Ann. § 405.006. But that notice was ineffective, for a simple, statutory reason: there was litigation pending. *See id*. § 405.004 (stating that an independent executor may file a notice to close the estate "when there is no pending litigation"); *In re Estate of Bean*, 206 S.W.3d 749, 759 (Tex. App.—Texarkana 2006, pet. denied) (holding that independent executor could not formally close an administration by affidavit while litigation was pending).

Priscilla also did not establish that the estate was otherwise closed. In the notice to close the estate—filed after
16 the SK Defendants moved to transfer venue—Priscilla *16 (as executor) stated that all debts known to exist against the estate had been paid, or had been paid to the extent permitted by the assets in her possession, and that all remaining estate assets had been distributed to her as the sole beneficiary of Randy's estate. Even so, further estate administration was needed because estate-related issues remained unresolved: (1) the claims arising from and during Priscilla's administration of the estate, and (2) whether Priscilla individually or Priscilla as executor had standing and capacity to assert those claims. Accordingly, Randy's estate was open and thus still pending, which triggered the probate court's power under Section 34.001 to transfer the case to itself from district court.[10] *See* Tex. Est. Code Ann. § 34.001(a); *John G. Kenedy Mem'l Found*., 159 S.W.3d at 144.

[10] Relying on *Pugh v. Turner*, 197 S.W.2d 822, 826 (Tex. 1946), Priscilla also asserts that her husband's estate closed as a matter of law one year after the probate court approved the inventory, appraisement, and list of claims in mid-October 2013. But the holding in *Pugh* "of a presumption that administration terminated at the expiration of one year is inapplicable" because of the adoption of the Probate Code (the Estates Code's predecessor). *Ford v. Roberts*, 478 S.W.2d 129, 132 (Tex. App.—Dallas 1972, writ ref'd n.r.e.).

Because Priscilla's and the SK Defendants' suit involved a "cause of action in which a personal representative of an estate pending in the statutory probate court is a party,"[11] the probate court's transfer was proper.[12] *See*
17 Tex. Est. Code Ann. *17 § 34.001(a); *see also id*. §§ 22.017 (defining "independent executor" to mean "the personal representative of an estate"), 22.031 (defining "representative" and "personal representative" to include independent executors).

[11] When the SK Defendants moved to transfer venue to probate court, Priscilla's live pleading included claims in her capacity as executor. By the time the probate court heard the venue-transfer motion, Priscilla had amended her petition again, this time to assert claims in her individual capacity only and ostensibly in an attempt to avoid transfer to the probate court. But at that time, the SK Firm's counterclaims against Priscilla in her capacity as executor remained pending, even though the SK Firm would later abandon them. Some two months after the transfer, Priscilla amended her petition against the SK Defendants to reassert claims in her capacity as executor.

12 On Priscilla's motion, the probate court consolidated her case against the SK Defendants with her case against the GPD Defendants. *See* Tex. Est. Code Ann. § 34.001(a) (permitting a statutory probate court to "consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to that estate").

B. The probate court's subject-matter jurisdiction

In the remaining parts of her first and second issues, Priscilla argues that the probate court lacked subject-matter jurisdiction over the case and that the probate court's orders and final judgment are thus void.

1. Standard of review and law regarding jurisdiction

Whether a trial court has subject-matter jurisdiction is a legal question that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) (op. on reh'g); *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). Subject-matter jurisdiction is "essential to a court's power to decide a case." *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013) (quoting *Bland I.S.D. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000)). Subject-matter jurisdiction is never presumed; it cannot be waived or
18 conferred by consent. *See Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75-76 (Tex. 2000). *18

"Without jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case." *Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 578 (Tex. 2013) (op. on reh'g) (quoting *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431, 127 S. Ct. 1184, 1191 (2007)). A judgment is void if it was rendered by a court without subject-matter jurisdiction. *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 309 (Tex. 2010) (orig. proceeding). "[W]hen one court has . . . exclusive jurisdiction over a matter, any order or judgment issued by another court pertaining to the same matter is void." *In re CC & M Garza Ranches Ltd. P'ship*, 409 S.W.3d 106, 109 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding) (quoting *Celestine v. Dep't of Family & Protective Servs.*, 321 S.W.3d 222, 230 (Tex. App.—Houston [1st Dist.] 2010, no pet.)).

2. The statutory probate court's jurisdiction

"Probate courts are courts of limited jurisdiction." *Stauffer v. Nicholson*, 438 S.W.3d 205, 213 (Tex. App.—Dallas 2014, no pet.). All probate proceedings must be filed and heard in a court exercising original probate jurisdiction, and a court exercising such jurisdiction also has jurisdiction over all matters related to the probate proceeding as specified in Section 31.002 for that type of court. Tex. Est. Code Ann. § 32.001(a); *see id.* § 31.002 (listing types of matters related to probate proceedings, which vary depending on whether the county has a statutory probate court, a county court at law exercising probate jurisdiction, or neither). In a county like
19 Tarrant that has a statutory probate court, that court has original jurisdiction over probate *19 proceedings. *Id.* § 32.002(c). Moreover, a statutory probate court has exclusive jurisdiction over "all probate proceedings, regardless of whether contested or uncontested." *Id.* § 32.005(a). And any cause of action related to the probate proceeding must be brought in a statutory probate court unless that court's jurisdiction is concurrent with a district court's jurisdiction as provided by Section 32.007 or with the jurisdiction of any other court.[13] *Id.*

13 A statutory probate court has concurrent jurisdiction with the district court in:

> (1) a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a personal representative;
>
> (2) an action by or against a trustee;
>
> (3) an action involving an inter vivos trust, testamentary trust, or charitable trust, including a charitable trust as defined by Section 123.001, Property Code;
>
> (4) an action involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate;
>
> (5) an action against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent; and
>
> (6) an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney.

Id. § 32.007.

A "probate proceeding" includes "a matter or proceeding relating to a decedent's estate;" "the probate of a will, with or without administration of the estate;" and "an application, petition, motion, or action regarding the
20 probate of a will *20 or an estate administration." *Id*. §§ 22.029, 31.001(1), (4); *see id*. § 22.012 (defining "estate"). A "matter related to a probate proceeding" includes, among other things, "any cause of action in which a personal representative of an estate pending in the statutory probate court is a party in the representative's capacity as personal representative." *Id*. § 31.002(c)(2).

3. Analysis

Here, the probate court had original jurisdiction over the administration of Randy's estate, *see id*. § 32.002(c), and thus had jurisdiction over "all matters related to the probate proceeding." *Id*. § 32.001(a). And as we determined above, Randy's estate was open and pending at the time the probate court transferred the SK Defendants' case from district court to itself. A pending probate proceeding triggers a statutory probate court's exclusive subject-matter jurisdiction over any "cause of action related to the probate proceeding" under Section 32.005. *See Baker v. Baker*, No. 02-18-00051-CV, 2018 WL 4224843, at *1 (Tex. App.—Fort Worth Sept. 6, 2018, no pet.) (mem. op.).

As noted, matters related to probate proceedings include "any cause of action in which a personal representative of an estate pending in the statutory probate court is a party in the representative's capacity as personal representative." Tex. Est. Code Ann. § 31.002(c)(2). Because Priscilla is a party to the suits against the SK Defendants and the GPD Defendants in her capacity as executor, those suits are "related to a probate
21 proceeding." *Id*. The SK Firm's abandonment of its counterclaims against the *21 estate after the transfer to probate court did not affect the probate court's jurisdiction. We therefore hold that the probate court had subject-matter jurisdiction over the case and its orders and final judgment are not void.[14] *See id*. §§ 32.001(a), .005(a).

14 When a district court and probate court have concurrent subject-matter jurisdiction over a cause of action "the issue is one of dominant jurisdiction." *See In re Puig*, 351 S.W.3d 301, 305 (Tex. 2011) (orig. proceeding). Priscilla made no argument in the trial court nor does she argue on appeal that the district court had dominant jurisdiction. Thus, we do not address the issue.

We overrule Priscilla's first and second issues.

IV.

Amended Pleadings and Waiver

Before we address Priscilla's issues challenging the probate court's summary-judgment rulings, we must determine whether she waived error by filing amended pleadings abandoning some of her claims after the probate court granted summary judgment against her on those claims. The SK Defendants and the GPD Defendants both point out that after the trial court granted summary judgment on Priscilla's claims for legal malpractice and breach of contract, she amended her pleadings to remove those claims. They argue that by doing so, she has waived any putative error regarding the trial court's granting summary judgment on these claims. *See Kinney v. Palmer*, No. 04-07-00091-CV, 2008 WL 2515696, at *3 (Tex. App.—San Antonio June 25, 2008, no pet.) (mem. op.) ("[B]y amending their pleading and eliminating the DTPA, negligent misrepresentation, and fraud references, the Kinneys abandoned those claims and have waived any error
22 concerning the trial court's action in granting *22 Palmer's motion for partial summary judgment as to these claims."); *see also* Tex. R. Civ. P. 65.

As a general rule, filing an amended petition that does not include a particular cause of action effectively nonsuits or voluntarily dismisses the omitted claim when the pleading is filed, and no hearing is necessary to effect the nonsuit. *FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 632 (Tex. 2008). Abandoning a cause of action in an amended pleading waives any error by the trial court regarding the abandoned cause of action. *Lopez v. Crest Gateway, LP*, No. 02-17-00429-CV, 2018 WL 5832124, at *2 (Tex. App.—Fort Worth Nov. 8, 2018, no pet.) (mem. op.).

But the supreme court has recognized "possible circumstances" that create an exception to this general rule: statements in the amended pleading indicating that the pleader intended to reserve her rights with respect to the omitted claims. *See FKM P'Ship*, 255 S.W.3d at 633 (citing *Ortiz v. Collins*, 203 S.W.3d 414, 421 n.4 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (reasoning that plaintiff who stated in his amended pleading that he did not waive and expressly reserved "his right to pursue or re-assert either in [the trial] court and/or on appeal" the causes of action previously dismissed by the trial court and not pleaded in the amended pleading did not abandon his previous claims)). If the pleading expressly indicates no intent to waive any rights associated with omitted causes of action, the pleader has not waived error regarding those claims. *See Spellmann v. Love*, 534
23 S.W.3d 685, 691 (Tex. App.—Corpus Christi-Edinburg 2017, pet. denied). *23

Here, in her amended pleading omitting her breach-of-contract and legal-malpractice claims, Priscilla stated, "Claims and parties have been removed from this pleading based on dismissal orders signed by the Court so that the live pleading will reflect the current parties and issues and for no other purpose. No claims or rights that might exist are being wa[i]ved." We conclude that this language clearly demonstrated Priscilla's intent to not abandon her claims for breach of contract and legal malpractice. *See Ortiz*, 203 S.W.3d at 421 n.4. Accordingly, we hold that she has not waived any alleged error by the trial court regarding these causes of action, and we can thus reach the merits of the trial court's summary-judgment rulings. *See Spellman*, 534 S.W.3d at 691 (citing *Ortiz*, 203 S.W.3d at 421 n.4).

V.

Summary Judgment in Favor of the GPD Defendants and the SK Defendants on Their Affirmative Defenses

In her third issue, Priscilla complains that the trial court erred by granting summary judgment in favor of the GPD Defendants on their limitations affirmative defense. In part of her fourth issue, she argues that the trial court erred by granting summary judgment in favor of the SK Defendants on their statute-of-frauds defense to her breach-of-contract claim.

A. Standard of review

Limitations and statute of frauds are affirmative defenses. Tex. R. Civ. P. 94. A defendant is entitled to summary judgment on an affirmative defense by conclusively proving all elements of that defense. *Frost Nat'l*
24 *Bank v. Fernandez*, 315 S.W.3d 494, *24 508-09 (Tex. 2010); *see* Tex. R. Civ. P. 166a(b), (c). To accomplish this, the defendant must present summary-judgment evidence that conclusively establishes each element of the affirmative defense. *See Chau v. Riddle*, 254 S.W.3d 453, 455 (Tex. 2008).

We review a summary judgment de novo. *Travelers Ins. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008).

B. Limitations (GPD Defendants)

Priscilla sued the GPD Defendants for legal malpractice, claiming that they were negligent in their legal representation of her individually and as estate executor in the sale of the Stegall Firm to Schultz and Kellar because the GPD Defendants failed to ensure that she had a written employment agreement and failed to advise her on the ramifications of not having such an agreement. Priscilla contended that the GPD Defendants' negligence resulted in "the loss of a majority of the value in the [f]irm and business being sold" and the loss of the value of the employment agreement. The GPD Defendants moved for summary judgment on limitations.

Legal-malpractice claims are governed by a two-year statute of limitations. *See* Tex. Civ. Prac. & Rem. Code
25 Ann. § 16.003(a); *Willis v. Maverick*, 760 S.W.2d 642, *25 644 (Tex. 1988). Limitations begin to run when the claim accrues, *see* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a), and a claim "accrues" when the claimant sustains a legal injury or, in cases governed by the discovery rule, when the claimant discovers or should have discovered the facts establishing the elements of a cause of action. *See Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 156 (Tex. 1991).

The point at which a cause of action accrues is a legal question. *Etan Indus., Inc. v. Lehmann*, 359 S.W.3d 620, 623 (Tex. 2011). A cause of action accrues "when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred." *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996). "A person suffers legal injury from faulty professional advice when the advice is taken." *Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997). But in legal-malpractice claims, the discovery rule defers the accrual of a claim until the client knows, or should have known through reasonable care and diligence, the facts establishing the elements of her cause of action. *See Willis*, 760 S.W.2d at 646. The client need not know the specific nature of each wrongful act that may have caused the injury for her claim to accrue under the discovery rule. *See KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 749

(Tex. 1999). Nor does the client need to know the full extent of her damages before limitations begin to run. *See Murphy*, 964 S.W.2d at 273. Rather, a cause of action accrues under the discovery rule when the client discovers or, in the exercise of reasonable diligence, should discover the "nature of [her] injury." *Childs v.*
26 *Haussecker*, 974 S.W.2d 31, 40 (Tex. *26 1998). "[D]iscovering the 'nature of the injury' requires knowledge of the wrongful act and the resulting injury." *Id*. Thus, the discovery rule defers accrual of a claim only until the client discovers, or should have discovered through reasonable diligence, the injury and that it was likely caused by the wrongful acts of another. *See id*.

Here, the GPD Defendants argued in their summary-judgment motion that limitations barred Priscilla's legal-malpractice claim because that claim accrued in either late May 2013 (when the Stegall Firm was sold to Schultz and Kellar without Priscilla's having an employment agreement) or, at the very latest, September 2013 (when Sparks and Priscilla met to discuss her not having an employment agreement), but she did not sue the GPD Defendants until March 14, 2016, well after the two-year limitations period had expired. Priscilla countered that her claim did not accrue under either the legal-injury rule or the discovery rule until she was fired on March 21, 2014, because only then did she suffer any financial injury.

Financial injury, however, is not necessarily the same as legal injury, and any legal injury that Priscilla incurred (in any capacity) as a result of the GPD Defendants' alleged legal malpractice occurred at the end of May 2013 when she sold the Stegall Firm without the benefit of a written employment agreement. *See Belt v. Oppenheimer*, *Blend*, *Harrison & Tate*, *Inc*., 192 S.W.3d 780, 785-86 (Tex. 2006) (concluding that legal-malpractice claim involving estate planning accrued when estate-planning attorney negligently drafted will, not when the estate suffered the negative consequences of that act); *Murphy*, 964 S.W.2d at 270 ("A person suffers
27 legal injury *27 from faulty professional advice when the advice is taken."). But because the discovery rule applies to legal-practice cases and Priscilla raised it, the SK Defendants had the burden to prove that Priscilla knew or should have known the facts establishing her legal-malpractice claim more than two years before she sued the SK Defendants on March 14, 2016. *See KPMG Peat Marwick*, 988 S.W.2d at 748 (holding a defendant moving for summary judgment on limitations must negate the discovery rule "if it applies and has been pleaded or otherwise raised").

According to Priscilla's summary-judgment evidence, she explained to Sparks that an employment agreement that would guarantee her employment for a specified term of years and give her some level of management control was an essential part of the sale, and she and Sparks had numerous discussions about the employment agreement and its terms leading up to the sale of the Stegall Firm in late May 2013. Priscilla knew that she did not have a written employment agreement when the sale closed. After the sale, Sparks drafted an employment agreement and sent it to Priscilla for review and approval. But the employment agreement was never finalized or executed.

The GPD Defendants argued that, at the latest, Priscilla knew or should have known the facts establishing her legal-malpractice claim at her meeting with Sparks on September 9, 2013. During that meeting, Priscilla "vented" to Sparks about Schultz and Kellar's management decisions and the changes they had made to the
28 firm. Sparks told her that because she did not have an employment agreement, she could leave the *28 firm and seek employment elsewhere. At the time of that meeting, Priscilla knew she could be fired. She instructed Sparks not to send the draft employment agreement to Schultz and Kellar because she "did not believe they would sign it" and because "it contained terms that were never discussed or agreed to that [she] also did not want to sign." Priscilla realized that "[t]here was no point in having [Sparks] try to negotiate a term employment agreement . . . as [she] had no leverage at that point to not sell them the Firm." Because she "had

greatly reduced leverage in the transaction," Priscilla understood in September 2013 that "there was no way that [she] could go back and get the shared management that [she] had discussed with Schultz and Kellar into a written agreement."

By the September 2013 meeting, then, Priscilla knew the nature of her injury. But Priscilla claims that she did not know she had a claim for legal malpractice until suffering financial loss when she was fired in March 2014. Under the discovery rule, however, "[o]nce a claimant learns of a wrongful injury, the statute of limitations begins to run even if the claimant does not yet know 'the specific cause of the injury; the party responsible for it; the full extent of it; or the chances of avoiding it.'" *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 207 (Tex. 2011) (op. on reh'g) (quoting *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 93-94 (Tex. 2004)). In discovery-rule cases, "a cause of action accrues when the plaintiff knows or reasonably should know that he has been legally injured by the alleged wrong, *however slightly*." *Murphy*, 964
29 S.W.2d at 273 (emphasis added). "The fact that *29 the plaintiff's actual damages may not be fully known until much later does not affect the determination of the accrual date for alleged . . . legal malpractice." *Id.*

Here, construing the summary-judgment evidence in Priscilla's favor, we conclude that the GPD Defendants conclusively established that by September 2013 (at the latest) Priscilla knew the facts establishing the elements of her legal-malpractice claim. Because she did not sue the GPD Defendants until over two years later, her legal-malpractice claim was barred by limitations. We therefore overrule Priscilla's third issue.

C. Statute of frauds (SK Defendants)

Priscilla claimed that as part of the sale to Schultz and Kellar in late May 2013, they agreed that the SK Firm would employ her for five years. Priscilla further claimed that the SK Defendants breached this agreement when they fired her in March 2014. As noted, the SK Defendants moved for summary judgment on Priscilla's breach-of-contract claim, arguing that the alleged agreement to employ Priscilla for five years was unenforceable because it was subject to the statute of frauds and was not in writing or signed by the parties. Priscilla countered that the employment agreement was enforceable despite the statute of frauds because she partially performed.

The statute of frauds is an affirmative defense to breach of contract. *See* Tex. Bus. & Com. Code Ann. § 26.01(a); Tex. R. Civ. P. 94; *Duradril, L.L.C. v. Dynomax Drilling Tools, Inc.*, 516 S.W.3d 147, 158 (Tex. App.—Houston [14th Dist.] 2017, no pet.). A contract that cannot be performed within one year of its making falls
30 within *30 the statute of frauds. *See* Tex. Bus. & Com. Code Ann. § 26.01(b)(6). Such a contract is enforceable against a party only if it is in writing and is signed by that party. *See id.* § 26.01(a). Thus, an agreement for employment for more than one year comes within the statute of frauds and must be in writing and signed by the defendant to be enforceable. *See Timmons v. Scarbrough, Medlin & Assocs., Inc.*, No. 05-05-00235-CV, 2005 WL 3436706, at *1 (Tex. App.—Dallas Dec. 15, 2005, no pet.) (mem. op.); *C.S.C.S. v. Carter*, 129 S.W.3d 584, 590 (Tex. App.—Dallas 2003, no pet.).

As the party pleading the statute of frauds, the SK Defendants bore the initial burden of establishing the defense's applicability. *See Dynegy, Inc. v. Yates*, 422 S.W.3d 638, 641 (Tex. 2013). Because the SK Defendants met their burden[15]—which Priscilla does not dispute—the burden shifted to her to establish an exception taking the oral employment agreement out of the statute of frauds. *See id.* In this regard, Priscilla argues that "Texas law requires [the contract's] enforcement in equity" because she "performed her obligations under the agreement."

15 Whether a contract comes within the statute of frauds is a legal question that we review de novo. *Dynegy*, 422 S.W.3d at 642. Here, the alleged five-year employment agreement is subject to the statute of frauds and is thus unenforceable because it is not in writing and signed by the SK Defendants. *See* Tex. Bus. & Com. Code Ann. § 26.01(a), (b)(6).

Partial performance is indeed an exception to the statute of frauds. *See Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 439 (Tex. App.—Dallas 2002, pets. denied). Under this exception, a contract that has been
31 partially performed but that does not *31 satisfy the statute of frauds may be enforced in equity if denial of enforcement would amount to virtual fraud. *Id.* The partial performance must be "unequivocally referable" to the agreement and corroborative of the fact that a contract actually was made. *Id.* That is, the acts "must be such as could have been done with no other design than to fulfill the particular agreement sought to be enforced; otherwise they do not tend to prove the existence of the parol agreement relied upon by the plaintiff." *Id.* at 439-40. "If the evidence establishes that the party who performed the act that is alleged to be partial performance could have done so for some reason other than to fulfill obligations under the oral contract, the exception is unavailable." *Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 426-27 (Tex. 2015).

Priscilla contends that she partially performed the employment agreement in several ways: by training Schultz and Kellar in the title business, by closing deals, by connecting them with referral sources and contacts, and by acting in the role of branch manager and silent partner. This claimed "partial performance" consisted of her rendering services to the firm—services for which Priscilla was indisputably compensated during the ten months she was employed there after the sale to Schultz and Kellar. "[A] salary compensates for services rendered; if a person received payment for his services, those services will not act as an exception to the statute of frauds." *Holloway v. Dekkers*, 380 S.W.3d 315, 324 (Tex. App.—Dallas 2012, no pet.); *see Timmons*, 2005 WL 3436706, at *2 ("Rendition of services for which a person receives a monthly salary is insufficient to take
32 an agreement outside of the statute of *32 frauds because the rendition of services is fully explained by the salary."). Accordingly, the services Priscilla provided and was paid for do not overcome the statute-of-frauds defense.

Priscilla also contends that she partially performed the employment agreement by signing over the company and by funding the firm's operating costs. But Priscilla does not contend—nor is there any evidence—that these actions were "unequivocally referable" to the employment agreement. That is, there is no evidence that Priscilla took these actions "with no other design than to fulfill" the employment agreement. *Exxon*, 82 S.W.3d at 439-40.

Because Priscilla failed to prove the partial-performance exception to the statute of frauds, the trial court properly granted summary judgment on her breach-of-contract claim based on the SK Defendants' statute-of-
33 frauds defense.[16] We thus overrule her fourth issue. *33

16 As noted, the trial court's order granting summary judgment for the SK Defendants did not specify the grounds for its ruling. The SK Defendants also moved for summary judgment on Priscilla's breach-of-contract claim on the ground that the employment agreement was unenforceable because the parties never had a meeting of the minds regarding its material terms. But we do not address this ground because we have concluded that the trial court properly granted summary judgment based on the SK Defendants' statute-of-frauds defense. *See Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003) (stating that if the "trial court's order does not specify the grounds for its summary judgment, [an appellate court] must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious"); *see also* Tex. R. App. P. 47.1.

VI.
Summary Judgment in Favor of the SK Defendants

on Priscilla's Remaining Claims

In her fifth issue, Priscilla argues that the trial court erred by granting summary judgment in favor of Schultz and Kellar on her claims for fraudulent inducement, fraud by nondisclosure, fraud by partial disclosure, and negligent misrepresentation.[17]

17 Although Priscilla's fifth issue generally challenges the granting of summary judgment on "all [her] remaining claims" against Schultz and Kellar, she has not presented any argument within that issue challenging the propriety of the summary judgment on her breach-of-fiduciary-duty claim. As a result, we will not address the propriety of the summary judgment on this claim. *See Shellnut v. Wells Fargo Bank, N.A.*, No. 02-15-00204-CV, 2017 WL 1538166, at *3 (Tex. App.—Fort Worth Apr. 27, 2017, pet. denied) (mem. op.); *see also LeBlanc v. Riley*, No. 02-08-00234-CV, 2009 WL 885953, at *3 (Tex. App.—Fort Worth Apr. 2, 2009, no pet.) (mem. op.) (noting that although a general issue challenging summary judgment is permissible, "to preserve error on a particular cause of action on which the trial court granted summary judgment, an appellant must still present argument and legal authority related to that particular claim").

A. Standard of review

We have already set out the standard of review for a summary judgment. Here we add only the reminder that a defendant that conclusively negates at least one essential element of a plaintiff's cause of action is entitled to summary judgment on that claim. *Frost Nat'l Bank*, 315 S.W.3d at 508; *see* Tex. R. Civ. P. 166a(b), (c). **B. Priscilla's claims for fraudulent inducement, fraud, and negligent misrepresentation**

According to Priscilla's pleadings, "[t]he parties all agreed and it was anticipated that after Schultz and Kellar
34 were owners, a written employment agreement would be *34 entered into reflecting the estimated value [she] had placed on the Stegall Firm with her continued involvement totaling at least $750,000.00 to be paid to [her] over five years through guaranteed wages plus bonuses."[18] Even though the parties never executed a written agreement, Schultz and Kellar continued to pay her the agreed-upon amounts until they fired her.

