

No. 01-23-00362-CV

=====

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

=====

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

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

=====

Original Proceeding from Harris County Probate Court No. 4

Cause No. 412,249-401

=====

APPELLANTS BRIEF ON APPELLATE COURT JURISDICTION

=====

Candice Schwager
Texas State Bar No. 240056
Schwager Law Firm
16807 Pinemoor Way
Houston, Texas 77058
832.857.7173
candiceschwager@outlook.com
FOR APPELLANT CANDACE CURTIS

IDENTITY OF PARTIES AND COUNSEL

APPELLANT

Candace Louise Curtis

APPELLANTS' ATTORNEY ON APPEAL

Candice Leonard Schwager

Texas Bar No. 24005603

The Schwager Law Firm

16807 Pinemoor Way

Houston, Texas 77058

832.857.7173

candiceschwager@outlook.com

APPELLEES

Carl Henry Brunsting

Bobbie G. Bayless

Bayless & Stokes

Brunsting

2931 Ferndale

Houston, Texas 77098

O: 713-522-2224

F: 713-522-2218

bayless@baylessstokes.com

Attorney for Drina Brunsting,

Alleged Attorney in Fact for Plaintiff Carl
in his individual capacity

ATTORNEY FOR CARL BRUNSTING IN THE TRIAL COURT

Anita Brunsting

Stephen A. Mendel

Brunsting

Texas State Bar No. 13930650 in the Trial Court

1155 Dairy Ashford, Suite 300

Houston, Texas 77079

O: 281-759-3213

Attorney for Co-Trustee Defendant, Anita

F: 281-759-3214
E: steve@mendellawfirm.com

Amy Brunsting

NEAL E. SPIELMAN Attorney for Co-Trustee Defendant, Amy
Brunsting
Texas State Bar No. 00794678 in the Trial Court
nspielman@grifmatlaw.com
1155 Dairy Ashford, Suite 300
Houston, Texas 77079
281.870.1124 - Phone
281.870.1647 - Facsimile

Carole Ann Brunsting

John Bruster Loyd Attorney for Carole Ann Brunsting
Jones, Gillaspia & Loyd, L.L.P. in the Trial Court
4400 Post Oak Pkwy, Suite 2360
Houston, TX 77027
O: 713-225-9000
F: 713-225-6126
E: bruse@jgl-law.com

TRIAL JUDGE

The Honorable James Horwitz
Presiding Judge, Harris County Probate Court No. 4

Table of Contents

IDENTITY OF PARTIES AND COUNSEL	ii
APPELLANTS' ATTORNEY ON APPEAL	ii
APPELLEES	ii
TRIAL JUDGE	iii
Table of Contents	iv
Table of Authorities	v
To the Honorable Justices,	1
Latches and Limitations	1
A. Void and Voidable Judgments	1
This Court Does have Appellate Jurisdiction	3
The Supplemental Record	5
Controlling Facts	6
The Complete Absence of Subject Matter jurisdiction	7
In Summary	8
Conclusion	10
Full Faith and Credit	11
CERTIFICATE OF SERVICE	12
CERTIFICATE OF COMPLIANCE	13

