No. 10-18-00057-CV
STATE OF TEXAS IN THE TENTH COURT OF APPEALS

Haight v. Koley Jessen PC

Decided Jun 12, 2019

No. 10-18-00057-CV

06-12-2019

TINA LEA HAIGHT, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF GRADY MARTIN HAIGHT, DECEASED, Appellants v. KOLEY JESSEN PC, LLO, DAVID DVORAK, AND DAVID MAYER, Appellees

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JOHN E. NEILL Justice

From the 40th District Court Ellis County, Texas
Trial Court No. 91058

MEMORANDUM OPINION

Appellants, Tina Haight, individually and as Executrix of the Estate of Grady Martin Haight, and Mark Fankhauser, as the Dependent Administrator with Will Annexed of the Estate of Grady Martin Haight, filed suit
2 against Appellees, Koley Jessen *2 P.C., L.L.O., David Dvorak, and David Mayer[1] for legal malpractice. The trial court granted Appellees' traditional motion for summary judgment. We affirm.

[1] There were other defendants who are not party to this appeal. The trial court disposed of all remaining parties and claims in an agreed final order of dismissal with prejudice.

BACKGROUND FACTS

Tina Haight and Grady Martin Haight (Marty) married in December 1998, and Tina filed for divorce in May 2009. Marty passed away on March 27, 2014, and at the time of his death the divorce proceedings were still pending. The Haights owned several businesses, including a roofing business and other businesses related to repair of storm damaged properties. Marty ran the Haight businesses, and he hired the law firm of Koley Jessen P.C., L.L.O. to represent some of the Haight businesses. Marty and Tina were each represented by separate counsel for the divorce proceedings.

After Marty's death, David Dvorak and David Mayer, partners in the Koley Jessen firm, began communicating with Tina and her personal lawyers concerning the sale of the Haight businesses. At the time Marty's will was admitted to probate, Tina was appointed Independent Executor of Marty's estate. Tina later resigned as Independent Executor of the estate, and Mark Fankhauser was appointed as Temporary Administrator of the estate. Fankhauser was later appointed Administrator with Will Annexed of the Estate of Grady Martin Haight, deceased. Fankhauser was substituted as a party in this cause of action. Tina eventually entered into an
3 agreement for the sale of her interest and *3 the estate's interest in all of the Haight businesses. After the

agreement was finalized, Tina Haight, individually and as Executrix of the Estate of Grady Martin Haight, filed suit in district court against Appellees and others for legal malpractice. Tina ultimately settled her disputes with the other defendants.

ISSUES ON APPEAL

Tina brings four issues on appeal. She argues that 1) the trial court lacked jurisdiction to hear the appeal; 2) the trial court erred in granting Appellees' motion for summary judgment; 3) the trial court erred in striking her summary judgment evidence; and 4) the trial court erred in granting summary judgment on all claims if it could only be sustained on conclusively negating reliance. Fankhauser brings four issues on appeal and argues that 1) summary judgment evidence was not properly before the court; 2) Appellees' failure to comply with Rule 1.07 of the Texas Disciplinary Rules of Professional Conduct precludes summary judgment in their favor; 3) the trial court improperly granted summary judgment because there was conflicting testimony; and 4) Appellees cannot rely on quasi-estoppel as a basis for summary judgment.

TINA'S ISSUES ON APPEAL

JURISDICTION

In the first issue, Tina argues that the district court did not have jurisdiction over the case. Ellis County does not have a statutory probate court. The Texas Estates Code provides that a probate proceeding includes any matter
4 related to the settlement, *4 partition, or distribution of an estate. *See* TEX. EST. CODE ANN. § 31.001 (West 2014). A matter related to a probate proceeding in a county in which there is no statutory probate court, but in which there is a county court at law exercising original probate jurisdiction, includes a claim brought by a personal representative on behalf of an estate. *See* TEX. EST. CODE ANN. § 31.002 (West 2014).

Tina contends that the present case is a matter related to the Haight probate proceeding because she brought the suit on behalf of herself as well as in her capacity as the Independent Executor of the Estate of Grady Martin Haight. Tina argues that because Ellis County Court, the County Court at Law of Ellis County, and the County Court at Law No. 2 of Ellis County are the only courts with original probate jurisdiction in Ellis County, the District Court lacked jurisdiction to hear this case.

In *In re Hannah*, relator had a relationship with the decedent and was named in his 2009 and 2010 wills. *In re Hannah*, 431 S.W.3d 801 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding). However, decedent executed a will in 2012 that did not include relator. *In re Hannah*, 431 S.W.3d at 804. After the death of the decedent, the 2012 will was admitted to probate and relator did not contest the will. *In re Hannah*, 431 S.W.3d at 805. Relator filed suit in district court for tortious interference with inheritance, slander, and conspiracy. *Id*.

In *In re Hannah*, the court held that a cause of action brought in the district court was not a "matter related to a
5 probate proceeding" within the scope of Section 31.002 of *5 the Estates Code. *In re Hannah*, 431 S.W.3d at 809. The court focused on the nature of the damages sought, and held that because the suit sought damages which would, if awarded, be satisfied from the defendant's individual assets rather than from any property of the estate, the claims were not related to a probate proceeding. *In re Hannah*, 431 S.W.3d at 809-811.

In *Narvaez*, the court agreed with the court in *Hannah* that the nature of the claims and the relief sought must be examined when determining whether the probate court has jurisdiction of a non-probate claim. *Narvaez v. Powell*, 564 S.W.3d 49, 56 (Tex. App.—El Paso 2018, no pet). In *Narvaez*, a group of heirs filed suit in district court against attorneys alleging breach of fiduciary duties and legal malpractice. *Narvaez v. Powell*, 564

S.W.3d at 52. The court in *Narvaez* found that a legal malpractice claim cannot be characterized as a probate proceeding within the meaning of Section 31.001 or related to a probate proceeding as that term is defined by Section 31.002 of the Estates Code. *Narvaez v. Powell*, 564 S.W.3d at 57.

Tina argues that this case is similar to *In re Perkins*, No. 10-17-00311-CV, 2017 LEXIS 12039 (Tex. App. — Waco December 27, 2017, no pet.) (mem. op.). In *Perkins*, a cause of action was brought in the district court of Walker County involving a dispute between sisters over the administration of their mother's estate. One sister filed suit in district court asserting that the other sister breached her fiduciary duty by refusing to sell property
6 and distribute the money. *In re Perkins*, 2017 LEXIS 12039 at *2. This Court found *6 that the cause of action was over a matter related to probate proceedings because the claim arose out of the representative's performance of her duties and that the County Court at Law of Walker County was the proper court in which to bring the claim. *In re Perkins*, 2017 LEXIS 12039 at *3-4. However, Tina's post probate claim is for legal malpractice and is not over a matter related to the probate proceedings.

Moreover, *Perkins* was a mandamus proceeding in which the party asked this Court to compel the district court to abate the proceeding until the estate matters were resolved. *In re Perkins*, 2017 LEXIS 12039 at *6. Tina filed the suit in the District Court and stated jurisdiction was proper because the amount in controversy exceeded the minimum jurisdictional limit of the court and the court had personal jurisdiction over the parties. Tina did not seek to have the case transferred to the County Court at Law.

We agree with the reasoning in *Hannah* and *Narvaez* and find that Tina's legal malpractice claim against Appellees is not a matter related to the probate proceeding as she seeks monetary damages from the Appellees. We overrule Tina's first issue.

SUMMARY JUDGMENT

In the second issue, Tina brings multiple arguments alleging that the trial court erred in granting Appellee's traditional motion for summary judgment. We review a grant of a motion for summary judgment de novo. *KCM Financial LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015); *Williams v. Parker*, 472 S.W.3d 467, 469 (Tex. App.—Waco 2015, no pet.) In a traditional motion for summary judgment, a movant must state specific
7 *7 grounds, and a defendant who conclusively negates at least one essential element of a cause of action or conclusively establishes all the elements of an affirmative defense is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Id*.

Tina first argues that the trial court relied upon summary judgment evidence that was not properly before the court. The parties had an Agreed Protective Order for the filing of confidential information. Pursuant to the Protective Order, documents designated as confidential information were to be filed in a separate envelope, sealed, and labeled "Filed Under Seal." The record shows that Appellees' summary judgment evidence was filed pursuant to the Protective Order. Tina argues that the filing did not comply with TEX. R. CIV. P. 76a and that the evidence was not before the trial court. At the hearing on the motion for summary judgment, Tina waived any objections to the Appellees' summary judgment evidence by failing to object to the materials or the manner in which they were filed. The record shows that the summary judgment evidence was before the trial court and is part of the appellate record. The complaint was not preserved for appellate review. TEX. R. APP. P. 33.1(a).

Tina next argues that the trial court erred in granting Appellee's motion for summary judgment based upon the evidence in the summary judgment record. Tina further contends that the trial court erred in concluding that the affirmative defenses of release and estoppel were established. When the trial court's judgment does not specify

which of several grounds proposed was dispositive, we affirm on any ground raised in *8 the motion that has merit and was preserved for review. *See Joe v. Two Thirty Nine J.V.*, 145 S.W.3d 150, 157 (Tex. 2004).

In the motion for summary judgment, Appellees argued that Tina released any and all claims against them. The parties entered into a settlement agreement which states:

> Effective upon payment to Seller pursuant to the Closing Statement (Exhibit B-3) and Closing of the Transaction, Seller, on her behalf and on behalf of the Estate, present and former spouses, dependents, agents, representatives, heirs, executors, administrators, trustees, partners, successors, assigns, attorneys, accountants, insurers, lenders and all persons acting by, through, under, or in concert with her, past or present (collectively, the "Seller's Releasors"), fully and finally releases and forever discharges Buyers and their present and former spouses, dependents, agents, representatives, heirs, executors, administrators, trustees, partners, successors, assigns, attorneys, accountants, insurers, lenders and all persons acting by, through, under, or in concert with them, past or present, and the Companies and their respective parents, entities, subsidiaries, and affiliates, past and present, as well as their former and present directors, officers, managers, owners, shareholders, members, managers, partners, associates, employees, contractors, customers, predecessors, successors, agents, representatives, insurers, successors, assigns, attorneys, including but not limited to the law firms Koley Jessen, P.C., L.L.O. and Wray, Willett, & Stoffer, PLLC, accountants, including but not limited to the accounting firm Nosal Professional Group, insurers, lenders and sureties, (collectively, the "Seller's Releasees"), of any and from any and all manner of actions, causes of action, claims for relief, in law or in equity, statutory relief, statutory claims, statutory violations, suits, liens, administrative remedies, injunctions, debts, torts, remuneration for services, breach of covenant of good faith and fair dealing, reports, applications, licensing, practices and procedures, frauds, contracts, promissory notes, agreements, promises, breaches of fiduciary duties, tortious interference with contracts, fraudulent inducement, defamation, violation of a law now or hereafter recognized, conversion, mismanagement, liabilities, claims, demands, wages, commission and expense claims, damages, interest, losses, charges, liabilities, invoices, penalties, liens, costs, fees or expenses, of any nature whatsoever, known or unknown, fixed or contingent ...which the Seller's Releasors or any of them now have or have ever had against the Seller's

*9

> Releasees or any of them that arise out of or are in anyway related to the Disputes, the Relationship, the Equity, any matter discussed herein or by reason of any and all acts, omissions, events or facts occurring or existing as of the date hereof. ...

The release is signed by Tina individually and as Independent Executrix of the Estate of Grady Martin Haight.

A release is a contractual arrangement that operates as a complete bar to any later action based upon matters covered in the release. *Naik v. Naik*, 438 S.W.3d 166, 174 (Tex. App. —Dallas 2014, no pet.). To release a claim effectively, the releasing instrument must "mention" the claim to be released. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex.1991); *Naik v. Naik*, 438 S.W.3d at 175. However, it is not necessary for the parties to anticipate and explicitly identify every potential cause of action relating to the subject matter of the release. *Naik v. Naik*, 438 S.W.3d at 175. Rather, "a valid release may encompass unknown claims and damages that develop in the future." *Id.*

The Settlement Agreement and Release was part of the summary judgment evidence admitted without objection and considered by the trial court. The release signed by Tina specifically releases the parties' attorneys and the Koley Jessen law firm. The release included all causes of action and claims for relief. The

release operates as a bar to Tina's claims.

Tina further contends that the release was obtained through trickery, that she did not understand what she was signing, and that she signed "naked signature pages" that did not contain the terms of the agreement. The law presumes that the party knows and *10 accepts the contract terms. *National Property Holdings*, *L.P. v. Westergren*, 453 S.W.3d 419, 425 (Tex. 2015). The record shows that Tina's attorney's read the provisions of the agreement to her. There is an acknowledgment signed by Tina that states "THE FOREGOING SETTLEMENT AND MUTUAL RELEASE AGREEMENT HAS BEEN READ AND FULLY UNDERSTOOD BEFORE THE SIGNING OF THE AGREEMENT." The trial court did not err in granting Appellees' motion for summary judgment. We overrule Tina's second issue. Further, since we find that the trial court did not err in granting summary judgment because Tina's claims were barred by the release, we need not address Tina's fourth issue. TEX. R. APP. P. 47.1.

SUMMARY JUDGMENT EVIDENCE

In the third issue, Tina argues that the trial court erred in sustaining Appellees' objection to her summary judgment evidence and striking the evidence. Appellees objected to Tina's summary judgment evidence, specifically Paragraph 17 of Tina's affidavit offered as Exhibit 31. Appellees argued that the "paragraph is a sham because it contradicts Tina's deposition testimony that she relied upon her own attorneys in deciding whether to enter in the transaction at issue." The trial court sustained the objection and struck Paragraph 17 of Exhibit 31.

Although we generally review summary judgments de novo, a trial court's refusal to consider evidence under the sham affidavit rule should be reversed only if it was an abuse of discretion. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018). This standard *11 of review reflects the deference traditionally afforded a trial court's decision to exclude or admit summary judgment evidence. *Lujan v. Navistar, Inc.*, 555 S.W.3d at 85. A trial court may conclude that a party does not raise a genuine fact issue by submitting sworn testimony that materially conflicts with the same witness's prior sworn testimony, unless there is a sufficient explanation for the conflict. *Lujan v. Navistar, Inc.*, 555 S.W.3d at 87.

In paragraph 17 of her affidavit, Tina stated that she relied upon representations made to her by Koley Jessen attorneys and others when deciding whether to enter into the transaction to sell the Haight businesses. However, the record shows that Tina previously stated that she relied on her own counsel during negotiations. The trial court did not abuse its discretion in striking the summary judgment evidence. We overrule Tina's third issue.

FANKHAUSER'S ISSUES ON APPEAL

SUMMARY JUDGMENT EVIDENCE

In his first issue, Fankhauser argues that the trial court relied upon summary judgment evidence that was not properly before the court. As discussed in Tina's second issue, the parties had an Agreed Protective Order for the filing of confidential information. At the hearing on the motion for summary judgment, Tina and Fankhauser waived any objections to the Appellees' summary judgment evidence by failing to object to the materials or the manner in which they were filed. The record shows that the summary judgment evidence was before the trial court and is part of the appellate record. *12 The complaint was not preserved for appellate review. TEX. R. APP. P. 33.1(a). We overrule Fankhauser's first issue.

PROFESSIONAL CONDUCT

Fankhauser argues in his second issue that the trial court was precluded from granting summary judgment in Appellees' favor because Koley Jessen failed to comply with Rule 1.07 of the Texas Disciplinary Rules of Professional Conduct. Rule 1.07 provides that "a lawyer shall not act as an intermediary between clients unless the lawyer consults with each client concerning the implications of the common representation ... and obtains each client's written consent to the common representation." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.07 (a) *reprinted* in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app.A.

Issues not expressly presented to the trial court by written motion, answer or other response to the motion for summary judgment shall not be considered on appeal as grounds for reversal. TEX. R. CIV. P. 166a(c); *see Garcia v. Garza*, 311 S.W.3d 28, 44 (Tex. App. —San Antonio 2010, pet. den'd). A party cannot raise new reasons why a summary judgment should have been denied for the first time on appeal. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678-79 (Tex. 1979); *Garcia v. Garza*, 311 S.W.3d at 44. Because this argument was not presented to the trial court, we are precluded from reaching its merits. We
13 overrule Fankhauser's second issue on appeal. *13

SUMMARY JUDGMENT

Fankhauser argues in the third issue that the trial court erred in granting Appellee's motion for summary judgment because a fact issue exists whether Tina properly executed the release documents.

In addressing Tina's second issue on appeal, we discussed in detailed fashion the manner in which the release was executed. We found that the release, properly signed by Tina, operates as a bar to Tina's claims. We further found that the law presumes that the party knows and accepts the contract terms. *National Property Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 425 (Tex. 2015). Tina contends that she did not understand what she was signing and that she signed "naked signature pages." However, the record shows that Tina's attorney's read the provisions of the agreement to her. There is an acknowledgment signed by Tina that states "THE FOREGOING SETTLEMENT AND MUTUAL RELEASE AGREEMENT HAS BEEN READ AND FULLY UNDERSTOOD BEFORE THE SIGNING OF THE AGREEMENT." The trial court did not err in granting Appellees' motion for summary judgment. We overrule Fankhauser's third issue. Because we find that the trial court did not err in granting summary judgment because Tina's claims were barred by the release, we need not address Fankhauser's fourth issue. TEX. R. APP. P. 47.1.

CONCLUSION

14 We affirm the trial court's judgment. *14

JOHN E. NEILL

Justice Before Chief Justice Gray,* Justice Davis, and Justice Neill

*(Chief Justice Gray concurs in the judgment. A separate opinion will not issue.)
Affirmed
Opinion delivered and filed June 12, 2019
[CV06]

No. 06-19-00053-CV
Court of Appeals Sixth Appellate District of Texas at Texarkana

Hawes v. Peden

Decided Dec 16, 2019

No. 06-19-00053-CV

12-16-2019

ROGER HAWES, TDCJ #712549, Appellant v. TAMMY E. HENDERSON PEDEN, AN INDIVIDUAL, TAMMY E. HENDERSON PEDEN, PLLC, A CORPORATION, THE ESTATE OF TAMMY E. HENDERSON PEDEN, TANIKA J. SOLOMON, AN INDIVIDUAL, AND TJ SOLOMON LAW GROUP, PLLC, A CORPORATION, Appellees

Memorandum Opinion by Justice Burgess

On Appeal from the 369th District Court Anderson County, Texas
Trial Court No. DCCV 18-630-369 Before Morriss, C.J., Burgess and Stevens, JJ.

2 *2 MEMORANDUM OPINION

Roger Hawes appeals from an order dismissing his suit against the Estate of Tammy E. Henderson Peden (Peden Estate) and Tanika J. Solomon, among others, for breach of contract, fraud, and misrepresentation. The primary issue in this case is whether the 369th Judicial District Court of Anderson County[1] had jurisdiction over Hawes's claims. For the reasons stated herein, we conclude that the trial court properly dismissed the lawsuit.

[1] Originally appealed to the Twelfth Court of Appeals in Tyler, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001. We are unaware of any conflict between precedent of the Twelfth Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

I. Factual and Procedural Background

Hawes filed a petition in a district court in Anderson County alleging that, in April 2016, he paid $2,500.00 to Tammy Henderson Peden (Peden) and her law firm—Tammy E. Henderson Peden, PLLC (Peden, PLLC)—to represent his interests before the Texas Board of Pardons and Paroles (Parole Board).[2] Hawes claimed that when Peden unexpectedly passed away in April 2017, Tanika J. Solomon and TJ Solomon Law Group, PLLC (Solomon), contracted with him to fulfill Peden's legal representation of Hawes and that that obligation was not fulfilled. In response to Hawes's petition for breach of contract, fraud, and misrepresentation, Solomon filed a plea to the jurisdiction alleging that the petition was subject to the jurisdiction of the probate court in which Peden's estate was then being probated. The trial court agreed, finding that the Harris County Probate Court had exclusive jurisdiction over Hawes's claims, and dismissed the suit without prejudice to refiling in the proper

3 court. *3

[2] Hawes is incarcerated in the Michaels Unit in Tennessee Colony, Texas.

In his pro se appeal from the order of dismissal, Hawes claims that the trial court erred in granting the plea to the jurisdiction because (1) his claims rose to the level of the trial court's jurisdiction, (2) Solomon's assumption of his legal representation negated the probate court's jurisdiction, (3) damages exceeded the probate court's statutory limits, (4) venue was mandatory in the county in which he was incarcerated, (5) the ex parte, unnoticed hearing without service of any pending motion caused Hawes to suffer an undue financial burden by subjecting him to additional filing fees, and (6) the basic tenets of due process required service of the motion and Hawes's presence at the hearing. Because we conclude that the trial court properly dismissed the lawsuit pursuant to Solomon's plea to the jurisdiction, we affirm the trial court's judgment.

II. Analysis

A. Standard of Review

"Whether a court has subject matter jurisdiction is a question of law." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) (citing *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002)). Unless a case involves "disputed evidence of jurisdictional facts that also implicate the merits of the case," we review questions of jurisdiction de novo. *Id.* "In deciding a plea to the jurisdiction, the trial court must determine if the plaintiff has alleged facts that affirmatively demonstrate its jurisdiction to hear the case." *Narvaez v. Powell*, 564 S.W.3d 49, 53 (Tex. App.—El Paso 2018, no pet.) (citing *Miranda*, 133 S.W.3d at 226). We construe pleadings liberally in favor of the pleader and accept the factual allegations in the pleadings as true. *Id.* When the pleadings affirmatively negate the existence of jurisdiction, "the trial court may grant the plea to the jurisdiction or the motion to dismiss without allowing the *4 plaintiff an opportunity to amend." *Id.* (citing *Miranda*, 133 S.W.3d at 226). "Whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction is a question of law reviewed *de novo*." *Miranda*, 133 S.W.3d at 226.

B. The Trial Court Did Not Err in Dismissing Hawes's Lawsuit

1. Probate Court Jurisdiction

At the time Hawes filed his petition in the trial court, the probate of the Peden Estate was pending in Probate Court No. 1 of Harris County. That is a statutory probate court. *See* TEX. GOV'T CODE ANN. § 25.1031(a). "In a county in which there is a statutory probate court, the statutory probate court has original jurisdiction of probate proceedings." TEX. ESTATES CODE ANN. § 32.002(c). "In a county in which there is a statutory probate court, the statutory probate court has exclusive jurisdiction of all probate proceedings . . . ." TEX. ESTATES CODE ANN. § 43.0059(a). "A cause of action related to the probate proceeding must be brought in a statutory probate court unless the jurisdiction of the statutory probate court is concurrent with the jurisdiction of a district court as provided by Section 32.007 or with the jurisdiction of any other court." TEX. ESTATES CODE ANN. § 32.005(a).[3] *5

[3] Section 32.007 of the Texas Estates Code provides that a statutory probate court has concurrent jurisdiction with the district court in certain actions not applicable in this case. Those actions include

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

TEX. ESTATES CODE ANN. § 32.007.

The term "probate proceeding," as used in the Texas Estates Code, has been defined to include "an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent." TEX. ESTATES CODE ANN. § 31.001(4) (Supp.)[4]; *see* TEX. ESTATES CODE ANN. § 22.029 ("probate matter," "probate proceedings, "proceeding in probate," and "proceedings for probate" are synonymous and include matters or proceedings related to decedent's estate). "[A] matter related to a probate proceeding includes . . . an action for trial of the right of property that is estate property." TEX. ESTATES CODE ANN. § 31.002(a)(6), (c)(1) (defining matters "related to a probate proceeding").

[4] The full text of this section reads,

> The term "probate proceeding," as used in this code, includes:
>
> (1) the probate of a will, with or without administration of the estate;
>
> (2) the issuance of letters testamentary and of administration;
>
> (3) an heirship determination or small estate affidavit, community property administration, and homestead and family allowances;
>
> (4) an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent;
>
> (5) a claim arising from an estate administration and any action brought on the claim;
>
> (6) the settling of a personal representative's account of an estate and any other matter related to the settlement, partition, or distribution of an estate;
>
> (7) a will construction suit; and
>
> (8) a will modification or reformation proceeding under Subchapter J, Chapter 255.

TEX. ESTATES CODE ANN. § 31.001.

2. Hawes's Petition

In his first three points of error, Hawes essentially claims that his case was properly filed in the district court notwithstanding the probate court action because his petition satisfies the statutorily required amount in
6 controversy and because Solomon replaced Peden as his legal *6 counsel.[5] We turn to Hawes's petition to determine whether it is a probate proceeding or related to a probate proceeding.

5 These points of error were not briefed separately.

Hawes's petition named Peden, Peden, PLLC, the Peden Estate, and Solomon, alleging that Tammy E. Henderson Peden and her law firm contracted to perform various legal services for Hawes, including representation before the Parole Board. Hawes alleged that he paid Peden $2,500.00 to perform the referenced legal services. Hawes further alleged that after Peden passed away on April 18, 2017, he entered into a contract with Solomon, who "assumed the responsibilities and contracted services of . . . Peden." Solomon thereafter allegedly failed to provide any of the assumed legal services, and Hawes was denied parole in June 2017. Hawes maintained that Solomon fraudulently represented that she had prepared and presented a parole plan to the Parole Board but that no such plan was prepared or presented. Solomon is then alleged to have withdrawn from Hawes's representation in December 2017. As a result, Hawes claimed that Solomon breached the contract for legal representation.

In addition, Hawes alleged that Peden, Peden PLLC., and the Peden Estate "breached the contract for legal services by failing to provide the contracted services, and or refunding the original amount of the contract in the amount of $2,500.00 to Roger Hawes." Hawes claimed that Peden, Peden, PLLC, and the Peden Estate were "liable in the amount of the original contracts: 1. $2,500.00 to Roger Hawes."[6] Hawes also claimed that
7 Solomon was liable for compensatory *7 damages in the amount of $2,500.00, and that Solomon, and the Peden Estate were liable for damages for pain, suffering, emotional distress, and continued incarceration.[7]

6 In her verified plea to the jurisdiction, Solomon alleged, among other things, that in April 2016, Hawes entered into a contract for legal representation before the Parole Board with Peden and her law firm. Solomon further alleged that Peden died in April 2017 and that "the probate of the Estate of Tammy E. Henderson Peden is currently pending in Cause No. 4858002, in the Probate Court Number 1, Harris County, Texas." Solomon further alleged that "a cause of action similar to this case is also pending in Cause No. 458002-401, Tanika J. Solomon v. The Estate of Tammy E. Peden, Terry Peden Individually and As Administrator, and Bobbi Lynn Blackwell, in the Probate Court Number 1, Harris County, Texas."

7 Donald Durbin and Anthony Fomby were also plaintiffs in the lawsuit. The combined damages asserted against all defendants by all plaintiffs was $115,600.00.

Hawes's petition alleges that Peden breached her contract with him and that the Peden Estate is liable for compensatory damages in the amount of $2,500.00 and is further liable for damages for pain, suffering, emotional distress, and continued incarceration. Hawes seeks damages against the Peden Estate that would, if awarded, be satisfied from property of the estate. *See*, *e.g.*, *In re Hannah*, 431 S.W.3d 801, 809-810 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (because suit sought damages which would be satisfied from defendant's individual assets rather than from estate property, claims were not related to probate proceeding); *Narvaez*, 564 S.W.3d at 56 (holding that nature of claims and relief sought are to be examined when determining probate court jurisdiction).

