Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00382-CV

Anthony C. **AGUILAR** and Michael A. Aguilar,
Appellants

v.

Margaret Anne **MORALES** individually and as Independent Executor of the Estate of Alvilda M. Aguilar; William E. Leighner, and Arthur Bayern,
Appellees

From the Probate Court No. 2, Bexar County, Texas
Trial Court No. 2012-PC-2802
Honorable Tom Rickhoff, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Karen Angelini, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: September 20, 2017

DISMISSED FOR LACK OF JURISDICTION

Appellants Anthony C. Aguilar and Michael Aguilar raise sixteen issues relating to three orders[1] entered in the probate proceeding regarding their mother Alvilda Aguilar's estate. Appellants raised the same issues in Appeal No. 04-16-00381-CV relating to their father Ramiro

[1] Appellants appeal the following three orders: (1) May 27, 2016 Order Denying Motion to Recuse; (2) June 7, 2016 Order declaring Anthony Aguilar a vexatious litigant; and (3) June 9, 2016 Order Granting Joint Motion to Dismiss Plaintiff's Baseless Claims Pursuant to Rule 91a.

Aguilar, Jr.'s estate. Because we conclude the complained-of orders are not properly before this court on appeal, we dismiss for lack of jurisdiction.

BACKGROUND

For purposes of this appeal, a detailed rendition of the underlying facts is unnecessary. Accordingly, we provide only those facts necessary for context.

Alvilda Aguilar passed away within a month of her husband, Ramiro Aguilar, Jr., in the summer of 2012. Appellants' sister, Margaret Morales, applied to probate their parents' wills in Statutory Probate Court No. 2 of Bexar County. The wills were admitted to probate, and Morales was appointed independent executrix of both estates on September 17, 2012.

On December 9, 2015, Morales filed an Account for Final Settlement and a Petition for Declaratory Judgment with Probate Court No. 2. On January 27, 2016, following a hearing on the final accounting, Probate Court No. 2 entered an Order Approving Final Account, which ordered that outstanding debts and expenses be paid and the remaining estate property be distributed prior to Probate Court No. 2's consideration of Morales's petition for a declaration that she be discharged and the estate closed.

On February 22, 2016, appellants filed a Counterclaim and Third-Party Claim in Probate Court No. 2 naming as defendants Morales and attorneys William Leighner and Arthur Bayern. On April 27, 2016, Bayern and Leighner jointly filed an amended motion to dismiss the claims against them as baseless pursuant to Texas Rule of Civil Procedure 91a. Probate Court No. 2 granted the motion on June 9, 2016.

Meanwhile, on March 3, 2016, Morales filed her First Amended Petition for Declaratory Judgment. On March 21, 2016, appellants filed a motion to recuse Judge Rickhoff, which was

denied by Judge David Peeples on May 21, 2016.[2] On March 25, 2016, Morales filed a motion to declare Anthony Aguilar a vexatious litigant and require security for costs and a pre-filing order. Probate Court No. 2 granted the motion, and on June 7, 2016, entered an order declaring Anthony Aguilar a vexatious litigant.

This appeal followed.

PROBATE COURT'S JURISDICTION

Appellants raise several issues concerning the closing of the estate and whether Probate Court No. 2 continued to have jurisdiction to enter orders and award attorney's fees.

Closing of the Estate – Estates Code Section 405

Appellants argue Probate Court No. 2 lacked jurisdiction to enter the complained-of orders because Probate Court No. 2's January 27, 2016 Order Approving Final Account closed the estate. Appellants also contend the "final" distribution of assets closed the estate.

The Texas Estates Code provides that an independent executor may close the independent administration of an estate by filing with the court a closing report or a notice of closing of the estate

> [w]hen all of the debts known to exist against the estate have been paid, or when they have been paid so far as the assets in the independent executor's possession will permit, when there is no pending litigation, and when the independent executor has distributed to the distributees entitled to the estate all assets of the estate, if any, remaining after payment of debts… .

TEX. EST. CODE ANN. § 405.004 (West 2014).

[2] Presiding Judge Guy Herman assigned Judge David Peeples to hear the motion.

Order Approving Final Account

Appellants first argue Morales's Account for Final Settlement operated as a closing report or notice of closing estate, and therefore, Probate Court No. 2's Order Approving Final Account closed the estate.

