



Fourth Court of Appeals
San Antonio, Texas

CONCURRING AND DISSENTING OPINION

No. 04-13-00404-CV

IN RE the **ESTATE OF** Alberto **TREVIÑO**, Jr.

Original Mandamus Proceeding¹

Opinion by: Rebeca C. Martinez, Justice
Concurring and Dissenting Opinion by: Patricia O. Alvarez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: September 25, 2013

I agree with the majority that the trial court's order transferring the probate proceedings from the constitutional county court in Zapata County to the 49th District Court in Zapata County was not available under section 4D(a) because the proceeding was not "contested" at the time of the transfer. *See* TEX. PROB. CODE ANN. § 4D(a) (West Supp. 2012). I also agree that the district court has no original probate jurisdiction and only has authority to hear contested probate matters pursuant to a proper transfer and that, consequently, the district court's orders entered after the transfer are void. Therefore, I concur in the opinion in part.

I respectfully disagree, however, with the majority's opinion that it was proper for the court to deny Treviño's motion for assignment of a statutory probate court judge to hear the entire probate proceeding pursuant to section 4D of the Probate Code. Section 4D provides that a county

¹ This proceeding arises out of Cause No. P-01796, styled *In re the Estate of Alberto Treviño, Jr.*, pending in the County Court, Zapata County, Texas, the Honorable Joe Rathmell presiding.

judge has a mandatory duty to request assignment of a statutory probate court judge to hear a contested matter when a party files such a motion before the judge of the county court transfers the matter to a district court. TEX. PROB. CODE ANN. § 4D(b) (West Supp. 2012) (the court shall grant the motion and may not transfer the matter to district court unless the motion seeking assignment of a statutory probate court judge is withdrawn). Because we concluded that the transfer to district court was premature as there was no “contested matter” at the time of transfer, the court’s denial of Treviño’s request for assignment of a statutory probate court judge was also premature. Once Treviño had notice of the claims and proceedings before the court and an opportunity to appear and contest the matters asserted therein, the court would be required by the language of the statute to grant Treviño’s motion and request assignment of a statutory probate court judge. *See id.* Therefore, I respectfully dissent in part and would order that the constitutional county court include in its order vacating the order of transfer a request for the assignment of a statutory probate court judge.

Patricia O. Alvarez, Justice