Because the petition names Peden's estate as a defendant and seeks damages directly from the estate, the petition is properly classified as a matter related to the probate proceeding. *See* TEX. ESTATES CODE ANN. § 31.002(a)(6), (c)(1) (matter related to probate proceeding includes disputes over ownership of estate property). As such, the trial court was correct to dismiss the lawsuit because the Harris County Probate Court No. 1 had
8 exclusive jurisdiction over this matter. We overrule Hawes's first three points of error. *8

III. Anderson County Venue

Hawes relies on Section 15.019 of the Texas Civil Practice and Remedies Code in support of his argument that his lawsuit against was required to be filed in Anderson County. Section 15.019 provides, "Except as provided by Section 15.014, an action that accrued while the plaintiff was housed in a facility operated by or under contract with the Texas Department of Criminal Justice shall be brought in the county in which the facility is located." TEX. CIV. PRAC. & REM. CODE ANN. § 15.019(a). This provision pertains to venue rather than subject-matter jurisdiction.

While "[s]ubject-matter jurisdiction refers to the court's power to hear a particular type of suit," venue "refers to the propriety of prosecuting, in a particular form, [sic] a suit on a given subject matter with specific parties, over which the forum must, necessarily, have subject-matter jurisdiction." *Scott v. Gallagher*, 209 S.W.3d 262, 264 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (quoting *Gordon v. Jones*, 196 S.W.3d 376, 383 (Tex. App.—Houston [1st Dist.] 2006, no pet.) "Venue pertains solely to where a suit may be brought and is a different question from whether the court has jurisdiction of the property or thing in controversy." *Id.* (citations omitted). "Moreover, unlike subject-matter jurisdiction, which may be challenged at any time, venue may be waived if not challenged in due order and on a timely basis." *Id.*; *see Basley v. Adoni Holdings, LLC*, 373 S.W.3d 577, 585 n.8 (mandatory venue provisions of Chapter 15 not jurisdictional and can be waived). Because Section 15.019 is a venue statute, it does not impact our analysis of subject-matter jurisdiction. And, we have determined that the Anderson County district court did not have subject-matter jurisdiction. We overrule this point of error. *9

9

IV. Hawes's Final Points of Error are Without Merit

We address Hawes's final two points of error together since they are both premised on the following assertions: (1) Hawes was not served with the jurisdictional plea, (2) Hawes did not receive notice of the hearing on the jurisdictional plea, and (3) Hawes was not permitted to be present at the hearing on the jurisdictional plea. Based on these assertions, Hawes claims that his due process rights were violated and that he incurred undue financial hardship by incurring an additional filing fee. The record reflects that these assertions are incorrect.

Solomon's plea to the jurisdiction was filed on November 26, 2018. The certificate of service indicated that this pleading was served via first class mail on "Mr. Roger Hawes, TDCJ #712549, 2664 FM 2054 Michael Unit, Tennessee Colony, TX 75886." Service by mail to Hawes at the listed address[8] complied with Rule 21a of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 21a.

[8] Hawes identified his TDCJ number in his complaint as 712549 and listed his address as "Michaels Unit, 2664 FM 2054, Tennessee Colony, TX 75886."

On February 4, 2019, the Anderson County District Clerk notified Hawes by letter—mailed to the same address listed on the certificate of service above—that "the above style [sic] and numbered cause [had] been set for PLEA TO JURISDICTION on the 6th day of March, 2019[,] at 10:00 AM, IN THE ANDERSON COUNTY COURTHOUSE, PALESTINE, TEXAS." Also on February 4, 2019, a file-marked document entitled "Notice of Submission" and prepared by Solomon was mailed to Hawes with a Rule 21a-compliant certificate of service, stating,

> You are advised that Defendant's Special Appearance will be submitted to the Court on Wednesday, March 6, 2019, at 10:00 a.m. in the above listed Court. No
>
> 10 *10
>
> oral hearing will be heard on this Special appearance unless you request one from the court and the court sets a date for oral hearing.

Nothing in the record indicates that the trial court set a date for an oral hearing on the jurisdictional plea. The record only indicates that the jurisdictional plea was submitted to the court for decision on March 6, 2019.

Because the record indicates that Hawes was properly served with the plea to the jurisdiction and was further properly notified of the date of submission—with no oral hearing having been conducted—we conclude that his final two points of error are without merit.

V. Conclusion

We affirm the trial court's judgment.

Ralph K. Burgess

Justice Date Submitted: October 24, 2019
Date Decided: December 16, 2019

NO. 12-15-00058-CV
COURT OF APPEALS TWELFTH COURT OF APPEALS DISTRICT TYLER, TEXAS

In re Davidson

485 S.W.3d 927 (Tex. App. 2016)
Decided Apr 6, 2016

NO. 12–15–00058–CV

04-06-2016

In re: Jeanette B. Davidson, Individually and as Independent Executor of the Estate of Gary L. Davidson, Deceased, Relator

Thomas R. McLeroy Jr., for Relator. Jeffrey L. Coe, for Appellee.

JAMES T. WORTHEN, Chief Justice

Thomas R. McLeroy Jr., for Relator.

Jeffrey L. Coe, for Appellee.

OPINION

JAMES T. WORTHEN, Chief Justice

In this original mandamus proceeding, Jeanette B. Davidson, individually and as independent executor of the
929 estate of Gary L. Davidson, deceased, challenges the trial court's order denying her motion to transfer *929
venue.[1] The issue presented is whether the trial court abused its discretion in denying Jeanette's motion to transfer venue to San Augustine County. We deny the petition for writ of mandamus.

[1] The real party in interest is Benjamin "Ben" Stone Haynes, independent executor of the estate of Stone Haynes, deceased. The respondent is the Honorable B. Jeffrey Doran, Judge of the Anderson County Court at Law.

Background

Stone Haynes died on May 1, 2012, in San Augustine County. His son Ben filed an application to probate his will stating that the Anderson County Court at Law had jurisdiction and venue because Stone Haynes was domiciled in Anderson County and had a fixed place of residence there at the time of his death. On August 1, 2012, before the will was admitted to probate, Ben signed under oath an interrogatory answer, stating that Stone Haynes was domiciled in San Augustine County and had a fixed place of residence in that county at the time of his death. He also filed on the same day a sworn Proof of Death and Other Facts containing the same information. The Anderson County Court at Law rendered an Order Probating Will and Authorizing Letters Testamentary on August 8, 2012, finding that Stone Haynes was domiciled in San Augustine County at the time of his death. The court also found that it has jurisdiction and permissive venue over the estate. On October 15, 2012, Ben filed an Inventory, Appraisement, and List of Claims showing the total value of the estate's

assets as $183,843.88. Included among those assets was the principal due, $172,778.88, on a real estate lien note that Gary and Jeanette Davidson executed on May 20, 1997, payable to Stone Haynes over a ten year period.

On July 24, 2012, also before the will was admitted to probate, Ben sued Jeanette, individually and as independent executor of Gary's estate. He alleged that the note executed by Gary and Jeanette was in default, that he had accelerated the debt according to the terms of the note, and that the sum of $172,778.88 plus accrued interest was currently due. Jeanette filed an answer, which included a counterclaim against Ben because he filed the suit in Anderson County even though, she alleged, venue was not proper in that county.

On October 26, 2012, Jeanette, individually and as independent executor of Gary's estate, filed a motion to transfer venue of the probate proceeding to San Augustine County. As support for the motion, Jeanette cited the mandatory venue provision for a proceeding to admit a will to probate. Ben filed a written response opposing the motion, and the trial court rendered an order denying the motion to transfer venue. This original proceeding followed.

Availability of Mandamus

Mandamus will issue only to correct a clear abuse of discretion for which the relator has no adequate remedy by appeal. *In re Prudential Ins. Co. of Am*., 148 S.W.3d 124, 135–36 (Tex.2004) (orig.proceeding). A trial court has no discretion in determining what the law is or applying the law to the facts. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex.1992) (orig.proceeding). A trial court abuses its discretion by failing to analyze or apply the law correctly. *Id*. As the party seeking relief, the relator bears the burden of demonstrating entitlement to mandamus relief. *Id*. at 837.

A party may apply for a writ of mandamus with an appellate court to enforce mandatory venue provisions. *See*
930 *930 Tex. Civ. Prac. & Rem. Code Ann. § 15.0642 (West 2002); *see also In re Hannah*, 431 S.W.3d 801, 806 (Tex.App.–Houston [14th Dist.] 2014, orig. proceeding) (per curiam). The focus of a mandamus proceeding under section 15.0642 is whether the trial court abused its discretion. *Id*. A party seeking to enforce a mandatory venue provision is not required to prove the lack of an adequate appellate remedy, but is required only to show that the trial court abused its discretion. *Id*.

Standing

"Venue for a probate proceeding to admit a will to probate or for the granting of letters testamentary or of administration is ... in the county in which the decedent resided, if the decedent had a domicile or fixed place of residence in this state." Tex. Est. Code Ann. § 33.001(1) (West 2014).[2] An "interested person" may file a motion to transfer a probate proceeding to the proper county if it appears that the trial court does not have priority of venue over the proceeding. ***Id***. § 33.102(a) (West 2014). Ben contends that Jeanette is not an "interested person" and therefore does not have standing to file a motion to transfer venue. In a probate proceeding, the burden is on the person whose standing is challenged to prove that she is an "interested person." *Womble v. Atkins*, 160 Tex. 363, 331 S.W.2d 294, 297–98 (1960); *A & W Indus. v. Day*, 977 S.W.2d 738, 741 (Tex.App.–Fort Worth 1998, no pet.).

2 Effective January 1, 2014, the Texas Probate Code was repealed and recodified in the Texas Estates Code. *See* Acts 2009, 81st Leg., ch. 680, § 1 *et seq.* ; Acts 2011, 82nd Leg., ch. 923, § 1 *et seq.* ; Acts 2011, 92nd Leg., ch. 1338, § 1 *et seq*. The new codification is "without substantive change," and its purpose is to make the law "more accessible and understandable." *See*Tex. Est. Code Ann. § 21.001 (West 2014). Accordingly, in this opinion we cite and refer to the Estates Code and its corresponding sections where the parties originally referred to the probate code.

Creditor of the Estate

The Estates Code defines an "[i]nterested person" or a "person interested" as "[a]n heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered." Tex. Est. Code Ann. § 22.018(1) (West 2014). Jeanette asserted in the trial court that she has standing because "as an alleged debtor of the decedent's estate who has denied liability and asserted claims against the estate, [she] clearly has a pecuniary interest which may be materially affected by the [probate] proceedings...." In her mandamus petition, she elaborates further that she has asserted a counterclaim for damages against the estate under the Texas Deceptive Trade Practices Consumer Protection Act. Therefore, she contends that she is a creditor of the estate whose standing is conferred by the statutory definition of "interested person."

In construing a statute, our primary objective is to give effect to the legislature's intent. *Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex.2010). Where there is no legislative definition of a term, we rely on the plain meaning of the text as expressing legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd results. *Id*.

The Estates Code does not define "creditor." However, Jeanette points out that, in legal parlance, "creditor" includes "[a] person or entity with a definite claim against another, especially a claim that is capable of adjustment and liquidation." Black's Law Dictionary (9th ed.2009). In the probate context, the legislature has
931 defined "claims" as including (1) liabilities of a decedent that survive the decedent's *931 death, including taxes, regardless of whether the liabilities arise in contract or tort or otherwise; (2) funeral expenses; (3) the expense of a tombstone; (4) expenses of administration; (5) estate and inheritances taxes; and (6) debts due a decedent's estate. Tex. Est. Code Ann. § 22.005 (West 2014).

Jeanette alleges in her counterclaim that Ben's acts and conduct in filing the suit in Anderson County instead of San Augustine County are "false, misleading or deceptive acts and practices under Tex. Bus. & Comm. Code Ann., § 17.46(b)(23)." *See*Tex. Bus. & Comm. Code Ann. §§ 17.46–17.63 (West 2011 & Supp.2015) (Deceptive Trade Practices–Consumer Protection Act). She alleges further that Ben's conduct was committed "knowingly and/or intentionally" and, consequently, the estate is liable for damages and attorney's fees. A suit for damages resulting from the alleged misconduct of an independent executor is not a pre-death liability of the decedent. *See*Tex. Est. Code Ann. § 22.005(1) (defining "claims" as including liabilities of decedent that survive his death). Nor is such an action one of the other enumerated expenses included within the estates code definition of "claims." *See**id*. § 22.005(2)-(6). Therefore, Jeanette's counterclaim does not qualify as a "claim" according to the estates code. Nevertheless, Jeanette argues that she has standing under the supreme court's definition of "person interested."

Pecuniary Interest in the Estate

Before the legislature defined "person interested" and "interested person," the Texas Supreme Court explained that

> the term "person interested" has a well-defined but restricted meaning. The interest referred to must be a pecuniary one, held by the party either as an individual or in a representative capacity, which will be affected by the probate or defeat of the will. An interest resting on sentiment or sympathy, or any other basis other than gain or loss of money or its equivalent, is insufficient. Thus the burden is on every person ... to allege, and, if required, to prove, that [s]he has some legally ascertained pecuniary interest, real or prospective, absolute or contingent, or in some manner materially affected....

Logan v. Thomason, 146 Tex. 37,202 S.W.2d 212, 215 (1947).[3] "The interest referred to must be one that will be affected by the probate or defeat of the will." *Id.* As one court has noted, "[c]ases after *Logan* have continued to give standing [to those] not set out in [the predecessor to Section 22.005], although in somewhat limited circumstances." *Allison v. Fed. Deposit Ins. Corp.*, 861 S.W.2d 7, 9 (Tex.App.–El Paso 1993, writ dism'd by agr.).

3 The note Gary and Jeanette executed was secured by a lien on 216.17 acres out of the N.G. Roberts League Survey, A–38, in San Augustine County. Gary and Jeanette were the owners of the 216.17 acres in fee simple, subject to Stone Haynes's encumbrance. However, the parties agreed at the hearing on Jeanette's motion to transfer venue that foreclosure of the lien is barred by limitations, but a suit for collection of the debt is not barred.

Jeanette states that she is in possession of money or property from which the alleged debt will be satisfied if Ben prevails in his suit. And she asserts that "the venue [of Ben's] suit has a direct impact on her pecuniary interest therein." More specifically, she contends that "[l]itigation in a forum distant from [her] residence increases the cost of litigation, the ease with which [she] can prosecute [her] defense to the litigation[,] and [her] prospect for a satisfactory conclusion thereof."

932 By these statements, Jeanette explains her reasons for wanting to transfer venue *932 to San Augustine County and the effect that a judgment against her in Ben's suit will have on her personal financial situation and the condition of Gary's estate. But she does not state facts that show she has a pecuniary interest in Stone Haynes's estate. *See, e.g., Logan*, 202 S.W.2d at 215; *see also In re Estate of Stone*, 475 S.W.3d 370, 377 (Tex.App.–Waco 2014, pet. denied) (holding that appellant could not be "interested person" because his contract to purchase estate property was not confirmed by court and he did not fall within statutory categories for "interested person" or have pecuniary interest in estate); *In re Estate of Bendtsen*, 230 S.W.3d 832, 834 (Tex.App.–Dallas 2007, no pet.) (person named executrix in decedent's prior will lacked standing to contest later will because she did not fall within statutory categories for "interested person" or have pecuniary interest in estate). Therefore, the trial court reasonably could have concluded that *Logan* does not apply.

Disposition

Based upon the foregoing analysis, we hold that the trial court reasonably could have concluded that Jeanette lacked standing to file a motion to transfer venue. Consequently, the trial court did not abuse its discretion in denying her motion to transfer venue of the probate proceeding. Accordingly, we ***deny*** Jeanette's petition for writ of mandamus.

NO. 12-18-00054-CV
COURT OF APPEALS TWELFTH COURT OF APPEALS DISTRICT TYLER, TEXAS

In re EOG Res., Inc.

Decided Jun 29, 2018

NO. 12-18-00054-CV

06-29-2018

IN RE: EOG RESOURCES, INC., RELATOR

GREG NEELEY Justice

ORIGINAL PROCEEDING
MEMORANDUM OPINION

Relator EOG Resources, Inc., seeks mandamus relief from the trial court's order refusing to transfer venue of the underlying proceeding to Harris County, Texas.[1] We conditionally grant the writ.

[1] Respondent is the Honorable Craig M. Mixon, Judge of the 1st District Court in San Augustine County, Texas. The Real Party in Interest is Cabot Oil and Gas Corporation.

BACKGROUND

Cabot Oil and Gas Corporation owns several gas producing wells in San Augustine County, Texas. Cabot contracted with EOG to operate those wells while Cabot maintained a non-operating working interest in them. Specifically, EOG and Cabot executed a Participation Agreement (PA) on February 28, 2011. The PA required the parties to execute Joint Operating Agreements (JOAs) that, among other things, authorized EOG to market Cabot's share of the gas produced from the wells, and to deduct certain expenses from the gas sale proceeds.[2]

[2] The JOAs also authorized the parties to execute gas marketing agreements (GMAs), although this was not a requirement in order for EOG to market the gas produced from the wells. The parties later executed GMAs on some, but not all, of the wells at issue.

In 2015, Cabot contacted EOG regarding its belief that EOG improperly deducted "unused firm transportation
2 reservation charges," a type of pipeline cost, from Cabot's share of *2 the proceeds. Accordingly, in 2017, it filed suit in San Augustine County, which is where the relevant wells are located.[3]

[3] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.011 (West 2017).

EOG filed a motion to transfer venue of the underlying lawsuit to Harris County, alleging that a mandatory venue provision in the PA required that claims "arising from this Agreement shall be brought in the State or Federal District Court of Harris County, Texas." Cabot responded that its claims are not based on any of the PA's provisions, they do not arise from it, and consequently do not trigger its venue provision. Moreover, it argued that the PA expired prior to the events giving rise to the suit, rendering it inapplicable. After a hearing, the trial court denied EOG's motion. EOG then filed this original mandamus proceeding.[4]

4 TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (West 2017).

AVAILABILITY OF MANDAMUS

A party may petition for a writ of mandamus with an appellate court to enforce mandatory venue provisions. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (West 2017); *see also* ***In re Hannah*** , 431 S.W.3d 801, 806 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (orig. proceeding) (per curiam). Contractual determination of venue is permitted by statute for actions arising from a "major transaction." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.020 (West 2017). This statute authorizing contractual determination of venue is a mandatory venue provision. *See* ***id .*** § 15.020(b), (c)(2).

Ordinarily, mandamus will issue only to correct a clear abuse of discretion for which the relator has no adequate remedy by appeal. ***In re Prudential Ins. Co. of Am.***, 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding). However, a party seeking to enforce a mandatory venue provision is not required to prove the lack of an adequate appellate remedy, but is required only to show that the trial court abused its discretion. ***In re Mo. Pac. R.R. Co.***, 998 S.W.2d 212, 216 (Tex. 1999) (orig. proceeding). A trial court has no discretion in determining what the law is or applying the law to the facts. ***Walker v. Packer*** , 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). A trial court abuses its discretion by failing to analyze or apply the law correctly. ***Id.*** As the party seeking relief, the relator bears the burden of demonstrating entitlement to mandamus relief. ***Id.*** at
3 837. *3

MOTION TO TRANSFER VENUE

EOG contends that the trial court abused its discretion when it failed to transfer venue of the proceeding to Harris County, because the parties contracted that venue would be fixed there for claims arising from this "major transaction." **Applicable Law**

An action arising from a "major transaction" shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county. TEX. CIV. PRAC. & REM. CODE ANN. § 15.020(b). Similarly, an action arising from a major transaction may not be brought in a county if the party bringing the action has agreed in writing that an action arising from the transaction must be brought in another county of this state and the action may be brought in that other county. *See* ***id .*** § 15.020(c)(2). "Major transaction" means a transaction evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than $1 million. *See* ***id .*** § 15.020(a).

Section 15.020 does not require that an action arise out of a specific agreement. ***In re Fisher*** , 433 S.W.3d 523, 531 (Tex. 2014) (orig. proceeding). Rather, it applies to an action "arising from a major *transaction*." ***Id.*** (emphasis in original). In determining whether the claims asserted "arise from" a major transaction, the court is to apply a "commonsense" examination of the substance of the claims made to determine if they "arise" from the transaction. ***Id.*** at 529-30. A court should consider whether a claimant seeks a direct benefit from a major transaction and whether that transaction, or some other general legal obligation, establishes the duty at issue. ***Id.*** at 529. To resolve the issue, we apply the same type of analysis courts use to determine whether a claim is within the scope of a contract's forum selection clause. ***Id.*** at 530 (finding "no reason to deviate from the type of analysis" used in forum selection clause cases to determine applicability of Section 15.020 mandatory venue provision).

As part of this analysis, we focus on "the parties' intent as expressed in their agreement." ***Pinto Tech. Ventures*** , ***L.P. v. Sheldon*** , 526 S.W.3d 428, 437 (Tex. 2017). The Texas Supreme Court observed that the words "arising out of the agreement" have broad significance absent any significant limitation from the language employed in the underlying agreement. ***Id.*** at 437. The court defined "arise" in the forum selection clause context to mean "to originate from a specified source," "to stem from," and "to result from." ***Id.*** Moreover, the court stated that
4 this standard *4 connotes "a causal connection or relation," concluding that but-for causation is sufficient. ***Id.*** at 437-38. A "but for" cause is one "without which the event could not have occurred." ***Id.*** at 438. In describing the temporal reach of but-for causation, the court stated that it "has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain." ***Id.*** Therefore, a party's "claims arise out of the agreement" when "but for the agreement, the party would have no basis to complain." ***Id.*** (citing ***In re Lisa Laser USA*** , ***Inc.***, 310 S.W.3d 880, 886 (Tex. 2010) (orig. proceeding) (per curiam)).

Section 15.020 is a mandatory venue provision, and when it is implicated, the tag-along venue provision in Section 15.004 also applies. ***Pinto Tech. Ventures*** , 526 S.W.3d at 447. Section 15.004 states that "[i]n a suit in which a plaintiff properly joins two or more claims or causes of action arising from the same transaction, occurrence, or series of transactions or occurrences, and one of the claims or causes of action is governed by the mandatory venue provisions of Subchapter B [including section 15.020], the suit shall be brought in the county required by the mandatory venue provision." TEX. CIV. PRAC. & REM. CODE ANN. § 15.004 (West 2017); *see* ***Pinto Tech . Ventures*** , 526 S.W.3d at 447. **Discussion**

The parties do not dispute, independently or in the aggregate, that the PA, the JOAs, and the GMAs constitute a major transaction or transactions. EOG argues that the PA expressly required the parties to enter JOAs, the JOAs are expressly subject to the terms of the PA, including its venue selection provision, and that but for the working interests established in the PA and JOAs, Cabot would have no claims against EOG. Moreover, its argument continues, the parties executed gas marketing agreements (GMAs) on some of the relevant wells but not others, and the GMAs are expressly subject to the JOAs, which are in turn subject to the PA containing the venue selection provision.

Cabot responds that the entire text of Section 7.9(a) of the PA shows that the parties intended to apply the venue provision only to claims under the PA, and its claims do not arise from the PA. Specifically, Cabot argues that the choice of law provision in Section 7.9(a) of the PA states that it applies to "this agreement and the transactions contemplated hereby," whereas the venue selection provision in that same section applies only to a
5 cause of action "arising from this Agreement." Section 7.9(a) provides in its entirety as follows: *5

> **THIS AGREEMENT AND THE TRANSACTIONS CONTEMPLATED HEREBY SHALL BE GOVERNED BY AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS WITHOUT GIVING EFFECT TO PRINCIPLES THEREOF RELATING TO CONFLICTS OF LAW RULES THAT WOULD DIRECT THE APPLICATION OF THE LAWS OF ANOTHER JURISDICTION.** Any claim or cause of action arising from this Agreement shall be brought in the State or Federal District Court of Harris County, Texas.

The PA defined "Agreement" as "this PARTICIPATION AGREEMENT." However, Section 7.10 states that "the *exhibits* and schedules referred to herein are attached hereto and incorporated herein by this reference, and unless the context expressly requires otherwise, the *exhibits* and schedules are incorporated in the definition of 'Agreement.'" (emphasis added). Section 7.14 states that "[t]his Agreement, together with the *exhibits* and schedules hereto, and any other documents delivered in connection with this Agreement contain the entire agreement of the Parties with respect to the subject matter hereof . . . ." (emphasis added).

The PA also defined "JOA" as "a joint operating agreement in the form attached to this Agreement as **Exhibit C** ." The form JOA attached to the PA in Exhibit C states that "[t]his Agreement is subject to that certain Participation Agreement dated February 28, 2011, by and between Cabot Oil & Gas Corporation and EOG Resources, Inc. (Participation Agreement). In the event of any conflicts between this Agreement and the Participation Agreement, the terms and provisions of the Participation Agreement shall prevail to the extent of the conflict."

Article III of the PA was entitled "Joint Operating Agreements and Operator," and Section 3.1 stated that "[c]ontemporaneously with the execution of this Agreement, the Parties shall execute a separate JOA covering . . . the Nolte GU No. 1H . . . . Prior to the Commencement of operations for each Qualified Well to be drilled on the Joint Interest or on a Drilling Unit that includes Joint Interests, the Parties will enter into a JOA for such Drilling Unit." The record shows that the parties executed a JOA in the form required by Exhibit C to the PA for the Nolte GU No. 1H on the same date that they executed the PA as contemplated by Section 3.1 of the PA.

The GMAs contain a provision that "[i]n the event of a conflict between this Agreement and the applicable Joint Operating Agreement, the terms of the applicable Joint Operating Agreement shall control."

As support for its argument, Cabot relies extensively on ***Christus Spohn Health Sys. Corp. v. Nueces County Hosp. Dist.***, 39 S.W.3d 626 (Tex. App.—Corpus Christi 2000, no pet.). *6 In that case, Christus contracted with the hospital district to provide health care to indigent residents of the county. ***Christus Spohn Health Sys. Corp.***, 39 S.W.3d at 628. The parties entered three agreements, a Master agreement, a Lease Agreement, and an Indigent Care Agreement. ***Id.*** Christus later filed suit, seeking a declaratory judgment concerning terms of the Indigent Care Agreement. ***Id.*** As part of its suit, Christus demanded arbitration, alleging that the arbitration provision in the Master Agreement applied to all of the agreements. ***Id.*** The arbitration provision provided in pertinent part that all "claim[s] arising out of this Agreement . . . shall be settled by arbitration conducted in Corpus Christi, Texas . . . ." ***Id.*** The court held that the Master Agreement explained that "this Agreement" refers to the Master Agreement, and that elsewhere, the phrase "this Agreement, and the Related Agreements" was used to indicate application of a provision to all three agreements. ***Id.*** at 629.

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Christus argued that the Indigent Care Agreement indicated it was executed under the terms of the Master Agreement. ***Id.*** at 629-30. The court, when examining the actual language of the Indigent Care Agreement, explained that "this Agreement constitutes a Related Agreement under the terms . . . expressed in the Master Agreement," which indicated the parties' intent to distinguish between the Master Agreement as "this Agreement" and the Lease Agreement and Indigent Care Agreement as "Related Agreements." ***Id.*** at 630.

