Chapter 1. The Administrative Process

A. Probate—What Is It, Who Needs It?

Read Texas Estates Code §§ 306.001 – 306.002(b)(c)

LOPEZ–FRANCO
v.
HERNANDEZ
351 S.W.3d 387
Court of Appeals of Texas, El Paso.
No. 08–08–00343–CV.
April 20, 2011. Rehearing Overruled July 6, 2011.

MCCLURE, JUSTICE.

This appeal involves competing claims to a life insurance policy between the insured's mother and the mother of his deceased daughter who was born out of wedlock. As counsel for Appellant suggests, "[i]t is a correct assumption that Lopez and Hernandez do not like each other. For the reasons that follow, we affirm.

FACTUAL BACKGROUND

This is an interpleader case filed by American General Life and Accident Insurance Company involving the distribution of life insurance proceeds. A $500,000 life insurance policy insured the life of Luis A. Franco-Lopez. The application named three beneficiaries: (1) Maria Concepcion Lopez, the insured's mother and Appellant in these proceedings; (2) Luis Anaya, the insured's son; and (3) Barbara A. Franco, the insured's daughter. The insurance contract specifically provided that the application is part of the policy.

The insured died on December 15, 2003, having performed all obligations under the policy. Upon American General's receipt of proof of his death, the proceeds became due and payable. Lopez demanded American General pay the entire amount to her as first beneficiary. American General paid $166,666.67 to Lopez as her uncontested one-third share of the proceeds. In September 2007, American General filed an interpleader action as to the remaining two-thirds. All three parties listed as defendants filed answers, and the court entered an agreed order granting the request for interpleader. American General deposited the remaining $350,957.25 into the registry of the court until such time as the competing claims were settled.

At the time of the insured's death, all three beneficiaries were living. Eleven months later, Barbara died at the tender age of three years. Hernandez is Barbara's mother. At the time suit was filed, no administration of Barbara's estate had been taken out.

Rule 11 Agreement

On February 2, 2008, Lopez and Maria Anaya entered into a Rule 11 agreement with regard to the insurance proceeds. They agreed that one-half of the money in the court registry be distributed to Lopez. After payment of attorneys' fees and costs, Lopez would then deposit the remainder of the money into an interest bearing account in the name of Victor Falvey, Luis's attorney ad litem. Falvey, as trustee, would then pay himself fees and release any interest earned on the account to Luis's mother on a monthly basis. Luis would directly receive 25 percent of the

principal when he turned eighteen. Falvey would retain the remaining 75 percent, distributing half to Luis when he turned twenty-two and the other half when he turned twenty-six. Lopez also agreed to pay Maria Anaya $5,000.

Competing Summary Judgment Motions

The crux of Hernandez's argument is that the insurance policy named three first beneficiaries: Lopez, Luis, and Barbara. Lopez emphasizes that Hernandez was not named as a beneficiary in the policy, in the application for life insurance, or in any other documentation. From this, Lopez concludes that Hernandez is not entitled to recover in her individual capacity. Lopez also alleges that because there was no probate of Barbara's estate, or an order from a court of competent jurisdiction naming Hernandez as representative of the estate, Hernandez is not entitled to recover in a representative capacity either. Lopez also maintains that she and the deceased agreed to obtain the life insurance policy together, and that she agreed to make—and did make—all the monthly premiums on the policy. She alleges further that the deceased intended her to be the primary beneficiary under the policy so that she could care for his children in the event of his death. The trial court granted Hernandez's motion, determining that (1) she was properly before the court as representative of her daughter's estate, and (2) there was no need for administration of the estate.

The final judgment was entered on September 24, 2008.

* * *

STANDING AND CAPACITY

Because of the overlapping themes of the issues presented, we will address Lopez's first seven issues together. Each of these hinges on the same argument: that administration of Barbara's estate was necessary and therefore, because Hernandez did not initiate probate proceedings rendering her a court appointed representative, she did not have standing or capacity to represent her daughter's estate.

It is undisputed that Hernandez was never appointed representative of Barbara's estate. In arguing their respective theories, both parties discuss *Shepherd v. Ledford*, 962 S.W.2d 28 (Tex. 1998). There, the court held that an heir may appear as representative of the decedent's estate if the heir pleads and proves that no administration of the decedent's estate is pending or necessary. *Id*. at 31. Lopez insists that *Shepherd* does not apply because that case involved a survival action rather than a claim to insurance proceeds. Further, regardless of *Shepherd*, a probate proceeding was necessary here because Barbara died leaving property (a claim to a portion of the insurance proceeds) and that "she left debts owing and she left heirs."

Hernandez counters that *Shepherd* is not limited to survival actions because: (1) the case cited by *Shepherd* involved a lease between the plaintiff's decedent and the defendants; and (2) to limit *Shepherd* in such a way creates a presumption favoring probate in direct contradiction with the Texas Probate Code.

> [n]o administration of any estate shall be granted unless there exists a necessity therefor, such necessity to be determined by the court hearing the application. Such necessity shall be deemed to exist if two or more debts exist against the estate, or if or when it is desired to have the county court partition the estate among the distributees.

TEX. PROB. CODE ANN. § 178(b) (West Supp. 2010).

Lopez provided an affidavit that she paid for Barbara's funeral expenses, thus creating a debt of Barbara's estate. But there is no evidence of a promise to repay the money, nor could Barbara have made such a promise at three years of age. While Barbara did leave her mother and a half

brother as potential heirs, the half brother referred to by Lopez in this context is not Luis, nor was the decedent his father. There is no evidence that the two potential heirs desired to have Barbara's estate partitioned or that they had any conflicting interests or claims to the proceeds. We conclude that no administration of Barbara's estate was necessary and that Hernandez had standing and capacity to bring the suit. We overrule Issues One through Seven.

JURISDICTION

In Issue Eight, Lopez contends that the trial court lacked jurisdiction over any claim by Hernandez as representative of the Estate, this time because distribution of insurance proceeds is not within the concurrent provisions of the Texas Probate Code. In support of the argument that the probate court had exclusive jurisdiction over the case, Lopez relies on Section 5(d), which, prior to its repeal in 2009, provided that:

> In those counties in which there is a statutory probate court, all applications, petitions, and motions regarding probate or administrations shall be filed and heard in the statutory probate court.

TEX. PROB. CODE ANN. § 5(d) (West 2003). Hernandez responds that probate courts only have exclusive jurisdiction over probate proceedings. She contends that an interpleader action in which one of the claimants is the estate of the decedent is not a "probate proceeding" within the meaning of the Probate Code. Rather, it is a proceeding over which district courts have concurrent jurisdiction. She directs us to Section 5(e), which was not repealed, and Section 4H(4):

> 5(e) A statutory probate court has concurrent jurisdiction with the district court in all personal injury, survival, or wrongful death actions by or against a person in the person's capacity as a personal representative, in all actions by or against a trustee, in all actions involving an inter vivos trust, testamentary trust, or charitable trust, and in all actions 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. For purposes of this section, 'charitable trust' includes a charitable trust as defined by Section 123.001, Property Code.
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> . . .
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> 4H: A statutory probate court has concurrent jurisdiction with the district court in:
>
> . . .
>
> (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.

TEX. PROB. CODE ANN. §§ 5(e); 4H(4) (West Supp.2010).

The interpleader action listed three parties as defendants: Lopez, Luis, and Hernandez as representative of Barbara's estate. There was no evidence that Lopez or Luis had any claims against Barbara's estate which would make them "interested" persons. We overrule Issue Eight.

AMBIGUITY

In Issue Nine, Lopez challenges the trial court's finding that no ambiguity existed in the application for insurance. She contends that because two sections of the application are irreconcilable, there is a genuine issue of material fact which must be submitted to a jury for resolution. In short, she claims that because she and Hernandez interpret the application differently, ambiguity is established as a matter of law. We disagree.

An insurance policy is a contract, and it is governed by the same rules of construction applicable to all contracts. *Balandran v. Safeco Ins. Co. of America*, 972 S.W.2d 738, 740-41

(Tex. 1998). The court's primary goal is to give effect to the written expression of the parties' intent. *Id*. at 741. The decedent's policy provided that, "[a]ll surviving Beneficiaries of the same class will share equally in any payment to that class, unless otherwise stated." The Application for Life Insurance (defined as part of the insurance policy), has two portions which, when combined, give rise to this dispute. First, section fourteen is entitled, "Beneficiary, with right to change." Directly to the right of the title, the words "see remarks" appear in parenthesis. In the box for section fourteen, there are two lines: "a. First" and "b. Second." Above the line to designate the name, relationship, and age of the first beneficiary, the deceased wrote, "Maria C. Lopez-Franco mother (56)." Between the lines for first and second beneficiaries he wrote, "Luis A. Franco-Anaya son," and on the line to designate second beneficiaries he wrote, "Barbara A. Franco Rivera daughter." The "Remarks" section on page four of the application contains the following language:

> *First Beneficiaries*
>
> (mother) MA. Concepcion Lopez [sic] Franco Luis Antonio Franco Anaya (son & Barbara Aleida Franco Rivera daughter)

Whether a contract is ambiguous is a question of law. *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). If the contract is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and a court should construe the contract as a matter of law. *SAS Institute, Inc. v. Breitenfeld*, 167 S.W.3d 840, 841 (Tex. 2005); *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997). We construe an unambiguous contract according to the plain meaning of its express wording. *Lyons v. Montgomery*, 701 S.W.2d 641, 643 (Tex. 1985). Unambiguous contracts are enforced as written. *Heritage Resources, Inc*., 939 S.W.2d at 121.

"A contract is ambiguous when its meaning is uncertain and doubtful or is reasonably susceptible to more than one interpretation." *Id*. However, a contract is ambiguous when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning. *Nevarez v. Ehrlich*, 296 S.W.3d 738, 742 (Tex. App.—El Paso 2009, no pet.). Not every difference in the interpretation of a contract amounts to an ambiguity. *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994). Mere disagreement over the meaning of a provision in the contract does not make the terms ambiguous. *Richardson Lifestyle Association v. Houston*, 853 S.W.2d 796, 800 (Tex. App.—Dallas 1993, writ denied). Likewise, uncertainty or lack of clarity in the language chosen by the parties is insufficient to render a contract ambiguous. *Preston Ridge Fin. Servs. Corp. v. Tyler*, 796 S.W.2d 772, 777 (Tex. App.—Dallas 1990, writ denied). Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered. *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983). When a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue. *Id*.

We determine whether a contract is ambiguous by looking at the contract as a whole in light of the circumstances present when the parties entered the contract. *Universal Health Servs., Inc. v. Renaissance Women's Group, P.A.*, 121 S.W.3d 742, 746 (Tex. 2003). If a contract is determined to be ambiguous, then a court may consider extraneous evidence to ascertain the true meaning of the instrument. *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc*., 907 S.W.2d 517, 520 (Tex. 1995).

An ambiguity may be either patent or latent. *Id*. A patent ambiguity is evident on the face of the contract. *Id*. A latent ambiguity arises when a contract that is unambiguous on its face is

applied to the subject matter with which it deals and an ambiguity appears by reason of some collateral matter. *Id*. When a contract contains an ambiguity, either patent or latent, the interpretation of the instrument becomes a fact issue. *Coker*, 650 S.W.2d at 394; *Quality Infusion Care, Inc. v. Health Care Service Corp*., 224 S.W.3d 369, 379 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The trier of fact must resolve the ambiguity by determining the true intent of the parties. *Coker*, 650 S.W.2d at 394-95.

