

Chapter Two
PROCEDURAL MATTERS IN PROBATE

A. JURISDICTION

TEXAS POLITICS – THE JUSTICE SYSTEM
§ 3.2 Local Trial Courts of Limited Jurisdiction

<http://texaspolitics.laits.utexas.edu/html/just/0302.html>

The part of the Texas court system governing probate, the disposition of wills, is one of the most complicated.

In most counties, the Constitutional County Court has original probate jurisdiction. In some counties, the Legislature has authorized County Courts at Law to share this original jurisdiction.

Additionally, the state District courts * * * have original jurisdiction in probate cases, but only when the probate matter is transferred from a Constitutional County court and where the Legislature has granted the District court original control and jurisdiction over personal representatives.

Things get still more complex. The Legislature saw a need for yet another type of court to deal with probate matters in the state's six largest metropolitan areas. So, it created statutory Probate courts. These courts have original and exclusive jurisdiction over their counties' probate matters, guardianship cases, and mental health commitments.

In summary, the Texas Constitution grants the Legislature the authority to determine which Texas courts have jurisdiction over probate matters. So, depending on how the Legislature assigned jurisdiction to the courts in a particular county, probate matters might be heard in the County court, County Court at Law, statutory Probate court, or District court.

IN RE LEWIS

Texas Appeals – Waco 2006
185 S.W.3d 615
mandamus denied

BILL VANCE, Justice.

This original proceeding arises from a probate proceeding in Burleson County, a county with no statutory probate court or county court at law. Jeffrey Lewis (Jeffrey), the real-party-in-interest and plaintiff below, filed suit in the constitutional county court, sitting in probate, against Relator Diana Faye Lewis (Diana), individually and as executrix of the estate of Doris A. Lewis, deceased. The probate court transferred the lawsuit to district court in Burleson County. Diana seeks a writ of mandamus directing Respondent, the Honorable Mike Sutherland, presiding judge of the constitutional county court of Burleson County, to vacate or rescind his order transferring the lawsuit to district court and to request an assignment of a statutory probate court judge to hear the lawsuit.

We will grant mandamus relief if there has been a clear abuse of discretion and the relator has no adequate legal remedy. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex.1992) (orig.proceeding). A trial court abuses its discretion if “ ‘it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law’ “ or if it clearly fails to correctly analyze or apply the law. *Id.* at 839, 840 (quoting *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex.1985)).

The chronology of relevant events is as follows:

- October 24, 2005: Jeffrey’s original petition is filed in the probate court.
- November 2, 2005: The county clerk receives, but does not “file,” Diana’s “Motion for Appointment of Statutory Probate Court Judge Pursuant to Section 5(b) of the Texas Probate Code.” The clerk did not file Diana’s motion because it was not accompanied by an alleged \$40.00 filing fee.
- November 3, 2005: The county clerk receives and files Jeffrey’s “Motion to Transfer Case to District Court.” The probate court signs an order granting Jeffrey’s “Motion to Transfer Case to District Court.”
- November 4, 2005: The county clerk receives the \$40.00 filing fee from Diana.

Because of the clear language in section 5(b-1) of the Probate Code, the issue before us is whether Diana's motion was "filed" on November 2. Section 5(b-1) provides in part:

If the judge of the county court has not transferred a contested probate matter to the district court under this section by the time a party files a motion for assignment of a statutory probate court judge, the county judge shall grant the motion and may not transfer the matter to the district court unless the party withdraws the motion.

Tex. Prob.Code Ann. § 5(b-1) (Vernon Supp.2005) (emphasis added). If Diana's motion was filed on November 2, the probate court could only grant her motion; it could not transfer the lawsuit to district court.

Texas courts have repeatedly held that if a motion for new trial is tendered to the clerk without the filing fee, the motion is "conditionally filed," and when the filing fee is paid, the motion is deemed filed on the day that it was tendered to the clerk for appellate timetable purposes. *Tate v. E.I. DuPont de Nemours & Co.*, 934 S.W.2d 83, 84 (Tex.1996); *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex.1993); *Polley v. Odom*, 937 S.W.2d 623, 624-26 (Tex.App.-Waco 1997, no writ); see also *Garza v. Garcia*, 137 S.W.3d 36, 37-39 (Tex.2004) (extending rule to cases where filing fee is never paid). No reason exists why the "conditional filing" rule should not apply to Diana's motion. We hold that Diana's motion was conditionally filed on November 2, and when the clerk received the filing fee on November 4, Diana's motion was deemed filed on November 2.

As Jeffrey notes, a court should not, absent emergency or other rare circumstances, consider a motion until its filing fee has been paid. See *Garza*, 137 S.W.3d at 38; *Jamar*, 868 S.W.2d at 319 n. 3. Thus, while the probate court should not have considered Diana's motion until the filing fee was paid, that does not mean that it could ignore its conditional filing. The purpose of the conditional filing rule is to establish the date on which a document is filed in order to promote certainty for litigants. See *Garza*, 137 S.W.3d at 38. If a court could ignore the date on which a conditionally filed document is filed, the rule would be empty. In sum, while a court should not consider the substance of a conditionally filed motion until the filing fee is paid, it cannot ignore the date of its conditional filing.

In this case, Diana's motion for assignment of a statutory probate court judge was conditionally filed on November 2, but the probate court could not have granted her motion until Diana paid the filing fee on November 4. Under the express language of section 5(b-1), the probate court could not have granted Jeffrey's motion on November 3, to transfer the lawsuit to district court because Diana's motion was already conditionally filed. See Tex. Prob.Code Ann. § 5(b-1). With respect to contested probate matters,

section 5(b-1) appears to contemplate a probate court facing competing motions to transfer to district court and for assignment of a statutory probate court judge. See *id.* (“the county judge ... shall grant the motion [for assignment of a statutory probate court judge] and may not transfer the matter to the district court unless the party withdraws the motion”) (emphasis added). In such a situation, section 5(b-1) mandates the result: the probate court shall grant the motion for assignment of a statutory probate court judge and may not transfer the contested matter to district court. See *id.* (emphasis added). Thus, in this case, the probate court abused its discretion by failing to correctly apply the law. See *In re Vorwerk*, 6 S.W.3d 781, 783-84 (Tex.App.-Austin 1999, orig. proceeding) (granting mandamus relief for failure of county court to assign statutory probate court judge to hear contested probate matter).

Diana must also establish that she lacks an adequate remedy by appeal. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135-36 (Tex.2004) (orig.proceeding). With the principles set out in *Prudential* governing our jurisprudential considerations, we find that Diana lacks an adequate remedy by appeal of the trial court’s transfer of the lawsuit to district court. See *id.* at 135-39 (no adequate remedy by appeal where trial court refused to enforce contractual jury waiver); *In re AIU Ins. Co.*, 148 S.W.3d 109, 115-20 (Tex.2004) (orig.proceeding) (no adequate remedy by appeal where trial court refused to enforce contractual forum selection clause); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272-73 (Tex.1992) (orig.proceeding) (no adequate remedy by appeal where trial court refused to enforce arbitration agreement to which Federal Arbitration Act applied); *Vorwerk*, 6 S.W.3d at 785 (no adequate remedy by appeal where probate court failed to grant motion for appointment of statutory probate court judge and instead transferred matter to district court). The probate court’s transfer of the lawsuit to district court deprived Diana of her statutory right to the assignment of a statutory probate court judge.

Because Respondent abused his discretion and Diana has no adequate remedy at law, we grant the petition for writ of mandamus and order Respondent to vacate his order transferring the lawsuit to district court and to request an assignment of a statutory probate court judge. We are confident that Respondent will comply with our ruling, so the writ will issue only if Respondent fails to advise this Court in writing within fourteen days after the date of this opinion that he has vacated the order transferring the lawsuit to district court and has requested an assignment of a statutory probate court judge.

Chief Justice GRAY dissenting.