Christus also pointed to the fact that the Indigent Care Agreement was attached as an "exhibit" to the Master Agreement, and the Master Agreement expressly included exhibits attached to it. ***Id.*** However, the court noted that the provision actually stated "This Agreement, (including all Exhibits and Schedules hereto) and the Related Agreements (including all Exhibits and Schedules thereto) constitute the entire agreement between the parties." ***Id.*** The court reasoned that "[i]f the Indigent Care Agreement were nothing more than an exhibit to the Master Agreement, then there would be no need for this provision to refer separately to 'the Related Agreements' to incorporate the Indigent Care Agreement into the 'entire agreement between the parties.'" ***Id.***

Christus also argued that one of the provisions in the Master Agreement specifically stated that they would form the Indigent Care Agreement, which indicated that the contracts are inseparable. ***Id.*** The court disagreed, stating that they are related, but distinct agreements based on the language used in the contracts. ***Id.*** Moreover, importantly, not only did the Master *7 Agreement contain an arbitration provision, but the Lease Agreement contained its own separate arbitration provision, whereas the Indigent Care Agreement contained none. ***Id.***

7

Similarly, Cabot relies on ***Pinto Tech. Ventures*** , where the Texas Supreme Court held that a mandatory venue provision in an amended shareholder's agreement did not apply to a finance agreement, noting that they were "separate and distinct," and there was no evidence that the parties ever agreed to a particular venue for an action arising from the financing transaction. ***Pinto Tech. Ventures*** , 526 S.W.3d at 447.

The agreements in this case are distinguishable from the agreements in those cases, and the evidence establishes that the parties agreed to venue for Cabot's claims in Harris County. *See* ***id .*** First, ***Christus*** involved the application of an arbitration provision, not a mandatory venue provision. Second, in contrast to ***Christus*** , only one of the agreements here contains a venue selection clause. Third, the Master Agreement in ***Christus*** merely recited that the parties would execute the Lease Agreement and the Indigent Care Agreement. Here, the PA not only expressly required that the parties execute JOAs, but the form JOA was attached as an exhibit to the PA, included in the definition of "this Agreement," and the JOAs were expressly made "subject to" the PA, which is an incorporation of its terms. *See* ***In re 24R*** , ***Inc.***, 324 S.W.3d 564, 567 (Tex. 2010) (orig. proceeding) (per curiam) ("Documents incorporated into a contract by reference become part of that contract."); *see also* ***In re Houston Cnty . ex rel Session*** , 515 S.W.3d 334, 341 (Tex. App.—Tyler 2015, no pet.) (orig. proceeding) (stating that when a contract is "subject to" a letter agreement, at minimum, the letter agreement is incorporated by reference into the contract) (citing ***EOG Res.***, ***Inc. v. Hanson Prod. Co.***, 94 S.W.3d 697, 702 (Tex. App.—San Antonio 2002, no pet.)). A contrary interpretation would render the JOAs' "subject to" language meaningless with respect to the venue provision. Furthermore, under the applicable legal standard, "but for" the interests created by the PA, Cabot would have no claims against EOG, and consequently Cabot's claims "arise from" the PA. *See* ***Pinto Tech . Ventures*** , 526 S.W.3d at 437-38; ***In re Fisher*** , 433 S.W.3d at 530.

Even if some of the claims did not arise from the PA, we would conclude that all of the claims should nevertheless be transferred to Harris County. The PA expressly required that a JOA covering the Nolte GU No. 1H interest be contemporaneously executed with the PA. The record shows that the parties satisfied this obligation and that it contained the provision stating that it was subject to the PA. This interest pertains to one
8 of the wells that forms the basis of *8 Cabot's suit. Thus, the parties manifested the intent that, at a minimum, with respect to this interest, they are part of the same major transaction. *See* ***Fort Worth Indep . Sch. Dist. v. City of Fort Worth*** , 22 S.W.3d 831, 840 (Tex. 2000) (holding that instruments pertaining to same transaction may be construed together). Therefore, the trial court was required to transfer Cabot's claims with respect to that interest. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.020. In addition, the tag-along venue provision applies to all of Cabot's remaining claims, requiring that all claims be transferred to the state or federal courts in Harris County.[5] *See* ***id .*** § 15.004; *see* ***Pinto Tech . Ventures*** , 526 S.W.3d at 447 (noting that if one claim is required to be transferred pursuant to Section 15.020, then all claims in suit must likewise be transferred pursuant to Section 15.004).

[5] Similarly, EOG marketed gas for some of the interests that form the basis of Cabot's claims solely under the JOAs as authorized by those agreements, unaccompanied by a corresponding GMA. With respect to these interests, the JOAs are "subject to" the PA, including its mandatory venue provision. As a result, the trial court should have transferred the claims based on these interests, along with the wells subject to GMAs according to the tag-along venue statute in Section 15.004. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.004; *see* ***Pinto Tech . Ventures*** , 526 S.W.3d at 447.

Cabot also argues that the caselaw development in this area concerned whether a contractual venue provision also applied to tort claims which arose out of the transaction governed by the contract at issue. *See*, *e.g.*, ***Pinto Tech . Ventures*** , 526 S.W.3d at 447; ***In re Fisher*** , 433 S.W.3d at 529-30. Although the caselaw in this area "discusse[s] a tort/contract dichotomy [in implementing the "but for" test], rather than the scope of contractual coverage, its reasoning [also] applies in [the forum selection clause context]," and consequently, the Section

15.020 "major transaction" context. *See* ***In re Lisa Laser USA*** , ***Inc.***, 310 S.W.3d at 884; *see also* ***In re Fisher*** , 433 S.W.3d at 530 (holding that the reasoning and analysis in ***In re Lisa Laser*** applies not only to forum selection clauses, but also to venue selection clauses in "major transactions" under Section 15.020).

Finally, Cabot contends that the PA expired prior to the events giving rise to its claims against EOG, and consequently, the venue provision does not apply. Section 6.1 of the PA creates a three year term. However, the PA expressly states that the provisions of Section 6.2 and Article VII shall survive the termination of the agreement, and Section 6.2 states that "any executed JOA shall survive the termination of this Agreement." Section 7.9, found in Article VII, contains the mandatory venue selection clause, which survives the
9 termination of the agreement. Additionally, Section 7.6 states in pertinent part that "the provisions of this *9
Agreement shall constitute covenants running with the land and shall remain in full force and effect and be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns." Cabot's argument is therefore without merit. We hold that the trial court abused its discretion in denying EOG's motion to transfer venue. *See* ***In re Fisher*** , 433 S.W.3d at 530-31.

CONCLUSION

Based upon our review of the record and the foregoing analysis, we conclude the trial court abused its discretion by denying EOG's motion to transfer venue of this proceeding to Harris County. Accordingly, we ***conditionally grant*** Relator's petition for writ of ***mandamus.*** We direct the trial court to (1) vacate its December 6, 2017 order denying EOG's motion to transfer venue, and (2) transfer the case to Harris County. We trust the trial court will promptly comply with this opinion and order. The writ will issue only if the trial court fails to do so ***within fifteen days of the date of the opinion and order.*** The trial court shall furnish this Court, within the time of compliance with this Court's opinion and order, a certified copy of the order evidencing such compliance.

GREG NEELEY

Justice Opinion delivered June 29, 2018.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

10 *10

COURT OF APPEALS TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

ORDER **EOG RESOURCES, INC.**, Relator
V. **HON. CRAIG M. MIXSON**, Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of **mandamus** filed by EOG Resources, Inc.; who is the relator in Cause No. CV-17-9753, pending on the docket of the 1st Judicial District Court of San Augustine County, Texas. Said petition for writ of **mandamus** having been filed herein on March 15, 2018, and the same having been duly considered, because it is the opinion of this Court that the petition for writ of **mandamus** be, and the same is, ***conditionally granted.***

And because it is further the opinion of this Court that the trial judge will act promptly, vacate his order of December 6, 2017, denying relator's motion to transfer venue, and issue an order transferring the cause to Harris County, Texas; the writ will not issue unless the **HONORABLE CRAIG M. MIXSON** fails to comply with this Court's order ***within fifteen (15) days*** from the date of this order.

Greg Neeley, Justice.

Panel consisted of Worthen, *C.J.*, *Hoyle*, *J. and Neeley*, *J.*

No. 02-18-00349-CV
Court of Appeals Second Appellate District of Texas at Fort Worth

In re Estate of Puckett

Decided Aug 1, 2019

No. 02-18-00349-CV

08-01-2019

ESTATE OF JAMES ANDREW PUCKETT, DECEASED

Memorandum Opinion by Justice Gabriel

On Appeal from the County Court at Law Cooke County, Texas
Trial Court No. PR17461 Before Sudderth, C.J.; Gabriel and Womack, JJ.

2 *2

MEMORANDUM OPINION

Appellant Reneé[1] Puckett Frazier appeals from the statutory county court's denial of her motion to dismiss appellee Rufus Aaron Puckett's motion to set aside a deed to real property. Frazier argues that because Aaron's motion to set aside was a suit for the recovery of land, the statutory county court did not have subject-matter jurisdiction. We conclude that because Aaron's motion related to a pending probate proceeding, the statutory county court had the jurisdiction to determine the issue.

[1] In the trial court, she referred to herself as "René," "Rene," and "Renee." In her appellate brief, she uses "Reneé."

I. BACKGROUND

A. THE WILL AND DEED

The operative facts are largely undisputed. James Andrew Puckett Sr. executed a will on October 24, 2016, naming his grandson Aaron as his independent executor. James Sr. devised his real and personal property to his son James Andrew Puckett Jr. and to two of his grandsons, Aaron and James Puckett III, in "equal shares and in fee simple absolute."[2] But James Sr. specifically made "no provisions" for his other two sons or for Frazier, his daughter.

[2] James Sr. specifically devised all of his guns, ammunition, and knives to James Jr. "to pass them onto his son . . . Aaron . . . when he sees fit or upon his death."

On April 26, 2017, James Sr. signed a general warranty deed conveying a one-acre parcel in Cooke County to
3 Frazier for $10 but granting himself a life estate in the *3 property. *See generally* Tex. Est. Code Ann. § 114.051 (authorizing transfer-on-death deeds); Tex. Prop. Code Ann. § 5.041 (allowing conveyance of an "estate of freehold or inheritance" to commence in the future).

B. PROBATE PROCEEDINGS

James Sr. died on May 18, 2017. Aaron applied to probate the will and for letters testamentary four days later in the County Court at Law of Cooke County, which is a statutory county court and has original probate jurisdiction as provided by law.[3] *See* Tex. Est. Code Ann. § 32.002(b); Tex. Gov't Code Ann. §§ 25.0003(d), 25.0511; *see also* Tex. Gov't Code Ann. § 26.149(a) (providing Cooke County's constitutional county court has no probate jurisdiction). The statutory county court admitted the October 24, 2016 will to probate, appointed Aaron independent executor of James Sr.'s will, and issued letters testamentary to Aaron.

[3] Cooke County does not have a statutory probate court. *See* Tex. Est. Code Ann. § 22.007(c).

Frazier filed an application to set aside the order admitting the will to probate based on her assertion that James Jr. and James III exerted undue influence over James Sr. when he executed the October 2016 will and also when he executed a prior will in 2015. Frazier requested that these wills be declared invalid and that James Sr.'s
4 March 19, 2013 will, which divided his estate equally among his four children, be admitted to probate. *4

Aaron, as the estate's independent executor, filed a motion to set aside the April 26, 2017 general warranty deed as void because James Sr. lacked the capacity to sign the deed because he "was in poor health and in the hospital under significant medication" at the time and because Frazier exerted undue influence on James Sr. *See generally* Tex. Est. Code Ann. § 114.054(a) (requiring transferor of transfer-on-death deed to have capacity to contract). Aaron also raised the issue in a counterclaim to Frazier's application to set aside the probate-admission order.

Aaron then filed an inventory and appraisement that listed the real property that was the subject of the general warranty deed as an estate asset and valued the parcel at $80,890. *See id*. § 309.051. The statutory county court approved the inventory. *See id*. §§ 309.051(d), 309.054. Frazier later asked for the appointment of an appraiser to value the parcel. *See id*. § 309.001(a).

Approximately thirteen months after Aaron filed his motion to set aside the general warranty deed, Frazier filed a motion to dismiss Aaron's motion for want of jurisdiction, arguing that the statutory county court did not have jurisdiction over a suit for the recovery of land that was not part of James Sr.'s estate at the time of his death. *See* Tex. Gov't Code Ann. § 25.0003(a), (d); *cf. id*. § 26.043(8) (providing constitutional county court has no jurisdiction over suit for the recovery of land). Aaron responded that the statutory county court, sitting as a probate court, had jurisdiction to consider any matter related to the probate proceeding, including "a claim
5 brought by a personal representative on behalf of an estate," "an action for trial *5 of title to real property that is estate property," and "an action for trial of the right of property that is estate property." Tex. Est. Code Ann. § 31.002(a)(3), (5), (6); *see also id*. § 32.001(a) (allowing court exercising original probate jurisdiction to hear "all matters related to the probate proceeding . . . for that type of court"), § 31.002(b)(1) (including matters listed in section 31.002(a) in probate jurisdiction for statutory county court if county, like Cooke County, has no statutory probate court).

The statutory county court held a nonevidentiary hearing on Frazier's motion to dismiss and issued a letter ruling granting the motion. In the letter, the statutory county court stated that because the property was conveyed before James Sr.'s death, it was not part of his estate; thus, any title issue must be heard by Cooke County's district court as a suit for the recovery of land. But four days later, during its plenary power, the statutory county court signed an order denying Frazier's motion. The statutory county court explained the reversal at a pretrial hearing:

> I am reversing my ruling on the motion to dismiss for lack of jurisdiction on the motion to set aside the deed for several reasons. One being that the probate proceeding was already pending when the motion to set aside the deed was filed. Second, the issue is going to be the same on the deed as the will, and that is lack of capacity and undue influence.
>
> . . . .
>
> . . . And the third thing is it would require a petition in the District Court which would create a second lawsuit for the parties, more expense and more pretrial hearings. And so I will be hearing the motion to set aside the deed.

6 *6

The issues of undue influence and testamentary capacity were tried to a jury in the statutory county court.[4] The unanimous jury found that Aaron, James Jr., and James III did not procure James Sr.'s October 24, 2016 will by undue influence; that James Sr. had testamentary capacity when he executed the October 24, 2016 will; that Frazier procured the April 26, 2017 deed through fraud and undue influence; and that James Sr. did not have the mental capacity to execute the April 26, 2017 deed. The statutory county court entered final judgment on the jury's verdict, declaring the October 24, 2016 will to be James Sr.'s valid and unrevoked will and setting aside the April 26, 2017 general warranty deed as void. Therefore, the statutory county court "deemed" that the real property that was the subject of the general warranty deed "remain[ed] an asset" of James Sr.'s estate.

4 No party requested that the reporter's record from the trial on the merits be prepared.

C. APPEAL

Frazier filed a notice of appeal from the order denying her motion to dismiss and from the final judgment. In her brief, however, Frazier attacks only the denial of her pretrial, jurisdictional motion and asks whether a statutory county court has probate jurisdiction to set aside a deed to real property not owned by the testator at the time of his death. Because James Sr. deeded the real property at issue to Frazier before his death, subject to
7 his life-estate interest, Frazier asserts that it cannot be *7 considered estate property and therefore does not fall within the statutory county court's probate jurisdiction as a related matter under section 31.002.

II. JURISDICTION

Because the statutory county court's jurisdiction to determine the validity of the general warranty deed is a question of law, we review the denial of Frazier's motion to dismiss de novo. *See Garza v. Rodriguez*, 18 S.W.3d 694, 696 (Tex. App.—San Antonio 2000, no pet.) (citing *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998)). To establish subject-matter jurisdiction, Aaron was required to affirmatively demonstrate the statutory county court's jurisdiction to hear the issue of the validity of the general warranty deed. *See Jansen v. Fitzpatrick*, 14 S.W.3d 426, 431 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (citing *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993)). We take as true the facts Aaron alleged in his motion to set aside the deed and his counterclaim requesting the same relief to determine whether he met his burden to establish jurisdiction in the statutory county court. *See Saenz v. Saenz*, 49 S.W.3d 447, 449 (Tex. App.—San Antonio 2001, no pet.).

In his motion to set aside, Aaron alleged that Frazier was in possession of the tract, which was "property belonging to the Estate" of James Sr., and refused to relinquish possession. Aaron acknowledged that Frazier asserted the property had been deeded to her shortly before James Sr.'s death but contended that James Sr. had

previously made no bequest to Frazier in his will, that he did not have the capacity to execute such a contract,
8 and that he was "under undue influence." In his *8 counterclaim, which he referred to as a suit to set aside the general warranty deed, Aaron again noted the lack of a bequest to Frazier in James Sr.'s October 2016 will and pointed to Frazier's undue influence and James Sr.'s lack of capacity: Eleven days after being admitted to the hospital with "serious medical issues" and while "under heavy medications," James Sr. "was tricked into signing a General Warranty Deed purportedly conveying his house to [Frazier]. Because the deed was procured by trickery and fraud, it is void."

As we explained above, Cooke County does not have a statutory probate court and its constitutional county court has no probate jurisdiction; therefore, the statutory county court exercises original jurisdiction over probate proceedings in Cooke County. *See* Tex. Est. Code Ann. § 32.002(b); Tex. Gov't Code Ann. §§ 25.0003(d), 25.0511, 26.149(a). *See generally Palmer v. Coble Wall Trust Co.*, 851 S.W.2d 178, 180 n.3 (Tex. 1992) ("Texas probate jurisdiction is, to say the least, somewhat complex."). For a claim to fall within the statutory county court's probate jurisdiction, it must be either a probate proceeding or a matter related to a probate proceeding as those terms are statutorily defined. *See In re Hannah*, 431 S.W.3d 801, 807-08 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (per curiam).

A probate proceeding encompasses "an application, petition, motion or action regarding . . . an estate administration," "a claim arising from an estate administration," and "any other matter related to the settlement,
9 partition, or distribution of an estate." Tex. Est. Code Ann. § 31.001(4)-(6). By alleging in the *9 pending probate proceeding that the general warranty deed was void based on his lack-of-capacity and undue-influence arguments, Aaron was bringing a claim arising from the estate administration that directly related to the settlement, partition, and distribution of James Sr.'s estate. *See id.* § 22.012 (broadly defining "estate"); *see also In re Frank Schuster Farms, Inc.*, No. 13-10-00225-CV, 2010 WL 2638481, at *6 (Tex. App.—Corpus Christi-Edinburgh June 29, 2010, orig. proceeding [mand. denied]) (mem. op.) (noting statutory precursor to section 22.012 broadly defines estate to include property subject to transfer). Therefore, the statutory county court had jurisdiction to determine the validity of the deed as a probate proceeding. *See Saenz*, 49 S.W.3d at 449 ("Title to the land conveyed both by Jose's will and by subsequent deeds is a matter appertaining to Jose's estate. The jurisdiction of the Jim Hogg county court acting as a probate court over such matters is exclusive while the estate administration is pending in that court."); *see also Baker v. Baker*, No. 02-18-00051-CV, 2018 WL 4224843, at *1-2 (Tex. App.—Fort Worth Sept. 6, 2018, no pet.) (mem. op.) (recognizing exclusive probate jurisdiction over related probate matter triggered if probate proceeding already pending); *Pullen v. Swanson*, 667 S.W.2d 359, 363 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (recognizing jurisdiction over matters incident to estate "necessarily presupposes that a probate proceeding is already pending in that court").

Additionally, Aaron's counterclaim and motion to set aside were matters related to a probate proceeding
10 because they involved the determination of the estate's right *10 to a claimed probate asset. *See English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979) ("The determination of a decedent's right to probate assets necessarily falls within the scope of being an action 'incident to an estate.'")[5]; *see also* Tex. Est. Code Ann. § 22.029 (including "matter or proceeding relating to a decedent's estate" in definition of probate proceeding). Frazier argues that because the one-acre tract was not a part of James Sr.'s estate as a result of the general warranty deed, Aaron's counterclaim and motion to set aside the deed were not "an action for trial of the right of property that **is estate property**"; thus, she contends that the validity of the deed is neither a probate proceeding nor a matter related to a probate proceeding. Tex. Est. Code Ann. § 31.002(a)(6) (emphasis added). Our sister court has rejected this exact argument. *See Frank Schuster*, 2010 WL 2638481, at *5-6 (relying on *English*, 593 S.W.2d at 676, and concluding that lawsuit seeking title to real property was matter having "direct impact" on

pending estate administration even though property arguably was not part of testator's estate at time of death); *see also Walker v. Walker*, 152 S.W.3d 220, 225 (Tex. App.—Dallas 2005, no pet.) ("We conclude that the probate court had jurisdiction to order the dependent administrator to sell the property, including the one-half
11 interest not owned by Mother's estate, because this *11 partition relates to Mother's estate under [the predecessor statute to sections 31.001 and 31.002 of the estates code]."). We agree with the *Schuster* court's analysis and applying it here, determine that Aaron's counterclaim and motion to set aside were matters directly related to a probate proceeding subject to the statutory county court's probate jurisdiction. Additionally, Frazier does not dispute that Aaron's counterclaim that he filed in the pending estate-administration proceeding as the independent administrator was a "claim brought by a personal representative on behalf of an estate," which is specifically included in the definition of a matter related to a probate proceeding. Tex. Est. Code Ann. § 31.002(a)(3), (b)(1).

5 The former probate code conferred probate jurisdiction over matters "incident to an estate"; but the statutory change to "matters related to a probate proceeding" in the current estates code is not a substantive difference. *Baker*, 2018 WL 4224843, at *1 n.3; *see also Frank Schuster*, 2010 WL 2638481, at *6 (concluding whether matter is related to probate proceeding involves same analysis as prior determination of incident to an estate).

III. CONCLUSION

Whether the one-acre tract was an estate asset was a determination arising from a pending probate proceeding and was a matter directly related to the estate's administration. Accordingly, the statutory county court had jurisdiction to determine Aaron's counterclaim and motion to set aside the deed. We conclude that Aaron affirmatively established the statutory county court's jurisdiction to determine the issue of the general warranty deed's validity. We overrule Frazier's issue and affirm the statutory county court's order denying Frazier's
12 motion to dismiss and its resulting final judgment. *See* Tex. R. App. P. 43.2(a). *12

/s/ Lee Gabriel

Lee Gabriel

Justice Delivered: August 1, 2019

No. 06-14-00067-CV
Court of Appeals Sixth Appellate District of Texas at Texarkana

In re Maxwell

Decided Aug 29, 2014

No. 06-14-00067-CV

08-29-2014

IN RE: CHRISTOPHER MAXWELL

Memorandum Opinion by Justice Moseley

Original Mandamus Proceeding Before Morriss, C.J., Carter and Moseley, JJ.

2 *2 MEMORANDUM OPINION

Christopher Maxwell has filed a petition for writ of mandamus asking this Court to order the Honorable Eric Clifford of the 6th Judicial District Court to take or refrain from taking certain actions in connection with his inmate trust account. He has attached a copy of a motion which he states was mailed to the trial court July 7, 2014, in which he asked the trial court to review his conviction and remove the attorney fees assessed against him and now being withdrawn from his inmate trust account. He argued in that motion and now in his petition that the attorney fees were improperly assessed against him and asks that the order be expunged of any reference to those fees.

This Court has written several times recently on the issue of attorney fees being improperly assessed against indigent defendants and has consistently reformed judgments to delete those awards. Court-appointed attorney fees assessed against an indigent defendant are error unless there is proof and a finding that he is no longer indigent. *Cates v. State*, 402 S.W.3d 250 (Tex. Crim. App. 2013); *Mayer v State*, 309 S.W.3d 552 (Tex. Crim. App. 2010). Where there is no such evidence or finding, the judgment is infirm, and the trial court errs by assessing attorney fees against a defendant. *Martin v. State*, 405 S.W.3d 944 (Tex. App.—Texarkana 2013, no pet.).

However, the proper way to attack such an alleged error is through a direct appeal from the conviction which contains the order—not by mandamus. By definition, a mandamus is an extraordinary proceeding available
3 only in the absence of other effective remedies. *3

Mandamus relief is normally appropriate only when the trial court clearly abused its discretion and the relator has no adequate remedy by appeal. *In re Reece*, 341 S.W.3d 360, 364 (Tex. 2011) (orig. proceeding); *In re Hannah*, No. 14-14-00126-CV, 2014 WL 1900615 (Tex. App.—Houston [14th Dist.] May 13, 2014, orig. proceeding). We have no record in this case; thus, we cannot determine whether a direct appeal was available (or even if the time for bringing one has yet expired). If an appeal could have been brought, mandamus under these facts cannot lie. The record and information provided does not show that an appeal was not available.

In addition, even if mandamus was an appropriate remedy, we cannot assess the propriety of the trial court's judgment, for we have no copy of that judgment or any other documentation to support or explain Maxwell's contentions. *See* TEX. R. APP. P. 52.3(g).

We deny the petition for writ of mandamus.

Bailey C. Moseley

Justice
Date Submitted: August 28, 2014
Date Decided: August 29, 2014

NO. 14-16-00240-CV
State of Texas in the Fourteenth Court of Appeals

In re OSG Ship Mgmt., Inc.

514 S.W.3d 331 (Tex. App. 2016)
Decided Dec 29, 2016

NO. 14–16–00240–CV

12-29-2016

IN RE OSG SHIP MANAGEMENT, INC., Relator

Robert L. Klawetter, Christina K. Schovajsa, Houston, TX, for Relator. Kurt B. Arnold, Houston, TX, for Real Party in Interest.

J. Brett Busby, Justice

Robert L. Klawetter, Christina K. Schovajsa, Houston, TX, for Relator.

Kurt B. Arnold, Houston, TX, for Real Party in Interest.

Panel consists of Justices Christopher, McCally, and Busby.

OPINION

J. Brett Busby, Justice

Relator OSG Ship Management, Inc. filed a petition for writ of mandamus in this Court, seeking enforcement
335 of a forum-selection *335 clause in an agreement it made with one of its seamen after he was injured. *See* Tex. Gov't Code Ann. § 22.221 (West 2004) ; *see also* Tex. R. App. P. 52. In the petition, relator asks us to compel the Honorable Elaine Palmer, presiding judge of the 215th District Court of Harris County, to set aside her March 7, 2016 order denying OSG's motion to dismiss and sign an order granting the motion to dismiss in the underlying case asserting personal injury claims under the Jones Act.

We conclude that the agreement at issue contains a clause selecting a Florida forum, that it is supported by consideration and not invalid under the Federal Employers Liability Act or on public policy grounds, and that its execution without the involvement of a union representative did not violate the parties' collective bargaining agreement. We conditionally grant the petition.

BACKGROUND

Rasheed Lawal sustained an injury on July 19, 2015, in the course and scope of his employment as a steward with OSG on the *M/T Overseas Anacortes* , a products tanker operating in the Bahamas. Lawal notified the vessel's master of his injury the next day, and he was immediately sent ashore for medical attention. Lawal was evaluated and then returned to the vessel. After a follow-up medical appointment three days later, Lawal was declared unfit for duty.

Lawal was employed under a collective bargaining agreement ("CBA") between the Seafarers International Union, of which he was a member, and the American Maritime Association, of which OSG was a member. Pursuant to the CBA, OSG commenced maintenance and cure payments of $16 per day to Lawal the day after he signed off the vessel.[1] On July 28, 2015, OSG wrote Lawal that it was offering him the opportunity to participate in a Post Incident Payment Plan. Under the Plan, OSG would pay Lawal $2,500 per month until Lawal reached maximum medical cure or the amount paid totaled $10,000.[2] In exchange for participating in the Plan, Lawal agreed to limit the forum in which Lawal could file suit to a federal or state court located in Hillsborough County, Florida. OSG explained to Lawal that "[y]ou are not required to participate in the Plan and you will not suffer any adverse employment actions by OSG if you decide not to participate in the Plan."

