

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

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

Contents

IDENTITY OF PARTIES AND COUNSEL.....	ii
STATEMENT ON ORAL ARGUMENT.....	vi
TABLE OF AUTHORITIES	vii
Appellant’s Reply to Appellees’ Answer.....	1
I. Subject Matter Jurisdiction is a Question of Law	2
II. This Appeal is Timely	3
III. Appellees Misrepresent Law, Fact and Misstate Appellants Arguments	3
IV. Appellant Was Never a Bonafide Plaintiff in the Probate Court	4
a. CURTIS’ federal claims were not filed in, transferred to or remanded to Harris County Probate Court as a matter of law.	4
b. Federal district courts lack the power to remand a case to a court from which it had not been removed.....	4
c. Federal district courts lack the power to remand or transfer an action originally filed in federal court to state court.	5
d. State courts lack the power to transfer an action originally filed in federal court to state court.	5

e. State probate courts authority to transfer an action to itself requires a pending probate.	5
V. Texas Estates Code Section 34.001	6
VI. There is no Pending Probate Case, Matter, or Proceeding.....	7
VII. Closing Independent Administration	8
VIII. Loss of Subject Matter Jurisdiction	8
IX. Failure to State a Claim.....	9
X. Summary Judgment Void for Failure to Render	10
XI. Conflict in Authorities Tex. Gov't Code §25.1034(a) REPEALED 11	
XII. Tex. Gov't Code §25.0021 is Controlling.....	12
XIII. Absence of a Case or Controversy	14
Conclusion	16
CERTIFICATE OF SERVICE	19
CERTIFICATE OF COMPLIANCE	19

STATEMENT ON ORAL ARGUMENT

Our court system has been described as "one of the most complex in the United States, if not the world." BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS, at 367; see also Continental Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444, 449 (Tex. 1996) (voicing "concern[] over the difficulties created for the bench, the bar, and the public by the patchwork organization of Texas' several trial courts"); Sultan, 178 S.W.3d at 753 (Hecht, J., dissenting) (noting that Texas courts' "jurisdictional scheme . . . has gone from elaborate . . . to Byzantine"); Camacho v. Samaniego, 831 S.W.2d 804, 807 n. 4, 811 (Tex. 1992) (stating that "confusion and inefficiency are endemic to a judicial structure with different courts of distinct but overlapping jurisdiction" and observing that "there are still more than fifty different jurisdictional schemes for the statutory county courts"); TEXAS JUDICIAL COUNCIL, ASSESSING JUDICIAL WORKLOAD IN TEXAS' DISTRICT COURTS 2 (2001), available at http://www.courts.state.tx.us/tjc/TJC_Reports/Final_Report.pdf. In re United Services Auto. Ass'n, 307 S.W.3d 299, 304 (Tex. 2010)

The People of Texas are entitled to clarity in the law. The Settlers of the inter vivos trust at issue here fully intended their estate plan, containing pour-over wills and directing independent administration, would enable their heirs to avoid the probate arena but has somehow failed to do so. There are innumerable peculiarities in this case and Appellant is of the opinion that the decisional process would be significantly aided by oral argument which is hereby respectfully requested.