18 Specifically, Priscilla claims that the $50,000 purchase price was well-below the firm's fair market value, which she estimates was about $1,000,000, and that the $750,000 in salary and bonuses she expected to receive under the five-year employment agreement was intended to compensate her for the firm's actual value.

In support of her fraudulent-inducement claim, Priscilla alleged that, "in conjunction with" the sale of the Stegall Firm, Schultz and Kellar falsely represented to her that they would employ her for five years at a certain salary, plus pay her a percentage of the monthly title premiums and escrow fees. Priscilla further claimed that Schultz and Kellar intended for her, individually and as executor, to rely on those representations and that those representations induced her, as executor, to sell the firm to them "with very favorable terms regarding owner financing" and a reduced purchase price. Priscilla claimed that she, individually and as executor, relied on these representations regarding the employment agreement when she sold the firm to Schultz and Kellar.

Similar to her claim for fraudulent inducement related to her sale of the firm, Priscilla's claims for fraud and negligent misrepresentation relate to the representations Schultz and Kellar made during the sale negotiations.
35 In support of *35 her fraud claims, Priscilla asserted that while she was negotiating the sale of the firm for both her and the estate's benefit, Schultz and Kellar failed to disclose or only partially disclosed their intentions regarding their agreement to continue to employ her after the sale and their belief that, without a signed employment agreement, they could change the terms of her employment or terminate her after they purchased

the firm. Similarly, in support of her negligent-misrepresentation claim, she alleged that Schultz and Kellar supplied false information—namely their promise to employ her after the sale—to her (both individually and as executor) during the sale negotiations.

C. Applicable law

To prevail on her claims for fraudulent inducement, fraud, and negligent misrepresentation, Priscilla must prove (among other things) that she actually and justifiably relied on Schultz's and Kellar's representations. *See*, *e.g.*, *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018) (stating that fraudulent inducement is a "species of common-law fraud that shares the same basic elements" and "arises only in the context of a contract"); *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 & n.15 (Tex. 2010) (op. on reh'g) (stating that fraud and negligent misrepresentation require a showing of actual and justifiable reliance); *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997) (stating that fraud by nondisclosure is a subcategory of fraud and that because reliance is an element of fraud, it is likewise an element of fraud by nondisclosure). Justifiable reliance usually presents a fact question for a jury to decide. *Barrow-Shaver Res. Co. v. Carrizo Oil*
36 *& Gas*, *36 *Inc.*, No. 17-0332, 2019 WL 2668317, at *19 (Tex. June 28, 2019) (citing *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 654 (Tex. 2018)).

"In measuring justifiability, we must inquire whether, 'given a fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud[,] it is extremely unlikely that there is actual reliance on the plaintiff's part.'" *Grant Thornton*, 314 S.W.3d at 923 (quoting *Haralson v. E.F. Hutton Grp., Inc.*, 919 F.2d 1014, 1026 (5th Cir. 1990)). Justifiable reliance can "be negated as a matter of law when circumstances exist under which reliance cannot be justified." *Orca Assets*, 546 S.W.3d at 654. "To determine whether, as a matter of law, justifiable reliance has been negated, we must consider the contract and the nature of the parties' relationship." *Barrow-Shaver Res.*, 2019 WL 2668317, at *19. Reliance on an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law. *See Orca Assets*, 546 S.W.3d at 658, 660 n.2. "Red flags" that indicate reliance is unwarranted can also negate justifiable reliance as matter of law. *See id.* at 655, 660 n.2.

D. The summary-judgment evidence

Schultz and Kellar claim that when Priscilla sold them the firm, "there was no agreement as to the terms of an employment agreement between the Firm and Priscilla." In their summary-judgment motion, they argued that Priscilla's reliance on their attorney's representations was not justifiable and that her reliance on her own
37 attorney's representations could not form the basis for her fraud claims against *37 Schultz and Kellar. But Priscilla did not rely solely on the attorneys' representations. According to her, she also relied on representations made by Schultz and Kellar in the months leading up to the closing.

At the time of Randy's death in February 2013, most of the Stegall Firm's revenue was generated through its title business. After Randy died, Priscilla had multiple options regarding the Stegall Firm: (1) close the firm and sell the firm's assets and use of the rented location and take her book of business and staff to another title company; (2) sell the firm on the open market to another attorney for cash or on a note and stay on as an employee; or (3) close the law firm and convert the business to a direct title operation. But because of the emotional impact of losing her husband and business partner, she decided that it would be best for her to stay with the firm and for the firm to continue to operate as it had before Randy's death. To that end, she approached Schultz and Kellar about buying it.

Over the next few months, Priscilla, Schultz, and Kellar discussed the firm's operations after the sale. They agreed that Priscilla would operate the title business, Schultz and Kellar would run the legal side of the firm, and Priscilla would train Schultz and Kellar in the title business. An accountant advised Priscilla that it would be beneficial from a tax perspective both to her and to Schultz and Kellar if the value of the title business—which included Priscilla's value, the value and continued earning potential of the staff, and the value of any pending closings—was paid through salary and bonus to Priscilla rather than through a "straight sale." Based
38 on this advice, *38 Priscilla told Schultz and Kellar that she "wanted a 10 year guarantee of $150,000 per year" and "wanted to be treated as a silent partner." She justified her demand by pointing out her "ownership and ability to take the whole [title] business where [she] wanted." Schultz and Kellar met privately, and a few days later, Schultz told Priscilla that he and Kellar "were both on board with everything" and suggested that Priscilla "be paid on a percentage of the office production in addition to the salary." Priscilla agreed, and in early March 2013, she "moved forward under this agreement and with this understanding and would not have moved forward toward this goal with [Schultz and Kellar] if they had not agreed to the salary, 10 years[,] and that [she] would be treated as a third partner."

In the months between Randy's death and the sale, Priscilla continued to work at the firm with Schultz and Kellar. By mid-May, Priscilla and Schultz and Kellar had hired lawyers (Sparks and Ruais, respectively) to represent them in the sale. Sparks drafted the sale documents in accordance with the principal terms the parties had negotiated before they retained counsel. Sparks and Ruais negotiated some of the finer terms of the sale and discussed the terms of Priscilla's employment agreement. According to Sparks, the employment agreement "was always something that was contemplated and was important [to all the] parties at some point during the negotiations."

Days before the closing, Priscilla learned that Schultz and Kellar wanted to change the length of her guaranteed
39 employment from ten years to either five or *39 seven years. She met with Schultz, who told her that both he and Kellar were "nervous" about the ten-year term. Priscilla later met with Schultz and Kellar together, and the parties agreed to "the 150K and percentages and all that remained was the number of years."

According to Priscilla, on the day of the sale (May 29, 2013), she was informed that Schultz and Kellar wanted a five-year contract with a ten-year extension option. Priscilla also alleged that she, Schultz, and Kellar met that day and agreed to a five-year term with an extension option. Later that day, Priscilla sold the firm to Schultz and Kellar for $50,000; the sale was seller-financed with a $50,000 promissory note and included a $100,000 line of credit, both of which were payable to Priscilla as executor and secured by the firm's assets.

The parties did not sign an employment agreement at closing. According to Sparks, he had not drafted an employment agreement to be executed at closing because the parties were still negotiating in the days leading up to the closing, but they insisted on closing as scheduled. Sparks "understood that an employment agreement would be prepared later, on terms discussed between [Priscilla] and the Buyers."

Priscilla knew that when she sold the firm to Schultz and Kellar, she did not have a written employment agreement with them. But at that time, she believed that what she and Schultz and Kellar "had agreed to regarding [her] salary, length of years[,] and bonus structure would be turned into a simple employment
40 agreement *40 after Schultz and Kellar were owners." She based her decision to sell the firm to them on their promise to employ her for at least five years.

Two days after the sale, Priscilla asked Sparks if he had a draft employment agreement for her to review. A week later, Sparks emailed Priscilla to ask "one more time" if she could provide him the information that he needed to finalize the draft of her employment agreement. On June 13, 2013, Sparks sent Priscilla a draft

employment agreement; she did not respond to Sparks until July 9. She wanted to meet with him regarding the employment agreement, but he was out of the office and could not meet until later that month. Priscilla "got busy" in July and August with work and family matters, so she and Sparks were unable to meet until September 9. By that time, Priscilla was unhappy with Schultz and Kellar's management of the firm and wanted to leave. She did not tell Sparks to send over the employment agreement that he had prepared because she "did not believe [Schultz and Kellar] would sign it" and because "it contained terms that were never discussed or agreed to that [she] also did not want to sign." Priscilla also felt that "[t]here was no point in having [Sparks] try to negotiate a term employment agreement . . . as [she] had no leverage at that point to not sell them the Firm."

Priscilla admits that she sold the firm to Schultz and Kellar without a written employment agreement in place. But she maintains that at the time of the sale, Schultz and Kellar had agreed to employ her for five years,
41 paying her $150,000 annually plus the agreed-upon bonuses. *41

E. Analysis

In their summary-judgment motion, Schultz and Kellar assert that Priscilla's reliance, if any, was unjustified as matter of law because (1) she could not justifiably rely on representations from their attorney; (2) she knew that any employment agreement would be in writing; (3) she sold them the firm without a written employment agreement; (4) she decided not to present Schultz and Kellar with a proposed written employment agreement; and (5) she knew the parties never contemplated an oral employment agreement.

Viewing the evidence in Priscilla's favor—as we must—and because we measure "justifiability" given Priscilla's "individual characteristics, abilities, and *appreciation of facts and circumstances at or before the time of the alleged fraud*," *see Grant Thornton*, 314 S.W.3d at 923 (emphasis added), Schultz and Kellar did not prove lack of justifiable reliance as a matter of law. There were no "red flags" to indicate that Priscilla's reliance was unwarranted, nor were Schultz's and Kellar's oral representations directly contradicted by the express, unambiguous terms of a written contract.[19] *See Orca Assets*, 546 S.W.3d at 655, 658. According to Priscilla,
42 leading up to *42 and at the time of the sale's closing, she relied on Schultz's and Kellar's representations regarding a promise of continued employment. The fact that Priscilla realized after the sale that she lacked the leverage to force them to execute a written employment agreement does not establish—as a matter of law—a lack of justifiable reliance leading up to the sale of the Stegall Firm to Schultz and Kellar. Accordingly, we sustain Priscilla's final issue.[20]

19 On appeal, Schultz and Kellar point to the security agreement's merger clause, which states:

> This Agreement and all documents and instruments executed in connection therewith or herewith, supersede any and all other agreements, either oral or in writing, between the parties hereto with respect to the subject matter hereof and contain all of the covenants and agreements between the parties with respect to the subject matter hereof.

Because Schultz and Kellar did not raise the merger clause as a summary-judgment ground, we decline to address what effect, if any, it has on whether Priscilla's reliance was justified. *See State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010) (stating that a "[s]ummary judgment may not be affirmed on appeal on a ground not presented to the trial court in the motion"); *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 681 (Tex. 2000) (concluding that merger-clause defense not raised in the trial court is unpreserved for appellate review).

20 Whether Priscilla or the estate owns these claims and whether she in her individual capacity could assert them was never determined by the trial court because the trial court dismissed as moot her declaratory-judgment action when it granted summary judgment against Priscilla on all her claims. We thus do not address these issues and leave them for the trial court to determine on remand.

VII.

Conclusion

Having sustained Priscilla's fifth issue, we reverse the trial court's judgment on her claims for fraudulent inducement, fraud by nondisclosure, fraud by partial disclosure, and negligent misrepresentation and remand those claims to the trial court. Because the trial court's dismissal of her declaratory-judgment claim as moot
43 was *43 based, in part, on its granting summary judgment on her fraud-based and negligent-misrepresentation claims, we reverse the trial court's dismissal and remand her declaratory-judgment claim as well. Having overruled Priscilla's first four issues, we affirm the remainder of the trial court's judgment.

/s/ Elizabeth Kerr

Elizabeth Kerr

Justice Delivered: November 21, 2019

No. 08-17-00157-CV
COURT OF APPEALS EIGHTH DISTRICT OF TEXAS EL PASO, TEXAS

Narvaez v. Powell

564 S.W.3d 49 (Tex. App. 2018)
Decided Jul 13, 2018

No. 08-17-00157-CV

07-13-2018

Dolores NARVAEZ, Luis Narvaez, Eduardo Velarde, Jose Juan Velarde, Julieta Duran, Luz Magdalena Escobar, and Jose Antonio Velarde Juarez, Appellants, v. Darron POWELL, Darron Powell PLLC, Hector Phillips, and Hector Phillips, P.C., Appellees

Hon. Chris M. Borunda, Hon. David S. Jeans, Hon. William A. Elias, El Paso, for Appellees. Hon. John M. Phalen Jr., Hon. Daniel J. Sheehan, Dallas, Hon. Cynthia C. Hollingsworth, for Appellants.

YVONNE T. RODRIGUEZ, Justice

Hon. Chris M. Borunda, Hon. David S. Jeans, Hon. William A. Elias, El Paso, for Appellees.

Hon. John M. Phalen Jr., Hon. Daniel J. Sheehan, Dallas, Hon. Cynthia C. Hollingsworth, for Appellants.

Before McClure, C.J., Rodriguez, and Palafox, JJ.

OPINION

YVONNE T. RODRIGUEZ, Justice

Appellants, Dolores Narvaez, Luis Narvaez, Eduardo Velarde, Jose Juan Velarde, Julieta Duran, Luz Magdalena Escobar, and Jose Antonio Velarde Juarez, appeal from an order dismissing their suit against their former attorneys, Darron Powell, Darron Powell PLLC, Hector Phillips, and Hector Phillips, P.C. The primary issue in this case is whether the Probate Court No. 2 of El Paso County, Texas has exclusive jurisdiction of Appellants' claims. Finding that it has exclusive jurisdiction of the breach of fiduciary duty, barratry, and declaratory judgment causes of action, and ancillary jurisdiction of the legal malpractice claim, we affirm the dismissal order.

FACTUAL SUMMARY

Maria Luisa Sienkiewicz executed wills in 2003, 2008, and 2009. The will executed on June 5, 2003 appointed her niece, Margarita C. Rodriguez as independent executrix. The will gave 25% to Rodriguez and 9.375% each to eight other relatives, Jose Antonio Velarde Juarez, Jose Velarde Maese, Jose Juan Velarde Avila, Julieta Duran, Luz Magdalena Escobar, Manuel Candido Velarde Betancourt, Luis Robert Velarde Betancourt, and Eduardo Velarde Betancourt. Sienkiewicz executed another will on December 19, 2008 appointing Luis Narvaez as independent executor. The 2008 will revoked all wills and codicils previously made by Sienkiewicz. The will gave 10% to Eduardo Velarde Betancourt, 10% to Dolores Narvaez, and 8% each to ten

other relatives, including Margarita C. Rodriguez. One year later, on December 4, 2009, Sienkiewicz executed a will appointing Luis Narvaez as independent executor. The will revoked all wills and codicils previously made by Sienkiewicz.

Four months after Sienkiewicz executed the third will, Julieta V. Duran filed an application for appointment of permanent guardian of the person and estate of Sienkiewicz. The application alleged that Sienkiewicz was incapacitated and was unable to make decisions for herself, and she had been diagnosed with Parkinson's Disease, dementia, and epilepsy. The application also asserted that Sienkiewicz had been the victim of abuse, neglect, and exploitation in San Antonio. Sienkiewicz died on January 19, 2003 leaving an estate with a value of approximately $20 million, including an 821-acre ranch in Karnes County, oil and gas interests from production on the ranch valued near $13 million, and cash and securities of approximately $6 million.

Dolores Narvaiz and Luis Narvaez hired Phillips and Powell to probate the 2009 will, and they signed a fee agreement on February 1, 2013. Appellants assert that Phillips and Powell induced Eduardo Velarde Betancourt, Jose Juan Velarde Avila, Julieta Duran, Luz Magdalena Escobar, and Jose Antonio Velarde Juarez (referred to collectively as the El Paso Heirs) to join the application to probate the 2009 will. Consequently, the
52 El Paso Heirs signed *52 fee agreements with Phillips and Powell in April 2013. Pursuant to the fee agreements, Phillips and Powell would receive a contingency fee on all assets and distributions obtained from Sienkiewicz's estate for the El Paso Heirs. In February 2013, Phillips and Powell filed an application for probate of the 2009 will in the Probate Court No. 2 of El Paso County, Texas.

Margarita C. Rodriguez and Luis Roberto Velarde (the San Antonio Contestants) filed a contest on the grounds of undue influence and lack of testamentary capacity. Rodriguez also filed an application for probate of the 2003 will. In May 2014, the heirs entered into a Family Settlement Agreement under which Appellants received 51% of the Estate, which included the distribution of mineral rights and royalties and the ranch in Karnes County. The San Antonio Contestants received 45% of the Estate, Arturo Alonzo Velarde received 4%, and Daniel Velarde received 0%. Under the Family Settlement Agreement, the El Paso Heirs each received 8.5% of the estate. This was less than the 9.375% they were entitled to under the 2003 Will, but half a percent more than they would have received under the 2009 Will. After attorney's fees, the El Paso Heirs each received 5.95% of the estate.

In February 2016, Dolores Narvaez informed Powell that $510,000 in estate funds were missing. Powell requested that the estate's CPA, Randall Smith, prepare a reconciliation and accounting of all estate inheritance distributions and attorneys' fees and expenses. On April 5, 2016, Dolores Narvaez filed a *pro se* letter with the Probate Court regarding the missing funds. Powell responded by filing the CPA's reconciliation and accounting with the Probate Court. The Probate Court signed an order approving the accounting and reconciliation prepared by the CPA.

On July 21, 2016, Appellants filed suit in the 34th District Court against Powell and Phillips alleging breach of fiduciary duties and legal malpractice. In their first amended petition, Appellants set forth numerous allegations regarding breach of fiduciary duty. The suit includes allegations that Powell and Phillips prepared unconscionable fee agreements, charged and received unconscionable fees, used threats and intimidation to force Dolores Narvaez to sign a contract to sell the ranch in Karnes County so Powell and Phillips could collect a $290,700 fee, filed the accounting with the Probate Court after the clients instructed Powell not to file it, and obtained an order from the Probate Court approving the accounting after Powell's attorney-client relationship with Appellants had terminated. As a remedy for the breaches of fiduciary duty, the suit seeks damages and forfeiture of all fees received by Phillips and Powell in the past, present and future. Appellants' first amended

petition also alleges that Powell and Phillips were negligent in failing to investigate and develop viable defenses in the will-contest litigation. Appellants seek damages with respect to these allegations. The suit includes a barratry claim based on an allegation that the contingency fee contracts with the El Paso Heirs were procured as a result of barratry. Pursuant to Sections 85.065 and 82.0651 of the Government Code, the El Paso Heirs[1] seek to void and rescind the plea agreements, and to recover all fees and expenses paid under the contracts, the balance of any fees and expenses paid to any other person under the contracts, actual damages,
53 and a penalty in the amount *53 of $10,000. Finally, the first amended petition seeks a declaratory judgment that: (1) the fee agreements are unconscionable and void, all fees obtained or sought by Phillips and Powell must be returned; (2) the conveyance of any mineral interests are canceled and those interests distributed to Appellants; (3) a constructive trust should be imposed on the mineral interests and upon any asset of Phillips and Powell purchased with fees received from the El Paso Heirs; and (4) a declaration that the fee agreements of the El Paso Heirs are void pursuant to Section 82.065 of the Government Code.

[1] The barratry claim is brought exclusively by the El Paso Heirs. Dolores Narvaiz and Luis Narvaiz are not a party to the claim.

Powell filed a verified motion to dismiss the suit for lack of jurisdiction on the ground that the Probate Court No. 2 has jurisdiction of the claims. Phillips joined the motion to dismiss. Following a hearing, the trial court granted the motion to dismiss for lack of jurisdiction. Appellants challenged the dismissal order by filing a petition for writ of mandamus and notice of appeal.[2]

[2] We denied mandamus relief because Appellants' have an adequate remedy by direct appeal of the dismissal order. *See In re Dolores Narvaez,Luis Narvaez, Eduardo Velarde, Jose Juan Velarde, Julieta Duran, Luz Magdalena Escobar, and Jose Antonio Velarde Juarez,* No. 08-17-00149-CV, 2018 WL 3407667 (Tex.App.—El Paso July 13, 2018, orig. proceeding).

SUBJECT MATTER JURISDICTION

In their sole issue, Appellants argue that the trial court erred by dismissing their case because the breach of fiduciary duty and legal malpractice claims are not probate proceedings or related to probate proceedings, and therefore, the Probate Court No. 2 does not have exclusive or dominant jurisdiction over the claims.

Standard of Review

Whether a trial court has subject-matter jurisdiction is a question of law subject to *de novo* review. *Frost National Bank v. Fernandez* , 315 S.W.3d 494, 502 (Tex. 2010) ; *Texas Natural Resource Conservation Commission v. IT–Davy* , 74 S.W.3d 849, 855 (Tex. 2002). A motion to dismiss based on a lack of subject matter jurisdiction is the functional equivalent of a plea to the jurisdiction. *In re Elamex, S.A. de C.V.* , 367 S.W.3d 891, 897 (Tex.App.—El Paso 2012, orig. proceeding).

A plaintiff has the burden of pleading facts which affirmatively show that the trial court has jurisdiction. *Texas Association of Business v. Texas Air Control Board* , 852 S.W.2d 440, 446 (Tex. 1993). In deciding a plea to the jurisdiction, the trial court must determine if the plaintiff has alleged facts that affirmatively demonstrate its jurisdiction to hear the case. *Texas Department of Parks & Wildlife v. Miranda* , 133 S.W.3d 217, 226 (Tex. 2004) ; *In re Elamex* , 367 S.W.3d at 897. The court must construe the pleadings liberally in favor of the pleader and accept as true the factual allegations in the pleadings. *Miranda* , 133 S.W.3d at 226, 228 ; *City of El Paso v. Marquez* , 380 S.W.3d 335, 340 (Tex.App.—El Paso 2012, no pet.). If the pleadings affirmatively negate jurisdiction, the trial court may grant the plea to the jurisdiction or the motion to dismiss without

allowing the plaintiff an opportunity to amend. *Miranda* , 133 S.W.3d at 226 ; *In re Elamex* , 367 S.W.3d at 897. Whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction is a question of law reviewed *de novo. Frost National Bank* , 315 S.W.3d at 502.

Statutory Probate Court Jurisdiction

54 The Probate Court No. 2 is a statutory probate court. A statutory probate court *54 has exclusive jurisdiction of all probate proceedings, regardless of whether contested or uncontested. TEX.ESTATES CODE ANN. § 32.005(a) (West 2014). A cause of action related to the probate proceeding must be brought in a statutory probate court unless the jurisdiction of the statutory probate court is concurrent with the jurisdiction of a district court as provided by Section 32.007 or with the jurisdiction of any other court. *Id.*

A statutory probate court has the general jurisdiction of a probate court as provided by the Estates Code, and the jurisdiction provided by law for a county court to hear and determine actions, cases, matters, or proceedings instituted under certain provisions of the Health and Safety Code. *See* TEX.GOV'T CODE ANN. § 25.0021 (West Supp. 2017). It is a court of limited jurisdiction. *See Stauffer v. Nicholson* , 438 S.W.3d 205, 213 (Tex.App.—Dallas 2014, no pet.), *citing In re United Services Automobile Association* , 307 S.W.3d 299, 302-03 (Tex. 2010) (contrasting the limited jurisdiction of statutory probate courts with the general jurisdiction of district courts).

Section 32.001 of the Estates Code establishes original probate court jurisdiction:

> (a) All probate proceedings must be filed and heard in a court exercising original probate jurisdiction. The court exercising original probate jurisdiction also has jurisdiction of all matters related to the probate proceeding as specified in Section 31.002 for that type of court.

TEX.ESTATES CODE ANN. § 32.001(a) (West 2014).

Section 31.001 of the Estates Code defines "probate proceedings" as including:

> (1) the probate of a will, with or without administration of the estate;
>
> (2) the issuance of letters testamentary and of administration;
>
> (3) an heirship determination or small estate affidavit, community property administration, and homestead and family allowances;
>
> (4) an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent;
>
> (5) a claim arising from an estate administration and any action brought on the claim;
>
> (6) the settling of a personal representative's account of an estate and any other matter related to the settlement, partition, or distribution of an estate; and
>
> (7) a will construction suit.

TEX.ESTATES CODE ANN. § 31.001 (West 2014).

Appellants' Pleadings

Appellants contend that the trial court erred by dismissing their suit because it is not a probate proceeding nor is it a matter related to the pending probate proceeding. Phillips and Powell argued in the trial court, and argue now on appeal, that Appellants' suit cannot be maintained in the district court because their claims are a matter related to the settlement, partition, or distribution of an estate, and therefore, the suit is a probate proceeding under Section 31.001(6). Each of Appellants' causes of action must be examined to determine whether it is a probate proceeding or related to a probate proceeding.

