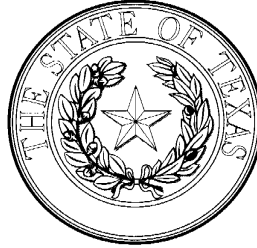


Opinion issued November 17, 2020



In The
Court of Appeals
For The
First District of Texas

NO. 01-19-00899-CV

DONNA CORBETT NEWDING AND LORI CORBETT GLIDDEN,
Appellants

V.

WILLIE LEE LAMBERT, Appellee

**On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Case No. 18-CV-0729**

MEMORANDUM OPINION

The district court granted summary judgment in Willie Lee Lambert's favor and dismissed the claims of Donna Corbett Newding and Lori Corbett Glidden with prejudice. Donna and Lori appeal contending either that their claims should not have been dismissed or should have been dismissed without prejudice.

We modify the district court's judgment to dismiss Donna and Lori's will-related claims without prejudice and affirm that part of the judgment as modified. We reverse the part of the judgment dismissing their trust-related claims and remand them to the district court for further proceedings consistent with our opinion.

BACKGROUND

Robert William Corbett died on November 26, 2016. Robert's aunt, Willie, applied to probate his will on March 6, 2017. On July 13, 2017, the probate court admitted Robert's will to probate and appointed Willie as the independent executor of Robert's estate.

Robert died unmarried and childless. In his will, Robert stated that he had placed all his real and personal property in a revocable trust and intended to dispose of this property under the trust's terms. As amended, the trust designated Willie and her son, Eddie Lee Lambert, as beneficiaries. Robert's will also provided that if the trust is found invalid, all his real and personal property are to pass to Willie and Eddie under the will's terms.

On June 6, 2018, Robert's cousins, Donna and Lori, filed this suit against Willie in the district court. They asserted three claims: negligence, breach of fiduciary duty, and fraud. Donna and Lori alleged that Willie induced Robert to execute his will after he had become incapacitated by a series of strokes. They further alleged that Willie appropriated or converted all the property placed in Robert's

trust. Donna and Lori sued Willie individually and in her representative capacities as the alleged trustee of the trust and as executrix of Robert's estate.

Willie answered and later moved for summary judgment. She moved for traditional summary judgment on the ground that Donna and Lori lacked standing to bring their claims because they did not have an interest in Robert's trust or estate. Willie also moved for no-evidence summary judgment as to Donna and Lori's claims, but her motion did not state the elements of these claims or specify which of these unstated elements she challenged.

On August 8, 2019, a week before the summary-judgment hearing, Donna and Lori filed an amended petition. In their amended petition, Donna and Lori added an allegation that Robert had revoked the trust before his death. They also added a fourth claim for conversion.

Donna and Lori contemporaneously filed a response opposing summary judgment. They contended that Willie's no-evidence motion was defective because it did not challenge specific elements of their claims. As to Willie's traditional motion, Donna and Lori's response is not a model of clarity. They appear to have argued that they have standing to sue Willie because they would have inherited some of Robert's property but for Willie's tortious conduct. Their argument rests on the premises that Robert revoked his trust before dying and lacked the capacity to

execute a will so that some of his property passes to them under the intestacy statute. *See generally* TEX. EST. CODE § 201.001.

The district court held a summary-judgment hearing on August 15, 2019. The next day, it granted summary judgment in Willie's favor without stating a basis for its ruling. It dismissed all claims with prejudice.

Donna and Lori moved for a new trial. They asserted that the district court should have dismissed their claims without prejudice due to lack of subject-matter jurisdiction as to the will or for lack of standing. As an exhibit, Donna and Lori attached a copy of their suit to cancel Robert's will, which they filed in the probate court on August 12, 2019. Among other grounds for cancellation, they asserted that Robert was incompetent or of unsound mind and that he was defrauded or subjected to undue influence.

Willie filed a response opposing the new-trial motion in which she argued that Robert did not revoke his trust. She also argued that Donna and Lori's separate suit for cancellation of Robert's will was barred by limitations.