[1] Section 14 of the CBA provides for maintenance and cure as follows:

> When a member of the Unlicensed Personnel is entitled to maintenance and cure under Maritime Law, he shall be paid maintenance at the rate of sixteen dollars ($16.00) per day for each day or part thereof of entitlement. The payment due hereunder shall be paid to the man weekly. This payment shall be made regardless of whether he has or has not retained an attorney, filed a claim for damages, or taken any other steps to that end and irrespective of any insurance arrangements in effect between the Company and any insurer.

[2] The cover letter acknowledged that "Seam[e]n that sustain an injury or illness while in the service of the vessel are entitled to maintenance, cure, and unearned wages."

Lawal signed the Post Incident Payment Plan Agreement ("PPA") on August 3, 2015, which provided, in its entirety:

> I, Rasheed Lawal, request that OSG Ship Management, Inc. allow me to participate in the Plan. I agree to the terms and conditions of participating in the Plan as described in the above correspondence, including the material term that any claim, dispute or controversy whatsoever that arises from my alleged July 19, 2015 injury aboard the M/T
>
> 336 *336
>
> OVERSEAS ANACORTES shall be litigated, if at all, in a federal court located in Hillsborough County, Florida to the exclusion of the courts of any other country, state, county, or city. In the event that a federal court lacks jurisdiction, then I agree to litigate any claim, dispute or controversy whatsoever that arises from my alleged July 19, 2015 injury in a state court of competent jurisdiction located in Hillsborough County, Florida to the exclusion of the courts of any other country, state, county, or city.

For the period beginning on August 1, 2015, and ending November 20, 2015, Lawal received a total of $10,000. Of this amount, $1,952 represented daily maintenance payments of $16 for 122 days.

Lawal filed suit against OSG in the 215th District Court in Harris County, in November 2015, seeking personal injury damages under the Jones Act[3] and general maritime law in connection with the July 2015 incident. OSG filed a motion to dismiss the suit based on the forum-selection agreement contained in the PPA, which required Lawal to file suit in a federal or state court located in Hillsborough County, Florida. In a response and sur-response, Lawal argued that the PPA contained an unenforceable venue-selection agreement, the PPA is void

for lack of consideration, enforcement of the PPA would be unreasonable because Lawal was not represented by legal counsel at the time he signed the PPA, and the PPA is not enforceable because a union representative did not represent Lawal at the time he signed the PPA.

[3] *See* 46 U.S.C. § 30140 (providing seamen with remedy for personal injury claims against employers).

The trial court held a hearing on OSG's motion to dismiss and denied the motion. OSG filed this petition shortly thereafter.

ANALYSIS

In its petition, OSG contends that the trial court abused its discretion by denying its motion to dismiss because the PPA is a forum-selection rather than a venue-selection agreement, it is supported by consideration, attorney representation was not necessary under the Texas Arbitration Act because that Act does not apply to forum-selection clauses, and union representation was not necessary because the PPA is not part of an employment agreement. Lawal responds with two additional arguments. First, Lawal asserts that the PPA is void because the Federal Employers Liability Act,[4] which is incorporated into the Jones Act, prohibits forum-selection clauses between seamen and their employers. Second, Lawal argues that attorney representation was required because releases by seamen are subject to careful scrutiny. We address these issues below.

[4] 45 U.S.C. §§ 51 –60.

I. Standard of review

To be entitled to mandamus relief, a relator must demonstrate that (1) the trial court clearly abused its discretion; and (2) the relator has no adequate remedy by appeal. *In re Reece* , 341 S.W.3d 360, 364 (Tex. 2011) (orig. proceeding). A trial court clearly 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 analyze the law correctly or apply the law correctly to the facts. *In re Cerberus Capital Mgmt. L.P.* , 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam). A trial court abuses its discretion when it fails to properly interpret or apply a
337 forum-selection clause. *In re Lisa Laser USA, Inc.* , 310 S.W.3d 880, 883 (Tex. 2010)*337 (orig. proceeding) (per curiam).

An appellate remedy is inadequate when a trial court improperly refuses to enforce a forum-selection clause because allowing the trial to go forward will vitiate and render illusory the subject matter of an appeal, i.e., trial in the proper forum. *Id.* ; *see also In reNationwide Ins. Co. of Am.* , 494 S.W.3d 708, 712 & n.2 (Tex. 2016) (orig. proceeding) ("[W]e have repeatedly held that appeal is inadequate to remedy the erroneous denial of such a motion [to dismiss based on a forum-selection clause]."). Thus, mandamus relief is available to enforce an unambiguous forum-selection clause. *Lisa Laser USA, Inc.* , 310 S.W.3d at 883.

II. The PPA includes a forum-selection clause.

The parties initially dispute whether the PPA includes a forum-selection clause. "The distinction between a forum selection clause and a venue selection clause is critical." *Lui v.Cici Enters. L.P.* , No. 14–05–00827–CV, 2007 WL 43816, at *2 (Tex. App.–Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.). Forum-selection clauses are presumptively valid unless shown to be unreasonable, and they may be enforced in Texas courts through a motion to dismiss. *Id.* ; *see alsoIn re Laibe Corp.* , 307 S.W.3d 314, 316 (Tex. 2010) (orig. proceeding) (per curiam); *In reInt'l Profit Assocs., Inc.* , 274 S.W.3d 672, 675 (Tex. 2009) (orig. proceeding)

(per curiam). Venue, in contrast, cannot be selected by private contract unless provided by statute. *Lui* , 2007 WL 43816, at *2. Moreover, unless venue is challenged by a motion to transfer venue filed before or concurrently with the defendant's answer, any objection to venue is waived. *Id.*

Forum refers to the jurisdiction, generally a nation or state, where suit may be brought. *Id.* ; *see alsoRamsay v. Tex. Trading Co.* , 254 S.W.3d 620, 627 (Tex. App.–Texarkana 2008, pet. denied) (" 'Forum' generally refers to a sovereign state."). Venue concerns the geographic location within the forum where the case may be tried. *In re Hannah* , 431 S.W.3d 801, 806 (Tex. App.–Houston [14th Dist.] 2014, orig. proceeding) (per curiam). "Venue may and generally does refer to a particular county, but may also refer to a particular court." *Gordon v. Jones* , 196 S.W.3d 376, 383 (Tex. App.–Houston [1st Dist.] 2006, no pet.).

Lawal contends that the PPA includes a venue-selection clause because it designates "a federal court located in Hillsborough County, Florida" or, alternatively, "a state court of competent jurisdiction located in Hillsborough County, Florida." This contention does not end our inquiry, however, because not all agreements can be neatly labeled as selecting either a forum or a venue. Some agreements select both. Here, the choice by Lawal and OSG to select a county in the State of Florida as the proper venue necessarily implies that they chose the State of Florida as the forum for a suit arising from Lawal's injury. *SeeIn re Morice* , No. 01–11–00541–CV, 2011 WL 4101141, at *1 (Tex. App.–Houston [1st Dist.] Sept. 15, 2011, orig. proceeding) (mem. op.) ("While [the parties] did not expressly select the State of New York as the forum in which such actions shall be tried, we conclude that their selection of a New York county as the proper venue for suits arising from the lease necessarily implies their selection of the State of New York as the forum for any such suit."); *see alsoLisa Laser USA, Inc.* , 310 S.W.3d at 882 (addressing the following provision as a forum-selection clause: "[t]he
338 California state [or federal] courts of Alameda County, California ... will have exclusive jurisdiction *338 arising out of this agreement, and [HealthTronics] hereby consents to the jurisdiction of such courts"). Accordingly, we conclude that the PPA also includes a forum-selection clause.[5]

5 In order to resolve this mandamus petition, we need not decide whether the portion of the PPA selecting Hillsborough County as the exclusive venue within Florida is enforceable.

Lawal points out that the Texas Legislature has given injured seamen the right to bring Jones Act claims in certain statutorily defined counties. *See* Tex. Civ. Prac. & Rem. Code Ann. § 15.0181 (West Supp. 2015). But this statute simply defines the counties that are mandatory venues for Jones Act claims properly brought in Texas state courts. Because the parties to the PPA selected a Florida forum, section 15.0181 does not apply to this case.[6]

6 *SeeGreat Lakes Dredge & Dock Co. v. Larrisquitu*, Civ. A. Nos. H–06–3489, 2007 WL 2330187, at *22 (S.D. Tex. Aug. 15, 2007) (expressing doubt that section 15.0181"would trump Texas's policy of presuming forum-selection clauses valid").

III. Consideration supports the PPA.

Lawal also asserts that no consideration supports the PPA because the CBA already required OSG to provide him maintenance and cure. To be enforceable, a contract must be supported by consideration. *McLernon v. Dynegy, Inc.* , 347 S.W.3d 315, 335 (Tex. App.–Houston [14th Dist.] 2011, no pet.). Consideration may consist of a benefit that accrues to one party or, alternatively, a detriment incurred by the other party. *Roark v. Stallworth Oil & Gas, Inc.* , 813 S.W.2d 492, 496 (Tex. 1991) ; *Nuszen v. Burton* , 494 S.W.3d 799, 806 (Tex. App.–Houston [14th Dist.] 2016, no pet.). "A promise to fulfill a pre-existing obligation cannot serve as new consideration for an amendment to a contract." *Dupree v. Boniuk Interests, Ltd.* , 472 S.W.3d 355, 368 (Tex.

App.–Houston [1st Dist.] 2015, no pet.) ; *see alsoMcCoy v. Alden Indus., Inc.* , 469 S.W.3d 716, 729 (Tex. App.–Fort Worth 2015, no pet.) (holding that insufficient consideration supports a contract modification where a party agrees to do what he was bound to do by an original contract).

"There is an ancient duty of a vessel to provide maintenance and cure to a seaman who is injured or falls ill while in the service of the ship." *Springborn v. Am. Commercial Barge Lines, Inc.* , 767 F.2d 89, 94 (5th Cir. 1985). "Maintenance is a daily stipend for living expenses, [and] cure is the payment of medical expenses." *Meche v. Doucet* , 777 F.3d 237, 244 (5th Cir. 2015) (citation and internal quotations omitted). "Maintenance and cure is a contractual form of compensation afforded by the general maritime law to seamen who fall ill or are injured while in the service of a vessel." *Id.* (citation and internal quotations omitted). The duty to provide maintenance and cure is unqualified: it cannot be contracted away by seamen, does not depend on the fault of the employer, and is not reduced due to the seaman's contributory negligence. *Boudreaux v. Transocean Deepwater, Inc.* , 721 F.3d 723, 725–26 (5th Cir. 2013).

In this case, the CBA set the rate of maintenance at $16 per day. OSG began making maintenance and cure payments to Lawal effective in late July 2015 and has continued (through at least January 2016) to pay maintenance during the pendency of the litigation.

In early August 2015, Lawal signed the PPA, which obligated OSG to pay Lawal $2,500 each month for four months (August through November 2015) until the total payments reached $10,000 or Lawal reached
339 maximum medical cure, whichever *339 occurred first. The payments would be reduced "at the time of payment for any payments or benefits that you receive from one or more of the following sources: general maritime law (e.g., maintenance), any state laws, federal social security disability or retirement benefits, any other third-party payment (excluding your personal insurance), any other government-sponsored programs, and any other company provided policy and plans." Thus, OSG was entitled to reduce the $2,500 monthly payment by $16 per day for the maintenance OSG was already obligated to pay pursuant to maritime law and the CBA. The Plan further provided that, in the event of litigation, any favorable judgment Lawal received would be set off and reduced by the Plan payments.

There are many reported cases addressing an employer's agreement to pay an injured seaman an advance against a future settlement or judgment in exchange for the seaman's agreement to resolve any disputes in a particular forum, and courts often enforce such agreements.[7] Although the PPA chooses a court rather than an arbitral forum, it is otherwise typical of such agreements, and we conclude it does not fail for lack of consideration. In August through November 2015 (122 days), Lawal was already entitled to receive maintenance payments of $1,952 under the CBA, assuming he did not reach maximum medical improvement earlier. Instead, OSG promised to pay him $10,000 during that same period under the PPA. Even if OSG had exercised its right to offset the maintenance received against its PPA payments, it would still have paid Lawal more than $8,000 under the PPA that he was not otherwise entitled to receive in August through November
340 2015.[8] OSG's promise *340 to pay Lawal this additional amount provides consideration for the PPA. *SeeKIT Projects, LLC v. PLT P'ship* , 479 S.W.3d 519, 526–27 (Tex. App.–Houston [14th Dist.] 2015, no pet.) (holding promise to pay fee provided consideration for contract amendment).

7 *SeeHarrington v. Atl. Sounding Co.*, 602 F.3d 113 (2d Cir. 2010) (rejecting certain defenses to post-injury arbitration agreement under which defendant agreed to pay a percentage of gross wages as advance against settlement until plaintiff was declared fit for duty and/or maximum medical improvement, whichever occurred first, and further credited the advance against any settlement the plaintiff might reach with the defendant or against any further arbitration award the plaintiff might receive, but remanding for hearing on defenses of lack of mental capacity or intoxication); *Barbieri v. K–Sea Transp. Corp.*, 566 F.Supp.2d 187 (E.D.N.Y. 2008) (enforcing post-injury arbitration agreement under which

plaintiff agreed to arbitrate his claims arising out of the incident in exchange for defendant paying him two-thirds of his average net weekly wage as advance against settlement, but requiring employer to pay costs of arbitration); *Matter ofSchreiber v. K–Sea Transp. Corp.*, 9 N.Y.3d 331, 849 N.Y.S.2d 194, 879 N.E.2d 733 (2007) (rejecting certain challenges to post-injury arbitration agreement under which plaintiff agreed to arbitrate his claims arising out of the incident in exchange for defendant paying him two-thirds of his average net weekly wage as advance against settlement, but remanding for hearing on whether defendant deceived plaintiff into signing); *In re Weeks Marine, Inc.*, 242 S.W.3d 849 (Tex. App.–Houston [14th Dist.] 2007, orig. proceeding [mand. denied]) (rejecting certain challenges to post-injury arbitration agreement under which plaintiff agreed to arbitrate any claims arising from his injury in exchange for defendant's agreement to advance certain sums to plaintiff; advances were to be credited against any recovery, by settlement or award, which plaintiff might have against defendant, but instructing trial court to hear evidence on procedural unconscionability defense).

8 The parties dispute whether OSG was also entitled to reduce its monthly PPA payment by any cure amounts it had already paid, but we need not resolve that dispute in order to conclude that the PPA is supported by consideration. There is no indication in the record that either party expected in August 2015 that cure payments would exceed $8,000 by November. Moreover, even if cure payments could be offset, Lawal was exchanging the possibility of receiving more than $1,952 in payments during those four months for a guarantee that he would receive a minimum of $10,000 (assuming, in both cases, that he did not reach maximum improvement earlier). That guaranteed minimum amount is a sufficient benefit to provide consideration for the PPA.

Lawal points out that the amounts he received for maintenance and cure after November 2015 could easily have exceeded this amount, but nothing in the PPA modifies OSG's continuing obligation to provide Lawal with maintenance and cure after November 2015. Lawal also relies on the provision allowing OSG to offset the plan payments against any recovery in litigation. It was not known whether there would be any litigation when the parties signed the PPA, however, and in any event Lawal received consideration by getting the money early. *SeeIn re Gerald Harris Builder, Inc.* , 927 F.2d 1067, 1069 (8th Cir. 1991) ("Even if [one party] was only advancing money that it would owe later, [the other party] received consideration by getting the money early."). Therefore, we hold that the PPA is supported by consideration.

IV. The Federal Employers Liability Act does not invalidate the PPA's forum-selection clause.

Lawal next contends that the forum-selection clause is not enforceable because the Jones Act[9] incorporates the Federal Employers Liability Act ("FELA"), which has been construed to prohibit forum-selection clauses. *SeeBoyd v. Grand Trunk W. R.R. Co.* , 338 U.S. 263, 265–66, 70 S.Ct. 26, 94 L.Ed. 55 (1949) (per curiam).

9 The Jones Act provides:

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

46 U.S.C. § 30140.

In *Boyd* , the Supreme Court of the United States addressed the validity of a contract restricting the choice of venue for a suit under FELA. *Id.* at 263, 70 S.Ct. 26. Boyd was injured in the course of his duties as a railroad employee. *Id.* The railroad advanced Boyd $50 twice during the following month. *Id.* Boyd signed an agreement each time, stipulating that if his claim could not be settled and he elected to sue the railroad, he

would file suit "within the county or district where [he] resided at the time [his] injuries were sustained and not elsewhere." *Id.* at 263–64, 70 S.Ct. 26. Although that county and district were in Michigan, Boyd filed suit in Illinois state court, and the railroad asked a Michigan court to enjoin the suit. *Id.* at 264, 70 S.Ct. 26.

With respect to available venues, FELA included the following provision, which remains substantially unchanged in the current statute:

> Under this Act an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States ....

341 *Id.* at 265 (quoting 45 U.S.C. § 56). All parties agreed that this provision allowed *341 Boyd to sue the Railroad in Illinois state court. FELA also includes a provision voiding any part of a contract "the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act." *Id.* (quoting 45 U.S.C. § 55).

Without addressing whether the plaintiff's choice of forum or venue under section 56 was a "liability created by [FELA],"[10] and with very little discussion, the Supreme Court "agree[d] with those courts which have held that contracts limiting the choice of venue are void as conflicting with [FELA]." *Id.* at 264–65, 70 S.Ct. 26. The Court stated that Boyd's "right to bring the suit in any eligible forum is a right of sufficient substantiality to be included with the Congressional mandate of § [55]." *Id* . In the Court's view, "[t]he right to select the forum granted in § [56] is a substantial right. It would thwart the express purpose of [FELA] to sanction defeat of that right by the device at bar." *Id.* at 266, 70 S.Ct. 26. Therefore, the Court held that the contract was void. *Id.* at 265, 70 S.Ct. 26.

> 10 *SeeKrenger v. Pa. R.R.*, 174 F.2d 556, 560 (2d Cir. 1949) (L. Hand, C.J., concurring) (explaining why contract limiting choice of forum does not exempt carrier from liability for damages).

OSG relies on the Supreme Court's subsequent opinion in *Pure Oil Company v. Suarez* , 384 U.S. 202, 86 S.Ct. 1394, 16 L.Ed.2d 474 (1966), which addressed the relationship between the federal general venue statute and the venue provision of the Jones Act that existed at that time. In *Pure Oil* , an injured seaman filed his Jones Act suit against Pure Oil in federal district court in the Southern District of Florida. *Id.* at 202, 86 S.Ct. 1394. Pure Oil sought to transfer the case to the Northern District of Illinois. *Id.*

The Jones Act venue provision provided that " ‘[j]urisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.’ " *Id.* at 203, 86 S.Ct. 1394.[11] As originally interpreted, the Jones Act venue provision would not have authorized Florida as a proper venue because corporate residence traditionally meant place of incorporation. *Id.* Pure Oil's place of incorporation was Ohio, and its principal office was in Illinois. *Id.* The federal general venue statute provided, however, that a corporate residence also included the district in which the company " ‘is licensed to do business or is doing business,’ " in addition to the place of incorporation. *Id.* at 204, 86 S.Ct. 1394 (quoting 28 U.S.C. § 1391(c)).

> 11 The Jones Act was formerly codified at 46 U.S.C. § 688. Congress renumbered the provisions of the federal maritime code under Title 46, effective October 6, 2006. See Pub. L. No. 109–304, § 6(c), 120 Stat. 1510 (2006). The Jones Act is currently codified at 46 U.S.C. § 30104.

The Supreme Court noted that, although the Jones Act venue provision was framed in jurisdictional terms, it referred only to venue. *Pure Oil Co.*, 384 U.S. at 203, 86 S.Ct. 1394 (citing *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748 (1924)).

Section 1391(c) made the range of proper venues broader in actions against corporations by providing a venue in any judicial district in which the corporate defendant "is doing business." *Id.* This change to the venue statute brought venue law in line with "modern concepts of corporate operations." *Id.* Thus, "the liberalizing purpose underlying [section 1391(c)'s] enactment and the generality of its language support the view that it applies to all venue statutes using residence as a criterion, at least in the absence of contrary restrictive indications in any such statute." *Id.* at 205, 86 S.Ct. 1394. The Court observed that this *342 view of section 1391(c) was consistent with the primary purpose of the Jones Act, which was to give seamen substantive rights and a federal forum for prosecuting their claims. *Id.* Therefore, the Court held that section 1391(c)'s definition of corporate residence applied to the Jones Act. *Id.* at 204, 86 S.Ct. 1394.

342

Some jurisdictions have applied *Boyd* in Jones Act cases, holding that forum-selection clauses are void under FELA because the Jones Act incorporates federal laws "regulating recovery for personal injury to, or death of, a railway employee." 46 U.S.C. § 30140; *see, e.g.* , *Boutte v. Cenac Towing, Inc.* , 346 F.Supp.2d 922, 931–32 (S.D. Tex. 2004) ; *Nunez v. Am. Seafoods* , 52 P.3d 720, 722–24 (Alaska 2002). Subsequently, the Fifth Circuit addressed whether an arbitration clause was void under the Jones Act by virtue of its incorporation of FELA. *Terrebonne v. K–Sea Transp. Corp.* , 477 F.3d 271, 280 (5th Cir. 2007). *Terrebonne* rejected the argument that *Boyd* applied to the Jones Act, reasoning that the Jones Act contained its own venue provision. *Id.* at 281. The Fifth Circuit relied on a prior decision holding that FELA did not govern venue in a Jones Act case. *Id.* (citing *Pure Oil v. Suarez* , 346 F.2d 890, 892 (5th Cir. 1965), *aff'd on other grounds* , 384 U.S. 202, 86 S.Ct. 1394, 16 L.Ed.2d 474 (1966)).[12] The *Terrebonne* court reasoned that because FELA's venue provision (section 56) was not applicable to Jones Act cases, it necessarily followed that nothing in FELA's voidness provision (section 55) applied to Jones Act venue. *Id.* at 282. Therefore, neither section 55 nor *Boyd* voided the arbitration clause in *Terrebonne* . *Id.* at 282–83.[13]

12 As discussed above, the Supreme Court, which affirmed the Fifth Circuit's judgment in *Pure Oil*, applied the federal general venue statute to the Jones Act to expand the definition of corporate residence to include the district in which the company is " 'licensed to do business or is doing business.' " 384 U.S. at 204, 86 S.Ct. 1394 (quoting 28 U.S.C. § 1391(c)). In its analysis, however, the Supreme Court did not address FELA in connection with the venue provision of the Jones Act. *SeeTerrebonne*, 477 F.3d at 282.

13 In *Terrebonne*, the court also distinguished *Boyd* because that case did not involve the Federal Arbitration Act ("FAA") or an arbitration agreement. 477 F.3d at 283. However, the analysis involving the FAA in *Terrebonne* is not relevant to the issues presented in this case.

After *Terrebonne* , the U.S. District Court for the Southern District of Texas addressed whether forum-selection clauses were enforceable under the Jones Act. *SeeLarrisquitu* , 2007 WL 2330187, at *1. The court concluded that although *Terrebonne* involved an arbitration agreement rather than a forum-selection clause, this difference did not affect its "clear holding that the FELA venue provisions do not apply in Jones Act cases[.]" *Id.* at *20. The court further observed that *Terrebonne* eliminated the statutory basis on which *Boutte* and *Nunez* held that the Jones Act incorporated the FELA venue provisions, making forum-selection clauses under the Jones Act unenforceable. *Id.* Thus, the *Larrisquitu* court held that forum-selection clauses are enforceable under the Jones Act. *Id.* at *23.

Under *Terrebonne* and *Larrisquitu* , Lawal would lose his argument that the forum-selection clause in the PPA is unenforceable. But in 2008, Congress intervened, repealing the venue provision of the Jones Act construed in *Pure Oil* and relied on by *Terrebonne* and *Larrisquitu* . *SeeUtoafili v. Trident Seafoods Corp.* , No. 09–2575 SC, 2009 WL 6465288, at *3 (N.D. Cal. Oct. 19, 2009) (citing National Defense Authorization Act for Fiscal
343 Year 2008, Pub. L. No. 110–181, § 3521, 122 Stat. 3, 596 (2008)). Some courts in other *343 jurisdictions have since considered whether FELA's venue provision now applies to the Jones Act in light of the repeal of the Jones Act's venue provision, which was retroactive to October 6, 2006. *See, e.g.* , *Riley v. Trident Seafoods Corp.* , Civ. No. 11–2500 (MJD/AJB), 2012 WL 245074, at *2–4 (D. Minn. Jan. 9, 2012) ; *Utoafili* , 2009 WL 6465288, at *2–6.

In *Utoafili* , the court concluded that the repeal of the Jones Act venue provision "pulled the rug out from under the rationale for refusing to incorporate FELA's venue provision into the Jones Act." 2009 WL 6465288, at *3. The *Utoafili* court looked to legislative history to determine whether FELA's prohibition was incorporated into the Jones Act. *Id.* at *3. A House Report stated that the 2008 repeal was intended to take effect "without substantive change" and "to make clearer that the prior law regarding venue, including the holding of [*Pure Oil*] and cases following it, remains in effect, so that the action may be brought wherever the seaman's employer does business." *Id.* at *5 (quoting H.R. Rep. No. 110–437, at 5 (2007)). The *Utoafili* court held there was no basis to conclude that Congress intended FELA's venue provision to be read into the Jones Act. *Id.* at *5. In *Riley* , another federal district court similarly considered legislative history, followed the reasoning of *Utoafili* , concluded that FELA's venue provisions should not be read in the Jones Act, and held that the forum-selection clause was not void. 2012 WL 245074, at *3–4.

We conclude that neither *Boyd* nor *Pure Oil* answers the question presented here. *Boyd* did not address the Jones Act, and *Pure Oil* interpreted a Jones Act venue provision that has since been repealed. In addition, unlike *Utoafili* and *Riley* , we do not resort to extrinsic materials such as legislative history. Instead, we focus our analysis on the plain language of the Jones Act and assume that the ordinary meaning of that language accurately expresses congressional purpose. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.* , 541 U.S. 246, 252, 124 S.Ct. 1756, 158 L.Ed.2d 529 (2004) ; *Morales v. Trans World Airlines, Inc.* , 504 U.S. 374, 383, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992).

The second sentence of the Act provides: "Laws of the United States *regulating recovery* for personal injury to, or death of, a railway employee apply to an action under this section." 46 U.S.C. § 30104 (emphasis added). The legal concept of venue does not "regulate recovery." Rather, as the Supreme Court has recognized, "venue is a matter that goes to process rather than substantive rights—determining which among various competent courts will decide the case"; more specifically, venue "does not bear on the substantive right to recover" but is a "matter of judicial housekeeping" under the Jones Act. *Am. Dredging Co. v. Miller* , 510 U.S. 443, 453–54, 457, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994). We therefore hold that the FELA venue provision does not apply to an action under the Jones Act. As a result, the FELA voidness provision addressed in *Boyd* plays no role in determining Jones Act venue and does not render the forum-selection provision of the PPA unenforceable. *SeeTerrebonne* , 477 F.3d at 282.

V. Lawal has not shown that the forum-selection clause is unenforceable under federal maritime law.

Lawal also challenges the PPA's forum-selection clause as contrary to a strong public policy of protecting seamen. Specifically, Lawal contends that enforcing the PPA is unreasonable because it is a release, which he
344 signed without the guidance of legal counsel.*344 In analyzing this challenge, we apply federal maritime law.

