AFFIRM; and Opinion Filed October 9, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00447-CV

CHARLES D. WALLACE, Appellant
V.
HATTIE LESLIE WALLACE, Appellee

On Appeal from the 255th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-04-19799

MEMORANDUM OPINION

Before Justices Bridges, Fillmore, and Stoddart
Opinion by Justice Fillmore

Charles D. Wallace and Hattie Leslie Wallace[1] were divorced on January 8, 2006. The agreed divorce decree awarded both Charles and Hattie fifty percent ownership, as tenants in common, of a house and lot located at 706 Carpenter Drive, Garland, Texas (the Property), and provided a procedure for the sale of the Property. After Charles's death on April 8, 2016, Hattie filed this suit to enforce the divorce decree. Mary Ann Wallace, Independent Executrix of Charles's Estate, responded to the suit.[2] The trial court appointed a receiver to sell the Property.

[1] Because the parties and Mary Ann Wallace, Independent Executrix of Charles's Estate, have the same surname, we use their first names in this opinion when it is necessary to refer to any of them individually.

[2] Charles died before suit was filed, and did not have the capacity to be sued. *See Stinson v. King*, 83 S.W.2d 398, 399 (Tex. Civ. App.—Dallas 1935, writ dism'd) ("[S]uits can be maintained by and against only parties having an actual or legal existence). However, Mary Ann, Independent Executrix of Charles's Estate, appeared in the case without raising any challenge by verified pleading to Charles's capacity to be sued. *See* TEX. R. CIV. P. 93(1). Defects in capacity are "clearly curable," *Gomez v Tex. Windstorm Ins. Ass'n*, No. 13-04-00598-CV, 2006 WL 733957, at *2 (Tex. App.—Corpus Christi 2006, pet. denied) (mem. op.), and we conclude Mary Ann's appearance in the case as Independent Executrix of Charles's Estate cured any defect in the parties. *See e.g.*, *Price v. Estate of Anderson*, 522 S.W.2d 690, 692 (Tex. 1975) (although decedent's estate was improperly sued, defect was cured when purpose of suit and nature of claim asserted were clear from outset; and personal representative, the person who should have been named in suit as defendant, was served, answered for "estate," and participated in all

In this interlocutory appeal,[3] Charles challenges the trial court's order appointing the receiver, arguing that rather than enforcing the divorce decree, the trial court's order appointing a receiver impermissibly altered the rights granted to Charles in the decree; and the trial court erred by failing to consider evidence of Charles's post-divorce contributions to the maintenance, improvement, and preservation of the Property. We affirm the trial court's order appointing a receiver.

Background

Hattie filed for divorce on November 14, 2004. Hattie and Charles subsequently entered into an Agreement Incident to Divorce (AID) at mediation. The trial court approved the AID and incorporated it into the January 18, 2006 divorce decree. As relevant to this appeal, both Charles and Hattie were awarded a "one-half interest as a tenant-in-common" in the Property. The trial court ordered the Property:

> [B]e listed with a realtor for sale at a price selected by the realtor, but not to be less than $77,000.00. The realtor to be used is _____ and shall be changed only by agreement of the parties. The sale price is to be reduced below $77,000.00 only upon written agreement of the parties. Any offer of $77,000.00 or more must be accepted by both parties.
>
> Charles D. Wallace is given the right of first refusal for any bona fide offer by paying Hattie Wallace one-half of the offer less the mortgage amount and less 6% realtor fee. The amount to be calculated as one-half of the home equity amount Hattie Wallace would actually receive should the house be sold, so that she received her actual one-half interest in the property.
>
> Either party may move the court to appoint a receiver to sell the house. IT IS ORDERED THAT THE COURT SHALL appoint a receive[r] on motion of either party after December 31, 2006 or at any time the mortgage payments on the house become three months in arrears.
>
> Should Charles Wallace fail to pay Hattie Wallace one-half the equity in the house (figured by taking a bona fide offer and subtracting the 6% realtor fee and

proceedings affecting case). Because the parties never formally substituted Mary Ann, Independent Executrix of Charles's Estate, as the defendant in the trial court or the appellant on appeal, we will consider Charles as the appellant in this appeal.

[3] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(1) (West Supp. 2016) (order appointing receiver subject to interlocutory appeal).

