Opinion issued July 28, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00925-CV

FRANCES HARRIS, Appellant

V.

LISA ANNETTE MOSLEY TAYLOR, Appellee

On Appeal from the County Court at Law No. 3
Fort Bend County, Texas
Trial Court Case No. 15-CPR-027971

MEMORANDUM OPINION

Appellant, Frances Harris, challenges the probate court's interlocutory order appointing a temporary administrator and temporary injunction order enjoining her from accessing certain financial accounts. In two issues, Harris contends that the probate court erred in not appointing her as independent executor and "appointing

a dependent administrator" without first hearing evidence and finding her disqualified to serve, and granting the motion of appellee, Lisa Annette Mosley Taylor, for injunctive relief.

We dismiss in part and reverse and remand in part.

Background

The decedent, David Mosley, Sr., died on January 20, 2015. In his will, he declared that he and his first wife, Josephine Mosley, had five children, including Harris and Taylor. After Josephine died, the decedent married Indiana Buckman. Aside from certain specific devises to Buckman and a son, he devised the residuary of his estate to his children to share equally. The decedent appointed Harris as independent executor and named Buckman as alternate independent executor.

After the decedent died, Harris applied to admit his will to probate and for issuance of letters testamentary, attesting that she is "qualified" for, and "entitled" to, "appointment as independent executor."

Taylor then filed her "First Amended Objection to the Application for Probate of a Will and Letters Testamentary; Motion for Appointment of Dependent Administrator with Will Annexed; Petition for Declaratory Judgment[;] and Motion to Enjoin [Harris]." She argued that Harris is disqualified[1] as a matter of law from serving as executor because she had claimed certain estate assets, i.e.,

[1] *See* TEX. EST. CODE ANN. § 304.003(5) (Vernon 2014) (person whom court finds "unsuitable" disqualified from serving as executor).

financial accounts of the decedent, as non-testamentary property belonging to her individually. Taylor asserted that Harris had "taken possession of," and "made distribution" of, certain estate assets, "without being duly appointed and qualifying as" executor. And she requested that the probate court deny Harris's request for appointment as independent executor. Taylor noted that although the decedent had named Buckman as an alternate executor, Buckman was "unwilling to accept appointment as [e]xecut[or] of the [d]ecedent's [e]state." Thus, Taylor requested that the probate court either appoint her as dependent administrator or "appoint a third-party [d]ependent [a]dministrator, with [the] [w]ill [a]nnexed."[2]

Taylor also sought a declaration that certain of the decedent's financial accounts, which Harris had claimed as her own by contractual "[r]ight[s] of [s]urvivorship," were "actually property of the [e]state and should be distributed in accordance with the [d]ecedent's will." She explained that the decedent, prior to his death, from 2004 to 2011, had held certain joint accounts with Harris, and he had granted her certain contractual rights of survivorship in those accounts. In 2009, however, the decedent, diagnosed with dementia, "may have been suffering from the illness even before that date." Taylor argued that Harris's purported

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[2] An "administrator" may be appointed "with the will annexed" when although there is a will, there is not an executor in place. *See* BLACK'S LAW DICTIONARY 44 (9th ed.). The primary distinction between dependent and independent administrations is the level of judicial supervision exercised over the representative. *Eastland v. Eastland*, 273 S.W.3d 815, 821 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

survivorship rights are "void" because the decedent lacked the mental capacity to grant her such rights, or was under the undue influence of Harris at the time he granted them. Taylor asserted that the decedent had "entrusted his financial matters to [Harris] with the understanding that she would" "hold the various accounts in trust for the benefit" of his children and "distribute his estate equally among all the four surviving children." Alternatively, Taylor sought a declaration that the decedent's accounts had been held in a constructive trust for the benefit of all of his children.

Taylor further sought a temporary injunction to enjoin Harris "from accessing all the financial accounts held at JP Morgan Chase Bank, held in the name of [the decedent] individually or jointly with [Harris], as of the [d]ecedent's date of death," until the probate court ruled on the request for declaratory relief. And Taylor sought an order "disgorg[ing]" from Harris "all funds" that she had removed from the decedent's accounts since the date of his death.

At a hearing on Taylor's contest, petition for declaratory relief, and motion for injunctive relief, the following discussion took place between the probate court and counsel for each party:

> [Taylor]: . . . . We agreed that we would nonsuit our [will contest] since [Harris] did submit the original will to the Court, and we said that we are accepting the will, but we are objecting to [Harris] being appointed executor.

. . . .

THE COURT: All you want to do is just settle the matter of an administrator?

[Taylor]: Yes, Your Honor. . . .

. . . .

Basically, [its] a contest to the provision saying that she is nominated to be executor, so.

[Harris]: Is it your dec action?

[Taylor]: It is there also.

[Harris]: Is it to disqualify her?