Considering the contract as a whole in light of the circumstances when the parties entered it, we conclude that the contractual terms surrounding the designation of beneficiaries are unambiguous. *See Breitenfeld*, 167 S.W.3d at 841; *Universal Health Servs., Inc*., 121 S.W.3d at 746; *McLaughlin*, 943 S.W.2d at 430. The contract is worded in such a way that it can be given a certain or definite legal meaning or interpretation. *See Breitenfeld,* 167 S.W.3d at 841*; McLaughlin*, 943 S.W.2d at 430. Lopez, Luis, and Barbara were intended to serve equally as first beneficiaries. We overrule Issue Nine.

DISBURSEMENT OF FUNDS

In Issue Ten, Lopez contends the trial court erred in ordering distribution to be made to Hernandez and Richard M. Zamora jointly because Zamora was not a party to and had no claim against the policy proceeds. Hernandez counters that even if Lopez is correct, she has not been harmed by the error. We agree. To justify reversal, an Lopez must demonstrate that not only did error occur, it was harmful. *Bergholtz v. Southwestern Bell Yellow Pages, Inc*., 324 S.W.3d 195, 198 (Tex. App.—El Paso 2010, no pet.) (a trial court's error of law is reversible only if it causes harm); TEX.R.APP.P. 44.1. We overrule Issue Ten and affirm the judgment of the trial Court.

Read Texas Estates Code §§ 452.001 – 452.008

NELSON
v.
NEAL
787 S.W.2d 343
(Tex. 1990)

SPEARS, JUSTICE.

This appeal involves the appointment of a temporary administrator under section 131A of the Texas Probate Code. Phyllis Neal filed an application in the probate court for the appointment of a temporary administrator for the estate of Eric "Ricky" Nelson, deceased. The probate court appointed a temporary administrator for the purpose of receiving citation in a wrongful death action. The court of appeals affirmed, concluding that a temporary administration in Texas should be granted until a need no longer exists for the administration or until an executor takes out a full or an ancillary administration in Texas. 764 S.W.2d 322. We affirm the court of appeals' judgment.

On December 31, 1985, Eric Nelson, a California resident, and Bobby Neal were killed as a result of a plane crash in Bowie County, Texas. Thereafter, Phyllis Neal, the widow of Bobby Neal, filed in federal court a wrongful death claim against Nelson's estate. Nelson's estate took no action to open an administration in Texas. Almost two years after the airplane crash, Neal sought to have G.W. Lavender appointed as temporary administrator of Nelson's estate pursuant

to section 131A of the Texas Probate Code. Neal's application for the temporary administration stated that she was unaware of the existence of any will and alleged the necessity of a temporary administration based upon the wrongful death claims of Neal and her children against Nelson's estate. On December 23, 1987, Neal successfully obtained the appointment of a temporary administrator to secure an agent for service of process because the statute of limitations on her wrongful death claim would run on December 31, 1987.

NECESSITY

Section 131A(b)(2) of the Texas Probate Code requires that the verified application for appointment of a temporary administrator include "facts showing an immediate necessity for the appointment of a temporary administrator."[1] In her application, Neal alleged an immediate necessity for an administration because a policy of liability insurance which covered the airplane crash was present in Nelson's estate. This insurance policy could be depleted if other judgment creditors were allowed to reach it before Neal could actuate coverage by timely serving her claim on a qualified personal representative of Nelson's estate.

Nelson's estate relies on *Piper v. Estate of Thompson*, 546 S.W.2d 341, 345 (Tex. Civ. App.—Dallas 1976, no writ), in arguing that an administration is necessary only when there are estate assets subject to administration in Texas, and at least two debts are to be satisfied out of the assets of the estate. TEX. PROB. CODE ANN. § 178 (Vernon 1956). Nelson's estate maintains that the trial court lacked jurisdiction to appoint an administrator because there were no such assets in Nelson's estate. However, Nelson's estate conceded this argument in the trial court. Moreover, the court of appeals, relying on Davis v. Cayton, 214 S.W.2d 801 (Tex. Civ. App.—Amarillo 1948, no writ), held that a liability insurance policy which may be applicable to Neal's wrongful death claims is an asset which supports an administration in Texas. 764 S.W.2d at 327.

In pertinent part, Section 178(b) provides:

> No administration of any estate shall be granted unless there exists a necessity therefor, such necessity to be determined by the court hearing the application. Such necessity shall be deemed to exist if two or more debts exist against the estate ... but mention of [this instance] of necessity for administration shall not prevent the court from finding other instances of necessity upon proof before it.

Tex. Prob. Code Ann. § 178 (Vernon 1956). The court of appeals held section 178(b) of the Probate Code does not mandate the existence of two or more debts, but rather, provides that when two or more debts exist, a necessity for administration shall be deemed. The court of appeals

[1] Section 131A(b) provides:

> Any person may file with the clerk of the court a written application for the appointment of a temporary administrator of a decedent's estate under this section. The application must be verified and must include the information required by Section 82 of this code and an affidavit that sets out:
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> (1) the name, address, and interest of the applicant;
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> (2) the facts showing an immediate necessity for the appointment of a temporary administrator;
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> (3) the requested powers and duties of the temporary administrator;
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> (4) a statement that the applicant is entitled to letters of temporary administration and is not disqualified by law from serving as a temporary administrator; and
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> (5) a description of the real and personal property that the applicant believes to be in the decedent's estate.

TEX. PROB. CODE ANN. § 131A (Vernon Supp.1989).

characterized the wrongful death action by Neal and her children as separate debts. We agree with this characterization.

In *Piper*, the estate contended that its claim for personal injuries and property damage arising out of the same incident constituted two distinct debts and that an administration was required under TEX. PROB. CODE ANN. § 178 (Vernon 1956). The *Piper* Court reasoned that the two claims could not be maintained as separate causes of action and therefore concluded that they constituted only one debt under section 178. *Id*. at 345. The facts in Piper are distinguishable from those in the present case. Neal's wrongful death action and the one she asserts on behalf of her children could both be brought independently of each other. Judgment in one would not bar recovery in the other. Thus, the two claims made by Neal constitute two debts against the estate of Eric Nelson, thereby creating a necessity for an administration in Texas.

The court below relies on *King v. King*, 230 S.W.2d 335 (Tex. Civ. App.—Amarillo 1950, writ ref'd), where appellant appealed from an order appointing a temporary administrator of an estate over which an independent executor already had full power and authority. The court in King held that there cannot be two legal administrations of an estate pending at the same time. The facts in King are distinguishable from those in the instant case. When Neal applied for the appointment of a temporary administrator, she did not know that Nelson's will had been admitted to probate in California. Therefore, we are not faced with the situation which existed in *King*, i.e. the appointment of a temporary administrator with knowledge that an administration with full power and authority already exists. We hold, therefore, that the King case is not applicable to the instant case.

It is important, however, to note that the appellate court in the instant case incorrectly interpreted the *King* opinion. The appellate court stated that *King* permits a temporary administrator to be appointed in Texas even if an administration exists in another state. 764 S.W.2d at 326. We do not interpret the King opinion in this manner. Rather, King stands for the proposition that a temporary administrator can be appointed "only in the event that there did not then already exist another administration with full powers." *King*, 230 S.W.2d at 339. Nowhere in the *King* opinion does the court state that Texas will refuse to honor an independent administration that exists within another state.

INTESTACY

Gunnar Nelson, Eric Nelson's son, contested Lavender's appointment on the grounds that Eric Nelson did not die intestate. Nelson's estate alleged that an executor of Eric Nelson's estate had been duly qualified under a will admitted to probate in California, rendering any appointment of a temporary administrator under section 131A improper.

Section 131A(b) of the Probate Code specifically provides that the application for appointment of a temporary administrator must include the information required by section 82 of the Probate Code. Section 82(b) requires "[t]he name and intestacy of the decedent. . . ." TEX. PROB. CODE ANN. § 82 (Vernon Supp.1989) (emphasis added). Since a will was admitted to probate in California, the inquiry becomes whether Eric Nelson died testate in Texas.

In her application for the appointment of a temporary administrator, Neal states that "applicant is unaware of any will left by Decedent, as all records regarding the Decedent's estate in California have been sealed by the court." Nelson's estate urges that a mere allegation of lack of knowledge is not tantamount to the unequivocal averment that the deceased died intestate as required by sections 82 and 131A. Neal maintains that this statement is tantamount to an assertion that she has no knowledge that there is a will. She argues that the statement cannot be construed except as a statement that decedent is intestate. Neal attempted to obtain copies of the

documents related to Nelson's estate from the clerk of the probate court in Los Angeles but was informed that the documents sought were sealed. Although she was required to swear under oath pursuant to section 131A that Eric Nelson died intestate, she could not unequivocally swear that Eric Nelson died without a will.

The burden of proving intestacy under oath was difficult to meet in the instant case as the records from the California probate court were sealed. The records were sealed at the request of Eric Nelson's estate; yet Gunnar Nelson contends that Neal failed to discharge her burden under section 131A because she was unable to make an unequivocal statement under oath about the information unavailable to her. We conclude that Neal's statement fulfills the requirement in section 82(b) that an applicant state the intestacy of the decedent.

HEARING

Under section 131A(h)(1) of the Probate Code, any person interested in the decedent's estate may contest the temporary administrator's appointment by requesting a hearing within fifteen days of the appointment. Section 131A(i) provides that, if requested, a hearing shall be held and determination made not later than the tenth day after the date the request was made. However, the Probate Code does not specify the nature of the hearing on the contest. The purpose for empowering temporary administrators was to provide a mechanism by which the assets of an intestate decedent's estate could be preserved until delivered into the control of a permanent administrator. *Ex parte Lindley*, 354 S.W.2d 364, 366 (Tex. 1962). Hence, section 131A in the probate context serves the same purpose as the temporary injunction—to preserve the status quo. *Compare Ex parte Lindley*, 354 S.W.2d at 366 *with Texas Aeronautics Comm'n v. Betts*, 469 S.W.2d 394, 398 (Tex. 1971).

The appointment of a temporary administrator is voidable if shown to be improper by the contesting party. Accordingly, Nelson's estate had the burden to contest the probate court's appointment of the temporary administrator. Since Nelson's estate had no opportunity to contest the initial appointment, the burden to show necessity of the temporary administration did not shift to Nelson's estate. Rather, this burden to show necessity remained with Neal.

The probate court's granting of the temporary administration is prima facie evidence that it found a necessity for appointing a temporary administrator. Therefore, Neal met her burden to show such necessity. At the Section 131A hearing, although the attorneys made statements about evidentiary matters, neither party proffered nor sought to admit any evidence. Exhibits tendered but not admitted into evidence are not part of the record and cannot be considered on appeal. *State Banking Board v. Valley National Bank*, 604 S.W.2d 415, 418 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

Additionally, neither the contest of the application for appointment of a temporary administrator nor the response to the contest is sworn to. Therefore, the only evidence in the record is the unrebutted prima facie showing that a temporary administration was necessary. Accordingly, there is nothing in the record from which we can determine that the trial court erred in making the appointment. *Texas & N.O.R. Co. v. Hayes*, 156 Tex. 148, 293 S.W.2d 484, 487 (1956) (holding that a case can be reversed only upon error disclosed in the record).

We hold that the probate court did not err in appointing G.W. Lavender as the temporary administrator of Eric Nelson's estate in Texas or in denying Gunnar Nelson's request to set aside its order appointing Lavender as administrator.

The judgment of the court of appeals is affirmed.

PHILLIPS, C.J., dissents in an opinion in which GONZALEZ and HECHT, JJ., join.

PHILLIPS, CHIEF JUSTICE, dissenting.

I dissent. The appointment of G. William Lavender as temporary administrator of Nelson's estate was valid at the time Neal served process upon the estate, but the appointment was voidable, and the probate court should have overturned the appointment at the contested hearing because Neal failed to meet her burden of proof.