The January 27, 2016 order specifies additional actions that must be accomplished to achieve final settlement and the closing of the estate.[3] Specifically, Probate Court No. 2 ordered that the outstanding debts and expenses "shall be paid" and further ordered that the remaining property "after payment of all debts and expenses shall be delivered to the beneficiaries" as directed in the will, subject to any withholding. Probate Court No. 2 then ordered that upon distribution of the estate, the court would consider Morales's petition for a declaration that she "be discharged and the administration of this [e]state be closed."

Further, our review of the docketing statements and the clerk's record filed in the pending appeals arising from the underlying cause shows the Independent Executor's Petition for Declaratory Judgment was pending at the time of the January 27, 2016 order. Neither the record nor the docketing statement reflect that Probate Court No. 2 signed an order disposing of the claims asserted in the petition.

Accordingly, we conclude Probate Court No. 2's Order Approving Final Account did not close the estate.

"Final" Distribution of Assets

Appellants assert the estate's assets were fully distributed by February 5, 2016, and that distribution of the assets served to close the estate. Appellants point to a letter from William Leighner as proof of the "final" distribution. According to appellants, Leighner wrote in the letter

[3] We have previously concluded the probate court's January 27, 2016 order was not a final, appealable order. *See Estate of Aguilar*, No. 04-16-00656-CV, 2107 WL 685711 (Tex. App.—San Antonio Feb. 22, 2017, no pet.).

dated February 5, 2016 that "there was a complete distribution to each of the beneficiaries after payment of debts, taxes, etc."

Appellants rely on *In re John G. Kenedy Mem'l Found.* and *In re Blankenship* to support their position. In a discussion of whether an estate was closed or pending, our sister court pointed out in *In re John G. Kenedy Mem'l Found.* that "[T]he final distribution of an estate's assets after all debts and claims against the estate are paid results in the closing of an estate." *In re John G. Kenedy Mem'l Found.*, 159 S.W.3d 133, 144 (Tex. App.—Corpus Christi 2004, orig. proceeding). In *In re Blankenship*, this court stated, "An estate is closed when the probate court signs an order discharging the administrator and closing the estate, or when all of the estate's property is distributed, the estate's debts are paid, and there is no need for further administration." *In re Blankenship*, 392 S.W.3d 249, 257-58 (Tex. App.—San Antonio 2012, no pet.).

Although Morales's Account for Final Settlement indicates there is no further need for administration of the estate and that debts are paid, it does not indicate all distributions had been made to the beneficiaries. Additionally, as discussed above, Probate Court No. 2's order approving the final account contemplated more steps to be taken before the closing of the estate. Further, the February 5, 2016 letter contains no assertions that a "complete distribution" was made to the beneficiaries "after payment of debts [and] taxes." Rather, Leighner describes two distribution checks payable to Anthony Aguilar and provides a history of previous distributions to all beneficiaries. Leighner makes no mention of a final or complete distribution in the February 5, 2016 letter.

Therefore, we conclude the estate was not closed by a complete and final distribution of the estate's assets by February 5, 2016.

"Mother Hubbard" Clause

Appellants additionally contend the "Mother Hubbard" clause contained in Probate Court No. 2's June 7, 2016 order, which stated "[a]ll other relief requested, be and hereby is Denied," finalized the proceedings and closed the estate. We disagree.

An order that finalizes proceedings is one that disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and parties. *Bison Bldg. Materials, Ltd. v. Aldridge*, 422 S.W.3d 582, 585 (Tex. 2002); *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192-93 (Tex. 2001). "[T]he standard Mother Hubbard clause is used in interlocutory orders so frequently that it cannot be taken as any indication of finality." *Lehmann*, 39 S.W.3d at 204.

The June 7, 2016 Order reads: "On this the 7th day of June, 2016, came to be heard the MARGARET ANNE MORALES' Motion to declare Plaintiff, ANTHONY C. AGUILAR, A VEXATIOUS LITIGANT AND REQUIRING SECURITY FOR COSTS AND MOTION FOR A PREFILING ORDER." The order includes Probate Court No. 2's findings with respect to: Anthony Aguilar's likelihood of prevailing in his counterclaim and third-party claim; the number of litigations Anthony Aguilar commenced, prosecuted, or maintained as a pro se litigant; and Anthony Aguilar's repeated re-litigation of the validity of the determinations against him or the same cause of action, claim, or controversy against Morales. Probate Court No. 2's order declares Anthony Aguilar a vexatious litigant, orders that security be paid, and concludes with the language: "All other relief requested, be and hereby is Denied."