Table of Authorities

Cases

Bayoud v. Bayoud 797 S.W.2d 304 (Tex. App. 1990).....	3
Boyd v. Gillman Film Corp. 447 S.W.2d 759 (Tex. Civ. App. 1969).....	11
<i>Browning v. Placke</i> , 698 S.W.2d 362, 363 (Tex. 1985)	2, 3
<i>Cook v. Cameron</i> , 733 S.W.2d 137, 140 (Tex. 1987).....	3
Dews v. Floyd 413 S.W.2d 800 (Tex. Civ. App. 1967).....	10
<i>Freedom Commc'ns, Inc. v. Coronado</i> , 372 S.W.3d 621, 623 (Tex. 2012).....	10
<i>Fulton v. Finch</i> , 162 Tex. 351, 346 S.W.2d 823, 827 (1961)	4
Gutman v. De Giulio, No. 05-20-00735-CV, at *8 (Tex. App. Feb. 25, 2022).....	3
Hagen v. Hagen 282 S.W.3d 899, 902 (Tex.2009).....	2, 5
In re Baylor Medical Center, 280 S.W.3d 227 (Tex. 2008).....	4
Kohls v. Kohls 461 S.W.2d 455 (Tex. Civ. App. 1970).....	5, 10
Mapco, Inc. v. Forrest, 795 S.W.2d 700, 703 (Tex. 1990)	3
Mitchell v. MAP Res., 649 S.W.3d 180, 196 n.15 (Tex. 2022)	5
Newsom v. State 236 S.W. 228 (Tex. Civ. App. 1922).....	10
PNS Stores, Inc. v. Rivera ex rel. Rivera, 379 S.W.3d 267, 272 n.8 (Tex. 2012).....	2, 4, 5
Ramsey v. Morris, 578 S.W.2d 809 (Tex. Civ. App. 1979)	4
Ramsey v. Ramsey, 19 S.W.3d 548, 552 (Tex.App.—Austin 2000, no pet.)	2
Rone v. Marti, 244 S.W. 639, 640 (Tex. Civ. App. 1922).....	5
Sanchez v. Hester, 911 S.W.2d 173, 176 (Tex. App.-Corpus Christi 1995, orig. proceeding)	3
State ex Rel. Latty v. Owens, 907 S.W.2d 484, 486 (Tex. 1995).....	4, 10
Texas Ass'n of Business v. Texas Air Control Bd., 852 S.W.2d 440, 443 (Tex. 1993)	9
Univ. of Tex. Sw. Med. Ctr. of Dallas v. Margulis, <u>11 S.W.3d 186, 187</u> (Tex.2000).....	10
<i>Wolf v. Holy Cross Church</i> , 49 S.W.3d 1, 4-5 (Tex. App. 1999).....	9
Wren v. Texas Employment Comm'n, 915 S.W.2d 506, 509	9

Statutes

Tex. Est. Code § 402.001	7
--------------------------------	---

Other Authorities

34 Tex.Jur.2d, § 260, p. 170, and cases cited	11
34 Tex.Jur.2d, Sec. 467, page 514	5, 10
Restatement (Second) of Judgments § 65 cmt. b.	5

To the Honorable Justices,

Appellant has received the Court's Notice of Intent to Dismiss for want of appellate court jurisdiction providing Appellant fourteen days in which to provide the court with a brief demonstrating that the appeals court does have jurisdiction in this matter. While the appellate court has no jurisdiction to reach to the merits it does have jurisdiction to determine whether the order or judgment underlying the appeal is void and to make appropriate orders based on that determination, as hereinafter more fully appears. Appellant is grateful for the opportunity to supplement the record with the basic documents necessary for the courts consideration on this narrow and pivotal issue and apologize for the inadvertent oversight.

Latches and Limitations

As this Court noted, this appeal was filed after expiration of the limitations period prescribed by the Texas Rules of Appellate Procedure. While this would give the a priori appearance of a want of appellate court jurisdiction, the question actually turns on the nature of the judgement challenged and whether the judgement is void or merely voidable.

A. Void and Voidable Judgments

Because there is some inconsistency in our state's jurisprudence concerning important distinctions between void and voidable judgments and direct and collateral attacks, we begin our analysis with a discussion of clarifying principles. It is well settled that a litigant may attack a void judgment directly or collaterally, but a voidable judgment may only be attacked directly. Hagen v. Hagen, 282 S.W.3d 899, 902 (Tex.2009) (holding that a divorce decree must be "void, not voidable, for a collateral attack to be permitted"); Ramsey v. Ramsey, 19 S.W.3d 548, 552 (Tex.App.—Austin 2000, no pet.). A direct attack—such as an appeal, a motion for new trial, or a bill of review—attempts to correct, amend, modify or vacate a judgment and must be brought within a definite time period after the judgment's rendition. A void judgment, on the other hand, can be collaterally attacked at any time. In re E.R., — S.W.3d —, — (Tex.2012). A collateral attack seeks to avoid the binding effect of a judgment in order to obtain specific relief that the judgment currently impedes. Browning v. Prostok, [165 S.W.3d 336, 346](#) (Tex.2005). After the time to bring a direct attack has expired, a litigant may only attack a judgment collaterally.

