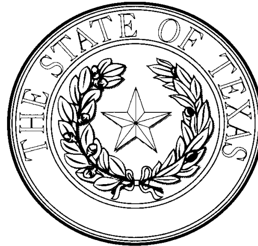
Opinion issued August 25, 2016



In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00567-CV
NO. 01-15-00586-CV

IN THE GUARDIANSHIP OF RUBY PETERSON

On Appeal from the Probate Court No. 1
Harris County, Texas
Trial Court Case Nos. 427208 & 427208-401

MEMORANDUM OPINION

These combined appeals arise from a family dispute over the care of Ruby Peterson, who is now deceased. Three of Ruby's sons—Don Peterson, Mackey ("Mack") Peterson, and Lonny Peterson—challenge an order approving a mediated

settlement agreement in the underlying guardianship proceeding.[1] Their primary contention in the guardianship appeal is that the probate court lost jurisdiction over the pending guardianship proceeding when Ruby died, thereby rendering void the subsequent order approving the settlement. We conclude that the Estates Code authorized the actions of the probate court, and accordingly we affirm its judgment.

Don, Mack, and Lonny also filed a civil suit for damages against the retirement home where Ruby lived: Silverado Senior Living, Inc. d/b/a Silverado Senior Living—Sugar Land ("Silverado").[2] The probate court dismissed that case and awarded attorney's fees to Silverado. Finding no reversible error in any of the various orders challenged on appeal, we affirm the judgment of dismissal and the award of attorney's fees in the civil suit.

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[1] Appellate case No. 01-15-00586-CV, appeal from *In re Guardianship of Ruby Peterson, an incapacitated person*, No. 427,208 in the Probate Court No. 1 of Harris County, Texas. Although the appellants' brief identifies Mack's wife, Tonya Peterson, as an appellant, there is no indication in the appellate record that Tonya was a party to this proceeding. The other three named appellants in this appeal are Don, Mack, and Lonny.

[2] Appellate case No. 01-15-00567-CV, appeal from *Mackey ("Mack") Glen Peterson, Tonya Peterson individually and as next friend of Ruby Peterson, Don Leslie Peterson, Carol Peterson individually and as next friend of Ruby Peterson, and Lonny Peterson v. Silverado Senior Living, Inc. d/b/a Silverado Living – Sugar Land*, No. 427,208-401 in the Probate Court No. 1 of Harris County, Texas. Like the appeal from the guardianship proceeding, Don, Mack, Lonny, and Tonya are identified as appellants. Don's wife, Carol Peterson, was a plaintiff in the trial court, but she is not a party to the appeal.

Background

In 1993, Ruby Peterson executed a durable power of attorney and health-care power of attorney appointing her oldest child, David, and her youngest child, Carol Ann, as her personal representatives. The following year Ruby's husband, Troy Peterson, passed away. Troy left a trust for Ruby's benefit during her lifetime, with the remainder to be shared after her death among their five children. David and Carol Ann were named as trustees.

Ruby lived independently from 1994 until 2013, although she began to show signs of dementia in 2012. In 2013, David and Carol Ann began acting under the 1993 powers of attorney to care for their mother and manage her financial affairs. By then, Ruby was 93 years old and her assets—her husband's testamentary trust, a bank account, and an IRA—were worth in excess of $2 million. In August 2013, after a doctor diagnosed her with dementia, Ruby entered the memory-care facility at Silverado. At that time, David and Carol Ann provided Silverado with a copy of Ruby's 1993 durable power of attorney and health-care power of attorney.

Unfortunately, Ruby's children became embroiled in a number of disputes. While David and Carol Ann believed their mother was suffering from dementia and required full-time memory care at a facility like Silverado, the other siblings disagreed. Brothers Don, Mack, and Lonny believed that Ruby was not suffering

from dementia but instead was overmedicated. They believed that David and Carol Ann were confining her at Silverado against her will.

