COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00110-CV

ALBERT LYNN BARCROFT APPELLANT

V.

CANDACE WALTON & KENNETH GIBBS APPELLEES

FROM PROBATE COURT NO. 2 OF TARRANT COUNTY
TRIAL COURT NO. 2005-0000126-2-D

MEMORANDUM OPINION[1]

I. Introduction

In nine issues, pro se Appellant Albert Lynn Barcroft (now deceased)[2] appeals the trial court's default judgment against him and in favor of Appellees

[1] *See* Tex. R. App. P. 47.4.

Candace Walton and Kenneth Gibbs, raising arguments about "jurisdiction, venue, failure to give notice, failure to severe [sic], and constitutional issues." We overrule Barcroft's second issue—which pertains to severance and the finality of the trial court's default judgment—as moot because while this appeal was pending, the trial court issued a final judgment on January 11, 2014.[3] We also overrule portions of his first issue and his seventh issue to the extent that they have raised subject matter jurisdiction, which we review sua sponte, *see Freedom Communications, Inc. v. Coronado*, 372 S.W.3d 621, 624 (Tex. 2012), and we overrule his remaining issues for failure to comply with the rules of civil and appellate procedure. As such, we affirm the trial court's judgment.

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[2]*See* Tex. R. App. P. 7.1(a)(1) (providing that if a party to a civil case dies after the trial court renders judgment but before the case has been finally disposed of on appeal, the appellate court will proceed to adjudicate the appeal as if all parties were alive, and its judgment will have the same force and effect as if rendered when all parties were living).

[3]As we have previously stated,

> The mootness doctrine prevents courts from rendering advisory opinions, which are outside the jurisdiction conferred by article II, section 1 of the Texas Constitution. A controversy must exist between the parties at every stage of the legal proceeding, including the appeal. An issue may become moot when a party seeks a ruling on some matter that, when rendered, would not have any practical legal effect on a then-existing controversy.

Mortg. Elec. Registration Sys., Inc. v. DiSanti, No. 02-10-00169-CV, 2011 WL 255815, at *2 (Tex. App.—Fort Worth Jan. 27, 2011, no pet.) (mem. op.) (citations omitted).

II. Subject Matter Jurisdiction

In his first issue, Barcroft complains that the trial court erred because he was given no notice "of hearings held to determine [his] standing and/or liability." Although standing is a component of subject matter jurisdiction, *see Texas Association of Business v. Texas Air Control Board*, 852 S.W.2d 440, 445 (Tex. 1993), it generally pertains to the *plaintiff*'s ability to bring a claim when he is personally aggrieved. *See Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996). Barcroft was a defendant, not a plaintiff, in the case below, and he has not directed us to any authority or provided any explanation to support his standing contention in his first issue.[4] *Cf.* Tex. R. App. P. 38.1(i) (requiring an appellate brief to contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record). Therefore, we overrule the standing portion of Barcroft's first issue.

In part of his seventh issue, Barcroft again raises a question about the probate court's subject matter jurisdiction over the case, but he refers us to a venue provision and to matters not contained within the official appellate record of the case, some of which he attached to his brief. *See* Tex. R. App. P. 34.1. While subject matter jurisdiction may be challenged at any time, venue—even

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[4]Barcroft does not address standing in the argument under his first issue. Instead, he refers us to the "hearings for death penalty sanctions and default judgment," for which he asserts he received no notice. Therefore, we conclude that he is actually complaining in this issue about Walton and Gibbs's motion to strike his pleadings and their motion for default judgment, and not standing as it is commonly understood in legal parlance.

mandatory venue—may be waived. *See* Tex. R. Civ. P. 86(1); *Scott v. McMillian*, No. 02-05-00410-CV, 2006 WL 1351502, at *2 (Tex. App.—Fort Worth May 18, 2006, no pet.) (mem. op.) ("Venue requirements, unlike jurisdictional requirements, may be waived, even if mandatory."); *see also Gordon v. Jones*, 196 S.W.3d 376, 383 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Herring v. Welborn*, 27 S.W.3d 132, 141 (Tex. App.—San Antonio 2000, pet. denied) ("A jurisdictional requirement []such as that contained in the Probate or Tax Codes[] takes precedence over a venue requirement.").[5] And "[w]e cannot consider documents attached to an appellate brief that do not appear in the record." *Murphy v. Leveille*, No. 02-08-00130-CV, 2009 WL 2619857, at *2 n.3 (Tex. App.—Fort Worth Aug. 26, 2009, no pet.) (mem. op.) (citing *Till v. Thomas*, 10 S.W.3d 730, 733 (Tex. App.—Houston [1st Dist.] 1999, no pet.)). As we explained in *Murphy*, "This court must hear and determine a case based on the record *as filed* and may not consider documents attached as exhibits to briefs." *Id.* (emphasis added).