The question before this court is whether Neal complied with section 131A(b) of the Texas Probate Code. Section 131A(b) required Neal to file a verified application for appointment of a temporary administrator for the estate of Eric Nelson, including a section 82(b) application for letters of administration, stating "[t]he name and intestacy of the decedent. . . ." TEX. PROB. CODE ANN. § 82(b) (1989) (emphasis added). Neal filed an affidavit, but did not swear as to the intestacy of Eric Nelson. In fact, Neal's sworn Application for Appointment of Temporary Administrator simply states as follows: "Applicant is unaware of any will left by Decedent, as all records regarding the Decedent's Estate in California have been sealed by the Court. . . ." TR. at 51 (emphasis added).

This court recognizes that Neal failed to swear unequivocally to Eric Nelson's intestacy, yet it excuses Neal's failure to comply with the affidavit requirements of section 82(b) by merely stating that it was "difficult" for Neal to acquire the information necessary to enable her to meet statutory affidavit requirements. At 346. The unavailability of information or the difficulty of obtaining information does not necessarily excuse an affiant from the burden of accurately swearing, under oath, to information required by statute. Texas law dictates that, unless authorized by statute, an affidavit is insufficient unless the allegations therein are direct and unequivocal, and perjury can be assigned upon it. *Burke v. Satterfield*, 525 S.W.2d 950, 955 (Tex. 1975). An affidavit that swears to facts "to the best of the affiant's knowledge or belief" will not suffice. *See Nagelson v. Fair Park Nat'l Bank*, 351 S.W.2d 925, 928 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.). Neal did not unequivocally swear to Nelson's intestacy as required by section 131A, and her burden of proving intestacy under oath was not excused merely because "[t]he burden of proving intestacy under oath was difficult to meet in the instant case. . . ." At 346.

As best I can determine, this is the first instance in Texas (or, for that matter, American) jurisprudence where a verification imposed by statute or rule has been judicially excused. This court's apparent standard of "difficulty" will almost certainly result in great confusion and unsettle the salutory purposes served by the many verification requirements in our procedure.

The very fact that Nelson's estate had sealed the probate proceedings in California suggested the existence of a will in California. Neal should have taken further steps, beyond simply asking the county clerk, to verify Nelson's intestacy. Neal never inquired as to who was the administrator or executor of the estate, and she never directly asked the estate or the estate's counsel about the existence of a will. If upon direct request, Nelson's estate had refused to acknowledge the existence of a will, then the estate would have prevented Neal from complying with the affidavit requirements. The estate, however, did not actively interfere. Neal simply did not use due diligence in determining the existence of the California will and failed to unequivocally swear to Nelson's purported intestacy. There is no sound reason to excuse Neal's failure to comply with the affidavit requirements of sections 131A and 82(b) of the Texas Probate Code.

Despite the absence of proper verification, the temporary appointment was not void at the time Neal served process in the underlying litigation that led to this proceeding. The probate

court appointed G. William Lavender temporary administrator on December 23, 1987, and the contested hearing was held on January 13, 1988. According to section 131A(i) of the Texas Probate Code:

> During the pendency of a contest of the appointment of a temporary administrator, the temporary appointee shall continue to act as administrator of the estate to the extent of the powers conferred by his appointment.

(emphasis added). In addition, section 28 of the Texas Probate Code states that:

> Pending appeals from orders or judgments appointing . . . temporary administrators or guardians, the appointees shall continue to act as such and shall continue the prosecution of any suits then pending in favor of the estate.

(emphasis added). G. William Lavender's appointment as temporary administrator of Nelson's estate was valid until contested on January 11, 1988, and absent contest, the court could have made the appointment permanent. TEX. PROB. CODE § 131A(j). Irrespective of the inadequacy of Neal's application for the initial appointment, the appointment was not void, but rather, merely voidable. A judgment is void only if 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). Neal's failure to comply with the affidavit requirements did not, therefore, deprive the probate court of jurisdiction. *Cf. Peek v. Equipment Service Co. of San Antonio*, 779 S.W.2d 802, 804 (Tex. 1989).

Once the probate court appointed a temporary administrator, Nelson's estate had the burden to contest the court's decision at a hearing. TEX. PROB. CODE ANN. § 131A(i) (1989). This court correctly states that neither side proffered nor sought to admit any evidence at the contested hearing. I agree with the court of appeals that the burden of proof to show the necessity of a temporary administration did not shift to Nelson's estate at the contested hearing because the estate had no prior opportunity to contest the initial temporary appointment until after the court announced its appointment. 764 S.W.2d at 325. Therefore, once the estate filed its Contest of Application for Appointment of Temporary Administrator, Neal once again had the burden to show necessity for a temporary administration. Because Neal failed to introduce any evidence at the contested hearing, she failed to meet her burden and the probate court should have overturned the temporary appointment.

Therefore, I dissent. In so dissenting, however, I do point out that G. William Lavender was validly serving as temporary administrator on January 11, 1988, at the time he was served with process by Neal in her suit against Nelson's estate.

GONZALEZ and HECHT, JJ., join in this dissent.

DEAN
v.
GETZ
970 S.W.2d 629
(Tex. App.—Tyler 1998, no writ)

HADDEN, JUSTICE.

Appellant, Carol Dean ("Carol"), appeals an order of the County Court of Smith County, Texas, which denied her application to be appointed successor independent executrix of the estate of L.A. Dean, Deceased ("the estate"). In five points of error, Carol asserts that the trial court erred in failing to appoint her because the L.A. Dean Last Will and Testament ("the will") named her as successor executrix and no conflict of interest was found by the trial court which would disqualify her to be appointed. She further alleges that the evidence was legally and factually insufficient to support the findings of the trial court supporting its judgment. Because Carol has failed to demonstrate that the trial court abused its discretion, we will affirm.

L.A. Dean died testate on May 18, 1991, and was survived by his wife, Barbara Smith Dean ("Barbara"), and four children, Carol, Larry A. Dean ("Larry"), Barbara Connally, and Betty Burton ("Betty"). In his will dated November 22, 1974, L.A. Dean devised to Barbara his interest in their home, his personal effects, and an unspecified amount of his property equal in value to the maximum marital deduction allowable under federal estate tax laws. L.A. Dean also devised the rest and residue of his property to Barbara for life with the power of disposition, and upon her death the remainder was devised to his four children, share and share alike. Included in the will was the following provision appointing the representative of the estate:

I constitute and appoint my wife, BARBARA SMITH DEAN, Independent Executrix, without bond, of this my Last Will and Testament. In the event of the death, resignation, incapacity, failure or refusal to qualify or serve of my said wife, then I appoint my son, LARRY A. DEAN, to be Independent Executor, without bond. In the event of the death, resignation, incapacity, failure or refusal to qualify or serve of my said son, then I appoint my oldest then surviving child to serve as Independent Executrix or Independent Executor, as the case may be, without bond.

On August 6, 1991, the trial court admitted the will to probate. However, because Barbara renounced her right to be appointed as Independent Executrix, the court appointed L.A. Dean's son, Larry, as the Independent Executor without bond. Approximately five years later on January 23, 1997, Larry resigned as Independent Executor. Contemporaneously with Larry's resignation, Carol, Barbara, and Betty each filed separate applications for the appointment of a successor representative. Carol, in her application, asserted that she was entitled to be appointed independent successor executrix under the will because she was the oldest then surviving child and was not disqualified by law from serving as such. Barbara asserted in her application that a third-party dependent administrator should be appointed because litigation against the four children was necessary to clear title to the real estate and to complete the administration of the estate. Barbara suggested that the court appoint local attorney Floyd Getz ("Getz") as administrator. In Betty's application, she also contended that a dependent administrator should be appointed because all of the children were disqualified under TEX. PROB. CODE ANN. § 78(e) (Vernon 1980 & Supp.1997). She asserted that:

> . . . Each child has an adverse interest to the Estate because they are beneficiaries of a portion of the Estate, the determination of which must be made by the personal

> representative. Decedent's Will left an unknown portion of property subject to a life estate pursuant to a "pre 1976" marital deduction formula clause. This clause requires expert interpretation in order to properly administrator [sic] and distribute the Estate. Due to the nature and scope of this decision, it creates an inherent conflict of interest between the children, the Estate and the surviving spouse, BARBARA SMITH DEAN, rendering all children unsuitable to serve as a personal representative as defined by Texas Probate Code § 78(e). . . .

After a hearing on February 4, 1997, the trial court found that there was a continuing need for the administration of the estate, and that the successor executors named in the will were disqualified because they were unsuitable under TEX. PROB. CODE ANN. § 78(e). The court also granted the applications to appoint a third-party dependent administrator, and appointed Getz as the dependent administrator of the estate. At the request of Carol, the trial court filed findings of fact and conclusions of law as follows:

* * *

CONCLUSIONS OF LAW

1. Carol Dean is disqualified from serving as the personal representative of the Estate of L.A. Dean, Deceased under section 78(e) of the Texas Probate Code.

2. Court supervision is necessary to properly complete the remaining administration of this estate.

3. A third party dependent administrator should be appointed as personal representative of the Estate of L.A. Dean, Deceased.

In points of error one, two, four and five, Carol asserts that the trial court erred in appointing Getz instead of her because there was no finding of fact that Carol had a conflict of interest with the estate which would disqualify her under section 78(e) of the Texas Probate Code. It is undisputed that she was the oldest child and was next in line to be appointed successor independent executrix under the terms of the will. She contends that the provisions of the will should be observed since persons named in the will are statutorily preferred over other classes of prospective administrators or executors. *See* TEX. PROB. CODE ANN. § 77 (Vernon 1980).[1] She argues that the apparent intent of the legislature in enacting section 77 of the Probate Code was to ensure that parties with an interest in the estate would be favored, and that an independent executor named in the will would not be rendered unsuitable simply because he had a good faith claim against the estate or because he was a beneficiary under the will. *See Boyles v. Gresham*, 158 Tex. 158, 309 S.W.2d 50, 53 (Tex. 1958).

Carol acknowledges that section 78 modified the statutory scheme contained in section 77 by setting forth prohibitions on the appointment of certain persons. Section 78 provides "No person is qualified to serve as an executor or administrator who is . . . (e) A person whom the court finds unsuitable." TEX. PROB. CODE ANN. § 78(e) (Vernon Supp.1998). However, Carol contends that an unsuitable person under the statute is a person who has a conflicting claim of ownership of

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[1] Section 77 of the Texas Probate Code sets forth the hierarchy for appointment of administrators, and provides, in pertinent part, as follows:

> Letters testamentary or of administration shall be granted to persons who are qualified to act, in the following order:
>
> (a) to the person named as executor in the will of the deceased. . . .

TEX. PROB. CODE ANN. § 77 (Vernon 1980).

property in the estate separate and distinct from a claim arising from a will. In her response, Barbara asserts that the disqualifying conflict of interest described by Carol is not exclusive. She notes that other conflicts of interests exist among the four children, the estate, and herself, which disqualify Carol as an estate representative and which show that the trial court did not abuse its discretion in appointing Getz as a dependent administrator.

The trial court is granted broad discretion in determining whether an individual is suitable to serve as an executor or administrator. *Kay v. Sandler*, 704 S.W.2d 430, 433 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.); *Bays v. Jordan*, 622 S.W.2d 148 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.). Our standard of review is an abuse of discretion standard. *Olguin v. Jungman*, 931 S.W.2d 607, 610 (Tex. App.—San Antonio 1996, no writ); *Spies v. Milner*, 928 S.W.2d 317, 319 (Tex. App.—Fort Worth 1996, no writ). The test for abuse of discretion is whether the court acted without reference to any guiding rules and principles, that is, whether the court acted arbitrarily or unreasonably. *Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241 (Tex. 1985). The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Downer*, 701 S.W.2d at 242.