1. Breach of Fiduciary Duty

In their first amended petition, Appellants allege that Phillips and Powell breached their fiduciary duties by:

(1) inducing the El Paso Heirs to sign contingent fee agreements for the sole

55 *55

purpose of taking money from the estate that legitimately belonged to the heirs;

(2) contracting for, charging, and receiving an unconscionable fee;

(3) preparing unconscionable fee agreements;

(4) taking a percentage of the distributions that the El Paso Heirs were entitled to receive;

(5) failing to disclose to the El Paso Heirs that they would lose 30% of their distributions to the lawyers regardless of the outcome of the will contest;

(6) contracting, charging for, and receiving fees they were not entitled to receive, including taking mineral interests, charging hourly fees in addition to the contingent fee agreements, and shifting taxes to Appellants in order to enhance their fees;

(7) representing Appellants in spite of a conflict of interest that was never disclosed;

(8) using threats, intimidation and false representations in an attempt to force Dolores Narvaez to sign a contract to sell the Karnes County ranch so Phillips and Powell could collect a $290,700 fee;

(9) falsely representing to Dolores Narvaez that the probate court had ordered her to sign the mineral deed;

(10) attempting to trick Dolores Narvaez into signing the mineral deed by including it in a stack of routine papers she was told to sign;

(11) presenting the mineral deed to the probate court with an order approving it even though the settlement agreement had not been prepared;

(12) preparing a written agreement that did not reflect the agreement made with the clients and attempting to intimidate them into signing it;

(13) preparing and filing a notice with an accounting attached that Appellants disputed and had instructed Powell not to file; and

(14) preparing and obtaining an order from the Probate Court approving the accounting after Powell had withdrawn from representation.

With respect to the breach of fiduciary duty claims, Appellants seek actual damages, punitive damages, and forfeiture of all fees received by Phillips and Powell in the past, present or future.

Appellants rely on *In re Hannah* , 431 S.W.3d 801 (Tex.App.—Houston [14th Dist.] 2014, orig. proceeding) in support of their argument that the Probate Court does not have jurisdiction of their claims. In *Hannah* , the decedent lived with the relator, Hannah, in Aransas County for twelve years prior to his death. *In re Hannah* , 431 S.W.3d at 804. She claimed that he executed wills in 2009 and 2010 and bequeathed $200,000 in cash and a vehicle. *Id.* In 2012, the decedent executed a new will that did not include any bequests to Hannah. *Id.* Under

the 2012 will, the $200,000 in cash was split between the decedent's sons and the vehicle identified in the earlier wills was left to a family friend who occasionally did work for the decedent. *Id.* Following the decedent's death, the 2012 will was admitted to probate in the County Court at Law of Aransas County as a muniment of title. *Id.* at 805. Hannah did not contest the will. *Id.* She filed suit in district court in Harris County against the sons and family friend seeking to recover damages for tortious interference with inheritance, slander, and conspiracy. *Id.* The district court entered orders transferring venue of the suit to the County Court at Law of Aransas County, and Hannah filed a mandamus petition to challenge the orders. *Id.* The Fourteenth
56 Court of Appeals held that the suit was not a "matter related to a probate proceeding" within the scope of *56 Section 31.002 of the Estates Code. *Id.* at 809-10. The Court of Appeals focused on the nature of the damages sought, and held that because the suit sought damages which would, if awarded, be satisfied from the defendant's individual asserts rather than from any property of the estate, the claims were not related to a probate proceeding. *Id.* at 809-811. Consequently, it conditionally granted mandamus relief in Hannah's favor.

We agree with *Hannah's* conclusion that the nature of the claims and the relief sought must be examined when determining whether the probate court has jurisdiction of a non-probate claim, but the instant case is factually distinguishable because Appellants are not seeking only monetary damages. They are seeking to recover distributions from the estate to the attorneys and to have conveyances of mineral interests to the attorneys declared void. *Hannah* is also distinguishable because it did not involve an ongoing probate proceeding. Further, *Hannah* did not concern an argument that the suit filed in the district court is a probate proceeding as defined in Section 31.001 of Estates Code. For these reasons, we conclude that *Hannah* is not controlling or dispositive of this case.

At the heart of Appellants' breach of fiduciary duty claim is their complaint regarding the fees charged by Phillips and Powell and distributed from the Estate to them. Appellants assert that those monies and mineral interests belonged to the Estate and never should have been distributed to the attorneys. Appellants seek to be made whole by having those fees recovered from Phillips and Powell and re-distributed to them. We conclude that the breach of fiduciary duty claim stated in the first amended petition is a probate proceeding because it is a matter related to the settlement, partition, or distribution of an estate. *See* TEX.ESTATES CODE ANN. § 31.001(6). The Probate Court No. 2 has exclusive jurisdiction of the breach of fiduciary duty cause of action.

2. Barratry

The first amended petition includes a cause of action alleging that the contingency fee contracts with the El Paso Heirs were procured as a result of barratry. The El Paso Heirs request that the trial court void and rescind the fee agreements, and they seek to recover all fees and expenses paid under the contracts. As was the case with the breach of fiduciary duty claim, the barratry cause of action pertains to the legal fees distributed from the estate to Phillips and Powell. As such, it falls within the definition of a probate proceeding under Section 31.001(6) of the Estates Code, and the Probate Court No. 2 has exclusive jurisdiction of it.

3. Declaratory Relief

Appellants' first amended petition also seeks a declaration concerning the parties' rights, status, and obligations with respect to the fee agreements and the fees distributed from the Estate to Phillips and Powell. Appellants seek a declaration that:

(1) the fee agreements are unconscionable and void;

(2) that all fees, past and future, obtained by or sought by Phillips and Powell be returned to Appellants;

(3) that all mineral interests received by Phillips and Powell be returned and any conveyance of any mineral interests to Phillips and Powell be canceled and those interests distributed to Appellants; and

(4) that a constructive trust be imposed on the mineral interests and upon the assets of Phillips and Powell that were purchased with fees received from the El Paso Heirs.

57 By their declaratory judgment cause of action, Appellants seek to have those fees *57 and mineral interests, which were distributed from the Estate to Powell and Phillips, returned and distributed to Appellants. Consequently, the cause of action is a probate proceeding because it is a matter related to the settlement, partition, or distribution of an estate. *See* TEX.ESTATES CODE ANN. § 31.001(6). Further, Appellants' allegations related to the conveyance of mineral interests to Phillips and Powell and their request to have those conveyances declared void and the property returned to Appellants can be characterized as an action involving trial of title to real property that is estate property. *See* TEX.ESTATES CODE ANN. § 31.002(a)(5) (West 2014). Consequently, it is related to the pending probate proceeding. We conclude that the Probate Court No. 2 has exclusive jurisdiction of the declaratory judgment claim.

4. Negligence

Appellants allege that Phillips and Powell committed legal malpractice by failing to investigate the circumstances surrounding the execution of the 2008 and 2009 wills, failing to develop and provide viable defenses to the contest of the 2009 will, failing to develop testimony to defeat the will contest, and failing to contact the witnesses to the 2008 and 2009 wills. Appellants seek damages with respect to the legal malpractice claim. This claim cannot be characterized as a probate proceeding within the meaning of Section 31.001 or related to a probate proceeding as that term is defined by Section 31.002. *See* TEX.ESTATES CODE ANN. § 31.002 (West 2014). Further, the probate court does not have concurrent jurisdiction with the district court in a legal malpractice claim. *See* TEX.ESTATES CODE ANN. § 32.007 (West 2014) (providing that statutory probate court has concurrent jurisdiction with the district court in: (1) a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a personal representative; (2) an action by or against a trustee; (3) an action involving an inter vivos trust, testamentary trust, or charitable trust, including a charitable trust as defined by Section 123.001, Property Code ; (4) an action involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate; (5) an action against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent; and (6) an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney).

A probate court may exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy. TEX.ESTATES CODE ANN. § 32.001(b). In order for a probate court to assert jurisdiction over matters incident to an estate, a probate proceeding must be pending in the court. *See Frost National Bank* , 315 S.W.3d at 506. That requisite is satisfied here. Typically, probate courts exercise ancillary or pendent jurisdiction when a close relationship exists between the non-probate claims and the claims against the estate. *See Shell Cortez Pipeline Co. v. Shores* , 127 S.W.3d 286, 294 (Tex.App.—Fort Worth 2004, no pet.), *citing Sabine Gas Trans. Co. v.Winnie Pipeline Co.* , 15 S.W.3d 199, 202 (Tex.App.—Houston [14th Dist.] 2000, no pet.) ; *Goodman v. Summit at W. Rim, Ltd.* , 952 S.W.2d 930, 933 (Tex.App.—Austin 1997, no pet.) (holding

that probate court can exercise "ancillary" or "pendent" jurisdiction over a claim only if it bears some relationship to the estate). That is, probate courts exercise their ancillary or pendent jurisdiction over non-
58 probate matters only when doing so will aid in the efficient administration *58 of an estate pending in the probate court. *Shell Cortez Pipeline* , 127 S.W.3d at 294-95.

The legal malpractice claim is interwoven with and related to Appellants' breach of fiduciary duties, barratry, and declaratory judgment causes of action. It will aid in the efficient administration of the estate to have the Probate Court resolve these related claims. We therefore find that the Probate Court No. 2 has exclusive jurisdiction of the breach of fiduciary duty, barratry, and declaratory judgment claims, and it has authority to exercise pendent or ancillary jurisdiction over the legal malpractice claim. Issue One is overruled. Having overruled Issue One, we affirm the trial court's order dismissing Appellants' suit for lack of jurisdiction.

NO. 14-16-00258-CV
Court of Appeals of Texas, Houston (14th Dist.).

Lee v. Ronald E. Lee Jr., Katherine Lee Stacy, & Legacy Trust Co.

528 S.W.3d 201 (Tex. App. 2017)
Decided Aug 1, 2017

NO. 14-16-00258-CV.

08-01-2017

Susan Camille LEE, Appellant v. Ronald E. LEE Jr., Katherine Lee Stacy, and Legacy Trust Company, Receiver, Appellees

Keri Brown, John William Porter, W. Cameron McCulloch, Adrianne Graves, Eric English, Neil Kenton Alexander Jr., Jonna Summers, Houston, for Appellees. Daniel J. Sheehan, John M. Phalen JR., Dallas, for Appellant.

Tracy Christopher, Justice

Keri Brown, John William Porter, W. Cameron McCulloch, Adrianne Graves, Eric English, Neil Kenton Alexander Jr., Jonna Summers, Houston, for Appellees.

Daniel J. Sheehan, John M. Phalen JR., Dallas, for Appellant.

Panel consists of Chief Justice Frost and Justices Christopher and Donovan.

OPINION

Tracy Christopher, Justice

In this dispute between siblings concerning the administration of their mother's testamentary trust, a sister appeals trial court rulings (1) removing her as trustee, (2) appointing a receiver, (3) approving the receiver's application for approval of a settlement agreement with the sister's brother, and (4) denying the sister's motion to continue the hearing on the receiver's application. We conclude that the statutory probate court's orders are not void for lack of jurisdiction, and that the court did not abuse its discretion in approving the settlement agreement or in denying the motion for a continuance. We accordingly affirm the trial court's judgment.

I. BACKGROUND

Katherine Pillot Lee Barnhart died in 1975, and under the terms of her will, most of her estate passed into a testamentary trust ("the Trust"). Barnhart's children Ronald E. Lee Jr. ("Ronald") and Susan Camille Lee ("Susan") are beneficiaries of the Trust, as are Ronald's daughter Katherine Lee Stacy ("Stacy") and Susan's daughter Susan Gibson ("Gibson"). The trustee is required to make quarterly distributions of one-sixth of the Trust's current net income to Ronald and one-sixth to Susan. If this amount, together with funds available from other sources, is insufficient to provide for either Ronald's or Susan's health, maintenance, and support, then the Trust must distribute additional amounts to that person from the remaining two-thirds of the Trust's current net

income. The remainder of the Trust's current net income must be distributed at least semi-annually to Stacy and Gibson. On the death of Ronald and Susan, the remainder of the Trust estate is to be transferred to new, separate trusts for Stacy and Gibson.*206 **A. The First Lawsuit: Susan's Suit Against Ronald**

Thirteen years after Barnhart's death, Ronald, the executor of his mother's estate and original trustee of the Trust, had made no distributions and had not responded to Susan's repeated demands for an accounting. Susan, individually and on behalf of the Trust, sued Ronald in a statutory probate court for breach of fiduciary duty and asked the trial court to remove him as executor and as trustee.

The jury found that Ronald breached his fiduciary duties to the Trust by expending large amounts on a later-abandoned real estate development project, unreasonable office expenses, and excessive executor's fees. The trial court reduced the amount of the damages assessed by the jury for excessive fees and declined to remove Ronald as executor or trustee. The parties agreed that each side's reasonable and necessary attorney's fees were $1.5 million for attorney's fees through trial, an additional $300,000 in the event of an appeal to an intermediate appellate court, and a further $100,000 in the event of an appeal to the Texas Supreme Court. The trial court ordered the Trust to pay for each side's attorney's fees.

Susan appealed. *See Lee v. Lee* , 47 S.W.3d 767 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (corr. op. on reh'g) (" *Lee I* "). We concluded that the trial court erred in reducing the damages assessed by the jury; in failing to remove Ronald as trustee; and in refusing to require Ronald to reimburse the Trust for Susan's attorney's fees. *See id.* at 801. Although Ronald had paid the judgment rendered by the trial court, the decision in *Lee I* left Ronald owing the Trust—of which Susan was now the trustee—more than $1.5 million as reimbursement for his excessive executor's fees and $1.9 million as reimbursement for Susan's attorney's fees. The parties agree that as of February 28, 2002, pre-and post-judgment interest brought this amount to $6,128,326.99.

B. This Lawsuit: Ronald's Suit Against Susan

Fourteen years after Susan became trustee, she too had failed to make any distributions to Ronald or his daughter; however, there is evidence that Susan made distributions to herself and her own daughter. In the summer of 2014, Ronald sued and requested a Trust accounting so he could calculate the extent to which his outstanding debt to the Trust was offset by the Trust's withholding of the required distributions to him. Susan refused to respond. Six months later, Ronald received notice of the impending foreclosure of one of the Trust's real properties for nonpayment of taxes. Susan allowed a default judgment to be taken against the Trust, but redeemed the property before it was sold.

Ronald sued Susan, individually and in her capacity as trustee, in the same statutory probate court in which the earlier case was tried. He asserted claims for breach of fiduciary duty, violations of the Trust's terms and of the Texas Trust Code, and asked for an accounting, Susan's removal as trustee, and attorney's fees. Stacy intervened in the action, seeking the same relief on the same grounds.

After finding that Susan had breached the terms of the Trust and of the Texas Trust Code, and that the Trust was at risk of further imminent harm from Susan's failure to pay taxes on Trust real property, the trial court removed Susan as trustee on June 18, 2015 and appointed Legacy Trust Company, N.A. ("Legacy") as the Trust's receiver. The trial court directed Legacy to, among other things, pay Ronald's attorney's fees; "[c]ollect, compromise, or settle all debts owed to the *207 Trust"; "[p]rosecute, defend, and/or settle all legal proceedings ... brought by or against the Trustee of the Trust"; and "[i]nstitute such legal proceedings as the Receiver deems necessary or advisable to obtain constructive or actual possession of assets of the Trust or to recover damages

suffered by the Trust." The trial court also granted the receiver "discretion not to pursue litigation against [Susan] that is undertaken by beneficiaries of the Trust for the benefit of the Trust." The trial court ordered Susan to provide to Legacy, within seven days, copies of all records in her possession, custody, and control sufficient to identify (1) all real and personal property owned by the Trust, or by Susan as trustee, at any time while Susan was trustee; and (2) all of the Trust's distributions and expenditures during that time. Susan did none of these things.

After Susan was removed as trustee, Ronald paid Legacy $8 million toward his debt to the Trust and asked to negotiate a settlement. Legacy informed Susan's attorney Thomas Zabel that it was negotiating a settlement with Ronald. Legacy also attempted to contact Susan directly by phone, email, letter, and finally by having a Legacy employee fly with Zabel to Florida, where Susan resides, but Susan refused to respond.

After months of negotiation, Legacy and Ronald reached a settlement agreement and Legacy filed an application for the trial court's approval. Susan filed a response and objections to the application. A week before the hearing on the application, Susan moved for a continuance of at least ninety days to conduct discovery. At the hearing on both matters, the trial court stated that it would hear the description of the settlement first, and that Susan could move for a continuance afterward if she still believed discovery was needed.

Legacy's president and chief executive officer Edward "Ned" Naumes testified in support of the settlement agreement, as did Ronald. At the close of the evidence on the application for approval of the settlement, the parties presented their arguments on Susan's motion for a continuance to perform discovery. The trial court denied the motion, approved the settlement, and informed counsel that the court would hold another hearing on the application in two weeks if Susan moved for a rehearing. Susan did not do so.

Two days after Susan filed her notice of appeal, Legacy and Ronald closed on the settlement agreement. In accordance with the agreement's terms, Ronald deeded his interest in certain property to Legacy, in its capacity as the Trust's receiver. Ronald also executed and delivered a promissory note and other agreements and made the first payment toward the cash portion of the settlement. In exchange for this and other consideration, Legacy sold to Ronald the Trust's judgment against him.

II. ISSUES PRESENTED

In her first issue, Susan asserts that the statutory probate court could exercise jurisdiction over the claims and requests raised in this case only if there were a pending probate proceeding. She asserts that there was no pending probate proceeding when the trial court removed her as trustee and appointed a receiver in June 2015, or when the trial court approved Legacy's settlement agreement with Ronald in March 2016. She therefore reasons that these rulings are void for want of jurisdiction. In her second issue, Susan contends that if the trial court had jurisdiction, then the trial court abused its discretion in approving the settlement agreement. She argues in her third issue that the trial court abused its discretion in denying her motion to continue the hearing
208 *208 on Legacy's application for approval of the settlement agreement.

III. THIS COURT'S JURISDICTION

A judgment or order by a court without the power or jurisdiction to render it is void. *See* *Urbish v. 127th Judicial Dist. Court* , 708 S.W.2d 429, 431 (Tex. 1986) (orig. proceeding). All courts accordingly are obliged "to ascertain that subject matter jurisdiction exists regardless of whether the parties have questioned it." *City of Houston v. Rhule* , 417 S.W.3d 440, 442 (Tex. 2013) (per curiam) (quoting *In re United Servs. Auto. Ass'n,* 307 S.W.3d 299, 306 (Tex. 2010) (orig. proceeding)). The requirement that a court must determine whether it has

subject-matter jurisdiction applies to appellate courts just as it does to trial courts. *See* *Pidgeon v. Turner* , No. 15-0688, —— S.W.3d ——, ——, 2017 WL 2829350, *6 (Tex. June 30, 2017) ; *Thai Xuan Vill. Condo. Ass'n, Inc. v. Hien Luu* , No. 14-15-00873-CV, 2016 WL 6887344, *2 (Tex. App.—Houston [14th Dist.] Nov. 22, 2016, no pet.) (mem. op.). Thus, before we can reach the merits of the trial court's challenged rulings, we first must determine whether we have jurisdiction to do so.

A. Finality of the Trial Court's Order Approving the Settlement

As part of Susan's first issue, she challenges the trial court's March 2, 2016 order approving the settlement—or more precisely, Legacy's sale of the judgment against Ronald—both on the merits and on the ground that the trial court lacked jurisdiction over the case. We have appellate jurisdiction only over final judgments and over statutorily authorized interlocutory appeals. *See Ogletree v. Matthews* , 262 S.W.3d 316, 318 n.1 (Tex. 2007). This is not a statutorily authorized interlocutory appeal, nor do the parties contend otherwise. We therefore lack jurisdiction to review the March 2, 2016 order unless it is a final order.

Ordinarily, there is only one final judgment in a case. *See Ventling v. Johnson* , 466 S.W.3d 143, 149 (Tex. 2015) (citing TEX. R. CIV. P. 301). As a rule, a judgment must dispose of all legal issues between or among all parties to be a final judgment. *See Jack B. Anglin Co. v. Tipps* , 842 S.W.2d 266, 272 (Tex. 1992) (orig. proceeding), *superseded by statute on other grounds as stated in In re Santander Consumer USA, Inc.* , 445 S.W.3d 216, 218 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding). Because Ronald's and Stacy's claims against Susan remain pending, the trial court's order approving the settlement of the Trust's judgment against Ronald does not constitute a final order by this definition. There are, however, exceptions to the general rule that a final, appealable judgment must dispose of all issues and all parties.

As the Texas Supreme Court held in *Huston v. F.D.I.C.* , "a trial court's order that resolves a discrete issue in connection with any receivership has the same force and effect as any other final adjudication of a court, and thus, is appealable." 800 S.W.2d 845, 847 (Tex. 1990) (op. on reh'g). Because the trial court's order approving the receiver's sale to Ronald of the Trust's judgment against him resolved this discrete issue, the order is a final, appealable judgment. *See id.* at 848 (discussing the policy reasons for concluding that a trial court's approval and confirmation of a receiver's sale of property is a final appealable judgment).

In the remainder of Susan's first issue, she argues that the trial court lacked jurisdiction to render its June 2015 order removing her as trustee and appointing a receiver. Ronald states that Susan's attempted appeal of that
209 ruling is untimely, *209 and thus, we lack jurisdiction to review it.[1] *See Gibson v. Cuellar* , 440 S.W.3d 150, 155 (Tex. App.—Houston [14th Dist.] 2013, no pet.). However, Susan's only complaint about the June 2015 order is that the trial court lacks jurisdiction over the entire case, which is the same jurisdictional argument she makes in her timely appeal of the trial court's March 2016 order. If Susan is correct and the trial court lacked jurisdiction over the case, then all of the trial court's actions are void. Thus, if we can reach Susan's argument that the March 2016 order is void for lack of jurisdiction, then our disposition of that argument applies equally to the trial court's June 2015 order. First, however, we must address Ronald's and Legacy's remaining challenges to our own subject-matter jurisdiction.

[1] Because Stacy adopted Ronald's appellate brief, she joins in the arguments we attribute to Ronald.

B. Lack of Mootness

Ronald and Legacy next contend that we lack subject-matter jurisdiction to review the order approving the settlement because the issue was rendered moot when the settlement closed. *See Matthews ex rel. M.M. v. Kountze Indep. Sch. Dist.* , 484 S.W.3d 416, 418 (Tex. 2016) ("The mootness doctrine applies to cases in which

a justiciable controversy exists between the parties at the time the case arose, but the live controversy ceases because of subsequent events."); *Kessling v. Friendswood Indep. Sch. Dist.* , 302 S.W.3d 373, 384 n.9 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (explaining that courts lack subject-matter jurisdiction over a moot claim). Ronald further contends that because Susan's appeal of the order approving the settlement is moot, her challenge to the trial court's denial of her motion to continue the hearing on the application for approval similarly is moot.

According to Ronald, Susan's appeal of the order approving the settlement became moot when the settlement agreement closed because he conveyed to the Trust his interests in two properties, one of which has been leased to a third party. Ronald also signed a promissory note and made the first payment of the cash portion of the settlement. Finally, the receiver filed a satisfaction of judgment. These facts, however, do not indicate that the appeal is moot.[2]

[2] In determining whether the appeal is moot, we have considered Legacy's affidavit concerning events that have transpired while this appeal has been pending. *See* Tex. Gov't Code Ann. § 22.220(c) (West Supp. 2016).

An appeal is rendered moot when there ceases to be a live controversy between the parties such that appellate relief would be futile. *See Marshall v. Hous. Auth. of City of San Antonio* , 198 S.W.3d 782, 787 (Tex. 2006). The conveyance of property can moot an appeal. For example, in *Mitchell v. Turbine Resources Unlimited, Inc.* , No. 14-15-00417-CV, 523 S.W.3d 189, 195–96, 2017 WL 1181228, at *5 (Tex. App.—Houston [14th Dist.] Mar. 30, 2017, pet. filed), the appellant sought reversal of the trial court's order authorizing a receiver to sell vehicles in which the appellant claimed an ownership interest. The appeal became moot when the appellant herself sold the vehicles and thereby eliminated her claim that she owned them. *See id.*

Unlike the facts in *Mitchell* , however, the parties in this case continue to have a live controversy for which appellate relief potentially is available. The promissory note can be rescinded; money paid can be refunded;
210 and a "satisfaction of judgment" can be set aside. *Cf.* *210 *Brown v. Enter. Recovery Sys., Inc.* , No. 02-11-00436-CV, 2013 WL 4506582, *1 (Tex. App.—Fort Worth Aug. 22, 2013, pet. denied) (mem. op.) (reversing in part and remanding, despite the filing of a notice of satisfaction of judgment). As for the conveyance of real property, the settlement resulted in conveyances only from Ronald to Legacy, in its capacity as the Trust's receiver, and if Susan should prevail, these transactions can be reversed. Although Ronald implies that the property was leased after he conveyed it, the record shows that the opposite is true: the lease was effective on July 1, 2015, nearly nine months before Ronald conveyed the property.

Because the evidence before us does not indicate that anything has been done that cannot be undone, or that the parties' dispute about the settlement has ceased to be a live controversy, we conclude that Susan's appeal of the order approving the settlement is not moot.

C. The Denial of Susan's Motion for a Continuance

In addition to asserting the mootness argument addressed above, Ronald contends that we lack jurisdiction to review the denial of Susan's motion to continue the hearing on Legacy's application for approval of the settlement agreement because Susan (1) failed to reduce the trial court's ruling to writing, and (2) failed to list the denial of her motion for a continuance in her notice of appeal.

1. Susan's Failure to Reduce the Trial Court's Ruling to Writing

Ronald contends that we lack jurisdiction to address this issue because Susan did not have the denial reduced to a written order, and he asserts that "[c]ourts dismiss for lack of jurisdiction appeals of oral orders." In support of this position, Ronald cites *Archer v. Tunnell* , No. 05-15-00459-CV, 2016 WL 519632, at *3 (Tex. App.—

Dallas Feb. 9, 2016, no pet.) (mem. op.). We are not bound by *Archer* , but even if we were, we would consider Ronald's reliance on *Archer* misplaced.