But because in a previous case we concluded that the probate court lacked jurisdiction over tort claims raised in a trust case, *see In re Guardianship*

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[5]In his eighth and ninth issues, Barcroft argues about "dominant jurisdiction," but this is a venue doctrine, not a question of subject matter or personal jurisdiction. *See Gordon*, 196 S.W.3d at 382–83 (explaining that venue and jurisdiction are not synonymous); *see also Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 622 (Tex. 2005) ("The transfer of a case pertains to venue, not jurisdiction."); *Perry v. Del Rio*, 66 S.W.3d 239, 252 (Tex. 2001) (explaining the reasons behind the dominant jurisdiction doctrine and its exceptions).

of Gibbs (*Gibbs I*), 253 S.W.3d 866, 869, 877 (Tex. App.—Fort Worth 2008, pet. dism'd) (op. on reh'g), and because we must review subject matter jurisdiction sua sponte, we will review this case's pertinent procedural background and the statutory bases for the probate court's subject matter jurisdiction to determine whether the probate court had subject matter jurisdiction in this case.

A. Procedural Background of the Instant Case

On April 1, 2014, the Pentex Foundation sued Walton, Gibbs, and their brother Howard Gibbs[6] in Fannin County. Three days later, Walton and Gibbs filed in Tarrant County probate court a petition for injunctive relief against Howard; Beverly Miller, individually and as trustee of the GWB Trust; Barcroft, individually and as the legal representative of the Pentex Royalty Trust and the Pentex Foundation; and Danny Unger, as trustee of the GBU Friends and Associates Trust and as the agent of the GWB Trust. In their petition, Walton and Gibbs sought to freeze all assets under the ownership and control of Howard, Miller, Barcroft, Unger, the GWB and GBU Trusts, the Pentex Royalty Trust, and the Pentex Foundation to secure the assets owned by the GWB Trust and to prevent future improper and illegal transfers from one trust to another.

In conjunction with their petition for injunctive relief, Walton and Gibbs sued for fraud, fraudulent concealment, civil conspiracy, theft, unjust enrichment, and breach of fiduciary duty. Among other things, they also sought to remove

[6]For clarity, we will refer to Howard Gibbs by his first name because he and appellee Kenneth Gibbs share the same last name.

Miller as trustee and to appoint a successor trustee. And they sought to transfer the Fannin County case to the probate court, arguing that it was ancillary to their case. The Fannin County court transferred its case to the Tarrant County probate court.[7]

Ultimately, the Tarrant County probate court struck Barcroft's pleadings for discovery abuse in September 2015 and granted a sizable default judgment against him in December 2015. The trial court signed a turnover order against Barcroft on September 19, 2016, which Barcroft appealed pro se, and which this court affirmed. *See Barcroft v. Walton*, No. 02-16-00404-CV, 2017 WL 1738079, at *2 (Tex. App.—Fort Worth May 4, 2017, no pet.) (mem. op.).

[7]Our record does not contain the original petition filed in the Fannin County case, and the Fannin County court was unsuccessful in its later attempt to vacate its transfer order. *See In re Gibbs*, No. 06-15-00002-CV, 2015 WL 400468, at *1 (Tex. App.—Texarkana Jan. 30, 2015, orig. proceeding) (mem. op.) (granting Walton and Gibbs's petition for writ of mandamus when the Fannin County court's November 21, 2014 order attempting to vacate the transfer order was issued after the court had lost jurisdiction to vacate it); *In re Pentex Found.*, No. 06-15-00003-CV, 2015 WL 392857, at *1 (Tex. App.—Texarkana Jan. 30, 2015, orig. proceeding) (mem. op.) (denying the Pentex Foundation's petition for writ of mandamus seeking to enforce a contractual venue provision when the case had been transferred to Tarrant County, a county over which the Sixth Court of Appeals had no jurisdiction). The Pentex Foundation and Joshua Unger, a trustee of the GBU Trust, filed a petition for writ of mandamus in this court seeking to enforce the Fannin County contractual venue provision that the Sixth Court of Appeals had refused to consider. *See In re Pentex Found.*, No. 02-15-00069-CV, 2015 WL 4472240, at *1 (Tex. App.—Fort Worth July 21, 2015, orig. proceeding) (mem. op.). We denied the petition. *Id.*

B. Precedent

We previously addressed a probate court's jurisdiction to hear tort claims involving a trust in a case involving some of the same individuals now before us. *See Gibbs I*, 253 S.W.3d at 869, 877. *Gibbs I* pertained to a trust of which Walton and Gibbs's mother Kathryn was a beneficiary. *Id.* at 869. Kathryn's children—Walton, Gibbs, Kip, and Howard—were also beneficiaries, and the trust provided that if Kathryn and any three of her four children agreed in writing, additional funds could be removed from the trust for her benefit. *Id.* In 1998, without consulting Kip, Kathryn, Walton, Gibbs, and Howard signed written authorizations to withdraw $1,015,000 from the trust to prepare for Y2K. *Id.*