The Probate Code does not define "unsuitable," as used in Section 78(e), and cases interpreting this provision recognize that no comprehensive, discrete explanation exists delineating the attributes which make someone unsuitable under the Probate Code. *Boyles*, 309 S.W.2d at 53; *Olguin*, 931 S.W.2d at 610. It would appear, therefore, that the legislature intended for the trial court to have wide latitude in determining who would be appropriate for the purpose of administering estates. However, several cases provide guidance in determining whether the trial court acted properly in determining that a person was unsuitable to serve. An administrator was disqualified as "unsuitable" when the bank in which he owned stock claimed certain of the estate's assets as its own property. *Haynes v. Clanton*, 257 S.W.2d 789, 792 (Tex. Civ. App.—El Paso 1953, writ dism'd by agr.). An individual was disqualified from serving as administrator of the estates of both a husband and his wife wherein each estate had adverse claims to the same insurance proceeds. *Hitt v. Dumitrov*, 598 S.W.2d 355, 356 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ). A surviving spouse was found unsuitable because she claimed property of the husband's separate estate as community property. *Ayala v. Martinez*, 883 S.W.2d 270 (Tex. App.—Corpus Christi 1994, writ denied). A finding by the trial court that a surviving wife was unsuitable as the representative of her husband's estate was affirmed by this court where her appointment "would be inimical to the interests of the Estate." Inimical was defined as adverse, antagonistic, and hostile. *Formby v. Bradley*, 695 S.W.2d 782, 785 (Tex. App.—Tyler 1985, writ ref'd n.r.e.). Family discord has also been grounds for disqualifying an applicant. *Spies*, 928 S.W.2d at 319. As the court stated in *Hitt*, "each estate should have a representative that will assume the role of an advocate to achieve the best possible advantage for the estate." *Hitt*, 598 S.W.2d at 356. If one has personal interests that are so adverse to those of the estate or the beneficiaries thereof that both cannot be fairly represented by the same person, then that person is not a proper person to administer the estate. *Bays*, 622 S.W.2d at 149; citing 18 A.L.R.2d 635 (1951).

From our examination of the record, it appears that the trial court did not abuse its discretion in concluding that Carol's interests were adverse to the estate and its beneficiaries for several reasons. First, if Carol were appointed, she would probably have to sue her mother, her brother, her two sisters and herself to determine what portion of the twenty-acre tract L.A. Dean intended to include in the homestead devised to Barbara. This would be necessary in order to carve out that portion of the real estate which should be considered by the estate's representative for

dedication to the marital deduction gift. She might also have to sue the prior executor, Larry, since the record reflects that he had engaged in questionable transactions, and since litigation might be necessary to recover misused assets and damages for alleged malfeasance.

Secondly, her interest as a vested remainderman would be adverse to the estate if she assumed the capacity of executrix since the will grants the independent executor the sole discretion to select from the total estate the properties which would constitute the marital deduction gift. The will further provides that the value of the properties selected for the marital deduction gift would be determined solely by the estate representative. These tasks were never performed by the prior executor, Larry, and until the valuation and selection were made, all of the estate properties would be encumbered with a vested remainder owned by the four children. Once that selection was made, however, and the marital deduction property was no longer encumbered by the vested remainder interests, the marital deduction properties would become marketable and could be disposed of by Barbara or the guardian of her estate for her maintenance and support. The will also grants Barbara the power to dispose of those assets which fall into her life estate portion of the estate properties. This power of disposition is exclusive to her and is nondelegable. If Barbara exercises this power, the vested remainder interests of the four children would be extinguished. However, the evidence adduced at the hearing indicated that Barbara was incapacitated, and that her power of disposition of the life estate properties would not likely be exercised. Thus, the life estate properties would probably remain intact until Barbara's death at which time the life estate properties will be distributed to the four children as remaindermen under their father's will. The decisions of the representative regarding valuation and selection, as well as timing, would, therefore, impact the amount of assets ultimately received by Carol from the estate. Carol could delay the valuation and selection process and allow the vested remainder interests to continue to cloud the title to all the estate properties rendering them unmarketable during Barbara's lifetime just as Larry had done. Carol could also place the choice properties of the estate into Barbara's life estate portion, and select the less desirable assets for her marital deduction properties. Although Carol testified that she would be "fair" in carrying out these duties, under these circumstances, the interests of Carol would be inimical to the interests of the estate.

Thirdly, the court's decision was supported by its finding that the family was in discord and had already engaged in other litigation over the estate among themselves. It was suggested that a solution to the family conflict would be for the four children to simply convey their vested remainder interests to their mother, Barbara, who could then use and dispose of the properties unencumbered by their interests. However, according to uncontradicted testimony, a transfer of their remainder interests to their mother would generate federal gift tax liabilities and would therefore not be a desirable solution. The finding that Carol was unsuitable was also supported by evidence of her recent expressed desire to remain uninvolved in the business affairs of the family.

From our examination of the record, we conclude that the trial court did not abuse its discretion in finding that Carol was unsuitable and thus disqualified to be the representative of the estate. Points of error one, two, four and five are overruled.

In point of error three, Carol asserts that the evidence was legally insufficient and, in the alternative, factually insufficient to support the thirty-two findings of fact of the court. She further asserts under this point of error that the findings of fact were immaterial and irrelevant to the question of whether she was unsuitable under section 78(e) of the Texas Probate Code. In her brief, Carol admits that twenty-seven of the findings of fact are not disputed by her. . . .

. . . As to finding of fact No. 11, the will itself clearly states that the independent executor has the sole discretion to designate which estate assets were to be distributed in satisfaction of the marital deduction devised to Barbara. Furthermore, Margaret Hussey ("Hussey"), a practicing attorney and the guardian of the estate of Barbara, testified that the marital deduction properties had not been selected by the prior executor. Finding of fact No. 23 is supported by the testimony of Carol's sister, Betty, who stated that she and Carol had a conversation about their father's estate approximately three months prior to the hearing. Carol told Betty that she had moved away from Tyler and did not plan to come back. She also stated that she did not want to be involved in her mother and father's estates, and basically wanted to "get away from all this mess." As to finding of fact No. 29, Hussey testified that, in her opinion, the personal representative of the estate might have to file a lawsuit against the children of L.A. Dean in order to obtain a legal construction of the will and to determine title to some of the property owned by the estate. Finding of fact No. 30 was supported by Hussey's testimony that the prior executor had filed no accounting in five years, had made no selection of the marital deduction properties so as to distinguish between those properties and the life estate properties, and had co-mingled funds of the estate with Barbara's funds. Hussey detailed several other aspects of the estate which need serious attention. As to finding of fact No. 32, it is clear from the will itself that the representative of the estate was to decide which properties would be used to satisfy the pecuniary interests of the children, and that the representatives' decisions would be determinative of the value to be placed on said properties. From our examination of the record and briefs, it appears that all of the court's findings of fact are either undisputed or are supported by legally and factually sufficient evidence.

Finally, Carol challenges the relevance of the thirty-two findings of fact made by the trial court. She points out that there is no specific finding that she was unsuitable due to a claim of ownership of estate assets. However, several findings of fact made by the trial court related to the need for a representative of the estate, the conflicts existing among the family members, the potential for future lawsuits among the family members, and the need for a disinterested person to determine the values of estate properties and select those properties which are to be distributed to Barbara in accordance with the devise of properties equal to the marital deduction. The evidence at trial showed that if Carol served as the representative of the estate, she would be placed in the position of having to engage her mother, brother and sisters in litigation; she would be placed in the position of evaluating and selecting marital deduction assets all to her own detriment or to the detriment of the estate; and in behalf of the estate, she would be called upon to accuse her brother of possible wrongdoing. These factors are all relevant to the issue of whether Carol would be faced with conflicting interests which would make her unsuitable as the representative of the estate. As discussed under points one, two, four and five, it does not appear from the cases cited that the disqualifying conflict of interest which Carol describes is the exclusive test for determining whether or not a person is unsuitable to serve as an estate representative. Furthermore, her recent expression of disinterest in the estate would be material to the suitability of a person to serve as a personal representative of an estate. Carol's point of error number three is overruled.

The judgment of the trial court is affirmed.

RAGSDALE
v.
PRATHER

132 S.W.2d 625
Court of Civil Appeals of Texas, El Paso.
No. 3848.
Sept. 28, 1939. Rehearing Denied Nov. 2, 1939.

PRICE, CHIEF JUSTICE.

This is a proceeding for the appointment of an administrator of the estate of John E. Ragsdale, deceased. Giffin Prather, appellee, filed application in the County Court of Cherokee County, setting forth the necessary jurisdictional facts and alleging the necessity for an administration. Charlotte Ragsdale filed opposition to the appointment. The grounds set forth in the opposition were, that on or about the 24th day of September, 1937, John E. Ragsdale had executed and delivered a trust agreement conveying to C. D. Acker, as trustee, for her use and benefit, all his property, real, personal and mixed. Hence the deceased died seized of no property to be administered. She further alleged that he had left a will giving all of his property to her and appointed her independent executrix, but she had not sought to probate same because, as before stated, he died seized of no property.

On the 28th day of May, 1938, the County Court of Cherokee County denied the application of Giffin Prather, but appointed Carlton Odom administrator, who had not applied for letters of administration. The order of appointment recited that there was a pending suit in the District Court between the heirs of John E. Ragsdale and appellant, and the Court deemed it improper to decide at that time the prior right to appointment as between appellant and the heirs.

Both appellee and appellant perfected appeals to the District Court of Cherokee County.

In the District Court appellant pleaded, in abatement of appellee's application for administration, that before the institution of the proceedings there was pending in the District Court of Cherokee County a suit by appellee and the other heirs of John E. Ragsdale seeking as against appellant the cancellation of the trust agreement. This plea was overruled by the Court and appellant reserved due exception to such action.

Appellant filed an amended contest in the District Court, not changing in any material way the basis of her contest from that urged in the Probate Court.

The District Court, on a hearing, decided that there was a necessity for administration and appointed Giffin Prather administrator, setting aside the order of the Probate Court appointing Carlton Odom. To this judgment appellant excepted and duly perfected her appeal to the Court of Civil Appeals.

Appellant predicates her appeal on the theory that the evidence fails to establish a necessity for administration, in that it shows that on the date of his death John E. Ragsdale was not possessed of any property. Further, that applicant failed to show that the deceased owed any debts at the time of his death, and that appellee is estopped to seek administration on account of the beforementioned suit, to which he was a party plaintiff as one of the heirs of John E. Ragsdale. She likewise complains that appellee failed to establish the necessary venue facts.

The evidence established that John E. Ragsdale died on the 9th day of November, 1937. In a conveyance from C. D. Acker, as trustee, to appellant, introduced in evidence by her and under

which she claims all of the property formerly owned by the deceased Ragsdale, it is recited that John E. Ragsdale died in Cherokee County, Texas, on or about the 8th day of November, 1937. Further, it is shown by the trust agreement, which was executed about two months prior to the death of John E. Ragsdale, that he owned numerous tracts of real estate in Cherokee County and a large amount of personal property, the actual situs of which was in Cherokee County. The only real estate purported to be conveyed by the trust agreement was situated in Cherokee County. Appellant testifies that she had taken possession of two of the rent houses and the home place. No question of venue was raised either in the County or District Court. We deem the evidence ample to sustain the finding of the trial court in this respect. The case was tried throughout on the theory that at the time of his death deceased had his domicile in Cherokee County and died there.