Donna and Lori's new-trial motion was denied by operation of law. They now appeal from the district court's summary judgment and dismissal of their claims.

DISCUSSION

Donna and Lori have taken inconsistent positions on appeal. In their opening brief, they conceded that the district court was right to grant summary judgment in

favor of Willie and dismiss all their claims for lack of standing. They merely argued that the district court erred in dismissing their claims with prejudice. But in their reply brief, Donna and Lori maintained that their claims relating to Robert's will should have been dismissed without prejudice for lack of jurisdiction. They argued that we must reverse and remand the district court's dismissal of their trust-related claims.

We ordinarily do not consider issues or arguments raised by appellants for the first time in a reply brief. *E.g.*, *Crowder v. Scheirman*, 186 S.W.3d 116, 121 n.2 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Yazdchi v. Bank One, Tex.*, 177 S.W.3d 399, 404 n.18 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). But because the additional issues and arguments in question concern the existence of subject-matter jurisdiction, we must consider them. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 94 (Tex. 2012) (subject-matter jurisdiction cannot be waived).

Standard of Review

We review summary judgments de novo. *KMS Retail Rowlett v. City of Rowlett*, 593 S.W.3d 175, 181 (Tex. 2019). We also review questions of subject-matter jurisdiction de novo. *In re H.S.*, 550 S.W.3d 151, 155 (Tex. 2018). In a de novo review, we give no deference to the trial court's ruling and redetermine each issue for ourselves. *Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998).

Applicable Law

Galveston County has a statutory probate court. TEX. GOV'T CODE § 25.0861(b). A statutory probate court has exclusive original jurisdiction over probate proceedings. EST. §§ 32.001(a), 32.002(c), 32.005(a). Probate proceedings include an “action regarding the probate of a will or an estate administration” and “a will construction suit.” *Id.* § 31.001(4), (7). Unless another court has concurrent jurisdiction, any matter related to probate proceedings also must be brought in the statutory probate court. *Id.* § 32.005(a). Matters related to probate proceedings include claims against an estate’s executor in her capacity as executor or arising out of her performance as executor and claims for estate property. *Id.* § 31.002(a)(1), (4)–(6), (c)(1). A statutory probate court has concurrent jurisdiction with the district court regarding an action against a trustee or concerning an inter vivos or testamentary trust. *Id.* § 32.007(2)–(3); TEX. PROP. CODE § 115.001(a), (d)(1).

To bring an action against a trustee or an action concerning a trust, one must be an “interested person.” PROP. §§ 115.001(a)–(c), 115.011(a). An “interested person” is “a trustee, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust.” *Id.* § 111.004(7). The interest can be “legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible.” *Id.* § 111.004(6). Whether a person other than a trustee or a named beneficiary qualifies as “an interested person may vary

from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.” *Id.* § 111.004(7). If one is not an “interested person,” then she lacks standing—a jurisdictional defect—to bring a trust-related action. *In re Duddleston*, No. 01-18-00561-CV, 2018 WL 6694710, at *2–4 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, orig. proceeding) (mem. op.).

A court must have subject-matter jurisdiction to dispose of a claim on the merits. *Douglas v. Delp*, 987 S.W.2d 879, 882 (Tex. 1999). If the court lacks jurisdiction, it must dismiss. *State v. Morales*, 869 S.W.2d 941, 949 (Tex. 1994). When the court dismisses for lack of jurisdiction, it ordinarily must do so without prejudice. *See, e.g., Scarbrough v. Metro Transit Auth. of Harris Cty.*, 326 S.W.3d 324, 339 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (dismissal for lack of standing); *EPGT Tex. Pipeline v. Harris Cty. Flood Control Dist.*, 176 S.W.3d 330, 342 (Tex. App.—Houston [1st Dist.] 2004, pet. dismissed) (dismissal because other court had exclusive jurisdiction). Jurisdictional defects may be raised for the first time on appeal. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445–46 (Tex. 1993). We must raise them even if the parties do not. *Am. K–9 Detection Servs. v. Freeman*, 556 S.W.3d 246, 260 (Tex. 2018).

