In The
Court of Appeals
Seventh District of Texas at Amarillo

Nos. 07-20-00226-CV
07-20-00271-CV
07-20-00320-CV
07-20-00321-CV
07-20-00346-CV
07-20-00347-CV

IN THE ESTATE OF WILLIAM LOUIS SUROVIK, JR., DECEASED

On Appeal from the 335th District Court
Burleson County, Texas
Trial Court No. 28,825, Honorable Carson T. Campbell, Presiding

April 22, 2022

MEMORANDUM OPINION

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

Six appeals arise from the probate proceeding of William L. Surovik, Jr. William's wife, Sara Jo Surovik, died in 2019.[1] William and Sara Jo's only son, and Appellant, is Richard J. Surovik; their only daughter is Appellee, Sara Jayne Wolz.[2] Sara Jayne is the dependent administrator of William's estate. On June 29, 2020, the district court signed

[1] Each appeal was originally filed in the Tenth Court of Appeals and was transferred to this Court by order of the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001.

[2] For clarity we will refer to the Surovik family members by their first names.

an order declaring that a will jointly executed by William and Sara Jo and dated November 27, 1968, was not contractual. Richard appealed from that order; his appeal was assigned case number 07-20-00226-CV. Thereafter Richard filed seven additional notices of appeal that challenged orders arising from William's probate proceeding. We consolidated all appeals for briefing. By order of April 29, 2021, we dismissed two of the appeals, case numbers 07-20-00345-CV and 07-20-00348-CV, for want of subject matter jurisdiction.[3] Richard's sole merits complaint in this Court is that the district court erroneously declared the 1968 will is not contractual. We affirm the district court's order.

Background

William died in Burleson County, Texas, in July 2016. Sara Jo applied for probate of the 1968 will in the county court. In relevant part, the 1968 will provides:

> KNOW ALL MEN BY THESE PRESENTS: That we, WILLIAM LOUIS SUROVIK, JR., and wife, SARA JO SUROVIK, of Burleson County, Texas, both being in good health, of sound and disposing mind and memory, and above the age of nineteen (19) years, do hereby make, publish and declare this to be our Last Will and Testament hereby revoking all previous Wills, if any, by either of us heretofore made.
>
> ITEM 1
>
> It is our will and desire and we hereby direct that the Executor of this Will shall pay all of the debts and expenses of the one of us dying first, including all expenses of last illness, funeral and burial.
>
> ITEM 2
>
> Upon the death of the one of us dying first, we hereby give, devise and bequeath unto the survivor of us, William Louis Surovik, Jr., or Sara Jo Surovik, as the case may be, our home in Caldwell, Texas, consisting of our

[3] *In re Estate of Surovik,* Nos. 07-20-00226-CV, 07-20-00271-CV, 07-20-00320-CV, 07-20-00321-CV, 07-20-00345-CV, 07-20-00346-CV, 07-20-00347-CV, 07-20-00348-CV, 2021 Tex. App. LEXIS 3320 (Tex. App.—Amarillo Apr. 29, 2021, per curiam order).

> lot and house located on North Hill Street, together with all of the improvements located thereon, and including all of the furniture and household goods and equipment in our said home, in fee simple and without remainder.
>
> ITEM 3
>
> Upon the death of the one of us dying first, we further give, devise and bequeath all of the remainder and residue of our property and estate of every character and description unto the survivor of us, William Louis Surovik, Jr., or Sara Jo Surovik, as the case may be, and unto our two children, Richard J. Surovik and Sara Jayne Surovik, so that the said survivor of us, William Louis Surovik, Jr., or Sara Jo Surovik, shall receive an equal undivided 1/2 interest in said property and our said two children together shall receive an equal undivided 1/2 interest in said property, in fee simple and without remainder.

Following admission of the 1968 will to probate, the county court appointed Sara Jo independent executor of William's estate on October 19, 2016. Routine matters in the administration of the probate estate followed, including filing the publisher's affidavit with notice to creditors and the inventory, appraisement, and list of claims.