Both state and federal courts have jurisdiction to resolve Jones Act suits. *In re Omega Protein, Inc.* , 288 S.W.3d 17, 20 (Tex. App.–Houston [1st Dist.] 2009, orig. proceeding). "When a state court hears an admiralty case, that court occupies essentially the same position occupied by a federal court sitting in diversity: the state court must apply substantive maritime law but follow state procedure." *Maritime Overseas Corp. v. Ellis* , 971 S.W.2d 402, 406 (Tex. 1998). Federal law governs the enforceability of forum-selection clauses in admiralty cases. *Carnival Cruise Lines, Inc. v. Shute* , 499 U.S. 585, 590, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991). Texas state courts generally employ the federal standard in analyzing forum-selection clauses even outside the maritime context; thus, the substantive analysis under federal law is similar to that under state law, and Texas procedural rules apply. *In re Omega Protein, Inc.* , 288 S.W.3d at 20.

Forum-selection clauses are prima facie valid and should be enforced unless doing so would be unreasonable. *M/S Bremen v. Zapata Off–Shore Co.* , 407 U.S. 1, 10, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) ; *see alsoWeber v. PACT XPP Techs., AG* , 811 F.3d 758, 773 (5th Cir. 2016) ("This court, in keeping with Supreme Court precedents, applies a strong presumption in favor of the enforcement of mandatory FSCs."). A party seeking to avoid a forum-selection clause bears a heavy burden of proof. *M/S Bremen* , 407 U.S. at 17, 92 S.Ct. 1907. The party must show that (1) the clause was the product of fraud or overreaching; (2) trial in the contractual forum would be so gravely difficult and inconvenient that the plaintiff will be effectively be deprived of his day in court; or (3) enforcement would contravene a strong public policy of the forum in which suit is brought. *Id.* at 12–13, 15, 18, 92 S.Ct. 1907.

In this case, Lawal contends that protecting seamen against overreaching post-injury releases is such a public policy. "Seamen ... are wards of admiralty whose rights federal courts are duty-bound to jealously protect." *Karim v. Finch Shipping Co.* , 374 F.3d 302, 310 (5th Cir. 2004). Releases or settlements of a seaman's rights are subject to careful scrutiny. *Steverson v. GlobalSantaFe Corp.* , 508 F.3d 300, 303 (5th Cir. 2007). It is the ship owner's burden to prove that a seaman's release is valid. *Id.* at 304. Consequently, the ship owner must demonstrate that the release was "executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights." *Garrett v. Moore–McCormack* , 317 U.S. 239, 248, 63 S.Ct. 246, 87 L.Ed. 239 (1942) ; *see alsoPremeaux v. Socony–Vacuum Oil Co.* , 144 Tex. 558, 192 S.W.2d 138, 141 (1946).

OSG responds that a plain reading of the PPA shows it is not a release. A release is a writing providing that a duty or obligation owed to one party is discharged immediately or on the occurrence of a condition. *Nat'l City Bank of Ind. v. Ortiz* , 401 S.W.3d 867, 876–77 (Tex. App.–Houston [14th Dist.] 2013, pet. denied) ; *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Ins. Co. of N. Am.* , 955 S.W.2d 120, 127 (Tex. App.–Houston [1st Dist.] 1997), *aff'd sub nom.Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.* , 20 S.W.3d 692 (Tex. 2000). A release extinguishes a claim and bars recovery on the released matter. *Id.*

Examining the plain language of the PPA, we conclude that it is not a release of Lawal's claims against OSG related to his July 19, 2015 injury. Rather, the PPA contemplates the possibility that Lawal would bring suit
345 against OSG for his injury, albeit *345 in Florida. Therefore, Lawal's non-representation by a lawyer at the time he signed the forum-selection clause does not establish that the clause is unenforceable on public policy grounds.[14]

14 In the trial court, Lawal relied on the Texas Arbitration Act ("TAA") to support his position that the forum-selection agreement is not enforceable because he was not represented by counsel at the time he signed the PPA. The TAA does not apply to a claim for personal injury unless each party to the claim, on the advice of counsel, agrees in writing to arbitrate, and the agreement is signed by each party and each party's attorney. *See* Tex. Civ. Prac. & Rem. Code Ann. § 171.002(c) (West 2011). Because the PPA does not contain an agreement to arbitrate, this TAA provision does not

apply. Furthermore, this provision is inconsistent with the Federal Arbitration Act and therefore is preempted by that Act. *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) (orig. proceeding) (per curiam); *Vista Quality Mkts. v. Lizalde*, 438 S.W.3d 114, 122–23 (Tex. App.–El Paso 2014, no pet.) ; *Forged Components, Inc. v. Guzman*, 409 S.W.3d 91, 98 (Tex. App.–Houston [1st Dist.] 2013, no pet.).

Moreover, Lawal has not shown that the PPA's forum-selection clause is otherwise unenforceable. Lawal presented no evidence in the trial court that the clause was procured as a result or fraud or overreaching, or that litigating his claims in Florida would be so gravely difficult and inconvenient that he would be deprived of his day in court.[15] Therefore, Lawal has not satisfied his burden to show that the forum-selection clause should not be enforced.

15 *Cf.Harrington*, 602 F.3d at 127 (remanding case to district court for findings on (1) the plaintiff's claimed lack of mental capacity to enter into the post-injury arbitration agreement due to intoxication from drinking heavily and taking pain medication; and (2) ratification); *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1142–43 (9th Cir. 2004) (remanding case to district court to hold evidentiary hearing on whether plaintiff's financial hardships and physical limitations would render enforcement of forum-selection clause unreasonable because plaintiff would be effectively denied his day in court).

VI. The Collective Bargaining Agreement did not require that the union represent Lawal in negotiating the PPA.

Finally, Lawal asserts that the CBA expressly covers the legal rights and remedies of the injured employee against the employer for work-related injuries. According to Lawal, OSG violated the CBA by negotiating the PPA with him directly, upsetting the relationship defined by the CBA and causing him to lose an advantage provided to him under the CBA—union representation to protect his rights and interests.

Section 1 of the CBA provides:

> The American Maritime Association (Association) on behalf of itself and each member Company of the Association [including OSG] recognizes the [specified district of the Seafarers International] Union as the sole and exclusive bargaining representative of all Unlicensed Personnel employed on board American flag vessels owned or operated by such Companies or its subsidiaries.

The key question in resolving Lawal's challenge is whether the PPA changes the terms and conditions of Lawal's employment with OSG. Under the National Labor Relations Act ("NLRA"),[16] an employer has a duty to bargain collectively with the duly recognized or accredited representative of the employees, and disregard of this duty violates the NLRA. *May Dep't Stores Co. v. N.L.R.B.* , 326 U.S. 376, 383–84, 66 S.Ct. 203, 90 L.Ed. 145 (1945). The mandatory subjects of collective bargaining between the union and the employer are wages,
346 hours, and other terms and conditions of employment. *346 *First Nat. Maint. Corp. v. NLRB* , 452 U.S. 666, 674, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981) ; *N.L.R.B. v. Wooster Div. of Borg–Warner Corp.* , 356 U.S. 342, 349, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958). To allow the employer to bargain directly with an employee on subjects designated for collective bargaining would "infringe an essential principle of collective bargaining." *May Dep't Stores* , 326 U.S. at 384, 66 S.Ct. 203. But nothing in the NLRA prevents the employee, "because he is an employee, [from] making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice." *J.I. Case Co. v. N.L.R.B.* , 321 U.S. 332, 339, 64 S.Ct. 576, 88 L.Ed. 762 (1944).

16 29 U.S.C. §§ 151 –169.

In this case, the PPA (1) addresses the forum for resolution of any claims arising out of the July 19, 2015 incident; (2) provides for additional payments to Lawal while expressly leaving his wages requiring a union contribution unchanged; (3) provides that Lawal will not suffer any adverse employment actions if he decides not to participate; and (4) does not change any duties or obligations of the parties under the CBA. For these reasons, the PPA is not an agreement addressing terms and conditions of Lawal's employment, and therefore the CBA did not require union representation of Lawal in negotiating the PPA.[17]

17 *SeeNunez v. Weeks Marine, Inc.*, Civ. A. No. 06–3777, 2007 WL 496855, at *3 (E.D. La. Feb. 13, 2007) (holding that, in Jones Act case, post-injury arbitration agreement was not part of plaintiff's employment contract because there was no language in agreement indicating that plaintiff's acceptance of the agreement was condition of his continued employment); *Schreiber*, 9 N.Y.3d at 337, 849 N.Y.S.2d 194, 879 N.E.2d 733 (rejecting argument that post-injury arbitration agreement providing for advances of wages in exchange for arbitrating claims related to the injury was part of contract of employment, and holding instead it was a separate agreement made after defendant had employed plaintiff when the reason for arbitration—the injury—already existed); *In re Weeks Marine, Inc.*, 242 S.W.3d at 855–56 (holding post-injury arbitration agreement was not "transformed into a contract of employment merely because it provided for advances to be calculated from [the plaintiff's] historical wages or credited against any eventual recovery for lost wages under the Jones Act" or because defendant made assurances that any advances under the agreement would be in addition to maintenance and cure to which plaintiff was already entitled).

CONCLUSION

The trial court abused its discretion by denying OSG's motion to dismiss based on an enforceable forum-selection clause, and OSG does not have an adequate remedy by appeal. Accordingly, we conditionally grant OSG's petition for writ of mandamus and direct the trial court to (1) vacate its March 7, 2016 order denying OSG's motion to dismiss and (2) dismiss the case. We are confident that the trial court will comply, and our writ will issue only if it does not.

No. 10-17-00311-CV
STATE OF TEXAS IN THE TENTH COURT OF APPEALS

In re Perkins

Decided Dec 27, 2017

No. 10-17-00311-CV

12-27-2017

IN RE CECILIA WILLIAMS PERKINS

TOM GRAY Chief Justice

Original Proceeding
MEMORANDUM OPINION

Perkins and Cromer are sisters. Their parents have died. Cromer would have been the independent executor of their mother's estate but she lived out of state at the time and waived the right. Perkins was duly appointed, qualified, and assumed the duties and role of independent executor.

Cromer became unhappy with how Perkins was administering the estate as independent executor. Cromer sought to remove Perkins as independent executor and have herself appointed. The trial court removed Perkins and appointed Cromer dependent executor.

2 The fundamental dispute between the sisters is whether the estate's real property *2 should be sold and the money divided or whether the property, which was left equally to them in undivided interest, should be distributed as undivided interest, or, as a third alternative, partitioned and the partitioned parts distributed. From what the parties have filed, the court handling the probate proceeding, the Walker County Court at Law, is in the process of conducting a partition proceeding and has ordered a sale of one tract of property.

Cromer has instituted a separate proceeding in the District Court against Perkins. In the District Court suit, she seeks damages from Perkins. Cromer asserts that her sister, Perkins, breached her fiduciary duty to Cromer by refusing to sell the property and distribute Cromer's share of the money to her. And, the allegations continue, that as a result, Cromer has been damaged by having to take the actions in the probate proceeding to remove Perkins as independent executor and then to cause the property to be sold in the partition proceeding going forward in the probate court.

Perkins was unsuccessful in convincing the District Court that it should abate the damages suit based upon the argument that the County Court at Law had original exclusive or original dominant jurisdiction. While the parties have used the terms somewhat interchangeable, they are not the same. If the District Court does not have any jurisdiction of the suit brought by Cromer, the County Court at Law does not have dominant jurisdiction, it has exclusive jurisdiction. With this summary of the background, we turn to the relevant
3 provisions of the Estates Code. *3

The Estates Code defines the "Scope of 'Probate Proceeding' for Purposes of Code" in section 31.001.[1] TEX. ESTATES CODE ANN. § 31.001 (West 2014). But more important to our issue is section 31.002 which defines "Matters Related to Probate Proceeding" to include "an action against a personal representative or former personal representative arising out of the representative's performance of the duties of a personal representative." *Id*. § 31.002(a)(1). This is precisely the type suit that Cromer has brought against Perkins in District Court. This provision is made applicable to the Walker County Court at Law by section 31.002(b) which states that "[f]or purposes of this code, in a county in which there is no statutory probate court, but in which there is a county court at law exercising original probate jurisdiction, a matter related to a probate proceeding includes: (1) all matters and actions described in Subsection (a)." *Id*. (b)(1).

[1] We are not ignoring section 22.029 which provides:

> The terms "probate matter," "probate proceedings," "proceeding in probate," and "proceedings for probate" are synonymous and include a matter or proceeding relating to a decedent's estate.

TEX. ESTATES CODE ANN. § 22.029 (West 2014). We simply note that it does not directly address the issue in this case.

We now turn to Chapter 32 of the Estates Code to determine the nature of the County Court at Law's jurisdiction, specifically whether it is exclusive or concurrent with the District Court. The general provision for jurisdiction of probate-proceedings and matters-related-to-probate-proceedings is section 32.001 which provides:

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

4 *4 TEX. ESTATES CODE ANN. § 32.001(a) (West 2014).

Because it is undisputed that in Walker County, the County Court at Law and the Walker County Court are the only courts with original probate jurisdiction, there is no question that the County Court at Law has jurisdiction of the matters-related-to-probate-proceedings as defined by the Estates Code, which includes a suit like Cromer's against a former personal representative arising out of the representative's performance of the duties as a personal representative. *See id*. §§ 32.002(b) and 31.002(a)(1).

This leads us to the question of whether the jurisdiction is exclusive or concurrent. Cromer argues that when the Estates Code means exclusive jurisdiction it says so, noting that section 32.005 provides for exclusive jurisdiction of a statutory probate court except where it has concurrent jurisdiction with a district court under section 32.007. *See id*. §§ 32.005(a) & 32.007. Cromer then argues,

> Notably, 32.007 bestows concurrent jurisdiction to the District Courts for, among other things, actions by or against a trustee. Tex. Estate [sic] Code § 32.007.
>
> This is just such an action against a trustee and this action for damages resulting from Perkins [sic] breach of duty is plainly not a matter where "the controlling issue is the settlement, partition or distribution of an estate." *Wolford*, 590 S.W.2d at 771.

We disagree.

First, this is not an action against a trustee. It is an action against a former independent executor. There is no trust instrument which determined Perkins's duties. *5 Perkins was a fiduciary for all the beneficiaries of the estate, which included herself and Cromer, just as Cromer is now a fiduciary for the estate, which includes herself and Perkins. Second, because the estate has not been closed, the claim, if any, belongs to the estate for the benefit of all the beneficiaries, not just Cromer. And thus the recovery, if any, will become part of the assets of the estate to be distributed.

Thus, we must circle back to the Estates Code wherein it provides:

> The administration of the estate of a decedent, from the filing of the application for probate and administration, or for administration, until the decree of final distribution and the discharge of the last personal representative, shall be considered as one proceeding for purposes of jurisdiction. The entire proceeding is a proceeding in rem.

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

This suggests that the only proper court in which to bring the claim, as long as the estate proceeding is open, is in the proceeding pending in the probate court; the County Court at Law. Moreover, even if the District Court has jurisdiction of the suit, the suit, and in particular the damages as currently pleaded, cannot be determined unless and until the probate court determines the highly interrelated issues being addressed in the partition proceeding which is pending in the County Court at Law. Furthermore, until the estate is fully administered, the former independent executor may not be able to appeal issues related to the removal, including payment of cost defending her removal, and issues regarding costs and expenses included in the final accounting, etc.

While it appears the County Court at Law may have exclusive jurisdiction of the *6 suit for damages against the former independent executor, we have only been asked to compel the district court to abate the proceeding until the parallel and interrelated estate matters have been resolved. Thus, we do not resolve the question of whether the County Court at Law's jurisdiction of the claims raised in the District Court suit, which is clearly a matter related to a probate proceeding, is exclusive.[2]

> [2] *See Frost Nat. Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010) (because appellee's claims were not within the jurisdiction of the probate court, Court did not decide whether rule of dominant jurisdiction applies in later-filed direct attacks that are exclusively within the jurisdiction of another court); *In re Hannah*, 431 S.W.3d 801, 809 n. 3 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (because relator's suit is not related to a probate proceeding, no need to address whether Estates Code provisions are mandatory or permissive).

It is well-settled that when a suit would be proper in more than one county, the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other courts. *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988); *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974). Dominant jurisdiction recognizes "the plaintiff's privilege to choose the forum" and accepts that choice as correct, provided "the forum is a proper one." *Gordon v. Jones*, 196 S.W.3d 376, 382 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (quoting *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 622 (Tex. 2005)). The court with the first-filed suit should proceed, and the other suit should be abated. *In re Tyler Asphalt & Gravel Co.*, 107 S.W.3d 832, 838 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). *See Wyatt*, 760 S.W.2d at 248. Further, mandamus is appropriate to compel one court to recognize the dominant jurisdiction of another court. *See Curtis v. Gibbs*, 511 *7 S.W.2d 263, 267 (Tex. 1974); *In re Tyler Asphalt & Gravel Co.*, 107 S.W.3d 832 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (trial court abused discretion by refusing to abate to allow suit in dominant jurisdiction

to proceed and relator had no remedy by appeal due to potential for confusion and conflicting judgments); *In re Sims*, 88 S.W.3d 297 (Tex. App.—San Antonio 2002, orig. proceeding) (dominant jurisdiction court abused its discretion by granting plea in abatement and relator had no remedy by appeal).

The effort to create two fronts on which Cromer is attacking Perkins and Perkins's belief in the propriety of, or preference for, distributing the property in undivided interest (as given to them by their mother) or partitioning the property in kind rather than selling it, is not a necessary or efficient use of judicial resources. While most dominant-jurisdiction-abatement mandamus proceedings are premised on the same litigation going forward in two different counties (venue), where one is filed first and thus recognized as having dominant jurisdiction, the same concerns apply to having two courts, a probate court and a district court, in the same county attempting to address many of the same issues. There is no question that the County Court at Law has jurisdiction of Cromer's claims against Perkins and that the probate proceeding was pending first. Additionally, some of the issues related to the District Court suit for damages had already been resolved in the County Court at Law and others were in the process of being resolved when the District Court action was filed.

8 The principles that underlie the use of a mandamus proceeding to compel a district *8 court to abate an action brought in one county in recognition of the dominant jurisdiction of another court in which the same claims had already been brought in another county, apply just as forcefully to this situation.[3] Based upon the foregoing, we conditionally grant Relator's Petition for Writ of Mandamus and direct the trial court judge to abate the proceeding pending in District Court until the proceeding pending in the probate court (the County Court at Law) has been concluded.[4]

[3] This same basic principle is applied to appellate courts as well. *See Miles v. Ford Motor Co.*, 914 S.W.2d 135, 138 (Tex. 1995).

[4] Cromer also asserts that Perkins waived her issue of dominant jurisdiction because Perkins filed an answer to Cromer's suit, "followed by multiple dilatory matters all before filing a plea in abatement." The record before us does not contain Perkins's answer or any of the alleged "multiple dilatory matters," and thus, does not support Cromer's assertion.

TOM GRAY

Chief Justice Before Chief Justice Gray, Justice Davis, and Justice Scoggins
Petition conditionally granted
Opinion delivered and filed December 27, 2017
[OT06]

NO. 12-17-00117-CV
COURT OF APPEALS TWELFTH COURT OF APPEALS DISTRICT TYLER, TEXAS

In re Phila. Indem. Ins. Co.

Decided May 24, 2017

NO. 12-17-00117-CV

05-24-2017

IN RE: PHILADELPHIA INDEMNITY INSURANCE COMPANY, RELATOR

BRIAN HOYLE Justice

ORIGINAL PROCEEDING
MEMORANDUM OPINION

Philadelphia Indemnity Insurance Company seeks mandamus relief from the trial court's order denying its motion to transfer venue.[1] We conditionally grant the writ.

[1] The respondent is the Honorable Dan Moore, Judge of the 173rd Judicial District, Henderson County, Texas. The underlying proceeding is trial court cause number CV15-0009-173, styled ***Red Dot Buildings Sys., Inc. vs. Rigney Constr. & Dev. LLC & Philadelphia Indem. Ins. Co.***

BACKGROUND

In 2014, Red Dot Buildings and Rigney Construction and Development, L.L.C. entered into a subcontract related to the construction of a school in Brooks County, Texas. Red Dot secured a payment bond from Philadelphia for the project in accordance with Chapter 2253 of the Texas Government Code.

When a dispute subsequently arose between Red Dot and Rigney, Red Dot sued for breach of contract. Rigney moved to transfer venue to Hidalgo County. The trial court denied the motion. Red Dot also made a payment bond claim with Philadelphia. In its first amended petition, Red Dot brought Philadelphia into the lawsuit under Chapter 2253 of the Texas Government Code. Philadelphia filed a motion to transfer venue with its original answer, asserting that the case must be transferred to Brooks County under section 2253.077 of the government code. Citing that venue had been determined before Philadelphia was a party, the trial court denied
2 Philadelphia's motion to transfer. This original proceeding followed. *2

AVAILABILITY OF MANDAMUS

Mandamus will issue only to correct a clear abuse of discretion for which the relator has no adequate remedy by appeal. ***In re Prudential Ins. Co. of Am.***, 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding). A trial court has no discretion in determining what the law is or applying the law to the facts. ***Walker v. Packer*** , 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). A trial court abuses its discretion by failing to analyze or apply the law correctly. ***Id.*** As the party seeking relief, the relator bears the burden of demonstrating entitlement to mandamus relief. ***Id.*** at 837.

In this case, Philadelphia seeks the enforcement of section 2253.077 of the Texas Government Code, which is mandatory in nature. *See* ***Poth Corp . v. Marble Falls Indep. Sch. Dist.***, 673 S.W.2d 648, 651 (Tex. App.—Austin 1984, no writ). A party may petition for a writ of mandamus with an appellate court to enforce mandatory venue provisions. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (West 2017); *see also* ***In re Hannah*** , 431 S.W.3d 801, 806 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (per curiam). A party seeking to enforce a mandatory venue provision is not required to prove the lack of an adequate appellate remedy, but is required only to show that the trial court abused its discretion. ***In re Mo. Pac. R.R. Co.***, 998 S.W.2d 212, 216 (Tex. 1999).

ABUSE OF DISCRETION

In its only issue, Philadelphia contends that the trial court abused its discretion when it denied the motion to transfer venue. Philadelphia argues that the transfer to Brooks County is mandatory under section 2253.077 of the government code. [2]

[2] Philadelphia also argues that there is an applicable contractual provision that mandates venue in Brooks County. Given our disposition of this proceeding under section 2253.077, we need not address this argument. *See* TEX. R. APP. P. 47.1.

Rule 87 of the Texas Rules of Civil Procedure governs motions to transfer venue. *See* TEX. R. CIV. P. 87. It provides that if venue has been sustained against a motion to transfer, no further motions shall be considered unless the new motion is based on a mandatory venue provision. TEX. R. CIV. P. 87(5). Therefore, the general rule is that only one venue determination may be made in a single proceeding in the same trial court. ***Van Es v. Frazier*** , 230 S.W.3d 770, 775 (Tex. App.—Waco 2007, pet. denied); *see also* ***Fincher v . Wright*** , 141 S.W.3d
3 255, 263-64 (Tex. App.—Fort Worth 2004, no pet.); ***In re Shell Oil Co.***, 128 S.W.3d *3 694, 696 (Tex. App.—Beaumont 2004, orig. proceeding); ***Marathon Corp. v. Pitzner*** , 55 S.W.3d 114, 137 n.6 (Tex. App.—Corpus Christi 2001), *rev'd on other grounds*, 106 S.W.3d 724 (Tex. 2003) (per curiam). In addition, a subsequent motion to transfer venue asserting a claim of mandatory venue is not permitted unless that claim was not available to the original movant. *See* TEX. R. CIV. P. 87(5); ***Frazier*** , 230 S.W.3d at 775.

In this case, the trial court denied Rigney's motion to transfer venue to Hidalgo County before Philadelphia was a party to the case. Normally, this would preclude Philadelphia from pursuing a transfer. *See* TEX. R. CIV. P. 87(5). However, Philadelphia's motion is based on a claim of mandatory venue under section 2253.077 of the government code. Chapter 2253 concerns payment bonds for public works projects and allows a payment bond beneficiary to sue the surety on a payment bond if a claim goes unpaid. *See* TEX. GOV'T CODE ANN. §§ 2253.021 (West 2016), 2253.073 (West 2016). Section 2253.077 expressly requires that "a suit under this chapter shall be brought in a court in a county in which any part of the public work is located." ***Id.*** § 2253.077 (West 2016); *see* ***Wichita County v . Hart*** , 917 S.W.2d 779, 781 (Tex. 1996) ("Legislature's use of the word 'shall' in a statute generally indicates the mandatory character of the provision[]"); *see also* ***Poth Corp .***, 673 S.W.2d at 651; TEX. GOV'T CODE ANN. § 311.016(2) (West 2013) (stating "shall" imposes a duty).

Red Dot did not assert a cause of action under Chapter 2253 against Rigney. Therefore, Rigney could not have relied on the mandatory venue provision of section 2253.077. *See* TEX. GOV'T CODE ANN. § 2253.077. Red Dot did, however, assert a claim for payment under the bond against Philadelphia pursuant to Chapter 2253. Accordingly, while a claim of venue under section 2253.077 was not available to Rigney, the claim was available to Philadelphia. *See* TEX. R. CIV. P. 87(5).

Based on the record, it is undisputed that the project at issue is located in Brooks County, Texas and that Red Dot's suit against Philadelphia is brought pursuant to Chapter 2253. Because section 2253.077 mandates that a suit under Chapter 2253 shall be brought in a court in a county in which any part of the public work is located, venue is mandatory in Brooks County. *See* TEX. GOV'T CODE ANN. § 2253.077; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 15.016 (West 2017) ("An action governed by any other statute prescribing mandatory venue shall be brought in the county required by that statute[]"). For this reason, the trial court abused its discretion when it denied Philadelphia's motion to transfer venue. *See* ***Walker*** , 827 S.W.2d at 840.

4 Accordingly, *4 Philadelphia has established its entitlement to mandamus relief. *See* ***In re Prudential Ins . Co. of Am.***, 148 S.W.3d at 135-36; *see also* ***In re Mo . Pac. R.R. Co.***, 998 S.W.2d at 216.

CONCLUSION

Based upon our review of the record and the foregoing analysis, we conclude the trial court should have granted Philadelphia's motion to transfer venue to Brooks County under section 2253.077 of the Texas Government Code. Accordingly, we ***conditionally grant*** Philadelphia's petition for writ of mandamus. We direct the trial court to vacate its April 10, 2017 order denying Philadelphia's motion to transfer, and in its stead, to issue an order granting Philadelphia's motion to transfer venue to Brooks County, Texas. We trust the trial court will promptly comply with this opinion and order. The writ will issue only if the trial court fails to do so ***within fifteen days of the date of the opinion and order.*** The trial court shall furnish this Court, within the time of compliance with this Court's opinion and order, a certified copy of the order evidencing such compliance.

BRIAN HOYLE

Justice Opinion delivered May 24, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

5 *5

COURT OF APPEALS TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

ORDER PHILADELPHIA INDEMNITY INSURANCE COMPANY, Relator V. **HON. DAN MOORE**, Respondent Appeal from the 173rd District Court of Henderson County, Texas (Tr.Ct.No. CV15-0009-173)

ON THIS DAY came to be heard the petition for writ of mandamus filed by **PHILADELPHIA INDEMNITY INSURANCE COMPANY**, who is the relator in Cause No. CV15-0009-173, pending on the docket of the 173rd Judicial District Court of Henderson County, Texas. Said petition for writ of mandamus having been filed herein on April 12, 2017, and the same having been duly considered, because it is the opinion of this Court that the petition for writ of mandamus be, and the same is, ***conditionally granted.***

And because it is further the opinion of this Court that the trial judge will act promptly and vacate his order of April 10, 2017, denying Philadelphia's motion to transfer, and in its stead, to issue an order granting Philadelphia's motion to transfer venue to Brooks County, Texas; the writ will not issue unless the **HONORABLE DAN MOORE** fails to comply with this Court order within fifteen (15) days from the date of

6 this order. *6

It is further ORDERED that **RED DOT BUILDINGS**, real party in interest, pay all costs incurred by reason of this proceeding.