Two years later, after Y2K came and went, Kip sued in Denton County Probate Court as Kathryn's next friend and sought guardianship over Kathryn's estate. *Id.* He also asserted claims against his siblings "for restitution/money had and received and breach of fiduciary duties related to removal of the trust funds" and sought punitive damages. *Id.* at 869–70. Ultimately, Kip won a $1,060,799.21 judgment on his restitution and breach-of-fiduciary-duty claims—which were transferred to the Denton County Probate Court as ancillary to the guardianship case—and the trial court modified the trust to remove Walton, Gibbs, and Howard as trust beneficiaries. *Id.* at 870. We vacated the trial court's judgment and rendered judgment dismissing the cause after concluding that the Denton County Probate Court lacked jurisdiction over Kip's tort claims. *Id.* at 877.

In determining that the probate court lacked subject matter jurisdiction over Kip's restitution and breach-of-fiduciary-duty claims, we reviewed the then-applicable statutes and noted that a statutory probate court's jurisdiction over actions involving trusts is concurrent with that of a district court. *Id.* at 870–71. Therefore, we stated, "the district court's jurisdiction over actions involving trusts determines the extent of a statutory probate court's jurisdiction over such actions." *Id.* at 871. We recounted the list of ten items that property code section 115.001(a) set out for actions "concerning trusts" over which a district court had jurisdiction and determined that Kip's causes of action against his siblings for restitution and breach of fiduciary duty were not enumerated in section 115.001(a) and did not fall within its scope.[8] *Id.* at 871–72. We stated that the mere fact that trust funds were implicated by a claim did not transform the claim into one "concerning" or "involving" trusts. *Id.* at 872. And because no law at that time gave the trial court subject matter jurisdiction over Kip's tort claims against his siblings for restitution and breach of fiduciary duty, we held that the trial court lacked subject matter jurisdiction over those claims and that its judgment rendered against Walton, Gibbs, and Howard on the claims was void. *Id.* at 877. Accordingly, we vacated the trial court's judgment and rendered judgment dismissing the cause. *Id.*

[8]Kip had asserted "fraud-type claims against [his siblings]." *Gibbs I*, 253 S.W.3d at 872.

C. Amendment to Section 115.001

Gibbs I was brought in the trial court before the legislature's 2007 amendment to section 115.001, which added subsection (a-1) and some additional language to subsection (a). *See* Act of May 16, 2007, 80th Leg., R.S., ch. 451, § 11, 2007 Tex. Gen. Laws 801, 804–05; *see also In re Wheeler*, 441 S.W.3d 430, 435 n.2 (Tex. App.—Waco 2014, orig. proceeding) (observing that *Gibbs I* predated the 2007 amendments); *Gibbs I*, 253 S.W.3d at 868 (withdrawing the court's October 5, 2006 opinion to substitute in its place the court's April 3, 2008 opinion on rehearing).

As of September 1, 2007, the pertinent portion of section 115.001, with the new additions italicized below, now provides:

> (a) Except as provided by Subsection (d) of this section, a district court has original and exclusive jurisdiction over *all proceedings by or against a trustee and* all proceedings concerning trusts, including proceedings to:
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> (1) construe a trust instrument;
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> (2) determine the law applicable to a trust instrument;
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> (3) appoint or remove a trustee;
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> (4) determine the powers, responsibilities, duties, and liability of a trustee;
>
> (5) ascertain beneficiaries;
>
> (6) make determinations of fact affecting the administration, distribution, or duration of a trust;
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> (7) determine a question arising in the administration or distribution of a trust;

(8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle;

(9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and

(10) surcharge a trustee.

(a-1) *The list of proceedings described by Subsection (a) over which a district court has exclusive and original jurisdiction is not exhaustive. A district court has exclusive and original jurisdiction over a proceeding by or against a trustee or a proceeding concerning a trust under Subsection (a) whether or not the proceeding is listed in Subsection (a)*.

. . . .

(d) The jurisdiction of the district court is exclusive except for jurisdiction conferred by law on:

(1) A statutory probate court[.]

Tex. Prop. Code Ann. § 115.001(a), (a-1), (d)(1) (West 2014) (emphasis added); *see also* Tex. Gov't Code Ann. § 25.2221(c)(2) (West 2004) (stating that Probate Court No. 2 of Tarrant County is a statutory probate court); Tex. Est. Code Ann. § 22.007(c) (West 2014) (stating that a "statutory probate court" is a court created by statute and designated as a statutory probate court under chapter 25 of the government code), § 32.001 (stating that a probate court may exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy), § 32.007(2) (explaining that a statutory probate court has concurrent jurisdiction with a district court in an action by or against a trustee).