In *Archer* , the Fifth Court of Appeals held that it lacked jurisdiction to review the denial of a summary-judgment motion and a motion to dismiss or abate. *See id.* at *2. The trial court orally denied one of the appellant's summary-judgment grounds, but did not rule, orally or in writing, on the appellant's other summary-judgment grounds or the motion to dismiss or abate. *See id.* Our sister court held that it lacked jurisdiction to review the trial court's alleged denial of the summary-judgment motion and the motion to dismiss or abate because "an interlocutory appeal may be perfected only from a written order, not an oral ruling." *Id.* at *3.

We need not decide whether we agree with the *Archer* court's reasoning, because the facts in this case are distinguishable. Here, the trial court announced on the record that it denied Susan's motion to continue the hearing on Legacy's application for approval of the settlement. The ruling was not required to be reduced to writing; the oral pronouncement was sufficient. *See* *Dunn v. Dunn* , 439 S.W.2d 830, 832 (Tex. 1969) ; *see also* TEX. R. CIV. P. 306a(2) ("Judges, attorneys and clerks are directed to *use their best efforts* to cause all judgments, decisions and orders of any kind to be reduced to writing and signed by the trial judge with the date of signing stated therein." (emphasis added)). The interlocutory ruling denying Susan's motion for continuance was merged into the written final judgment approving the settlement. *See Roccaforte v. Jefferson County* , 341 S.W.3d 919, 924 (Tex. 2011) ("The final judgment necessarily replaced the interlocutory order, which merged into the judgment...."); *211 *In re Newsome* , Nos. 14-12-01083-CV and 14-12-01084-CV, 2012 WL 6163124, at *1 (Tex. App.—Houston [14th Dist.] Dec. 11, 2012, orig. proceeding) (per curiam) (mem. op.) ("An interlocutory order is appealable when it has merged into a subsequent final, appealable order.").

2. Susan's Failure to List the Denial of the Motion for Continuance in Her Notice of Appeal

Ronald also asserts that we lack jurisdiction to review the denial of Susan's motion for continuance because it is not listed in her notice of appeal. This argument is contrary to the Texas Rules of Appellate Procedure and to binding precedent from both the Texas Supreme Court and our own court.

A party is not required to describe in a notice of appeal each interlocutory ruling to be challenged in the appellate court, but need only "state the date of the judgment or order appealed from." *See* TEX. R. APP. P. 25.1(d)(2) ; *see also Perry v. Cohen* , 272 S.W.3d 585, 587 (Tex. 2008) ("We initially note that the shareholders were not required to state in their notice of appeal that they were challenging the interlocutory order granting special exceptions. They were required only to state the date of the judgment or order appealed from—in this instance the order dismissing their suit."); *Valls v. Johanson & Fairless, L.L.P.* , 314 S.W.3d 624, 631 n.7 (Tex. App.—Houston [14th Dist.] 2010, no pet.) ("A notice of appeal need not identify every adverse interlocutory ruling the appellant intends to challenge; instead, the notice must state only the date of the judgment or order from which he appeals—in this case, the order granting summary judgment.").

Because Susan complied with Texas Rule of Appellate Procedure 25.1(d)(2) by stating in her notice of appeal her intent to appeal the trial court's final order signed on March 2, 2016, she invoked our jurisdiction not only to review that order but also to address interlocutory rulings that were merged into it.

In sum, we have jurisdiction to consider Susan's appeal of the trial court's written order granting Legacy's application for approval of the settlement agreement and the trial court's oral ruling denying Susan's motion for a continuance of the hearing on that application. We now turn to Susan's first issue, in which she argues that the

statutory probate court's order approving the settlement agreement is void because the trial court lacked jurisdiction over the case.

IV. THE STATUTORY PROBATE COURT'S JURISDICTION

The existence of subject-matter jurisdiction is a question of law, which we review de novo. *See* *Rhule* , 417 S.W.3d at 442. Susan's argument that the trial court lacked jurisdiction turns on a question of statutory construction, which likewise presents a question of law subject to de novo review. *See* *In re M.G.N.* , 441 S.W.3d 246, 248 (Tex. 2014) (per curiam).

Susan contends that the statutory probate court lacked jurisdiction over these proceedings because the pleadings show that Ronald and Stacy sued to remove Susan as trustee and hold her liable for breach of fiduciary. Citing section 115.001 of the Texas Trust Code, she argues that the district court has original, exclusive jurisdiction over all proceedings to remove a trustee or to determine a trustee's liability. *See* TEX. PROP. CODE ANN. § 115.001(a)(3) (West 2014) (district court's jurisdiction over actions to appoint or remove a trustee); *id.* § 115.001 (a)(4) (district court's jurisdiction over actions to determine a trustee's "powers, responsibilities, duties, and liability"). Susan acknowledges that statutory probate courts have concurrent jurisdiction with district
212 courts over actions by or against a trustee and *212 actions involving testamentary trusts, *see* TEX. EST. CODE ANN. § 32.007(2), (3) (West 2014), but she maintains that a statutory probate court can exercise that jurisdiction only when a probate proceeding is actually pending. She contends that no probate proceeding was pending when the statutory probate court granted Legacy's application to approve the Trust's settlement agreement with Ronald, and thus, the order is void for lack of jurisdiction. Our review of the legislative framework for a statutory probate court's jurisdiction shows that the court's trust jurisdiction is independent of its probate jurisdiction.

We begin, as Susan does, with section 115.001 of the Texas Trust Code. Although Susan is correct in stating that section 115.001 gives a district court original, exclusive jurisdiction over proceedings to remove a trustee or to determine a trustee's liability, section 115.001 also provides that statutory probate courts are an exception to this general rule. Section 115.001(a) states, "*Except as provided by Subsection (d) of this section* , a district court has original and exclusive jurisdiction over all proceedings by or against a trustee and all proceedings concerning trusts...." (emphasis added). Turning to subsection (d), we note the provision reads, "[t]he jurisdiction of the district court is exclusive *except for jurisdiction conferred by law on ... a statutory probate court* ...." *Id.* § 115.001(d)(1) (emphasis added). The trial court in this case was Harris County Probate Court No. 2, which is a statutory probate court. *See* TEX. GOV'T CODE ANN. § 25.1031 (West Supp. 2016). Thus, if the law confers jurisdiction on a statutory probate court to hear actions against a trustee or actions involving testamentary trusts, then Harris County Probate Court No. 2 had jurisdiction over the case.

In section 32.006 of the Texas Estates Code, the legislature expressly conferred on statutory probate courts the jurisdiction to hear actions involving testamentary trusts and actions in which a trustee is a party:

> In a county in which there is a statutory probate court, the statutory probate court has jurisdiction of:
>
> (1) an action by or against a trustee;
>
> (2) an action involving an inter vivos trust, testamentary trust, or charitable trust....

TEX. EST. CODE ANN. § 32.006 (West 2014). *See also id.* § 32.007 (stating that a statutory probate court and a district court have concurrent jurisdiction over such actions). Thus, under the unambiguous language of these statutes, Harris County Probate Court No. 2 had jurisdiction over this suit.

Susan nevertheless contends a statutory probate court's jurisdiction over trust matters "is limited." As support for this proposition, she relies on Texas Estates Code section 32.001 :

> (a) All probate proceedings must be filed and heard in a court exercising original probate jurisdiction. The court exercising original probate jurisdiction *also* has jurisdiction of all matters related to the probate proceeding as specified in Section 31.002 for that type of court.
>
> (b) A probate court may exercise *pendent and ancillary jurisdiction* as necessary to promote judicial efficiency and economy....

Id. § 32.001(a), (b) (emphasis added). Section 31.002, referenced above, describes the types of actions constituting "a matter relating to a probate proceeding," and those actions differ depending on whether the court exercising jurisdiction is a statutory probate court, a county court at law exercising original probate jurisdiction, or neither. *See id.* § 31.002. Regarding a statutory *213 probate court, which is the "type of court" at issue here, section 31.002 provides that "a matter related to a probate proceeding" includes the "administration of a testamentary trust if the will creating the trust has been admitted to probate in the court." *See id.* § 31.002(b)(2), (c)(1).

A plain reading of these sections reveals that they do not limit a probate court's jurisdiction. To the contrary, section 32.001 expands the jurisdiction of a court that is exercising original probate jurisdiction over a probate proceeding, so that the same court in which the probate proceeding is pending also has jurisdiction over matters related to the probate proceeding. But, if no probate proceeding is pending, then section 32.001 (with its incorporation of section 31.002) does not apply.

Susan contends that the probate proceeding concerning her mother's estate closed many years ago, and although we assume, without deciding, that Susan is correct, the absence of a pending probate proceeding does not deprive a statutory probate court of its independent jurisdiction over testamentary-trust actions. In actions concerning testamentary trusts, the statute's text does not limit the statutory probate court's jurisdiction. *See id.* § 32.006.

Our conclusion that a statutory probate court has jurisdiction over "an action involving an inter vivos trust, testamentary trust, or charitable trust" as unambiguously stated in Texas Estates Code section 32.006, is unaffected by the authorities Susan cites concerning proceedings "appertaining to or incident to an estate." The authorities on which Susan relies deal with the conditions in which a court exercising original probate jurisdiction can exercise jurisdiction over related or ancillary matters; they do not address a statutory probate court's independent jurisdiction over trust actions.[3] Indeed, Susan herself maintains that the case before us is not a proceeding "appertaining to or incident to an estate"; thus, her reliance on case law addressing a statutory probate court's jurisdiction over proceedings "appertaining to or incident to an estate" is misplaced.

[3] *See, e.g.*, Tex. Est. Code Ann. § 36.001 (defining the term "probate proceeding"); *Valdez v. Hollenbeck*, 465 S.W.3d 217, 224 n.8 (Tex. 2015) (explaining that "[t]he heirs initially filed their lawsuit in the original probate proceeding as a suit appertaining and incident to a probate estate under [the predecessor statute] section 5A of the Probate Code," under which "a probate proceeding must be pending for a probate court to exercise jurisdiction over matters related to that proceeding"); *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 506 (Tex. 2010) (holding that a probate court lacked jurisdiction over a proceeding to declare heirship because a "court empowered with probate jurisdiction may only

exercise its *probate* jurisdiction over matters incident to an estate when a probate proceeding related to such matters is already pending in that court" (emphasis added) (quoting *Bailey v. Cherokee Cty. Appraisal Dist.*, 862 S.W.2d 581, 585 (Tex. 1993))); *In re John G. & Marie Stella Kenedy Mem'l Found.*, 315 S.W.3d 519, 522 (Tex. 2010) (orig. proceeding) (quoting the same language from *Bailey*); *Goodman v. Summit at W. Rim, Ltd.*, 952 S.W.2d 930, 933 (Tex. App.—Austin 1997, no pet.) (citing *Bailey*); *In re Estate of Hanau*, 806 S.W.2d 900, 904 (Tex. App.—Corpus Christi 1991, writ denied) ("The trial court has power to hear all matters *incident to an estate* only in those instances where a probate proceeding, such as the administration of an estate, is actually pending in the court in which the suit is filed, relating to a matter incident to that estate." (emphasis added) (citing *Interfirst Bank–Hous. v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 873 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.))); *Pullen v. Swanson*, 667 S.W.2d 359, 363 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (stating that a statutory probate court's jurisdiction "to hear all matters *incident to an estate* necessarily presupposes that a probate proceeding is already pending in that court" (emphasis added)).

214 We overrule Susan's first issue.*214 **V. CHALLENGE TO THE MERITS OF THE ORDER APPROVING THE SETTLEMENT**

In an appeal from a trial court's grant of a receiver's application for approval of a settlement, we review the ruling for abuse of discretion. *See Ace Prop. & Cas. Ins. Co. v. Prime Tempus, Inc.* , No. 03-06-00236-CV, 2009 WL 2902713, at *2 (Tex. App.—Austin Aug. 26, 2009, no pet.) (mem. op.). The challenged ruling constitutes an abuse of discretion if it was made arbitrarily, unreasonably, or without reference to any guiding rules and principles. *See Crawford v. XTO Energy, Inc.* , 509 S.W.3d 906, 911 (Tex. 2017). A trial court does not abuse its discretion if it based its decision on conflicting evidence, some of which supports its decision. *See Unifund CCR Partners v. Villa* , 299 S.W.3d 92, 97 (Tex. 2009) (per curiam). On the other hand, the trial court abuses its discretion if its ruling is contrary to the only permissible view of the probative, properly admitted evidence. *Id.*

A. The Incomplete Record

Before reaching the merits of the argument, we must settle an issue Ronald raises concerning the state of the reporter's record. According to Ronald, the reporter's record before us is incomplete, and we therefore must presume that the omitted material supports the trial court's ruling and summarily affirm. *See In re J.A.T.* , 502 S.W.3d 834, 836 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("[I]n the absence of an agreement between the parties or a statement of the appellant's issues to be presented on appeal, 'we must presume that the omitted portions of the record are relevant and would support the judgment.' " (quoting *Mason v. Our Lady Star of the Sea Catholic Church* , 154 S.W.3d 816, 822 (Tex. App.—Houston [14th Dist.] 2005, no pet.))).

Ronald contends that the reporter's record is incomplete because Susan did not ask that the court reporter include in the appellate record a transcript of a hearing that took place on June 18, 2015. Ronald maintains that a transcript of that proceeding was necessary because during the March 2, 2016 hearing on the application to approve the settlement, his attorney said, "I'll ask the Court to take judicial notice of the proceeding in this Court on June 18, 2015 and the evidence that was offered," and the trial court responded, "So noted." Because a transcript of that proceeding is not in the record, Ronald argues that we must presume the evidence offered during the June 18, 2015 hearing is relevant and supports the judgment. Although Susan filed a reply brief after Ronald pointed out this omission, she did not respond to this argument.

We agree that the presumption applies. *See id.* But, even if it did not, we still would conclude that the record before us supports the trial court's approval of the settlement agreement.

B. The Terms of the Settlement Agreement

At the hearing, the parties agreed that as of February 26, 2002, the amount of the outstanding judgment and post-judgment interest Ronald owed the Trust was $6,128,326.99, and that if interest had continued to accrue without interruption up to the time of the hearing, the amount of Ronald's outstanding debt would have been about $24 million. It is undisputed, however, that Ronald paid the Trust $8 million in the summer of 2015, so
215 that the $24 million figure overstates the amount owed by at least 50%.[4] The value that the *215 Trust received in exchange for the judgment against Ronald included (1) money; (2) interests in real property; (3) the release of various claims; and (4) Ronald's execution of an "Agreement Respecting Certain Prospective Real Estate Acquisitions" and an "Agreement Respecting Conduct of the Litigation."

[4] Because post-judgment interest compounds annually, one cannot arrive at the total amount owed simply by subtracting from $24 million the amounts that have been paid or that otherwise should have been credited. *See* Tex. Fin. Code Ann. § 304.006 (West 2016).

1. The Monetary Part of the Settlement Agreement

Ronald agreed to pay the Trust $4 million at 4% interest over two years. As Susan admits in her brief, Ronald made the first payment 90 days before it was due.

2. Conveyance of Ronald's Interests in Real Property

The settlement agreement called for Ronald to convey to the Trust his undivided 25% interest in two properties, River Bend Farm and Cap Rock Ranch.

River Bend Farm's appraised value is $3.5 million, and Naumes testified that Ronald's interest in the property could be worth as much as a million dollars. Although Susan asserts that the conveyance of Ronald's interest in River Bend Farm "was of little or no value because the Trust already owned the interest," she does not support this statement. The evidence instead shows that Susan and Ronald each owned an undivided 25% interest in the farm, and the Trust owned the remaining undivided 50% interest. While Susan was trustee, the taxes on the property became delinquent, and the taxing authorities sued Susan, individually and in her capacity as trustee of the Trust, and Ronald. No one answered the suit, and the taxing authorities foreclosed on Ronald's interest to satisfy the default judgment against him for $11,334.63. After the sale, Susan, in her capacity as trustee, redeemed it, and the Trust received the excess proceeds from the sale. At the hearing for approval of the settlement agreement, Ronald's counsel stated, "When you redeem the property of a co-tenant under the Texas statute, you restore the title to the parties prior to the tax sale." The trial court responded, "I know the law. That's a correct statement of it."[5] Although Susan states in her brief that "[t]he legal effect of the redemption by the Trust of Ronald's 25% in the River Bend Farm is in dispute," she presents no grounds for disputing the trial court's implied finding that Ronald owned a 25% undivided interest in the property at the time of the settlement agreement.

[5] *See Poenisch v. Quarnstrom*, 361 S.W.2d 367, 372 (Tex. 1962) ("The general rule is that when a cotenant redeems property from a tax foreclosure sale, such action is considered as being for the benefit of all co-owners..... The redemption of the property could at most give rise to some claim for contribution.... (citations omitted)).

The settlement agreement also requires Ronald to convey to the Trust his undivided 25% interest in the 6,431-acre Cap Rock Ranch. Legacy had Cap Rock Ranch appraised during the settlement negotiations, but did not state its appraised value on the record.

3. Released Claims

A third component of Ronald's consideration for his purchase of the Trust's judgment against him concerned the release of the following claims against the Trust.

(a) Claims for damages, interest, or other expenses due to the untimely distribution of his share of the Trust's net income actually collected before December 31, 2013

216 Ronald's claims against the Trust for damages due to the delay in distributing *216 his share of the Trust's net income include at least two elements.

The first element is represented by the taxes that Ronald was required to pay on income that was attributed to him, but not paid. According to the evidence presented at the hearing, Susan, in her capacity as trustee, reported that the Trust made distributions to Ronald, when in fact, he received nothing. Ronald nevertheless was required to pay taxes on the income attributed to him. Naumes stated at the hearing that he believed the amount Ronald paid was under $500,000.

The second element of the claim consists of damages from delayed distributions of income that should have been made to Ronald, but that were not reported even as fictitious distributions. According to Naumes, this component of the claim could run into the millions of dollars. The amount cannot be definitely ascertained because Susan—in violation of a court order—has refused to provide Trust records. There is, however, some circumstantial evidence. For example, records that Legacy has been able to obtain from financial institutions show that while Susan was trustee she made distributions to herself and her daughter of at least $2.3 million, but made no distributions to Ronald or his daughter. Susan and Ronald hold identical interests in Trust income, as do Stacy and Gibson, so if Susan were entitled to distributions, then Ronald would have been entitled to distributions at the same time and in the same amount.

Due to Susan's refusal to cooperate in reconstructing fourteen years' worth of Trust financial information, Naumes estimates the costs of forensic accounting and legal fees to definitively determine the amount due to Ronald would run into the millions. This is supported by the $3 million in trial-level legal fees incurred by the parties in *Lee I* and the further $800,000 in legal fees assessed by the trial court in the event of an appeal.[6] Moreover, Naumes testified that in the years since *Lee I* was tried, both the rates charged by the attorneys and the number of attorneys involved in this litigation have increased.

6 *See Lee I*, 47 S.W.3d at 775, 797.

(b) Claims regarding the calculation of the Judgment and interest

Ronald claims that the post-judgment interest of "the Judgment" (defined in the settlement agreement as the 1996 judgment in *Lee I* , as modified by the 2001 decision in the appeal of that case and reflected in the appellate court's 2002 mandate and in the trial court's 2012 order reviving the dormant judgment) has been calculated incorrectly. The record shows that in 2002, Ronald contacted Susan's attorney Zabel with a plan to pay the judgment in full by assigning to the Trust (1) his interests in the same two properties he conveyed as part of the settlement agreement; and (2) his beneficial interest in income distributions from the Trust until the judgment was satisfied. Ronald's counsel believed that the distributions due to Ronald upon the sale of the properties would substantially satisfy the judgment, but if a balance remained after the sale, the difference would be satisfied by cash loaned from Stacy's separate trust. Neither Zabel nor Susan ever responded. Ronald claims that, given his offer to temporarily assign his interest in income distributions to the Trust, and the Trust's failure to distribute any income to him, the accrual of post-judgment interest should have been suspended, or at least reduced by the amount of income that should have been distributed to him. Naumes testified that settling
217 such claims would be more *217 beneficial to the Trust than incurring the costs of litigating them.

(c) Claims related to the allocation of Trust receipts and expenses between principal and income prior to December 31, 2013

Ronald was entitled to distributions of the Trust's current net income, and he claims Susan reduced the Trust's net income by the way in which she allocated Trust receipts and expenses between principal and income. This is another area in which Naumes was concerned about the costs to the Trust of accurately reconstructing its financial history during the time Susan was the trustee. According to Naumes, "[W]e would do forensic accounting for the rest of our lives to determine whether or not the allocation of principal [and] income was right."

(d) Claims for trustee's fees and Trust expenses due to Ronald, or incurred and paid by him, before June 30, 2015

Naumes testified that Ronald paid for all of a property's costs while he owned an interest in it; however, no evidence was introduced about the amount of those costs.[7]

[7] From the tax suit, we also know that Ronald did not always timely pay the taxes on his interest in River Bend Farm.

(e) Additional released claims

There is less evidence about other claims that Ronald released as part of the settlement agreement. These additional claims, some of which appear to duplicate claims already mentioned, are as follows:

- Claims for payment of income from revenue collected by the Trust before December 31, 2014, to the extent that amounts payable for his health, maintenance, and support exceeded his one-third share of the Trust's net income;

- Claims for attorney's fees Ronald incurred before June 30, 2015, to the extent that such claims had not already been reimbursed by Legacy;

- Claims for attorney's fees Ronald incurred in connection with the settlement agreement or the Judgment;

- Claims that the Judgment is dormant or unenforceable;

- Claims to equitably reform the Judgment based on the inequitable or improper accrual of interest; and

- Claims "for damages suffered on account of [Ronald's undivided 25% interest] in River Bend Farm."

4. Additional Agreements

The settlement also included two additional agreements.

In the "Agreement Respecting Certain Prospective Real Estate Acquisitions," Ronald agreed to the Trust's proposed purchase of Susan's undivided 25% interests in the Cap Rock Ranch and Rim Rock Ranch properties for not more than $3.4 million, and to the Trust's proposed purchase of Susan's undivided 25% share of the River Bend Farm for a price not to exceed its appraised value. Naumes explained that obtaining Ronald's approval of these proposed purchases was intended to eliminate the risk of suit if Legacy converted "an earning asset into what may become an un-earning asset." Naumes also stated that it would be of great value to the

Trust if Legacy could unite the undivided interests in the property, and that the Trust would benefit if Ronald
218 were not able to "blackball" those acquisitions. There is no evidence about whether Susan *218 would agree to sell her share of the properties to the Trust.

In the "Agreement Respecting Conduct of the Litigation" in this case, Legacy, Ronald, and Stacy agreed that at least a portion of Ronald's and Stacy's claims against Susan would benefit the Trust. To avoid duplicating their efforts and multiplying its own attorney's fees, Legacy agreed that (a) Ronald's counsel would take the lead in pursuing those claims; (b) Stacy's counsel would take secondary responsibility for pursuing their claims while avoiding duplication of the work of Ronald's counsel; (c) Legacy would reimburse Ronald $500,000 and Stacy $100,000 for their reasonable and necessary attorney's fees and litigation expenses; and (d) if Ronald or Stacy believe that additional reasonable and necessary attorney's fees and litigation expenses should be incurred, then that person can request advance approval for the additional expenditures, which approval Legacy will not unreasonably withhold. In return, Ronald and Stacy agreed that Legacy was not obliged to them to prosecute the Trust's claims against Susan for breaches of her obligations to the Trust while serving as its trustee.[8]

[8] As previously mentioned, the trial court authorized Legacy to sue to recover Trust assets or to recover damages suffered by the Trust, "provided, however, that the Receiver shall have discretion not to pursue litigation against [Susan] that is undertaken by beneficiaries of the Trust for the benefit of the Trust."

C. Ronald's and Legacy's Evaluation of the Settlement Agreement

According to Naumes, Legacy believes that the settlement is in the best interest of the Trust and the Trust's four beneficiaries, and is "absolutely" a better deal for the Trust than attempting to collect the full amount of the judgment and accrued interest in an adversarial proceeding. Naumes testified that in evaluating the settlement, Legacy did not assign specific dollar values to each of Ronald's claims, but instead evaluated the settlement agreement as a whole and concluded that the exchange was fair and equitable. Naumes further stated that after reviewing Ronald's tax returns and extensively interviewing him about his assets, holdings, separate property, and community property, Naumes believes that the settlement represents the most that Legacy can expect to obtain from Ronald. Ronald similarly testified that the full amount of the Trust's judgment against him, including post-judgment interest, exceeds his net worth.

D. Susan's Arguments on the Merits of the Settlement Agreement

Susan contends that the trial court abused its discretion in approving the settlement because the trial court (a) applied the wrong standard by relying "on its own view of continued litigation," (b) lacked sufficient evidence to determine the merits of Ronald's released claims or of the Trust's best interests, and (c) approved the settlement for only half of the judgment's value without determining the merits of the claims Ronald released. We examine each of these arguments in turn.

1. The Trial Court's Reliance "Upon Its Own View of Continued Litigation"

Susan argues that the trial court "abused its discretion by approving the settlement based upon its own view of continued litigation." In support of this argument, Susan relies on *Webre v. Black* , 458 S.W.3d 113 (Tex. App.—Houston [1st Dist.] 2015, no pet.). In that case, the First Court of Appeals reversed a trial court's approval of
219 a settlement between the court-appointed guardian of a ward's estate *219 and the ward's former attorney-in-fact, who allegedly had engaged in transactions that were presumptively unfair to the estate. *See id.* at 118–19. The trial court approved the settlement based on the stated view that it was not in the interest of the 87-year-old incompetent ward to continue litigating a dispute that would not personally benefit the ward, regardless of whether the litigation would benefit the ward's estate. *See id.* at 114, 116–18. The appellate court reversed

because the trial court was required by statute to consider whether the settlement was in the best interest of the ward's estate, but instead excluded evidence on that issue and considered only whether the settlement was in the best interest of the ward himself. *See id.* at 119–20 (citing former TEX. PROB. CODE § 774(a)(4)).