TOM GRAY, Chief Justice, dissenting.

It has always been the accepted general rule that the trial court clerk does not proceed to file a pleading until the filing fee is paid. The Supreme Court did create an exception when the time of filing was critical to preserving a party's ability to pursue an appeal. This line of cases is easily distinguished in that the exception created relates to the preservation of the right of appeal. The motion in our case does not impact the perfection of the right to an appeal for having the merits of the case reviewed, so the exception to the general rule created by the line of cases cited by the relator and the majority should not be applied to this case. As stated by the Texas Supreme Court in the last pronouncement of the policy for this line of cases, "We construe the Rules of Appellate Procedure liberally, so that decisions turn on substance rather than procedural technicality." *Garza*, 137 S.W.3d at 38. But the issue before us is entirely a rule of procedure, and the rules should be enforced—otherwise, chaos reigns.

There is one case in this line of cases with a secondary holding that is, however, applicable to our case. In *Garza*, the Texas Supreme Court notes that there are two effects of filing the motion. First, it sets the appellate time table. The holding on this issue is that the filing of the motion for new trial, even without the payment of the filing fee, extended the time within which a notice of appeal could be filed. The second holding was that the failure to timely pay the filing fee before the court lost its plenary power meant that the motion for new trial did not preserve the appellant's factual insufficiency complaint for review, because that issue was never properly made to the trial court. *Garza*, 137 S.W.3d at 38.

In our case, the real-party-in-interest filed its motion to transfer the case to a district court prior to the time the fee was paid on the relator's motion to transfer the case to a probate court. Thus, by the time the fee was paid for relator's motion, the trial court had lost the authority to do anything other than to grant the real-party-in-interest's motion. In effect, applying the second holding in *Garza*, the relator failed to preserve his right to have the case transferred to a probate court because, by the time the relator paid the filing fee, the real-party-in-interest had already filed a motion to transfer the case to a district court which the trial court had no option but to grant. Thus, by the time the relator paid the fee, the trial court had no authority to transfer the case to a probate court.

Relator did not pay the filing fee when the motion to transfer was first presented for filing. The natural result of this failure under the general rule is that the clerk did not file the motion. Before relator paid the filing fee and tendered the motion *620 to transfer the case to a probate judge, a motion to transfer the case to a district judge was filed. See Tex. Prob.Code Ann. § 5(b)(1) & (2) (Vernon Supp.2005). The appropriate fee was paid when the motion to transfer the case to a district judge was tendered for filing. The county judge did what any reasonable, analytical,

rules-oriented person would have done—he granted the first properly filed motion to transfer the case. Indeed, it could be viewed as what we are determining is whether the district clerk should be compelled to give relator’s motion a filing date prior to the date that it was actually filed.

At this Court, our clerk files everything tendered for filing and tries to collect the fees later if they are not paid at the time of filing. This is a matter of convenience because we do not have a way to keep track of pleadings that remain unfiled because the filing fee has not been paid. Our system has created its own set of problems. Just a few of those problems are (1) the clerk must act as a collection agent for our Court, (2) there is different treatment by justices if the fee remains unpaid, and (3) the need to write off uncollected filing fees.

I would not impose the system that we have chosen to use on all the trial court clerks. And I would not expand the exception to the rule which is applicable to documents which impact the timing of perfecting an appeal. By this holding, the exception, at least as to the date of filing, has now swallowed the rule.

Conclusion

I do not find that the trial court abused its discretion. I would deny the petition for writ of mandamus.

NOTES AND QUESTIONS

1. *Read* Prob. Code §§ 4, 5, 5A, 5B.
2. Which court has jurisdiction to probate a will in a county with no statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court? What happens if the will is contested?
3. Which court has jurisdiction to probate a will in a county with a statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court? What happens if the will is contested?
4. What jurisdiction does a statutory probate court have to determine matters closely related to the probate of a will?
5. Which courts have jurisdiction over trusts?
6. Statutory probate courts are now found in the following counties:
 - a. Bexar (San Antonio) (2)
 - b. Collin (McKinney) (1)

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- c. Dallas (Dallas) (3)
 - d. Denton (Denton) (1)
 - e. El Paso (El Paso) (2)
 - f. Galveston (Galveston) (1)
 - g. Harris (Houston) (4)
 - h. Hidalgo (Edinburg) (1)
 - i. Tarrant (Fort Worth) (2)
 - j. Travis (Austin) (1)

See <http://www.courts.state.tx.us/trial/probate.asp> for additional information on statutory probate courts, including a list of the judges currently in office.

7. See generally Woodward & Smith §§ 1-12.

AUSTIN NURSING CENTER, INC. v. LOVATO

Supreme Court of Texas 2005
171 S.W.3d 845

Chief Justice Jefferson delivered the opinion of the Court.

On behalf of her deceased mother, Pauline Wilson Lovato filed a survival action against Guadalupe Zamora, M.D., Austin Nursing Center, Inc., and related entities and individuals (collectively “Austin Nursing Center”). In her original petition, filed within the statute of limitations, Lovato asserted that she was the personal representative of her mother’s estate. In actuality, Lovato was not appointed independent administrator until after the statute of limitations on the survival action expired. Austin Nursing Center moved for summary judgment, arguing that Lovato lacked standing to bring the survival action at the time the case was filed, and the trial court granted the motion. The court of appeals reversed, holding that Lovato’s later-acquired status as the estate’s personal representative gave her standing, which related back to the time of the lawsuit’s original filing.

We hold that the standing doctrine’s requirements were satisfied and that the trial court had jurisdiction to hear the case. We further hold that although Lovato may have lacked capacity to bring the survival action at the time the lawsuit was filed, any defect in her capacity was later cured by her appointment as the estate’s administrator. Accordingly, we affirm the court of appeals’ judgment.

I Background

Ninety-two-year-old Margarita Torres Wilson allegedly developed pressure ulcers while a resident at Austin Nursing Center from May to June 1998. She was discharged from the center in June and transferred to another care facility. Wilson died on August 18, 1998.

On January 27, 2000, before limitations expired, Lovato filed this survival action on behalf of her mother's estate pursuant to the survival statute, which provides that "[a] personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person." Tex. Civ. Prac. & Rem. Code § 71.021(b). Lovato alleged that she was the "Personal Representative" of Wilson's estate, but also that "no administrator [of the estate] ha[d] been appointed." Lovato asserted that Austin Nursing Center's medical negligence harmed Wilson, resulting in physical pain and impairment, mental anguish, medical expenses, and disfigurement.

Two months after she brought the survival action, Lovato filed an application for independent administration of Wilson's estate in the probate court, asking that she be appointed administrator of the estate and alleging that her mother died intestate, had no real property, and had personal property valued at less than \$2,000. The probate court appointed Lovato administrator nearly two years later, on May 9, 2002, after the statute of limitations on the survival action had expired.

On April 22, 2002, Austin Nursing Center moved for summary judgment, arguing that because Lovato did not prove she was an heir or the estate's personal representative, she lacked standing to bring the survival claim, depriving the trial court of subject matter jurisdiction. Austin Nursing Center argued alternatively that the survival claim was barred by limitations because a party with standing did not timely assert it.

Lovato filed her fourth amended petition and her first supplemental petition on May 20, 2002. In these petitions, Lovato alleged that she was the "Independent Administratrix" of her mother's estate. Lovato then responded to Austin Nursing Center's motion for summary judgment, arguing that her fourth amended petition related back; that she fulfilled the purpose and intent of the statute of limitations by notifying the defendants of the survival claim; and that she had standing to bring the survival claim because she was an heir at the time the original petition was filed, and no administration was pending or necessary.