[Taylor]: No, sir. It is to say the account [Harris] is claiming is hers by right of survivorship should be set aside and should be part of the estate and distributed as part of decedent's will.

[Harris]: We should set it for trial because it sounds like a will contest.

. . . .

[Taylor]: . . . . The will does name successor executor. [Buckman] is here. I don't know if [Buckman] is willing to serve or not. My concern is her being able to serve independently of [Harris's] influence on her and [Harris] attempting to be a proxy for her. So we are asking the Court to give us guidance on how you want to proceed with the contest to the qualification.

THE COURT: I will probably appoint an independent dependent administrator that is not in any way related to the clients. I can do that. We can set it. Do you want a jury trial?

[Taylor]: We would request a jury trial.

. . . .

[Harris]: I understand as far as any administrator, my client does not want to agree to it only because—

THE COURT: She's not going to have a choice.

[Harris]: The value of the estate right now is so little. All that is left is that little house worth about 30,000 and a bank account maybe has about ten.

. . . .

[Taylor]: . . . . Our position is that the estate is worth about $200,000. You bring in all the accounts that [Harris] is alleging that she received by right of survivorship that shouldn't have been because [the decedent] didn't have capacity. We have evidence to proceed forward on the dec action, so we feel there [are] assets that need to be protected. We tried to mediate this and it was very ineffective. . . .

. . . .

THE COURT: I will say this, in most cases if there is a dispute, I will go outside just to be clean with it. . . .

. . . .

We can try another mediation or appoint a temporary dependent administrator.

. . . .

I'm not going to give either party control. When it's family you need someone outside.

After Buckman testified that she was willing to serve as alternate executor, the probate court moved forward with appointing an administrator as follows:

THE COURT: All right. I'm going to appoint Mr. Richard Tate as dependent administrator of this, and he will be in contact with you.

[Taylor]: Are we moving forward?

THE COURT: I just appointed someone.

[Harris]: This is to admit the will to probate.

[Taylor]: We are only contesting the appointment of executor.

[Harris]: But none of the other appointments—

[Taylor]:	Well, the Judge already made her decision that she is going to appoint a dependent administrator.
[Harris]:	I'm just trying to understand what your point is.
THE COURT:	If you-all will get in contact with him. And we will add that everything be frozen in those accounts. I do not want anything withdrawn from any of those accounts. They are to stay as they are.

After the hearing, the probate court admitted the will to probate, appointed Richard Tate as "Temporary Dependent Administrator with Will Annexed," and required Tate to post a bond in the amount of $50,000. The probate court further ordered that

> all financial institutions . . . that have financial accounts that were held in the name of [the decedent], individually or jointly, as of the date of death . . . and more specifically those accounts held at [institution] that [Harris] claims by right of joint . . . survivorship, immediately freeze all withdrawals or transfers of funds from said accounts by [Harris] or anyone else, until further order of [the probate court].

Appointment of Temporary Administrator

In her first issue, Harris argues that the probate court erred in not appointing her as independent executor and "appointing a dependent administrator" without first hearing evidence and finding her disqualified to serve.

As a threshold matter, we first consider our jurisdiction to hear Harris's appeal from the probate court's order appointing a temporary administrator. *See Freedom Commc'ns, Inc. v. Coronado,* 372 S.W.3d 621, 623–24 (Tex. 2012). "Appellate courts must determine, even sua sponte, the question of jurisdiction,

and the lack of jurisdiction may not be ignored simply because the parties do not raise the issue."[3] *Walker Sand, Inc. v. Baytown Asphalt Materials, Ltd*., 95 S.W.3d 511, 514 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

Generally, appeals may be taken only from final judgments. *Lehmann v. Har–Con Corp*., 39 S.W.3d 191, 195 (Tex. 2001). Probate proceedings are an exception to the "one final judgment" rule, in that it is possible to have more than one final, appealable order. *De Ayala v. Mackie*, 193 S.W.3d 575, 578 (Tex. 2006). Further, there may be appeals from interim orders rendered on discrete issues before the entire proceeding is concluded. *Id*. However, not every interlocutory order in a probate case is appealable. *Id*. "An order that merely sets the stage for the resolution of proceedings is interlocutory and not appealable." *In re Estate of Scott*, 364 S.W.3d 926, 927 (Tex. App.—Dallas 2012, no pet.); *see De Ayala*, 193 S.W.3d at 579.

