



**IN THE
TENTH COURT OF APPEALS**

No. 10-09-00215-CV

IN THE ESTATE OF HELEN D. WALLACE, DECEASED

**From the County Court at Law No. 1
Johnson County, Texas
Trial Court No. P200819721**

MEMORANDUM OPINION ON REHEARING

Theresa Isenberger and Mary Moriset appeal the dismissal of their petition for construction of the will of Helen Wallace, their sister. The will of Helen Wallace was offered and admitted to probate in the county court at law of Johnson County, Texas. Shortly thereafter, Isenberger and Moriset filed their petition for the county court at law to construe Wallace's bequest in her will, which also sought a determination, in part, of whether a trust was created by the terms of the will. The independent executor, Robert Semple, and the Office of the Attorney General filed a joint plea to the jurisdiction, asking the trial court to dismiss the petition for lack of jurisdiction on the basis that the county court at law did not have jurisdiction over the cause of action because it related to a trust, over which only the district court had jurisdiction. Isenberger and Moriset complain that the trial court erred by granting the plea to the jurisdiction because the

question presented in their petition was to construe the terms of the will, over which the county court at law would have jurisdiction.¹

On original submission, this Court reversed and remanded the trial court's judgment. *See In the Estate of Helen D. Wallace, Deceased*, No. 10-09-00215-CV, 2010 Tex. App. LEXIS 4556 (Tex. App.—Waco June 16, 2010). Upon reviewing Semple and the Attorney General of Texas's joint motion for rehearing, we requested a response from Isenberger and Moriset. As authorized by Rule of Appellate Procedure 49.3, we issue this modified opinion after requesting the response. TEX. R. APP. P. 49.3. On reconsideration of the issues presented, we will grant the motion for rehearing, withdraw our prior opinion and judgment, and issue this opinion and judgment. We reverse the judgment of the trial court and remand this cause for further proceedings. *Id.*

Relevant Statutes

This case was filed prior to the effective date of the 2009 amendments to the Probate Code; therefore, we must address the statutes in effect at the time of the filing of this action, which now have largely been repealed. The county court at law of Johnson County exercised original probate jurisdiction over this matter pursuant to section 5(c). TEX. PROB. CODE ANN. § 5(c), *repealed by* Acts 2009, 81st Leg., ch. 1351, § 12(h), effective September 1, 2009. Probate Code section 5(f) gave courts exercising original probate jurisdiction the power to hear “all matters incident to an estate.” TEX. PROB. CODE ANN.

¹ Recently, the Legislature amended the Probate Code to include section 4B(b)(2), which gives the county court at law jurisdiction over issues regarding testamentary trusts; however, this provision did not become effective until September 1, 2009. Actions pending before that date, such as this one, are not affected by the amendment.

§ 5(f), *repealed by* Acts 2009, 81st Leg., ch. 1351, § 12(h), effective September 1, 2009. Section 5A(a) defined what constitutes “appertaining to estates” and “incident to an estate” for statutory county courts at law, and includes actions to construe wills as well as “generally all matters relating to the settlement, partition, and distribution of estates of deceased persons.” TEX. PROB. CODE ANN. § 5A(a), *repealed by* Acts 2009, 81st Leg., ch. 1351, § 12(h), effective September 1, 2009. Isenberger and Moriset contend that their action was for the purpose of construing the will of Helen Wallace, which is within the grant of jurisdiction pursuant to section 5A(a).

However, Semple and the Attorney General of Texas contend that section 5(c), which gave the statutory county courts at law jurisdiction in probate matters when there was no statutory probate court, was limited by the phrase “unless otherwise provided by law.” TEX. PROB. CODE ANN. § 5(c), *repealed by* Acts 2009, 81st Leg., ch. 1351, § 12(h), effective September 1, 2009. They contend that the provisions in the property code relating to trusts fall within that exception.

Property Code Section 115.001 gives the district court exclusive and original jurisdiction over “all proceedings concerning trusts,” and follows with a non-exclusive list of included proceedings. TEX. PROP. CODE ANN. § 115.001 (Vernon 2007). This list does not include whether or not a trust has been formed, and more specifically, does not include whether an alleged trust was formed by the terms of a will and whether that trust, if created, is a beneficiary of the will.