TABLE OF AUTHORITIES

Cases

Browning v. Placke, 698 S.W.2d 362.....	3
Curtis v Brunsting 704 F.3d 406 (5th Cir. 2013).....	8
Dallas County Appraisal Dist. v. Funds Recovery, Inc.,887 S.W.2d 465	2
Easterline v. Bean, 49 S.W.2d 427	3
First National Bank of Pulaski v. Curry, 301 F.3d 456	4
Flores v. Peschel, 927 S.W.2d 209	5
Fredonia St. Bank v. General American Life Ins. Co., 881 S.W.2d 279.....	4
Gaddy v. State, 433 S.W.3d 128.....	3
Galligan v. Westfield Centre Service, Inc., 82 N.J. 188, 198 (N.J. 1980).....	5
Garcia v. Dial, 596 S.W.2d 524.....	3
Garza v. Rodriguez, 18 S.W.3d 694, 698 (Tex.App.-San Antonio 2000, no pet.).....	9
In re Forlenza 140 S.W.3d 373	10
In re Sensitive Care, Inc., 28 S.W.3d 35.....	3
<i>Masa Custom Homes, LLC v. Shahin</i> , <u>547 S.W.3d 332, 338</u> (Tex. App.-Dallas 2018, no pet.) ...	3, 11
Mooney v. Harlin, 622 S.W.2d 83	8
Mortensen v. Villegas 630 S.W.3d 355	12
Murphy v. Hunt, 455 U.S. 478, 481 (1982).....	14
Nix v. State, 65 S.W.3d 664, 667-68 (Tex. Crim. App. 2001).....	3
O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974)	14
Peacock v. Wave Tec Pools, Inc., 107 S.W.3d 631	3
Puente v. State, 71 S.W.3d 340.....	3
Shell Cortez Pipeline v. Shores, 127 S.W.3d 286, 291-92 (Tex. App. 2004).....	2
Stephenson v. Walker, 593 S.W.2d 846	7
Texas Comm. Bk. v. Correa 28 S.W.3d 723 and authorities cited therein.....	8
United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950).....	14
W.C. Bank, Inc. v. Team, Inc., 783 S.W.2d 783, 785 (Tex. App.—Houston [1st Dist.] 1990, no writ)	11
Ward v. Malone, 115 S.W.3d 267	2

Williams v. Lara, 52 S.W.3d 171, 184 (Tex. 2001)..... 14, 15

Statutes

Tex. Est. Code § 1022.002(d)..... 8
Tex. Est. Code § 22.005..... 7
Tex. Est. Code § 22.012..... 7
Tex. Est. Code § 22.029..... 7
Tex. Est. Code § 32.001..... 7, 8
Tex. Est. Code §402.001..... 7
Tex. Gov’t Code § 25.0021..... 2, 12, 13, 14
Tex. Gov’t Code § 25.1034(a)..... 12, 13, 14
Tex. Gov’t Code §25.1034(a)..... 11

Other Authorities

BLACK’S LAW DICTIONARY 1134 (6th ed. 1990) 6

Rules

Rule 13 Federal Rules of Civil Procedure 9
Tex. R. Civ. P. Rule 97(a)..... 9
Texas Rule of Civil Procedure 174(a) 5

Appellant's Reply to Appellees' Answer

Appellant's arguments are:

1. Carl Henry Brunsting lacked standing to file tort claims in the probate court either individually or as Independent Executor.
2. The statutory probate court has no subject matter jurisdiction over Carl's ancillary 412,249-401 claims because there was no pending probate and nothing to be ancillary to.
3. Carl missed the statute of limitations for bringing claims on behalf of the estate of Elmer H. Brunsting No. 412248, depriving the court of jurisdiction over the Elmer H. Brunsting share of the trust.
4. Appellant was never a "plaintiff" in the 412,249-401 action. Appellant's trust claims were filed in the federal court and never filed in the statutory probate court, nor remanded or transferred to the statutory probate court.
5. The agreed order to consolidate estate of Nelva Brunsting with estate of Nelva Brunsting [ROA 288-293] did not make Appellant a co-plaintiff with Carl Brunsting.

