

No. 01-23-00362-CV

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

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Candace Louise Curtis v. Carl Henry Brunsting, Individually and as
Independent

Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting

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Original Proceeding from Harris County Probate Court No. 4

Cause No. 412,249-401

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APPELLANTS BRIEF ON APPELLATE COURT JURISDICTION

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TRIAL JUDGE

The Honorable James Horwitz
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To the Honorable Justices,

Appellant has received the Court's Notice of Intent to Dismiss for want of appellate court jurisdiction and granting Appellant fourteen days in which to provide the court with a brief demonstrating that the appeals court does have jurisdiction in this matter. While the appellate court's jurisdiction to consider the merits has lapsed, this Court continues to have jurisdiction to vacate void orders issued in the absence of subject matter jurisdiction.

The appellate court always has jurisdiction to determine an order void for lack of subject matter jurisdiction

The Judgment issued in this case is void due to lack of subject matter jurisdiction. A judgment is void when it is apparent that the court rendering judgment "had no jurisdiction of the parties, *no jurisdiction of the subject matter*, no jurisdiction to enter the judgment, or no capacity to act as a court." *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985)(emphasis added). *Mapco*, 795 S.W.2d at 703. When a party appeals a void judgment due to lack of subject matter jurisdiction, the appellate court has jurisdiction to vacate the judgment and dismiss the case. *Pappas v. Shamoun & Norman LLP*, No. 05-01405-CV, 2018 WL 274691 At *3 (Tex. App.—Dallas, May 31, 2018, no pet); *Duggan v. Tanglewood Villa Owners*

Assn, 2017 WL 2610032 At *2-3 (Tex. App.—Dallas, June 2017, no pet). Any order issued without subject matter jurisdiction is void. Appellant can assert lack of subject matter jurisdiction for the first time on appeal because a void judgment is a nullity. The time constraints normally applicable to direct appeals based on the merits do not apply to a void judgment for lack of subject matter jurisdiction. Errors other than lack of jurisdiction render the judgment merely voidable and must be attacked within prescribed time limits. *Cook v. Cameron*, 733 S.W.2d 137, 140 (Tex. 1987), *Bayoud v. Bayoud* 797 S.W.2d 304 (Tex. App. 1990)

This Court Does have Appellate Jurisdiction

This Court has jurisdiction to declare the Court’s judgment void for lack of subject matter jurisdiction as such a challenge is not subject to the normal time constraints applicable to appeals. *Fulton v. Finch*, 162 Tex. 351, 346 S.W.2d 823, 827 (1961).¹” *Ramsey v. Morris*, 578 S.W.2d 809 (Tex. Civ. App. 1979). “The law is well settled that a void judgment is a nullity that may be attacked at any time.” (citation omitted); Restatement (Second) of Judgments § 65 cmt. b.” *Mitchell v.*

¹ *Fulton v. Finch* was superseded by statute by *In re Baylor Medical Center*, 280 S.W.3d 227 (Tex. 2008) on other ground.

MAP Res., 649 S.W.3d 180, 196 n.15 (Tex. 2022). "A formal judgment rendered by a court without jurisdiction of the subject-matter is void, and may be attacked at any time in any manner." Rone v. Marti, 244 S.W. 639, 640 (Tex. Civ. App. 1922).

It is well settled that a litigant may attack a void judgment directly or collaterally. Hagen v. Hagen 282 S.W.3d 899, 902 (Tex.2009) "Where a court rendering judgment does not have jurisdiction, the judgment is void and cannot operate as res judicata; it neither binds, bars, nor Estops anyone." 34 Tex.Jur.2d, Sec. 467, page 514. Kohls v. Kohls 461 S.W.2d 455 (Tex. Civ. App. 1970) see also PNS Stores, Inc. v. Rivera ex rel. Rivera, 379 S.W.3d 267, 272 (Tex. 2012)

*The Court's judgment in this case is void for lack of subject matter jurisdiction, not merely voidable, a key distinction. While voidable judgments must be challenged within normal appellate time constraints, there is no deadline to challenge a judgment that is void for lack of subject matter jurisdiction. "Whether a trial court has subject matter jurisdiction is a question of law that we review de novo. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex. 2004); Tex. Nat. Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 855 (Tex. 2002)." Price v. Univ. of Tex. at Brownsville Tex. Southmost Coll., NUMBER 13-16-00351-CV, at *6 (Tex. App. Nov. 16, 2017)*

"A court's precision in discussing the judgment as void or voidable is important in order to avoid engendering confusion when the distinction is material. Thus, ...if a party challenges a judgment as void, the first inquiry should necessarily be whether the alleged defect renders the judgment void or merely voidable."