> all funds due on the mortgage in effect as of the date of the divorce, less all payments made), within 30 days of said offer being made, the house is to be sold for the offer made with the parties splitting the funds remaining equally after all costs of sale are paid.

On November 17, 2016, Hattie filed a motion for the appointment of a receiver, alleging Charles had died, and Mary Ann, as Independent Executrix of Charles's Estate, had deeded the Property to herself, individually. Hattie subsequently filed a motion to reopen and to enforce the divorce decree, requesting the trial court "entertain a Motion to Appoint a Receiver pursuant to the terms of the Decree[.]"

Mary Ann, as Independent Executrix of Charles's Estate, responded to Hattie's motion to reopen and to enforce, asserting (1) Hattie was not entitled to the requested relief because, as explained in a plea to the jurisdiction,[4] the trial court did not have jurisdiction over Hattie's claim; and (2) Hattie's claim was barred in whole or part by the applicable statute of limitations or by laches. Mary Ann also contended that "should the trial court reopen this matter, [Charles] is entitled to present evidence of the separate property used to maintain the property and payoff the outstanding balance on the mortgage, which is an equitable claim of the estate against [Hattie's] interest" in the Property.

At the hearing on Hattie's motions, Hattie testified she and Charles agreed to sell the Property. After the divorce decree was signed, Hattie's son lived on the Property until 2010 or 2011. During that time period, Hattie did not want to request the Property be sold. After learning from her son that Charles had died, Hattie "went to get a deed" for the Property. She learned that her "name was no longer on the house." Instead, Mary Wallace was the listed owner of the Property. The trial court admitted into evidence the divorce decree; a June 6, 2016 Special Warranty Deed transferring the property from Mary Ann, as Independent Executrix of Charles's

[4] This pleading is not in the appellate record.

Estate, to Mary Ann, individually; and a January 16, 2017 Rescission of Special Warranty Deed in which Mary Ann, as Independent Executrix of Charles's Estate, stated she desired to rescind the June 6, 2016 Specially Warranty Deed and that Mary Ann, individually, consented to the rescission.

On cross-examination, Charles's counsel attempted to question Hattie about whether she made any mortgage or tax payments relating to the Property following the entry of the divorce decree. The trial court sustained Hattie's relevance objections to these questions.[5]

The trial court signed an order on April 6, 2017, appointing a receiver to sell the Property; ordering the parties to fully cooperate with the receiver; authorizing the receiver "to manage, control, and dispose of the property as she sees fit in her sole discretion"; and ordering the proceeds of any sale be deposited in the registry of the court.

Jurisdiction

This Court's jurisdiction "as to the merits of a case extends no further than that of the court from which the appeal is taken." *Pearson v. State*, 315 S.W.2d 935, 938 (Tex. 1958). If the trial court lacked jurisdiction over the claims, then we have jurisdiction only to set aside the trial court's order and dismiss the appeal. *Dallas Cty. Appraisal Dist. v. Funds Recovery, Inc.*, 887 S.W.2d 465, 468 (Tex. App.—Dallas 1994, writ denied); *see also Duggan v. Tanglewood Villa Owners Ass'n, Inc.*, No. 05-16-00300-CV, 2017 WL 2610032, at *2 (Tex. App.—Dallas June 16, 2017, no pet.) (mem. op.). Because we questioned the trial court's jurisdiction over claims relating to the Property, we requested the parties file jurisdictional briefs addressing whether the statutory probate court in Dallas County has exclusive jurisdiction over Hattie's request for an appointment of a receiver to sell the Property.

[5] Charles's counsel also stated he "would proffer Ms. Mary Wallace simply for the fact to put on evidence that the credit that Mr. Wallace is entitled to as cotenant of the property; however, you've already sustained that objection, so I will not call Ms. Mary Wallace at this time."