This case was brought in the probate court to remove a trustee but also to obtain damages for tort claims—fraud and other misdeeds—involving the trust. Because the legislature has expressly provided that the list of proceedings in subsection 115.001(a) is not exhaustive and that a district court has jurisdiction over a proceeding by or against a trustee or a proceeding concerning a trust under subsection (a) "whether or not the proceeding is listed" therein,[9] and because "the district court's jurisdiction over actions involving trusts determines the extent of a statutory probate court's jurisdiction over such actions," *Gibbs I*, 253 S.W.3d at 871, we conclude that the trial court had subject matter jurisdiction to hear the case. Therefore, we overrule this portion of Barcroft's seventh issue to the extent that he raised subject matter jurisdiction.

III. Procedure

As noted above, Barcroft is pro se. But pro se litigants are "held to the same standards as licensed attorneys and must comply with all applicable rules."[10] *Tchernowitz v. Gardens at Clearwater*, No. 04-15-00716-CV, 2016 WL

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[9]As to statutory construction, "When statutory text is clear, we do not resort to rules of construction or extrinsic aids to construe the text because the truest measure of what the Legislature intended is what it enacted." *Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp.*, 520 S.W.3d 887, 893 (Tex. 2017) (citing *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016)).

[10]We note for context that this pro se case and Barcroft's pro se appeal of the turnover order have not been his first experiences with the legal system. *See Barcroft v. State*, 900 S.W.2d 370, 371–72 (Tex. App.—Texarkana 1995, no writ) (concluding that pro se appellant's suit against the State for a declaratory judgment designating him to be a "Private State Citizen of Texas," with all rights and immunities "of a state citizen/sovereign," was frivolous and affirming the trial

6247008, at *2 (Tex. App.—San Antonio Oct. 26, 2016, no pet.) (mem. op.).[11] This is to ensure fairness in our treatment of all litigants through the use of a single set of rules. *See Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005). The parties and this court are bound by the statutes, cases, and rules of procedure that apply to the case. *See, e.g.*, *ReadyOne Indus., Inc. v. Casillas*, 487 S.W.3d 254, 263 (Tex. App.—El Paso 2015, no pet.) ("As an intermediate

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court's judgment dismissing his suit); *see also United States v. Barcroft*, No. 4:07cv100, 2009 WL 1447092, at *3 (E.D. Tex. May 21, 2009) (rejecting Barcroft's claims "that he is a sovereign person who is not subject to the United States' tax laws"); *Barcroft v. Cty. of Fannin*, 118 S.W.3d 922, 926–27 (Tex. App.—Texarkana 2003, pet. denied) (observing that pro se appellant's claimed status as a "Sovereign Citizen" was "at this point in our history, imaginary" and that he had brought his litigation in a capacity that did not exist).

[11]Barcroft complained in his pro se motion to recuse the Tarrant County probate court judge that the judge was unduly prejudiced against pro se litigants because "no pro se litigant has ever prevailed in this court when an attorney faced him/her on the other side." Barcroft did not support this claim in his motion with any sort of documentation and he ignored entirely the more obvious reason pro se litigants might tend to lose, i.e., their lack of legal education or training, which tends to lead them, as here, to critical mistakes of form and substance. *See Murry v. Bank of Am., N.A.*, No. 02-13-00303-CV, 2014 WL 3866154, at *4 (Tex. App.—Fort Worth Aug. 7, 2014, pet. dism'd w.o.j.) (mem. op.) (observing that appellant's comments in her brief "indicate that she does not understand the role of the judge and of the attorneys at trial, and as a result, she has confused normal legal procedures with criminal activity"); *Gleason v. Isbell*, 145 S.W.3d 354, 357 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (Frost, J., concurring and dissenting) (observing that pro se appellant did not focus on the merits of the case or the legal issues as to the court's holding, logic, rationale, or factual recitation, but instead used his motion for rehearing "as a platform to launch personal attacks on virtually everyone involved in the case—including opposing parties and counsel, the trial judge who ruled against him in the court below, the appellate justices that decided his case on appeal, and even the clerk's office and the court's professional staff").

state appellate court, we are bound to apply the controlling law as interpreted by this state's highest court.").

A. Procedural Rules

The appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record. Tex. R. App. P. 34.1; *see also* Tex. R. App. P. 3.1(g) (defining "reporter" as "the court reporter or court recorder"). Among other items, the rules of appellate procedure require the clerk's record in civil cases to contain "all pleadings on which the trial was held," "the notice of appeal," and "any request for a reporter's record, including any statement of points or issues under Rule 34.6(c)." Tex. R. App. P. 34.5(a)(1), (7), (9). At any time before the clerk's record is prepared, any party may file with the trial court clerk a written designation specifying items to be included in the record. Tex. R. App. P. 34.5(b)(1). Relevant items that are omitted from the clerk's record may be supplemented, and that supplemental record will become part of the appellate record of the appeal. Tex. R. App. P. 34.5(c)(1), (3). The official reporter's record may also be supplemented if anything relevant is omitted from it, and that supplemental record will also become part of the appellate record of the appeal. Tex. R. App. P. 34.6(d).