We note, however, that each of the items in the listing has one common characteristic; the presumption that a valid trust exists and that something about it

needs judicial action or oversight. Further, we note that in the new statute giving probate courts jurisdiction over issues regarding testamentary trusts, there is still no listing that would specifically address the determination of whether a will created a trust or designated a trust as a beneficiary of a will. See TEX. PROB. CODE ANN. § 4B(b)(2), effective Sept. 1, 2009 (Vernon Supp. 2010). One logical interpretation would be that such an express grant is unnecessary if the probate court already had such jurisdiction.

The Bequest

Wallace's will states that:

After the payment of my debts, funeral and last illness expenses, and death taxes, I will give, bequeath and devise all my property both real and personal, or mixed, wheresoever situated and howsoever acquired, I may die seized and possessed of, or have an interest in, as follows:

To ROBERT SEMPLE, I grant and devise power of appointment of my entire estate to provide for abandoned, injured and strayed animals.

Wallace did not make any specific bequests, and this was the only bequest made in her will.

Analysis

The issue before us is to determine whether an action filed to determine whether certain language contained in a will creates a valid power of appointment or a trust, and how it designates the beneficiaries is "incident to an estate" or a "proceeding concerning trusts" for purposes of determining which court has jurisdiction to make that ultimate determination based on the statutes in effect at that time. We hold that

this determination is one that is “incident to an estate” for purposes of establishing subject matter jurisdiction.

A power of appointment and a trust are not the same, with each being given statutory authority in separate sections of the Property Code. *See* TEX. PROP. CODE ANN. Title 9 (Trusts) & Title 10, Subtitle C (Powers of Appointment) (Vernon 2007). The inclusion of a power of appointment in Wallace’s will, if valid, merely grants Semple the right to determine the disposition of the property, which would be in some way to take care of stray animals, but would give him no legal title to Wallace’s estate outside of the power. The powers held by the individual holding the power of appointment may or may not be inconsistent with that of a trustee; however, they are separate roles. *See G.A.C. Halff Found. v. Calvert*, 281 S.W.2d 178, 184 (Tex. Civ. App.—San Antonio 1955, writ ref’d n.r.e.).

Within the four corners of a will, the trial court must determine the intent of the testator and how the estate is to be distributed. *In re Dillard*, 98 S.W.3d 386, 391 (Tex. App.—Amarillo 2003, pet. denied). This determination must include the identities of the beneficiaries, which in this case, would require the trial court to construe Wallace’s bequest within her will. This is what Isenberger and Moriset asked the trial court to do in their petition before the county court at law.

Semple and the Attorney General of Texas contend that the *dicta* found in the case of *In re Dillard* is dispositive of this issue. *In re Dillard*, 98 S.W.3d 386, 391 (Tex. App.—Amarillo 2003, pet. denied) (“Whether an instrument created a trust and the extent of that trust’s interests (and those of its beneficiaries) in property are clearly fact

issues affecting the administration of the trust. Consequently, only a district court had the power to adjudicate them.”). In *Dillard*, a trust was clearly created by the will in question and the creation of the trust was not disputed in the appeal, therefore the issue of whether a testamentary trust was created was not before the Court. *Id.* at 390. Additionally, the bequest in question did not involve the determination of a power of appointment such as in this case, but sought a construction of the terms of the trust, which is also not sought after in this appeal.

We find that it was erroneous for the trial court to grant the plea to the jurisdiction with no determination of whether the bequest was a valid power of appointment or something else, including a trust, or whether the bequest failed entirely. If the county court at law determines that a trust was created, certainly the district court would have exclusive jurisdiction over the determination of the terms of the trust. We sustain issue one.

Conclusion

We find that the trial court erred in granting the plea to the jurisdiction dismissing the claims of Isenberger and Moriset because their claims were not within the exclusive trust jurisdiction of the district court. We reverse the judgment of the county court at law and remand this cause to the county court at law for further proceedings.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Reyna, and
Justice Davis

Rehearing granted, Reversed and remanded

Opinion on Rehearing delivered and filed November 3, 2010

[CV06]