On July 18, 2002, the trial court granted Austin Nursing Center's motion for summary judgment and dismissed the survival action. The court of appeals reversed the trial court's judgment, holding that (1) Lovato had "filed her original petition within the limitations period, with authority to bring the survival action as an heir"; and (2) "Lovato became

the independent administrator of her mother's estate and filed an amended petition in that capacity." 113 S.W.3d 45, 55. The court reasoned that "Lovato cured her defective standing as personal representative of the estate," because her post-limitations petition "relate[d] back to the original filing of her case." *Id.* (citing Tex. Civ. Prac. & Rem.Code § 16.068). Thus, the court of appeals concluded that the trial court had jurisdiction to hear the survival action. *Id.*

We granted Austin Nursing Center's petition for review. * * *

III Discussion

Austin Nursing Center argues that the court of appeals erred because, under our decision in *Shepherd v. Ledford*, Lovato had standing as an heir only if she could plead and prove that there was no administration pending in probate court and none was necessary. See *Shepherd v. Ledford*, 962 S.W.2d 28, 31-32 (Tex.1998). According to Austin Nursing Center, Lovato failed to meet this burden. Austin Nursing Center also contends that the court of appeals incorrectly permitted Lovato's post-limitations appointment as administrator to cure her pre-limitations lack of standing, an incurable jurisdictional defect..

Lovato contends that the court of appeals' judgment should be affirmed because she had standing as an heir when she originally filed the survival action within the limitations period. Alternatively, Lovato contends that even if she lacked standing as an heir when she originally filed the survival action, her post-limitations amended petition, which she filed as independent administrator of Wilson's estate, related back to the original filing of the survival action, thereby correcting any deficiency in standing. We turn first to the issue of standing.

A Standing Versus Capacity

The parties dispute whether Lovato had standing to assert a survival claim on behalf of Wilson's estate. Although courts and parties have sometimes blurred the distinction between standing and capacity, we believe that the issue presented here is more appropriately characterized as one of capacity.

A plaintiff must have both standing and capacity to bring a lawsuit. *Coastal Liquids Transp.*, 46 S.W.3d at 884. The issue of standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a "justiciable interest" in its outcome, whereas the issue of capacity "is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate." 6A Charles Alan Wright, Arthur r. Miller, and Mary Kay Kane, *Wright, Miller & Kane, Federal Practice and*

Procedure: Civil 2d § 1559, at 441 (2d ed.1990). We have previously distinguished between these two threshold requirements as follows:

A plaintiff has standing when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy.

Nootsie, Ltd. v. Williamson County Appraisal Dist., 925 S.W.2d 659, 661 (Tex.1996); see also 6A WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1559, at 441 (“Capacity has been defined as a party’s personal right to come into court, and should not be confused with the question of whether a party has an enforceable right or interest.”).

In Texas, the standing doctrine requires that there be (1) “a real controversy between the parties,” that (2) “will be actually determined by the judicial declaration sought.” *Nootsie*, 925 S.W.2d at 662 (quoting *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex.1993)). Implicit in these requirements is that litigants are “properly situated to be entitled to [a] judicial determination.” 13 Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d* § 3531, at 338-39 (2d ed.1984). Without standing, a court lacks subject matter jurisdiction to hear the case. *Tex. Ass’n of Bus.*, 852 S.W.2d at 443. Thus, the issue of standing may be raised for the first time on appeal. *Id.* at 445.

In addition to standing, a plaintiff must have the capacity to pursue a claim. For example, minors and incompetents are considered to be under a legal disability and are therefore unable to sue or be sued in their individual capacities; such persons are required to appear in court through a legal guardian, a “next friend,” or a guardian ad litem. * * * Although a minor, incompetent, or estate may have suffered an injury and thus have a justiciable interest in the controversy, these parties lack the legal authority to sue; the law therefore grants another party the capacity to sue on their behalf. Unlike standing, however, which may be raised at any time, a challenge to a party’s capacity must be raised by a verified pleading in the trial court. * * *

B

Survival Claims--Standing

At common law, a person’s claims for personal injuries did not survive her death. * * * In 1895, the Legislature abrogated this rule by enacting the survival statute, which now provides: “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

(now codified at Tex. Civ. Prac. & Rem.Code § 71.021(b)); Russell, 841 S.W.2d at 344. We have described a survival claim as one that belongs to the decedent:

[Under the Texas Survival Statute], a decedent's action survives his death and may be prosecuted in his behalf. The survival action, as it is sometimes called, is wholly derivative of the decedent's rights. The actionable wrong is that which the decedent suffered before his death. The damages recoverable are those which he himself sustained while he was alive and not any damages claimed independently by the survival action plaintiffs (except that funeral expenses may also be recovered if they were not awarded in a wrongful death action). Any recovery obtained flows to those who would have received it had he obtained it immediately prior to his death--that is, his heirs, legal representatives and estate. Russell, 841 S.W.2d at 345 (citations omitted); see also Tex. Civ. Prac. & Rem.Code § 71.021(b).

The parties to a survival action seek adjudication of the decedent's own claims for the alleged injuries inflicted upon her by the defendant. Had the decedent lived, she would have had standing to seek redress in the courts for those injuries; due to her death, a representative must pursue the claim on her behalf. Here, that representative, Wilson's daughter, was ultimately granted the power to sue on the estate's behalf. A change in the status of the party authorized to assert the decedent's personal injury claim, however, does not change the fact that the decedent has been personally aggrieved and would not, therefore, eliminate the decedent's justiciable interest in the controversy. Because a decedent's survival claim becomes part of her estate at death, it follows that the estate retains a justiciable interest in the survival action.

We therefore hold that, in a survival action, the decedent's estate has a justiciable interest in the controversy sufficient to confer standing. * * * When a decedent has been personally aggrieved by a defendant's conduct, the survival action advances a "real controversy" between the estate and the defendant that "will be actually determined by the judicial declaration sought." See Nootsie, 925 S.W.2d at 662. Therefore, because the pleadings in this case alleged that the defendants' negligent conduct injured Wilson, her estate had standing to pursue a claim.

We next consider whether Lovato had the capacity to bring the survival claim on the estate's behalf.

C

Survival Claims--Capacity

Certain individuals are afforded the capacity to bring a claim on an estate's behalf. In general, only the estate's personal representative has the

capacity to bring a survival claim. *Frazier v. Wynn*, 472 S.W.2d 750, 752 (Tex.1971) (“[T]he personal representative ... is ordinarily the only person entitled to sue for the recovery of property belonging to the estate.”); see also *Shepherd v. Ledford*, 962 S.W.2d 28, 31 (Tex.1998). We have acknowledged, however, that under certain circumstances heirs may be entitled to sue on behalf of the decedent’s estate. *Shepherd*, 962 S.W.2d at 31-32. For example, in *Shepherd*, we held that “[h]eirs at law can maintain a survival suit during the four-year period the law allows for instituting administration proceedings if they allege and prove that there is no administration pending and none [is] necessary.” *Id.* We also acknowledged that a family agreement regarding the disposition of the estate’s assets can provide support for the assertion that no administration of the decedent’s estate is necessary. *Id.* at 32-34.

The parties dispute whether, under this Court’s holding in *Shepherd*, Lovato was qualified to bring suit as an heir at the time she filed the survival action. * * * We need not decide whether Lovato proved heirship, however, because we hold that, in any event, Lovato acquired the capacity to sue as the estate’s personal representative when she was appointed administrator on May 9, 2002. We must, therefore, consider whether Lovato’s claims are barred because she did not cure the defect in her representative capacity until after limitations had expired.

D

Defects in Capacity

The survival action in this case is a health care liability claim governed by the two-year statute of limitations in the Medical Liability and Insurance Improvement Act (the “MLIIA”). * * * The parties agree that limitations expired on November 1, 2000 and that Lovato filed her original petition before that date. Her fourth amended and first supplemental petitions, however, were filed after limitations ran. The parties dispute whether these amended petitions should relate back to Lovato’s original petition.