On the 24th day of September, 1937, John E. Ragsdale executed and delivered a trust agreement wherein he conveyed to C. D. Acker, as trustee, for the use and benefit of appellant his interest in eight parcels of real estate in Cherokee County. This instrument also had a blanket clause conveying all lands or interest in lands owned or held by him in said county. The instrument further described and conveyed numerous bonds and stocks of the face value of over $35,000. There was likewise a blanket clause with reference to bonds and securities. It conveyed all bonds and securities held by the First National Bank in Jacksonville, Texas, for the account of John E. Ragsdale, aggregating $40,500. This aggregate includes the securities and bonds specifically described. The so-called trust agreement gives the trustee broad powers and provides that upon settlor's death the property was to be conveyed to appellant. It was filed for record on the 12th day of November, 1937.

On the 16th day of December, 1937, W. B. Ragsdale, E. B. Ragsdale, T. W. Ragsdale, Giffin Prather, Coly Morris, Conrad Morris, Daisy Morris, and Mrs. Nora Cureton, joined by her husband, C. M. Cureton, as heirs of John E. Ragsdale, filed suit against appellant to set aside the hereinbefore described trust agreement and the conveyance thereunder by C. D. Acker, as trustee, to appellant and to recover the property therein described. The petition alleges that at the time of the execution of the instrument, and for at least three years prior thereto, that John E. Ragsdale was of unsound mind; that he was more than seventy-two years of age on said date, and was in very poor mental and physical health, suffering from a mental disease known as senile dementia, and unable to understand the nature and effect of his acts. The petition further assailed the instrument on the ground of fraud and undue influence. The petition does not, however, contain an allegation that no administration is pending and that there are no debts, hence no necessity for an administration.

If John E. Ragsdale was, prior to his death, vested with the right to maintain this action or a similar one, his heirs and administrator may prosecute same. His heirs may prosecute same alone, provided that there is no administration and no necessity therefor. The petition charges fraud to have been perpetrated upon the deceased and not by the deceased.

Heirs may maintain an action to recover property of an ancestor only upon allegation and proof that there is no administration pending upon the estate and no necessity therefor. *Youngs et al. v. Youngs,* Tex. Com. App., 26 S.W.2d 191; *Bluitt v. Pearson*, 117 Tex. 467, 7 S.W.2d 524; *Adams v. Bankers' Life Co*., Tex. Com. App., 36 S.W.2d 182.

It is basic and fundamental that in a proceeding for the appointment of an administrator neither the Probate Court nor the District Court, exercising appellate jurisdiction, can finally pass upon the validity or invalidity of claims asserted by or against the estate of the deceased.

The claim in favor of the estate is ample property upon which to administer. *Rivera v. Atchison T. & S. F. Ry. Co*., Tex. Civ. App., 149 S.W. 223; *Lancaster & Wallace v. Sexton*, Tex. Civ. App., 245 S.W. 958.

If the court petitioned to appoint the administrator to prosecute a claim cannot authoritatively pass upon the validity thereof, what is the test to support its validity for the purpose of supporting an administration? It is suggested the assertion in good faith should in all events be sufficient. This test might be applied as well against the estate. It not appearing otherwise, good faith should be presumed in the assertion of the claim. The claim to set aside the trust instrument is, in our opinion, sufficient property upon which to administer. Appellant's assignments in relation to this point are overruled.

Appellant asserts that by joining as an heir in the suit against her, appellee is estopped to seek appointment as administrator. The suit does recognize the existence of the trust agreement and the conveyance thereunder. It may be true that before either the heirs or an administrator and the heirs can recover possession of any of this property the trust agreement must be first cancelled. Appellee and his co-plaintiffs do not allege in the petition that there are no debts, hence no necessity for administration. This assignment is overruled.

The necessity for an administration should be determined as of the time of the hearing on the application therefor. The statement of facts herein shows that the funeral expenses of deceased are unpaid, a relative having advanced same, and that taxes are due. If the trust instrument be set aside, there will be inheritance taxes to pay.

Even small claims are sufficient to support an administration. *Rye v. Guffey Petroleum Co*., 42 Tex. Civ. App. 185, 95 S.W. 622. This assignment is overruled.

The appointment of an administrator was essential to the proper protection of the asserted rights of both appellee and appellant. Appellant suggests that if this Court deems the appointment of an administrator necessary, that we limit his authority. To limit the authority of an administrator is beyond the jurisdiction of the Court. The law fixes his duty and powers. Article 3314 of the Revised Statutes, as applied to estates of deceased persons, provides:

> "Upon the issuance of letters testamentary or of administration upon any such estate, the executor or administrator shall have the right to the possession of the estate as it existed at the death of the testator or intestate."

The judgment of the trial court is affirmed.

In re ESTATE OF RAMSAY
2008 WL 2941248
(Tex. App.—Corpus Christi 2008)

MEMORANDUM OPINION

VELA, JUSTICE.

Appellant, Johnna Kay Zwernemann ("Johnna"), appearing pro se, appeals an order of the trial court denying her application to be the temporary administrator of her mother's estate. We affirm.

I. BACKGROUND

Susan Ramsay, the mother of Johnna, Michael Zwernemann and appellee, Rochelle McDonald, was found dead in her mobile home on February 21, 2007. An investigator with the Victoria County Sheriff's office found a suicide note at the scene. The death was later ruled a suicide. Although there was testimony offered that Ramsay prepared a will in 2002, it could not be found after her death. Ramsay's suicide note stated that there was no will. The parties proceeded as if Ramsay died intestate.

Thereafter, all three children applied to be appointed administrator of her estate. Both Michael and Johnna had been estranged from their mother. Johnna had not spoken with her mother since 1999. McDonald had been given up for adoption by Ramsay at birth and the two had reunited in 1999. After a two-day hearing before the court, the trial court appointed McDonald to be the permanent dependent administrator. Later, the trial court vacated its order because McDonald was unable to obtain a bond.

Johnna then filed another application to be appointed the temporary administrator of Ramsay's estate. McDonald opposed the application. In addition to the earlier hearing that lasted two days, the trial court also held a lengthy hearing on Johnna's application. The trial court heard evidence that Johnna had broken into Ramsay's mobile home after her death and had removed estate property. The trial court ordered Johnna to return the property, but, as of the date of the hearing on Johnna's application, she had not done so. Johnna testified that she had taken a guitar from the mobile home and that it was being appraised. She said the guitar that had originally been in the case is "the subject of a murder investigation" in Austin. Johnna testified that she believed her mother might still be alive and part of a witness protection program. She also testified that her mother may not have committed suicide and Johnna desired to further investigate the circumstances of her death.

Johnna claimed in the trial court to be indigent, yet she believed that she could qualify for a bond if named temporary administrator. According to Johnna, the Ramsay estate might be worth more than one million dollars; other witnesses testified that the probate assets were merely a mobile home, a truck and some personal items. Johnna also consistently denied at the hearings that McDonald was Ramsay's daughter even in the face of uncontroverted evidence provided by McDonald's adoptive mother that Ramsay was McDonald's biological mother. After Johnna introduced all of the evidence she wished to present, the trial court denied her application to be temporary administrator of the Ramsay estate.

II. STANDARD OF REVIEW AND APPLICABLE LAW

The probate code lists the following persons as not qualified to serve as an executor or administrator of an estate: ". . . (a) [a]n incapacitated person; (b) [a] convicted felon . . .; (c) [a] non-resident (natural person or corporation) of this State who has not appointed a resident agent to accept service of process . . .; (d) [a] corporation not authorized to act as a fiduciary in this State; or (e) [a] person whom the court finds unsuitable. TEX. PROB. CODE ANN. ' 78 (Vernon 2003). The probate code does not define the term "unsuitable." The court has broad discretion in determining who is suitable for an appointment as an administrator in a particular case. *Ayala v. Mackie,* 158 S.W.3d 568, 572 (Tex. App.CSan Antonio 2005, pet. denied); *In re Estate of Robinson* (Tex. App.—Corpus Christi 2004, pet. dism'd); *Cravey v. Hennings,* 705 S.W.2d 368, 370 (Tex. App.—San Antonio 1986, no writ). It appears that the legislature intended trial courts to have wide latitude in determining who should administer estates. *Dean v. Getz*, 970 S.W.2d 629, 633 (Tex. App.—Tyler 1998, no pet.). . . . Our review of this appointive power is limited to the question whether the court has abused its discretion. *Id.* at 371.

III. ANALYSIS

Johnna's issues will be addressed as a single issue. She complains of the trial court's order denying her application. She also contests the earlier order appointing McDonald, but, because that order was vacated by the trial court, there is nothing for us to review.

Here, the trial court heard ample evidence to decide, in its discretion, that Johnna was an unsuitable candidate for appointment as temporary administrator. There was evidence that Johnna broke into Ramsay's mobile home, refused to acknowledge that McDonald was Ramsay's child, alternatively argued that Ramsay might be alive or had died through suspicious circumstances not related to suicide, and failed to comply with the trial court's earlier order requiring her to turn over the items she had improperly taken from the Ramsay residence. The trial court did not abuse its discretion in denying Johnna's appointment based upon the evidence it heard. Johnna's issues are overruled.

IV. CONCLUSION

We affirm the judgment of the trial court.

B. Personal Representative

The term "personal representative" refers generally to the varying types of executors and administrators of a deceased person's estate. The extent to which the actions of the personal representative are supervised by a court of law is governed by the type of administration initiated in the probate court and modified to some degree by local court custom.

The laws of the State of Texas make provision for the independent administration, which frees the executor from many of the costly, time consuming requirements of the dependent administration, allowing the executor to manage most of the affairs of the estate free of court control.

There are also at least 13 kinds of personal representatives which include:

- Emergency Temporary Administrator
- Temporary Administrator Pending Contest
- Independent Executor
- Executor With Bond
- Administrator With Will Annexed
- Temporary Administrator With Will Annexed
- Guardian
- Emergency Temporary Guardian
- Temporary Guardian Pending Contest
- Dependent Administrator With Will Annexed
- Dependent Administrator
- Independent Administrator
- Successor of ALL OF THE ABOVE

Know which of these administrations require bonds and court supervision, and which do not.

BAILEY
v.
CHEROKEE COUNTY APPRAISAL DISTRICT
862 S.W.2d 581
(Tex. 1993)*

Dissenting Opinion of Justice
Gonzalez June 3, 1993.

OPINION ON MOTION FOR REHEARING

SPECTOR, JUSTICE.

Respondents' motions for rehearing are granted in part and overruled in part. The court's opinion and judgment of June 3, 1993 are withdrawn, and the following is substituted therefor.

This cause presents the question whether a suit to collect ad valorem taxes accruing on estate property during administration is a claim against the estate, properly filed in probate court, or a claim for which heirs are personally liable. The court of appeals held that the heirs are personally liable for the taxes and that a district court has concurrent jurisdiction with a statutory probate court over this matter. 817 S.W.2d 117 (1991). Because we hold that the present suit constitutes a claim against the estate which should have been filed in the probate court in which the administration was pending, we reverse the judgment of the court of appeals and dismiss the taxing authorities' claims without prejudice.

In 1973, W.E. Bailey died intestate in Cherokee County, Texas, survived by his wife, Petitioner Alibe Carter Bailey, and two adult sons, Petitioners William E. Bailey and Robert E. Bailey. At the time of his death, W.E. and Alibe Carter Bailey owned as community property land located in Cherokee County. Alibe Carter Bailey was appointed administrator of the estate in the intestate dependent administration.

