



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-15-00443-CV

ESTATE OF JOE D. WHITTENBURG, JR., DECEASED

On Appeal from the County Court at Law No 2
Randall County, Texas
Trial Court No. 2015-205P, Honorable Delwin T. McGee, Presiding

August 4, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Trek Exploration, Inc. (Trek) appeals from an “Order Admitting Will to Probate and Appointing Wanda Whittenburg as Independent Executrix.” Through two issues, it argues that “the trial court had before it an objection to the Application [for probate] filed by [Trek]; however, [Trek] was never given [actual] notice of the hearing, a clear violation of the procedural guarantees of the 14th Amendment’s due process clause” We overrule the issues and affirm the judgment.

Apparently the hearing to which Trek refers is that conducted on September 16, 2015 on the application to probate the last will and testament of Joe D. Whittenburg. As Trek acknowledged in its appellate brief, notice of the application was made via

“[c]itation by posting . . . issued by the Clerk of the County Court of Randall County, Texas on June 4, 2015.” Such is permitted by the Texas Estates Code. That is, when an application to probate a will produced in court is filed, the clerk must issue a citation to all interested parties. TEX. EST. CODE ANN. § 258.001(a) (West 2014). The citation is then “served by posting” *Id.* at § 258.001(b); see TEX. EST. CODE ANN. § 51.053 *et. seq.* (describing the manner in which service is made by posting).¹

Next, it has long been the law in Texas that probate proceedings are *in rem*, and “rules applicable to cases in which jurisdiction over the person [*i.e. in personam*] must be acquired before a personal judgment can be rendered, have no application to such proceedings.” *Thomas v. Bonnie*, 66 Tex. 635, 2 S.W. 724, 726 (Tex. 1886); *Soto v. Ledezma*, 529 S.W.2d 847, 850 (Tex. Civ. App.—Corpus Christi 1975, no writ). In other words, personal service normally is not required in *in rem* proceedings, *Soto v. Ledezma*, 529 S.W.2d at 850, unless, of course, statute or other law dictates otherwise. Again, statute does not here, as shown above.

Trek argues, though, that the Due Process Clause contained in the Fourteenth Amendment to the United States Constitution requires actual or personal service. Furthermore, the authority it cited suggests that when a legal proceeding has the effect of “immediately and drastically diminish[ing] the value of” one’s interest in property and the interest holder can be identified through “reasonably diligent efforts,” then due process requires actual notice of the proceeding. *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 485, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), quoting, *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed. 180

¹ Trek does not argue that the posting here failed to comply with the statutory requirement for service by posting.

(1983). Yet, in citing that authority and tenet, Trek fails to explain how the mere probate of a will or appointment of an executor over the estate being probated has the effect of immediately and drastically diminishing the value of its claim. The proceedings here did not involve the adjudication of claims to or against the estate being administered. Nor did they result in any transfer of property or the like. They simply served to recognize the existence of a will and designate someone to fulfill the testator's intent as captured by that document. So, given its utter lack of effort to explain how any interest it had was being affected in any way by the proceeding at issue here, we cannot say that Trek established that *Tulsa, Mennonite*, or the other constitutional authority it cited requires actual notice of the mere application to probate a will and designate an executor.

We overrule Trek's complaints and affirm the order admitting the will of Joe D. Whittenburg to probate and appointing Wanda Whittenburg as independent executrix.²

Brian Quinn
Chief Justice

²This result seems especially appropriate given that the supposed claim uttered by Trek as justifying its involvement in the probate has been settled. The supplemental clerk's record filed with this court indicates that Executrix Whittenburg transferred to Trek the shares of stock it sought from Joe D. Whittenburg.