In a county, such as Dallas County, with a statutory probate court, *see* TEX. GOV'T CODE ANN. § 25.0591(d) (West 2004), the statutory probate court has original jurisdiction of "probate proceedings," TEX. EST. CODE ANN. § 32.002(c) (West 2014), and "matters relating to probate proceedings, *Bloom v. Swango*, No. 05-14-01237-CV, 2015 WL 5786824, at *3 (Tex. App.—Dallas Oct. 5, 2015, pet. denied) (mem. op.); *In re Hannah*, 431 S.W.3d 801, 807–08 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (per curiam) (For a claim to be subject to the jurisdiction provisions of the Texas Estates Code, "it must qualify either as a 'probate proceeding' or a 'matter related to a probate proceeding' as defined by" the code.); *see also* TEX. EST. CODE ANN. § 22.029 (West 2014) ("The terms 'probate matter,' 'probate proceedings,' 'proceeding in probate,' and 'proceedings for probate' are synonymous and include a matter or proceeding relating to a decedent's estate."). As possibly relevant to this appeal, a "probate proceeding" includes an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent, TEX. EST. CODE ANN. § 31.001(4) (West 2014), and a "matter related to a probate proceeding" includes an action for trial of the right of property that is estate property. *Id.* § 31.002(a)(6), (c). "A cause of action related to the probate proceeding must be brought in a statutory probate court unless the jurisdiction of the statutory probate court is concurrent with the jurisdiction of a district court as provided by Section 32.007 or with the jurisdiction of any other court." *Id.* § 32.005.[6]

Charles first contends the trial court did not have jurisdiction over Hattie's motion to appoint a receiver because that motion related to a secured claim against property of Charles's Estate and, therefore, falls within the estate code's definition of probate proceeding or matter relating to a probate proceeding. However, the court that renders a decree of divorce "retains the

[6] Section 32.007 of the estates code provides that a statutory probate court has concurrent jurisdiction with the district court in certain actions not applicable in this case. *See* TEX. EST. CODE ANN. § 32.007.

power" to enforce the property division in the decree or in an agreement incident to divorce that was approved by the court. TEX. FAM. CODE ANN. § 9.002 (West Supp. 2016); *Pearson v. Fillingim*, 332 S.W.3d 361, 363 (Tex. 2011) (per curiam). The court may enforce the division of property made or approved in the divorce decree by rendering further orders "to assist in the implementation of or to clarify the prior order." TEX. FAM. CODE ANN. § 9.006(a) (West Supp. 2016). It may also "specify more precisely the manner of effecting the property division previously made or approved if the substantive division of property is not altered or changed." *Id.* § 9.006(b). Accordingly, even if Hattie's motion to appoint a receiver pursuant to the divorce decree is a "probate proceeding" or a "matter relating to a probate proceeding," the trial court had concurrent jurisdiction with the statutory probate court to address the motions. *See In re Sims*, 88 S.W.3d 297, 302–03 (Tex. App.—San Antonio 2002, orig. proceeding) (considering whether county court in which application to probate husband's last will and testament was filed or trial court that rendered divorce, both of which had concurrent jurisdiction over wife's claim to enforce divorce decree, had dominant jurisdiction over claim).

Relying on section 102.005 of the estates code, Charles next argues the statutory probate court has exclusive jurisdiction because Mary Ann, as Charles's surviving spouse, has a life estate interest in the Property and, therefore, the Property may not be partitioned. As relevant here, section 102.005 prohibits the partition of a homestead among the decedent's heirs during the lifetime of the surviving spouse for as long as the surviving spouse elects to use or occupy the property as a homestead. TEX. EST. CODE ANN. § 102.005(1) (West 2014). However, Hattie is not seeking to partition the Property as one of Charles's heirs; rather, she is seeking partition of the Property as a tenant in common. Although homestead rights can attach to property interests held by tenancy in common, such homestead rights may not prejudice the rights of a cotenant. *Clements v. Lacy*, 51 Tex. 150, 162–63 (1879); *see also Sayers v. Pyland*, 161 S.W.2d

769, 773 (Tex. 1942); *Grant v. Clouser*, 287 S.W.3d 914, 919–20 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Generally, homestead rights attaching to property interests held by a cotenant are subordinate to another cotenant's right to partition. *Cleveland v. Milner*, 170 S.W.2d 472, 476 (Tex. 1943); *Grant*, 287 S.W.3d at 920. Therefore, even if Mary Ann has a homestead right in the Property, that right is subordinate to Hattie's right to partition the Property, and would not deprive the trial court of jurisdiction to enforce the divorce decree by appointing a receiver to sell the Property.