Following commencement of the dependent administration, Respondents, Cherokee County, Cherokee County Appraisal District, and the City of Jacksonville, filed suit in the District Court of Cherokee County against the Baileys jointly and severally, seeking a personal judgment in the amount of $90,608.48 for tax years 1976-1986, and foreclosure of tax liens for delinquent property taxes, interest, and fees which had accrued subsequent to the decedent's death. The district court rendered a judgment ordering foreclosure of the tax liens, but denied the taxing authorities' prayers for personal judgment against the Baileys. The court of appeals reversed and remanded, holding that the taxing authorities were entitled to the personal judgment. 817 S.W.2d at 120.

I.

Taxes accruing during the pendency of administration are generally charged against the estate. *See Blanton v. Mayes*, 72 Tex. 417, 420, 10 S.W. 452, 453 (1889) ("Taxes due at the date of the death of the testator, and those subsequently accruing, would constitute debts of the estate. . . ."). The Probate Code classifies expenses of administration and expenses incurred in the preservation,

* Editor's Note: The Court's opinion and judgment of June 3, 1993 were withdrawn on rehearing; dissenting opinion by Justice Gonzalez joined by Justice Hightower and Justice Enoch stands as delivered on June 3, 1993.

safekeeping, and management of the estate as claims against the estate. TEX. PROB. CODE § 322.[2] Ad valorem taxes on estate property fall within the scope of such expenses: the estate's representative is empowered to borrow money "[f]or the payment of any ad valorem, income, gift estate, inheritance, or transfer taxes upon the transfer of an estate or due from a decedent or ward or his estate." TEX. PROB. CODE § 329(a)(1) (emphasis added). Thus, ad valorem taxes accruing during administration are classified as claims against the estate. *See Oldham v. Keaton*, 597 S.W.2d 938, 945 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.) (ad valorem taxes paid during pendency of administration were expenses necessary to preserve estate assets); *San Antonio Sav. Ass'n v. Beaudry*, 769 S.W.2d 277, 281 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (expenses incurred by administrator in obtaining reduced valuation of estate property for ad valorem tax purposes were payable from proceeds of the property).

Heirs are not ordinarily personally liable for claims against the estate while the estate remains under administration. *See Blinn v. McDonald*, 92 Tex. 604, 610-11, 46 S.W. 787, 790 (1898).3 A creditor of an estate "cannot have a personal judgment against heirs, devisees or legatees, or legal representatives of the estate of a decedent. . . . [T]he creditor must enforce his claim through administration, where the estate is not distributed; not directly against the heirs." *Smith v. Basham*, 227 S.W.2d 853, 856 (Tex. Civ. App.—Dallas 1950), *aff'd*, 233 S.W.2d 297 (Tex. 1950).[4]

The taxing authorities argue, though, that title to the property vested immediately in the heirs upon the decedent's death, giving rise to immediate, personal liability for subsequently accruing taxes. This argument is based upon provisions of the Tax and Probate Codes. Section 32.07 of the Tax Code provides:

> [P]roperty taxes are the personal obligation of the person who owns or acquires the property on January 1 of the year for which the tax is imposed. . . .

Additionally, Section 37 of the Probate Code provides:

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[2] The dissenting opinion argues that expenses necessary for the preservation of an estate are not classifiable as such until they have been paid by the administrator. The Probate Code, however, prohibits the administrator in a dependent administration from paying a claim until it has been approved by the court. TEX. PROB. CODE § 319. Approval by the court entails classification of the expense in the hierarchy of claims established by Probate Code section 322. *See* Blair v. State, 640 S.W.2d 867, 869 (Tex. 1982). Thus, the dissenting opinion's reasoning would leave administrators in a financial trap: an expense would not be classifiable as a claim until it had been paid; yet a claim would not be payable until it had been classified as an expense.

[3] Other jurisdictions have also followed the rule that heirs may not be held personally liable prior to the distribution of estate property. *See* Keele v. Stakes, 608 So.2d 1041, 1043 (La.Ct.App.1992) ("The provisions of our Civil Code make clear that an heir must accept the succession to which he is called before he becomes responsible for the debts of the succession."); Wittkamp v. Wittkamp, 69 Ohio Law Abs. 605, 126 N.E.2d 473, 475 (C.P.1954) (under Ohio law, heirs are liable only to extent of assets actually recovered); Landau v. Landau, 409 Ill. 556, 101 N.E.2d 103, 107 (1951) (heirs are liable for decedent's debts only if they receive estate assets); In re Schmitt's Will, 187 Misc. 988, 66 N.Y.S.2d 686, 690 (Sur.Ct.1946) (heirs, holders of equitable title in estate property, are not personally liable for realty taxes; rather, administrator as holder of legal title is liable).

[4] *See also* Potts v. W.Q. Richards Memorial Hosp., 558 S.W.2d 939, 945 (Tex. Civ. App.—Amarillo 1977, no writ) (in order to recover from heirs, unpaid creditor must prove that property actually distributed to heir equaled or exceeded amount sought); Perkins v. Cain Coffee, 466 S.W.2d 801, 803 (Tex. Civ. App.—Corpus Christi 1971, no writ) (heirs not personally liable to a claimant against the estate unless they have disposed of or altered property); Elkin v. Sanders, 397 S.W.2d 309, 312 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.) (devisees not personally liable for testator's debts though creditors could enforce claims against property in their hands).

> [W]henever a person dies intestate, all of his estate shall vest immediately in his heirs at law, but . . . shall still be liable and subject in their hands to the payment of the debts of the intestate . . . ; but upon the issuance of letters . . . of administration upon any such estate, the . . . administrator shall have the right to possession of the estate . . . and he shall recover possession of and hold such estate in trust to be disposed of in accordance with the law.

The taxing authorities contend that these provisions, read together, establish that the heirs, as the owners, are personally liable for the taxes at issue.

For taxing purposes, however, the heirs are not considered the owners of estate property yet under administration. *See Harper v. Swoveland*, 591 S.W.2d 629, 630 (Tex. Civ. App.—Dallas 1979, no writ) (while title vests immediately in devisee upon decedent's death, this title is subject to administration). Probate Code Section 37, in addition to declaring that an estate vests immediately in the heirs, also mandates that upon the issuance of letters, the administrator "shall have the right to possession of the estate as it existed at the death of . . . the intestate . . . and he shall recover possession of and hold such estate in trust to be disposed of in accordance with the law." Thus, the administrator is designated the trustee of the estate property:

> Under Texas law, during the period of administration, the decedent's estate in the hands of the executor or administrator constitutes a trust estate. The executor or administrator is more than a stake-holder, or the mere agent as a donee of a naked power of the heirs, legatees, and devisees. He has exclusive possession and control of the entire estate. He is charged with active and positive duties. He is an active trustee of a trust estate.

Jones v. Whittington, 194 F.2d 812, 817 (10th Cir.1952); *see also Morrell v. Hamlett*, 24 S.W.2d 531, 534 (Tex. Civ. App.—Waco 1929, writ ref'd) (estate property under administration is held in trust).

Under Section 37, the administrator, as trustee of the estate property, assumes legal title. *See Long v. Long*, 252 S.W.2d 235, 247 (Tex. Civ. App.—Texarkana 1952, writ ref'd n.r.e.) ("In any active trust the legal title and right of possession are vested in the trustee. . . ."). As holder of legal title, the trustee is the owner for the purpose of taxation. This principle was articulated in *Driscoll Foundation v. Nueces County*, 445 S.W.2d 1, 6 (Tex. Civ. App.—Beaumont 1969, writ dism'd w.o.j.), which also involved the assessment of ad valorem taxes:

> The Trustees, not the Foundation, had the legal title to the property involved in this suit; and, as owners, the Trustees were required to render the same for ad valorem taxes. . . . As a general rule, property held in trust is assessed to the Trustee as holder of the legal title and not to the beneficiary, even though the tax is in substance on the interest of the beneficiary.

(Citations omitted.) While it is true that the heirs hold equitable title to estate property, this interest does not give rise to tax liability. The responsibility for taxes lies with the administrator as holder of legal title.

The rule vesting the estate immediately in the heirs, codified in Probate Code Section 37, has not been construed to impose tax liability on heirs prior to distribution. The rule was adopted in conformance with the axiom that "[t]here is never a time when title is not vested in someone." *Welder v. Hitchcock*, 617 S.W.2d 294, 297 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.). This court has rejected the contention that heirs are consequently personally liable for debts of the estate prior to distribution. *See Blinn v. McDonald*, 92 Tex. 604, 608, 46 S.W. 787,

788 (1898) (during administration, heirs have no power to dispose of the property, and have no personal liability for debts against the property).[5]

II.

Because the present action constitutes a claim against the estate filed after administration had begun in the county court at law sitting in probate, jurisdiction lies with the county court.

In those counties where there are statutory courts exercising probate jurisdiction, such courts share original jurisdiction over probate proceedings with the constitutional county court, to the exclusion of the district court. TEX. PROB. CODE § 5(c). Accordingly, administration of the Bailey estate was properly initiated in the Cherokee County Court at Law.

The Probate Code further provides that "[a]ll courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate." TEX. PROB. CODE § 5(e). With regard to proceedings in statutory county courts, "matters incident to an estate" are defined to include "all claims by or against an estate" and "all actions for trial of title to land and for the enforcement of liens thereon incident to an estate." TEX. PROB. CODE § 5A(a). The instant suit constitutes a "claim against the estate" rather than a claim for which the putative heirs may be held personally liable. The suit is, moreover, an action "for the enforcement of liens" on land which is "incident to the estate." In sum, this suit pertains to matters incident to the estate and the county court at law is vested with jurisdiction over it. *See Blair v. State*, 640 S.W.2d 867, 869 (Tex. 1982) ("The scheme for administration of estates is that claims should be submitted to the probate court for classification and then paid through orders of the probate court.").

When sitting in probate, the county court at law is empowered to enforce creditors' claims against the estate. A creditor may petition the court to order payment of the claim; if funds on hand are insufficient, the court may order the sale of estate property. TEX. PROB. CODE § 326; *see also Rivera v. Morales*, 733 S.W.2d 677, 678 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.) (an administrator has a duty to pay creditors pursuant to orders of the probate court). If the administrator refuses to make a court-ordered payment, the creditor may have execution issued against the property for the amount owed, plus interest and costs. TEX. PROB. CODE § 328(a). Alternatively, the court may cite the representative and sureties to show cause why they should not be held liable for the debt, as well as interest, costs and damages. TEX. PROB. CODE § 328(b).

Instead of submitting their claim to the county court, the taxing authorities filed suit in the district court. The record reflects that the Baileys filed a "Plea in Abatement and Motion for Dismissal of Cause" in the district court, urging that the taxing authorities' action be dismissed for want of jurisdiction. The district court in its final judgment denied the Baileys' motion to dismiss.

The taxing authorities argue that because the district court is empowered with original probate jurisdiction, it has jurisdiction to hear matters incident to the estate.[6] We disagree. A court empowered with probate jurisdiction may only exercise its probate jurisdiction over matters incident to an estate when a probate proceeding related to such matters is already pending in that court. *See Interfirst Bank-Houston v. Quintana Petroleum*, 699 S.W.2d 864, 873 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). Thus, because the ongoing administration in the county court at law sitting in probate was the only probate proceeding pending, that court alone had jurisdiction over matters incident to the estate.

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[5] *See also* Potts v. W.Q. Richards Memorial Hosp., 558 S.W.2d at 945; Perkins v. Cain Coffee, 466 S.W.2d at 803; Elkin v. Sanders, 397 S.W.2d 309 at 312; Smith v. Basham, 227 S.W.2d at 856.

[6] See TEX. PROB. CODE §§ 5(a), (d), and (e).