Generally, cases involving post-limitations representative capacity involve an amended pleading alleging that capacity for the first time. * * * In such cases, the issue is usually whether the plaintiff’s post-limitations amendment, altering the plaintiff’s capacity, can relate back to the plaintiff’s pre-limitations pleadings. This case is somewhat unusual, however, because Lovato has alleged representative status on behalf of the estate in every petition filed with the trial court. Her original petition asserted that she was the “Personal Representative of the Estate of Margarita Torres Wilson.” This allegation, though apparently untrue, asserted that Lovato was bringing suit in her capacity as the estate’s representative. Thus, the issue here is not whether her amended pleadings relate back to her original petition--as every petition alleges her

representative status--but whether her post-limitations capacity cures her pre-limitations lack thereof. We conclude that it does.

We have previously recognized that the substitution of a personal representative for dependents does not introduce a new or different cause of action and that such a substitution will relate back to the time of the original filing of the lawsuit. *Pope*, 207 S.W. at 516. Similarly, when a widow filed suit in her individual capacity and later amended her pleadings to assert her capacity as administratrix, we held “[t]hat this defect did not prevent her suit from being ‘properly commenced,’ “ prior to expiration of the statute of limitations. *Davis*, 16 S.W.2d at 118. We noted that:

The defect in her petition was that she sued as an individual, instead of as administratrix. She was the real party at interest, no matter by whom the suit was prosecuted.

This action was commenced before it was barred under the terms of any statute of limitations by the filing of the original petition and the service of citation on the Director General. * * * Although we decided *Davis* and *Pope* before the relation-back statute was enacted, we do not believe the statute compels a different result. Moreover, when faced with a change in a defendant’s capacity--an amended petition filed against an estate’s representative, when the original petition named only the estate itself--we held that limitations did not bar the claim, because “the purpose and the nature of the claim asserted were clear from the outset.” *Price v. Estate of Anderson*, 522 S.W.2d 690, 692 (Tex.1975); see also *Rooke v. Jenson*, 838 S.W.2d 229, 230 (Tex.1992).

If, as we have held, a plaintiff’s amended pleading alleging representative capacity satisfies the relation-back requirements, an original petition that alleges the correct capacity should suffice for limitations purposes, provided that capacity, if challenged, is established within a reasonable time. The trial court, by granting summary judgment, necessarily concluded that, despite her pleading to the contrary, *Lovato* was not the estate’s personal representative at the time she filed the original petition. While we presume that *Lovato* and her attorney filed that petition in good faith, we cannot ascertain from this record the basis for their pleading that *Lovato* was, in fact, “Personal Representative” of *Wilson’s* estate when “no administrator has been appointed.” The parties, or the trial court, are in a better position to determine whether the pleading was filed after reasonable inquiry. * * * In any event, it would be pointless to require that the plaintiff file an “amended” pleading containing the same allegations of capacity as were stated in her original petition. The estate commenced the suit before limitations expired; *Lovato* cured the defect in her capacity before the case was dismissed. Under those circumstances, the estate had standing and was ultimately represented by a person with capacity to pursue the claim on its behalf.

Having determined that Lovato remedied her defective capacity and that her original petition was timely, we need not reach Austin Nursing Center's remaining argument--that the MLIIA's mandatory two-year limitation period "notwithstanding any other law" precludes Lovato's post-limitations amendment from relating back to her original petition. Because Lovato's original petition asserting her representative capacity was filed before the statute of limitations expired, the survival claim is not time-barred.

IV

Conclusion

We affirm the court of appeals' judgment. See Tex.R.App. P. 60.2(a).

Justice JOHNSON did not participate in the decision.

NOTES AND QUESTIONS

1. On the same day, the Supreme Court of Texas decided *Lorentz v. Dunn*, 171 S.W.3d 854 (Tex. 2005), a case with similar facts. The court reversed the lower court's holding that the plaintiff lacked standing because she had not been appointed either at the time she filed the survival action or when the statute of limitations had run.

2. What are the practical and legal consequences of the *Austin* and *Lorentz* decisions? Do you agree?

B. VENUE

Read Prob. Code §§ 6, 8; Civil Prac. & Rem. Code §§ 15.007 & 15.031.

NOTES AND QUESTIONS

1. Decedent died residing in Lubbock County. His estate consisted mainly of real estate located in Travis County. His will was prepared in Bexar County. In what county or counties is venue proper for the probate of Decedent's will?

2. If two or more courts have concurrent venue, which court has proper jurisdiction?

3. Is venue for an action to construe a will governed by § 6? See *Boyd v. Ratliff*, 541 S.W.2d 223 (Tex. Civ. App.—Dallas 1976, writ dismissed).

GONZALEZ v. RELIANT ENERGY, INC.

Supreme Court of Texas 2005
159 S.W.3d 615

Justice OWEN delivered the opinion of the Court.

Two interlocutory appeals in the same underlying case present the issue of whether section 15.007 of the Texas Civil Practice and Remedies Code places venue limitations on a statutory probate court's discretionary authority, pursuant to section 5B of the Texas Probate Code, to transfer to itself a wrongful death, personal injury, or property damage case in which a personal representative of an estate pending in that court is a party. The court of appeals held that under section 15.007, a statutory probate court cannot effectuate such a transfer unless venue in the county in which the probate court is located would be proper under section 15.002 of the Civil Practice and Remedies Code. We affirm.

I

Guadalupe Gonzalez, Jr., lived with his wife Jannete and their children in Hidalgo County. Guadalupe Gonzalez was killed in an accident while working at a Reliant Energy power plant in Fort Bend County, near Houston. Jannete Gonzalez initiated an estate administration proceeding in statutory probate court in Hidalgo County and was appointed dependent administrator of her husband's estate. While the administration of the estate was pending, Gonzalez filed a wrongful death and survival action against Reliant in the Hidalgo County statutory probate court. Reliant moved to transfer venue of the wrongful death and survival case to a district court in Harris County, where its principal place of business is located. The probate court denied the motion.

Meanwhile, Gonzalez filed an identical wrongful death and survival action in a Harris County district court and ten days later filed a motion in the Hidalgo County probate court asking that court to transfer the Harris County suit to Hidalgo County and consolidate the two actions, citing former section 5B of the Texas Probate Code. The version of section 5B that was in effect prior to the 2003 amendments applies to this suit, and it provided:

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, county, or statutory 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.

Back in Harris County, Reliant answered in the Harris County suit and applied for an anti-suit injunction, requesting that Gonzalez be enjoined from pursuing the wrongful death and survival action in Hidalgo County. Reliant argued that section 15.007 of the Civil Practice and Remedies Code rendered venue of that suit improper in Hidalgo County and that the Harris County court had dominant jurisdiction over Gonzalez's wrongful death and survival claims even though they were first filed and remained pending in Hidalgo County. Section 15.007 provides:

Notwithstanding Sections 15.004, 15.005, and 15.031, 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.

Gonzalez countered by filing an amended motion to transfer in Hidalgo County, informing the probate court of the impending anti-suit injunction hearing in Harris County. The Hidalgo County probate court then advanced its hearing on the motion to transfer to itself the Harris County suit so that its hearing would occur before the Harris County anti-suit injunction hearing. Reliant responded by moving for and obtaining a temporary restraining order in the Harris County court requiring Gonzalez to contact the Hidalgo County court and reschedule the hearing on the motion to transfer for a date after the anti-suit injunction hearing.

In accordance with the Harris County district court's temporary restraining order, Gonzalez filed a request in the Hidalgo County probate court to reschedule the transfer hearing. The probate court denied that request, as well as Reliant's motion for a continuance, proceeded with its hearing, and granted Gonzalez's motion to transfer her suit out of the Harris County district court and into the Hidalgo County probate court. The Hidalgo County probate court also denied Reliant's motion to abate.