Analysis

Whether asserted against Willie individually or in her representative capacity as executor or trustee, Donna and Lori’s claims fall into two categories: those

relating to Robert's trust and those relating to his will. Because Robert ostensibly gave all his property to Willie and her son via the trust or, alternatively, the will, if Donna and Lori are to recover any of this property, they must invalidate both. None of their claims involve property that is not subject to one of these instruments.

Will-Related Claims

In part, Donna and Lori sued Willie in her capacity as the executor of Robert's will contesting the will's validity. But these claims cannot be brought in the district court because the statutory probate court has exclusive original jurisdiction over them. *See* EST. §§ 31.002(a)(1), (4), (c)(1), 32.005(a); *Jones v. LaFargue*, 758 S.W.2d 320, 325 (Tex. App.—Houston [14th Dist.] 1988, writ denied). Because the district court lacked subject-matter jurisdiction to hear these claims, it had no choice but to dismiss them. *Morales*, 869 S.W.2d at 949. This remains true even though Willie did not raise the probate court's exclusive jurisdiction as a ground for dismissal. *See James v. Underwood*, 438 S.W.3d 704, 713 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (trial court can address jurisdiction on its own motion). Dismissal on this basis, however, must be without prejudice. *EPGT Tex. Pipeline*, 176 S.W.3d at 342.

Trust-Related Claims

In part, Donna and Lori sued Willie individually and in her capacity as trustee for misappropriating trust property. To assert claims relating to the trust, they had to

show that they have standing as “interested persons.” *See* PROP. §§ 115.001(a)–(c), 115.011(a). Donna and Lori are not beneficiaries or trustees of the trust. Indeed, they claim that Robert revoked the trust. Thus, to qualify as “interested persons,” Donna and Lori must show that they had an interest in or a claim against the trust or were affected by its administration. *Id.* § 111.004(7). Because Robert gave all his property to Willie and her son via his will in the event that his trust is invalid, any interest that Donna and Lori could have in trust property is contingent on the will’s invalidity. That is, both the trust and will must be invalid for Donna and Lori to recover on trust-related claims because if the will is valid, then any property that ostensibly had been in the trust would pass to Willie and her son anyway.

Willie argues Donna and Lori cannot challenge Robert’s will at this point because they did not file their will contest within two years of the date on which the probate court admitted the will to probate. Willie is correct about the timing. The will was admitted to probate in July 2017, and Donna and Lori did not file their will contest in the probate court, which has exclusive jurisdiction over contests, until August 2019. Willie likewise is correct that a two-year limitations period generally applies to will contests. EST. § 256.204(a); *Stoll v. Henderson*, 285 S.W.3d 99, 105 (Tex. App.—Houston [1st Dist.] 2009, no pet.). However, there is a discovery exception “for forgery or other fraud.” EST. § 256.204(a). Donna and Lori pleaded fraud both in this suit and in their will contest. Given this exception for fraud, we

cannot say whether their suit is barred by limitations, which is a matter for the probate court's consideration in the first instance. *See Stoll*, 285 S.W.3d at 105.

We therefore hold that the district court erred in dismissing Donna and Lori's trust-related claims, which are contingent on the will contest, for lack of standing.

CONCLUSION

We hold that the district court correctly dismissed Donna and Lori's will-related claims but erred in dismissing these claims with prejudice. We further hold that the district court erred in dismissing their trust-related claims. Accordingly, we modify the district court's judgment to dismiss the will-related claims without prejudice and affirm that part of the judgment as modified. We reverse the part of the district court's judgment dismissing the trust-related claims and remand them to the district court for further proceedings consistent with our opinion.

Gordon Goodman
Justice

Panel consists of Justices Kelly, Goodman, and Countiss.