With regard to the reporter's record, if necessary for the appeal, the appellant must request in writing that the official court reporter prepare it and must designate the exhibits to be included. Tex. R. App. P. 34.6(b). A request to the court reporter must also designate the portions of the proceedings to be

included, and the appellant must file a copy of the request with the trial court clerk.[12] Tex. R. App. P. 34.6(b)(1)–(2). If the appellant requests a partial reporter's record, he must include in the request a statement of the points or issues to be presented on appeal. Tex. R. App. P. 34.6(c)(1). The appellant requesting a partial reporter's record "*will then be limited to those points or issues*." Tex. R. App. P. 34.6(c)(1) (emphasis added). The appellate court must presume that the partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues. Tex. R. App. P. 34.6(c)(4). We must also presume that the omissions from the partial reporter's record support the trial court's judgment. *Barcroft*, 2017 WL 1738079, at *1 (citing *Bennett v. Cochran*, 96 S.W.3d 227, 228–30 (Tex. 2002)).

B. Barcroft's Issues or Points on Appeal

As set out below, the majority of Barcroft's remaining issues do not comply with the rules of appellate procedure. *See* Tex. R. App. P. 34.2 ("Agreed Record"), 34.3 ("Agreed Statement of the Case"), 34.6(c)(1) ("Partial Reporter's Record"); *see also Barcroft*, 2017 WL 1738079, at *1.

Barcroft's March 22, 2016 notice of appeal included a "designation of record," and was filed with the trial court clerk. He served his notice of appeal on

[12]The court reporter is only responsible for preparing, certifying, and timely filing the reporter's record if a notice of appeal has been filed, if the appellant has requested that the reporter's record be prepared, and if the party responsible for paying for it to be prepared has paid, or made satisfactory arrangements to pay, the reporter's fee or is entitled to appeal without paying the fee. Tex. R. App. P. 35.3(b)(1)–(3).

this court's clerk and served a copy on Walton and Gibbs's attorney, on Miller, and on Howard's attorney, but he did not serve it on the court reporter. In his notice of appeal, he asserted that "[t]he court's rulings in the December 30, 2015 hearing are the *only* issues in this appeal; therefore, the *court's record* for that hearing *only* are hereby designated to be sent to the Court of Appeals." [Emphases added.] *Cf.* Tex. R. App. P. 34.5(a)(1) (requiring in civil cases that all pleadings on which the trial was held be included in the clerk's record). Therefore, to the extent that his notice of appeal contains a designation, we infer from the language used and Barcroft's actions that when Barcroft used the term "court's record," he was referring to the clerk's record, and not the reporter's record. *See* Tex. R. App. P. 34.5(a)(5) (requiring inclusion of the court's judgment or other order that is being appealed).

Our inference is supported in that on April 11, 2016, we emailed a letter to Barcroft, his opposing counsel, the probate court clerk, and the court reporter, stating that we had received Barcroft's notice of appeal. In our letter, we directed Barcroft to file his docketing statement within ten days and informed him about the required filing fee. We also included the following directive:

> **NOTE TO APPELLANT:** At or before the time for perfecting the appeal, you must request in writing that the official reporter prepare the reporter's record. The request must designate the exhibits to be included. A request to the court reporter must also designate the portions of the proceedings to be included. You must also file a copy of this request with the trial court clerk. *See* Tex. R. App. P. 34.6.

And two days later on April 13, 2016, Barcroft sent a letter to the court reporter stating,

> This is a request for designation of record in the above numbered cause with regards to two specific issues to the Second Court of Appeals of Texas in Ft. Worth, Texas. Two questions that will be brought before the Court of Appeals are:
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> 1. Does failure to give a party proper notice of a hearing mitigate or negate any order of the court based in whole or partially on that hearing?
>
> 2. Can a final judgment be entered on one party to case [sic] without first separating that party to a new case number?

Barcroft requested that the court reporter prepare the record "only with regards to those two issues," and "only those portions of the record which relate to either any notice given to Albert Lynn Barcroft of any hearing on or after October 1, 2015; or, any portion of the record that indicates that the case was separated for the purpose of the default judgment."

Barcroft copied this court and his opposing counsel on this letter. While Barcroft did not file his designation and request for partial reporter's record with the probate court clerk, *cf.* Tex. R. App. P. 34.5(a)(9) (requiring the clerk's record to contain any request for a reporter's record, including any statement of points or issues under rule 34.6(c)), 34.6(b)(2) ("The appellant must file a copy of the request with the trial court clerk."), it is nonetheless part of this court's file of post-trial proceedings in the appeal. *See* Tex. R. Evid. 201.