Webre is distinguishable from the case at hand. Here, the trial court excluded no evidence, and there is no evidence that the trial court failed to consider whether the settlement was in the best interests of the Trust or its beneficiaries.

We also disagree with Susan's implication that avoiding the costs of litigation can never be a valid consideration in evaluating a settlement agreement. Here, the evidence presented at the hearing showed that, in light of Susan's stonewalling of efforts to reconstruct the Trust's financial history, attempting to exactly quantify the amount that Ronald owes would increase the Trust's expenses, which would reduce its current net income to the prejudice of all of its beneficiaries. While the delay in litigating that issue could allow post-judgment interest to continue accruing at Ronald's expense, neither the Trust nor its beneficiaries would benefit from such delay if—as Ronald and Naumes testified—the full amount of post-judgment that has accrued (if no credits are applied toward it) already exceeds Ronald's net worth.

2. The Sufficiency of the Evidence on Which to Decide Whether the Settlement Is in the Trust's Best Interest

Susan next contends that the trial court lacked sufficient evidence on which to exercise its discretion. We disagree. Although we will not repeat our summary of the major points of the evidence drawn from our review of the approximately 600-page reporter's record, we are confident that the information we have summarized was sufficient to allow the trial court to evaluate the settlement agreement.

In arguing that this evidence was inadequate to permit the trial court to evaluate the settlement agreement, Susan relies on *In re Rains* , 473 S.W.3d 461 (Tex. App.—Amarillo 2015, no pet.). *Rains* concerned a settlement under the Structured Settlement Protection Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 141.001 –.007. The Act requires a factoring company to obtain court approval before it can purchase a person's right to receive tax-free payments of a structured settlement. *See id.* § 141.004. No such purchase is at issue here.

Susan nevertheless contends that the factors the *Rains* court considered in reviewing a trial court's approval of the transfer of structured-settlement payment rights applies by analogy to our review of the trial court's ruling approving the settlement at issue here. But, even in the context of the Structured Settlement Protection Act, we expressly declined to follow *Rains* because its eighteen-factor analysis "take[s] the court's analysis well beyond the scope of the inquiry authorized." *Metro. Life Ins. Co. v. Structured Asset Funding, LLC* , 501 S.W.3d 706, 720 (Tex. App.—Houston [14th Dist.] 2016, no pet.). That conclusion applies with even more force here,
220 where some of the factors considered in *Rains* are plainly inapplicable. *220 For example, it is not possible to consider the Trust's "future yet reasonably foreseeable domestic, economic, physical, medical, and educational needs," its "age, education, and acumen," or its "business or financial acumen." *See Rains* , 473 S.W.3d at 464.

3. The Trial Court's Failure to Determine the Merits of Ronald's Released Claims

In her last challenge to the merits of the trial court's decision, Susan contends that the trial court failed to determine the merits of Ronald's released claims and that the court approved the settlement of the judgment against Ronald "for only one-half its value." Some of the problems with these arguments are self-evident.

First, to obtain a trial court's determination of the merits of a claim is to litigate that claim, which is the very object that a settlement is intended to avoid. The record nevertheless is sufficient to allow the trial court to conclude that the Trust had net income that should have been distributed to Ronald while Susan was trustee, and that if the issue were litigated, Ronald's debt to the Trust would be offset to some degree by the Trust's debt to Ronald. The delay required to determine the extent of the offset (1) would prejudice Ronald because post-judgment interest of 10% per annum, compounded annually, would continue to accrue during that time;[9] and (2) would not benefit the Trust, because even if Ronald were entitled to no offset, he still could not pay the full amount of the judgment. Naumes not only testified that Ronald does not have the financial ability to pay the judgment, but also stated, "I don't believe that I could have gotten another nickel out of him." Obtaining a release of the claims, however, saves the Trust the expense of litigating them.

[9] *See* Tex. Fin. Code Ann. § 304.006. The post-judgment interest Ronald owed to the Trust would outstrip the pre-judgment interest accruing on any debt that the Trust owed to him, because pre-judgment does not compound. *See id.* § 304.104.

Second, the trial court does not have a "line-item veto" of the claims released in the settlement agreement, but must approve or reject the settlement agreement as a whole. Moreover, even if some of Ronald's claims are valueless, the Trust is not harmed by their release.

Third, although Susan characterizes the settlement as a sale of the judgment against Ronald for less than half of its value, this is not supported by the record. The Trust received an $8 million payment; an additional $4 million payable over two years; the conveyance of a 25% interest in a property appraised for $3.5 million, and for which Ronald's share may be worth as much as $1 million; and the release of a claim for around $500,000 for taxes he was required to pay on income previously attributed to him but which he never received. Based on Susan's distributions to herself and her daughter of about $2.3 million and the fact that both Susan and Ronald each are entitled to a distribution of the 1/6th of the Trust's current net income, Ronald also may be entitled to delay damages from past-due multi-million-dollar distributions. These amounts total more than $15 million, which is considerably more than half of the value of the Trust's judgment against Ronald. Moreover, the judgment's post-judgment interest is compounded annually, so if any of the amounts that the Trust owed Ronald should have been credited against the accrual of post-judgment interest, then those amounts would further reduce the amount of post-judgment interest that continued to compound. Consequently, the value of the Trust's
221 judgment against Ronald after any offsets cannot be precisely determined *221 without knowing what amounts should have been distributed, and when Ronald should have been paid. Thus, the inability to more exactly quantify the value of Ronald's released claims is due in part to Susan's failure to provide Legacy with the Trust's financial information as she was ordered to do.

On this record, we cannot say that the trial court abused its discretion in approving the settlement. We overrule Susan's second issue.

VI. DENIAL OF SUSAN'S MOTION FOR A CONTINUANCE

When a party moves for a continuance to conduct discovery, we review the denial of the motion for a clear abuse of discretion. *See Joe v. Two Thirty Nine Joint Venture* , 145 S.W.3d 150, 161 (Tex. 2004). The Texas Rules of Civil Procedure specify that no motion for a continuance shall be granted "except for sufficient cause supported by affidavit, or by consent of the parties, or by operation of law. TEX. R. CIV. P. 251. When reviewing the ruling on the merits, some of the factors we consider include "the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the

continuance has exercised due diligence to obtain the discovery sought." *See id.* First, however, the record must show that the complainant complied with the rules governing a motion for continuance. *See Brown v. Gage* , 519 S.W.2d 190, 192 (Tex. Civ. App.—Fort Worth 1975, no writ).

If a first motion for continuance is sought to obtain testimony, then

> [the movant] shall make affidavit that such testimony is material, showing the materiality thereof, and that he has used due diligence to procure such testimony, stating such diligence, and the cause of failure, if known; ... and, if it be for the absence of a witness, he shall state the name and residence of the witness, and what he expects to prove by him; and also state that the continuance is not sought for delay only, but that justice may be done....

TEX. R. CIV. P. 252.

Susan's motion did not meet these requirements. She asked for a continuance of "at least 90 days" to "conduct discovery to determine" the following:

> (i) Legacy's valuation of the Judgment;
>
> (ii) what, if any, credits Ronald Lee claims he is entitled to;
>
> (iii) Ronald Lee's ability to pay the Judgment in full;
>
> (iv) what, if any, other consideration Ronald Lee is providing under the terms of the settlement;
>
> (v) what claims are the subject of the releases given by Ronald Lee to Legacy under the settlement; and
>
> (vi) why the settlement is in the best interest of the Trust as alleged by Legacy.

Susan attached to the motion only the verification of her attorney Daniel J. Sheehan, who attested that he had read the motion and that the statements it contained were true and correct.

Susan did not identify in her motion the discovery she planned to conduct, or indeed, why discovery was necessary at all. All of the information she identified in her motion was either incorporated in Legacy's application for approval of the settlement or was presented at the hearing. At the close of the evidence, the trial court asked Sheehan what discovery Susan needed and whom the attorney wished to depose. Sheehan responded, "[O]bviously, we have a pretty good record on Mr. Naumes. But I think that Tom Zabel should have
222 an *222 opportunity to testify in some capacity." Zabel, however, is one of Susan's attorneys. As her agent, not only is he subject to Susan's control, but he also was served with Legacy's application for approval of the settlement agreement. If his testimony was wanted, he had only to attend the hearing, without need of a continuance.

We overrule this issue.

VII. CONCLUSION

The statutory probate court properly exercised its trust jurisdiction over this suit, and thus, none of its challenged orders are void for lack of jurisdiction. Moreover, the record does not show that the trial court abused its discretion in approving the Trust's receiver's application for approval of its settlement agreement with Ronald Lee Jr. or in denying Susan Lee's motion for a continuance.

We affirm the trial court's judgment.

NO. 01-13-01091-CV

Court of Appeals For The First District of Texas

King v. Deutsche Bank Nat'l Trust Co.

472 S.W.3d 848 (Tex. App. 2015)
Decided Aug 18, 2015

NO. 01–13–01091–CV

08-18-2015

Judith King, individually and as Independent Executor of the Estate of Kenneth King, Appellants v. Deutsche Bank National Trust Company, as Indenture Trustee, on behalf of the Owners of Accredited Mortgage Loan Trust 2004–4 Asset Backed Notes, by its Attorney–In–Fact and Servicer–In–Fact, Select Portfolio Servicing, Inc., Appellee

Michael S. O'Connor, Houston, TX, for appelant. Michael D. Conner, Michael F. Hord, Hirsch & Westheimer, P.C., Houston, TX, for appellee.

Rebeca Huddle, Justice

Michael S. O'Connor, Houston, TX, for appelant.

Michael D. Conner, Michael F. Hord, Hirsch & Westheimer, P.C., Houston, TX, for appellee.

OPINION

Rebeca Huddle, Justice

This appeal arises from a dispute between Judith King, individually and as executor of the estate of Kenneth King, and Deutsche Bank National Trust Company regarding foreclosure of a home equity lien on the Kings' property. King sued Deutsche Bank in the district court, contesting its right to foreclose, and Deutsche Bank counterclaimed for foreclosure. Both parties filed summary-judgment motions, and the trial court denied King's and granted Deutsche Bank's. On appeal, King contends that the trial court lacked jurisdiction over Deutsche Bank's counterclaim and therefore the summary judgment order is void. We agree, vacate the judgment of the trial court, and render judgment dismissing the case for want of subject-matter jurisdiction.

Background

In June 2012, Judith King, individually and as executor of the estate of Kenneth King, sued Deutsche Bank in the district court, contesting Deutsche Bank's application for foreclosure in an earlier-filed case in the same court. In her petition, King asserted that she had filed a plea in abatement in that earlier case and requested that the foreclosure application be transferred to Harris County Probate Court No. 3. Deutsche Bank responded to the petition and counterclaimed for foreclosure against King.

A year later, Deutsche Bank moved for summary judgment on King's claims and for summary judgment on its affirmative claim for foreclosure. It argued that it was entitled to foreclosure, that King's petition did not state an affirmative claim against it, and that King had no evidence to support any claims she alleged. King did not

file a response to the motion, and instead filed her own motion for summary judgment. She argued that Deutsche Bank was not properly appointed as a substitute trustee in the deed of trust, and therefore any foreclosure sale was void. She did not raise the issue of jurisdiction.

The trial court denied King's motion, granted Deutsche Bank's motion, rendered judgment in Deutsche Bank's favor on its foreclosure claim, and rendered judgment that King take nothing.

851 *851

Discussion

In her first and second issues, King contends that the trial court lacked subject-matter jurisdiction over the case because Harris County Probate Court No. 3 had (1) dominant jurisdiction and (2) exclusive jurisdiction over Deutsche Bank's counterclaim. In her third issue, she argues that because the trial court lacked subject-matter jurisdiction, its judgment is void.

In response, Deutsche Bank argues that King has not proved the existence of a statutory probate court proceeding in Harris County Probate Court No. 3. Deutsche Bank also argues that even if such a proceeding exists, the statutory probate court does not have exclusive jurisdiction over its counterclaim, and to the extent that the probate court has dominant jurisdiction, King waived her complaint by failing to file a plea in abatement. Finally, Deutsche Bank argues that King has waived her jurisdictional arguments by raising them for the first time on appeal and that King should be estopped from challenging jurisdiction because she chose to file her suit against Deutsche Bank in the district court.

A. Standard of Review and Law on Jurisdiction

Whether a trial court has subject-matter jurisdiction is a question of law that we review de novo. *Tex. Natural Res. Conservation Comm'n v. IT – Davy,* 74 S.W.3d 849, 855 (Tex.2002). "Subject-matter jurisdiction is 'essential to a court's power to decide a case.' " *City of Houston v. Rhule,* 417 S.W.3d 440, 442 (Tex.2013) (per curiam) (quoting *Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 553–54 (Tex.2000)). Subject-matter jurisdiction is never presumed, and cannot be waived or conferred by consent, waiver, estoppel, or agreement. *Dubai Petroleum Co. v. Kazi,* 12 S.W.3d 71, 75 (Tex.2000).

"Without jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case." *Fin. Comm'n of Tex. v. Norwood,* 418 S.W.3d 566, 578 (Tex.2013) (quoting *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.,* 549 U.S. 422, 431, 127 S.Ct. 1184, 1191, 167 L.Ed.2d 15 (2007)). "The failure of a jurisdictional requirement deprives the court of the power to act (other than to determine that it has no jurisdiction), and ever to have acted, as a matter of law." *City of DeSoto v. White,* 288 S.W.3d 389, 393 (Tex.2009) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser,* 140 S.W.3d 351, 359 (Tex.2004)). Thus, "[a] judgment is void if rendered by a court without subject-matter jurisdiction." *In re United Servs. Auto. Ass'n,* 307 S.W.3d 299, 309 (Tex.2010) (orig. proceeding).

"[S]ubject-matter jurisdiction [may] 'be raised for the first time on appeal by the parties or by the court.' " *Id.* at 306 (quoting *Loutzenhiser,* 140 S.W.3d at 358). Indeed, "a court is *obliged* to ascertain that subject-matter jurisdiction exists regardless of whether the parties questioned it." *Id.* (emphasis in original); *City of Allen v. Pub. Util. Comm'n of Tex.,* 161 S.W.3d 195, 199 (Tex.App.–Austin 2005, no pet.) ("[T]he question of jurisdiction is fundamental and can be raised at any time in the trial of a case or on appeal.").

" '[W]hen one court has ... exclusive jurisdiction over a matter, any order or judgment issued by another court pertaining to the same matter is void.' " *In re CC & M Garza Ranches Ltd. P'ship,* 409 S.W.3d 106, 109 (Tex.App.–Houston 1st Dist. 2013, orig. proceeding) (quoting *Celestine v. Dep't of Family & Protective Servs.,* 321 S.W.3d 222, 230 (Tex.App.–Houston 1st Dist. 2010, no pet.)). However, when the jurisdiction of two courts is concurrent, "the issue is one of dominant *852 jurisdiction." *In re Puig,* 351 S.W.3d 301, 305 (Tex.2011). As a general rule, when cases involving the same subject matter and same parties are brought in different courts, the court with the first-filed case has dominant jurisdiction, and the other case should be abated. *See Wyatt v. Shaw Plumbing Co.,* 760 S.W.2d 245, 248 (Tex.1988); *see also Perry v. Del Rio,* 66 S.W.3d 239, 252 (Tex.2001). To contest a court's lack of dominant jurisdiction requires the filing of a plea in abatement. *See In re Puig,* 351 S.W.3d at 306.

B. Analysis

Section 32.005(a) of the Estates Code provides:

> In a county in which there is a statutory probate court, the statutory probate court has exclusive jurisdiction of all probate proceedings, regardless of whether contested or uncontested. A cause of action related to the probate proceeding must be brought in a statutory probate court unless the jurisdiction of the statutory probate court is concurrent with the jurisdiction of a district court as provided by Section 32.007 or with the jurisdiction of any other court.

Tex. Est. Code Ann. § 32.005(a) (West 2014).[1] In a county in which there is a statutory probate court, a cause of action "related to [the] probate proceeding" includes, among other things, "an action brought against a personal representative in the representative's capacity as a personal representative" and "an action [to] enforce[ ] a lien against [estate property]." *See* Tex. Est. Code Ann. § 31.002(a)(4), (5) (West 2014) (defining "matters related to a probate proceeding"). "[A] claim brought by a personal representative on behalf of an estate" is also a claim "related to [a] probate proceeding." *See id.* § 31.002(a)(3), (c)(1) (West 2014).

[1] The Texas Probate Code has been amended and recodified since the underlying lawsuit was filed. *See* Act of May 9, 2013, 83rd Leg., R.S., ch. 161, art. 6, 2013 Tex. Gen. Laws 623, 633–57. However, the text of the applicable statutes was not substantively changed. *See id.* For ease of reference, we will cite to the new Texas Estates Code, which became effective January 1, 2014.

Section 32.007 provides that a statutory probate court has concurrent jurisdiction with a district court over several types of actions:

(1) a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a personal representative;

(2) an action by or against a trustee;

(3) an action involving an inter vivos trust, testamentary trust, or charitable trust, including a charitable trust as defined by Section 123.001, Property Code;

(4) an action involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate;

(5) an action against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent; and

(6) an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney.

Id. § 32.007 (West 2014).

1. Did King waive her jurisdictional arguments or is she estopped from raising them?

Before we address King's contention that the trial court lacked jurisdiction to enter summary judgment in favor of Deutsche Bank, we address two threshold matters raised by Deutsche Bank.

853 *853 First, Deutsche Bank argues that King has waived her jurisdictional arguments by failing to file a plea in abatement or otherwise adduce evidence in the trial court that a probate proceeding exists. Section 32.005(a) requires the existence of a probate proceeding in order for a probate court to have jurisdiction over related actions. *See* Tex. Est. Code Ann. § 32.005(a). Deutsche Bank argues that there is no record evidence supporting King's claim that a probate proceeding exists in Harris County Probate Court No. 3, and therefore we cannot consider whether that court has exclusive jurisdiction over its counterclaim.

Deutsche Bank identified one of its counter-defendants as "Judith King, as Independent Executor of the Estate of Kenneth King." *See* Tex. Est. Code Ann. § 22.017 (West 2014) (" 'Independent executor' means the personal representative of an estate under independent administration as provided" by the Estates Code.). Deutsche Bank also represented to the trial court in its motion for summary judgment that (1) Kenneth King passed away "on or about October 2, 2010," (2) "Judith King filed an Application to Probate Will and Issuance of Letters Testamentary on or about February 20, 2011 in the Harris County Probate Court at Law No. Three under Cause No. 402647," and (3) "the probate court issued letters testamentary on April 13, 2011 and Judith King was named as the independent executor." Although a party's representations in a motion do not constitute evidence, we conclude that these representations constitute judicial admissions regarding the existence of the probate proceeding. *See Holy Cross Church of God in Christ v. Wolf,* 44 S.W.3d 562, 568 (Tex.2001) (holding that party made judicial admission in summary-judgment response and counter-motion for summary judgment). Accordingly, we conclude that Deutsche Bank is estopped from asserting there is no existing probate proceeding because of its judicial admissions to the contrary.

Second, Deutsche Bank contends that King waived her jurisdictional arguments and is estopped from challenging jurisdiction because she elected to sue in district court. Deutsche Bank relies upon *Hiles v. Arnie & Co., P.C.,* 402 S.W.3d 820 (Tex.App.–Houston 14th Dist. 2013, pet. denied), and *Howell v. Mauzy,* 899 S.W.2d 690 (Tex.App.–Austin 1994, writ denied), to support its contention that King should be estopped from contesting jurisdiction because she affirmatively represented to the district court that it had jurisdiction. But *Hiles* and *Howell* are both dominant jurisdiction cases. *See Hiles,* 402 S.W.3d at 825 (noting abatement based on dominant jurisdiction is based on principles of comity, convenience, and necessity for an orderly proceeding); *Gordon v. Jones,* 196 S.W.3d 376 (Tex.App.–Houston 1st Dist. 2006, no pet.) (noting doctrine of dominant jurisdiction pertains to venue, not subject-matter jurisdiction). And unlike subject-matter jurisdiction, which is at issue here, dominant jurisdiction may be waived if not timely asserted. *See Hiles,* 402 S.W.3d at 826; *Howell,* 899 S.W.2d at 698. Likewise, a party may be estopped from asserting dominant jurisdiction by its inequitable conduct. *See Hiles,* 402 S.W.3d at 825; *Howell,* 899 S.W.2d at 698. By contrast, subject-matter jurisdiction, which is at issue here, may be raised for the first time on appeal, and cannot be waived or conferred by consent, waiver, estoppel, or agreement. *See Dubai Petroleum Co.,* 12 S.W.3d at 75. Thus, King may neither waive nor be estopped from challenging subject-matter jurisdiction. *See id.*

2. Does the trial court lack subject-matter jurisdiction over the parties' claims?

854 *854 We conclude that the statutory probate court has exclusive jurisdiction over the parties' claims and that the trial court therefore lacked jurisdiction to adjudicate the case. The first sentence in Section 32.005(a) of the Estates Code confers upon the statutory probate court "exclusive jurisdiction of all probate proceedings." Tex. Est. Code Ann. § 32.005(a). The following sentence provides that "[a] cause of action related to the probate proceeding must be brought in a statutory probate court unless the jurisdiction of the statutory probate court is concurrent with the jurisdiction of a district court as provided by Section 32.007 or with the jurisdiction of any other court." *Id.* Deutsche Bank's counterclaim is a matter "related to a probate proceeding," because it is "an action [to] enforce [ ] a lien against [estate property], and King's claims are "related to a probate proceeding" because they are "claim[s] brought by a personal representative on behalf of an estate." *See id.* § 31.002(a)(3), (4), (5), (c)(1). And the action is not among those enumerated in Section 32.007 for which district and probate courts have concurrent jurisdiction. *See id.* § 32.007.

This Court has held that nearly identical language in the Estates Code pertaining to guardianship proceedings is jurisdictional and confers exclusive jurisdiction on statutory probate courts over actions related to guardianship proceedings. In *In re CC & M Garza Ranches Limited Partnership,* 409 S.W.3d 106 (Tex.App.–Houston 1st Dist. 2013, orig. proceeding), we considered Section 607D of the Probate Code, now Section 1022.005 of the Estates Code, which provides:

(a) In a county in which there is a statutory probate court, the statutory probate court has exclusive jurisdiction of all guardianship proceedings, regardless of whether contested or uncontested.

(b) A cause of action related to a guardianship proceeding of which the statutory probate court has exclusive jurisdiction as provided by Subsection (a) must be brought in the statutory probate court unless the jurisdiction of the statutory probate court is concurrent with the jurisdiction of a district court as provided by Section 1022.006 or with the jurisdiction of any other court.

Tex. Est. Code Ann. § 1022.005 (West 2014); *see In re CC & M Garza Ranches Ltd. P'ship,* 409 S.W.3d at 109.

We held that this language vested the statutory probate court with exclusive jurisdiction over claims that the statute defined as matters "related to a guardianship proceeding." *In re CC & M Garza Ranches Ltd. P'ship,* 409 S.W.3d at 109; *see* Tex. Est. Code Ann. § 1021.001 (West 2014). We concluded that "[b]y giving the statutory probate court exclusive jurisdiction over all claims related to a guardianship proceeding, the Legislature necessarily deprived all other courts of the power to adjudicate those claims." *In re CC & M Garza Ranches Ltd. P'ship,* 409 S.W.3d at 109. Thus, only the statutory probate court had the power to decide such claims, and an order or judgment issued by another court pertaining to those claims would be void. *See id.*

The provision of the Estates Code at issue in *In re CC & M Garza Ranches Limited Partnership* is virtually identical to the provision at issue here. Following the rationale in *In re CC & M Garza Ranches Limited Partnership,* we hold that Section 32.005(a) of the Estates Code likewise confers the statutory probate court with exclusive jurisdiction over the case.

Deutsche Bank contends that Section 32.005(a)'s requirement that a cause of action related to a probate proceeding "must be brought in a statutory probate court" suggests only dominant, and not exclusive,
855 jurisdiction. But as Deutsche Bank acknowledges *855 in its brief, the only case that Deutsche Bank cites to support this proposition predates the "exclusive jurisdiction" language the Legislature added to the Probate Code (now Estates Code) in 2009.[2] *See First State Bank of Bedias v. Bishop,* 685 S.W.2d 732, 736 (Tex.App.–

Houston 1st Dist. 1985, writ ref'd n.r.e.) (construing previous version of statute, which explicitly permitted suit in question to be filed in probate court or any court of proper jurisdiction, and holding that probate court had dominant, and not exclusive, jurisdiction over claims).

[2] *Bishop* involved a suit on a claim rejected by a personal representative. When *Bishop* was decided, Section 313 of the Probate Code permitted suits on a claim rejected by a personal representative to be filed "in the court of original probate jurisdiction 'or in any other court of proper jurisdiction.' " *First State Bank of Bedias v. Bishop,* 685 S.W.2d 732, 736 (Tex.App.–Houston 1st Dist. 1985, writ ref'd n.r.e.). The current version of that section, Section 355.064, permits a suit on a rejected claim to be filed only "in the court of original probate jurisdiction in which the estate is pending." Tex. Est. Code Ann. § 355.064(a) (West 2014). And before the 2009 amendments, the Probate Code did not use the term "exclusive jurisdiction," providing only that "all applications, petitions and motions regarding probate [and] administrations ... shall be filed and heard in [statutory probate] courts" and that matters "appertaining to estates" or "incident to an estate" shall be brought in those courts. *See* Act of May 28, 2003, 78th Leg., R.S., ch. 1060, §§ 1–4, 2003 Tex. Gen. Laws 3052, 3052–3054 (former Tex. Prob. Code Ann. §§ 5A(b), 5(c)).