The Texas Supreme Court has noted that "determining whether an otherwise interlocutory probate order is final enough to qualify for appeal has proved difficult." *De Ayala*, 193 S.W.3d at 578. Courts have in the past relied on a "substantial right" test, under which a probate court's order was appealable if it adjudicated a "substantial right." *Id*. Later, the supreme court set out to "clarify appellate jurisdiction," noting that "while adjudication of a 'substantial right' [is]

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[3] We requested and received supplemental briefing from both parties on the jurisdiction issue.

one factor to be considered, equally important" is "earlier precedent requiring that the order dispose of all issues in the phase of the proceeding for which it was brought." *Id*. "To sidestep 'potential confusion' about the appropriate test for jurisdiction," the supreme court adopted the following test:

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

Id. Thus, if there is not an express statute, an order in a probate case is final and appealable only if it disposes of all parties or issues in a particular phase of the proceeding. *See id*.

There is not a statute expressly declaring the appointment of a temporary administrator to be a "final and appealable" "phase" of a probate proceeding. *See id.*; *see, e.g.*, TEX. EST. CODE ANN. § 356.556(c) (Vernon 2014) ("The court's action in confirming or disapproving a report of a sale has the effect of a final judgment. Any person interested in the estate . . . is entitled to have an order entered under this section reviewed as in other final judgments . . . .").

We note, however, that the Estates Code does contemplate appeals from orders appointing temporary administrators. *See* TEX. EST. CODE ANN. § 351.053 (Vernon 2014) ("*Pending an appeal from an order or judgment appointing an*

administrator or temporary administrator, the appointee shall continue to: (1) act as administrator or temporary administrator; and (2) prosecute any suit then pending in favor of the estate." (emphasis added)). Courts have applied section 351.053, or otherwise considered appeals from orders appointing temporary administrators, where such orders also settled or resolved the issues raised in a particular phase of the proceedings. *See De Ayala*, 193 S.W.3d at 578 (absent express statute, probate order final and appealable only if it disposes of all parties or issues in particular phase of proceedings); *see, e.g.*, *Nelson v. Neal*, 787 S.W.2d 343, 343 (Tex. 1990) (considering appeal from probate court order finding "necessity for appointing a temporary administrator" and contest to such appointment not properly filed); *In re Estate of Vigen*, 970 S.W.2d 597, 598–99 (Tex. App.—Corpus Christi 1998, no pet.) (exercising jurisdiction over appeal from order appointing temporary administrator where probate court found applicant disqualified to serve as executor and "there [were] no ongoing proceedings relevant to [that] issue"); *Spies v. Milner*, 928 S.W.2d 317, 318–19 (Tex. App.—Fort Worth 1996, no writ) (order denying application to serve as executor final and appealable as to applicant's rights as executor); *see also Pine v. deBlieux*, 360 S.W.3d 45, 46 n.1 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (order settling party's rights as executor constituted "final, appealable order").

Harris argues that this Court has jurisdiction over her appeal from the probate court's order appointing "a dependent administrator" because the probate court "finally adjudicated a substantial right" by foreclosing her ability to serve as executor. She notes that the Estates Code vests a testator with the absolute power to select his own representative unless that person is found to be disqualified or unsuitable. *See* TEX. EST. CODE ANN. § 304.001 (Vernon 2014) (probate court "shall grant letters testamentary" to "persons qualified to act, in the following order: (1) the person named as executor in the decedent's will"); *id.* § 304.003 (Vernon 2014) (person found "unsuitable" not qualified to serve as executor); *In re Estate of Brimberry*, No. 12-04-00154-CV, 2006 WL 861483, at *4 (Tex. App.—Tyler Mar. 31, 2006, pet. denied) (mem. op.). And she asserts that the probate court appointed "a dependent administrator" without first hearing evidence and finding her disqualified or unsuitable to serve as executor.

The record reflects that the probate court, in its order, appointed Tate as a "*Temporary* Dependent Administrator." (Emphasis added.) The Estates Code provides that a probate court "may appoint a temporary administrator" if a contest related to probating a will is pending. *See* TEX. EST. CODE ANN. § 452.051(a) (Vernon Supp. 2015). And the appointment may continue until the contest is terminated and an executor is appointed. *See id.* § 452.051(b). Because Taylor filed a contest disputing that Harris is qualified to serve as executor, the probate

court was authorized to appoint a temporary administrator until the resolution of that dispute. *See id.*; *In re Estate of Deering*, No. 09-10-00229-CV, 2010 WL 3724750, at *2 (Tex. App.—Beaumont Sept. 23, 2010, no pet.) (mem. op.) (dispute over qualification of executor named in will authorized appointment of temporary administrator pending resolution); *In re Estate of Stanton*, 202 S.W.3d 205, 209 (Tex. App.—Tyler 2005, pet. denied).

Taylor, at the hearing on her contest, did not present any evidence that Harris is disqualified or unsuitable to serve as executor, and the probate court did not make any findings on the issue. However, section 452.051 does not require an evidentiary hearing or any such findings prior to the appointment of a temporary administrator. *See Cravey v. Hennings*, 705 S.W.2d 368, 370 (Tex. App.—San Antonio 1986, no writ) (applying former Probate Code).