Brian Hoyle, Justice.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

NO. 12-17-00370-CV
COURT OF APPEALS TWELFTH COURT OF APPEALS DISTRICT TYLER, TEXAS

In re Rigney Constr. & Dev., LLC

Decided Feb 6, 2018

NO. 12-17-00370-CV

02-06-2018

IN RE: RIGNEY CONSTRUCTION & DEVELOPMENT, LLC, RELATOR

JAMES T. WORTHEN Chief Justice

ORIGINAL PROCEEDING
MEMORANDUM OPINION

Rigney Construction and Development, LLC seeks mandamus relief from the trial court's orders refusing to transfer venue and severing the case against Brooks County Independent School District (BCISD).[1] We deny the writ.

[1] The Respondent is the Honorable Dan Moore, Judge of the 173rd Judicial District Court, Henderson County, Texas. The underlying proceeding is trial court cause number CV15-0009-173, styled ***Red Dot Bldg. Sys.***, ***Inc. v. Rigney Constr. & Dev.***, ***LLC v. Brooks Cty. I.S.D.***

BACKGROUND

In 2014, Rigney entered into a contract (the general contract) with BCISD to construct a new school building, known as the Lasater project. This general contract contained a mandatory venue provision that required any "action" resulting from the contract be brought in the county where BCISD's administrative offices are located. Acting in its capacity as general contractor, Rigney entered into a subcontract (the subcontract) with Red Dot Building Systems for construction of a steel building. Rigney contends that the subcontract incorporated by reference the mandatory venue provision from the general contract.

On January 5, 2015, Red Dot sued Rigney in Henderson County alleging Rigney breached the subcontract by failing to pay Red Dot for its materials and work on BCISD's steel building. On February 6, Rigney sued Red Dot in Hidalgo County alleging Red Dot breached the subcontract. Red Dot and Rigney each filed motions to
2 transfer venue. Rigney maintained that *2 the Henderson County lawsuit should be transferred to Brooks County or, alternatively, to Hidalgo County. On October 22, the Henderson County court overruled Rigney's motion. The Hidalgo County court also denied Red Dot's motion to transfer venue to Henderson County. Following a petition for writ of mandamus, on December 2, 2016, the Texas Supreme Court determined that Henderson County was the court of dominant jurisdiction, and the Hidalgo County lawsuit was abated.[2]

[2] *See* ***In re Red Dot Bldg . Sys.***, ***Inc.***, 504 S.W.3d 320 (Tex. 2016) (orig. proceeding).

In January 2016, Rigney filed a third-party petition against BCISD in the Henderson County lawsuit. The third-party petition alleged that BCISD breached the general contract by providing vague plans and specifications for construction of the school. Rigney also asserted a counterclaim against Red Dot for violations of the Deceptive Trade Practices Act, breach of contract, and accord and satisfaction.

BCISD filed a motion to transfer venue, plea to the jurisdiction, and original answer. In its motion to transfer, BCISD sought transfer of the case to Brooks County under the mandatory venue provision found in section 15.0151 of the Texas Civil Practice and Remedies Code and the terms of the general contract. BCISD argued that "Brooks County is the mandatory venue for any cause of action arising out of the Lasater Project and the parties' AIA Contracts." In the alternative, BCISD requested the third party action be severed and transferred to Brooks County.

In September 2017, the trial court granted BCISD's motion to transfer with respect to Rigney's claims against BCISD and ordered that the third party action against BCISD be severed and transferred to Brooks County. In its order on BCISD's motion to transfer, the trial court stated, "this order transferring venue in no way affects Plaintiff Red Dot Building System, Inc.'s cause of action against Defendant Rigney Construction & Development, LLC, which action shall remain in this Court under the existing cause number." This original proceeding followed.

AVAILABILITY OF MANDAMUS

Mandamus will issue only to correct a clear abuse of discretion for which the relator has no adequate remedy by appeal. ***In re Prudential Ins. Co. of Am.***, 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding). A trial court has no discretion in determining what the law is or applying the law to the facts. ***Walker v. Packer*** , 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). A trial court abuses its discretion by failing to analyze or apply
3 the law correctly. *3 ***Id.*** As the party seeking relief, the relator bears the burden of demonstrating entitlement to mandamus relief. ***Id*** . at 837.

An appellate remedy is adequate when any benefits to mandamus review are outweighed by the detriments. ***In re Prudential*** , 148 S.W.3d at 136. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate. ***Id.*** This determination is not "abstract or formulaic," but rather is a practical and prudential determination. ***Id.*** Flexibility is the principal virtue of mandamus relief and rigid rules are "necessarily inconsistent" with that flexibility. ***Id.*** Thus, the supreme court has held that "an appellate remedy is not inadequate merely because it may involve more expense or delay" than a writ of mandamus, however, the word "merely" must be carefully considered. ***Id.*** Appeal is not an adequate remedy when the denial of mandamus relief would result in an "irreversible waste of judicial and public resources." ***Id.*** at 137. The decision whether there is an adequate remedy on appeal "depends heavily on the circumstances presented." ***Id.*** The decision is not confined to the private concerns of the parties but can extend to the impact on the legal system. ***Id.***

MOTION TO TRANSFER VENUE

In its first issue, Rigney contends the trial court abused its discretion when it refused to transfer the entire lawsuit, including the claims by and against Red Dot, to Brooks County.[3] Rigney argues that transfer to Brooks County is required under the terms of the mandatory venue provision in the general contract and incorporated in the subcontract.[4] **Applicable Law**

[3] Although the issues presented section of Rigney's brief identifies eight questions, Rigney divides its discussion into essentially two issues; thus, we construe the brief as presenting two issues for our review.

4 Rigney also maintains that venue is mandatory in Brooks County under section 15.0151 of the civil practice and remedies code because BCISD is a political subdivision. However, the claims involving Red Dot do not constitute an "an action against a political subdivision." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.0151(a) (West 2017), § 15.0151(b) (West 2017) (a "political subdivision" means a governmental entity in this state, other than a county, that is not a state agency, and includes a municipality, school or junior college district, hospital district, or any other special purpose district or authority).

Rule 87 of the Texas Rules of Civil Procedure, which governs motions to transfer venue, provides that if venue has been sustained against a motion to transfer, no further motions shall be considered unless the new motion is based on a mandatory venue provision. TEX. R. CIV. P. 87(5). Therefore, the general rule is that only one venue determination may be made in a single proceeding in the same trial court. ***Van Es v. Frazier*** , 230
4 S.W.3d 770, 775 (Tex. App.—Waco *4 2007, pet. denied); *see also* ***Fincher v . Wright*** , 141 S.W.3d 255, 263-64 (Tex. App.—Fort Worth 2004, no pet.); ***In re Shell Oil Co.***, 128 S.W.3d 694, 696 (Tex. App.—Beaumont 2004, orig. proceeding); ***Marathon Corp. v. Pitzner*** , 55 S.W.3d 114, 137 n.6 (Tex. App.—Corpus Christi 2001), *rev'd on other grounds*, 106 S.W.3d 724 (Tex. 2003) (per curiam). In addition, a subsequent motion to transfer venue asserting a claim of mandatory venue is not permitted unless that claim was not available to the original movant. *See* TEX. R. CIV. P. 87(5); ***Frazier*** , 230 S.W.3d at 775.

A party may petition for a writ of mandamus with an appellate court to enforce mandatory venue provisions. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (West 2017); *see also* ***In re Hannah*** , 431 S.W.3d 801, 806 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (per curiam). A party seeking to enforce a mandatory venue provision is not required to prove the lack of an adequate appellate remedy, but is required only to show that the trial court abused its discretion. ***In re Mo. Pac. R.R. Co.***, 998 S.W.2d 212, 216 (Tex. 1999).

A forum-selection clause provides parties with an opportunity to contractually preselect the jurisdiction for dispute resolution. ***Pinto Tech. Ventures*** , ***L.P. v. Sheldon*** , 526 S.W.3d 428, 436 (Tex. 2017) (citing ***In re AIU Ins. Co.***, 148 S.W.3d 109, 111 (Tex. 2004) (orig. proceeding)). Forum-selection clauses are generally enforceable and presumptively valid. ***In re Laibe Corp.***, 307 S.W.3d 314, 316 (Tex. 2010) (orig. proceeding) (per curiam); ***In re Int'l Profit Assocs., Inc.***, 274 S.W.3d 672, 675 (Tex. 2009) (orig. proceeding) (per curiam). Failing to give effect to contractual forum-selection clauses and forcing a party to litigate in a forum other than the contractually chosen one amounts to "'clear harassment' . . . injecting inefficiency by enabling forum-shopping, wasting judicial resources, delaying adjudication on the merits, and skewing settlement dynamics...." ***In re Lisa Laser USA*** , ***Inc.***, 310 S.W.3d 880, 883 (Tex. 2010) (orig. proceeding) (quoting ***In re AutoNation*** , ***Inc.***, 228 S.W.3d 663, 667-68 (Tex. 2007) (orig. proceeding)). A party attempting to show that such a clause should not be enforced bears a heavy burden. ***In re Lyon Fin. Servs., Inc.***, 257 S.W.3d 228, 232 (Tex. 2008) (orig. proceeding) (per curiam) (citing ***In re AIU Ins . Co.***, 148 S.W.3d at 113); ***In re Laibe Corp .***, 307 S.W.3d at 316; ***In re ADM Inv. Servs., Inc.***, 304 S.W.3d 371, 375 (Tex. 2010) (orig. proceeding). A trial court abuses its discretion in refusing to enforce a forum-selection clause unless the party opposing enforcement meets its heavy burden of showing that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for
5 reasons of fraud or overreaching, (3) enforcement would *5 contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial. ***In re ADM Inv. Servs., Inc.***, 304 S.W.3d at 375; ***M/S Bremen v. Zapata Off-Shore Co.***, 407 U.S. 1, 15-17, 92 S. Ct. 1907, 1916-17, 32 L. Ed. 2d 513 (1972). Mandamus relief is available to enforce forum-selection agreements because there is no adequate remedy by appeal when a trial court abuses its discretion by refusing to enforce a valid forum-selection clause that covers the dispute. ***In re Int'l Profit Assocs., Inc.***, 274 S.W.3d at 675.

However, although the terms are not always used with precision, forum and venue are not synonymous. Forum pertains to the jurisdiction, generally a nation or State, where suit may be brought. *See*, *e.g.*, ***Michiana Easy Livin' Country*** , ***Inc. v. Holten*** , 168 S.W.3d 777, 784 (Tex. 2005) (explaining that before a defendant is subject to specific jurisdiction in a particular state, the defendant must purposefully avail itself "of the privilege of conducting activities within *the forum State*. ...") (emphasis added). In contrast, venue concerns the geographic location within the forum where the case may be tried. *See*, *e.g.*, ***Boyle v . State*** , 820 S.W.2d 122, 139-40 (Tex. Crim. App. 1989) (en banc) (stating that venue "concerns the geographic location *within the State* where the case may be tried.") (emphasis added); ***Gordon v. Jones*** , 196 S.W.3d 376, 383 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("Venue may and generally does refer to a particular county, but may also refer to a particular court[]") (internal citations omitted); ***Liu v. CiCi Enters.***, ***L.P.***, No. 14-05-00827-CV, 2007 WL 43816, at *2 (Tex. App.—Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.).

The distinction between a forum selection clause and a venue selection clause is critical. Under Texas law, forum selection clauses are enforceable unless shown to be unreasonable, and may be enforced through a motion to dismiss. *See* ***M/S Bremen*** , 407 U.S. at 10, 92 S. Ct. at 1913 (stating that forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances"); ***Holten*** , 168 S.W.3d at 793 (emphasizing that "enforcement of a forum-selection clause is mandatory absent a showing that 'enforcement would be unreasonable and unjust, or that the clause was invalid due to fraud or overreaching.'") (quoting ***In re Automated Collection Techs.***, ***Inc.***, 156 S.W.3d 557, 559 (Tex. 2004)); ***Automated Collection Techs.***, ***Inc.***, 156 S.W.3d at 559-60 (granting petition for writ of mandamus and directing trial court to grant defendant's motion to dismiss based on a contractual
6 forum selection clause). In contrast, venue selection *6 cannot be the subject of a private contract unless otherwise provided by statute. ***Fleming v. Ahumada*** , 193 S.W.3d 704, 712-13 (Tex. App.—Corpus Christi 2006, no pet.) (citing ***Fidelity Union Life Ins . Co. v. Evans*** , 477 S.W.2d 535, 537 (Tex. 1972)); ***Bristol-Myers Squibb Co. v. Goldston*** , 957 S.W.2d 671, 674 (Tex. App.—Fort Worth 1997, pet. denied) ("Because venue is fixed by law, any agreement or contract whereby the parties try to extend or restrict venue is void as against public policy.").

An action arising from a major transaction, such as the contract at issue in this case, is a circumstance in which contractual determination of mandatory venue is permitted by statute.[5] TEX. CIV. PRAC. & REM. CODE ANN. § 15.020(a) (West 2017) (defining "major transaction" as one "evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than $1 million[]"), § 15.020(b) (West 2017) ("[a]n action arising from a major transaction shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county[]"); *see* ***In re Group 1 Realty*** , ***Inc.***, 441 S.W.3d 469, 472 (Tex. App.—El Paso 2014, no pet.). Venue must be challenged by a motion to transfer filed before or concurrently with the defendant's answer. TEX. CIV. PRAC. & REM. CODE ANN. § 15.063 (West 2017). Absent a timely filed motion to transfer venue, the defendant's objection to improper venue is waived. TEX. R. CIV. P. 86(1); ***Wilson v. Tex. Parks & Wildlife Dep't*** , 886 S.W.2d 259, 260 (Tex. 1994), *overruled in part on other grounds*, ***Golden Eagle Archery*** , ***Inc. v. Jackson*** , 24 S.W.3d 362, 372 (Tex. 2000). **Analysis**

5 Per the general contract, BCISD agreed to pay Rigney $5,350,000.00.

We first address whether Rigney is entitled to challenge the trial court's denial of BCISD's motion to transfer the entire case, as opposed to only the claims against BCISD, to Brooks County. Although BCISD, not Rigney, was the movant, Rigney is a party to the proceedings and Rigney's rights are affected by the trial court's ruling. *See* ***Terrazas v . Ramirez*** , 829 S.W.2d 712, 723 (Tex. 1991) (to be entitled to mandamus, relator must have

justiciable interest in underlying controversy); ***In re Lakeside Realty , Inc.***, No. 12-05-00078-CV, 2005 WL 1177228, at *2 (Tex. App.—Tyler May 18, 2005, orig. proceeding) (mem. op.) (relator participated in trial court proceedings and was affected by the order it sought to challenge; therefore, it had standing to seek
7 mandamus relief). Accordingly, we conclude that Rigney may *7 challenge the denial of BCISD's motion to transfer the entire case in this original proceeding.[6] *See* ***In re Yancey*** , No. 12-17-00235-CV, 2017 WL 4020664, at *2 (Tex. App.—Tyler Sept. 13, 2017, orig. proceeding) (mem. op.) (holding that Yancey could pursue mandamus regarding denial of Attorney General's motion to transfer because she was a party to that proceeding and her rights were affected by the trial court's denial). Because we so conclude, we must now determine whether Rigney has shown an actual entitlement to mandamus relief.

[6] Red Dot contends that Rigney's petition for writ of mandamus is untimely because Rigney originally moved for transfer in 2015. We reject this argument because, as discussed, Rigney challenges the denial of BCISD's motion to transfer and is entitled to do so.

According to Rigney, venue should be transferred to Brooks County because of the following provision found in the general contract:

> Exclusive venue for any action arising out of the Project or the Contract Documents is in the state courts of the county in which the Owner's administrative offices are located.

Rigney classifies this provision as a forum selection clause and contends that the provision was incorporated into the subcontract. To support this contention, Rigney points to the following clause in subsection A of section 1.00, entitled "coordination," of a document regarding pre-engineered metal buildings:

> The General Conditions of the Contract for Construction and the Supplementary Conditions to the General Conditions of the Contract for Construction shall be considered as part of this section of the specifications.

Assuming, without deciding, that the subcontract incorporated the general contract's venue provision, we disagree with Rigney's classification of the provision as a forum selection clause. By its express language, the clause clearly addresses the geographic location within the forum where the case may be tried. *See*, *e.g.*, ***Boyle*** , 820 S.W.2d at 139-40; ***Gordon*** , 196 S.W.3d at 383; ***Liu*** , 2007 WL 43816, at *2. Because the provision refers to the county in which suit should be brought, it is a venue selection clause and not a forum selection clause. *See* ***In re Medical Carbon Research Institute , L.L.C.***, No. 14-07-00935-CV, 2008 WL 220366, at *1-2 (Tex. App.—Houston [14th Dist.] Jan. 29, 2008, orig. proceeding) (mem. op.) (holding that contractual provision referring to the county where suit should be brought is a venue selection clause, not a forum selection clause).
8 *8

Additionally, a venue selection clause is subject to Rule 87(5), which generally does not permit more than one venue determination unless the claim was not available to the original movant. TEX. R. CIV. P. 87(5); ***In re Med. Research Inst.***, 2008 WL 220366, at *1; ***Frazier*** , 230 S.W.3d at 775. In this case, there has already been a prior venue determination with respect to the lawsuit involving Red Dot. The trial court denied Rigney's original motion to transfer venue in 2015, and the Texas Supreme Court determined that Henderson County had dominant jurisdiction. *See* ***In re Red Dot Bldg . Sys., Inc.***, 504 S.W.3d 320, 323-24 (Tex. 2016) (orig. proceeding). That Rigney filed a third-party petition against BCISD is of no moment, as it is the main action between Rigney and Red Dot that determines venue, not the third-party action. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.062(a) (West 2017) ("[v]enue of the main action shall establish venue of a counterclaim, cross claim, or third-party claim properly joined under the Texas Rules of Civil Procedure or any applicable

statute[]"); *see also* ***In re Perryman*** , No. 14-13-00131-CV, 2013 WL 1384914, at *2 (Tex. App.—Houston [14th Dist.] Apr. 4, 2013, orig. proceeding) (mem. op.) (holding that plain language of section 15.062(a) "requires that the main action between plaintiffs and defendants establishes venue, not third-party actions[]").

Furthermore, this is not a case in which the venue claim was previously unavailable to Rigney. *See* TEX. R. CIV. P. 87(5). Rigney's claim is based on the subcontract between itself and Red Dot, which Rigney contends incorporated the general contract's mandatory venue provision. Consequently, Rigney's claim that venue is mandatory in Brooks County, and the entire case must be transferred there, has been available to it since the institution of the lawsuit. Thus, because there has been a prior venue determination and the claim that venue is mandatory in Brooks County has always been available to Rigney, Rigney is not entitled to a subsequent venue determination and it would have been improper for the trial court to make a subsequent venue determination.[7] *See* TEX. R. CIV. P. 87(5); ***Frazier*** , 230 S.W.3d at 775. Accordingly, we conclude that Rigney has failed to show that the trial court abused its discretion by refusing to transfer the Red Dot claims to Brooks County. *See* ***In re Mo . Pac. R.R. Co.***, 998 S.W.2d at 216; *see also* ***Frazier*** , 230 S.W.3d at 775. *9

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[7] Because we so conclude, we need not address Rigney's challenge to the timeliness of Red Dot's response to the motion to transfer. *See* TEX R. CIV. P. 47.1.

SEVERANCE

In its second issue, Rigney argues that the trial court abused its discretion by severing the case against BCISD and transferring that portion of the case to Brooks County.

Texas Rule of Civil Procedure 41 provides that "[a]ny claim against a party may be severed and proceeded with separately." TEX. R. CIV. P. 41. A claim is severable if (1) the controversy involves more than one cause of action; (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted; and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues. ***Guar. Fed. Sav. Bank v. Horseshoe Operating Co.***, 793 S.W.2d 652, 658 (Tex. 1990); ***Paradigm Oil*** , ***Inc. v. Retamco Operating*** , ***Inc.***, 161 S.W.3d 531, 540 (Tex. App.—San Antonio 2004, pet. denied). A trial court has broad discretion in the severance of causes of action. ***Morgan v. Compugraphic Corp.***, 675 S.W.2d 729, 734 (Tex. 1984). Severance is appropriate if a controversy involves two or more separate and distinct causes of action, each of which might constitute a complete lawsuit. ***Rodarte v. Cox*** , 828 S.W.2d 65, 71 (Tex. App.—Tyler 1991, writ denied). "The controlling reasons for a severance are to do justice, avoid prejudice and further convenience." ***Guar. Fed. Sav. Bank*** , 793 S.W.2d at 658.

In this case, Rigney claims that the third element, whether the severed claim is so interwoven with the remaining action that they involve the same facts and issues, has not been met. Rigney identifies the following issues that pertain to both the case against Red Dot in Henderson County and the case against BCISD in Brooks County:

> What plans and specifications were required for the pre-engineered metal building;
> BCISD's, Rigney's, and Red Dot's obligations under the contracts;
> What Red Dot actually delivered;
> Whether what Red Dot delivered complied with plans and specifications and, if not, whether Red Dot, Rigney, or BCISD is at fault;
> The damages suffered if what Red Dot delivered complied with plans and specifications and if BCISD is responsible for those damages;
> The damages suffered if what Red Dot delivered did not comply with plans and specifications; and
> Whether Red Dot, Rigney, or BCISD is entitled to the approximately $100,000 retained by BCISD.

Rigney also points to the following items of evidence as demonstrating that element three is not satisfied in this case:

> The initial contract between BCISD and Rigney (containing plans and specifications), and the contract between Rigney and Red Dot;

10 *10

> Evidence of what each contract required;
> Pictures and evidence of what Red Dot provided;
> Evidence of whether the goods, materials and services provided by Red Dot complied with the general contract, the subcontract, and bidding requirements;
> The difference in value between the goods, materials and services Red Dot provided, and those required by the general contract and the subcontract; and
> The project architect's conclusions that Red Dot was not entitled to additional money and was obligated to provide certain items per plans and specifications.

Additionally, Rigney contends that the claims are so interwoven that severance may result in inconsistent verdicts, its contribution claim against BCISD cannot be tried separately, and the severance violates the concept of judicial economy.

Regarding Rigney's assertion that it alleged a contribution claim against BCISD that cannot be severed, Rigney's third-party petition states as follows:

> Brooks ISD had a duty and responsibility to provide Rigney plans and specifications that were free of errors and omissions. Brooks ISD has breached that duty by being negligent in providing plans and specifications with errors and omissions which have caused Rigney damages, losses, loss of income, attorneys fees, and other undetermined losses. Rigney therefore is seeking contribution from BCISD for the damages claimed by Red Dot.

While couched as a contribution claim, the substance of Rigney's claim is based in contract to which a contribution claim is inapplicable. *See* ***Jones v . Landry's Seafood Inn & Oyster Bar-Galveston , Inc.***, 328 S.W.3d 909, 913 (Tex. App.—Houston [14th Dist.] 2010, no pet.) ("a court considers the substance, not the label, of a claim to determine its nature[]"); *see also* ***CBI NA-CON , Inc. v. UOP Inc.***, 961 S.W.2d 336, (Tex. App.—Houston [1st Dist.] 1997, pet. denied) ("breach of contract claim is not a basis for contribution under chapter 33 of the Texas Civil Practice and Remedies Code[]"); TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.011-.017 (West 2015), § 33.002(a) (West 2015) (Chapter 33 applies to tort and Deceptive Trade Practices Act claims). Accordingly, Rigney's contention that its claim against BCISD could not be severed lacks merit.

We also disagree with Rigney's contention that the severed claim against BCISD is so interwoven with the remaining claims involving Red Dot so as to preclude severance and violate notions of judicial economy. At issue in this case are two distinct contracts and their respective breach of contract claims. Red Dot sued Rigney alleging it breached the subcontract by failing to pay money owed to Red Dot. Rigney's claims against Red Dot revolve around whether Red Dot (1) complied with its agreement to timely provide a pre-engineered metal
11 building per plans and *11 specifications; and (2) acquiesced to a deduction in the contract amount, the payment of which resulted in accord and satisfaction. Rigney sued BCISD alleging it breached the general contract. No contract exists between Red Dot and BCISD.

In construction contracts, in the absence of an express agreement to the contrary, a subcontractor is not in privity with the owner and thus looks to the general contractor alone for payment. ***Hite v. Ark-La-Tex Elec.***, ***Inc.***, No. 12-17-00072-CV, 2017 WL 5622931, at *2 (Tex. App.—Tyler Nov. 22, 2017, no pet. h.) (mem. op.). Persons performing services or providing materials to a general contractor are paid by the general contractor, not the owner, even if the work is done under the direction of and in accordance with the plans furnished by the owner. ***Id.*** Accordingly, Rigney, as general contractor, was directly liable to Red Dot, as subcontractor. *See* ***id .*** Thus, whether BCISD breached its duties under the general contract to provide "plans and specifications that were free of errors and omissions" is a wholly different fact issue than whether Rigney breached its contract with Red Dot by failing to pay or Red Dot satisfied its own obligations under the subcontract. Therefore, the legal issues raised for these separate claims are not identical, Rigney could have brought suit against BCISD independently, and the cause of action could be tried as if it were the only claim in controversy. *See* ***Guar . Fed. Sav. Bank*** , 793 S.W.2d at 658; *see also* ***Paradigm Oil*** , 161 S.W.3d at 540; ***Rodarte*** , 828 S.W.2d at 71. As the Texas Supreme Court has stated, severance of a claim is proper under these circumstances. *See* ***Guar . Fed. Sav. Bank v*** , 793 S.W.2d at 658.

Accordingly, we conclude that the trial court did not abuse its discretion by severing Rigney's breach of contract claim against BCISD. *See* ***Morgan*** , 675 S.W.2d at 733-34; ***Paradigm Oil*** , 161 S.W.3d at 540. And because the action against BCISD must be brought in Brooks County under the general contract's venue provision, the trial court did not abuse its discretion in transferring Rigney's case against BCISD to Brooks County once the claim was severed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.0151 (West 2017). Absent an abuse of discretion, Rigney has failed to satisfy the mandamus standard. *See* ***Walker*** , 827 S.W.2d at 840.

DISPOSITION

For the reasons discussed above, Rigney has not shown its entitlement to mandamus relief. We ***deny*** its petition
12 for writ of mandamus. *12

JAMES T. WORTHEN

Chief Justice Opinion delivered February 6, 2018.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

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COURT OF APPEALS TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of mandamus filed by Rigney Construction & Development, LLC; who is the relator in Cause No. CV15-0009-173, pending on the docket of the 173rd Judicial District Court of Henderson County, Texas. Said petition for writ of mandamus having been filed herein on November 28, 2017, and the same having been duly considered, it is the opinion of this Court that a writ of mandamus should not issue, it is therefore CONSIDERED, ADJUDGED and ORDERED that the said petition for writ of mandamus be, and the same is, hereby **DENIED.**

James T. Worthen, Chief Justice.

Panel consisted of Worthen, C.J., Hoyle, J. and Neeley, J.

No. 08-19-00080-CV
COURT OF APPEALS EIGHTH DISTRICT OF TEXAS EL PASO, TEXAS

Mortensen v. Villegas

630 S.W.3d 355 (Tex. App. 2021)
Decided Feb 1, 2021

No. 08-19-00080-CV

02-01-2021

George L. MORTENSEN, Appellant, v. Daniel VILLEGAS and Elvia L. Ramirez, Appellees.