The order was entered following a hearing on Morales's motion to declare Anthony Aguilar a vexatious litigant, and the contents of the order clearly address only Morales's motion. The order does not state with unmistakable clarity it is a final judgment with respect to all parties or claims.

For these reasons, we conclude the "Mother Hubbard" clause contained in Probate Court No. 2's June 7, 2016 order did not close the estate.

Issues one, two, and three are predicated on a finding that the estate was closed by one of the three events discussed above. Having already determined the estate was not closed by any of these three events, we disagree with appellants' contention Probate Court No. 2 lacked jurisdiction to enter subsequent orders.

Issues one, two, three, five, six, and seven are overruled.

Attorney's Fees

Although appellants identify issue sixteen as whether a court may award attorney's fees for events occurring after the court has lost jurisdiction, appellants provide no citations or argument in support of the issue. *See* TEX. R. APP. P. 38.1 (requiring an appellate brief to provide the court with a discussion of the facts and the authorities relied upon). Because appellants' briefing on this issue provides no argument or analysis supporting any argument, the brief provides insufficient basis for us to analyze and determine this issue.

Therefore, we conclude appellants waived this issue based upon their failure to comply with Rule 38.1.

Issue sixteen is overruled.

Having addressed appellants' issues implicating Probate Court No. 2's jurisdiction, we turn to the question of whether we have jurisdiction to consider the remaining complained-of orders that are the subject of appellants' appeal.

APPELLATE COURT'S JURISDICTION

As a general rule, appeals may be taken only from final judgments. *See Lehmann*, 39 S.W.3d at 195. However, "[p]robate proceedings are an exception to the 'one final judgment' rule; in such cases, 'multiple judgments final for purposes of appeal can be rendered on certain discrete

issues.'" *De Ayala v. Mackie*, 193 S.W.3d 575, 578 (Tex. 2006) (quoting *Lehmann*, 39 S.W.3d at 192). To determine whether a probate court order is final for purposes of appeal, we first give controlling effect to "an express statute, such as the one for the complete heirship judgment, declaring the phase of the probate proceedings to be final and appealable." *Id*. (quoting *Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995)). If there is no express statute, a probate court order is final and appealable only if it "dispose[s] of all parties or issues in a particular phase of the proceedings." *Id*. at 579. An order that "does not end a phase of the proceedings, but sets the stage for the resolution of the proceedings is interlocutory." *Id*.

Declaratory Judgment Action

Appellants contend Probate Court No. 2 lacks jurisdiction over Morales's declaratory judgment action filed in Probate Court No. 2. Appellants assert the action is not a proceeding incident to the estate because it does not concern, and is not connected to, matters relating to the estate. The record before us indicates that appellants' complaints focus on an action which is still pending in the lower court. Appellants provide us with no legal basis to review the pending action in the absence of a final and appealable order. Accordingly, we conclude appellants' complaints regarding Probate Court No. 2's exercise of jurisdiction over the declaratory judgment action are not properly before this court.

Issue four is dismissed for lack of jurisdiction.

May 27, 2016 Order Denying Motion to Recuse[4]

Appellants raise three issues concerning Probate Court No. 2's May 27, 2016 order denying their motion to recuse. Appellants contend the denial of the motion to recuse was an abuse of discretion and violated the due process clauses of the United States and Texas Constitutions.

[4] We have previously addressed appellants' attempt to appeal the probate court's September 1, 2016 order denying a separate tertiary motion to recuse. *See Estate of Aguilar*, No. 04-16-00656-CV, 2107 WL 685711 (Tex. App.—San

Appellants filed their motion to recuse Judge Rickhoff pursuant to section 25.00255 of the Texas Government Code on March 21, 2016. TEX. GOV'T CODE ANN. § 25.00255 (West Supp. 2016). Appellants' motion to recuse was denied by Judge Peeples on May 21, 2016.

The denial of a recusal motion is only reviewable on appeal from a final judgment. *In re Matter of Guardianship of Hart*, 460 S.W.3d 742, 743 (Tex. App.—Fort Worth 2015, no pet.) ("It is clear that a party may appeal from an order denying a motion to recuse a judge of a statutory probate court only after final judgment has been entered."). A final judgment has not been entered in the underlying proceeding. *See Estate of Aguilar*, No. 04-16-00655-CV, 2017 WL 603632 (Tex. App.—San Antonio Feb. 15, 2017, no pet.). Therefore, appellants' complaints regarding Probate Court No. 2's order denying their motion to recuse are not properly before this court.