6. The summary judgment order challenged is void for failure to render and other systemic defects noted *infra*.
7. There is a conflict in the case law regarding the boundaries of statutory probate court jurisdiction over inter vivos trusts. Statutory probate court jurisdiction over inter vivos trusts is ancillary to and not independent from its statutory probate jurisdiction as *Lee v. Ronald E. Lee Jr., Katherine Lee Stacy, & Legacy Trust Co.*, 528 S.W.3d 201, 212 (Tex. App. 2017) held. The boundaries of statutory probate court jurisdiction is defined in the controlling statute. [Tex. Gov't Code § 25.0021]
8. Appellate Jurisdiction *over the merits of an appeal extends no further than that of the court from which the appeal is taken.* *Ward v. Malone*, 115 S.W.3d 267, 268 (Tex.App.-Corpus Christi 2003, pet. denied); *Dallas County Appraisal Dist. v. Funds Recovery, Inc.*, 887 S.W.2d 465, 468 (Tex.App.-Dallas 1994, writ denied). *Shell Cortez Pipeline v. Shores*, 127 S.W.3d 286, 291-92 (Tex. App. 2004)

I. Subject Matter Jurisdiction is a Question of Law

Parties cannot create subject matter jurisdiction by waiver, agreement, consent or participation or otherwise, where it is not strictly authorized by operation of law.

“It is well established law that jurisdiction cannot be created by waiver or by

agreement” *Puente v. State*, 71 S.W.3d 340, 343 (Tex.Crim.App.2002); *Garcia v. Dial*, 596 S.W.2d 524, 527 (Tex.Crim.App.1980) (orig. proceeding). *Gaddy v. State*, 433 S.W.3d 128, 142 (Tex. App. 2014).

Moreover, a trial court's subject matter jurisdiction is never presumed and cannot be waived. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993).

II. This Appeal is Timely

A void judgment is a 'nullity' that can be attacked at any time." *see Masa Custom Homes, LLC v. Shahin*, 547 S.W.3d 332, 338 (Tex. App.-Dallas 2018, no pet.). A void judgment may be attacked either directly or collaterally. *PNS Stores*, 379 S.W.3d at 271. A void judgment is an absolute nullity and has no legal force or effect, while a voidable judgment is capable of being voided or confirmed. See *In re Sensitive Care, Inc.*, 28 S.W.3d 35, 39 (Tex.App.-Ft. Worth 2000, no pet.); *Easterline v. Bean*, 49 S.W.2d 427, 429 (Tex. 1932). A judgment is void when the court had no jurisdiction to issue it. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985). Other defects merely render the judgment voidable. *Peacock v. Wave Tec Pools, Inc.*, 107 S.W.3d 631, 636 (Tex. App. 2003)

III. Appellees Misrepresent Law, Fact and Misstate Appellate Arguments

While Appellees argue contrary facts to those established by Appellant, Appellees cannot prevent the court of appeals from relying on an Appellant's statement of facts without offering evidence to support their contrary factual assertions. See *Fredonia St. Bank v. General American Life Ins. Co.*, 881 S.W.2d 279, 283-84 (Tex. 1994). Appellees do not offer evidence to support their contrary factual assertions.

IV. Appellant Was Never a Plaintiff in the Probate Court

- a. CURTIS' federal claims were not filed in, transferred to or remanded to Harris County Probate Court as a matter of law.

There is nothing in the appellate record to support a contrary view. The law involves both substance and procedure and while some substantive and procedural defects can be cured, others will be fatal. The only path from state court to a federal court is removal. Removal can only be obtained where specifically authorized and not barred by an abstention doctrine. The only path from federal to state court is remand but remand is only authorized when a case has first been removed and it can only be returned to the court it was removed from.

- b. Federal district courts lack the power to remand a case to a court from which it had not been removed.

“A case may be remanded only to the court from which it was removed and the federal district court does not have the authority to remand a case originally brought in federal court.” See First National Bank of Pulaski v. Curry, 301 F.3d 456, 467 (6th Cir. 2002).

- c. Federal district courts lack the power to remand or transfer an action originally filed in federal court to state court.