On the advice of an attorney, David and Carol Ann hired a geriatric psychiatrist, Dr. Chris Merkyl, to examine Ruby. He diagnosed her with "severe dementia and severe disorientation and memory impairment." He stated: "She is not capable of making her own financial or other decisions. Ruby Peterson is emotional about her loss of independence and could be easily manipulated or pressured."

In November 2013, David and Carol Ann's attorney sent a letter to Don, Mack, and Lonny, informing them that David and Carol Ann were Ruby's legal representatives and that Ruby lacked capacity to sign a legal document. Two days later, Don and Mack persuaded Ruby to revoke the powers of attorney previously granted to David and Carol Ann and to sign a new durable power of attorney in favor of them.

Don and Mack then filed an application for guardianship over the person and estate of Ruby Peterson, for a declaratory judgment finding that the new durable power of attorney was valid and the one signed in 1993 was not, and for injunctive relief prohibiting David and Carol Ann from acting as Ruby's representatives.

The probate court appointed an investigator, who concluded that Ruby was then "currently residing in a memory care facility where her needs are met and she

is safe." The investigator noted that Ruby had "executed estate planning documents in 1993 which are a less restrictive alternative to guardianship." The investigator recommended that the application for guardianship be denied.

The court also appointed an attorney ad litem and a guardian ad litem. After completing an investigation, the guardian ad litem concluded that Ruby was "incapacitated" when she signed the power of attorney in 2013 and that a permanent guardianship was not in her best interest because the 1993 powers of attorney were a less restrictive alternative.

David and Carol Ann responded to the application for guardianship. They filed a cross-claim for declaratory judgment that the November 2013 power of attorney and revocation of the 1993 power of attorney were both invalid because they were signed when Ruby lacked capacity to sign them. They also sought sanctions and costs. About a week later, the guardianship application was nonsuited, but the case remained on the probate court's active docket due to David and Carol Ann's cross-claims for declaratory relief and sanctions.

Around the same time, Don, Mack, and Lonny filed a separate civil lawsuit in district court against Silverado, David, Carol Ann, and others. The civil suit was transferred to the probate court under its ancillary jurisdiction. Although the legal claims changed over the course of five amended versions of the petition, Don, Mack, and Lonny consistently alleged causes of action for false imprisonment,

assault and battery, and conspiracy. The caption of the petition asserted that they were each suing in their individual capacities and as next friends of Ruby Peterson. They also sought temporary injunctive relief to prevent David and Carol Ann from acting on Ruby's behalf. The probate court held a five-day evidentiary hearing before denying the requested injunctive relief.

Silverado filed a plea to the jurisdiction in which it argued that Don, Mack, and Lonny lacked standing to sue on behalf of Ruby because the 1993 power of attorney in favor of David and Carol Ann was valid and the 2013 power of attorney in favor of Don and Mack was not. Silverado also moved to dismiss the civil suit under Rule 91a on the same basis. Silverado further argued that because it had relied in good faith on the 1993 powers of attorney, it was statutorily immune from liability.

Don, Mack, and Lonny subsequently filed their fourth amended petition. In that petition, they added claims against David and Carol Ann for breach of trust and breach of fiduciary duty. They also alleged new breach of trust and breach of fiduciary duty claims against Silverado, based on its failure to recognize the 2013 power of attorney appointing Don and Mack as Ruby's representatives.

In response to Silverado's Rule 91a motion, Don, Mack, and Lonny argued that their pleadings, taken as true, demonstrated that there was a question of fact as to Ruby's incapacity and the validity of her revocation of the 1993 powers of

attorney. They further argued that because Silverado was aware that Ruby had signed a revocation of her powers of attorney in 2013, it did not rely "in good faith" on the 1993 power of attorney, rendering it ineligible to claim statutory immunity.

Shortly thereafter, the siblings engaged in mediation and reached an agreement, which provided, among other things:

> Carol Ann Manley and David Peterson shall continue to act as agent for Mrs. Peterson pursuant to the Durable Power of Attorney, Appointment of the Durable Power of Attorney for Health Care, Directive to Physicians, Sale of Real Property, et al, document dated June 23, 1993 ("1993 POA"). The parties will jointly request that the Court find the 1993 POA to be valid and remaining in effect and that any revocation of the 1993 POA executed in November 2013 to be invalid.