Issues eight, nine, and ten are dismissed for lack of jurisdiction.

June 7, 2016 Order – Vexatious Litigant

Appellants appeal Probate Court No. 2's order declaring Anthony Aguilar a vexatious litigant. Appellants argue Probate Court No. 2 erred because, pursuant to Estates Code section 32.001(d), all proceedings incident to a probate proceeding are considered one proceeding.

When a court finds a plaintiff to be a vexatious litigant under section 11.054 of the Civil Practice and Remedies Code, the court is required to order the plaintiff furnish security, set the amount of security, and set the date by which it must be furnished. TEX. CIV. PRAC. & REM. CODE ANN. § 11.055. If security is not posted by the date ordered, the trial court is required to dismiss the litigation as to the moving defendant. *Id*. at § 11.056.

Here, there is no relevant rule or statute that declares the type of challenged order to be final and appealable. Applying the *De Ayala* test, we conclude that Probate Court No. 2's order

Antonio Feb. 22, 2017, no pet.). We dismissed appellants' appeal for lack of jurisdiction because the probate court's order was one that could only be reviewed from a final judgment. *Id*.

declaring Anthony Aguilar a vexatious litigant, which threatened to dismiss Anthony Aguilar's claims against Morales if Anthony Aguilar did not pay security on or before June 21, 2016 "is more like a prelude than a finale." *De Ayala*, 193 S.W.3d at 578. The record in this appeal does not show Anthony Aguilar failed to post security or that his action was dismissed. Therefore, the order declaring Anthony Aguilar a vexatious litigant does not dispose of a claim which if asserted independently would be the proper subject of a lawsuit. *Id*.; *see also Almanza v. Keller*, 345 S.W.3d 442, 443 (Tex. App.—Waco 2011, no pet.) ("[T]here is no statutory right of an interlocutory appeal of a vexatious litigant order or the related order requiring security."); *cf. Douglas v. Am. Title Co*., 196 S.W.3d 876, 877 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (addressing on appeal trial court's order declaring appellant vexatious litigant only after he failed to furnish court-ordered security and his lawsuit was dismissed).

Accordingly, appellants' complaint regarding Probate Court No. 2's order declaring Anthony Aguilar a vexatious litigant is not properly before this court at this time.

Issue fifteen is dismissed for lack of jurisdiction.

Rule 91A Motion

Appellants present four issues regarding Probate Court No. 2's Order Granting Joint Motion to Dismiss Plaintiff's Baseless Claims Pursuant to Rule 91a. Appellants argue Probate Court No. 2 erred because it did not address the motion until seventy-six days after it was filed. Appellants additionally contend their third-party claim had a basis in law and stated a cause of action that had a basis in fact.

Appellants filed a petition entitled "Counterclaim and Third Party Claim" naming Morales as counter defendant and Bayern and Leighner as third party defendants. Bayern and Leighner filed a joint amended motion to dismiss appellants' baseless claims pursuant to Rule 91a, which Probate Court No. 2 granted on June 9, 2016. Probate Court No. 2's order stated:

> Third party petition and all transferred causes of action filed by [appellants] against [Leighner] and [Bayern] on February 22, 2016 in this cause of action [are] hereby DISMISSED WITH PREJUDICE."

Probate Court No. 2's order, however, did not dispose of the claims against Morales. Nor does the record contain an order severing the claims against Bayern and Leighner from those against Morales.

Here, there is no relevant rule or statute declaring the type of order challenged by appellants to be final and appealable. Applying the *De Ayala* test, we conclude that Probate Court No. 2's order, which dismissed only the claims brought against Bayern and Leighner, "is more like a prelude than a finale." *De Ayala*, 193 S.W.3d at 578; *cf. Merrick v. Helter*, 500 S.W.3d 671, 672-73 & n.4 (Tex. App.—Austin 2016, pet. denied) (noting that dismissal did not become final and appealable until remaining claims of all parties were disposed of through nonsuit).

Therefore, appellants' claims complaining of Probate Court No. 2's order granting Bayern's and Leighner's joint motion to dismiss are not properly before this court.

Issues eleven, twelve, thirteen, and fourteen are dismissed for lack of jurisdiction.

CONCLUSION

For the reasons stated above, this appeal is dismissed for lack of jurisdiction.

Irene Rios, Justice