While a voidable judgment is subject to time constraints outlined in the Texas Rules of Appellate procedure, a void judgment can be

collaterally attacked at any time. PNS Stores, Inc. v. Rivera ex rel. Rivera, 379 S.W.3d 267, 272 n.8 (Tex. 2012)

This appeal challenges the subject matter jurisdiction of a statutory probate court to act in this particular case, because: 1. Candace Curtis' lawsuit was filed in federal court and not transferred or remanded to the probate court and 2. The claims filed by the purported Independent Executor were not filed until after the probate proceeding had closed. Because Carl Brunsting's claims were not filed ancillary to a pending probate proceeding, the statutory probate court had no jurisdiction over the claims. All judgments and orders were entered after the probate proceeding had long closed. Thus, said orders were signed without subject matter jurisdiction and must be vacated as void.

The Supplemental Record

Because Carl's 412249-401 action was filed as ancillary to the Estate of Nelva Brunsting No. 412249, it is necessary to examine the record in the base case. The appeals court is requested to take judicial notice of certified copies of the relevant records from the base cases that are attached to this brief and that were previously filed with the Appeals Court in Petition for Writ of Mandamus No. 01-22-00514-cv on July 11, 2022. Appellant has asked the probate clerk to supplement the appellate

record² with the relevant base case records. Appellant is also attaching certified copies with this brief for the Court's convenience.

Controlling Facts

The record will show that the Decedents, Elmer H. and Nelva E. Brunsting, had identical pour-over wills [ROA]³, with a family living trust as the sole devisee and that both wills called for independent administration. The record will further show that letters testamentary for independent administration were issued August 28, 2012 [ROA]⁴; that the inventory, appraisal, and list of claims had been filed by the independent executor March 27, 2013 and approved by the probate court April 5, 2013 [ROA]⁵ and, that Carl Henry Brunsting filed his civil tort suit in the statutory probate court April 9, 2013 [ROA 5-24]. The law on independent administration is clear.

Tex. Est. Code § 402.001

When an independent administration has been created, and the order appointing an independent executor has been entered by the probate

² Letter attached

³ Tabs 12 & 18 Accepted 01-22-00514-CV First Court of Appeals Houston, Texas 7/12/2022

⁴ Tabs 14 & 20 Accepted 01-22-00514-CV First Court of Appeals Houston, Texas 7/12/2022

⁵ Tabs 15 & 22 Accepted 01-22-00514-CV First Court of Appeals Houston, Texas 7/12/2022

court, and the inventory, appraisalment, and list of claims has been filed by the independent executor and approved by the court or an affidavit in lieu of the inventory, appraisalment, and list of claims has been filed by the independent executor, as long as the estate is represented by an independent executor, further action of any nature may not be had in the probate court except where this title specifically and explicitly provides for some action in the court.

After the inventory, appraisalment, and list of claims has been filed by the independent executor and approved by the probate court no further action of any nature could be had in the probate court except where Title II of the Estates Code specifically and explicitly provides such action.

The Complete Absence of Subject Matter jurisdiction

The Action filed by Carl Henry Brunsting, Individually and as Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting on April 9, 2013 [ROA 5-24] was filed five days after the inventory had been approved and probate was closed. The Action was brought under the Texas Civil Practices and Remedies Code as ancillary to a closed probate administration [ROA]⁶. Not only does the initial pleading fail to cite to any provision in Title II of the Estates Code

⁶ Drop Orders Tabs 16 & 23 Accepted 01-22-00514-CV First Court of Appeals Houston, Texas 7/12/2022

that specifically and explicitly authorized the independent executor to take such action, it fails to even mention the estates code.

In Summary

*“Whether a trial court has subject matter jurisdiction is a question of law that we review de novo. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex. 2004); Tex. Nat. Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 855 (Tex. 2002).” Price v. Univ. of Tex. at Brownsville Tex. Southmost Coll., NUMBER 13-16-00351-CV, at *6 (Tex. App. Nov. 16, 2017)*

The statutory probate court was never capable of composing a court of competent jurisdiction over the subject matter of Independent Executor Carl Brunsting’s non-probate related action and consequently, all orders and judgments in Cause No. 412249-401 are void ab initio for want of subject matter jurisdiction.

Independent Executor Carl Henry Brunsting was foreclosed by will from further action in the probate court, other than the recording of the wills and the return of an inventory, and was foreclosed by statute from further action in the probate court after that inventory had been approved. Carl Henry Brunsting, not being an heir to any pending estate, had no individual standing to file any action in the probate court in any event. This is a very straightforward matter of statutory law based upon a modest set of incontrovertible facts.