Further, Taylor, in the probate court, sought a declaration that the financial accounts that Harris claims as her personal property are actually the property of the estate. A person who claims ownership of an estate's assets, to the exclusion of the estate, is "denying the estate's title" and "unsuitable as a matter of law" to serve as executor. *See Pine*, 360 S.W.3d at 49–51. Because the record does not reflect that the substance of the declaratory action, i.e., whether the accounts at issue actually belong to the estate, has been decided, there has not been a resolution of whether

Harris is unsuitable to serve as executor. Rather, the discussion in the record of the hearing shows that a trial on the matter is pending.

Further, we note that Harris did not, in the probate court, file a contest to the appointment of Tate as temporary administrator or challenge his suitability to serve. *See* TEX. EST. CODE ANN. §§ 452.006, 452.007 (Vernon 2014); *Nelson*, 787 S.W.2d at 346 (appointment of temporary administrator voidable if shown by contest to be improper).

We conclude that the probate court's order appointing a temporary administrator is interlocutory and not subject to immediate appeal. *See De Ayala*, 193 S.W.3d at 578 ("[I]f there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or parties not disposed of, then the probate order is interlocutory.").

Accordingly, we dismiss for lack of jurisdiction Harris's appeal from the probate court's order appointing a temporary administrator.

Temporary Injunction[4]

In a portion of her second issue, Harris argues that the probate court's temporary injunction is "void" because the probate court, in its order, did not set

[4] This Court has jurisdiction over Harris's appeal from the probate court's temporary injunction order. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4) (Vernon 2015) (authorizing interlocutory appeal from temporary injunction).

the case for trial. *See* TEX. R. CIV. P. 683. Taylor, in her supplemental brief on appeal, concedes that the temporary injunction order is "void" on this ground and requests that the case be remanded "so that the [probate] court may reissue the temporary injunction in conformity with [r]ule 683."

Whether to grant or deny a temporary injunction is within a trial court's sound discretion. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); *INEOS Grp. Ltd. v. Chevron Phillips Chem. Co.*, 312 S.W.3d 843, 848 (Tex. App.—Houston [1st Dist.] 2009, no pet.). A trial court abuses its discretion in granting or denying a temporary injunction if it misapplies the law to the established facts. *INEOS Grp. Ltd.*, 312 S.W.3d at 848. On appeal, the scope of our review is limited to the validity of the temporary injunction order. *Id.*

The purpose of a temporary injunction is to preserve the status quo of the litigation's subject matter pending a trial on the merits. *Butnaru*, 84 S.W.3d at 204. A temporary injunction is an extraordinary remedy that does not issue unless the party seeking relief pleads and proves: (1) a cause of action against the defendant, (2) a probable right to the relief sought, and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru*, 84 S.W.3d at 204. "To show a probable right of recovery, an applicant need not establish that it will finally prevail in the litigation, but it must, at the very least, present some evidence that,

under the applicable rules of law, tends to support its cause of action." *INEOS Grp. Ltd.*, 312 S.W.3d at 848.

Rule 683 provides, in pertinent part, as follows:

> Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought. The appeal of a temporary injunction shall constitute no cause for delay of the trial.

TEX. R. CIV. P. 683. This procedural requirement is mandatory. *Qwest Commc'ns Corp. v. AT&T Corp.*, 24 S.W.3d 334, 337 (Tex. 2000). And an order granting a temporary injunction that does not meet this requirement is "subject to being declared void and dissolved." *Id.* "The reason for requiring that an injunction order include a trial date is to prevent [a] temporary injunction from effectively becoming permanent without a trial." *EOG Res., Inc. v. Gutierrez*, 75 S.W.3d 50, 53 (Tex. App.—San Antonio 2002, no pet.).

Here, the probate court, in its temporary injunction order, did not set the case for trial. Because the order does not comply with rule 683, we conclude that the probate court erred in granting the temporary injunction. *See* TEX. R. CIV. P. 683; *Crenshaw v. Chapman*, 814 S.W.2d 400, 402 (Tex. App.—Waco 1991, no pet.) (temporary injunction order imposing "freeze" on estate assets "fatally defective" and void where order did not set case for trial). Accordingly, we hold that the probate court's order granting Taylor a temporary injunction is void, and we order

the temporary injunction dissolved. *See Qwest Commc'ns Corp*., 24 S.W.3d at 337.

We sustain Harris's second issue, in part.[5]

Conclusion

We dismiss Harris's appeal from the probate court's order appointing a temporary administrator. We reverse the probate court's order granting a temporary injunction, and we remand the case to the probate court for further proceedings.

Terry Jennings
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Lloyd.

[5] Because Harris's procedural complaint is dispositive, we do not reach the remaining portions of her second issue, in which she asserts that Taylor did not present evidence establishing a probable right to relief and irreparable injury.