On May 26, 2016, the clerk filed a 678-page record containing Walton and Gibbs's petition for injunctive relief and amended petition to remove trustee,

Barcroft's various motions to transfer and pleas in abatement, the parties' rule 11 agreement, Walton and Gibbs's motion to strike Barcroft's pleadings, Walton and Gibbs's motion for default judgment against Barcroft, various orders of the trial court, and Barcroft's motion for new trial and notice of appeal, among a few other documents. The record also contained an affidavit by the probate court clerk dated May 6, 2016, stating that on May 6, 2016, she became aware that the clerk's record had not been prepared or filed with the court and requesting an extension of time to file it.

Walton and Gibbs subsequently twice requested supplementation of the clerk's record. Their first supplementation request, on August 30, 2016, requested the addition to the appellate record of Barcroft's motions to quash discovery requests. The record was accordingly supplemented with Barcroft's October 20, 2014 "Motion to Quash Subpoena Duces Tecum or Alternatively Limit Discovery," his November 13, 2014 "Second Amended Motion to Quash Notice of Deposition," his March 27, 2015 "Motion to Quash Oral Deposition," and his August 11, 2015 "Motion to Quash Oral Deposition." Walton and Gibbs's second supplementation request, on March 20, 2017, requested the addition of the September 19, 2016 turnover order and the January 11, 2017 final judgment.

On April 27, 2016, the court reporter notified this court that she would not be filing a reporter's record in this case because "[a]fter receiving the designation of record from . . . Barcroft, [she] checked her records and found no records that

would apply to the designated portion of the records requested." The court reporter noted that she had informed Barcroft of this.

The severability issue in Barcroft's statement of points or issues to be presented on appeal has been mooted by the issuance of a final judgment in the case. His remaining issue pertains to whether he received "proper" notice of "any hearing on or after October 1, 2015," which corresponds to the remaining portion of his first issue: "Is it reversible error when no notice is given to the defendant party of hearings held to determine his . . . liability, and which could be dispositive to the case?"[13]

C. Hearings After October 1, 2015

The record reflects that at the time that this case was filed in April 2014, Barcroft lived in Guatemala and had been blocking e-mail sent by Walton and Gibbs's attorney for "approximately six (6) months." The parties filed a rule 11 agreement as to email service of all documents in October 2014, and Barcroft contends in his brief that Walton and Gibbs's counsel had honored the parties' rule 11 agreement by emailing everything "up until the hearings for death penalty sanctions and default judgment. For those pleadings, [opposing counsel] allegedly mailed notice to Guatemala."[14] Barcroft asserts that he did not receive

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[13]In contrast to his briefing in this court, in which he asserts that he received no notice of the default judgment hearing, in his motion for new trial, Barcroft complained about having received no "proper" notice.

[14]Barcroft does not appear to distinguish between notice of pleadings being filed and notice of hearings being set on the pleadings.

these pleadings nor the orders that resulted therefrom and that he received a copy of the default judgment through another defendant "well after the fact." Barcroft also complains that the trial court denied his motion for new trial based on lack of notice. In his reply brief, he asserts that he "never told the court nor any of the parties that he would no longer accept service by e-mail under his Rule 11 Agreement."

But while Barcroft refers us in the argument section of his first issue to both the death penalty sanctions hearing and the default judgment hearing, i.e., complaining that he received no notice of the motions or the hearings thereon, the record reflects that the associate judge issued the order granting Walton and Gibbs's motion to strike on September 29, 2015. Therefore, the hearing on the motion to strike would have necessarily occurred prior to the "on or after October 1, 2015" designation that Barcroft provided to the court reporter. Because we must presume that any omissions support the trial court's judgment, we will therefore only consider Barcroft's complaint with regard to the default judgment hearing as presented in his statement of points or issues to be presented on appeal: "Does failure to give a party proper notice of a hearing mitigate or negate any order of the court based in whole or partially on that hearing?" *See* Tex. R. App. P. 34.6(c)(1), (4).

1. The Record

To their default judgment motion, Walton and Gibbs attached the trial court's September 29, 2015 order granting their motion to strike. *See* Tex. R.

Civ. P. 306a. In the September 29, 2015 order, the trial court struck all of Barcroft's pleadings after finding, among other things, that although there was a rule 11 agreement on file with the court indicating that Barcroft would receive service via email, Barcroft had shut down his email and had refused to accept service from anyone in the case. The trial court also found in the order that Barcroft was refusing to participate in the proceedings in the trial court. Barcroft did not request the reporter's record of the trial court's hearing on the motion to strike. *Cf. Alcantar v. Okla. Nat'l Bank*, 47 S.W.3d 815, 823 (Tex. App.—Fort Worth 2001, no pet.) (observing that recitals in a judgment are presumed to be true, although the presumption can be rebutted when there is a conflict between the judgment and the record).