Harris County Statutory Probate Court No. 4 never acquired jurisdiction over Candace Curtis' federal claims or over civil claims filed by Carl Brunsting after the probate proceeding was closed. *Where the trial court lacks jurisdiction, it has only the power to dismiss the suit* Wren v. Texas Employment Comm'n, 915 S.W.2d 506, 509. (Tex.App.-Houston [14th Dist.] 1995, no writ). Wolf v. Holy Cross Church, 49 S.W.3d 1, 4-5 (Tex. App. 1999). The probate court had no discretion but to dismiss the case.

Where a court rendering judgment does not have jurisdiction, the judgment is void and cannot operate as res judicata; it neither binds, bars, nor Estops anyone. 34 Tex.Jur.2d, Sec. 467, page 514. Dews v. Floyd 413 S.W.2d 800 (Tex. Civ. App. 1967) Kohls v. Kohls 461 S.W.2d 455 (Tex. Civ. App. 1970).

Voidable judgments are subject to laches and limitations while void judgments are barred by neither. "A judgment void upon its face is subject to an attack at any time, regardless of the statute of limitation." Newsom v. State 236 S.W. 228 (Tex. Civ. App. 1922).

Additional Authorities

"A judgment void upon its face is subject to an attack at any time, regardless of the statute of limitation." Newsom v. State, 236 S.W. 228 (Tex. Civ. App. 1922).

A collateral attack is used to attack a void order and has no set procedure or

statute of limitations. *Roman Catholic Diocese of Dallas v. County of Dallas Tax Collector*, 228 S.W.3d 475, 480 (Tex.App. 2007, no pet.); *Zarate v. Sun Operating Ltd.*, 40 S.W.3d 617, 620-21 (Tex.App. 2001, pet. denied).

Shackelford v. Barton 156 S.W.3d 604 (Tex. App. 2004)

A collateral attack is any proceeding to avoid the effect of a judgment that does not meet all the requirements of a valid direct attack, i.e., a motion for new trial or a bill of review. Toles v. Toles, 113 S.W.3d 899, 914 (Tex.App.-Dallas 2003, no pet.); Zarate v. Sun Operating Ltd., Inc., 40 S.W.3d 617, 620 (Tex.App.-San Antonio 2001, pet. denied); Glunz v. Hernandez, 908 S.W.2d 253, 255 n. 3 (Tex.App.-San Antonio 1995, writ denied). For a collateral attack, there is neither a set procedure nor a statute of limitations. Zarate, 40 S.W.3d at 620-21; Glunz, 908 S.W.2d at 255. Collateral attacks may only be used to set aside a judgment that is void or involves fundamental error. Zarate, 40 S.W.3d at 621; Glunz, 908 S.W.2d at 255. A judgment is void if it is shown that the court lacked jurisdiction (1) over a party or the property; (2) over the subject matter; (3) to enter a particular judgment; or (4) to act as a court. Zarate, 40 S.W.3d at 621; Glunz, 908 S.W.2d at 255 (citing Cook v. Cameron, 733 S.W.2d 137, 140 (Tex. 1987)); see also Browning v. Placke, 698 S.W.2d 362, 363 (Tex. 1985). Shackelford v. Barton 156 S.W.3d 604 (Tex. App. 2004)

Zarate v. Sun Operating Ltd., Inc., 40 S.W.3d 617

Collateral attacks may only be used to set aside a judgment that is void or involves fundamental error. Zarate, 40 S.W.3d at 621; Glunz, 908 S.W.2d at 255. A judgment is void if it is shown that the court lacked jurisdiction (1) over a party or the property, (2) over the subject matter, (3) to enter a particular judgment, or (4) to act as a court. Zarate, 40 S.W.3d at 621; Glunz, 908 S.W.2d at 255 (citing Cook v. Cameron, 733 S.W.2d 137, 140 (Tex. 1987)); see also Browning v. Placke, 698 S.W.2d 362, 363 (Tex. 1985). Zarate v. Sun Operating Ltd., Inc., 40 S.W.3d 617

In re A.G.G 267 S.W.3d 165 (Tex. App. 2008)

There is no set procedure for a collateral attack and no statute of limitations. Id. at 620-21. A collateral attack may be used to set aside a judgment that is void or involves fundamental error. Id. at 621. However, the ability to collaterally attack a judgment is limited because we presume the validity of the judgment under attack, and extrinsic evidence may not be used to establish a lack of jurisdiction. Toles v. Toles, 113 S.W.3d 899, 914 (Tex.App.-Dallas 2003, no pet.); Davis v. Boone, 786 S.W.2d 85, 87, n. 3 (Tex.App.-San Antonio 1990, no writ). To prevail on a collateral attack, the challenger must show that the judgment is void on its face. Sotelo v. Scherr, 242 S.W.3d 823, 830 (Tex.App.-El Paso 2007, no pet.). A collateral attack fails if the judgment contains jurisdictional recitals, even if other parts of the record show a lack of jurisdiction. Toles, 113 S.W.3d at 914. In re A.G.G 267 S.W.3d 165 (Tex. App. 2008)