In November 2016, Richard refused delivery of a certified letter from Sara Jo's attorney. On December 29, 2016, attorney Wesley T. Keng filed a notice of appearance as counsel for Richard. In a letter dated January 6, 2017, from Keng to Sara Jo's counsel, Keng stated that Richard did not agree to a proposed division of the estate and that the division did not "seem to follow the percentages listed in the will." On January 31, 2017, attorney Laura Upchurch filed a motion for substitution as counsel for Sara Jo. In part, the motion alleged "[i]n light of disputes that have arisen with regard to the partition and distribution of the assets of the Estate, Executrix has now hired Laura Upchurch . . . ."

On the same day as the motion for substitution, Sara Jo filed a "Motion to Transfer Contested Matters to District Court." In relevant part, the pleading "request[ed] that the [county court] transfer all contested matters in this probate action to the District Court of Burleson County, Texas, pursuant to Section 32.003 of the Texas Estates Code . . . ." That same day, the county judge signed an order transferring "this cause . . . to the District Court of Burleson County, Texas, for determination of the contested matters in this probate proceeding."

Thereafter, for almost four years, the parties litigated a multiplicity of estate-related disagreements in the district court, where Richard both sought relief and opposed relief to other parties. During December 2017, Richard filed an objection to the amended inventory, appraisement, and list of claims filed by Sara Jo. Richard sought the removal of Sara Jo as independent executor in a June 2018 motion. After having received several orders with which he disagreed, in May 2019, Richard filed a motion in the district court challenging the county court's transfer order alleging*, inter alia,* its voidness due to the absence of a contested matter at the time of the transfer. No ruling was obtained on the motion, however.

Following Sara Jo's death in June 2019, Sara Jayne was appointed dependent administrator of William's estate. Sara Jo left a 2013 will, giving her entire estate to Sara Jayne. In Sara Jo's probate case, Richard sought a declaratory summary judgment that the 1968 will was contractual; the rights of Sara Jo, Richard, and Sara Jayne were fixed by the 1968 will; and any modifications of the 1968 will by Sara Jo after William's death were a breach of the 1968 will's contract. A docket sheet entry indicates the district court denied Richard's motion.

Meanwhile, the parties continued litigating contested matters in William's probate case. In July 2019, Richard filed a motion for summary judgment seeking declarations similar to those sought in Sara Jo's probate case. In January 2020, Richard filed an instrument with the district clerk entitled "Affidavit of Constructive Trust" and an ostensible claim stating that "on receipt" he was due from the estates of his father and mother the sum of $10,417,986. In March 2020, Richard filed an objection to Sara Jayne's application to sell personal property of the estate; the next month, he filed an objection, including a general denial, to Sara Jayne's application for partition and distribution of estate real property. Richard then filed an amended pleading in the district court alleging that court lacked subject matter jurisdiction, which was denied by verbal rendition on December 4, 2020. A July 2020 order contained a finding by the district court that "even after mediation and the exchange of offers of settlement, the beneficiaries of the Estate have been unable to reach an agreement for division and distribution of the real property of the Estate[.]"

Analysis

Richard's Jurisdictional Challenges

District Court Jurisdiction

By his second issue, which we take up first, Richard "contends that the district court never acquired jurisdiction because when the case was transferred there were no 'contested matters.'" Earlier in the pendency of his appeals, Richard presented the same jurisdictional challenge to this Court via a petition for writ of mandamus. *In re Surovik,* No. 07-20-00371-CV, 2021 Tex. App. LEXIS 1704 (Tex. App.—Amarillo Mar. 8, 2021,

orig. proceeding [mand. denied]) (mem. op.). We denied relief and deem it unnecessary to reiterate our analysis. It is noteworthy that at the time the county court transferred the case to the district court, there was before the county court the statement of counsel for Sara Jo, and later Sara Jayne, that "[i]n light of disputes that have arisen with regard to the partition and distribution of the assets of the Estate, Executrix has now hired [attorney] Laura Upchurch . . . ." 2021 Tex. App. LEXIS 1704, at *6. We concluded, "[g]iven the uncontroverted statement of counsel in her motion that the partition and distribution of the estate was disputed, on this record we cannot say [the county judge] committed a clear abuse of discretion by transferring the case." 2021 Tex. App. LEXIS 1704, at *7.