Walton and Gibbs also attached to their motion a certificate of last known address for Barcroft, stating that his last known physical address was P.O. Box 03, Morales 18004, Izabal, Guatemala. This appears from the record to be a correct address for Barcroft because at the conclusion of his request for findings of fact and conclusions of law, which he filed on March 2, 2016, Barcroft listed his mailing address as P.O. Box 03, Morales, Izabal, Guatemala. Walton and Gibbs also provided an affidavit from their attorney, who averred that as far as she could ascertain, Barcroft was not in military service.

Instead of responding to the October 2, 2015 motion for default judgment, on October 22, 2015, Barcroft efiled a motion to recuse the Tarrant County probate court judge.

According to the face of the default judgment, almost three months elapsed between the filing of the default judgment motion and the hearing thereon. The default judgment recites that the associate judge held a hearing on Walton and Gibbs's motion for default judgment against Barcroft on December 30, 2015, and the order was approved by the probate court judge on January 4, 2016.

Twenty-three days later, on January 27, 2016, Barcroft timely filed his motion for new trial. *See* Tex. R. Civ. P. 329b(a) (providing that a motion for new trial shall be filed prior to or within thirty days after the judgment or other order complained of is signed). In his motion for new trial, among other things, Barcroft asked the trial court to set aside the default judgment and to grant him a new trial because "[w]ith regards to the December 30, 2015 hearing being addressed herein, there was no proper service to this Defendant."[15] Barcroft did not attach anything to support his motion for new trial beyond his assertion that his statements in the motion were true and correct.

No hearing was set on the motion for new trial, and it was overruled by operation of law. *See* Tex. R. Civ. P. 329b(c).

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[15]While Barcroft also complained in his motion for new trial that he did not receive proper service because Walton and Gibbs did not allege facts to make him amenable to service via the state's long-arm statute, by October 2014, Barcroft had waived his special appearance and had entered into the rule 11 agreement for service by email.

2. The Supplemental Clerk's Record

The clerk of this court inquired of the probate court clerk as to whether any notice of the default judgment hearing was filed by Walton and Gibbs. Upon learning that one had been filed, we requested that a supplemental clerk's record containing that notice be filed in this court. *See* Tex. R. App. P. 34.5(c)(1). That notice reflects that on December 22, 2015, Walton and Gibbs's counsel served a copy of the notice on Barcroft by mail and efile.[16]

Inspired by our success in discovering this item that Barcroft had excluded from his trial court record designation,[17] we optimistically asked our clerk to inquire of the probate court clerk about any notice from Barcroft that he was no longer going to receive email and about any earlier notice of a hearing on the motion for default judgment against Barcroft. Upon learning that both of these items also existed, we requested that an additional supplemental clerk's record containing these items be filed in this court.

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[16]The first item on the list of four settings is "Plaintiffs' Motion for Default Judgment against Albert Barcroft, to be held December 30, 2015, at 2:15 p.m." The other three settings are Walton and Gibbs's motion to show cause with regard to Howard and their motion for summary judgment against Howard, set for January 14, 2016, at 1:30 p.m.; a pretrial hearing set for February 17, 2016, at 1:30 p.m.; and the trial, set for February 23, 2016, at 9:30 a.m.

[17]We tend to agree with the sentiment expressed by a federal court in one of Barcroft's other cases: "The record in this case is a mess . . . . The Court will nonetheless attempt to dissect the issues before it." *United States v. Barcroft*, No. 4:07cv100, 2009 WL 690880, at *1 (E.D. Tex. Mar. 9, 2009).

On August 27, 2015, Barcroft filed a document entitled, “Defendant Albert Lynn Barcroft Hereby Gives Notice of No E-mail and Change of Service Requirements.” In that notice, which he dated and signed on August 17, 2015, Barcroft informed the court and all parties that he was immediately and temporarily relocating to Mexico for approximately three months and that he would maintain his Guatemalan mailing address and have his box “checked regularly for important papers and service,” but that he would not have access to the internet or to email. He denied that the parties had a rule 11 agreement otherwise, stating, “Defendant has no Rule 11 agreement in place, so all service needs to be by land or air mail from this point forward.” He expressly “require[d] that all service [be] mailed to him at P.O. Box 03, Morales, 18004, Izabal, Guatemala, Central America.” Barcroft stated in his certificate of service that he mailed the notice on August 18, 2015.

On October 7, 2015, Walton and Gibbs filed a notice of hearing regarding the scheduling of a motion for default judgment hearing against Barcroft for October 23, 2015. The certificate of service reflects that Barcroft was served both by mail and by efile. By October 22, 2015, according to Barcroft’s efiling of his motion to recuse the probate court judge, Barcroft again had access to the internet and to his email, and as noted above, the default judgment hearing was reset to December 30, 2015.