In the present case, the United States District Court never had jurisdiction of the action, and even if that court had jurisdiction, it did not have the power to transfer the action to the state courts. No statute authorizes a federal court to transfer such an action to state courts. See White v. CommercialStd. Fire Marine Co., 450 F.2d 785, 786 (5th Cir. 1971). A federal court may not transfer an action commenced in that court to a state court. A federal court may remand an action to a state court only if the action was commenced in the state court and then removed to a federal court. See 28 U.S.C. §§ 1447 etseq. See, e.g., Edward Hansen, Inc. v. Kearny Post OfficeAssocs., 166 N.J. Super. 161 (Ch.Div. 1979). Galligan v. Westfield Centre Service, Inc., 82 N.J. 188, 198 (N.J. 1980)

- d. State courts lack the power to transfer an action originally filed in federal court to state court.

Texas Rule of Civil Procedure 174(a) allows any court in the state to transfer a case from another court to itself for purposes of consolidating that case with another case pending in the first court. However, “Rule 174(a) by its own language allows consolidation only of actions or cases that are then “pending before the court.” Neither the rule itself, nor any cases interpreting it, suggests that it may be used to extend the court's authority to transfer and consolidate cases pending before other courts.” Flores v. Peschel, 927 S.W.2d 209, 212-13 (Tex. App. 1996)

- e. State probate courts authority to transfer an action to itself requires a pending probate.

Texas Estates Code § 34.001 only allows a probate court to transfer an action to itself when the action to be transferred is incident to a pending probate. The

Brunsting estate closed April 4, 2013 and the purported transfer of the federal case occurred in 2014 [ROA 297-303].

V. Texas Estates Code Section 34.001

“Sec. 34.001. TRANSFER TO STATUTORY PROBATE COURT OF PROCEEDING RELATED TO PROBATE PROCEEDING. (a) A judge of a statutory probate court, on the motion of a party to the action or on the motion of a person interested in an estate, may transfer to the judge's court from a district, county, or statutory court a cause of action related to a probate proceeding pending in the statutory probate court or a cause of action in which a personal representative of an estate pending in the statutory probate court is a party and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to that estate.”

It should be noted that the word "pending" is not defined in the probate code.

See Tex. Prob. Code Ann. § 3 (Vernon 2003). Black's Law Dictionary defines

"pending" as:

Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Awaiting an occurrence or conclusion of action, period of continuance or indeterminacy. Thus, an action or suit is 'pending' from its inception until the rendition of a final judgment. BLACK'S LAW DICTIONARY 1134 (6th ed. 1990); see Alba, 89 S.W.3d at 134 (utilizing Black's Law Dictionary's definition of "suspension" in construing statute). In re John G. Kenedy Memorial Found, 159 S.W.3d 133, 143-44 (Tex. App. 2004).

VI. There is no Pending Probate Case, Matter, or Proceeding

Independent Executor Carl Brunsting filed his tort claims in the probate court four days after the verified inventory had been approved, the probate closed and no further action of any nature could be had in that court while the estate was still represented by an independent executor. Tex. Est. Code §402.001.

There is no evidence of an ongoing probate case, probate matter or probate proceeding, as those terms are defined by Estates Code Section 22.029 and there is no evidence before this court of any personal property of a decedent subject to in rem proceedings. “Probate proceedings” are in rem (Tex. Est. Code § 32.001) involving “claims” against a decedent’s property (Tex. Est. Code § 22.012). “Claims” are defined (Tex. Est. Code § 22.005) to include:

“(1) liabilities of a decedent that survive the decedent's 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 inheritance taxes; and (6) debts due such estates.”

Furthermore, “in rem” is a term applied to proceedings or actions instituted against the thing, that is, an action taken directly against property or brought to enforce a right in the thing itself. *Stephenson v. Walker*, 593 S.W.2d 846, 849 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ)

In an action in rem the thing proceeded against is itself seized and impleaded as the defendant. No person is a defendant in such a suit. (Tex. Est. Code § 32.001(d)) and (Tex. Est. Code § 1022.002(d)); see also *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981). Breach of fiduciary in the administration of an inter vivos trust is an action in tort, *Curtis v Brunsting* 704 F.3d 406 (5th Cir. 2013).