APPELLANT: George L. Mortensen, 3668 Bishop Way, El Paso, TX 79903. ATTORNEYS FOR APPELLEES: Daniel Anchondo, Anchondo & Anchondo, 2509 Montana Ave., El Paso, TX 79903, Frank J. Guzman, Frank J. Guzman, P.C., 521 Texas Ave, El Paso, TX 79901.

GINA M. PALAFOX, Justice

APPELLANT: George L. Mortensen, 3668 Bishop Way, El Paso, TX 79903.

ATTORNEYS FOR APPELLEES: Daniel Anchondo, Anchondo & Anchondo, 2509 Montana Ave., El Paso, TX 79903, Frank J. Guzman, Frank J. Guzman, P.C., 521 Texas Ave, El Paso, TX 79901.

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

OPINION

GINA M. PALAFOX, Justice

This is the second *pro se* appeal by Appellant George L. Mortensen in which he contests the dismissal of claims asserted in an heirship proceeding pending in a statutory probate court. Following dismissal of prior claims based on lack of standing, Mortensen returned to the same cause and forum below to assert claims against Daniel Villegas and Elvia L. Ramirez (Appellees, collectively), as well as against other defendants who
359 are not parties to this appeal.[1] For a second time, the probate *359 court dismissed Mortensen's claims for want of jurisdiction, and in doing so, granted relief sought by Appellees to include awards of attorney's fees. Mortensen raises six issues challenging the court's dismissal of his claims and the sufficiency of the evidence supporting the fee awards. We affirm in part and reverse and remand in part.

[1] Mortensen's original petition named five defendants, Daniel Villegas, Elvia L. Ramirez, Crystal Dianne Ortiz, Steven Joseph Casares, and State Farm Fire and Casualty Company. By notice of appeal, however, Mortensen only challenged final orders of the probate court that pertain to three of the originally named defendants, Villegas, Ramirez and Ortiz. Even still, only Villegas and Ramirez were served with process, and later, obtained favorable relief from the court below. As to Ortiz, she was never served with legal process and Mortensen merely challenged the probate court's denial of his motion for alternative service. Texas courts lack personal jurisdiction over a party if service of citation is not accomplished on that party. *See Robb v. Horizon Communities Improvement Ass'n, Inc.* , 417 S.W.3d 585, 590 (Tex. App.—El Paso 2013, no pet.) (citing *In re E.R.* , 385 S.W.3d 552, 563 (Tex. 2012)). By Order issued August 6, 2019,

we rejected Mortensen's attempt to appeal the interlocutory order pertaining to Ortiz. Thus, only Villegas and Ramirez remain as appellees to this appeal. For brevity, we will refer to Villegas and Ramirez collectively as Appellees unless there is a need to identify either one individually.

I. BACKGROUND

A. Mortensen's first appeal

In 2010, Crystal Dianne Ortiz filed an application for the appointment of a dependent administration of the estate of her father, Jose Casares (Decedent), in Probate Court No. 1 of El Paso County. For several years, little activity transpired in the case until Ortiz retained new counsel. In 2015, Ortiz filed a motion to dismiss her application for dependent administration asserting that she and her brother, Steven Joseph Casares, were the only heirs and that an administration of an estate was not necessary. Ortiz included an application to determine heirship with her dismissal motion. On December 1, 2015, the court granted Ortiz's motion to dismiss the application for dependent administration but made no determination of the Decedent's heirs.

On May 6, 2016, Mortensen filed a *pro se* pleading characterizing himself as an interested person asserting an "authenticated claim" against the estate. Mortensen described that he owned real property located next door to a property owned by Decedent. Alleging that Decedent's property had been abandoned for several years, Mortensen claimed his neighboring property had been encroached upon and adversely affected by the circumstance. Mortensen sought recovery of $30,000 against Decedent's estate for diminishment of the value of his property, for the labor he had expended to pull weeds and pick-up trash from Decedent's property, and for time he spent researching and pursuing his claim.

On February 15, 2017, the probate court entered a judgment declaring that Ortiz and her brother, Steven Joseph Casares, were the heirs of Decedent and each shared a one-half interest in Decedent's real and personal property. Ortiz later filed a motion to declare Mortensen a vexatious litigant who filed an unsubstantiated and unfounded claim. Ortiz further asserted that Mortensen lacked standing to bring his suit. Thereafter, the court rendered an order denying Mortensen's claim based on his lack of standing and his failure of proof of appropriation over the subject property. The court also denied the motion to declare him a vexatious litigant. Although Mortensen appealed to this Court, we affirmed the probate court's judgment. *See Matter of Estate of Casares* , 556 S.W.3d 913, 915-16 (Tex. App.—El Paso 2018, no pet.). Like the court below, we held that Mortensen lacked standing to challenge the heirship claims or to otherwise present a claim for damages in the heirship proceeding. *Id.*

B. Mortensen files new claims

360 Following the first appeal, Mortensen returned to the same heirship proceeding *360 and filed an original petition in which he asserted new claims against Decedent's heirs, Ortiz and Casares; against Appellee Elvia L. Ramirez, a notary public employed by Ortiz's attorney; against State Farm Fire and Casualty Company (State Farm), the notary surety of Ramirez; and against Appellee Daniel Villegas, a friend of Decedent's family. The petition describes that Ortiz resides in San Antonio, and Casares is believed to be homeless but he maintains a mailing address in Colorado Springs, Colorado. By his petition, Mortensen alleged the following as his causes of action: (1) that Ramirez improperly refused to give him access to her notary records; (2) that State Farm failed to pay a bond claim on behalf of Ramirez pertaining to her refusal; (3) that Ortiz committed slander by filing a police report that alleged that Mortensen had committed a burglary of the Decedent's home; (4) that Ortiz committed libel by filing the police report; and (5) that Ortiz, Casares, and Villegas, committed a "Nuisance Tort[ ]" against Mortensen who had expended time and expenses repairing Decedent's property.[2]

2 Regarding defendant State Farm, Mortensen dismissed his sole claim against it pursuant to a settlement agreement. As to heir Steven Casares, our record includes a citation showing a signed return asserting that service was effected on him by certified mail, restricted delivery, return receipt. The record also includes a green card reflecting delivery of an article addressed to Casares at an address in Colorado Springs, CO, which purportedly contains a signature of Casares on the delivery receipt. But Casares made no appearance or filed any pleading in the record below.

Relevant to this appeal, Ramirez and Villegas each filed a combined motion which sought protection from discovery and dismissal of all claims asserted. By their motions, Ramirez and Villegas asserted that Mortensen had brought frivolous, groundless claims in bad faith and for the purpose to cause unnecessary and needless costs of litigation. Relying on this Court's prior ruling, Appellees pointedly claimed that Mortensen did not qualify as an interested person of the heirship proceeding. Along with dismissal, Ramirez and Villegas sought attorney's fees of $5,000 and $10,000, respectively. Responding to Villegas's motion, Mortensen contended that "$10,000 in ‘reasonable attorney fees’ is not based on the realities in this case and is simply [ ] designed to intimidate the Plaintiff and attempt to prevent further discovery that would support Plaintiff's causes of action." In responding to Ramirez's motion, he argued against dismissal but included no specific response to the claim for attorney's fees.

At the hearing that followed, Ramirez and Villegas urged dismissal asserting the court had already determined that Mortensen lacked standing to assert claims in the proceeding and that ruling had been affirmed on appeal by this Court. Mortensen continued to urge that he had standing with the court and he opposed dismissal. As the hearing concluded, the trial court reiterated that it had already determined that Mortensen lacked standing in the estate, and he had improperly brought claims for which the court lacked jurisdiction. Before concluding, the court announced its willingness to allow the attorneys representing Ramirez and Villegas to submit bills for having "to defend this again." Subsequently, the trial court rendered the following written orders: (1) an order denying Mortensen's motion for alternative service on Ortiz; (2) an order granting Villegas's motion for a protective order; and (3) an order dismissing Mortensen's petition in its entirety which included orders awarding attorney's fees of $4,500 to Ramirez and $3,375 to Villegas. Invoices from both attorneys were
361 attached to the *361 court's order reflecting itemized charges for legal services which corresponded to the respective amounts of fee awarded.

This appeal followed.

II. ISSUES ON APPEAL

In six issues, Mortensen challenges the probate court's order dismissing his original petition, the court's grant of protective orders and awards of attorney's fees to Villegas and Ramirez, and the denial of his motion for alternative service on Ortiz. Responding, Appellees assert a series of arguments. First, that the probate court lacked subject-matter jurisdiction over claims asserted by Mortensen urging that he lacked standing to litigate matters involving the estate. Second, Appellees further argue that the probate court did not abuse its discretion in granting protective order relief. Third, as to the awards of attorney's fees, Appellees contend that Mortensen waived error by failing to object in the probate court and by failing to adequately brief his challenge in this Court. Fourth, regarding a specific portion of the fees awarded to Villegas, Mortensen waived any complaint about Villegas's failure to segregate recoverable fees from those that were nonrecoverable. Fifth, if no waiver occurred, Appellees alternatively argue that this Court should imply findings of fact and conclusions of law in support of such fee awards.

III. DISCUSSION

A. Issues One, Two, Three, and Six: Whether the probate court lacked subject-matter jurisdiction over Mortensen's original petition

1. Standard of Review

Whether a trial court has subject-matter jurisdiction is a question of law subject to de novo review. *Frost Nat'l Bank v. Fernandez* , 315 S.W.3d 494, 502 (Tex. 2010). Standing is a component of subject-matter jurisdiction, *State v. Naylor* , 466 S.W.3d 783, 787 (Tex. 2015), and a constitutional prerequisite to maintaining suit. *Tex. Dep't of Transp. v. City of Sunset Valley* , 146 S.W.3d 637, 646 (Tex. 2004). We always have jurisdiction to resolve questions of standing and jurisdiction. *Naylor* , 466 S.W.3d at 787. The existence of subject-matter jurisdiction and standing are rigid questions of law that are not negotiable and cannot be waived. *See Naylor* , 466 S.W.3d at 792 ; *Tex. Ass'n of Bus. v. Tex. Air Control Bd.* , 852 S.W.2d 440, 444-45 (Tex. 1993). Both are essential to a court's power to decide a case. *Bland Indep. Sch. Dist. v. Blue* , 34 S.W.3d 547, 553-54 (Tex. 2000).

A motion to dismiss based on the court's lack of subject-matter jurisdiction is the functional equivalent of a plea to the jurisdiction. *Narvaez v. Powell* , 564 S.W.3d 49, 53 (Tex. App.—El Paso 2018, no pet.). A plaintiff has the burden of pleading facts which affirmatively show that the trial court has jurisdiction. *Tex. Ass'n of Bus.* , 852 S.W.2d at 446. In deciding a plea to the jurisdiction, the trial court must determine if the plaintiff has alleged facts that affirmatively demonstrate its jurisdiction to hear the case. *Tex. Dep't of Parks & Wildlife v. Miranda* , 133 S.W.3d 217, 226 (Tex. 2004).

2. Applicable Law

The Probate Court No. 1 of El Paso County is a statutory probate court. A statutory probate court has the general jurisdiction of a probate court as provided by the Texas Estates Code, and the jurisdiction provided by law for a county court to hear certain matters under the Health and Safety Code. *See* TEX. GOV'T CODE ANN. § 25.0021. It is a court of limited jurisdiction. *Narvaez* , 564 S.W.3d at 54.*362 For a suit to be subject to the jurisdiction provisions of the Texas Estates Code, it must qualify as either a "probate proceeding," or a "matter related to a probate proceeding," as defined by the Estates Code. *In re Hannah* , 431 S.W.3d 801, 807-08 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (citing TEX. EST. CODE ANN. §§ 21.006, 32.001(a), 33.002, 33.052, 33.101).

362

Section 31.001 of the Texas Estates Code provides:

The term "probate proceeding," as used in this code, includes:

> (1) the probate of a will, with or without administration of the estate;
>
> (2) the issuance of letters testamentary and of administration;
>
> (3) an heirship determination or small estate affidavit, community property administration, and homestead and family allowances;
>
> (4) an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent;
>
> (5) a claim arising from an estate administration and any action brought on the claim;
>
> (6) the settling of a personal representative's account of an estate and any other matter related to the settlement, partition, or distribution of an estate;
>
> (7) a will construction suit; and
>
> (8) a will modification or reformation proceeding under Subchapter J, Chapter 255.

TEX. EST. CODE ANN. § 31.001.

"A matter related to a probate proceeding" is defined based on whether a county has a statutory probate court or county court at law exercising probate jurisdiction. *Hannah* , 431 S.W.3d at 809-10. As we have a statutory probate court in this case, Section 31.002(c) governs the scope of matters considered "related to a probate proceeding...." That provision states as follows:

> (c) For purposes of this code, in a county in which there is a statutory probate court, a matter related to a probate proceeding includes:
>
> (1) all matters and actions described in Subsections (a) and (b); and
>
> (2) any cause of action in which a personal representative of an estate pending in the statutory probate court is a party in the representative's capacity as personal representative.

TEX. EST. CODE ANN. § 31.002(c).

As referenced within that provision, subparts (a) and (b) provides as follows:

> (a) For purposes of this code, in a county in which there is no statutory probate court or county court at law exercising original probate jurisdiction, a matter related to a probate proceeding includes:
>
> (1) an action against a personal representative or former personal representative arising out of the representative's performance of the duties of a personal representative;
>
> (2) an action against a surety of a personal representative or former personal representative;
>
> (3) a claim brought by a personal representative on behalf of an estate;
>
> (4) an action brought against a personal representative in the representative's capacity as personal representative;
>
> (5) an action for trial of title to real property that is estate property, including the enforcement of a lien against the property; and
>
> (6) an action for trial of the right of property that is estate property.
>
> (b) For purposes of this code, in a county in which there is no statutory probate

363 *363

> court, but in which there is a county court at law exercising original probate jurisdiction, a matter related to a probate proceeding includes:
>
> (1) all matters and actions described in Subsection (a);
>
> (2) the interpretation and administration of a testamentary trust if the will creating the trust has been admitted to probate in the court; and
>
> (3) the interpretation and administration of an inter vivos trust created by a decedent whose will has been admitted to probate in the court.

TEX. EST. CODE ANN. § 31.002(a), (b).

Finally, a probate court may also exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy. TEX. EST. CODE ANN. § 32.001(b). Yet for a probate court to have such authority to exercise jurisdiction over matters incident to an estate, it is axiomatic that there must necessarily be a probate proceeding then pending in such court. *Frost Nat'l Bank* , 315 S.W.3d at 506 ; *Narvaez* , 564 S.W.3d at 57.

3. Application

First, we observe that none of Mortensen's causes of action in his original petition qualify as a recognized "probate proceeding" pursuant to statutory terms. *See* TEX. EST. CODE ANN. § 31.001. Excluding the cause of action no longer pending against State Farm for its alleged failure to pay a bond claim, all remaining claims alleged in the petition were all based on the following acts or omissions: (1) failure of a notary public to afford access to her notary records; (2) slander based on a police complaint made against Mortensen; (3) libel for the same; and (4) a "Nuisance Tort[ ]" attributed to the cost for repair and maintenance of the property. Plainly,

none of these acts or omissions fall within any of the eight categories recognized as comprising probate proceedings under Texas Estates Code section 31.001. *See* TEX. EST. CODE ANN. § 31.001. Said differently, the prosecution of these claims fail to attack, impact, or otherwise alter the heirship judgment. While these purported claims do implicate certain parties who had some relation to a probate proceeding, their identity alone or the role played by each cannot bring the claims within the jurisdiction of the probate court. *See Hannah* , 431 S.W.3d at 808-09 (holding that relator's suit—consisting of a claim for money damages against multiple parties based on defendants' alleged conduct in slandering relator and tortuously interfering with the bequests to her in a decedent's prior wills—was not a "probate proceeding," despite the gravamen of the suit being that she was disinherited as a result of the defendants' alleged actions, where: (1) the suit did not fall within any of the categories listed within Texas Estates Code section 31.001 ; (2) the prosecution of relator's suit would not attack, impact, or otherwise alter the probate judgment; and (3) whatever potential liability the defendants may face based on their alleged individual actions vis-à-vis relator was a distinct matter to be determined, not by application of probate law, but rather by the law pertaining to her specific claims).

Moreover, for like reasons, we note that none of Mortensen's causes of action brought by his original petition qualify as "matter[s] related to a probate proceeding," even though he asserts purported causes that implicate individuals who were involved in some manner with the prior probate proceeding. *See* TEX. EST. CODE ANN. § 31.002(a), (b), (c).

Finally, we further find that the probate court no longer had pendent and ancillary jurisdiction to exercise over
364 Mortensen's newly raised causes of action because *364 the probate proceeding had already concluded—having resulted in a judgment declaring heirship—and no longer remained pending in the probate court. *See Frost Nat'l Bank* , 315 S.W.3d at 506 ; *Narvaez* , 564 S.W.3d at 57. Thus, this third and last avenue through which Mortensen might have established jurisdiction was no longer viable to otherwise support the court's ancillary jurisdiction.

In sum, we conclude that Mortensen failed to raise a cause of action in which the probate court had subject-matter jurisdiction given his failure to allege a single claim that qualified as either a "probate proceeding," as a "matter related to a probate proceeding," or as one that triggered the probate court's pendent and ancillary jurisdiction. *See Hannah* , 431 S.W.3d at 807-08. Consequently, the statutory probate court here had no power nor constitutional authority to decide Mortensen's claims or any of the motions stemming therefrom. *See Bland* , 34 S.W.3d at 553-54 (instructing that subject-matter jurisdiction is essential to a court's power to decide a case). Accordingly, because we have concluded there is a want of subject-matter jurisdiction as to all claims asserted by Mortensen's petition, we will not address on their merits the arguments raised in Mortensen's Issues One, Two, Three, and Six, which challenge the probate court's order dismissing his petition, the order granting protective orders, and the order denying Mortensen's motion for alternative service of Ortiz, and we overrule these four issues.[3]

[3] Appellees also contend that Mortensen does not have standing to advance his claims under the probate court cause number of this case for the same reasons we articulated in his previous appeal. *See Casares* , 556 S.W.3d at 915-16. As we previously observed, in a probate proceeding the burden is on the person whose standing is challenged to prove that he is an "interested person." *Id.* at 915. The Texas Estates Code defines an "interested person" as "an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered...." Tex. Est. Code Ann. § 22.018(1). We also observed in the prior appeal that the probate court was not administering an estate. *Casares* , 556 S.W.3d at 915. Thus, we held that Mortensen did not have a "claim against an estate being administered." *Id.* And for this additional reason, we would hold that Mortensen has no standing to raise his Issues One, Two, Three, and Six here and overrule them.

Although we overrule these issues based on the probate court's lack of subject-matter jurisdiction to hear them, we nonetheless retain the ability to consider whether the awards of attorney's fees by that court was proper, and we proceed to address Mortensen's remaining issues contesting those fees. *See Marcus v. Smith* , 313 S.W.3d 408, 415 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (holding that the court had jurisdiction to address Appellant's complaint about trial attorney fees even though the court did not have jurisdiction to address the merits of the underlying proceeding from which those fees arose).

B. Issues Four and Five: The awards of attorney's fees

In Issues Four and Five, Mortensen generally contends that the probate court abused its discretion in awarding attorney's fees of $4,500 to Ramirez and $3,375 to Villegas. In both issues, Mortensen broadly contends that the award of fees to each movant was unsupported by evidence. As to each award, however, he further includes a separate and distinct complaint. In Issue Four, he contends the fees to Ramirez were not reasonable; whereas in Issue Five, he contends the fees to Villegas were not incurred. Responding, Ramirez and Villegas present a
365 two-part argument: (1) that Mortensen waived error *365 regarding the fees awarded to their respective attorneys; and (2) if error was not waived, that this Court should imply that the probate court made all findings necessary to support the fee awards including findings that the respective awards were reasonable and necessary.

Addressing Issues Four and Five together, we begin with the waiver arguments.

1. Whether Mortensen Waived Error with Respective to the Fee Awards

Ramirez and Villegas contend that Mortensen waived error: (1) by failing to lodge any objection to the award of attorney's fees in the probate court; and (2) by inadequately briefing on appeal his complaint against such fees. We agree in part and disagree in part.

a. Probate Court Proceedings

"Parties are restricted on appeal to the theory on which the case was tried." *Wells Fargo Bank, N.A. v. Murphy* , 458 S.W.3d 912, 916 (Tex. 2015). Moreover, if no objection was made that matches the complaint on appeal, then the issue has not been preserved for appellate review. *See* TEX. R. APP. P. 33.1(a) ; *Martinez Jardon v. Pfister* , 593 S.W.3d 810, 831 (Tex. App.—El Paso 2019, no pet.). Complaints that attorney's fees were not recoverable either by statute or by other basis may be waived on appeal if no such objection was properly made in the trial court. *See, e.g., Snowden v. Artesia Wells Ranch 1994, Ltd.* , No. 13-19-00157-CV, 2020 WL 2610924, at *2 (Tex. App.—Corpus Christi May 21, 2020, no pet.) (mem. op.) (holding claim about lack of statutory authority for attorney's fees was waived by failure to appropriately object); *In re Baby Boy R.* , 191 S.W.3d 916, 921 (Tex. App.—Dallas 2006, pet. denied) (holding the same for constitutional claims in general); *Gipson-Jelks v. Gipson* , 468 S.W.3d 600, 604 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (stating that preservation of error regarding attorney's fees requires a complaint to the trial court by timely request, objection, or motion with sufficient specificity to bring awareness of complaint to the trial court).

Nevertheless, despite these restrictions on appellate review, it is further recognized that a complaint about the legal or factual sufficiency of the evidence to support an award of fees may be raised for the first time on appeal in a civil nonjury case. *See* TEX. R. CIV. P. 324(a), (b) ; TEX. R. APP. P. 33.1(d) ; *see also Interest of D.Z.* , 583 S.W.3d 284, 292 (Tex. App.—Houston [14th Dist.] 2019, no pet.) ; *WPS, Inc. v. Enervest Operating, L.L.C.* , No. 01-06-00759-CV, 2010 WL 2244077, at *16 (Tex. App.—Houston [1st Dist.] May 28, 2010, pet. denied) (mem. op. on reh'g); *O'Farrill Avila v. Gonzalez* , 974 S.W.2d 237, 249 (Tex. App.—San Antonio 1998, pet. denied).

Here, the record shows that Ramirez and Villegas each filed a combined motion in the probate court in which they sought a protective order from discovery and a dismissal of all claims brought against them. By their motions, Ramirez and Villegas asserted that Mortensen had filed claims that were frivolous, groundless, brought in bad faith, and for the purpose of harassment. And, as a basis for dismissal of the suit, both motions referenced this Court's prior opinion and judgment which had affirmed the probate court's prior ruling that Mortensen was not an interested person in the pending probate proceeding. While Ramirez sought a fee award of $5,000 by his motion, Villegas's fee claim sought $10,000.

In his responsive pleading filed with the court below, Mortensen opposed the fee request of Villegas but not
366 that of Ramirez. And, in doing so, his pleading simply *366 argued that "$10,000 in 'reasonable attorney fees' is not based on the realities in this case...." As the hearing below nearly concluded, the probate court indicated it had no jurisdiction over the claims asserted given that Mortensen lacked standing in the estate. Thereafter, the court indicated it would allow the attorneys representing Ramirez and Villegas to submit their bills for having to, once again, defend the suit brought in that court. At this point, Mortensen lodged no objection to the award of fees. The court then granted both motions to dismiss. Shortly thereafter, as reflected by the dismissal order dated February 19, 2019, invoices were submitted from movants' attorneys which reflected fees of $4,500 billed to Ramirez, and $3,375 billed to Villegas. The probate court's dismissal order includes a separate award of fees to each movant corresponding to the invoices submitted. Mortensen filed no post-hearing motion for new trial.

In his appellate briefing, Mortensen advances a variety of arguments challenging the probate court's award of fees to Ramirez and Villegas. In general terms, he contends the fees were not recoverable pursuant to any statutory authority based on the type of suit at issue and further argues the fees awarded were "an excessive fine" in violation of the U.S. and Texas Constitutions. More pointedly, he further asserts that the probate court erred by awarding fees to Ramirez and Villegas given that the fees sought by their respective motions were not of the kind or type permitted by section 38.001 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (listing what types of claims are allowed for the recovery of attorney's fees). Because Mortensen failed to properly and timely object in the probate court that the fees lacked a legal basis, he failed to preserve error on that basis and we do not otherwise decide that issue.[4] *See* TEX. R. APP. P. 33.1(a) ; *Gipson-Jelks* , 468 S.W.3d at 604 (appellant did not preserve complaint regarding trial court's lack of statutory or contractual basis for attorney's fee award in trial court); *Snowden* , 2020 WL 2610924, at *2 ; *Baby Boy R.* , 191 S.W.3d at 921.

[4] We note here that Tex. R. Civ. P. 13 permits a court, upon motion or upon its own initiative, to impose an appropriate sanction upon either a party, or his or her attorney, if the court finds that a pleading, motion, or other paper is groundless and brought in bad faith or for the purpose of harassment. *See* Tex. R. Civ. P. 13. However, the Supreme Court recently clarified that when a court exercises its discretion to shift attorney's fees as a sanction, there must be some evidence of reasonableness to establish that the sanction is " 'no more severe than necessary' to fairly compensate the prevailing party." *Nath v. Texas Children's Hospital* , 576 S.W.3d 707, 709 (Tex. 2019). "Consequently, when a party seeks attorney's fees as sanctions, the burden is on that party to put forth some affirmative evidence of attorney's fees incurred and how those fees resulted from or were caused by the sanctionable conduct." *Id.* (citing *CHRISTUS Health Gulf Coast v. Carswell* , 505 S.W.3d 528, 540 (Tex. 2016)).

Accordingly, we overrule Issues Four and Five in part.

Next, we consider the remainder of arguments raised by Mortensen's briefing.

b. Briefing Objections

When a party appears *pro se* , he or she is held to the same standards as a licensed attorney and must comply with all applicable laws and rules of procedure. *Robb* , 417 S.W.3d at 590. If *pro se* litigants were not required to comply with applicable rules of procedure, they would be given an unfair advantage over parties represented by counsel. *Id.* When reviewing a brief, whether filed by counsel or by *pro se* parties, we are required to
367 construe it reasonably, yet liberally, so that the right *367 to appellate review is not lost by waiver. *Id.* Moreover, substantial compliance with the rules is sufficient. *See* TEX. R. APP. P. 38.9. Simply said, a party's brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. TEX. R. APP. P. 38.1(i).

Beyond the argument asserting there is no legal basis for the fee awards, Mortensen's briefing also argues that the attorney's fees were "unsupported and unreasonable" or "not incurred," and "provide no proof of the reasonableness or necessity of the fees...." We construe these complaints as arguing that the evidence presented was legally insufficient. *See Brownhawk, L.P. v. Monterrey Homes, Inc.* , 327 S.W.3d 342, 346 (Tex. App.—El Paso 2010, no pet.) (instructing that a "no evidence" challenge is a legal sufficiency challenge). Remaining mindful of our duty to construe briefing reasonably, yet liberally, we find that Mortensen adequately established the right to an appellate review of the legal sufficiency of the fee awards. *See Robb* , 417 S.W.3d at 590. We thus hold that Mortensen's legal sufficiency argument was not waived by a failure to adequately brief it to this Court. *See* TEX. R. APP. P. 38.1(i), 38.9.