Finally, Charles argues the probate of his estate was the first suit affecting the Property and was filed in the statutory probate court, giving that court dominant jurisdiction over the claim. The doctrine of dominant jurisdiction is applicable when two actions involving the same subject matter are brought in different courts having concurrent jurisdiction. *In re Sims*, 88 S.W.3d at 303; *see also In re Puig*, 351 S.W.3d 301, 305 (Tex. 2011) (orig. proceeding) (per curiam) ("When the jurisdiction of a county court sitting in probate and a district court are concurrent, the issue is one of dominant jurisdiction."). "The court in which suit is first filed generally acquires dominant jurisdiction to the exclusion of other courts *if* venue is proper in the county in which suit was first filed." *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 622 (Tex. 2005). The proper method for contesting a court's lack of dominant jurisdiction is the filing of a plea in abatement. *In re Puig*, 351 S.W.3d at 303. A dominant jurisdiction complaint must be timely asserted and proven by a plea in abatement or it is waived. *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988), *disagreed with on other grounds, In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 292–93 (Tex. 2016) (orig. proceeding); *Gutierrez v. Gutierrez*, No. 05-14-00803-CV, 2016 WL 1242193, at *2 (Tex. App.—Dallas Mar. 30, 2016, no pet.) (mem. op.). Nothing in the appellate record reflects that Charles either filed a plea in abatement in the trial court asserting the statutory probate court had dominant jurisdiction over

Hattie's motion to appoint a receiver or obtained a ruling on any such plea. He therefore waived any argument the statutory probate court had dominant jurisdiction over this dispute.

We conclude the trial court had jurisdiction over Hattie's motion to appoint a receiver. Accordingly, we have jurisdiction over this interlocutory appeal.

Authority to Enter Order

In his first issue, Charles contends the trial court's order appointing a receiver impermissibly alters, amends, or otherwise modifies the divorce decree because the order does not expressly include Charles's right of first refusal. Hattie argues the paragraph of the parties' agreement regarding the appointment of a receiver did not include Charles's right of first refusal and that putting any constraints on the receiver's ability to sell the Property would impermissibly alter the terms of the parties' agreement.

We review a trial court's order appointing a receiver for an abuse of discretion. *Spiritas v. Davidoff*, 459 S.W.3d 224, 231 (Tex. App.—Dallas 2015, no pet.). "It is an abuse of discretion for a trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles, or to rule without supporting evidence." *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998) (citations omitted); *see also Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

Divorcing couples may enter into agreements to divide their property. *See* TEX. FAM. CODE ANN. § 7.006(a) (West 2006) ("To promote amicable settlement of disputes in a suit for divorce or annulment, the spouses may enter into a written agreement concerning the division of the property and the liabilities of the spouses and the maintenance of either spouse."). An agreed property division, although incorporated into a final divorce decree, is treated as a contract and is controlled by the usual rules of contract construction. *Allen v. Allen*, 717 S.W.2d 311, 313 (Tex. 1986); *Beshears v. Beshears*, 423 S.W.3d 493, 500 (Tex. App.—Dallas 2014, no

pet.). Our primary concern in interpreting the decree is to ascertain the intent of the parties as expressed in the terms of the agreement. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983); *Beshears*, 423 S.W.3d at 500. To achieve this objective, we must examine and consider the entire writing in an effort to harmonize and give effect to all the provisions so that none will be rendered meaningless. *Coker*, 650 S.W.2d at 393; *In re W.B.B.*, No. 05-16-00454-CV, 2017 WL 511208, at *4 (Tex. App.—Dallas Feb. 8, 2017, no pet.) (mem. op.). Ordinarily, the writing alone will be deemed to express the parties' intentions because it is the objective, not subjective, intent that controls. *Matagorda Cty. Hosp. Dist. v. Burwell*, 189 S.W.3d 738, 740 (Tex. 2006) (per curiam); *In re W.B.B.*, 2017 WL 511208, at *4.

If, when read as a whole, the divorce decree's terms are so worded that it can be given a certain or definite legal meaning or interpretation, then it is unambiguous, and we must give effect to the order in light of the literal language used. *Coker*, 650 S.W.2d at 393; *Beshears*, 423 S.W.3d at 500. However, if the decree's terms are ambiguous, we must review the record along with the decree to aid in interpreting the judgment. *Coker*, 650 S.W.2d at 393; *Beshears*, 423 S.W.3d at 500. The decree is ambiguous only if, after application of the rules of construction, the judgment is reasonably susceptible to more than one meaning or if its meaning is uncertain or doubtful. *Coker*, 650 S.W.2d at 393; *In re W.B.B.*, 2017 WL 511208. at *5. Whether a divorce decree is ambiguous is a question of law we review de novo. *Shanks v. Treadway*, 110 S.W.3d 444, 447 (Tex. 2003); *In re W.B.B.*, 2017 WL 511208, at *5.