VII. Closing Independent Administration

An independent administration does not require formal closing procedures as it is axiomatic that an independent estate administration closes upon court approval of the verified inventory [ROA 99 para 99]. See *Texas Comm. Bk. v. Correa* 28 S.W.3d 723, 727-28 (Tex. App. 2000) (emphasis mine)

VIII. Loss of Subject Matter Jurisdiction

“Although courts generally do not lose subject matter jurisdiction once it attaches, a probate court is a specialized court that can lose jurisdiction over matters incident to an estate if it loses jurisdiction over the probate matters.” Id. (citing *In re Estate of Hanau*, 806 S.W.2d 900, 904 (Tex.App.-Corpus Christi 1991, writ denied)). ***In other words, once an estate closes, incident claims are pendent or ancillary to nothing, and the probate court loses jurisdiction.*** Id.; see also *Schuld v. Dembrinski*, 12 S.W.3d 485, 487 (Tex.App.-Dallas 2000, no pet.) (*“the pendency of a probate proceeding is a requisite for a court's exercise of jurisdiction over*

matters related to it"); Garza v. Rodriguez, 18 S.W.3d 694, 698 (Tex.App.-San Antonio 2000, no pet.) ("before a matter can be regarded as incident to an estate . . . a probate proceeding must actually be pending").

IX. Failure to State a Claim

Whether reviewing Plaintiff/Appellee Carl Brunsting's original petition [ROA 5-24] or the Original Counter Claims filed by Co-trustee Defendant Appellees Anita Brunsting and Amy Brunsting, [ROA 304-311] the pleadings fail to state a claim within the jurisdiction of the statutory probate court.

Relevant to summary judgment, the Co-Trustee Defendant/Appellees Original Counterclaims, filed November 4, 2019 [ROA 304-311], were untimely, and compulsory counter claims waived under Rule 13 Federal Rules of Civil Procedure and Tex. R. Civ. P. Rule 97(a).

The Co-Trustee Defendant/Appellees' Original Counterclaims also fail to contain any jurisdictional statements affirmatively declaring that the probate court, in which the action was brought, had the jurisdiction to hear and decide the claims and, impliedly relies upon Plaintiff Carl Brunsting's jurisdictional statements, which appellant covered in her opening brief beginning on page 27.

"The general rule is that the allegations of the plaintiff's petition must state facts which affirmatively show the jurisdiction of the court in

which the action is brought. Brown v. Peters, 127 Tex. 300, 94 S.W.2d 129 (1936); Smith v. Horton, 92 Tex. 21, 46 S.W. 627 (1898); Texas N.O.R.R. Co. v. Farrington (Tex.Com.App., 1905), 40 Tex. Civ. App. 205, 88 S.W. 889. Richardson v. First Nat. Life Ins. Co., 419 S.W.2d 836, 839 (Tex. 1967)”

“(“The pleader is required to allege facts that affirmatively demonstrate the court's jurisdiction to hear a case. See Tex. Ass'n of Bus., 852 S.W.2d at 446.” It was not Fidelity's burden to plead specific facts that would disprove subject matter jurisdiction. James, as the plaintiff, had the initial burden of alleging facts and framing legal arguments that would affirmatively demonstrate the trial court's jurisdiction to hear her claims. Miranda, 133 S.W.3d at 225–26 (citing Texas Ass'n of Bus., 852 S.W.2d at 446). Unsupported legal conclusions do not suffice. See Creedmoor–Maha Water Supply Corp. v. Tex. Comm'n on Env't'l Quality, 307 S.W.3d 505, 515–16 & nn. 7 & 8 (Tex.App.-Austin 2010, no pet.). James v. Underwood, 438 S.W.3d 704, 716 (Tex. App. 2014))”

“As a general matter, the pleader must allege facts that affirmatively demonstrate the court's jurisdiction to hear the case.” See *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1998). *In re Forlenza* 140 S.W.3d 373. The Co-Trustee Defendant/Appellees Original Counterclaims’ fail to identify any claims they are filing counter to. Rather than satisfying their burden to establish jurisdiction, Appellees ask the court to assume jurisdiction where it does not exist.