The distinction between void and voidable judgments is critical when the time for a direct attack has expired. Before then, the distinction is less significant because—whether the judgment is void or voidable—the result is the same: the judgment is vacated. PNS Stores, Inc. v. Rivera ex rel. Rivera, 379 S.W.3d 267 (Tex. 2012)

A judgment is void only when it is apparent that the court rendering judgment "had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court." *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985). Errors other than lack of jurisdiction render the judgment merely voidable and must be attacked within prescribed time

limits. *Cook v. Cameron*, 733 S.W.2d 137, 140 (Tex. 1987), *Bayoud v. Bayoud* 797 S.W.2d 304 (Tex. App. 1990)

Voidable orders are readily appealable and must be attacked directly, but void orders may be circumvented by collateral attack or remedied by mandamus. *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990) (original proceeding); *Sanchez v. Hester*, 911 S.W.2d 173, 176 (Tex. App.-Corpus Christi 1995, orig. proceeding). A judgment is void if it is apparent that the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to render the judgment, or no capacity to act as a court. *Mapco*, 795 S.W.2d at 703. All errors other than jurisdictional deficiencies render the judgment merely voidable, and such errors must be corrected on direct attack. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985). *Gutman v. De Giulio*, No. 05-20-00735-CV, at *8 (Tex. App. Feb. 25, 2022)¹

This Court Does have Appellate Jurisdiction

“While it is wholly unnecessary to appeal from a void judgment, it is

¹ In re Ocegueda 304 S.W.3d 576 (Tex. App. 2010) This same conclusion was reached by the court citing to *Browning v. Placke* and *Cook v. Cameron*

nevertheless settled that an appeal may be taken and the appellate court in such a proceeding may declare the judgment void. Fulton v. Finch, 162 Tex. 351, 346 S.W.2d 823, 827 (1961).² ” Ramsey v. Morris, 578 S.W.2d 809 (Tex. Civ. App. 1979) State ex Rel. Latty v. Owens, 907 S.W.2d 484, 486 (Tex. 1995)

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

A direct attack—such as an appeal, a motion for new trial, or a bill of review—attempts to correct, amend, modify or vacate a judgment and must be brought within a definite time period after the judgment's rendition. A void judgment, on the other hand, can be collaterally attacked at any time. PNS Stores, Inc. v. Rivera ex rel. Rivera, 379 S.W.3d 267, 272 n.8 (Tex. 2012)

This appeal challenges the subject matter jurisdiction of a statutory probate court to act in this particular case because the claims filed by the Independent Executor after the independent administration had closed, failed to invoke the jurisdiction of the statutory probate court. All judgments and orders therein were

² *Fulton v. Finch* was superseded by statute by *In re Baylor Medical Center*, 280 S.W.3d 227 (Tex. 2008) on other ground.

entered in the complete absence of subject matter jurisdiction and are therefore, void ab initio.

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

“The law is well settled that a void judgment is a nullity that may be attacked at any time.” (citation omitted)); Restatement (Second) of Judgments § 65 cmt. b.” Mitchell v. MAP Res., 649 S.W.3d 180, 196 n.15 (Tex. 2022). “A formal judgment rendered by a court without jurisdiction of the subject-matter is void, and may be attacked at any time in any manner.” ” Rone v. Marti, 244 S.W. 639, 640 (Tex. Civ. App. 1922).

The Supplemental Record

Because Carl’s 412249-401 action was filed as ancillary to the Estate of

Nelva Brunsting No. 412249, it is necessary to examine the record in the base case. The appeals court was requested to take judicial notice of certified copies of the relevant records from the base cases, previously filed with the Appeals Court in the record relating to Petition for Writ of Mandamus No. 01-22-00514-cv on July 11, 2022, Appellant has asked the probate clerk to supplement the appellate record with those self-same records and will also be attaching certified copies with this brief for the Court's convenience.

Controlling Facts

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

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

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

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

statutory probate court April 9, 2013 [ROA5]⁶. The law on independent administration is clear.