Subsequently, the hearing on Reliant's application for an anti-suit injunction went forward in the Harris County district court, and that court refused to grant injunctive relief. Reliant then initiated proceedings in two courts of appeals. It sought a writ of mandamus from the Thirteenth District Court of Appeals directing the Hidalgo County court to vacate its transfer order, and that request for relief was denied. Reliant also perfected an interlocutory appeal in the First District Court of Appeals from the Harris County district court's denial of temporary injunctive relief. One business day before the Hidalgo County wrongful death and survival case was set for trial, a divided court of appeals sitting en banc, held that the Harris County district court had abused its discretion in denying Reliant's

request for an anti-suit injunction. The court of appeals remanded the case to the Harris County district court with instructions to enter a temporary injunction. In accordance with the court of appeals' directive, the Harris County district court enjoined Gonzalez "from engaging in proceedings with respect to the wrongful death suit" pending in the Hidalgo County probate court. Gonzalez filed a motion for rehearing of the court of appeals' decision and a separate interlocutory appeal of the district court's injunction.

The court of appeals, again sitting en banc and again divided, considered Gonzalez's motion for rehearing and her interlocutory appeal at the same time, though it denied her motion to consolidate. The court of appeals denied Gonzalez's motion for rehearing of its decision in Reliant's appeal from the denial of injunctive relief, withdrew that opinion, and dismissed the first (Reliant's) appeal. In the same opinion, the court of appeals affirmed the trial court's order granting Reliant's application for an anti-suit injunction, which had been issued in compliance with the court of appeals' directive in the first interlocutory appeal. The court of appeals concluded that section 5A of the Probate Code gives the Hidalgo County statutory probate court concurrent jurisdiction with the Harris County district court over the wrongful death and survival suit at hand, but held that section 5A does not "dispense with the requirement that proper venue must lie for a statutory probate court to exercise its concurrent jurisdiction." Similarly, the court of appeals held that section 5B of the Probate Code, which gives a statutory probate court discretionary authority to transfer to itself a cause of action in which a personal representative of an estate pending in that court is a party, does not dispense with the requirement that venue of the wrongful death and survival action must be proper in the probate court. The court rejected Gonzalez's argument that the Hidalgo County probate court had dominant jurisdiction over the case, holding "it is axiomatic that a court cannot have 'dominant jurisdiction' if it does not have proper venue."

Finally, the court of appeals concluded that venue was improper in Hidalgo County due to section 15.007 of the Civil Practice and Remedies Code, which states that "to the extent 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."

Gonzalez filed two petitions for review in this Court. We have jurisdiction over these interlocutory appeals because there were dissents in the court of appeals and because the court of appeals' opinion expressly declined to follow and conflicts with the holding in *In re Houston Northwest Partners, Ltd.* We granted Gonzalez's petitions and the petition in *Houston Northwest Partners* and consolidated the cases for oral

argument. The Houston Northwest Partners controversy has since settled.
* * *

II

It is undisputed that Gonzalez's estate administration proceeding was properly brought in the Hidalgo County statutory probate court. That court has jurisdiction over the proceeding pursuant to section 5 of the Texas Probate Code, and venue is proper under section 6 of the Probate Code, which governs venue for the probate of wills and administration of estates. Gonzalez's husband was domiciled in Hidalgo County at the time of his death.

It is also undisputed that the Hidalgo County statutory probate court has jurisdiction over Gonzalez's wrongful death and survival action. Former section 5A(c)(1), which governs this suit, provided that "[a] statutory probate court has concurrent jurisdiction with the district court in all actions: (1) by or against a person in the person's capacity as a personal representative." This Court held in *Palmer v. Coble Wall Trust Co.* that this provision, added in 1985 and then contained in section 5A(b), gave probate courts jurisdiction over wrongful death and survival actions. However, this provision does not confer venue. Venue in wrongful death and survival actions is governed by section 15.002 of the Civil Practice and Remedies Code, which provides:

§ 15.002. Venue: General Rule

(a) Except as otherwise provided by this subchapter or Subchapter B or C, all lawsuits shall be brought:

- (1) in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred;
- (2) in the county of defendant's residence at the time the cause of action accrued if defendant is a natural person;
- (3) in the county of the defendant's principal office in this state, if the defendant is not a natural person; or
- (4) if Subdivisions (1), (2), and (3) do not apply, in the county in which the plaintiff resided at the time of the accrual of the cause of action.

The accident that caused the death of Gonzalez's husband occurred in Fort Bend County, and Reliant's principal place of business is in Harris County. Accordingly, venue in Hidalgo County was not proper unless some provision of the Probate Code overrides section 15.002 with respect to wrongful death and survival actions. Gonzalez contends that even if she could not have filed and maintained her wrongful death and survival claims in Hidalgo County over Reliant's objection that venue was

improper, the 1999 version of section 5B of the Probate Code, which governs this case, gave the probate court unfettered authority to transfer wrongful death and personal injury claims to itself. Accordingly, Gonzalez contends that the Hidalgo County probate court had the power to transfer her Harris County suit to Hidalgo County even though venue in Hidalgo County would otherwise be improper. Neither the wording nor the history of section 5B of the Probate Code or section 15.007 of the Civil Practice and Remedies Code supports this position. Former section 5B provided:

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, county, or statutory 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.

However, section 15.007 of the Civil Practice and Remedies Code provides:

§ 15.007. Conflict With Certain Provisions

Notwithstanding Sections 15.004, 15.005, and 15.031, 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.

Thus the question is whether section 5B of the Probate Code authorized the Hidalgo County statutory probate court's transfer of the wrongful death case to itself from the Harris County district court despite section 15.007 and the fact that venue of the suit is not otherwise proper in Hidalgo County. We hold that section 15.007 of the Civil Practice and Remedies Code prohibits such a transfer when there is a timely objection.

Section 15.007 clearly curbs a party's ability to initially bring a lawsuit involving personal injury, death, or property damage in a statutory probate court when venue of the suit is not proper under Chapter 15 in the county in which the probate court is located, even if the probate court has jurisdiction to hear the suit. Section 15.007 also limits the probate court's discretion to transfer those kinds of cases to itself if venue is improper under Chapter 15.

Gonzalez's main argument--that section 5B is not a venue provision and that section 15.007 is therefore inapplicable because it governs only

when there is a conflict between Chapter 15 and the venue provisions of the Probate Code--is unpersuasive. Section 5B permits a transfer. The transfer of a case pertains to venue, not jurisdiction. While section 5A grants concurrent jurisdiction in probate and district courts, section 15.007 makes clear that the transfer authority granted in section 5B is limited by the venue constraints set forth in Chapter 15 for wrongful death, personal injury, and property damage claims. Hidalgo County is not a county of proper venue for the wrongful death suit under section 15.002, as it is not a "county in which all or a substantial part of the events or omissions giving rise to the claim occurred" or the "county of the defendant's principal office in this state." The venue provisions in Chapter 15 govern regardless of whether the issue is the propriety of bringing the suit in the Hidalgo County probate court in the first instance or the probate court's authority to transfer the case. The fact that suit was first brought in another county does not make venue any more proper in Hidalgo County.

The Legislature chose between competing policy considerations in enacting section 5B of the Probate Code and section 15.007 of the Civil Practice and Remedies Code. On the one hand, the Legislature has "persistent [ly] expan[ded]" the statutory probate courts' jurisdiction over the years. On the other hand, the venue statutes were revised in 1995--the same year section 15.007 was added--in an effort to reduce forum shopping. Section 15.007 thus evidences a policy choice by the Legislature in favor of ensuring that suits involving death, personal injury, and property damage are filed in accordance with Chapter 15's venue statutes.

Because Hidalgo County was not a county of proper venue for the wrongful death suit, the Hidalgo County statutory probate court erred in granting Gonzalez's section 5B motion to transfer. In doing so, the probate court "actively interfered with the jurisdiction" of the Harris County court.