X. Summary Judgment Void for Failure to Render

As clearly stated on the pretrial conference record, [Reporters Record Vol 3 of 3 pg. 5 ln. 14-18] Visiting Judge Stone stated that she had been in contact with

Judge Horwitz and had signed the proposed summary judgment order. There was never a substantive hearing and there is no evidence in the record to the contrary.

*The rules of civil procedure do not authorize a judge to render a decision following a hearing unless she personally heard the evidence on which the order or judgment is based. See Masa Custom Homes, 547 S.W.3d at 335; W.C. Bank, Inc. v. Team, Inc., 783 S.W.2d 783, 785 (Tex. App.—Houston [1st Dist.] 1990, no writ). When a judge has no authority to render an order or judgment, that order or judgment is void. See Masa Custom Homes, 547 S.W.3d at 338. An appellate court has no jurisdiction to consider the merits of an appeal of a void order or judgment. See id. Catapult Realty Capital, L.L.C. v. Johnson (In re Catapult Realty Capital, L.L.C.), No. 05-19-01056-CV, at *9 (Tex. App. Feb. 20, 2020) and authorities cited therein.”*

XI. Conflict in Authorities Tex. Gov’t Code §25.1034(a) REPEALED

Appellees argue that there is no conflict of law and that the trust action filed by Independent Executor Carl Brunsting did not require a pending probate to establish jurisdiction in the statutory probate court.

Lee Stacy, & Legacy Trust Co., 528 S.W.3d 201, 212 (Tex. App. 2017)

“Our review of the legislative framework for a statutory probate court's jurisdiction shows that the court's trust jurisdiction is independent of its probate jurisdiction.” Lee v. Ronald E. Lee Jr., Katherine Lee Stacy, & Legacy Trust Co., 528 S.W.3d 201, 212 (Tex. App. 2017)

A case on point with Lee, In re J7S Inc., 979 S.W.2d 374, 377 n.2 (Tex. App. 1998), provides the following analysis under the former probate court:

“Likewise, section 25.1034(a) of the Government Code provides that

the statutory probate courts of Harris County have concurrent jurisdiction with the district courts in all actions by or against a personal representative, whether or not the matter is appertaining to or incident to an estate. See TEX. GOV'T CODE ANN. § 25.1034(a) (Vernon Supp. 1998)."

XII. Tex. Gov't Code §25.0021 is Controlling

A plain reading of Tex. Gov't Code § 25.0021 clearly shows that section 25.0021 prevails over any specific provisions for a particular probate court or county that attempts to create jurisdiction in a statutory probate court other than jurisdiction over probate, guardianship, mental health, or eminent domain proceedings. Former Tex. Gov't Code §25.1034(a) granted statutory probate courts in Harris County jurisdiction over trusts in direct conflict with the boundaries set by the controlling statute; Tex. Gov't Code § 25.0021, which easily explains the apparent conflict and why 1034(a) was repealed.

The Texas Supreme Court in their opening paragraph cite to Tex. Gov't Code § 25.0021 as the statute that defines statutory probate jurisdiction. In re United Services Auto. Ass'n, 307 S.W.3d 299, 302-303 (Tex. 2010) and Mortensen v. Villegas 630 S.W.3d 355, 361 (Tex. App. 2021) quoted infra.

Tex. Gov't Code § 25.0021

"Section 25.0021 - Jurisdiction

(a) If this section conflicts with a specific provision for a particular

statutory probate court or county, the specific provision controls, except that this section controls over a specific provision for a particular court or county if the specific provision attempts to create jurisdiction in a statutory probate court other than jurisdiction over probate, guardianship, mental health, or eminent domain proceedings.