As for Richard's subsidiary contention that the district court ruled on matters that were not contested and therefore beyond its jurisdiction, Richard has not identified those portions of the proceeding, including any resulting orders, that he believes are infirm for want of jurisdiction. We conclude Richard's subsidiary claim was not adequately briefed and is waived. *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"); *Smith v. Dixon,* No. 07-20-00197-CV, 2021 Tex. App. LEXIS 5592, at *6 (Tex. App.—Amarillo Jul. 14, 2021, pet. denied) (mem. op.) (finding appellant's issues waived for inadequate briefing; brief lacked substantive argument and citation to legal authority and the record); *Forsthoff v. Brazos Cty.,* No. 10-14-00297-CV, 2015 Tex. App. LEXIS 1136, at *3 (Tex. App.—Waco Feb. 5, 2015, no pet.) (mem. op.) (concluding issue waived for failure to cite supporting legal authority).

Appellate Jurisdiction

The parties do not dispute our appellate jurisdiction in case number 07-20-00226-CV to review the district court's summary judgment declaring the 1968 will was not contractual. However, Richard argues in passing that his appeals bearing this court's case numbers 07-20-00271-CV, 07-20-00320-CV, 07-20-00321-CV, 07-20-00346-CV, and 07-20-00347-CV do not concern appealable orders.

Generally, courts of appeals have jurisdiction only over appeals of final judgments and certain interlocutory orders made immediately appealable by statute. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 51.012, 51.014; *De Ayala v. Mackie,* 193 S.W.3d 575, 578 (Tex. 2006) (op. on reh'g) (citing *Lehmann v. Har-Con Corp.,* 39 S.W.3d 191, 195 (Tex. 2001)). A judgment is final for purposes of appeal if it disposes of all pending parties and claims. *Lehmann,* 39 S.W.3d at 195. Unless "specially provided by law," only "one final judgment" may be rendered in any cause. TEX. R. CIV. P. 301.

Likewise, the Texas Estates Code provides that "[a] final order issued by a probate court is appealable to the court of appeals." TEX. ESTATES CODE ANN. § 32.001(c). However, probate proceedings present an exception to the "one final judgment" rule. *De Ayala,* 193 S.W.3d at 578. Thus, in a probate proceeding, an order is final and appealable before the entire proceeding is concluded if the order disposes of a discrete phase of the litigation or if a statute expressly permits an appeal from a specific type of order. *Id.* at 579; *Crowson v. Wakeham,* 897 S.W.2d 779, 783 (Tex. 1995). An order that does not end a discrete phase of the proceedings, but only "sets the stage" for the resolution of all proceedings, is interlocutory. *De Ayala,* 193 S.W.3d at 579.

In case number 07-20-00271-CV, Richard appealed from the district court's July 13, 2020, "Order Approving Application for Partition and Sale of Estate Real Property and Mineral Interests." This order directed the administrator to distribute to the beneficiaries, in the percentages of ownership the court previously declared, corporate stock, certain mineral interests, and the surface estate of a tract of real property located in Upton County. The July 13 order also addressed the estate's surface ownership in eight tracts of real property located in Burleson County. After finding these tracts were not subject to partition in kind, the district court found partition by sale was in the best interest of the estate and its beneficiaries. The court accordingly ordered: (1) the administrator to obtain a listing agreement with a real estate broker for the sale of the Burleson County properties; (2) the listing agreement to permit a beneficiary to purchase the estate's surface interest free of a broker's commission under specified terms; and (3) the administrator to comply with the report-of-sale provisions of Chapter 356 of the Estates Code for each tract of Burleson County real property.

Also relevant to this discussion, the July 13 order included among its findings:

> [I]t is in the best interests of the Estate and the Estate beneficiaries that the Burleson County Real Property be sold, at a private sale for cash, and that the Stock, the Upton County Real Property and the Mineral Interests be distributed to the beneficiaries of the Estate in shares equal to the beneficiaries' respective interests in the Estate, as determined by this Court's judgment.

Notably, the entirety of assets was incapable of distribution following the July 13 order because the Burleson County property awaited partition by sale, either to a beneficiary under specific terms, or by a purchaser at private sale.