Furthermore, the court in which suit is first filed acquires dominant jurisdiction to the exclusion of coordinate courts. *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974). Because the administration was already pending in the county court when this suit was filed in the district court, the jurisdiction of the county court is dominant. *See Thomas v. Tollon*, 609 S.W.2d 859, 860 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (where county court originally exercised jurisdiction over the estate of decedent it was the proper court to determine matters incident to the estate).[7]

III.

We hold that the estate bears the liability for ad valorem taxes accruing during administration and that therefore the Bailey heirs may not be held personally liable prior to distribution. The present suit to collect the taxes is a claim against the estate over which the probate court maintained exclusive jurisdiction once the administration commenced in that court. We reverse the judgment of the court of appeals and dismiss the taxing authorities' claims. Our disposition of this cause is without prejudice to any right of the taxing authorities to present claims incident to the estate in the county court at law sitting in probate.

With certain exceptions not relevant here, taxing units are exempt from court costs in suits to collect delinquent taxes. TEX. TAX CODE § 33.49. Consequently, court costs incurred by the Baileys will be assessed against them. *See Nacogdoches Indep. School Dist. v. McKinney*, 513 S.W.2d 5 (Tex. 1974) (winning taxpayer in action by school district to recover taxes was required to pay only those costs incurred by him).

Dissenting opinion by GONZALEZ, J., joined by HIGHTOWER and ENOCH, JJ.

GONZALEZ, JUSTICE, dissenting.

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[7] *See also* Carlisle v. Bennett, 801 S.W.2d 589, 592 (Tex. App.—Corpus Christi 1990, no writ) (even assuming that probate court did not have exclusive jurisdiction it was entitled to exercise jurisdiction exclusive of other courts as first court to acquire jurisdiction under theory of "dominant jurisdiction"); Crawford v. Williams, 797 S.W.2d 184, 185 (Tex. App.—Corpus Christi 1990, writ denied) (district court did not have jurisdiction over will contest proceeding where county court had acquired and exercised jurisdiction). *Cf.* TEX. PROB. CODE § 5B ("A judge of a statutory probate court . . . may transfer to his court from a district . . . court a cause of action appertaining to or incident to an estate pending in the statutory probate court and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to that estate.").

CHANDLER
v.
R. C. WELBORN
156 Tex. 312, 294 S.W.2d 801
(Tex. 1954)

WALKER, JUSTICE.

On the principal question involved in this case, we hold that creditors of a decedent may maintain an action for the benefit of the estate to set aside a deed executed by the decedent while insane if: (1) the other nonexempt assets of the estate are not sufficient to pay the claims of creditors, (2) the property conveyed by such deed would be subject to the payment of such claims if owned by the decedent at the time of his death, and (3) the heirs and personal representative of the decedent are adversely interested and attempt to uphold the deed.

Senator and Mrs. W. J. Cunningham owned as their community homestead two lots in the City of Abilene. When Mrs. Cunningham died intestate in 1947, her one- half interest in the property passed to her three children, Myrtle Mae Chandler, Florence Irion, and W. J. Cunningham, Jr., who are the petitioners in this case. Senator Cunningham continued to make his home on the property, but was a patient in the hospital from 1950 until his death in 1952. On April 5, 1951, he executed a deed conveying his interest in the property to petitioners in equal shares, and this is the instrument which is under attack in the present case.

About a month after the deed was executed, petitioners instituted suit in trespass to try title against their father and his sister, Mrs. R. C. Welborn, who is one of the respondents, for the recovery of title to and possession of the property. The defendants answered with a general denial. Another respondent, Hendrick Memorial Hospital, intervened in the suit, claiming to be a creditor of Senator Cunningham and alleging that the property had been abandoned as his homestead and that the conveyance to petitioners was in fraud of creditors, and prayed that the deed be set aside. This was the status of the case at the time of Senator Cunningham's death.

After the Senator's death, petitions in intervention were filed by the other respondents, who are also creditors of his estate. Mrs. Welborn filed an amended answer in which she claimed as a creditor of the estate and asserted a cross-action against petitioners to set aside the deed on the ground that the grantor was of unsound mind at the time it was made. Myrtle Mae Chandler, petitioner, having been appointed administratrix of her father's estate, respondents filed amended petitions in intervention, making her a party to the suit in that capacity and adopting the cross-action alleged in Mrs. Welborn's amended answer.

The suit then became a controversy between respondents on the one hand and petitioners on the other, the former seeking to set aside the deed and the latter attempting to uphold it. The jury found, in response to the single special issue submitted, that Senator Cunningham was of unsound mind at the time he executed the deed to petitioners, and the trial court entered judgment that the deed be set aside and cancelled. This judgment has been affirmed by the Court of Civil Appeals. 282 S.W.2d 940. We have concluded that the judgment of the Court of Civil Appeals should be affirmed. The case was tried before the effective date of the Texas Probate Code, V.A.T.S. Probate Code, § 1 et seq., and we refer in this opinion to the statutes as they existed prior to January 1, 1956.

Petitioners advance a number of arguments in support of their contention that respondents are not entitled to maintain this suit. The parties stipulated that the property was Senator Cunningham's homestead at the time he made the deed. Petitioners argue that the deed cannot be set aside at the instance of creditors, because the property was exempt from their claims when the conveyance was made. It is well settled that a conveyance of exempt property may not be attacked on the ground that it was made in fraud of creditors. *Sorenson v. City Nat. Bank*, 121 Tex. 478, 49 S.W.2d 718; *Crow v. First Nat. Bank of Whitney*, Tex. Civ. App., 64 S.W.2d 377 (writ ref'd); Johnson v. Echols, Tex. Civ. App., 21 S.W.2d 382 (writ ref'd). *See also* 20 TEX. JUR. 381, § 18. The judgment setting aside the deed in the present case, however, is based on a jury finding that the grantor was of unsound mind.

A deed executed by a person of unsound mind may be set aside during the lifetime of the grantor at the instance of his guardian or in an action instituted by the grantor after he recovers his sanity. This cause of action survives the death of the grantor, and ordinarily passes to his heirs, devisees or personal representatives. *See* 12 C.J.S., *Cancellation of Instruments*, § 45, p. 1016; 9 AM. JUR., *Cancel. of Inst*., p. 357, § 10. As pointed out by the Court of Civil Appeals, no constituent member of Senator Cunningham's family survived him, and if the conveyance is set aside, his interest in the property will be subject to the payment of respondents' claim. Under these circumstances the statutes and rules relating to exempt property and the right to attack conveyances made in fraud of creditors simply have no application.

Petitioners also contend that creditors do not have such an interest in the estate of their deceased debtor as will enable them to maintain a suit of this character, and cite *Logan v. Thomason*, 146 Tex. 37, 202 S.W.2d 212; *Daniels v. Jones*, Tex. Civ. App., 224 S.W. 476 (writ ref'd.); and *Pena y. Vidaurri's Estate v. Bruni*, Tex. Civ. App., 156 S.W. 315 (writ. ref'd.). These cases hold that a creditor of, or person claiming to have purchased property from, a decedent is not a 'person interested' in the estate within the meaning of arts. 3315 and 3339, and hence has no standing in court either as proponent or contestant of a purported will left by the decedent. Creditors clearly have no interest in the probate of their debtor's will, because the payment of their claims will not be affected thereby. It is immaterial to them by whom their claims are paid, or whether the assets of the estate are administered under the will or as in the case of intestacy. *See Daniels v. Jones*, *supra*.

It is very material to respondents, however, whether Senator Cunningham's deed to his children is set aside or permitted to remain in effect. The grantor owned no other property at the time of his death. If the conveyance stands, respondents will receive nothing on their claims. If the deed is set aside, the grantor's one-half interest in the property can be used to pay their claims. When the other assets of the estate liable for the payment of claims are not sufficient to pay the same, the creditors have a direct and substantial interest in the recovery by the estate of property which can be used to pay such claims.

Under the provisions of art. 3314, the property of a person who dies intestate passes to his heirs at law, but the administrator has the right to possession of the estate, except property exempted by law, as it existed at the death of the intestate. Creditors of the decedent do not own a direct interest in the property as such, but their situation is somewhat analogous to that of stockholders of a corporation whose directors refuse to institute suit to enforce corporate rights or redress a wrong done the corporation. Although the stockholders own no direct interest in the assets of the corporation, equity recognizes their right under certain circumstances to institute suit for the benefit of the corporation.

Article 1981 of our statutes provides that suits for the recovery of real and personal property belonging to the estate of a decedent may be instituted by the executor or administrator, and judgment in such cases is conclusive in the absence of fraud or collusion on the part of the representative. This statute states a general rule of procedure, and in the absence of circumstances requiring the intervention of equity vests in the personal representative the prior and exclusive right to bring such suits. It is clear, however, that the statute does not operate to deny in all cases the right of persons other than the executor or administrator to institute an action for the benefit of the estate. When administration is pending, the heirs are generally not entitled to maintain a suit for the recovery of property belonging to the estate, but in *Barrera v. Gannaway*, 130 Tex. 142, 105 S.W.2d 876, we observed that there are exceptions to this rule as pointed out in the opinion of the Court of Civil Appeals in that case. The last mentioned opinion, which is found in 74 S.W.2d 717, 718, after stating the general rule governing the maintenance of suits by heirs, declares that:

> "Other exceptions to the general rule exist in cases where, there being an administration, it appears that the administrator will not or cannot act, or that his interest is antagonistic to that of the heirs desiring to sue. *Rogers v. Kennard* (54 Tex. 30, 37); *Lee v. Turner*, 71 Tex. (264), 266, 9 S.W. (149), 150; M*odern Woodmen of America v. Yanowsky* (Tex. Civ. App.) 187 S.W. 728."

If art. 1981 does not preclude the maintenance of suit by heirs under these circumstances, it is no obstacle to a suit by creditors in a similar case.

Many years ago this Court recognized that under certain circumstances creditors of a decedent must be permitted to bring suit for the protection of their interest in the estate. The opinion in *Crain v. Crain*, 17 Tex. 80, states:

> ". . . that the administratrix is a trustee, acting for the benefit of creditors and distributees, and that in cases where she will not or cannot act for the protection and preservation of the estate, the cestui que trusts have a right to act in the behalf and for the protection of their eventual interests, and that such rights are the proper subjects of judicial cognizance."

Equity will not suffer a right to be without a remedy. And when the legal remedies available to creditors are not adequate for the protection of their interests in the estate of their deceased debtor, equity will permit them to maintain a suit for the benefit of the estate. *Mead Co. v. Doerfler*, 146 Neb. 21, 18 N.W.2d 524, 158 A.L.R. 724; *Rummens v. Guaranty Trust Co*., 199 Wash. 337, 92 P.2d 228; *Sayres v. Johannes*, 116 Misc. 497, 190 N.Y.S. 247; *Gilbert v. Thomas*, 3 Ga. 575; Annotation, 158 A.L.R. 729. IN POMEROY'S EQUITY JURISPRUDENCE, 5th ed. 1941, Vol. 4, p. 459, § 1154b, the rule is stated as follows:

> "By virtue of the auxiliary jurisdiction of equity, a creditor may maintain a suit, somewhat in the nature of a 'creditor's bill', to reach assets which justly and equitably belong to the estate, and to bring them within the power and control of the administrator, so that they may be administered upon and distributed by him."

When an executor or administrator refuses to account for property in his possession belonging to the estate or fails to exercise ordinary diligence to recover assets of the estate, the creditors usually have an adequate remedy by suit on the representative's bond. It is our opinion, however, that this is not an adequate remedy in the present case. The amount of an administrator's bond is determined by the value of the property owned by the decedent at the time of his death. Since the estate owns no property other than the cause of action to set aside the deed, it may be assumed that only a nominal bond was required of his administratrix. In the second place, the heirs and administratrix hold and claim the property under a deed from the decedent which is voidable but

not void, and the administratrix could not be charged with a violation of any duty with respect to such property until the deed is set aside.