This document was signed by each of Ruby's children and their respective attorneys.

The trial court held a hearing on the Rule 91a motion and the siblings' settlement agreement. The court signed an order in the guardianship proceeding, approving the mediated settlement agreement and authorizing the attorney ad litem and guardian ad litem to sign the agreement on behalf of Ruby. The court also granted the Rule 91a motion in the civil case, dismissing the false imprisonment, assault and battery, and conspiracy claims against Silverado.

Silverado then filed a second Rule 91a motion to dismiss, seeking dismissal of the remaining breach of trust and breach of fiduciary duty claims which had

been added in the fourth amended petition, and arguing that there was no basis in law for these claims because Don, Mack, and Lonny lacked standing, Silverado acted in good faith under the 1993 power of attorney, and it did not owe a fiduciary duty or duty of trust to Don, Mack, or Lonny. Silverado also argued that there was no basis in fact because no reasonable person could believe the facts pleaded.

The next day, the plaintiffs amended their petition again, joining as plaintiffs Carol Peterson (Don's wife) and Tonya Peterson (Mack's wife). In the fifth amended petition, all plaintiffs asserted individual claims for declaratory judgment that the 1993 durable power of attorney was revoked in 2013, false imprisonment, assault and battery, conspiracy, breach of trust, and breach of fiduciary duty. Carol and Tonya also alleged the same claims as next friends of Ruby. In response, Silverado filed a supplement to its plea to the jurisdiction and answer, in which it asserted that Carol and Tonya also lacked standing to bring claims on behalf of Ruby.

The trial court granted both Silverado's plea to the jurisdiction and its second Rule 91a motion, dismissing the breach of fiduciary duty and breach of trust claims against Silverado.

Two days later, Ruby died. Don, Mack, and Lonny filed a motion to dismiss the pending guardianship proceeding, arguing that the probate court lost jurisdiction when Ruby died. David, Carol Ann, and both the attorney ad litem and

the guardian ad litem opposed dismissal and sought entry of judgment on the mediated settlement agreement. They argued that the mediated settlement agreement was a binding and irrevocable agreement under the Estates Code. They also argued that the court retained jurisdiction under Section 1022.001 of the Texas Estates Code over matters relating to the guardianship proceeding.

The court granted a motion for summary judgment in favor of Silverado, dismissing with prejudice all remaining claims that Carol and Tonya had asserted. Pursuant to the terms of the mediated settlement agreement, the court also entered a final judgment in the guardianship proceeding.

Don, Mack, and Lonny have appealed from the judgments in both the guardianship proceeding and the civil suit. Tonya also appeals from the final judgment in the civil suit.

Analysis

I. Guardianship appeal (No. 01-15-00586-CV)

A. Jurisdiction

In their first and second issues arising from the guardianship proceeding, Don, Mack, and Lonny (the "guardianship appellants") argue that the probate court lost jurisdiction when Ruby died, "except for the filing of the final accounting and dismissing the guardianship proceeding," and therefore the final judgment approving the mediated settlement agreement was void. Whether a trial court has

jurisdiction is a question of law that we review de novo. *See, e.g.*, *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323 (Tex. 2006).

The guardianship appellants argue that a probate court loses jurisdiction over a guardianship proceeding upon the death of the ward, except for the filing of a final accounting and closing of guardianship. The guardianship of the estate of a ward shall be settled when the ward dies. TEX. ESTATES CODE § 1204.001(b)(1). The guardianship appellants rely on *Easterline v. Bean*, 121 Tex. 327, 49 S.W.2d 427 (1932), for the proposition that "when a ward dies, the probate court loses jurisdiction of the guardianship matter, save and except that the guardianship shall be immediately settled and closed, and the guardian discharged." *Easterline*, 121 Tex. at 331, 49 S.W.2d at 428. The guardianship appellants reason that the same rule should apply here, when no guardianship had been imposed before Ruby's death.