3. Applicable Law

The trial court struck all of Barcroft's pleadings, "including his Second Amended Answer (and all prior answers)." A judgment rendered against a defendant who appears but does not file an answer is not a default judgment but rather a judgment nihil dicit. *Hegwer v. Edwards*, No. 05-15-01464-CV, 2017 WL 1075608, at *4 (Tex. App.—Dallas Mar. 22, 2017, no pet.) (defining "nihil dicit" as "he says nothing"). A defendant who has appeared in a case must be notified of a dispositive hearing. *Roberts v. Mariner Vill. Condo. Ass'n*, No. 14-16-00021-CV, 2017 WL 89405, at *1 (Tex. App.—Houston [14th Dist.] Jan. 10, 2017, no pet.) (mem. op.); *see LBL Oil Co. v. Int'l Power Servs., Inc.*, 777 S.W.2d 390, 390–91 (Tex. 1989) ("Once a defendant has made an appearance in a cause, he is entitled to notice of the trial setting as a matter of due process under the Fourteenth Amendment to the federal constitution." (citing *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 108 S. Ct. 896 (1988)); *cf. Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 184 & n.8 (Tex. 2012) (observing that a judgment nihil dicit is treated "much the same as [] a no-answer default judgment" but that a death-penalty discovery sanction, while similar to a no-answer default judgment, "is not the same for all purposes" and implicates due process concerns). Accordingly, Barcroft was entitled to notice of the default judgment hearing. But as set out in his statement of points or issues on appeal (and in his motion for new trial), his complaint is about the lack of what he deemed "proper" notice, which he defined in his motion for new trial, and in his

appellate brief, as the forty-five days' notice required under rule of civil procedure 245.

Rule of civil procedure 245 provides that the trial court may set contested cases on written request of any party, or on its own motion, "with reasonable notice of not less than forty-five days to the parties of a first setting for trial . . . provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties." Tex. R. Civ. P. 245. It also provides that "[n]oncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time." *Id.* A case is "noncontested," and thus not subject to rule 245's 45-day notice requirement, when the defendant does not file a written answer. *Long v. Comm'n for Lawyer Discipline*, No. 14-11-00059-CV, 2012 WL 5333654, at *2 (Tex. App.—Houston [14th Dist.] Oct. 30, 2012, no pet.) (mem. op.). Because the trial court had struck Barcroft's pleadings, his case was noncontested. *Id.*; *see also Templeton Mortg. Corp. v. Poenisch*, No. 04-15-00041-CV, 2015 WL 7271216, at *3 (Tex. App.—San Antonio Nov. 18, 2015, no pet.) (mem. op.).

Nonetheless, assuming arguendo that Barcroft was actually entitled to forty-five days' notice under rule 245 with regard to the default judgment hearing, the right to notice prior to judgment is subject to waiver, *In re K.M.L.*, 443 S.W.3d 101, 119 (Tex. 2014), and a party may waive a complaint about lack of notice by failing to take action when he receives some, but less than, the requisite initial

forty-five days' notice. *Custom-Crete, Inc. v. K-Bar Servs., Inc.*, 82 S.W.3d 655, 659 (Tex. App.—San Antonio 2002, no pet.); *see also Templeton Mortg. Corp.*, 2015 WL 7271216, at *2. In light of this court's own diligence in searching for missing components of the record—including Barcroft's August 2015 notice that he was not going to be accepting email service for two or three months, which directly contradicts his assertion in his reply brief that he "never told the court nor any of the parties that he would no longer accept service by e-mail under his Rule 11 Agreement"— Barcroft was on notice by October 22 at the latest that a default judgment was being pursued against him by Walton and Gibbs. Although Barcroft efiled other documents, he did not complain about the lack of "proper" notice of the default judgment hearing until after the default judgment was entered against him, thereby waiving his complaint about "proper" notice.

Because Barcroft waived his complaint about lack of "proper" notice, we cannot conclude that the trial court abused its discretion when it allowed his motion for new trial to be overruled by operation of law. *See Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009) (abuse of discretion standard of review).[18] We therefore overrule the remainder of Barcroft's first issue with

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[18]A trial court abuses its discretion if the court acts without reference to any guiding rules or principles, that is, if the act is arbitrary or unreasonable. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007); *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004). An appellate court cannot conclude that a trial court abused its discretion merely because the appellate court would have ruled differently in the same circumstances. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995); *see also Low*, 221 S.W.3d at 620.

regard to notice. Because Barcroft's remaining issues were not raised in his statement of issues or points on appeal in his partial reporter's record designation, we do not reach them. *See* Tex. R. App. P. 34.6(c), 47.1.

IV. Conclusion

Having overruled Barcroft's issues that were raised in his statement of issues or points on appeal in his designation of partial reporter's record, we affirm the trial court's judgment.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: WALKER, MEIER, and SUDDERTH, JJ.

WALKER, J., concurs without opinion.

DELIVERED: September 7, 2017