Although Mortensen waived error as to the legal basis of the awards, he preserved error as to his challenge of the legal sufficiency of the evidence to support those awards. *See* TEX. R. CIV. P. 324(a), (b) ; TEX. R. APP. P. 33.1(d) ; *see also D.Z.* , 583 S.W.3d at 292 ; *WPS* , 2010 WL 2244077, at *16 ; *O'Farrill Avila* , 974 S.W.2d at 249.

2. Legal Sufficiency of the Evidence to Support the Fee Awards

a. Standard of Review

In general, the trial court's determination of what constitutes a reasonable and necessary attorney's fee is subject to an abuse of discretion standard on appeal. *Gerges v. Gerges* , 601 S.W.3d 46, 65 (Tex. App.—El Paso 2020, no pet.). An award of fees which is not supported by legally sufficient evidence is arbitrary and constitutes an abuse of discretion. *Brownhawk* , 327 S.W.3d at 348. The party seeking an award of attorney's fees bears the burden of establishing entitlement to an award. *Sullivan v. Abraham* , 488 S.W.3d 294, 299 (Tex. 2016). "Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP* , 578 S.W.3d 469, 498 (Tex. 2019). In determining whether there is legally sufficient evidence to support such award, we consider the evidence presented in the light most favorable to the findings necessary to support the court's decision and disregard evidence contrary to the findings unless a reasonable fact finder could not. *See City of Keller v. Wilson* , 168 S.W.3d 802, 807 (Tex. 2005).

b. Application

Before we assess the sufficiency of the evidence presented to the probate court, we next address Ramirez's and Villegas's remaining argument that this Court "should imply that the Probate Court made all findings that were necessary to support the attorney's fee awards it made" where neither party requested findings of fact and conclusions of law and that this Court should affirm for this reason alone. Generally, judgments are presumed

valid. *Anderson Mill Mun. Util. Dist. v. Robbins* , 584 S.W.3d 463, 473 (Tex. App.—Austin 2005, no pet.).
368 When neither *368 party requests findings of fact and conclusions of law, it is implied that the trial court made all fact findings necessary to support its judgment. *Id.* However, when the appellate record includes the reporter's and clerk's record, these implied findings are not conclusive and may be challenged for legal and factual sufficiency. *Id.* As Appellees appear to contend that such implied findings should be conclusive without regard to the evidence presented in support of the fees awarded, we reject this contention, and instead, we proceed to consider whether the evidence was legally sufficient in light of the applicable standard of review. *See id.*

Mortensen argues that the invoices provided were insufficient to support the two fee awards. As to this argument, we agree. Although we find the invoices themselves provide sufficient detail as to the legal services performed, the date of those services, and the amount of time spent for each service, nonetheless, we further conclude that these invoices fail to satisfy all required elements to support a fee award. *See Rohrmoos* , 578 S.W.3d at 498. Standing alone the invoices fail to establish the reasonableness of the time spent on legal services and the reasonableness of the rates charged. *Id.* ("the fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate"). Notably, no testimony was presented by affidavit or otherwise establishing the reasonableness of the time spent or of the rate charged. *Id.* Thus, we hold in this instance that the evidence was legally insufficient to support the probate court's award of attorney's fees where no evidence was presented as to all required elements. *See Robles v. Nichols* , 610 S.W.3d 528, 538 (Tex. App.—El Paso 2020, no pet. h.) (holding the evidence was insufficient to support an award of attorney's fees where there was no evidence on two of the *Rohrmoos* considerations, namely, the particular services performed and the reasonable amount of time required to perform the services); *compare Gerges* , 601 S.W.3d at 66-67 (holding that the award of attorney's fees was supported by legally sufficient evidence where: (1) the prevailing party's attorney testified about her experience and opined that her billing rate was a reasonable fee in the area; and (2) the prevailing party submitted billing records that detailed the work performed, who performed it, when the services were performed, the amount of time spent for each service, and the hourly rate for each person performing the service). Accordingly, we conclude that the probate court abused its discretion by awarding fees unsupported by legally sufficient evidence. *See Brownhawk* , 327 S.W.3d at 348.

Therefore, we sustain the remaining part of Issues Four and Five and reverse the probate court's award of $4,500 to Ramirez, and $3,375 to Villegas, for their respective attorney's fees. But in light of *Rohrmoos's* recent clarification of the sufficiency requirements of such awards—and such clarification having been issued while this appeal remained pending—we remand the matter to the court below in the interest of justice for further proceedings limited to Appellees' attorney's fee claims.[5] *See* TEX. R. APP. P. 43.3(b) ; *see also Robles* , 610
369 S.W.3d at 538.*369 **IV. CONCLUSION**

5 Appellees also raise a contention on appeal that Mortensen waived some portion of his legal sufficiency argument on the attorney's fees awarded to Villegas by failing to object that the requested fees had not been properly segregated. A party seeking recovery of attorney's fees must "segregate fees between claims for which they are recoverable and claims for which they are not." *Tony Gullo Motors I, L.P. v. Chapa* , 212 S.W.3d 299, 311 (Tex. 2006). Yet, we need not address this additional contention relating to any failure to segregate fees because we have already held that Mortensen waived any challenges to the attorney's fees—aside from, and solely, a nonwaivable sufficiency challenge.

Having overruled Issues One, Two, Three, and Six, we affirm the portion of the probate court's judgment dismissing Mortensen's petition, the order denying Mortensen's motion for alternative service of Ortiz, and the granting of protective orders to Villegas and Ramirez. Having overruled in part and sustained in part Issues Four and Five, we affirm the award of attorney's fees to Appellees but reverse that portion of the probate court's judgment awarding fees in the amount of $4,500 to Ramirez and $3,375 to Villegas, and remand for further proceedings to determine the reasonable amount of fees to be awarded.

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

Narvaez v. Powell

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

No. 08-17-00157-CV

07-13-2018

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

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

YVONNE T. RODRIGUEZ, Justice

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

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

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

OPINION

YVONNE T. RODRIGUEZ, Justice

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

FACTUAL SUMMARY

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

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

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

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

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

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

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

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

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

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

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

SUBJECT MATTER JURISDICTION

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

Standard of Review

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

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

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

Statutory Probate Court Jurisdiction

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

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

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

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

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

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

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

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

Appellants' Pleadings

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

1. Breach of Fiduciary Duty

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

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

55 *55

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

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

(3) preparing unconscionable fee agreements;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Barratry

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

3. Declaratory Relief

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

(1) the fee agreements are unconscionable and void;

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

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

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

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

4. Negligence

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

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

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

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

No. 05-17-00447-CV
Court of Appeals Fifth District of Texas at Dallas

Wallace v. Wallace

Decided Oct 9, 2017

No. 05-17-00447-CV

10-09-2017

CHARLES D. WALLACE, Appellant v. HATTIE LESLIE WALLACE, Appellee

Opinion by Justice Fillmore

On Appeal from the 255th Judicial District Court Dallas County, Texas
Trial Court Cause No. DF-04-19799

MEMORANDUM OPINION

Before Justices Bridges, Fillmore, and Stoddart
Opinion by Justice Fillmore

Charles D. Wallace and Hattie Leslie Wallace[1] were divorced on January 8, 2006. The agreed divorce decree awarded both Charles and Hattie fifty percent ownership, as tenants in common, of a house and lot located at 706 Carpenter Drive, Garland, Texas (the Property), and provided a procedure for the sale of the Property. After Charles's death on April 8, 2016, Hattie filed this suit to enforce the divorce decree. Mary Ann Wallace, Independent Executrix of Charles's Estate, responded to the suit.[2] The trial court appointed a receiver to sell the
2 Property. *2

[1] Because the parties and Mary Ann Wallace, Independent Executrix of Charles's Estate, have the same surname, we use their first names in this opinion when it is necessary to refer to any of them individually.

[2] Charles died before suit was filed, and did not have the capacity to be sued. *See Stinson v. King*, 83 S.W.2d 398, 399 (Tex. Civ. App.—Dallas 1935, writ dism'd) ("[S]uits can be maintained by and against only parties having an actual or legal existence). However, Mary Ann, Independent Executrix of Charles's Estate, appeared in the case without raising any challenge by verified pleading to Charles's capacity to be sued. *See* TEX. R. CIV. P. 93(1). Defects in capacity are "clearly curable," *Gomez v Tex. Windstorm Ins. Ass'n*, No. 13-04-00598-CV, 2006 WL 733957, at *2 (Tex. App.—Corpus Christi 2006, pet. denied) (mem. op.), and we conclude Mary Ann's appearance in the case as Independent Executrix of Charles's Estate cured any defect in the parties. *See e.g.*, *Price v. Estate of Anderson*, 522 S.W.2d 690, 692 (Tex. 1975) (although decedent's estate was improperly sued, defect was cured when purpose of suit and nature of claim asserted were clear from outset; and personal representative, the person who should have been named in suit as defendant, was served, answered for "estate," and participated in all proceedings affecting case). Because the parties never formally substituted Mary Ann, Independent Executrix of Charles's Estate, as the defendant in the trial court or the appellant on appeal, we will consider Charles as the appellant in this appeal.

In this interlocutory appeal,[3] Charles challenges the trial court's order appointing the receiver, arguing that rather than enforcing the divorce decree, the trial court's order appointing a receiver impermissibly altered the rights granted to Charles in the decree; and the trial court erred by failing to consider evidence of Charles's post-divorce contributions to the maintenance, improvement, and preservation of the Property. We affirm the trial court's order appointing a receiver.

3 *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(1) (West Supp. 2016) (order appointing receiver subject to interlocutory appeal).

Background

Hattie filed for divorce on November 14, 2004. Hattie and Charles subsequently entered into an Agreement Incident to Divorce (AID) at mediation. The trial court approved the AID and incorporated it into the January 18, 2006 divorce decree. As relevant to this appeal, both Charles and Hattie were awarded a "one-half interest as a tenant-in-common" in the Property. The trial court ordered the Property:

> [B]e listed with a realtor for sale at a price selected by the realtor, but not to be less than $77,000.00. The realtor to be used is _____ and shall be changed only by agreement of the parties. The sale price is to be reduced below $77,000.00 only upon written agreement of the parties. Any offer of $77,000.00 or more must be accepted by both parties.
>
> Charles D. Wallace is given the right of first refusal for any bona fide offer by paying Hattie Wallace one-half of the offer less the mortgage amount and less 6% realtor fee. The amount to be calculated as one-half of the home equity amount Hattie Wallace would actually receive should the house be sold, so that she received her actual one-half interest in the property.
>
> Either party may move the court to appoint a receiver to sell the house. IT IS ORDERED THAT THE COURT SHALL appoint a receive[r] on motion of either party after December 31, 2006 or at any time the mortgage payments on the house become three months in arrears.
>
> Should Charles Wallace fail to pay Hattie Wallace one-half the equity in the house (figured by taking a bona fide offer and subtracting the 6% realtor fee and

3 *3

> all funds due on the mortgage in effect as of the date of the divorce, less all payments made), within 30 days of said offer being made, the house is to be sold for the offer made with the parties splitting the funds remaining equally after all costs of sale are paid.

On November 17, 2016, Hattie filed a motion for the appointment of a receiver, alleging Charles had died, and Mary Ann, as Independent Executrix of Charles's Estate, had deeded the Property to herself, individually. Hattie subsequently filed a motion to reopen and to enforce the divorce decree, requesting the trial court "entertain a Motion to Appoint a Receiver pursuant to the terms of the Decree[.]"

Mary Ann, as Independent Executrix of Charles's Estate, responded to Hattie's motion to reopen and to enforce, asserting (1) Hattie was not entitled to the requested relief because, as explained in a plea to the jurisdiction,[4] the trial court did not have jurisdiction over Hattie's claim; and (2) Hattie's claim was barred in whole or part by the applicable statute of limitations or by laches. Mary Ann also contended that "should the trial court reopen

this matter, [Charles] is entitled to present evidence of the separate property used to maintain the property and payoff the outstanding balance on the mortgage, which is an equitable claim of the estate against [Hattie's] interest" in the Property.

[4] This pleading is not in the appellate record.

At the hearing on Hattie's motions, Hattie testified she and Charles agreed to sell the Property. After the divorce decree was signed, Hattie's son lived on the Property until 2010 or 2011. During that time period, Hattie did not want to request the Property be sold. After learning from her son that Charles had died, Hattie "went to get a deed" for the Property. She learned that her "name was no longer on the house." Instead, Mary Wallace was the listed owner of the Property. The trial court admitted into evidence the divorce decree; a June 6, 2016 Special Warranty Deed transferring the property from Mary Ann, as Independent Executrix of Charles's *4 Estate, to Mary Ann, individually; and a January 16, 2017 Rescission of Special Warranty Deed in which Mary Ann, as Independent Executrix of Charles's Estate, stated she desired to rescind the June 6, 2016 Specially Warranty Deed and that Mary Ann, individually, consented to the rescission.

On cross-examination, Charles's counsel attempted to question Hattie about whether she made any mortgage or tax payments relating to the Property following the entry of the divorce decree. The trial court sustained Hattie's relevance objections to these questions.[5]

[5] Charles's counsel also stated he "would proffer Ms. Mary Wallace simply for the fact to put on evidence that the credit that Mr. Wallace is entitled to as cotenant of the property; however, you've already sustained that objection, so I will not call Ms. Mary Wallace at this time."

The trial court signed an order on April 6, 2017, appointing a receiver to sell the Property; ordering the parties to fully cooperate with the receiver; authorizing the receiver "to manage, control, and dispose of the property as she sees fit in her sole discretion"; and ordering the proceeds of any sale be deposited in the registry of the court.

Jurisdiction

This Court's jurisdiction "as to the merits of a case extends no further than that of the court from which the appeal is taken." *Pearson v. State*, 315 S.W.2d 935, 938 (Tex. 1958). If the trial court lacked jurisdiction over the claims, then we have jurisdiction only to set aside the trial court's order and dismiss the appeal. *Dallas Cty. Appraisal Dist. v. Funds Recovery, Inc.*, 887 S.W.2d 465, 468 (Tex. App.—Dallas 1994, writ denied); *see also Duggan v. Tanglewood Villa Owners Ass'n, Inc.*, No. 05-16-00300-CV, 2017 WL 2610032, at *2 (Tex. App.—Dallas June 16, 2017, no pet.) (mem. op.). Because we questioned the trial court's jurisdiction over claims relating to the Property, we requested the parties file jurisdictional briefs addressing whether the statutory probate court in Dallas County has exclusive jurisdiction over Hattie's request for an appointment of a receiver to sell the Property. *5

In a county, such as Dallas County, with a statutory probate court, *see* TEX. GOV'T CODE ANN. § 25.0591(d) (West 2004), the statutory probate court has original jurisdiction of "probate proceedings," TEX. EST. CODE ANN. § 32.002(c) (West 2014), and "matters relating to probate proceedings, *Bloom v. Swango*, No. 05-14-01237-CV, 2015 WL 5786824, at *3 (Tex. App.—Dallas Oct. 5, 2015, pet. denied) (mem. op.); *In re Hannah*, 431 S.W.3d 801, 807-08 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (per curiam) (For a claim to be subject to the jurisdiction provisions of the Texas Estates Code, "it must qualify either as a 'probate proceeding' or a 'matter related to a probate proceeding' as defined by" the code.); *see also* TEX. EST. CODE ANN. § 22.029 (West 2014) ("The terms 'probate matter,' 'probate proceedings,' 'proceeding in probate,' and

'proceedings for probate' are synonymous and include a matter or proceeding relating to a decedent's estate."). As possibly relevant to this appeal, a "probate proceeding" includes an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent, TEX. EST. CODE ANN. § 31.001(4) (West 2014), and a "matter related to a probate proceeding" includes an action for trial of the right of property that is estate property. *Id*. § 31.002(a)(6), (c). "A cause of action related to the probate proceeding must be brought in a statutory probate court unless the jurisdiction of the statutory probate court is concurrent with the jurisdiction of a district court as provided by Section 32.007 or with the jurisdiction of any other court." *Id*. § 32.005.[6]

[6] Section 32.007 of the estates code provides that a statutory probate court has concurrent jurisdiction with the district court in certain actions not applicable in this case. *See* TEX. EST. CODE ANN. § 32.007.

Charles first contends the trial court did not have jurisdiction over Hattie's motion to appoint a receiver because that motion related to a secured claim against property of Charles's Estate and, therefore, falls within the estate code's definition of probate proceeding or matter relating to a probate proceeding. However, the court that
6 renders a decree of divorce "retains the *6 power" to enforce the property division in the decree or in an agreement incident to divorce that was approved by the court. TEX. FAM. CODE ANN. § 9.002 (West Supp. 2016); *Pearson v. Fillingim*, 332 S.W.3d 361, 363 (Tex. 2011) (per curiam). The court may enforce the division of property made or approved in the divorce decree by rendering further orders "to assist in the implementation of or to clarify the prior order." TEX. FAM. CODE ANN. § 9.006(a) (West Supp. 2016). It may also "specify more precisely the manner of effecting the property division previously made or approved if the substantive division of property is not altered or changed." *Id*. § 9.006(b). Accordingly, even if Hattie's motion to appoint a receiver pursuant to the divorce decree is a "probate proceeding" or a "matter relating to a probate proceeding," the trial court had concurrent jurisdiction with the statutory probate court to address the motions. *See In re Sims*, 88 S.W.3d 297, 302-03 (Tex. App.—San Antonio 2002, orig. proceeding) (considering whether county court in which application to probate husband's last will and testament was filed or trial court that rendered divorce, both of which had concurrent jurisdiction over wife's claim to enforce divorce decree, had dominant jurisdiction over claim).

Relying on section 102.005 of the estates code, Charles next argues the statutory probate court has exclusive jurisdiction because Mary Ann, as Charles's surviving spouse, has a life estate interest in the Property and, therefore, the Property may not be partitioned. As relevant here, section 102.005 prohibits the partition of a homestead among the decedent's heirs during the lifetime of the surviving spouse for as long as the surviving spouse elects to use or occupy the property as a homestead. TEX. EST. CODE ANN. § 102.005(1) (West 2014). However, Hattie is not seeking to partition the Property as one of Charles's heirs; rather, she is seeking partition of the Property as a tenant in common. Although homestead rights can attach to property interests held by tenancy in common, such homestead rights may not prejudice the rights of a cotenant. *Clements v. Lacy*, 51
7 Tex. 150, 162-63 (1879); *see also Sayers v. Pyland*, 161 S.W.2d *7 769, 773 (Tex. 1942); *Grant v. Clouser*, 287 S.W.3d 914, 919-20 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Generally, homestead rights attaching to property interests held by a cotenant are subordinate to another cotenant's right to partition. *Cleveland v. Milner*, 170 S.W.2d 472, 476 (Tex. 1943); *Grant*, 287 S.W.3d at 920. Therefore, even if Mary Ann has a homestead right in the Property, that right is subordinate to Hattie's right to partition the Property, and would not deprive the trial court of jurisdiction to enforce the divorce decree by appointing a receiver to sell the Property.

Finally, Charles argues the probate of his estate was the first suit affecting the Property and was filed in the statutory probate court, giving that court dominant jurisdiction over the claim. The doctrine of dominant jurisdiction is applicable when two actions involving the same subject matter are brought in different courts having concurrent jurisdiction. *In re Sims*, 88 S.W.3d at 303; *see also In re Puig*, 351 S.W.3d 301, 305 (Tex. 2011) (orig. proceeding) (per curiam) ("When the jurisdiction of a county court sitting in probate and a district court are concurrent, the issue is one of dominant jurisdiction."). "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." *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 622 (Tex. 2005). The proper method for contesting a court's lack of dominant jurisdiction is the filing of a plea in abatement. *In re Puig*, 351 S.W.3d at 303. A dominant jurisdiction complaint must be timely asserted and proven by a plea in abatement or it is waived. *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988), *disagreed with on other grounds*, *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 292-93 (Tex. 2016) (orig. proceeding); *Gutierrez v. Gutierrez*, No. 05-14-00803-CV, 2016 WL 1242193, at *2 (Tex. App.—Dallas Mar. 30, 2016, no pet.) (mem. op.). Nothing in the appellate record reflects that Charles either filed a plea in abatement in the trial court asserting the statutory
8 probate court had dominant jurisdiction over *8 Hattie's motion to appoint a receiver or obtained a ruling on any such plea. He therefore waived any argument the statutory probate court had dominant jurisdiction over this dispute.

We conclude the trial court had jurisdiction over Hattie's motion to appoint a receiver. Accordingly, we have jurisdiction over this interlocutory appeal.

Authority to Enter Order

In his first issue, Charles contends the trial court's order appointing a receiver impermissibly alters, amends, or otherwise modifies the divorce decree because the order does not expressly include Charles's right of first refusal. Hattie argues the paragraph of the parties' agreement regarding the appointment of a receiver did not include Charles's right of first refusal and that putting any constraints on the receiver's ability to sell the Property would impermissibly alter the terms of the parties' agreement.

We review a trial court's order appointing a receiver for an abuse of discretion. *Spiritas v. Davidoff*, 459 S.W.3d 224, 231 (Tex. App.—Dallas 2015, no pet.). "It is an abuse of discretion for a trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles, or to rule without supporting evidence." *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998) (citations omitted); *see also Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

Divorcing couples may enter into agreements to divide their property. *See* TEX. FAM. CODE ANN. § 7.006(a) (West 2006) ("To promote amicable settlement of disputes in a suit for divorce or annulment, the spouses may enter into a written agreement concerning the division of the property and the liabilities of the spouses and the maintenance of either spouse."). An agreed property division, although incorporated into a final divorce decree, is treated as a contract and is controlled by the usual rules of contract construction. *Allen v. Allen*, 717 S.W.2d
9 311, 313 (Tex. 1986); *Beshears v. Beshears*, 423 S.W.3d 493, 500 (Tex. App.—Dallas 2014, no *9 pet.). Our primary concern in interpreting the decree is to ascertain the intent of the parties as expressed in the terms of the agreement. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983); *Beshears*, 423 S.W.3d at 500. To achieve this objective, we must examine and consider the entire writing in an effort to harmonize and give effect to all the provisions so that none will be rendered meaningless. *Coker*, 650 S.W.2d at 393; *In re W.B.B.*, No. 05-16-00454-CV, 2017 WL 511208, at *4 (Tex. App.—Dallas Feb. 8, 2017, no pet.) (mem. op.). Ordinarily, the

writing alone will be deemed to express the parties' intentions because it is the objective, not subjective, intent that controls. *Matagorda Cty. Hosp. Dist. v. Burwell*, 189 S.W.3d 738, 740 (Tex. 2006) (per curiam); *In re W.B.B.*, 2017 WL 511208, at *4.

If, when read as a whole, the divorce decree's terms are so worded that it can be given a certain or definite legal meaning or interpretation, then it is unambiguous, and we must give effect to the order in light of the literal language used. *Coker*, 650 S.W.2d at 393; *Beshears*, 423 S.W.3d at 500. However, if the decree's terms are ambiguous, we must review the record along with the decree to aid in interpreting the judgment. *Coker*, 650 S.W.2d at 393; *Beshears*, 423 S.W.3d at 500. The decree is ambiguous only if, after application of the rules of construction, the judgment is reasonably susceptible to more than one meaning or if its meaning is uncertain or doubtful. *Coker*, 650 S.W.2d at 393; *In re W.B.B.*, 2017 WL 511208. at *5. Whether a divorce decree is ambiguous is a question of law we review de novo. *Shanks v. Treadway*, 110 S.W.3d 444, 447 (Tex. 2003); *In re W.B.B.*, 2017 WL 511208, at *5.

As noted above in the discussion of our jurisdiction over this appeal, a trial court that renders a divorce decree generally retains the power to enforce or clarify the property division contained or approved in the decree. TEX. FAM. CODE ANN. §§ 9.002, 9.006(a), 9.008. However, after its plenary power expires, a court may not alter, amend, or modify the substantive division of property in the decree. *Id.* § 9.007(a), (b); *Shanks*, 110
10 S.W.3d at 449; *Beshears*, 423 *10 S.W.3d at 501. An order entered by the trial court after expiration of its plenary power that amends, modifies, alters, or changes the actual, substantive division of property made or approved in a final decree of divorce is beyond the jurisdiction of the trial court and is void. TEX. FAM. CODE ANN. § 9.007(b); *Beshears*, 423 S.W.3d at 501.

The divorce decree in this case states either party may request the appointment of a receiver to sell the Property, and the trial court "shall" appoint a receiver "on motion of either party after December 31, 2006." Interpreting an agreement containing words such as "may" and "shall" requires the determination of whether the words are intended as permissive or mandatory. *Akhtar v. Leawood Hoa, Inc.*, 508 S.W.3d 758, 763-64 (Tex. App.—Houston [1st Dist.] 2016, no pet.). "The word 'shall' as used in contracts is generally mandatory, operating to impose a duty." *Lesikar v. Moon*, 237 S.W.3d 361, 367 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *see also* TEX. GOV'T CODE ANN. § 311.016(2) (West 2013) (under Code Construction Act, "shall" imposes duty unless context in which used "necessarily requires a different construction or unless a different construction is expressly provided by statute"). Therefore, based on the unambiguous language in the divorce decree, Hattie had the right to request the trial court appoint a receiver to sell the Property and, after December 31, 2006, the trial court had a duty to grant the request. Therefore, the trial court properly enforced the divorce decree by appointing a receiver to sell the Property.

The paragraph of the parties' agreement regarding the appointment of a receiver to sell the Property does not expressly state Charles retained his right of first refusal following the appointment of a receiver, but is both preceded and followed by paragraphs addressing the parties' agreement that Charles had a right of first refusal upon the receipt of a bona fide offer for the Property, as well as the method of calculating Hattie's interest in the Property should Charles exercise that right. Although the trial court's order appointing a receiver to sell the
11 Property *11 does not specifically mention Charles's right of first refusal, it also does not deprive Charles of that right. Accordingly, the trial court did not impermissibly alter, amend, or modify the division of property in the divorce decree by appointing the receiver to sell the Property. We resolve Charles's first issue against him.

Evidence of Equitable Claims

In his second issue, Charles contends the trial court erred by sustaining Hattie's relevancy objection to questions regarding any mortgage payments or taxes on the Property that she paid following the divorce. We review a trial court's decision to exclude evidence under an abuse of discretion standard. *McCafferty v. McCafferty*, No. 05-16-00587-CV, 2017 WL 3124470, at *2 (Tex. App.—Dallas July 24, 2017, no pet. h.) (mem. op.). We will uphold the ruling if there is any legitimate basis in the record to support it. *Id*.

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the case more or less probable than it would be without the evidence. TEX. R. EVID. 401. The only issue before the trial court was whether Hattie was entitled under the terms of the parties' agreement to the appointment of a receiver to sell the Property. Questions pertaining to any contributions Hattie or Charles may have made to the maintenance, improvement, or preservation of the Property after January 18, 2006, were not relevant to this determination, and the trial court, therefore, did not err by sustaining Hattie's relevance objection to those questions. We resolve Charles's second issue against him.

We affirm the trial court's order appointing a receiver.

/Robert M. Fillmore/

ROBERT M. FILLMORE

12 JUSTICE 170447F.P05 *12

JUDGMENT

On Appeal from the 255th Judicial District Court, Dallas County, Texas, Trial Court Cause No. DF-04-19799. Opinion delivered by Justice Fillmore, Justices Bridges and Stoddart participating.

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

It is **ORDERED** that appellee Hattie Leslie Wallace recover her costs of this appeal from appellant Charles D. Wallace, by and through Mary Ann Wallace, Independent Executrix of the Estate of Charles D. Wallace. Judgment entered this 9th day of October, 2017.