(b) A statutory probate court as that term is defined in Section 22.007(c), Estates Code, has:

(1) the general jurisdiction of a probate court as provided by the Estates Code; and

(2) the jurisdiction provided by law for a county court to hear and determine actions, cases, matters, or proceedings instituted under:

(A) Section 166.046, 192.027, 193.007, 552.015, 552.019, 711.004, or 714.003, Health and Safety Code;

(B) Chapter 462, Health and Safety Code; or

(C) Subtitle C or D, Title 7, Health and Safety Code.

Tex. Gov't. Code § 25.0021

Amended by Acts 2017, Texas Acts of the 85th Leg. - Regular Session, ch. 324, Sec. 22.023, eff. 9/1/2017.

Amended by Acts 2001, 77th Leg., ch. 635, Sec. 1, eff. 9/1/2001.

Added by Acts 1987, 70th Leg., ch. 148, Sec. 4.01, eff. 9/1/1987.”

Tex. Gov't Code § 25.1034(a) was a provision applicable to a particular statutory probate court or county that sought to extend the jurisdiction of the statutory probate courts of Harris County beyond the boundaries set by the controlling statute, Tex. Gov't Code § 25.0021, which would explain why section

(a) of Tex. Gov't Code § 25.1034(a) was repealed¹. The Texas Supreme Court has confirmed that Tex. Gov't Code § 25.0021 is the statute that defines the boundaries of statutory probate court jurisdiction.

“Texas has some 3, 241 trial courts within its 268, 580 square miles. Jurisdiction is limited in many of the courts; it is general in others. Compare TEX. GOV'T CODE § 25.0021 (describing jurisdiction of statutory probate court), with § 24.007-.008 (outlining district court jurisdiction); Thomas v. Long, 207 S.W.3d 334, 340 (Tex. 2006)” In re United Services Auto. Ass'n, 307 S.W.3d 299, 302-303 (Tex. 2010)

XIII. Absence of a Case or Controversy

An essential component of subject matter jurisdiction is the constitutional requirement of an existing case or controversy among the parties. *“For a plaintiff to have standing, a controversy must exist between the parties at every stage of the legal proceedings, including the appeal”*. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). If a controversy ceases to exist — *“the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome”* — *the case becomes moot*. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982); see also *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001)

¹ Tex. Gov. Code § 25.1034 (a) Repealed by Acts 2001, 77th Leg., ch. 635, Sec. 3(2), eff. Sept. 1, 2001. Tex. Gov't Code § 25.0021 is controlling.

Appellees, the original plaintiff and his original defendants in the probate court, have made their solidarity abundantly clear by filing a unified answer. Their “Second Joint Motion for Extension of Time to File the Appellees Brief of Defendant Co-Trustee Anita K. Brunsting, Defendant Co-trustee Amy R. Brunsting, & Plaintiff Carl H. Brunsting” clearly states that Appellees’ counsel required a coordinated effort due to the “*aligned and complementary interest among the Appellees*”. Prior to this admission the Appellees filed a Rule 11 Agreement in which they make their aligned and complementary interest in not prosecuting their claims official [ROA 314-317]. A proper question here is when did the interests of state court plaintiff Carl Brunsting become aligned with those of his defendants?

A case becomes moot if a controversy ceases to exist between the parties at any stage of the legal proceedings, including the appeal. Allstate Ins. Co. v. Hallman, 159 S.W.3d 640, 642 (Tex. 2005); Bd. of Adjustment of San Antonio v. Wende, 92 S.W.3d 424, 427 (Tex. 2002); Williams v. Lara, 52 S.W.3d 171, 184 (Tex. 2001). In re Kellogg Brown & Root, Inc., 166 S.W.3d 732, 737 (Tex. 2005). Appellate courts lack jurisdiction over moot controversies. See Olley v. HCM, LLC, 449 S.W.3d 572, 575 (Tex. App.-Houston [14th Dist.] 2014, pet. denied).