Metro Transit v. Jackson, 212 S.W.3d 797 (Tex. App. 2007)

“ Because subject-matter jurisdiction is a power that exists by operation of law only, and cannot be conferred upon any court by consent or waiver, a judgment will never be considered final if the court lacked subject-matter jurisdiction.” Id. ”

*A trial court has no discretion to refuse to set aside a void judgment, but has the duty to do so at any time that such matter is brought to its attention. Id. "A judgment which is absolutely void is, in the language of some courts, mere waste paper, and the court in which such judgment is rendered does not lose jurisdiction over the subject-matter after the term of the court at which the judgment was entered has expired. There is an inherent continuing power in such court to set aside its void judgment." Barton v. Montex Corp., 295 S.W. 950, 953 (Tex.Civ.App.-Austin 1927, writ disp'd) (citing Milam County v. Robertson, 47 Tex. 222, 1877 WL 8602 at *8 (1877)). Metro Transit v. Jackson, 212 S.W.3d 797 (Tex. App. 2007)*

Mccamant v. Mccamant, 187 S.W. 1096 (Tex. Civ. App. 1916)

"If the want of jurisdiction over either the subject or the person appears by the record, there is no doubt the judgment is void." 2 Black on Judgments, §§ 276-278.

Nor will lapse of time nor laches affect the right to vacate a Judgment void on its face. Black on Judgments, § 313; Cunningham v. Taylor, 20 Tex. 126-130. Mccamant v. Mccamant, 187 S.W. 1096, 1099 (Tex. Civ. App. 1916)

Conclusion

"When appeal is taken from a void judgment, the appellate court has no jurisdiction to consider the merits of the appeal but has jurisdiction to declare the judgment void and dismiss the case. In re A.M., 2020 Tex. App. LEXIS 2128, at *7-8."

This Appellate court has jurisdiction to determine that the orders and judgment issued in this case is void for lack of subject matter jurisdiction, an inquiry that is not time barred by the Texas Rules of Appellate Procedure because subject matter jurisdiction is an issue that must be addressed de novo by this court. See State ex rel. Latty v. Owens,907 S.W.2d 484, 486 (Tex.1995); see also Univ. of Tex. Sw. Med. Ctr. of Dallas v. Margulis,11 S.W.3d 186, 187 (Tex.2000) (per curiam) Freedom Commc'ns, Inc. v. Coronado, 372 S.W.3d 621, 623 (Tex. 2012).

Appellant in this proceeding claims the right to have the complete absence of subject matter jurisdiction in the 412,249-401 action declared in this court, in this

proceeding, at this time, and neither doctrines of laches nor statutes of limitations apply to judgments void for want of subject matter jurisdiction.

Full Faith and Credit

Appellant originally filed her claims in the Southern District of Texas [ROA 219-247] and the matter was dismissed under the probate exception, then reversed and remanded by the Fifth Circuit Court of Appeal, *Curtis v. Brunsting* 704 F .3d 406, [ROA 248-255] finding the probate exception inapplicable to Appellants claims'. A preliminary injunction from the federal case continues to govern the parties' conduct and the trust(s). This court must respect the federal court's prior holding on jurisdiction as res judicata.

The probate court⁷ acknowledged throughout that the federal preliminary injunction remains in effect. [ROA 258-263]. Thus, this Court should likewise defer to the federal court's prior ruling on jurisdiction in this case, holding that this is not a probate matter or probate proceeding and was not filed ancillary to a pending probate

⁷ ROA No. 01-23-00362-CV Reporters Record Vol 3 of 3, P.16

proceeding, depriving the probate court of subject matter jurisdiction over Carl Brunsting or Candace Curtis' purported claims.

Respectfully,

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CERTIFICATE OF SERVICE

I, Candice Schwager, hereby certify that the foregoing document, along with the Clerk and Reporters records, were served on all counsel of record through the state electronic filing system and via email on the 7th day of March 2024.

Candice L Schwager
Candice Schwager

CERTIFICATE OF COMPLIANCE

I, Candice Schwager, hereby certify that this document was generated by a computer using Microsoft Word which indicates that the countable content of this document is 3784 words, including footnotes; that the aggregate of all brief filed by Appellant do not exceed 27,000 words and is thus in compliance with TEX. R. APP. P. 9.4(i)(2)(B).

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