A statutory probate court has original jurisdiction over all matters related to "guardianship proceedings." TEX. ESTATES CODE §§ 1022.001(a), 1022.002(c). A "guardianship proceeding" is statutorily defined as "a matter or proceeding related to a guardianship" or "any other matter covered by" Title 3 of the Estates Code, including "an application, petition, or motion regarding guardianship or a substitute for guardianship under this title." *Id.* § 1002.015(2). The court also "may

exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy." *Id.* § 1022.001(b). Moreover, the entry of a judgment on a mediated settlement agreement is specifically authorized by the Estates Code, which provides that "a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule or law." *Id*. § 1055.151(c).

In this case, Ruby was the proposed ward in a pending guardianship proceeding at the time of her death. The parties engaged in mediation to determine whether they could agree on a less restrictive alternative to the imposition of a guardianship, and they entered into the mediated settlement agreement. *See id.* § 1055.151(b). The agreement resolved various disputes in the guardianship proceeding, such as the validity of the 1993 powers of attorney, payment of fees and expenses relating to proceedings in the probate court, ancillary claims the parties had asserted against each other, and requests for sanctions arising from conduct in the proceeding. As such, these matters fall under the court's statutory jurisdiction in the Estates Code. *See id.* §§ 1022.001, 1022.002(c).

The guardianship appellants argue that the terms of the mediated settlement agreement were moot because Ruby had died. But a probate court retains jurisdiction to settle an estate so long as a justiciable controversy remains. *See Zipp v. Wuemling*, 218 S.W.3d 71, 74 (Tex. 2007). Thus, the settlement agreement,

which addressed matters of continuing controversy among the signatories, was not rendered moot by Ruby's death. Even the *Easterline* case, relied upon by the appellants, recognized a probate court's jurisdiction to settle and close matters relating to a guardianship upon the death of a ward. *See Easterline*, 121 Tex. at 331, 49 S.W.2d at 428.

We conclude that the court had jurisdiction to enter final judgment based on the mediated settlement agreement, and we overrule the guardianship appellants' first two issues.

B. Lack of standing to challenge third-party sanctions on appeal

In their third issue arising from the guardianship proceeding, the guardianship appellants challenge two sanctions orders, which imposed sanctions solely against their trial attorney. "Texas courts have long held that an appealing party may not complain of errors that do not injuriously affect it or that merely affect the rights of others." *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 843 (Tex. 2000). "An appellant is not harmed when sanctions are imposed solely against the appellant's attorney." *Niera v. Frost Nat. Bank*, No. 04-09-00224-CV, 2010 WL 816191, at *1 (Tex. App.—San Antonio Mar. 10, 2010, pet. denied) (mem. op.); *see Matbon, Inc. v. Gries*, 287 S.W.3d 739, 740 (Tex. App.—Eastland 2009, no pet.); *Williams v. Colthurst*, 253 S.W.3d 353, 367 (Tex. App.—Eastland 2008, no pet.). An appellant lacks standing to challenge an order imposing sanctions solely

upon his attorney. *Bahar v. Lyon Fin. Servs., Inc.*, 330 S.W.3d 379, 388–89 (Tex. App.—Austin 2010, pet. denied). The orders in this case imposed sanctions solely upon the guardianship appellants' trial attorney. As such, the guardianship appellants lack standing to challenge the orders. We overrule the third issue.

II. Appeal from civil suit (No. 01-15-00567-CV)

A. Dismissal of civil appellants' causes of action

Don, Mack, Lonny, and Tanya (the "civil appellants") argue that the trial court erred by dismissing their claims against Silverado.

1. False-imprisonment, assault and battery, and conspiracy claims

In their first issue, the civil appellants challenge the trial court's order which granted Silverado's first Rule 91a motion and dismissed the claims of Don, Mack, and Lonny for false imprisonment, assault and battery, and conspiracy. The live pleading at the time the order was entered was the fourth amended petition in which the plaintiffs asserted claims individually and as next friends of Ruby. On appeal, their sole argument to reverse the dismissal of these claims is that the court erred because their fifth amended petition, filed over three weeks after the motion was granted, stated additional facts that supported the claims. In their fourth issue, the civil appellants argue that the trial court erred by denying a motion to reconsider its ruling on this motion.