III

With regard to the parties' arguments as to which court had "dominant jurisdiction" over the wrongful death suit, we agree with the court of appeals that unless venue would be proper in both Harris and Hidalgo counties, the concept of "dominant jurisdiction" is inapplicable to this case. The court in which suit is first filed generally acquires dominant jurisdiction to the exclusion of other courts if venue is proper in the county in which suit was first filed. "As long as the forum is a proper one, it is the plaintiff's privilege to choose the forum." Hidalgo County, however, was not a proper forum for Gonzalez's wrongful death suit, and the Hidalgo County statutory probate court therefore could not have acquired dominant jurisdiction over the suit even though it was first filed there.

IV

* * * The procedural errors by the court of appeals were thus harmless and do not require reversal.

For the foregoing reasons, we affirm the court of appeals' judgment.

NOTES AND QUESTIONS

1. On the same day, the Texas Supreme Court resolved a conflicting lower court case involving similar facts by conditionally granting mandamus directing a probate court to vacate its order granting a transfer motion under Probate Code § 5B. *In re Terex*, 48 Tex. S. Ct. J. 477 (2005), granting conditional mandamus to *In re Terex*, 123 S.W.3d 673 (Tex. App.—El Paso 2003).

2. The result in this case appears to have been codified by the 2003 Texas Legislature in H.B. 4 which amended Probate Code §§ 5A, 5B, and 607 to provide that venue of an action by or against a personal representative for personal injury, death, or property damage is determined under § 15.007.

C. REVIEW OF PROBATE DECISIONS**1. Certiorari**

Texas law formerly provided that any person interested in a decedent's estate could have the proceedings of a probate court corrected and revised in the District Court by a writ of certiorari. Section 30 of the Probate Code which had authorized this method of review was repealed in 1975.

2. Appeal

Read Prob. Code § 5(g).

CROWSON v. WAKEHAM

Supreme Court of Texas 1995
897 S.W.2d 779

GAMMAGE, Justice, delivered the opinion of the Court, in which all JUSTICES join.

This is an attempt to appeal a probate court ruling in a will contest and application to determine heirship proceeding. The trial court granted a

partial summary judgment against Bonnie Crowson, who claimed to be the common law wife of the decedent, on the ground that she was not his common law wife. The trial court later severed the Crowson summary judgment. Crowson followed the appellate timetable from the severance order, not the partial summary judgment order. The court of appeals determined that the appeal was untimely because the original partial summary judgment was an appealable order under the Probate Code. We hold that the partial summary judgment order was interlocutory because of the contested heirship proceeding. Since the appeal from the severance order was timely, we reverse the judgment of the court of appeals and remand the cause to that court for further proceedings.

George A. Brisson, Jr., died on August 4, 1989. He had no children. Ann Blanks filed a will for probate which she alleged that Brisson executed. The will named Blanks as the sole beneficiary and independent executrix. Bonnie Crowson filed a contest to the application to probate the will. She alleged she was the common law wife of Brisson. She also filed a counterclaim to Blanks' will proceedings seeking actual and exemplary damages for what she alleged was Blanks' knowing and willful attempt to defraud her.

Jerry Edwin Wakeham and four other people filed an intervention alleging they were cousins and heirs of decedent. They also contested the will, but alleged they were the true heirs. Carol Grey Honza filed an application to determine heirship and contest of the will. She alleged not only that the Blanks will was a fraud, but also that Brisson had left a will devising his property to his mother, who predeceased him. She alleged that since gifts to his mother lapsed, an heirship proceeding was necessary to determine the heirs under the intestate descent and distribution laws. Several other purported cousins or relatives also intervened in the heirship and will contest proceeding. All the intervenors contested Crowson's allegation that she was Brisson's common law spouse.

Blanks voluntarily nonsuited her application to probate her version of Brisson's will. The controversy that was left involved the heirship determination, and specifically as to Crowson, whether she was the common law wife. The intervenors filed a motion for summary judgment, based on deemed admissions that Crowson was not the common law wife, which the trial court granted on March 30, 1993. Crowson filed a motion for reconsideration to this order, which was overruled. On June 1, 1993, at Wakeham's request, the trial court signed an order severing the partial summary judgment from the other issues in the heirship proceeding. The stated reason was to make it final for appellate purposes. Crowson filed a motion for rehearing of the summary judgment. The court denied this motion. Following the appellate timetable for the June 1, 1993 order,

Crowson filed an appeal that was timely if the severance set the date, but untimely if the March 30, 1993 partial summary judgment date controlled.

After receiving the transcript but before receiving any briefs, the court of appeals on its own motion sent a letter to all counsel requesting briefs on whether the March 30 order was a final order for purposes of appeal. Since there is no opinion and the letter comes closest to explaining the court of appeals' reasons for dismissal, we reproduce it in the margin. After the parties submitted briefs, the court of appeals issued an order dismissing the appeal for want of jurisdiction because it was untimely.

After reviewing the transcript in this case, the Court has questions concerning its jurisdiction over this cause. Specifically, all rights of Bonnie Crowson in the estate of George Alfred Brisson, Jr., deceased, seem to have derived from her claim that she was his common-law wife. On March 30, 1993, the trial court signed an order declaring that Crowson was not his common-law wife. This order appears to have adjudicated all of Crowson's substantive rights concerning the estate and, in a probate context, would appear to be the final order for appellate purposes. * * *

Under this analysis, however, the subsequent severance was unnecessary to make the summary judgment appealable and the appellate timetable to complain about the trial court's judgment that Crowson was not the decedent's common-law wife ran from March 30, 1993. Therefore, this appeal appears to be untimely.

The court of appeals correctly noted that the probate statutes create special rules for what is appealable in probate cases. As we have explained:

[I]n order to authorize an appeal in a probate matter, it is not necessary that the decision, order, decree, or judgment referred to therein be one which fully and finally disposes of the entire probate proceeding. However, it must be one which finally disposes of and is conclusive of the issue or controverted question for which that particular part of the proceeding is brought.... This statute doubtless has application only to such decisions, orders or judgments as at the end of a term would be held conclusive as adjudicative of some controverted question or right, unless set aside by some proceeding appellate or revisory in its nature. [Citations omitted.]

Kelly v. Barnhill, 144 Tex. 14, 188 S.W.2d 385, 386 (1945) (interpreting the predecessor to Tex.Probate Code § 5(f)). We subsequently wrote:

We interpret [former Probate Code § 28, recodified as § 5(e)] to mean that it has application only to such decisions, orders or judgments as at the end of a term would be held to have

conclusively adjudicated some controverted question or right, unless set aside by some proper appellate or revisory procedure. [Citation omitted.] If the motion to dismiss the contest on the ground that contestants had failed to show an interest in the estate had been sustained, the order would have finally disposed of the controverted question involved, and would have been appealable. Since the order overruling respondents' motion to dismiss failed to finally dispose of the controverted issue, it, therefore, amounts to no more than an interlocutory order, inclusive in its nature made in the progress of the trial, and, therefore not appealable.

Fisher v. Williams, 160 Tex. 342, 331 S.W.2d 210, 213-14 (1960). Both decisions leave much unanswered about how broad or narrow the "issue" must be to constitute an appealable portion of the proceeding. We have also, on occasion, stated the standard to be that all issues of law and fact between the parties involved have been resolved. * * *

The case cited by the court of appeals' letter, Estate of Wright, 676 S.W.2d 161 (Tex.App.--Corpus Christi 1984, writ ref'd n.r.e.), is frequently cited for its language that adjudication of "in other words, a substantial right" makes the probate order appealable. Wright, 676 S.W.2d at 163. In Wright, the substantial right adjudicated was the heirship of all the heirs. The court held that the trial court could not go back and reopen the heirship determination to exclude some previously adjudicated heirs. The case is clearly distinguishable from the present situation in that Wright made a complete determination of all heirship claims but here only Crowson is determined not to be an heir, leaving the numerous other heirship issues still pending. Further, the court described the appealable probate order as disposing of "issue(s) involved in that particular phase of the probate proceeding." Id. at 163-64. Under the present facts, the trial court's conclusion that the established facts negate Crowson's claim to be an heir does not automatically dispose of the heirship claims of all the intervenors and consequently does not dispose of this whole "particular phase" of the probate proceeding. Additionally, the Wright opinion recognized that a special provision, Tex.Probate Code Ann. § 55(a), expressly provided the heirship proceeding judgment "shall be a final judgment." Id. at 164.