Deutsche Bank also relies upon *Helena Chemical Company v. Wilkins,* 47 S.W.3d 486 (Tex.2001), to argue that the use of the phrase "must be brought" in the second sentence of Section 32.005(a) is not jurisdictional or at most suggests dominant, and not exclusive, jurisdiction. In *Helena,* the Texas Supreme Court observed that "the word 'must' is given a mandatory meaning when followed by a noncompliance penalty." *Id.* at 493 (quoting *Harris Cnty. Appraisal Dist. v. Consol. Capital Props. IV,* 795 S.W.2d 39, 41 (Tex.App.–Amarillo 1990, writ denied)). Deutsche Bank reasons that, because the Estates Code does not state a penalty, "must be brought" in this context is not mandatory. Deutsche Bank also points out that the Supreme Court has "held language that appears to impose a mandatory duty to be only directory when this interpretation is most consistent with the Legislature's intent" and that "[e]ven if a statutory requirement is mandatory, this does not mean that compliance is necessarily jurisdictional." *Id.* at 493. Deutsche Bank argues that, because the Estates Code does not say "the statutory probate court has exclusive jurisdiction of all probate proceedings and all causes of action related to the probate proceeding," we must conclude that the Legislature did not intend to give the statutory probate court exclusive jurisdiction over any causes of action related to a probate proceeding.

But *Helena* does not state that use of the word "must" may *only* be mandatory or jurisdictional when followed by a noncompliance penalty; instead, it directs that "[w]hen a statute is silent about the consequences of noncompliance, we look to the statute's purpose to determine the proper consequences." *Id.* at 494. As we have already noted, this Court held in *In re CC & M Garza Ranches Limited Partnership* that the purpose of a virtually identical provision of the Estates Code was to confer exclusive jurisdiction on the statutory probate court. 409 S.W.3d at 109. Deutsche Bank argues that such a reading is unreasonable, but does not address the fact that we would be required to overturn our precedent in order to so hold. *See Helena Chem. Co.,* 47 S.W.3d at 493 (appellate court "must presume that the Legislature intends an entire statute to be effective and that a just
856 and reasonable *856 result is intended"). And we disagree that the statute cannot reasonably be read to vest exclusive jurisdiction in the statutory probate court—the second sentence of Section 32.005(a) may reasonably be understood to mean that jurisdiction is vested exclusively in the probate court if the claim in question is not identified in Section 32.007 as a claim for which concurrent jurisdiction exists. Accordingly, we follow *In re CC & M Garza Ranches Limited Partnership* and conclude that the statute confers on statutory probate courts exclusive jurisdiction over causes of action related to a probate proceeding unless Section 32.007 provides that the action is subject to concurrent jurisdiction in a district court or with the jurisdiction of any other court. *See In re CC & M Garza Ranches Ltd. P'ship,* 409 S.W.3d at 109.

Deutsche Bank contends that our construction of the statute renders Section 34.001 of the Estates Code meaningless. Section 34.001 provides, in part:

> A judge of a statutory probate court, on the motion of a party to the action or on the motion of a person interested in an estate, may transfer to the judge's court from a district, county, or statutory court a cause of action related to a probate proceeding pending in the statutory probate court or a cause of action in which a personal representative of an estate pending in the statutory probate court is a party ....

Tex. Est. Code Ann. § 34.001(a) (West 2014). Deutsche Bank argues that a district, county, or other statutory court would never have occasion to transfer causes of action related to probate proceedings if the probate court had exclusive jurisdiction over them.

We disagree. Our construction of Section 32.005(a) recognizes that the Estates Code provides for concurrent jurisdiction over *some* causes of action related to a probate proceeding. Specifically, the statutory probate court has concurrent jurisdiction with district courts in actions enumerated in Section 32.007. Tex. Est. Code Ann. § 32.005(a). Far from rendering Section 34.001 meaningless, our construction of Section 32.005(a) gives effect to Section 34.001 by recognizing that its function is to grant the statutory probate court discretion to transfer to itself actions identified in Section 32.007 that may properly be heard in another court with concurrent jurisdiction.

Because the statutory probate court has exclusive jurisdiction over the parties' claims, we hold that the trial court lacked subject-matter jurisdiction over the case. *See In re CC & M Garza Ranches Ltd. P'ship,* 409 S.W.3d at 109. Consequently, the summary judgment rendered in Deutsche Bank's favor is void. *See In re United Servs. Auto. Ass'n,* 307 S.W.3d at 309 ("A judgment is void if rendered by a court without subject-matter jurisdiction."); *In re CC & M Garza Ranches Ltd. P'ship,* 409 S.W.3d at 109 (judgment rendered by district court when statutory probate court had exclusive jurisdiction over related actions would be void).

We sustain King's second and third issues. Because King's first issue would not entitle her to any relief greater than we are already granting, we do not reach her first issue. *See* Tex. R. App. P. 47.1.

Conclusion

We vacate the trial court's judgment and render judgment dismissing the case for want of subject-matter jurisdiction. All pending motions are dismissed as moot.

No. 05-14-01237-CV
Court of Appeals Fifth District of Texas at Dallas

Bloom v. Swango

Decided Oct 5, 2015

No. 05-14-01237-CV

10-05-2015

MICHAEL BLOOM, Appellant v. SANDRA M. SWANGO, Appellee

Opinion by Justice Fillmore

On Appeal from the Probate Court No. 3 Dallas County, Texas
Trial Court Cause No. PR-14-01380-3

MEMORANDUM OPINION

Before Justices Fillmore, Stoddart, and Richter[1]

Opinion by Justice Fillmore

[1] The Hon. Martin Richter, Justice, Assigned.

Michael Bloom appeals the probate court's judgment declaring heirship, arguing in his first two issues that the probate court did not have jurisdiction to make a determination of heirship because Sandra M. Swango failed to allege and prove all the required statutory elements. In his third issue, Bloom contends that, because the probate court did not have jurisdiction, the probate court's judgment is void. We affirm the probate court's judgment declaring heirship.

Background

Bloom and Swango's mother, Clarice Bloom (the Decedent), died on January 31, 2014. Swango filed an
2 application for letters of dependent administration and for a determination of *2 heirship. Bloom filed a motion to dismiss the application on May 29, 2014, asserting the probate court lacked subject-matter jurisdiction. Bloom specifically argued Swango failed to allege the Decedent owned or was entitled to property in this state "at the time of death," and the deficiency could not be corrected because the Decedent "transferred all her assets before death."

On July 2, 2014, the day Swango's application was set for hearing, Bloom filed an "Opposition to Application for Dependent Administration and Issuance of Letters of Administration." "[I]n view of the efiling this morning" of the opposition to an administration, the probate court continued Swango's application for dependent administration and issuance of letters of administration and transferred that matter to the court's contested case docket. The probate court proceeded to hear Swango's application for a determination of heirship.

The evidence at the hearing established the Decedent had been married only once, her husband had predeceased her, Bloom and Swango were her only children, and she died without having executed a will. Swango answered affirmatively when asked if she contended the Decedent's estate owned both personal and real property and that an administration was necessary to collect the assets of the estate and distribute them to the Decedent's heirs. On cross-examination, Swango testified the estate owned real property located at 6747 Hillwood in Dallas, as well as personal property. Swango agreed she was told the Decedent had transferred her real property to Bloom, but believed that "may not exactly be the case." The probate court signed a judgment, declaring Bloom and Swango to be the Decedent's heirs and that each were entitled to a fifty percent share of the property of the estate.

Bloom filed a motion to set aside the judgment determining heirship and dismiss the case or, alternatively, a motion for new trial, asserting the probate court did not have jurisdiction because Swango had failed to allege, and the evidence at the hearing failed to establish, that the Decedent owned or was entitled to property at "the
3 time of death." In a supplement to the *3 motion, Bloom provided the probate court with a May 6, 2013 deed and a May 6, 2013 conveyance and assignment of property, both made pursuant to section 5.041 of the property code, signed by the Decedent that transferred all of her real and personal property, other than her interest in a family trust, to Bloom upon her death. Swango responded that a determination of heirship was a probate proceeding over which the probate court had jurisdiction and she had pleaded and proved the Decedent owned property at the time of death. The probate court overruled Bloom's motion, and Bloom appealed the judgment declaring heirship. *See* TEX. EST. CODE ANN. § 202.202 (West 2014) (judgment in proceeding to declare heirship is final judgment that may be appealed within same time limits and in same manner as other judgments in probate matters).

Standard of Review

Whether a court has subject matter jurisdiction is a question of law that we review de novo. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 502 (Tex. 2010); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). A plea to the jurisdiction is a dilatory plea that challenges the trial court's subject matter jurisdiction. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 149 (Tex. 2012); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).[2] It is used to defeat a cause of action without regard to whether the claims asserted have merit. *Bland Indep. Sch. Dist.*, 34 S.W.3d at 554. The claimant has the burden to allege facts that affirmatively demonstrate the trial court has subject matter jurisdiction. *Heckman*, 369 S.W.3d at 150; *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *Haga v. Thomas*, 409 S.W.3d 731, 736
4 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). A *4 plea to the jurisdiction can challenge the sufficiency of the claimant's pleadings or the existence of necessary jurisdictional facts. *See Miranda*, 133 S.W.3d at 226-28.

> 2 Although Bloom raised his jurisdictional challenge through a motion to dismiss and a motion for new trial, the standard of review is the same regardless of the procedural vehicle used. *See Bland Indep. Sch. Dist.*, 34 S.W.3d at 554 (challenge to jurisdiction may be made through plea to the jurisdiction or other procedural vehicle).

When the plea challenges the claimant's pleadings, we determine whether the claimant has pleaded facts that affirmatively demonstrate the trial court's jurisdiction, construing the pleadings liberally and in favor of the claimant. *Miranda*, 133 S.W.3d at 226; *Haga*, 409 S.W.3d at 736. If the pleadings affirmatively negate jurisdiction, the plea should be granted. *Heckman*, 369 S.W.3d at 150. If the pleadings do not contain enough facts to demonstrate the propriety of jurisdiction, but do not affirmatively demonstrate incurable defects in

jurisdiction, the claimant should be afforded the opportunity to amend. *Miranda*, 133 S.W.3d at 226-27. But if the pleadings affirmatively negate the existence of jurisdiction, the plea may be granted without giving the claimant an opportunity to amend. *Id*. at 227.

The plea to the jurisdiction standard generally mirrors that of a traditional motion for summary judgment. *Id*. at 228. When the plea challenges jurisdictional facts, we "'consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised,' even where those facts may implicate the merits of the cause of action." *City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009) (quoting *Miranda*, 133 S.W.3d at 227). If the evidence creates a fact question as to the jurisdictional issue, then the fact-finder will decide that question. *Id*. (citing *Miranda*, 133 S.W.3d at 227-28). "However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law." *Id*. (quoting *Miranda*, 133 S.W.3d at 228). When reviewing the evidence, we must "'take as true all evidence favorable to the nonmovant' and 'indulge every reasonable inference and resolve any doubts in the nonmovant's favor.'" *Id*. (quoting *Miranda*, 133 S.W.3d at 228). *5

Analysis

In his first two issues, Bloom contends the probate court did not have jurisdiction over the application to determine heirship because Swango failed to adequately plead, and the evidence failed to establish, that the Decedent owned or was entitled to property at the time of death. We construe Bloom's arguments as challenging both Swango's pleadings and the jurisdictional facts.

Applicable Law

The Texas Constitution does not specifically provide for probate courts, but generally grants the Legislature authority to create courts and prescribe their jurisdiction. *See* TEX. CONST. art. V, §§ 1, 8; *Stauffer v. Nicholson*, 438 S.W.3d 205, 214 (Tex. App.—Dallas 2014, no pet.). Pursuant to this authority, the Legislature established the Dallas County Probate Court Number 3, the probate court in this case. *See* TEX. GOV'T CODE ANN. § 25.0591(d)(3) (West 2004); *see also* TEX. EST. CODE. ANN. § 22.007(c) (West 2014) (statutory probate court is a "court created by statute and designated as a statutory probate court" under chapter 25 of government code). Although a statutory probate court is a court of limited jurisdiction, *see In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 302-03 (Tex. 2010), it has exclusive jurisdiction over all "probate proceedings." TEX. EST. CODE ANN. § 32.005(a) (West 2014).[3] A "probate proceeding" includes the issuance of letters of administration and a determination of heirship. *Id*. § 31.001(2), (3). The statutory probate court also has jurisdiction of all matters related to the probate proceeding, *id*. § 32.001(a), including an action for trial of title to real property or for right of property that is estate property. *Id*. § 31.002(a)(5), (6), (c)(1). *6

[3] A statutory probate court has concurrent jurisdiction with the district court in certain actions not relevant to this appeal. *See* TEX. EST. CODE ANN. § 32.007 (West 2014).

A statutory probate court is authorized to determine, through a proceeding to declare heirship,

> (1) the persons who are a decedent's heirs and only heirs; and
>
> (2) the heirs' respective shares and interests under the laws of this state in the decedent's estate or, if applicable, in the trust.

Id. § 202.001; *see also id*. § 22.007(a)(2) (the term "court" as used in estates code includes statutory probate court). A statutory probate court may conduct a proceeding to declare heirship when a person dies intestate owning or entitled to property in this state and there has been no administration in this state of the person's

estate. *Id*. § 202.002(1). As relevant to Bloom's complaints on appeal, the application to declare heirship is required to state a general description of all property belonging to the decedent's estate or held in trust for the benefit of the decedent. *Id*. § 202.005(7).

Sufficiency of Pleadings

In his first issue, Bloom asserts the probate court did not have jurisdiction because Swango's application for determination of heirship failed to allege the Decedent owned or was entitled to property "at the time of death," as required by section 202.002 of the estates code, and failed to provide a general description of the property alleged to be owned by the Decedent, as required by section 202.005 of the estates code.

In her application for determination of heirship, Swango pleaded the Decedent "owned real and personal property," described the property "generally as real property, furniture, personal effects, and other miscellaneous property with a probable value in excess of $10,000," and stated a necessity existed for an administration in order to partition the estate among the distributees. The application requested that the probate court determine "who are the heirs of the Decedent" and appoint Swango as the administrator of the Decedent's
7 estate. *7

Bloom asserts Swango's pleadings alleged only the Decedent owned property "at some time," rather than "at the time of death." Texas follows a "fair notice" standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy, and what type of evidence might be relevant. *Low v. Henry*, 221 S.W.3d 609, 612 (Tex. 2007); *see also* TEX. R. CIV. P. 45.[4] Pleadings must give fair notice of the claim asserted and the relief sought to provide the opposing party with enough information to enable him to prepare a defense. *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015). Pleadings are sufficient if a cause of action may be reasonably inferred from what is specifically stated, even if an element of the cause of action is not specifically alleged. *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993) (op. on reh'g); *see also Lipsky*, 460 S.W.3d at 590. In the absence of special exceptions, the petition should be construed liberally in favor of the pleader. *Boyles*, 855 S.W.2d at 601; *Bever Props., LLC v. Jerry Huffman Custom Builder, L.L.C.*, No. 05-13-01519-CV, 2015 WL 4600347, at *14 (Tex. App.—Dallas July 31, 2015, no pet.) (mem. op.). However, a court may not use a liberal construction of the petition as a license to read into the petition a claim it does not contain. *Bever Props., LLC*, 2015 WL 4600347, at *14; *Holden v. Holden*, 456 S.W.3d 642, 650 (Tex. App.—Tyler 2015, no pet.).

> 4 The rules of civil procedure apply in probate matters to the extent they do not differ from the procedure established by the estates code. *See Bank of Tex., N.A., Trustee v. Mexia*, 135 S.W.3d 356, 362 (Tex. App.—Dallas 2004, pet. denied); *see also Thomas v. Whaley*, 561 S.W.2d 526, 529 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.) (applying Texas Rule of Civil Procedure 45 to probate matter).

Swango's petition as a whole placed Bloom on notice that Swango was seeking a declaration of heirship following the Decedent's death in order to distribute property owned by the Decedent to her heirs. We conclude that, construing the pleadings liberally and in favor of Swango, Swango pleaded facts that affirmatively demonstrate the probate court's jurisdiction over the application for determination of heirship. *See Estate of Maxey*, 559 S.W.2d 458, 461 (Tex. Civ. App.—Texarkana, 1977, writ ref'd n.r.e.) (pleadings seeking
8 determination of *8 heirship were sufficient when they "show[ed] such facts as would indicate that the cause of action was one over which the county court had jurisdiction, that is, an action to declare heirship); *see also* TEX. EST. CODE ANN. §§ 32.005, 31.001(3). We resolve Bloom's first issue against him.

Jurisdictional Facts

In his second issue, Bloom contends Swango failed to establish the jurisdictional fact that the Decedent owned or was entitled to property at the time of her death. In support of his argument, Bloom relies heavily on *Jansen v. Fitzpatrick*, 14 S.W.3d 426, 432 (Tex. App.—Houston [14th Dist.] 2000, no pet.), in which the court of appeals noted that "for a court to have jurisdiction to determine heirship, the estate must own real property, or if there is none, personal property, in that county." Because we conclude, under the appropriate standard of review, there was sufficient evidence to raise an issue of disputed fact regarding whether the Decedent owned or was entitled to property at the time of her death, we need not determine if a decedent's ownership of or entitlement to property at the time of death is a jurisdictional fact on which the claimant must offer evidence before a statutory probate court has jurisdiction to proceed with a proceeding to declare heirship. *See Estate of Maxey*, 559 S.W.2d at 461.[5]

[5] In *Estate of Maxey*, the court of appeals concluded it was not necessary for the applicants seeking a determination of heirship to prove the decedent owned or claimed an interest in property at the time of his death before the county court could declare the heirship of the decedent. *Estate of Maxey*, 559 S.W.3d at 462. In *Estate of Maxey*, however, a trespass to try title suit involving the same real property as was at issue in the proceeding to determine heirship was filed in the district court prior to the filing of the application to determine heirship in the county court. *Id*. at 460. The district court, therefore, had jurisdiction to proceed not only with the trespass to try title action, but also with a determination of heirship. *Id*. at 460. The party opposing the determination of heirship did not seek to abate the county court proceeding until the district court concluded its proceedings. *Id*. at 461. The county court made a determination of heirship, but refused to find the decedent died owning or being entitled to any real property. *Id*. The court of appeals concluded that, because the district court retained jurisdiction over the title dispute, requiring the petitioners to prove title to the real property in the county court would be a "useless thing" and it was sufficient that the application to determine heirship stated the petitioners were claiming to be the owners of the decedent's estate and the decedent owned the property described in the application. *Id*. at 462. --------

At the hearing on the application to determine heirship, Swango responded affirmatively when asked if she contended the estate owned both personal and real property. She identified the real property owned by the
9 estate by address and added the estate also owned personal property. *9 When asked if she had previously acknowledged the Decedent had deeded her real property to Bloom, Swango responded affirmatively, but stated she had learned additional information that made her believe the information was not accurate. Bloom subsequently filed a motion for new trial and provided the probate court with (1) a deed by which the Decedent conveyed the real property at 6747 Hillwood Lane to Bloom at the time of her death, and (2) a conveyance and assignment by which the Decedent conveyed her personal property, other than her interest in a family trust, to Bloom at the time of her death. At the hearing on the motion for new trial, the probate court indicated it understood the issue was whether the Decedent was competent to sign the deed and the assignment and stated that issue would have to be litigated. *See Jansen*, 14 S.W.3d at 432 (right to set aside a deed based on grantor's incompetency was a "chose in action" constituting a personal property right of decedent sufficient to support an application for declaration of heirship).

Viewing the evidence in the light most favorable to Swango, and indulging every reasonable inference and resolving any doubts in Swango's favor, as the applicable standard of review requires, we conclude there is sufficient evidence to raise a disputed issue of fact as to whether the Decedent owned or was entitled to property at the time of her death. Accordingly, the probate court did not err by finding it had jurisdiction over Swango's application for determination of heirship. We resolve Bloom's second issue against him.

Based on our resolution of his first two issues, we need not consider Bloom's third issue in which he argues the probate court's judgment declaring heirship is void because the probate court lacked jurisdiction over the
10 application to determine heirship. *See* TEX. R. APP. P. 47.1. *10

We deny Swango's request for sanctions pursuant to rule of appellate procedure 45 and affirm the trial court's judgment.

/Robert M. Fillmore/

ROBERT M. FILLMORE

JUSTICE

11 141237F.P05 *11

JUDGMENT

On Appeal from the Probate Court No. 3, Dallas County, Texas, Trial Court Cause No. PR-14-01380-3. Opinion delivered by Justice Fillmore, Justices Stoddart and Richter participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED.**

It is **ORDERED** that appellee Sandra M. Swango recover her costs of this appeal from appellant Michael Bloom.

No. 04-13-00518-CV
Fourth Court of Appeals San Antonio, Texas

Davis v. Merriman

Decided Mar 4, 2015

No. 04-13-00518-CV No. 04-13-00875-CV

03-04-2015

Sandra Garza DAVIS f/k/a Sandra C. Saks and Landen Saks, Appellants v. Lauren Saks MERRIMAN and Marcus P. Rogers, Interim Trustee, Appellees Sandra SAKS, Margaret Landen Saks, and Lee Nick McFadin III Appellants v. Lauren SAKS a/k/a Gloria Lauren Nicole Saks and Marcus P. Rogers, Interim Trustee, Appellees

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Opinion by: Karen Angelini, Justice

MEMORANDUM OPINION

From the Probate Court No. 1, Bexar County, Texas
Trial Court No. 2011-PC-3466
Honorable Polly Jackson Spencer, Judge Presiding
Opinion by: Karen Angelini, Justice Sitting: Karen Angelini, Justice Rebeca C. Martinez, Justice Jason Pulliam, Justice AFFIRMED IN PART, DISMISSED FOR LACK OF JURISDICTION IN PART

In these consolidated appeals, the appellants, Margaret Landen Saks and her mother, Sandra C. Saks, challenge
2 a judgment confirming an arbitration award and an order in aid of *2 enforcement of judgment. The appellees, Lauren Saks and Marcus P. Rogers, urge us to affirm the judgment confirming the arbitration award and to dismiss for lack of jurisdiction the appeal from the order in aid of enforcement of judgment. We affirm the judgment confirming the arbitration award, but dismiss for lack of jurisdiction the appeal from the order in aid of enforcement of judgment.

BACKGROUND

These appeals arise from disputes concerning an inter vivos trust. In 1991, Sandra created the trust for the benefit of her children, "Gloria Lauren Nicole Saks ['Lauren'] and Margaret Landen Saks Merriman ['Landen'] and any other children later born or legally adopted . . . by Sandra Saks ['Sandra']." In accordance with the terms of the trust agreement, Sandra's sister, Diane Flores, was appointed trustee. Lauren and Landen are the trust's sole beneficiaries.

In August 2011, Lauren filed suit against Flores, the trustee, and Sandra, the settlor, in a statutory probate court in Bexar County, Texas. The suit, which alleged breaches of fiduciary duty and failures to comply with the trust agreement, sought an accounting and a constructive trust. Lauren also sought Flores's removal as trustee. On December 28, 2011, the probate court appointed Marcus P. Rogers as interim trustee. Thereafter, Rogers submitted a report to the probate court in which he concluded that any attempt by Flores to terminate the trust was ineffective.

On April 2, 2012, the parties entered into a mediated settlement agreement ("MSA"). The MSA required the parties to resolve future disputes by mediation and arbitration. Specifically, the MSA provided,

> If one or more disputes arise with regard to the interpretation and/or performance of this Agreement or any of its provisions, including the form of further documents to be executed, the Parties agree to further mediation in an attempt to resolve same with Thomas Smith, the Mediator[] who facilitated this settlement. In the event a dispute arises between the Parties, it is hereby agreed that the dispute shall be referred to Thomas Smith, the Mediator herein, for arbitration in accordance with the applicable United States Arbitration and Mediation Rules of Arbitration. The
>
> 3 *3
>
> arbitrator's decision shall be final and legally binding and judgment may be entered thereon . . . .

On May 8, 2012, the probate court signed an order approving the MSA and authorizing Rogers, the interim trustee, to sign the MSA. However, the order approving the MSA did not dismiss the claims in the underlying suit.

On August 21, 2012, Lauren filed a motion to compel arbitration, claiming that matters regarding the interpretation and performance of the MSA remained unresolved. On September 4, 2012, the probate court, in accordance with the MSA, ordered Sandra, Lauren, Landen, and Rogers to attend mediation and, if necessary, arbitration. The arbitration took place on October 18, 2012. The arbitrator's award ordered Sandra and Flores to execute certain documents conveying to the trust all of their rights, title, and interest in certain property "no later than October 31, 2012."

Sandra filed a motion asking the probate court to vacate the arbitrator's award. The motion was denied. Landen did not ask the probate court to vacate the arbitrator's award.

On May 7, 2013, the probate court signed a final judgment confirming the arbitrator's award. The probate court incorporated the arbitration award into its judgment and entered it as a judgment of the court. The arbitration award ordered Sandra and Landen to execute certain conveyance documents. Sandra and Landen appealed the judgment confirming the arbitrator's award. This appeal was docketed in this court as appellate cause number 04-13-00518-CV.