As noted above in the discussion of our jurisdiction over this appeal, a trial court that renders a divorce decree generally retains the power to enforce or clarify the property division contained or approved in the decree. TEX. FAM. CODE ANN. §§ 9.002, 9.006(a), 9.008. However, after its plenary power expires, a court may not alter, amend, or modify the substantive division of property in the decree. *Id.* § 9.007(a), (b); *Shanks*, 110 S.W.3d at 449; *Beshears*, 423

S.W.3d at 501. An order entered by the trial court after expiration of its plenary power that amends, modifies, alters, or changes the actual, substantive division of property made or approved in a final decree of divorce is beyond the jurisdiction of the trial court and is void. TEX. FAM. CODE ANN. § 9.007(b); *Beshears*, 423 S.W.3d at 501.

The divorce decree in this case states either party may request the appointment of a receiver to sell the Property, and the trial court "shall" appoint a receiver "on motion of either party after December 31, 2006." Interpreting an agreement containing words such as "may" and "shall" requires the determination of whether the words are intended as permissive or mandatory. *Akhtar v. Leawood Hoa, Inc.*, 508 S.W.3d 758, 763–64 (Tex. App.—Houston [1st Dist.] 2016, no pet.). "The word 'shall' as used in contracts is generally mandatory, operating to impose a duty." *Lesikar v. Moon*, 237 S.W.3d 361, 367 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *see also* TEX. GOV'T CODE ANN. § 311.016(2) (West 2013) (under Code Construction Act, "shall" imposes duty unless context in which used "necessarily requires a different construction or unless a different construction is expressly provided by statute"). Therefore, based on the unambiguous language in the divorce decree, Hattie had the right to request the trial court appoint a receiver to sell the Property and, after December 31, 2006, the trial court had a duty to grant the request. Therefore, the trial court properly enforced the divorce decree by appointing a receiver to sell the Property.

The paragraph of the parties' agreement regarding the appointment of a receiver to sell the Property does not expressly state Charles retained his right of first refusal following the appointment of a receiver, but is both preceded and followed by paragraphs addressing the parties' agreement that Charles had a right of first refusal upon the receipt of a bona fide offer for the Property, as well as the method of calculating Hattie's interest in the Property should Charles exercise that right. Although the trial court's order appointing a receiver to sell the Property

does not specifically mention Charles's right of first refusal, it also does not deprive Charles of that right. Accordingly, the trial court did not impermissibly alter, amend, or modify the division of property in the divorce decree by appointing the receiver to sell the Property. We resolve Charles's first issue against him.

Evidence of Equitable Claims

In his second issue, Charles contends the trial court erred by sustaining Hattie's relevancy objection to questions regarding any mortgage payments or taxes on the Property that she paid following the divorce. We review a trial court's decision to exclude evidence under an abuse of discretion standard. *McCafferty v. McCafferty*, No. 05-16-00587-CV, 2017 WL 3124470, at *2 (Tex. App.—Dallas July 24, 2017, no pet. h.) (mem. op.). We will uphold the ruling if there is any legitimate basis in the record to support it. *Id.*

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the case more or less probable than it would be without the evidence. TEX. R. EVID. 401. The only issue before the trial court was whether Hattie was entitled under the terms of the parties' agreement to the appointment of a receiver to sell the Property. Questions pertaining to any contributions Hattie or Charles may have made to the maintenance, improvement, or preservation of the Property after January 18, 2006, were not relevant to this determination, and the trial court, therefore, did not err by sustaining Hattie's relevance objection to those questions. We resolve Charles's second issue against him.

We affirm the trial court's order appointing a receiver.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

170447F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CHARLES D. WALLACE, Appellant	On Appeal from the 255th Judicial District Court, Dallas County, Texas,
No. 05-17-00447-CV V.	Trial Court Cause No. DF-04-19799. Opinion delivered by Justice Fillmore,
HATTIE LESLIE WALLACE, Appellee	Justices Bridges and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Hattie Leslie Wallace recover her costs of this appeal from appellant Charles D. Wallace, by and through Mary Ann Wallace, Independent Executrix of the Estate of Charles D. Wallace.

Judgment entered this 9th day of October, 2017.