The Wright opinion does cite a number of other cases with the "substantial right" language applied in a variety of contexts. We have used the "substantial right" language ourselves in making an analogy to the standards for an appealable receivership order. Huston v. FDIC, 800 S.W.2d 845, 848 (Tex.1990).

While it is true that the determination that Crowson was not the common law wife adjudicated her substantial right because she had no

other basis to claim as an heir, it also left pending all the other heirship rights of the intervenors. The substantial right language always appears as one of the factors for determining whether a probate order is appealable, but equally important is our language that the order must dispose of all issues in the phase of the proceeding for which it was brought. Crowson originally brought her action against Blanks to contest the first will. That action ended when Blanks nonsuited. Blanks and Crowson are not adverse parties to this appeal. The intervenors all brought actions against Crowson as part of the larger heirship proceedings. As between Crowson and the intervenors, the proper “phase” of the proceeding is the heirship determination. The pleadings to exclude her from heirship all appear in applications seeking to establish the respective intervenors’ own heirship claims. We acknowledge our language heretofore has been somewhat ambiguous, but we do not believe that the “phase” or proceedings which raised the intervenors’ contest with Crowson, when properly construed in this case, could be anything other than the whole heirship proceeding.

Because of the potential confusion, we adopt the following test for probate appeals. If there is an express statute, such as the one for the complete heirship judgment, declaring the phase of the probate proceedings to be final and appealable, that statute controls. Otherwise, if there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or parties not disposed of, then the probate order is interlocutory. For appellate purposes, it may be made final by a severance order, if it meets the severance criteria, as did the order in the present case. In setting this standard, we are mindful of our policy to avoid constructions that defeat bona fide attempts to appeal. * * * A severance order avoids ambiguities regarding whether the matter is appealable. Litigants can and should seek a severance order either with the judgment disposing of one party or group or parties, or seek severance as quickly as practicable after the judgment.

Under either the old or new standard, we hold that the partial summary judgment against Crowson was interlocutory as a probate order. The appellate timetable commenced with the date of the severance order and Crowson’s appeal bond was timely. We reverse the judgment of the court of appeals dismissing the appeal as untimely, and remand the cause to that court for further proceedings consistent with this opinion.

DE AYALA v. MACKIE

Supreme Court of Texas 2006
193 S.W.3d 575

Chief Justice JEFFERSON delivered the opinion of the Court.

We deny the motion for rehearing. We withdraw our opinion of April 21, 2006 and substitute the following in its place.

Maria Cristina Brittingham-Sada de Ayala (“Ayala”), defendant below, alleged that the trial court lacked subject matter jurisdiction over this ancillary probate proceeding involving the estate of her father, a Mexican testator whose will was probated in Mexico. The trial court denied Ayala’s motion to dismiss, and she pursued an interlocutory appeal. The court of appeals concluded it had jurisdiction over the appeal, and the parties now agree. Because we disagree, we reverse the court of appeals’ judgment and dismiss the appeal.

I**Factual Background**

Juan Roberto Brittingham McLean (“Brittingham”), a Mexican resident, died testate in Mexico on January 14, 1998. His will was admitted to probate in a Mexican court, and two executors, Raul Hernandez Garcia and Harold Turk, were named. Brittingham’s wife, Ana Maria de la Fuente de Brittingham, sued his estate in that proceeding and asked that court to set aside their property agreement. The Mexican probate court denied her request, and an appeal is pending in Mexico. The Mexican probate proceeding remains open.

Subsequently, in August 2000, Ms. Brittingham filed an application to have Brittingham’s will admitted to probate in Texas, as she alleged that he owned personal property (described as bank deposits, portfolio investments, and claims against third parties) in Webb County. Later that month, the trial court issued ancillary letters testamentary to Ms. Brittingham, naming her the independent executor of Brittingham’s estate (the “Estate”). On behalf of the Estate, Ms. Brittingham sued Brittingham’s daughters and grandchildren (who, pursuant to Brittingham’s will, were the beneficiaries of ninety-five percent of his residuary estate), accusing them of pillaging the Estate’s assets. Brittingham’s only son, John R. Brittingham Aguirre (“Aguirre”), intervened, alleging an interest as a creditor of the Estate.

Ayala moved to dismiss the ancillary probate proceeding for lack of subject matter jurisdiction or, alternatively, to have Ms. Brittingham removed as executor. The trial court denied the motion, and Ayala appealed.

The Estate and Aguirre moved to dismiss the appeal for lack of appellate jurisdiction. Citing *Crowson v. Wakeham*, they argued that, because numerous pleadings and issues remained pending in the trial court, the trial court's order was an unappealable interlocutory order. *See Crowson*, 897 S.W.2d 779 (Tex.1995). The court of appeals disagreed and concluded that it had jurisdiction. 131 S.W.3d 3, 7. Relying on *Crowson*, the court noted that the probate court order addressed all the relief requested by Ayala's motion, resolved the question of subject matter jurisdiction, and confirmed both the admission of the will to probate and the appointment of Ms. Brittingham as executor. *Id.* Thus, the court held that the probate court's order "complete [d] the initial phase of the probate proceeding and [was] final for purposes of appeal." *Id.* The court then held that the trial court had subject matter jurisdiction over the ancillary probate proceeding, but that Ms. Brittingham should be removed as executor due to a conflict of interest. *Id.* at 8-9.

After the court of appeals issued its opinion, Ms. Brittingham resigned as representative of the ancillary estate and withdrew from the litigation. Subsequently, Roberto Tijerina, the Mexican estate's successor independent executor, applied to be named Ms. Brittingham's successor in the Texas case. On April 14, 2004, the trial court denied Tijerina's application and appointed Kevin Michael Mackie as the Estate's successor administrator. Mackie has entered an appearance on behalf of the Estate in this matter.

II Appellate Jurisdiction

We first consider whether the court of appeals had jurisdiction over Ayala's appeal, even though respondents apparently no longer contest that jurisdiction. *See Univ. of Tex. Med. Branch v. Barrett*, 159 S.W.3d 631, 633 n. 8 (Tex.2005). Generally, appeals may be taken only from final judgments. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex.2001). Probate proceedings are an exception to the "one final judgment" rule; in such cases, "multiple judgments final for purposes of appeal can be rendered on certain discrete issues." *Id.* at 192. The need to review "controlling, intermediate decisions before an error can harm later phases of the proceeding" has been held to justify this rule. *Logan v. McDaniel*, 21 S.W.3d 683, 688 (Tex.App.-Austin 2000, pet. denied). Not every interlocutory order in a probate case is appealable, however, and determining whether an otherwise interlocutory probate order is final enough to qualify for appeal, has proved difficult.

In the past, courts relied on the "substantial right" test to decide whether an ostensibly interlocutory probate order had sufficient attributes of finality to confer appellate jurisdiction. *See, e.g., Huston v. F.D.I.C.*, 800 S.W.2d 845, 848 (Tex.1990); *Estate of Wright*, 676 S.W.2d 161, 163

(Tex.App.-Corpus Christi 1984, writ ref'd n.r.e.). Under that standard, once the probate court adjudicated a “substantial right,” the order was appealable. That phrase soon became a fruitful source of litigation as appellate courts struggled to delineate its parameters. Eleven years ago, we attempted to clarify appellate jurisdiction in this complex area. See *Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex.1995) (acknowledging that “our language heretofore has been somewhat ambiguous”). We noted that, while adjudication of a “substantial right” was one factor to be considered, equally important was our earlier precedent requiring that the order dispose of all issues in the phase of the proceeding for which it was brought. *Id.* at 782-83. To sidestep “potential confusion” about the appropriate test for jurisdiction, we adopted this test:

If there is an express statute, such as the one for the complete heirship judgment, declaring the phase of the probate proceedings to be final and appealable, that statute controls. Otherwise, if there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or parties not disposed of, then the probate order is interlocutory.