Under Rule 91a, "a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact." TEX. R. CIV. P. 91a.1; *see Guillory v. Seaton, LLC*, 470 S.W.3d 237, 240–41 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." TEX. R. CIV. P. 91a.1. The court considers solely "the pleading of the cause of action, together with any pleading exhibits," and does not consider any other part of the record. TEX. R. CIV. P. 91a.6; *Guillory*, 470 S.W.3d at 241. "In doing so, we apply the fair notice pleading standard applicable in Texas to determine whether the allegations of the petition are sufficient to allege a cause of action." *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). We review a dismissal under Rule 91a de novo. *Guillory*, 470 S.W.3d at 241; *Dailey v. Thorpe*, 445 S.W.3d 785, 788 (Tex. App.–Houston [1st Dist.] 2014, no pet.).

In ruling on a Rule 91a motion, a trial court is specifically prohibited from considering an amendment that was not filed at least three days before the date of the hearing on the motion. TEX. R. CIV. P. 91a.5(c). In this case, the trial court granted Silverado's Rule 91a motion on November 10, 2014. The appellants filed their fifth amended petition on December 4, 2014. The civil appellants' brief relies entirely on the allegations of the fifth amended petition to argue that the motion

was erroneously granted. However, Rule 91a.5(c) expressly prohibits consideration of that amended petition, filed after the motion already had been decided. For the same reason, the subsequently filed amended petition could not be considered as a reason to change the ruling in response to the motion for reconsideration. Accordingly, we overrule the civil appellants' first and fourth issues arising from their suit against Silverado.

2. Civil appellants' standing to assert claims on behalf of Ruby

In their second issue, the civil appellants assert that the trial court erred by granting Silverado's plea to the jurisdiction, which challenged the authority and standing of the plaintiffs to assert claims on behalf of Ruby. While at the outset of the litigation the parties disputed the validity of the various documents granting powers of attorney to act for Ruby, this issue was eventually resolved by agreement. The parties' mediated settlement agreement acknowledged the validity of the 1993 powers of attorney granted to David and Carol Ann, as well as the invalidity of the attempt to revoke those powers of attorney in 2013.

On appeal, the civil appellants attempt to relitigate the dispute over the powers of attorney by invoking a person's right to revoke a medical power of attorney. They present no argument why, as argued by Silverado, this issue was not resolved definitely by the mediated settlement agreement.

We conclude the trial court did not err by granting the jurisdictional plea as to all the civil appellants' claims asserted on behalf of Ruby. We overrule the second issue.

3. Tonya's individual claims for breach of trust and breach of fiduciary duty

In their third issue, the civil appellants assert that the trial court erred by granting Silverado's second Rule 91a motion, which sought dismissal of the claims for breach of trust and breach of fiduciary duty. In light of our disposition of issue two, we need only address this issue as it pertains to the plaintiffs' individual claims, not the claims they brought on behalf of Ruby.

When the second Rule 91a motion was initially filed, the breach of trust and breach of fiduciary duty claims were the only remaining claims in the case. But a fifth amended petition was filed, in which Don, Mack, and Lonny nonsuited their individual claims. The fifth amended petition also joined Tonya as a plaintiff who asserted various claims in her individual capacity, including breach of trust and breach of fiduciary duty. Silverado supplemented its motion to reflect the amended petition, reasserting the request to dismiss the breach of trust and breach of fiduciary duty claims of all plaintiffs.

Because Don, Mack, and Lonny nonsuited their individual claims in the fifth amended petition, only Tonya's individual claims remain for review. And the argument on appeal as to Tonya's claims is inadequately briefed. The brief block-

quotes nine paragraphs from the fifth amended petition, and the brief nakedly asserts that the quoted passages "adequately stated facts supporting the court's jurisdiction to grant remedies" on the breach of trust and breach of fiduciary claims. However, the entire quoted portion of the petition relates not to Tonya's claims, but only to Ruby's claims (which, as noted above, were properly dismissed because of the civil appellants' lack of standing to assert them).