Tex. Est. Code § 402.001

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

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

The Complete Absence of Subject Matter jurisdiction

The Action filed by Carl Henry Brunsting, Individually and as Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting on April 9,

⁶ Tab 25 Accepted 01-22-00514-CV First Court of Appeals Houston, Texas 7/12/2022

2013 [ROA 5] was filed five days after the inventory had been approved. The Action was brought under the Texas Civil Practices and Remedies Code as ancillary to a closed probate administration [ROA]⁷. Not only does the initial pleading fail to cite to any provision in Title II of the Estates Code that specifically and explicitly authorized the independent executor to take such action; it fails to even mention the estates code.

In Summary

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

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

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

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

Standing is implicit in the concept of subject matter jurisdiction, which is essential to the authority of the trial court to decide a case. Texas Ass'n of Business v. Texas Air Control Bd., 852 S.W.2d 440, 443 (Tex. 1993). The claims filed by the Independent Executor after the independent administration had closed failed to invoke the jurisdiction of the statutory probate court as a matter of law.

The only jurisdiction Harris County Statutory Probate Court No. 4 ever acquired over the 412249-401 matter at the time the independent executor filed his nonprobate tort action, was to dismiss for want of subject matter jurisdiction. A court always has jurisdiction to dismiss for want of jurisdiction.

Where the trial court lacks jurisdiction, it has only the power to dismiss the suit Wren v. Texas Employment Comm'n, 915 S.W.2d 506, 509. (Tex.App.-Houston [14th Dist.] 1995, no writ). Wolf v. Holy Cross Church, 49 S.W.3d 1, 4-5 (Tex. App. 1999)

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

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

Conclusion

Appellate courts do not have jurisdiction to address the merits of appeals from void orders or judgments; rather, they have jurisdiction only to determine that the order or judgment underlying the appeal is void and make appropriate orders based on that determination. See State ex rel. Latty v. Owens,907 S.W.2d 484, 486 (Tex.1995); see also Univ. of Tex. Sw. Med. Ctr. of Dallas v. Margulis,11 S.W.3d 186, 187 (Tex.2000) (per curiam) Freedom Commc'ns, Inc. v. Coronado,

372 S.W.3d 621, 623 (Tex. 2012).

'Although a void judgment may be attacked directly, as well as collaterally, there is no necessity for doing so; it need not be vacated or set aside; it may be simply ignored. And when some right is asserted under the judgment, its invalidity may be pointed out by anyone in any kind of proceeding, in any court, and at any time.' 34 Tex.Jur.2d, § 260, p. 170, and cases cited. *Boyd v. Gillman Film Corp.* 447 S.W.2d 759 (Tex. Civ. App. 1969).

Appellant in this proceeding claims the right to have the complete absence of subject matter jurisdiction in the 412,249-401 action declared in this court, in this proceeding, at this time, and neither doctrines of laches nor statutes of limitations apply to judgments void for want of subject matter jurisdiction. There is no bar to this court granting the very narrow relief herein stated.

Full Faith and Credit

Appellant originally filed her claims in the Southern District of Texas [ROA 219-247] and the matter was dismissed under the probate exception, then reversed and remanded by the Fifth Circuit Court of Appeal, *Curtis v. Brunsting* 704 F.3d 406, [ROA 248-255] the probate exception has already been held inapplicable to

Appellants claims. None-the-less, as can be seen by the Appellees Answer and insistence that there is probate court jurisdiction over this controversy, any effort to obtain remedy in the Southern District of Texas has been met with a reluctance based upon comity and appellees insistence that jurisdiction lies with the probate court.

The relief requested here could be granted by the SDTX as the probate court⁸ left the injunction⁹ in place, but the federal court has due respect for comity and the full faith and credit clause of our federal constitution and would be more comfortable granting relief to Appellant with this court's declaration on the complete absence of probate court jurisdiction over this trust controversy.

Respectfully submitted

CERTIFICATE OF SERVICE

⁸ ROA No. 01-23-00362-CV Reporters Record Vol 3 of 3, P.16

⁹ [ROA 258-263

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

CERTIFICATE OF COMPLIANCE

I, Candice Schwager, hereby certify that this document was generated by a computer using Microsoft Word which indicates that the countable content of this document is 2502 words, including footnotes; that the aggregate of all brief filed by Appellant do not exceed 27,000 words and is thus in compliance with TEX. R. APP. P. 9.4(i)(2)(B).

Respectfully submitted,