On November 14, 2013, the trial court signed an order titled, "Order in Aid of Enforcement of Judgment." In this order, the probate court found that Sandra and Landen had failed to comply with the arbitration award and the judgment confirming the arbitration award by failing to execute the conveyance documents as previously ordered, and deemed the documents executed. Sandra and Landen appealed this order. The latter appeal was
4 docketed in this court as appellate cause number 04-13-00875-CV. *4

JUDGMENT CONFIRMING THE ARBITRATION AWARD

An arbitration award is given the same effect as a judgment of last resort and is conclusive as to all matters of fact and law. *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002); *Stieren v. McBroom*, 103 S.W.3d 602, 605 (Tex. App.—San Antonio 2003, pet. denied). We review the trial court's judgment confirming an arbitration award de novo. *Corr. Products Co., Ltd. v. Gaiser Precast Constr.*, 394 S.W.3d 818, 823-24 (Tex. App.—El Paso 2013, no pet.); *GJR Mgmt. Holdings, L.P. v. Jack Raus, Ltd.*, 126 S.W.3d 257, 262 (Tex. App.—San Antonio 2003, pet. denied). In conducting this review, we indulge all reasonable presumptions in favor of

upholding the arbitration award. *Gaiser Precast Constr.*, 394 S.W.3d at 824; *GJR Mgmt. Holdings*, 126 S.W.3d at 262. "Because Texas law favors arbitration, judicial review of an arbitration award is extraordinarily narrow." *E. Texas Salt Water Disposal Co., Inc. v. Werline*, 307 S.W.3d 267, 271 (Tex. 2010).

No one disputes that the arbitration agreement in this case is governed by the Texas Arbitration Act ("TAA"). *See* TEX. CIV. PRAC. & REM. CODE ANN. 171.001-.098 (West 2011). The TAA requires a trial court to confirm an arbitration award upon a party's application unless a party offers grounds for vacating, modifying, or correcting the award. *Callahan & Assoc. v. Orangefield Indep. Sch. Dist.*, 92 S.W.3d 841, 844 (Tex. 2002) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.087 (West 2011)). When no grounds for vacating the award are presented, the trial court "on application of a party, shall confirm the award." TEX. CIV. PRAC. & REM. CODE § 171.087.

Bexar County Probate Courts Nos. 1 and 2 are statutory probate courts. *See* TEX. GOV'T CODE ANN. § 25.0171(c) (West Supp. 2014). Statutory probate courts have jurisdiction over actions by or against a trustee and actions involving inter vivos trusts. *See* TEX. ESTATES CODE ANN. § 32.006 (West 2014). This jurisdiction is concurrent with the jurisdiction of the district courts. *See* TEX. ESTATES CODE ANN. § 32.007 (West 2014). Statutory probate courts also have *5 jurisdiction over other matters, such as probate proceedings. *Stauffer v. Nicholson*, 438 S.W.3d 205, 215 (Tex. App.—Dallas 2014, no pet.).

Jurisdictional Arguments

As a threshold matter, we note the arguments presented by Sandra and Landen are unrelated to any grounds presented in Sandra's motion to vacate the arbitration award.[1] Instead, Sandra and Landen argue the probate court was deprived of subject matter jurisdiction both at the time it compelled arbitration and at the time it rendered judgment confirming the arbitration award.[2] In making these jurisdictional arguments, Sandra and Landen acknowledge that the probate court acquired subject matter jurisdiction over Lauren's suit. However, according to Sandra and Landen, prior to compelling arbitration, the probate court lost subject matter jurisdiction either because (1) the trust had terminated or (2) the probate court's plenary power had expired. In response, Lauren and Rogers argue the probate court did not lose subject matter jurisdiction prior to compelling arbitration or prior to confirming the arbitration award.

[1] Landen filed a motion for new trial but did not file a motion to vacate the arbitration award.

[2] In appellate cause number 04-13-00518-CV, Sandra and Landen state their issues as follows:

1. Did the trial court's plenary power end on June 9, 2012, which was 30 days after the M[ediated] S[ettlement] A[greement] was approved on May 8, 2012?

2. Did the court lack jurisdiction to compel the parties to arbitration pursuant to an [o]rder dated September 5, 2012?

3. Was the arbitration award void because arbitration was commenced pursuant to a void court order rather than pursuant to a petition for arbitration filed in accordance with the United States Arbitration and Mediation Rules of Arbitration as provided in the Mediated Settlement Agreement?

4. Was the trial court's [j]udgment signed on May 7, 2013, approving a void arbitration award also void?

We will address both jurisdictional theories presented by Sandra and Landen. Under their first theory, that the probate court lost subject matter jurisdiction because of the termination of the trust, Sandra and Landen contend
6 that under the language of the trust agreement, Flores, as trustee, *6 was authorized to terminate the trust and distribute the trust assets to the income beneficiaries. They further contend that, on or about December 21, 2011, Flores terminated the trust in accordance with the trust agreement, and the termination deprived the probate court of jurisdiction to compel arbitration.

In response, Lauren and Rogers argue the trust was never terminated. This argument is supported by the record. Both the MSA reached by the parties and the arbitration award are premised on the notion that the trust was not terminated. Additionally, Lauren argues that, even if the trust had been terminated, the probate court would not have been deprived of jurisdiction. According to Lauren, the probate court's jurisdiction was invoked when she filed the underlying suit alleging claims for breach of fiduciary duty and failures to comply with the trust agreement. Lauren contends that even if the trust had been terminated on December 21, 2011, her claims would have survived the termination of the trust, and therefore, the probate court would have retained subject matter jurisdiction. We find Lauren and Rogers's arguments convincing. We conclude that the probate court was not deprived of jurisdiction based on the argument that the trust was terminated.

Under their second theory, Sandra and Landen argue that the order compelling arbitration and the judgment confirming the arbitration award are void because they were signed after the probate court's plenary power expired. This argument is based on the theory that the order approving the MSA constituted rendition of a final judgment and the probate court's jurisdiction ended thirty days after it signed the order approving the MSA.

Mere approval of a settlement agreement does not constitute rendition of judgment. *S & A Rest. Corp. v. Leal*, 892 S.W.2d 855, 858 (Tex. 1995). And, as a general rule, "a judgment issued without a conventional trial is final if and only if either it actually disposes of all claims and parties then before the court, regardless of its
7 language, or it states with unmistakable clarity that it is a *7 final judgment." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192-93 (Tex. 2001). Courts determine whether an order amounts to a final judgment from its language and from the record in the case. *Id*. at 195.

Here, the order approving the MSA provided, in relevant part,

> IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Court approves the Mediated Settlement Agreement attached to the Motion to Approve Settlement Agreement as Exhibit "A;" that Marcus P. Rogers, Interim Trustee of the Saks Children Family Trust or ATFL&L, is authorized to sign the Mediated Settlement Agreement attached to this Motion.

Thus, the order approving the MSA did not dispose of all claims and parties before the probate court, nor did it state with unmistakable clarity that it was a final judgment. *See Lehmann*, 39 S.W.3d at 192-93. Additionally, nothing in the record indicates that the order approving the MSA was a final judgment. Because the MSA was not a final judgment, the probate court's plenary power did not expire thirty days after the probate court signed the order.

The only case cited by Sandra and Landen that arguably supports their jurisdictional arguments is *Goodman v. Summit at West Rim, Ltd.*, 952 S.W.2d 930 (Tex. App.—Austin 1997, no pet.). In *Goodman*, the executor of a decedent's estate filed suit in the probate court to clear title to property owned by the estate. *Id*. at 932. In response, the defendant brought third-party claims against other entities. *Id*. Initially, the probate court exercised its ancillary jurisdiction over the third-party claims. *Id*. However, once matters concerning the estate were settled, the probate court dismissed all of the claims by and against the estate. *Id*. Thereafter, the third-party defendants moved to dismiss the claims against them on the ground that, once the claims involving the estate were settled, the probate court lacked subject matter jurisdiction to consider the ancillary claims. *Id*. The probate court agreed and dismissed the ancillary claims from the probate court. *Id*. The court of appeals upheld the dismissal, noting that the "probate court had discretion to resolve ancillary claims against third parties only to the extent that such claims were necessary to resolve *8 claims within its original jurisdiction. . . . The court's discretion undoubtedly vanished with the dismissal of the estate from the probate proceeding." *Id*. at 934.

Sandra and Landen's reliance on *Goodman* is misplaced. *Goodman* involved the probate court's ancillary jurisdiction over a claim related to a decedent's estate. *Id*. at 933. However, unlike *Goodman*, the present case was not a probate proceeding and it did not involve the exercise of ancillary jurisdiction. *See* TEX. ESTATES CODE ANN. § 22.029 (West 2014) (defining probate proceedings as proceedings or matters relating to a decedent's estate). Instead, the present case was an action against a trustee and it involved an inter vivos trust. *See* TEX. ESTATES CODE ANN. § 32.006; *Nicholson*, 438 S.W.3d at 214-15 (acknowledging that a statutory probate court has jurisdiction not only over matters against a trustee or involving an inter vivos trust, but also over probate proceedings). Thus, *Goodman* is inapplicable to the present case.

We conclude the probate court had subject matter jurisdiction at the time it compelled arbitration and at the time it rendered judgment confirming the arbitration award.[3] We, therefore, overrule Sandra and Landen's arguments that the order compelling arbitration and the judgment confirming the arbitration award were void.

[3] We further note that the Texas Arbitration Act confers jurisdiction on trial courts to confirm arbitration awards at any time. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.082(a) (West 2011) ("The filing with the clerk of the court of an application for an order under this chapter, including a judgment or decree, invokes the jurisdiction of the court."); *see also* §§ 171.081; 171.087 (West 2011).

Remaining arguments

Rule 38.1(i) of the Texas Rules of Appellate Procedure requires a brief to contain a "clear and concise argument for the contentions made with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). An appellate issue unsupported by argument or citation to the record or by appropriate legal authority presents nothing for our review. *Blankinship v. Brown*, 399 S.W.3d 303, 307 (Tex. App.—Dallas 2013, pet. denied). "Failure to cite legal authority or to *9 provide substantive analysis of the legal issues presented results in waiver of the complaint." *In re Estate of Taylor*, 305 S.W.3d 829, 836 (Tex. App.—Texarkana 2010, no pet.). As the reviewing appellate court, we have neither a duty nor a right to perform an independent review of the record and applicable law to determine if there was error. *Valadez v. Avitia*, 238 S.W.3d 843, 845 (Tex. App.—El Paso 2007, no pet.).

In their briefs, Sandra and Landen attempt to raise several other issues concerning the order compelling arbitration and the judgment confirming the arbitration award. However, the arguments made in support of these issues are wholly unsupported by citation to appropriate legal authority. We, therefore, conclude that Sandra and Landen's remaining issues challenging the judgment confirming the arbitration award present nothing for our review. *See* TEX. R. APP. P. 38.1(i).

ORDER IN AID OF ENFORCEMENT OF JUDGMENT

Next, Sandra and Landen challenge the probate court's order in aid of enforcement of judgment.[4] This order states that Sandra and Landen failed to execute certain conveyance documents as ordered in the judgment confirming the arbitration award and deems these documents executed "by operation of law."

[4] Lee Nick McFadin III also filed a notice of appeal in appellate cause number 04-13-00875-CV. Rogers has moved to dismiss McFadin from this appeal because McFadin was not a party below. Because we conclude that we have no jurisdiction over an appeal from the order in aid of enforcement of judgment, Rogers's motion to dismiss McFadin is denied as moot.

Generally, post-judgment orders made for the purpose of carrying into effect a prior judgment are not subject to appeal because they are not final judgments. *Wagner v. Warnasch*, 295 S.W.2d 890, 893 (Tex. 1956); *Walter v. Marathon Oil Corp.*, 422 S.W.3d 848, 855 (Tex. App.—Houston [14th Dist.] 2014, no pet.). A writ of execution and orders incident to such a writ are generally not appealable. *Qualia v. Qualia*, 37 S.W.3d 128, 129 (Tex. App.—San Antonio 2001, no pet.). However, there are exceptions to this rule. A few types of post-judgment orders, such as *10 those in the nature of a mandatory injunction, are appealable. *Walter*, 422 S.W.3d at 855; *id.*; *see Kennedy v. Hudnall*, 249 S.W.3d 520, 523-24 (Tex. App.—Texarkana 2008, no pet.) (concluding a particular turnover order was not in the nature of a mandatory injunction and therefore was not appealable).

Here, Lauren argues that the general rule applies in this case, and therefore, the appeal from the order in aid of enforcement of judgment must be dismissed. We agree that the order in aid of enforcement of judgment is not an appealable order. It is not in the nature of a mandatory injunction; it merely carries into effect the judgment confirming the arbitration award. Thus, it is not the type of post-judgment order that is reviewable by appeal. The appeal from the order in aid of enforcement of judgment is therefore dismissed for lack of jurisdiction. *See Walter*, 422 S.W.3d at 855-56 (dismissing appeal for lack of jurisdiction when challenged order did not fall within the limited class of appealable, post-judgment orders); *Qualia*, 37 S.W.3d at 129 (dismissing for lack of jurisdiction appeal from an order that simply provided for enforcement of a judgment in Mexico).

DAMAGES FOR FRIVOLOUS APPEAL

In a cross-issue, Rogers urges this court to impose sanctions against Sandra and Landen for filing frivolous appeals. Rule 45 of the Texas Rules of Appellate Procedure allows an appellate court, after a determination that an appeal is frivolous, to award to the prevailing party "just damages." TEX. R. APP. P. 45. Typically, appellate courts award the amount of attorney's fees incurred by the appellee as proven by testimony or affidavit. *Walker v. Hardin*, No. 04-03-00864-CV, 2005 WL 899926, at *2 (Tex. App.—San Antonio April 20, 2005, no pet.); *see Smith v. Marshall B. Brown, P.C.*, 51 S.W.3d 376, 382 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (awarding $5,000.00 in appellate attorney's fees which were proven by affidavit). Here, however, Rogers has
11 not provided an affidavit or other proof of his attorney's fees and expenses involved in *11 responding to these appeals. We, therefore, deny Rogers's request for sanctions against Sandra and Landen for filing frivolous appeals. *See Walker*, 2005 WL 899926, at *2 (declining to award appellee attorney's fees for a frivolous appeal in the absence of proof).

CONCLUSION

The judgment confirming the arbitration award is affirmed. The appeal from the order in aid of enforcement of judgment is dismissed for lack of jurisdiction.

Karen Angelini, Justice

NO. 01-13-01077-CV
Court of Appeals of Texas, Houston (1st Dist.).

Warren v. Weiner

462 S.W.3d 140 (Tex. App. 2015)
Decided Feb 5, 2015

NO. 01–13–01077–CV

2015-02-05

Katherine R. Warren, as Next Friend of M.H.W., a Minor, Beneficiary of the M.H.W. 2000 Trust, Appellant v. Andy I. Weiner, Trustee of the M.H.W. 2000 Trust, Appellee

Carol A. Cantrell , Meredith McIver , Cantrell & Cantrell, PLLC, Houston, TX, for Appellant. Sarah Patel Pacheco , Kathleen Tanner Beduze , C. Henry Kollenberg , Crain, Caton & James, P.C., Houston, TX, for Appellee. Panel consists of Chief Justice Radack and Justices Bland and Huddle.

Jane Bland

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On Appeal from the Probate Court No. 4, Harris County, Texas, Trial Court Case No. 425578
Carol A. Cantrell, Meredith McIver, Cantrell & Cantrell, PLLC, Houston, TX, for Appellant. Sarah Patel Pacheco, Kathleen Tanner Beduze, C. Henry Kollenberg, Crain, Caton & James, P.C., Houston, TX, for Appellee.
Panel consists of Chief Justice Radack and Justices Bland and Huddle.

OPINION

Jane Bland, Justice

In probate court, Katherine Warren petitioned to modify a trust, granted for the benefit of her minor son. The probate court dismissed her suit for lack of subject matter jurisdiction because the trustee parents are divorced and their obligations to each other and their children were defined in family law proceedings. Because the probate court had jurisdiction over Warren's claims, we reverse.

Background

In 1999, husband and wife Andy Weiner and Katherine Warren had their third son, M.H.W. The next year, they created an irrevocable trust, calling it the M.H.W.2000 Trust, for M.H.W.'s benefit. They named themselves as co-trustees.

Weiner and Warren divorced in 2012. Their divorce decree in part addressed the M.H.W.2000 Trust and similar trusts Weiner and Warren had created for their other children, as follows:

IT IS ORDERED that the following children's trusts are held in irrevocable trusts, which shall continue as written, and that each party will take any and all necessary steps to provide full co-trustee ownership and control of each such account including the placing of such accounts in a deposit and withdrawal agreement requiring both co-trustees to disburse funds....

Since their divorce, Weiner and Warren have disagreed over various aspects of the management of the children's trusts; each has accused the other of violating the trusts' terms.

In August 2013, Weiner petitioned in family court for a modification of the parent-child relationship between Weiner and two of his children; by then, the third child had attained the age of majority. A month later, Warren commenced this action in probate court, requesting that the M.H.W.2000 Trust be terminated and the trust estate distributed to a Uniform Transfers to Minors Act account, with Warren as its sole custodian. Alternatively, she asked the probate court to remove Warren and Weiner as trustees and appoint an independent trustee. She filed her original petition in her capacity as co-trustee of the M.H.W. 2000 Trust, but later amended her petition to assert claims only as next friend for M.H.W.*143

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In response, Weiner amended his petition in the family court case to request that the family court appoint him the exclusive manager of the children's estates, including their trusts. He also filed a plea to the jurisdiction, a plea in abatement, and an answer in the probate court proceeding. Weiner argued that the probate court lacked subject-matter jurisdiction over Warren's suit because the family court has continuing, exclusive jurisdiction over Warren's claims. In the alternative, he argued that the probate proceeding should be abated until the family court ruled on his petition to modify his parent-child relationship with his minor sons. The probate court granted the jurisdictional plea, and Warren appeals from its order.

Standard of Review

"Whether a court has subject matter jurisdiction is a question of law that we review de novo." *City of Dallas v. Carbajal,* 324 S.W.3d 537, 538 (Tex.2010); *see alsoTex. Parks & Wildlife Dep't v. Sawyer Trust,* 354 S.W.3d 384, 388 (Tex.2011). In reviewing a trial court's order on a plea to the jurisdiction, we examine only the plaintiff's pleadings and the evidence pertinent to the jurisdictional inquiry. *State v. Holland,* 221 S.W.3d 639, 642–43 (Tex.2007) (citing *Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 225–26 (Tex.2004)). We construe the pleadings liberally in favor of the plaintiff. *Id.*

"[T]he interpretation of a statute [is] a matter of law," which we review de novo. *Enter. Leasing Co. of Hous. v. Harris Cnty. Toll Rd. Auth.,* 356 S.W.3d 85, 89 (Tex.App.–Houston [1st Dist.] 2011, no pet.); *see alsoState v. Heal,* 917 S.W.2d 6, 9 (Tex.1996).

Applicable Law

The Texas Family Code confers continuing, exclusive jurisdiction in the family courts over matters relating to the parent-child relationship. Tex. Fam. Code Ann. § 155.001(a) (West 2012) ("Except as otherwise provided by this section, a court acquires continuing, exclusive jurisdiction over the matters provided for by this title in connection with a child on the rendition of a final order."). A family court's jurisdiction remains exclusive over related later-filed proceedings: "If a court of this state has acquired continuing, exclusive jurisdiction, no other court of this state has jurisdiction of a suit with regard to that child," with exceptions not relevant here. *Id.* § 155.001(c). Section 101.032 of the Family Code provides that a suit affecting the parent-child relationship is a suit "in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is requested." Tex. Fam. Code Ann. § 101.032; *seeChalu v. Shamala,* 125 S.W.3d 737, 738 (Tex.App.–Houston [1st Dist.] 2003, no pet.).

In contrast, trusts are regulated by the Estates Code. "In a county in which there is a statutory probate court, the statutory probate court has jurisdiction of: (1) an action by or against a trustee; [and] (2) an action involving an inter vivos trust, testamentary trust, or charitable trust...." Tex. Est.Code Ann. § 32.006 (West Supp.2014). "A statutory probate court has concurrent jurisdiction with the district court in: ... (2) an action by or against a trustee; [or] (3) an action involving an inter vivos trust...." *Id.* § 32.007 (West Supp.2014).

Exclusive Jurisdiction

Thus, the administration of an inter vivos trust like this one generally is a matter within the jurisdiction of a probate court. *Id.* The issue before us is whether the family court obtained *exclusive* jurisdiction over the
144 management of the *144 M.H.W.2000 Trust pursuant to the provisions of the 2012 divorce decree. We conclude that it did not. Although the Family Code confers continuing, exclusive jurisdiction upon a family court "over the matters provided for [in the statute] in connection with a child on the rendition of a final order," that jurisdiction is exclusive only insofar as the Family Code is implicated. *See*Tex. Fam.Code Ann. § 155.001(a).

The fact that Weiner and Warren agreed to the terms of the divorce decree, which provided that the trusts would "continue as written," does not deprive the probate court of subject-matter jurisdiction. Parties may neither confer nor waive jurisdiction by agreement. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 445–46 (Tex.1993). Nor does the divorce decree purport to govern administration of the trust. Instead, the decree expressly acknowledges that the trust agreement governs, and requires the parent to continue to seek appointment as co-trustees.

Weiner suggests that the administration of the trust is a child-support issue and thus a dispute about it falls within the exclusive jurisdiction of the family court. We disagree. Although the trust was created for M.H.W.'s benefit, nothing in either the trust agreement or in the divorce decree provides that the trust is to be used as child support. Neither the trust nor the decree requires any trust distributions before M.H.W. reaches the age of 30.

Both parties rely on *Barrientos v. Nava,* 94 S.W.3d 270 (Tex.App.–Houston [14th Dist.] 2002, no pet.), in which our sister court considered whether the family court had continuing, exclusive jurisdiction over a suit to recover the benefits of life insurance policies. 94 S.W.3d at 275–76. The *Barrientos* court held that the family court had jurisdiction over the mother's suit against the children's grandmother because the life insurance policies replaced child support that was lost when the father violated the divorce decree. *Id.* at 278. The court further held that that judicial economy and practical considerations made it appropriate for the family court to hear additional claims indirectly related to the support obligation. *Id.* at 279. "As a court of general jurisdiction in which family matters merely take precedence, the family district court was clearly permitted to hear and decide the trust issues in [the] case." *Id.* Nothing *in Barrientos* suggests that the family court had *exclusive* jurisdiction over claims involving funds not designated as child support; rather, the court held that the family court had general jurisdiction to hear such claims.

The trust instrument, not the divorce decree, governs the administration of the trust's assets; a modification to the terms of the trust is not a child-support matter exclusive to the family court's jurisdiction. Because the administration of the M.H.W.2000 Trust is not a child-support matter as the Family Code defines it, the probate court had jurisdiction to hear the dispute. *Compare*Tex. Fam.Code Ann. §§ 155.001(a) (scope of family court's exclusive jurisdiction), 155.003(a) (exercise of that jurisdiction) *with*Tex. Est.Code Ann. §§ 32.006 (scope of probate court's jurisdiction), 32.007 (scope of concurrent jurisdiction of probate and district courts).

Dominant Jurisdiction

The trial court's order did not abate this suit in favor of the family court. Instead, the court granted the plea to the jurisdiction and dismissed Warren's claims. "The general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts." *Curtis v. Gibbs,* 511 S.W.2d 263, 267 (Tex.1974). "Any subsequent suit involving the same parties and the same
145 controversy *145 must be dismissed if a party to that suit calls the second court's attention to the pendency of the prior suit by a plea in abatement." *Id.* To obtain a dismissal of the probate suit on the basis that the family court had acquired dominant jurisdiction, Weiner must show that (1) the family court proceeding commenced first, (2) that suit is still pending, (3) the same parties are involved, and (4) the controversies are the same. *In re Sims,* 88 S.W.3d 297, 303 (Tex.App.–San Antonio, orig. proceeding); *see alsoWyatt v. Shaw Plumbing Co.,* 760 S.W.2d 245, 247–48 (Tex.1988). "It is not required that the exact issues and all the parties be included in the first action before the second is filed, provided that the claim in the first suit may be amended to bring in all necessary and proper parties and issues." *Wyatt,* 760 S.W.2d at 247. The test is whether there is an inherent interrelation of the subject matter in the two suits. *Id.; see alsoDallas Fire Ins. Co. v. Davis,* 893 S.W.2d 288, 292 (Tex.App.–Fort Worth 1995, orig. proceeding).

In urging that we abate the probate proceeding, Weiner argues that the probate claims relate back to the original divorce proceeding under Section 16.068 of the Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem.Code Ann. § 16.068 (West 2012). But a pleading does not relate back if "the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence." *Id.* The parties' trust-management claims do not relate back to the original family court petition under Section 16.068 because they arose post-divorce. Nor did M.H.W. appear as a party, as required by law in a suit concerning a trust. *See*Tex. Prop. Code Ann. § 115.011 (West 2012) (beneficiary of trust is necessary party to proceeding concerning trust, including proceeding to appoint or remove trustee).

In contrast to this probate court proceeding, the family court suit was a divorce proceeding between Weiner and Warren in their individual capacities and a suit affecting the parent-child relationship under the Family Code. The children and the trusts were not parties to the divorce, nor did Weiner and Warren appear in their capacities as co-trustees or as next friends of M.H.W. While the family court appointed an amicus attorney to protect the interests of M.H.W. and another of the children, the amicus did not represent M.H.W. Rather, the role of amicus attorney "is to provide legal services necessary to assist the court in protecting a child's best interests rather than to provide legal services to the child." Tex. Fam.Code Ann. § 107.001(1) (West 2012).