After Carl Brunsting’s (Drina Brunsting’s) March 18, 2022 non-suit of Appellant Candace Curtis, [ROA 327-329] there is officially no dispute between Carl and Candace and no evidence that there ever was and yet Carl’s counsel has clearly assumed an oppositional posture in this appeal. See also [Reporters Record Vol 2 of 3 p.13 Ln.5 through p.16 Ln.11]

Conclusion

Appellant's federal lawsuit was never in the probate court. Candace Curtis' trust lawsuit claims were filed in federal court, not state court. The record reflects the absence of any pleading containing legal claims filed by or against Candace Curtis concerning the Brunsting family trusts. The record contains no such pleading because Plaintiff filed all trust claims in federal court. Appellees waived counter-claims against Curtis by not timely asserting them in the federal lawsuit when they are compulsory in nature.

The federal court granted Curtis' application for preliminary injunction, which remains unambiguously in effect until modified by the federal court. The federal injunction [ROA 258-263] remains in full force, [Reporters Record Vol 3 of 3] as the federal case was administratively closed not dismissed, remanded, or transferred to probate court as Appellees disingenuously insist. Appellees cite neither facts nor law that leads to such an absurd conclusion.

The federal Court had no discretion to transfer or remand Curtis' trust claims to probate court. The federal court's only authority was to dismiss Candace Curtis if diversity was polluted. However, even if dismissed, it does not follow that Curtis' trust lawsuit is pending in probate court. Subject matter jurisdiction must be proven. Judgment cannot be rendered on a claim not before the court, rendering the order for

summary judgment at issue void. If Curtis dismissed her federal case and re-filed in probate court, there would be evidence to prove this in the record. Appellees have wholly failed to identify any claim for relief by or against Curtis upon which summary judgment could be granted.

Appellee does not dispute that the instant case was filed as “ancillary” to a pending estate. The trust lawsuit is clearly marked ancillary by the -401 designation. Implicit in the label, ancillary, is the mandate that a probate action be pending at the time of the purported transfer from district court. The record demonstrates that probate was immediately closed upon the probate court’s approval of the estate inventory—before the purported transfer was ever attempted. The lack of a pending probate at the time of the purported transfer of related ancillary claims is fatal, mandating dismissal of this case.

The jurisdictional problems referenced herein render Appellees’ contentions impossible. With respect to the declaratory judgment claims filed by Carl Brunsting concerning the trust in probate court, Carl’s resignation as independent executor deprived the court of authority to pursue further estate related litigation by the absence of a plaintiff. There is no case or controversy in the court below as demonstrated by Appellee Plaintiff and his de jure Defendants’ unified pleadings.

Appellees have not met their burden of proving that the Harris County Statutory Probate Court has jurisdiction over any claim of Candace Curtis against other parties to this case or any counter-claim asserted against Candace Curtis. Appellees outrageously expect the court to presume that Curtis' federal claims somehow ended up in probate court, while not being able to definitively state facts and legal arguments in support of this basic premise. Without demonstrating that such claims were ever pending in the probate court, the order granting summary judgment is a nullity and void. Whether or not this Court opts to resolve the apparent conflict concerning independent trust jurisdiction, Appellees cannot demonstrate that such claims were ever pending in probate court. As such, the Order granting summary judgment on "claims" of Candace Curtis is void for lack of subject matter jurisdiction. The order must be reversed and judgment for dismissal granted in favor of Candace Curtis.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I, Candice Schwager, hereby certify that the foregoing document, along with the Clerk and Reporters records, were served on all counsel of record through the state electronic filing system and via email on the 1ST DAY of November 2023.

Candice L Schwager

Candice Schwager

CERTIFICATE OF COMPLIANCE

I, Candice Schwager, hereby certify that this document was generated by a computer using Microsoft Word which indicates that the countable content is 4183 words, including footnotes, and is thus in compliance with TEX. R. APP. P. 9.4(i)(2)(B).

Candice L Schwager

Candice Schwager

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