It has also been suggested that respondents might obtain an order from the probate court directing the administratrix to institute suit to set aside the deed, and have her removed in the event she failed to comply with the order. It has been said that a personal representative may not bring suit against himself as an individual, 14-A TEX. JUR., 772, sec. 811, but we shall assume that the administratrix could maintain the present suit. The probate court may or may not direct her to institute the suit, or order her removal for failure to do so. Either side may appeal from its orders on either of these questions. If the present administratrix is finally removed, there are two other grantees in the deed who have a right to be appointed in her place which is prior to that of any disinterested person. Further litigation would then be necessary to compel the successor representative to institute suit or to obtain his removal for refusing to do so. After extended preliminary litigation and a long delay, the administratrix or her successor might be forced to bring suit. If the suit is brought by the present administratrix or by either of the other grantees who is appointed in her place, it would be somewhat less than realistic to expect that the action would be prosecuted with the vigor and zeal necessary to protect the rights of creditors. We think that under these circumstances the creditors should not be required to incur the expense and suffer the delays involved in compelling the personal representative to bring suit. The administratrix is a party to this action, and the estate will be bound by the judgment entered herein. There is no danger of a second suit, and the grantees in the deed are not prejudiced in a legal sense by permitting the creditors to maintain this suit. *See* discussion in *Prusa v. Everett*, 78 Neb. 251, 113 N.W. 571.

Petitioners argue that when the Legislature enacted arts. 3996 and 3997, it preempted the field of suits by a creditor to set aside the deed of his debtor, and that these statutes provide the only remedy creditors have against the grantees of their debtor. The two articles govern the right to attack transfers and certain other transactions by a debtor where there is either absence of consideration or an intent to hinder, delay or defraud creditors. They do not purport to define, limit or deny the right of creditors to maintain a suit to set aside the conveyance of a decedent who was insane at the time of its execution, and should not be given the construction or effect for which petitioners contend.

By their fourth point, petitioners say that they as individuals were not made parties to the suit by any respondent who is a creditor of the estate, and that the judgment of the trial court cannot stand because the grantees in the deed are necessary parties. Petitioners are named as adverse parties in the second paragraph of Mrs. Welborn's amended answer, but they contend that the evidence fails to show that she is a creditor of the estate. We shall assume that they are correct in this latter contention.

The introductory paragraph of the pleadings on which the other respondents went to trial expressly name only the administratrix as an adverse party, but in the body of such pleadings respondents adopt the cross-action alleged in the second and third paragraphs of Mrs. Welborn's amended answer. It clearly appears from these pleadings that respondents seek to set aside the deed against petitioners as individuals. Petitioners through their counsel participated in the trial of the case and vigorously contested respondents' action to set aside the deed. They have not been misled or prejudiced in any way, and are so connected with the suit by their interest in the result and their active participation in and control of the litigation as to be bound by the judgment regardless of whether they were properly named as adverse parties in respondents' pleadings. *See Miller v. Dyess*, 137 Tex. 135, 151 S.W.2d 186, 137 A.L.R. 578; *Perkins v. Terrell*, Tex. Civ. App., 214 S.W. 551 (writ. ref'd.); *Mims v. Hearon*, Tex. Civ. App., 248 S.W.2d 754 (no writ);

Annotation, 139 A.L.R. 9. Under these circumstances, they cannot be heard to say that they were not made parties to the suit.

Petitioners' remaining points assert that the trial court erred in the exclusion of certain evidence and the admission of other evidence. In her written deposition taken at the instance of petitioners, Mrs. Chandler testified in response to direct interrogatories that she had observed Senator Cunningham while he was in the hospital, and that his mental condition was good at the time he signed the deed. The trial court excluded this testimony upon respondents' objection that the same contravenes art. 3716, Vernon's Ann. Tex. Civ. Stat., commonly known as the Dead Man's Statute.

When the deposition was taken, the witness was a party to the suit in her individual capacity, but not in the capacity of administratrix of Senator Cunningham's estate. Petitioners argue that the competency of a witness under art. 3716 is determined as of the time the testimony is taken, and that the suit was not an action by or against heirs or representatives of a decedent when Mrs. Chandler gave her deposition. The Court of Civil Appeals concluded that statute applied to the action even before the administratrix was made a party, but it is not necessary for us to decide that question.

Article 3716 expressly extends to actions by or against executors, administrators or guardians in which judgment may be rendered against them as such, and to all actions by or against heirs or representatives of a decedent arising out of any transaction with the decedent. Whether the action falls within the terms of the statute is determined as of the time of the trial. *Pugh v. Turner*, 145 Tex. 292, 197 S.W.2d 822, 172 A.L.R. 707. Since the administratrix was a party to the suit in her representative capacity at the time her testimony was offered, the action is one to which the statute applies.

If the action falls within the provisions of the statute, then neither 'party' is permitted to testify against the other as to any transaction with, or statement by, the testator, intestate or ward. We do not attempt to frame a definition which comprehends all of the decisions bearing on the question, but as a general rule the word 'party' means a person who has a direct and substantial interest in the issue to which the testimony relates and who is either an actual party to the suit or will be bound by any judgment entered therein. *See Lehmann v. Krahl*, Tex., 285 S.W.2d 179; *Newton v. Newton*, 77 Tex. 508, 14 S.W. 157; *Ragsdale v. Ragsdale*, 142 Tex. 476, 179 S.W.2d 291. Whether the witness is a 'party' within the meaning of the statute is determined by the circumstances existing at the time his testimony is taken. *Ragsdale v. Ragsdale*, *supra*. When Mrs. Chandler gave her deposition, she was an actual party to the suit in her individual capacity and was interested in the issue to which the excluded testimony relates. It thus appears that both the action and the witness fall within the terms of the statute, and the parties recognize that the excluded testimony relates to a transaction with the decedent. It necessarily follows that the testimony was properly excluded unless the statute was waived by respondents.

Petitioners' direct interrogatories required the witness to state the extent to which she had observed her father in the hospital and to express her opinion as to his mental capacity at the time the deed was executed. Respondents propounded cross-interrogatories inquiring whether the decedent suffered from delusions, talked about imaginary events, made irrational statements, or failed to recognize old acquaintances. The cross-interrogatories thus called for answers relative to transactions with the decedent, but were restricted to the question of the decedent's mental capacity, which was the subject of inquiry in the direct interrogatories.

It is well settled that when the testimony of a witness, who would otherwise be incompetent to testify regarding the matters covered by art. 3716, is taken by deposition and the 'opposite party'

initiates an inquiry relative to a transaction with the decedent, the statute is waived and the witness may testify fully regarding such transaction. *Jackson v. Jones*, 74 Tex. 104, 11 S.W. 1061; *Allen v. Pollard*, 109 Tex. 536, 212 S.W. 468; *Hopkins v. Robertson*, Tex. Civ. App., 138 S.W.2d 310 (writ. ref'd.). But here the inquiry with reference to the decedent's mental condition was initiated by petitioners, and respondents merely cross-examined the witness with reference thereto. So far as we have been able to determine, this Court has not decided whether such cross-examination constitutes a waiver of the statute.

The decisions of the courts of civil appeals are not in harmony on the question of whether the opposite party waives the statute by merely cross- examining the witness on the trial of the case with reference to matters brought out over his objection on direct examination. Some have expressed the view that waiver occurs if the cross-examination elicits the same facts brought out on direct examination. *Walkup v. Stone*, Tex. Civ. App., 73 S.W.2d 912 (writ dism'd); *Dunn v. Peters*, Tex. Civ. App., 126 S.W.2d 997 (no writ). We think that the better rule is that the opposite party does not waive the statute if his cross-examination is limited to the testimony improperly admitted over his objection on direct examination. S*ee Jones-O'Brien, Inc., v. Loyd*, Tex. Civ. App., 125 S.W.2d 684 (writ. dism'd.); *Hupp v. Hupp*, Tex. Civ. App., 235 S.W.2d 753 (writ ref'd. n.r.e..); *Thomason v. Burch*, Tex. Civ. App., 223 S.W.2d 320 (writ ref'd. n.r.e.); Annotations, 64 A.L.R. 1149, 107 A.L.R. 483, 159 A.L.R. 411.

It is well settled that cross-examination of a witness as to testimony improperly admitted over objection does not waive the right to complain of the error. *Dallas Railway & Terminal Co. v. Bailey*, 151 Tex. 359, 250 S.W.2d 379. And this is true even where the witness on cross-examination repeats or restates some or all of the evidence given on direct examination. *Cathey v. Missouri, K. & T. Ry. Co. of Texas*, 104 Tex. 39, 133 S.W. 417, 33 L.R.A.,N.S., 103. If an objection that testimony contravenes art. 3716 is overruled, the party making the objection should not be required to determine at his peril whether reversible error has been committed and forego the right of cross-examination if he does not wish to waive the statute.

And when the testimony of a witness is taken by deposition, a party should not be compelled to choose between waiving either the statute or the right of cross-examination. There is no ruling on the admissibility of deposition testimony until the same is offered during the trial of the case. If the witness does not testify in person at the trial, the opposite party must cross-examine at the time the deposition is taken or not at all. We hold, therefore, that when the testimony of a witness is taken by deposition and one party initiates an inquiry relating to a transaction with the decedent, the opposite party does not waive the statute by simply interrogating the witnesses with reference to the facts brought out on direct examination. This rule preserves to the latter party the right to object to the testimony at the trial of the case, and to have the benefit of his cross-examination if the objection is overruled.

The trial court permitted Dr. Jack Haynes to testify, over petitioners' objection that the same is too remote, that when he observed Senator Cunningham in July, 1952, the latter did not recognize anyone and his mind was a total blank. The witness also stated that he could not, from what he observed at that time, express an opinion as to the Senator's mental condition fifteen months earlier. The members of the jury were thus informed by the witness that his testimony has no bearing on the issue they were required to decide, and their verdict is amply supported by the other evidence in the record. Under these circumstances it cannot be said that the admission of the doctor's testimony, if erroneous, was reasonably calculated to or probably did cause the rendition of an improper judgment.

The judgment of the Court of Civil Appeals is affirmed.

Problems and Notes

1. A client comes to your office with a holographic will which reads as follows:

> *2/25/2010*
> *Hi There*
> *I wish to leave all my worldly possessions, both simple and complicated, to Nora on my Facebook page and let Bud take care of my car. So-long.*

What problems are raised by the document? Can you as a lawyer make a judgment as to the validity of the will, or must a probate judge make that determination?

2. A client calls you and says she has been named executrix under her deceased uncle's will. She says there were many personal items belonging to her uncle, but the members of the family divided everything between themselves the day after the funeral. She is calling to ask you if this division of property is acceptable. What is your response? What will you need to know to determine if you will represent her? What will you do about the personal property? You may supply any missing facts.

3. Can a surviving spouse pay the decedent spouse's bills without the necessity of probate?

4. Dan Decedent died on October 8th of last year. The Administrator and determined heirs of his estate have agreed to a partial distribution of his estate. Only one heir, Ingrid the Incarcerated, was left out of the discussion about the distribution. Everyone has agreed to payment of one creditor of the estate using a Certificate of Deposit in Dan's name at First Bank. The CD was left to Ingrid under the will and had no death beneficiary. If their calculations are correct, another CD in a Swiss bank will become due when Ingrid's prison time is up, and everyone has agreed that this CD can be used to pay Ingrid at that time.

The heirs ask you to represent them in drawing up an agreement. How do you advise them? They say if you will not represent their point of view, they will pull their $100,000 retainer immediately.