Nor does Weiner's amended petition in family court relate back to his original petition. The original petition made no mention of the trust-administration dispute, and it was only after Warren filed suit in family court over that dispute that Weiner asserted claims related to administration of the trusts. The two suits were not so inherently interrelated as to confer dominant jurisdiction over the trust claims on the family court. *SeeWyatt,* 760 S.W.2d at 247; *Dallas Fire Ins.,* 893 S.W.2d at 292.

Given these differences between the family court and probate court proceedings, Weiner did not meet his burden to demonstrate facts sufficient to support his plea in abatement and dismissal. Accordingly, the probate court erred in dismissing Warren's suit on the basis of a pending proceeding in which another court already had acquired dominant jurisdiction.

146 * *146

Conclusion*

Because the Probate Code, and not the Family Code, governs administration of the M.H.W.2000 Trust, we hold that a suit regarding the management and proposed dissolution of the trust does not fall within the exclusive jurisdiction of the family court. We reverse the order of dismissal and remand the case to the probate court for further proceedings.

We express no opinion on whether the probate court could have stayed, rather than dismissed, the probate court proceeding pending resolution of the family court suit regarding whether Weiner or Warren have violated the divorce decree in their administration of the trust.

No. 01-02-00679-CV
Court of Appeals of Texas, First District, Houston

Reliant Energy v. Gonzalez

Decided Sep 6, 2002

No. 01-02-00679-CV

Opinion issued September 6, 2002

On Appeal from the 113th District Court, Harris County, Texas, Trial Court Cause No. 2002-21820

Panel consists of Justices Mirabal, Taft, and Smith.[8]

[8] The Honorable Jackson B. Smith, Jr., retired Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

EN BANC OPINION

MARGARET GARNER MIRABAL, Justice.

This is an accelerated, interlocutory appeal from the denial of an application for an anti-suit injunction. This case addresses the scope of a statutory probate court's jurisdiction. We reverse.

Factual Background and Procedural History

Jannete Gonzalez is the surviving widow and dependent administrator of the estate of her late husband, Guadalupe Gonzalez, Jr., who was killed August 24, 2001, while working at a Reliant Energy power plant in Houston, Texas. The following time line of events is relevant to the disposition of this case.

> September 28, 2001 — Gonzalez filed a wrongful death and survival lawsuit against Reliant in Hidalgo County probate court, where her husband's estate was being probated.
>
> October 26, 2001 — Reliant filed a motion to transfer venue of the wrongful death and survival suit to Harris County.
>
> December 13, 2001 — Reliant's motion to transfer venue was denied.[1]

[1] Reliant sought mandamus relief from the Corpus Christi Court of Appeals, and its was denied without opinion. *In Re Reliant Energy, Inc*., No. 13-02-00073-CV (Tex.App.-Corpus Christi, February 1, 2002). We note that, as a general rule, non-mandatory venue determinations are not reviewable by mandamus. *In re Missouri Pac. R.R. Co*, 998 W.W.2d 212, 215-16 (Tex. 1999).

> April 29, 2002 — Gonzalez filed in a Harris County district court, a lawsuit that asserted the identical claims and sought the same relief as the previously filed Hidalgo County wrongful death and survival lawsuit.

May 9, 2002 — In Hidalgo County, Gonzalez filed an "administrator's motion to transfer and consolidate" the Harris County lawsuit with the Hidalgo County case, pursuant to Section 5B of the Probate Code.

May 10, 2002 — The probate court set a hearing for Gonzalez's transfer and consolidation motion for June 19, 2002.

May 16, 2002 — Reliant filed an answer to the Harris County lawsuit and asserted a counterclaim asking the court for an anti-suit injunction, which would prevent Gonzalez from prosecuting the Hidalgo County action.

May 16, 2002 — The district court set a hearing on Reliant's request for an anti-suit injunction for June 3, 2002.

May 20, 2002 — Gonzalez amended her motion to transfer and consolidate, advising the Hidalgo County probate court of the upcoming hearing in the Harris County district court.

May 20, 2002 — The Hidalgo County probate court rescheduled the June 19, 2002 hearing for May 30, 2002.

May 22, 2002 — Reliant sought a temporary restraining order in the Harris County district court in order to prevent Gonzalez from proceeding with her motion to transfer and consolidate until after the June 3 temporary injunction hearing in Harris County.

May 23, 2002 — Judge Hanks, sitting as the ancillary judge for the Harris County district courts, granted Reliant's request for a temporary restraining order.[2]

[2] The TRO ordered Gonzalez not to set a hearing on her motion to transfer and consolidate until after the June 3 hearing, it also commanded Gonzalez to contact the Hidalgo County probate court and have the May 30 hearing rescheduled to a later date.

May 23, 2002 — In the Hidalgo County probate court, Reliant filed a motion to abate.

May 28, 2002 — In Hidalgo County, Gonzalez filed a "Request to Pass the May 30, 2002 Hearing on Second Motion to Transfer and Consolidate and Have the Hearing Rescheduled until after June 3, 2002."

May 29, 2002 — Reliant filed a "Motion to Continue Administrator's Motion to Transfer" with the Hidalgo County probate court.

May 30, 2002 — The Hidalgo County probate court held a hearing on Gonzalez's motion to transfer and consolidate as well as Reliant's motion for continuance and abatement. The court signed a "Transfer of Proceeding Order" that transferred and consolidated the Harris County case with the Hidalgo County case.[3] Reliant's motions for continuance and abatement were denied.

[3] Reliant attempted to mandamus the trial judge for signing the transfer order in the Corpus Christi Court of Appeals, but it was denied on July 23, 2002.

June 3, 2002 — Harris County District Court Judge Patricia Hancock held a hearing on Reliant's application for a temporary injunction.

June 26, 2002 — Reliant's request for temporary injunction was denied.

On appeal, Reliant presents the following issue: Did the Harris County district court abuse its discretion in failing to issue a temporary injunction to protect its dominant jurisdiction from identical proceedings in the Hidalgo County probate court and to prevent Gonzalez's attempt to circumvent the anti-forum shopping policies behind the venue statutes?

Anti-suit Injunctions

Texas state courts have the power to restrain persons from proceeding with suits filed in other courts of this state by granting what is called an "anti-suit injunction." *Gannon v. Payne*, 706 S.W.2d 304, 305 (Tex. 1986). The general rule is that, when a suit is filed in a court of competent jurisdiction, in an appropriate case that court is entitled to proceed to judgment and may protect its jurisdiction by enjoining the parties to a suit filed in another court of this state. *Id*. at 305-306.

Standard of Review

The decision to grant or deny an anti-suit injunction is reviewed under an abuse of discretion standard. *Gannon,* 706 S.W.2d at 305. A trial court abuses its discretion when it misapplies the law to the established facts of the case. *See Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241-42 (Tex. 1985).

Conflict

As a general rule, when cases involving the same subject matter are brought in different courts, the court with the first-filed case has dominant jurisdiction and should proceed, and the other case should abate. *Perry v. Del Rio,* 66 S.W.3d 239, 252 (Tex. 2001). This rule applies when both courts *are proper forums* for the suit. *Id*.

In this case, both the Harris County district court and the Hidalgo County probate court had subject matter jurisdiction over Gonzalez's wrongful death claim. *See Palmer v. Coble Wall Trust Co., Inc.,* 851 S.W.2d 178, 182 (Tex. 1992) (probate courts have jurisdiction over wrongful death and survival actions); *Tovias v. Wildwood Properties Partnership, L.P.*, 67 S.W.3d 527, 529 (Tex.App.-Houston [1st Dist.] 2002, no pet.) (holding district courts and probate courts have concurrent subject matter jurisdiction over wrongful death actions, and that **neither court has exclusive jurisdiction**); Tex. Prob. Code Ann. § 5A (c)(1) (Vernon Supp. 2002) ("statutory probate court has concurrent jurisdiction with the district court in all actions . . . by or against a person in the person's capacity as a personal representative. . .").

Under the general venue statute, Harris County is a county of proper venue because Reliant's principal place of business is in Harris County, and Reliant timely asserted its right to be sued in Harris County. *See* Tex. Civ. Prac. Rem. Code Ann. § 15.002 (a) (Vernon Supp. 2002). Hidalgo County is not a county of proper venue under the venue provisions of the Civil Practice and Remedies Code. However, the Hidalgo County probate court ruled that it was the proper forum for this litigation under sections 5A and 5B of the Probate Code. Tex. Prob. Code Ann. §§ 5A, 5B (Vernon Supp. 2002).

The issue in this case is the proper construction to be given to seemingly conflicting provisions of the Probate Code and the Texas Civil Practice and Remedies Code.

Rules of Statutory Construction

Matters of statutory construction are questions of law for the court to decide. *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989). Our objective in construing a statute is to determine and give effect to the intent of the lawmaking body. *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.,* 966 S.W.2d 482, 484 (Tex. 1998). In so doing, we look first to the plain and common meaning of the statute's words. *Id*; *see also Fitzgerald v. Advanced Spine Fixation Sys., Inc.,* 996 S.W.2d 864, 865 (Tex. 1999). We should not adopt a

construction that would render a law or provision absurd or meaningless. *See Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987); *Mueller v. Beamalloy*, 994 S.W.2d 855, 860 (Tex.App.-Houston [1st Dist.] 1999, no pet.).

Statutory Provisions

Gonzalez argues that the following Probate Code provisions control, and that the case should be tried in the Hidalgo County probate court:

> Section 5A(b)
>
> . . . In situations where the jurisdiction of a statutory probate court is concurrent with that of a district court, any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in the district court.[4]
>
> [4] The phrases "appertaining to estates" and "incident to an estate" include all claims by or against an estate. Tex. Probate Code Ann. § 5A(b) (Vernon Supp. 2002).

Tex. Prob. Code Ann. § 5A(b) (Vernon Supp. 2002).

> Section 5B
>
> A judge of a statutory probate court, on the motion of a party to the action or on the motion of a person interested in an estate, *may transfer to his court from a district . . . court* a cause of action appertaining to or incident to an estate pending in the statutory probate court or a cause of action in which a personal representative of an estate pending in the statutory probate court is a party and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to that estate.

Tex. Prob. Code Ann. § 5B (emphasis added).

Reliant argues that, because this is a suit by an executor for ***wrongful death*** , the venue provisions of the Civil Practice and Remedies Code control over the provisions of the Probate Code, and the suit must remain in the Harris County district court. Section 15.007 states in relevant part:

> [T]o the extent that venue under this chapter for a suit ***by*** or against an ***executor*** , administrator, or guardian as such, ***for personal injury*** , ***death*** , ***or property damage*** conflicts with venue provisions under the Texas Probate Code, this chapter controls.

Tex. Civ. Prac. Rem. Code Ann. § 15.007 (Vernon Supp. 2002) (emphasis added). It is Reliant's position that, by enacting section 15.007, the legislature has carved out three exceptions to the general rule that claims by an estate must be brought in probate court.

Thus, the determinative issue presented is whether sections 5A and 5B of the Probate Code provide for "dominant jurisdiction" of this wrongful death action in the probate court, or whether these provisions are subject to the limiting language of section 15.007 of the Civil Practice and Remedies Code. We note that this Court in *Tovias* specifically held that probate courts do *not* have "exclusive" subject matter jurisdiction over wrongful death lawsuits. 67 S.W.3d at 529.

Analysis

"Jurisdiction" deals with the *power of a court to determine an action* involving a particular subject matter as between the parties and to render a certain judgment. *See National Life Co. v. Rice* 167 S.W.2d 1021, 1024 (1943); 2 McDonald, Texas Civil Practice, § 6:2 (1992). "Venue" deals with the *propriety of prosecuting a suit* involving a given subject matter and specific parties *in a particular county. See National Life*, 167 S.W.2d at 1025; 2 McDonald, Texas Civil Practice at § 6:2. The principal distinction is that the parties cannot waive a lack of jurisdiction of the subject matter, but either may waive a rule of venue favorable to itself. *Nipper v. U-Haul Co. of San Antonio*, 516 S.W.2d 467, 470 (Tex.App.-Beaumont 1974, no writ); 2 *McDonald*, Texas Civil Practice, § 6:2 (1992).

It did not become clear that probate courts have jurisdiction over wrongful death and survival claims until 1992, when the Texas Supreme Court issued its opinion in the *Palmer* case. *See Palmer*, 851 S.W.2d at 181 (stating that, even though the legislature amended section 5A of the Probate Code in 1985 to give probate courts jurisdiction of such claims, many courts of appeals continued to hold probate courts had no such jurisdiction). After the clarification in 1992, the Texas legislature, in 1995, passed into law section 15.007 of the Civil Practice and Remedies Code that deals strictly with three types of lawsuits, "for personal injury, death, or property damage." When suit is brought by an executor or administrator "for personal injury, death, or property damage," the venue provisions of chapter 15 of the Civil Practice and Remedies Code control over conflicting venue provisions under the Probate Code. Tex. Civ. Prac. Rem. Code Ann. § 15.007 (Vernon Supp. 2002) (*added by* Act May 4, 1995, 74th Leg., R.S., ch. 138, § 1, sec. 15.007, 1995 Gen. Laws 978, 980). The effect of the 1995 statute has been described as follows:

> The 1995 Texas Legislature made substantial amendments and additions to the venue provisions of the Civil Practice and Remedies Code. The most important of these changes, for estate administration purposes, is that the determination of proper venue for an action by or against a personal representative for personal injury, death, or property damage is no longer made under the Probate Code, but rather under § 15.007 of the Civil Practice Remedies Code.

17 Texas Practice, Probate and Decedents' Estates, § 11 (1971 Supp. 2002).

> Forum shopping is against public policy, as reflected by the changes in venue law as part of last year's [1995] tort reform legislation. Particularly, section 15.007, which appears to be a legislative attempt to clarify and reiterate probate court jurisdiction over tort suits, prevents plaintiffs from . . . transferring such suits (forum shopping) to probate court in contravention of the venue statutes.

DB Entertainment, Inc. v. Windle, 927 S.W.2d 283, 288 (Tex.App.-Fort Worth 1996, orig. proceeding).[5]

[5] We note that this court, in *Greathouse v. McConnell*, was critical of other portions of the opinion in *DB Entertainment*, but we did not address the statements about Section 15.007; *Greathouse* did not involve wrongful death and survivor claims. *Greathouse v. McConnell*, 982 S.W.2d 165, 169-71 (Tex.App.-Houston [1st Dist.] 1998, pet. denied).

In the present case, Reliant preserved its right under the venue statute to have suit brought in Harris County, and Gonzalez subsequently filed suit in Harris County.

This case is distinguishable from cases such as *In re Ramsey, Lanier v. Stem*, and *Henry v. LaGrone* [6] in which the courts held that certain venue provisions under the Civil Practice and Remedies Code were trumped by the transfer provision of section 5B of the Probate Code. The controlling difference is that none of those cases were suits for wrongful death, personal injury or property damage. None of those cases dealt with Section 15.007, in

which the Texas legislature specifically mentioned the Probate Code and said that in three types of cases only, suits for "personal injury, death, or property damage," the proper county for suit was to be determined in accordance with the Civil Practices and Remedies Code, not the Probate Code.

6 *In re Ramsey*, 28 S.W.3d 58, 59-60 (Tex.App.-Texarkana 2000, no pet.); *Lanier v. Stem*, 931 S.W.2d 1, 2-3 (Tex.App.-Waco 1996, orig. proceeding); *Henry v. LaGrone*, 842 S.W.2d 324, 327 (Tex.App.-Amarillo 1992, orig. proceeding).

We conclude that, because this is a wrongful death suit, section 15.007 controls. To hold otherwise would render section 15.007 meaningless, and, under established rules of statutory construction, we should not adopt a construction that would render a law absurd or meaningless. *See Redmon*, 745 S.W.2d at 316; *Mueller*, 994 S.W.2d at 860.[7]

7 We are aware that our sister court has expressed a contrary view in dicta in *In Re J7S Inc*., but that case was for recovery of land and not for personal injury, death, or property damage; the court correctly held that Section 15.007 was inapplicable. *In Re J7S Inc*., 979 S.W.2d 374, 378 (Tex.App.-Houston [14th Dist.] 1998, orig. proceeding).

Conclusion

We hold that Section 15.007 of the Texas Civil Practice and Remedies Code precludes the transfer of this wrongful death suit to the Hidalgo County probate court. Although the Hidalgo County probate court has concurrent jurisdiction with the Harris County district court, the Hidalgo County probate court does not have dominant jurisdiction because it is not a "proper forum" for the suit in light of Reliant's assertion of its right to be sued in Harris County. *See Perry*, 66 S.W.3d at 252 (stating that, when cases involving the same subject matter are brought in different courts with concurrent jurisdiction, we look to whether both courts are proper forums for the suit in determining which has dominant jurisdiction).

Accordingly, the Harris County district court abused its discretion when it denied Reliant's application for an anti-suit injunction. We reverse the order of the trial court and remand this cause to the trial court with instructions to grant the temporary injunction in keeping with this opinion.

All pending motions are denied as moot.

Justice Mirabal dissented from the panel's decision to affirm the trial court's order.

En banc consideration was requested. Tex.R.App.P. 41.2(c).

A majority of the Court voted for en banc consideration of the panel's decision. *See id*.

The en banc Court consists of Justices Mirabal, Taft, Nuchia, Jennings, Radack, Keyes, Alcala, and Smith.

Justice Mirabal, writing for the majority of the en banc Court, joined by Justices Nuchia, Jennings, Radack, Keyes, and Alcala. *See* Tex.R.App.P. 47.5.

Justice Smith, joined by Justice Taft, dissenting from the judgment of the en banc Court. *See id*.

Chief Justice Schneider and Justice Hedges not participating. *See id*.

JACKSON B. SMITH, JR.[fn4], Justice, dissenting. [fn4] The Honorable Jackson B. Smith, Jr., retired Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

I dissent. In my opinion, the trial court properly denied the application for an anti-suit injunction.

Dominant Jurisdiction

As a general rule, if two lawsuits concerning the same controversy and parties are pending in courts of coordinate jurisdiction, the court in which suit was "first filed" acquires "dominant jurisdiction" to the exclusion of the other court. *Wyatt v. Shaw Plumbing Co.,* 760 S.W.2d 245, 248 (Tex. 1988); *Clawson v. Millard*, 934 S.W.2d 899, 900 (Tex.App.-Houston [1st Dist.] 1996, orig. proceeding).

In this case, both the Harris County district court and the Hidalgo County probate court had subject matter jurisdiction over Gonzalez's wrongful death claim. *Tovias v. Wildwood Properties Partnership, L.P.*, 67 S.W.3d 527 (Tex.App.-Houston [1st Dist.] 2002, no pet.); *see also* Tex. Prob. Code Ann. § 5A (Vernon Supp. 2002) ("statutory probate court has concurrent jurisdiction with the district court in all actions . . . by or against a person in the person's capacity as a personal representative. . ."). Therefore, because Gonzalez filed her lawsuit in Hidalgo County first, that court acquired dominant jurisdiction over the case. *Wyatt,* 760 S.W.2d at 248.

However, there are three exceptions to the "first filed" rule, one of which Reliant claims applies to this case. Under the first exception, the Hidalgo County court will not have dominant jurisdiction if Gonzalez engaged in inequitable conduct that estops her from asserting prior active jurisdiction. *See Wyatt,* 760 S.W.2d at 248; *Clawson,* 934 S.W.2d at 901. The type of misconduct necessary to invoke this exception "must in some manner involve or circumvent the choice of forum." *Sweezy Constr., Inc. v. Murray*, 915 S.W.2d 527, 532 (Tex.App.-Corpus Christi 1995, orig. proceeding).

Reliant points out that in 1995, the Texas Legislature made substantial amendments to the venue provisions of the Civil Practice Remedies Code, and the most important of these changes was that the determination of proper venue for an action by or against a personal representative for personal injury, death, or property damage is no longer made under the Probate Code, but rather under section 15.007 of the Civil Practice Remedies Code. [1] Tex. Civ. Prac. Rem. Code Ann. § 15.007 (Vernon Supp. 2002). However, in 1999 the legislature amended section 5B of the Probate Code [2] and apparently did not perceive a conflict between venue statute section 15.007 of the Civil Practice and Remedies Code and section 5B of the Probate Code. If the Legislature had wanted to except personal injury, death, or property damage causes of action from the authority given to a probate court to transfer a case from a district court to a probate court, it could have done so, but it did not.

[1] Section 15.007 states as follows:

> Notwithstanding Sections 15.004, 15.005, and 15.031 of the Civil Practice and Remedies Code, to the extent that venue under this chapter for a suit by or against an executor, administrator, or guardian as such, for personal injury, death, or property damage conflicts with venue provisions under the Texas Probate Code, this chapter controls.

[2] Act of May 20, 1999, 76th Leg., R.S., ch. 1431, § 1, sec. 5B, 1999 Gen. Laws 4876, 4876.

Reliant claims that Gonzalez is trying to "circumvent the choice of forum" by filing identical lawsuits, in different venues, and then utilizing section 5B of the probate code to facilitate "forum shopping." Reliant claims that Gonzalez initially filed suit in the wrong venue, Hidalgo County, and is now trying to "launder" her venue error by filing suit in Harris County, a county of proper venue, and then transferring the case back to Hidalgo County by requesting a 5B transfer motion.

However, any conflict between section 15.007 of the Civil Practice and Remedies Code and the venue statutes of the probate code would not affect a probate court from granting a 5B transfer, because section 5B is not a venue statute. Tex. Prob. Code Ann. § 5B (Vernon Supp. 2002). Several courts have noted that section 15.007 does not prevent transfers pursuant to section 5B of the Probate Code because that section of the Probate Code

deals with jurisdiction, not venue. *See In re J7S Inc*., 979 S.W.2d 374, 378 (Tex.App.-Houston [14th Dist.] 1998, orig. proceeding) (noting that section 5A of the Probate Code is a jurisdictional statute), *In re Ford Motor Co*., 965 S.W.2d 571, 575 (Tex.App.-Houston [14th Dist.] 1997, orig. proceeding) (same); *see also Henry v. LaGrone*, 842 S.W.2d 324, 327 (Tex.App.-Amarillo 1992, orig. proceeding) (same).

Regardless of which court has dominant jurisdiction or where venue for this case is proper, section 5B of the Probate Code [3] expressly authorizes a statutory probate court, such as the Hidalgo County Probate Court, to transfer a suit pending in a district court, to itself, when that suit is one in which a personal representative of an estate is a party. Tex. Prob. Code Ann. § 5B (Vernon Supp. 2002); *see also Greathouse v. McConnell*, 982 S.W.2d 165, 171 (Tex.App.-Houston [1st Dist.] 1998, pet. denied).

[3] Section 5B states:

> A judge of a statutory probate court, on the motion of a party to the action or on the motion of a person interested in an estate, *may transfer to his court from a district . . . court* a cause of action appertaining to or incident to an estate pending in the statutory probate court or *a cause of action in which a personal representative of an estate pending in the statutory probate court is a party* and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to that estate.

Although venue for Gonzalez's wrongful death suit may have been appropriate only in Harris County, I would hold that the express transfer authority granted by section 5B applies notwithstanding the venue statutes. *See In re Ramsey,* 28 S.W.3d 58, 59-60 (Tex.App.-Texarkana 2000, no pet.); *see also In re J7S Inc*., 979 S.W.2d at 377-78, *LaGrone*, 842 S.W.2d at 327; *Lanier v. Stem*, 931 S.W.2d 1, 2-3 (Tex.App.-Waco 1996, orig. proceeding).

For example, in *Henry v. LaGrone*, the trustee of a trust for an incompetent adult filed a petition for declaratory relief in a district court, even though other matters with respect to the estate were ongoing in probate court. 842 S.W.2d at 325-26. After the probate court entered an order directing the district court to transfer the case, the district court refused to comply and issued a writ of prohibition. *Id*. Relators then sought a writ of mandamus against the district court judge for refusing to comply with the transfer order. *Id*. On appeal, the Amarillo Court of Appeals held that, even though venue was appropriate in the district court, section 5B of the Probate Code authorized the statutory probate court to transfer the suit notwithstanding any mandatory venue provisions. *Id*. at 327.

Similarly, in *In re Ramsey*, a claim was instituted in district court involving a partnership in which the decedent had been a partner. 28 S.W.3d 58, 59-60 (Tex.App.-Texarkana 2000, no pet. h.). Because the representative of the decedent's estate was named as a party to the suit, the probate court where the decedent's estate was being administered ordered that the partnership action should be transferred to the probate court for resolution. *Id*. After the district court refused to transfer the case, the representative of the decedent's estate sought a writ of mandamus to force the district court to transfer the suit. *Id*. On appeal, the Texarkana Court of Appeals held that, although venue of the partnership suit may have been appropriate where it was filed, "the express transfer authority granted by section 5B applies notwithstanding the venue statute" and, "when faced with the probate court's transfer order, the district court was required to transfer the suit." *Id*. at 61.

Thus, even assuming that the Harris County district court had dominant jurisdiction over the wrongful death case and that venue was proper only in Harris County, the Harris County district court would still be required to transfer the case back to Hidalgo County when faced with the 5B transfer order. Since 1983 when section 5B was added to the Probate Code, it appears to be clear that the intent of the Texas Legislature is to allow

consolidation of all causes of action incident to an estate in the statutory probate court in order to promote efficient administration of estates and judicial economy. *Id*. at 63. By denying Reliant's request for an anti-suit injunction, I believe the district court was promoting that purpose and did not abuse its discretion.

Conclusion

I would affirm the order denying the application for an anti-suit injunction.