Id. at 783. Recognizing the inherent difficulties in applying any test to determine appealability, we urged parties to seek severance orders to eliminate ambiguities about whether the order was intended to be final and appealable. *Id.* at 783 (explaining that “[l]itigants can and should seek a severance order either with the judgment disposing of one party or group or parties, or seek severance as quickly as practicable after the judgment”).

The parties in this case did not seek a severance before appealing the order. They could hardly be faulted, however, as an order denying a motion to dismiss an entire proceeding for want of subject matter jurisdiction is more like a prelude than a finale. It certainly does not dispose of a claim that, if asserted independently, would be the proper subject of a lawsuit. See *Guar. Federal Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex.1990); see also *Crowson*, 897 S.W.2d at 783 (urging severance of a claim only “if it meets the severance criteria”); see, e.g., *Forlano v. Joyner*, 906 S.W.2d 118, 120 (Tex.App.-Houston [1st Dist.] 1995, no writ) (“The [venue] transfer order, on the other hand, does not resolve a ‘claim’ at all, and is thus not severable.”); *H.E. Butt Grocery Co. v. Currier*, 885 S.W.2d 175, 177 (Tex.App.-Corpus Christi 1994, no writ) (holding that an order granting a motion to compel discovery could not be severed because it “does not address a ‘claim’ that may be severed under the rules”).

Moreover, under *Crowson*, the trial court’s order was interlocutory because it did not dispose of all parties or issues in a particular phase of the proceedings. Because an order denying a plea to the jurisdiction and

refusing to remove an executor does not end a phase of the proceedings, but sets the stage for the resolution of all proceedings, the order is interlocutory. *See, e.g., Fischer v. Williams*, 160 Tex. 342, 331 S.W.2d 210, 213-14 (1960) (“Since the order overruling respondents’ motion to dismiss [in a probate proceeding] failed to finally dispose of the controverted issue [whether will contestants had shown an interest in the case], it, therefore, amounts to no more than an interlocutory order, inconclusive in its nature, made in the progress of the trial, and, therefore, not appealable.”); *In re O’Bryant*, No. 04-04-00359-CV, 2004 WL 2616323, at *1, 2004 Tex.App. LEXIS 7147, at *2-*3 (Tex.App.-San Antonio Aug.11, 2004, no pet.) (dismissing appeal for lack of jurisdiction, as order denying plea to the jurisdiction in probate case was interlocutory); *Mobil Oil Corp. v. Shores*, 128 S.W.3d 718, 721 (Tex.App.-Fort Worth 2004, no pet.) (court of appeals lacked jurisdiction to review probate court’s denial of plea to the jurisdiction).

The court of appeals did not reach Ayala’s other alleged basis for appellate jurisdiction: that the trial court’s failure to remove Ms. Brittingham as executor was immediately appealable as an order that “overrules a motion to vacate an order that appoints a receiver or trustee.” TEX. CIV. PRAC. & REM. CODE § 51.014(a)(2). Accordingly, we must decide whether the Legislature intended by that language to give appellate courts jurisdiction over all orders refusing to remove estate executors. To support her contention, Ayala relies on our statement in *Bailey v. Cherokee County Appraisal District*, that “the administrator is designated the trustee of the estate property.” *Bailey*, 862 S.W.2d 581, 584 (Tex.1993).

The Legislature enacted the statute permitting interlocutory appeal of orders overruling motions to vacate orders appointing receivers or trustees in 1917, and the provision remains substantially unchanged today. *See* Act of March 30, 1917, 35th Leg., R.S., ch. 168, § 1, 1917 Tex. Gen. Laws 379, 379 (now codified at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(2)). At no time during the statute’s almost ninety-year history have we held that it applies to a motion to remove an estate’s executor. Our statement in *Bailey*-that an administrator is designated trustee of estate property-referred to the administrator’s obligation, as holder of legal title to the estate’s property, to pay ad valorem taxes accruing during administration. *Bailey*, 862 S.W.2d at 583, 586. It did not equate an executor to a trustee for all purposes, and there is no evidence that the Legislature intended to permit immediate appeals of orders refusing to remove estate executors. Accordingly, we conclude that section 51.014(a)(2) does not permit Ayala to pursue an interlocutory appeal of the trial court’s order.

IV
Conclusion

Because the court of appeals was without jurisdiction, we reverse the court of appeals' judgment and dismiss the appeal. TEX. R. APP. P. 60.2(c).

Justice O'NEILL and Justice GREEN did not participate in the decision.

NOTES AND QUESTIONS

1. Who has the right to appeal? Is there an express or implied requirement that the appellant be an interested person?
2. In some circumstances, an appeal bond will not be required. What are they? *Read* Prob. Code § 29.
3. *See generally* Woodward & Smith §§ 101-119.

3. Bill of Review

Read Prob. Code § 31.

NOTES AND QUESTIONS

1. Who may file a bill of review?
2. What are the time limits for filing a bill of review?
3. Three conditions must be met to prevail on a bill of review: (1) The claim or defense must be meritorious, (2) the movant must have been prevented from asserting or making the claim or defense by fraud, accident, or mistake of the opposite party, and (3) the movant must not be at fault or negligent. *See Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979).
4. What advantages might a bill of review have over an appeal?
5. In the case of *In re Estate of Davidson*, 153 S.W.3d 301 (Tex. App.—Beaumont 2004, pet. denied), the trial court denied a bill of review under Probate Code § 31 but did not sever it from the underlying will contest. The moving party appealed. The appellate court dismissed the appeal holding that it lacked jurisdiction because the order denying the bill of review was not a final and appealable order. The court explained that the ultimate issue was whether the court's order admitting the will to probate should be set aside. In addition to the bill of review pleading, the

will contestants also filed a traditional will contest under Probate Code § 93 which had not yet been decided. Because the issues overlap and the court had not yet ruled on all issues, the ruling on the bill of review was not a final and appealable order as required by *Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995).

6. The underlying estates in the case of *In re John G. Kenedy Memorial Foundation*, 159 S.W.3d 133 (Tex. App.—Corpus Christi-Edinburg 2004, no pet.), have a long history in Texas law arising out of the administration of the estates of several members of the wealthy Kenedy family, that is, John, Jr., his wife, Elena, and his sister, Sarita, by a person claiming to be John, Jr.’s biological child. This alleged child filed numerous bills of review seeking to reopen the Kenedy estates which have been closed for many decades. A statutory probate judge who was assigned to the County Court of Kenedy County transferred to his court under Probate Code § 5B the alleged child’s bills of review pending in other courts. The appellate court determined that the judge had no authority to issue these transfer orders.

The court began its analysis by explaining that a bill of review is a direct attack on a prior judgment, must be brought in the court rendering the judgment, and only that court has jurisdiction over the bill. However, once the bill of review is filed in the proper court, it may then be transferred to another court if a procedure to do so exists and is properly followed.

The court then examined Probate Code § 5B with great care and determined that it provided no authority for the statutory probate court judge to effectuate a transfer. The court explained that the transfer power granted in § 5B only applies if an estate is currently pending in the probate court. In this case, the decedents’ estates had been closed for many years. Thus, § 5B did not provide the judge with authority to make the transfer. The court rejected the argument that the filing of a bill of review regarding an estate closed for decades causes the estate to regain a pending status.

Justice Castillo filed a lengthy dissent arguing that the existence of a contested probate matter was sufficient to trigger § 5B’s transfer power despite the statute’s requirement of a “pending” estate.

7. *See generally* Woodward & Smith §§ 128-131.

D. STATUTES OF LIMITATION

1. To Probate a Will

Read Prob. Code § 73.