An appellant's brief must contain "a clear and concise argument for the contentions made, with appropriate citations to authorities and the record." TEX. R. APP. P. 38.1(i). We interpret this requirement reasonably and liberally. *See Republic Underwriters Ins. Co. v. Mex–Tex., Inc.*, 150 S.W.3d 423, 427 (Tex. 2004) (citing *Verburgt v. Dorner*, 959 S.W.2d 615, 616–17 (Tex. 1997)). "Nonetheless, parties asserting error on appeal still must put forth some specific argument and analysis showing that the record and the law supports their contentions." *San Saba Energy, L.P. v. Crawford*, 171 S.W.3d 323, 338 (Tex. App.—Houston [14th Dist.] 2005, no pet.). "Additionally, appellate courts are not required to sift through the record without guidance from the party to find support for a party's bare assertion of error." *Crider v. Crider*, No. 01–10–00268–CV, 2011 WL 2651794, at *5 (Tex. App.—Houston [1st Dist.] July 7, 2011, pet. denied) (mem. op.). "[E]rror may be waived by inadequate briefing." *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284 (Tex. 1994).

Applying this standard, we find that Tonya's arguments that her individual claims for breach of trust and breach of fiduciary duty should not have been dismissed pursuant to Rule 91a have been inadequately briefed and are waived. *See* TEX. R. APP. P. 38.1(i). We overrule issue three.

4. Declaratory judgment claim

In their sixth issue, the civil appellants contend that the trial court inappropriately rendered a final judgment dismissing all claims because none of Silverado's various requests for dismissal (Rule 91a motions, plea to the jurisdiction, and summary judgment motion) specifically addressed their declaratory judgment claim. Arguably, this issue has been waived due to inadequate briefing. *See id.* However, to the extent we can construe the brief liberally and understand the gravamen of their complaint, we still must overrule it.

The fifth amended petition sought a declaratory judgment that the 1993 durable power of attorney given to David and Carol was revoked as of November 15, 2013. The civil appellants are correct in their observation that this claim was not specifically addressed by Silverado's dispositive motions. However, the final judgment in the guardianship proceeding did resolve this claim. As part of that final judgment, the trial court found that "the instruments entitled Revocation of Previous Power of Attorney signed by Mrs. Peterson dated November 15, 2013" were "void and of no effect." We have resolved the only substantive challenge to

this final judgment by concluding that the probate court did not lose its jurisdiction to enter judgment upon Ruby's death. Accordingly, any procedural error in the dismissal of the parallel claim in the civil lawsuit is not a basis for reversal. The civil appellants offer no explanation of how the error probably caused the rendition of an improper judgment or prevented a proper presentation of the appeal. *See* TEX. R. APP. P. 44.1(a). In light of the judgment rendered in the guardianship proceeding, we conclude they cannot demonstrate reversible error.

B. Waiver of remaining appellate issues

Finally, the civil appellants' fifth issue raises multifarious objections to the award of Silverado's attorney's fees. More relevant than the compressed conglomeration of complaints is the civil appellants' failure to provide any citation to the record or to any legal authority in support of any of them. The brief simply does not contain a clear or concise basis for reversing the award of attorney's fees. *See* TEX. R. APP. P. 38.1(i). We interpret briefing requirements liberally, but the court cannot shoulder the appellants' burden of marshalling the record and the legal arguments necessary to successfully challenge an award of attorney's fees. *See, e.g.*, *Crider*, 2011 WL 2651794, at *5. Accordingly, we overrule the fees challenge as inadequately briefed. *See* TEX. R. APP. P. 38.1(i).

Conclusion

We affirm the judgments of the trial court.

Michael Massengale
Justice

Panel consists of Justices Jennings, Massengale, and Huddle.