We conclude the July 13 order specified additional action before the matters it concerned could be finally concluded. It did not "dispose of all issues in the phase of the proceeding for which it was brought," *De Ayala,* 193 S.W.3d at 578 (citing *Crowson,* 897 S.W.2d at 782-83), but rather set the stage for further proceedings. *Id*. at 579. Accordingly, we agree with Richard that we lack jurisdiction to consider his appeal in case number 07-20-00271-CV. That appeal is therefore dismissed.

On the other hand, the orders confirming sales of estate real property, which are the subject of Richard's appeals in case numbers 07-20-00320-CV, 07-20-00321-CV, 07-20-00346-CV, and 07-20-00347-CV, are expressly made appealable by statute. TEX. EST. CODE ANN. § 356.556(c) (providing that the court's action of approving a sale of real property "has the effect of a final judgment."). We conclude we possess jurisdiction to consider Richard's appeal in these case numbers and discuss the merits of those appeals below.

Appeals in Case Numbers 07-20-00320-CV, 07-20-00321-CV, 07-20-00346-CV, and 07-20-00347-CV

After carefully reviewing Richard's briefs, we find no argument assigning error to the orders from which appeals were pursued in case numbers 07-20-00320-CV, 07-20-00321-CV, 07-20-00346-CV, and 07-20-00347-CV. Accordingly, we affirm the orders signed by the trial court for these appeals.

Appeal in Case Number 07-20-00226-CV

Through his sole merits issue, Richard contends the trial court erred by rendering a summary judgment declaring that the 1968 will was not a contractual will. The

construction of an unambiguous will is a question of law we review de novo. *In re Estate of Baker,* No. 10-18-00215-CV, 2021 Tex. App. LEXIS 4138, at *2 (Tex. App.—Waco May 26, 2021, no pet.). We review a trial court's order granting summary judgment de novo. *Lujan v. Navistar, Inc.,* 555 S.W.3d 79, 84 (Tex. 2018); *Knopf v. Gray,* 545 S.W.3d 542, 545 (Tex. 2018). "When reviewing a traditional motion for summary judgment, we must determine whether the movant met its burden to establish that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law." *James v. Young,* No. 10-17-00346-CV, 2018 Tex. App. LEXIS 2406, at *5 (Tex. App.—Waco Apr. 4, 2018, no pet.) (mem. op.) (citing TEX. R. CIV. P. 166a(c); *Sw. Elec. Power Co. v. Grant,* 73 S.W.3d 211, 215 (Tex. 2002)).

Section 254.004 of the Texas Estates Code requires that wills executed on or after September 1, 1979, can only be contractual if the language of the will expressly provides such. TEX. ESTATES CODE ANN. § 254.004. Because the 1968 will was executed before 1979, the requirements of section 254.004 are inapplicable. We therefore look to the common law for determining whether a contractual will was executed.

"The separately executed wills of two or more persons contained in a single instrument is a joint will." *Ellexson v. Ellexson,* 467 S.W.2d 515, 519 (Tex. Civ. App.—Amarillo 1971, no writ). "A joint will becomes . . . contractual[] only when it is executed pursuant to an agreement between the testators to dispose of their property in a particular manner, each in consideration of the other." *Id.* If a joint will is contractual, the estates of the testators are considered and treated as a single estate and jointly disposed of by both testators in dispositive provisions of the will, upon the death of the second testator. *See In re Estate of Gibson,* 893 S.W.2d 749, 751 (Tex. App.—Texarkana 1995, no writ);

Fisher v. Capp, 497 S.W.2d 393 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.). A contractual will represents both a proposed testamentary disposition of property inherent in a will and a contract between the testators. *Meyer v. Shelley,* 34 S.W.3d 619, 622 (Tex. App.—Amarillo 2000, no pet.). Under the will's contractual provision, the testators agree to a specific disposition of property on the death of the second. *Id*. Upon the death of the first, however, the survivor is bound by the agreement and cannot dispose of the subject property in a manner contrary to the agreement. *Id*.

A contractual will is revealed by a two-part analysis. *In the Estate of McFatter,* 94 S.W.3d 729, 733 (Tex. App.—San Antonio 2002, no pet.); *Fisher,* 597 S.W.2d at 399. First, the gift to the survivor is not absolute and unconditional, even if it initially so appears. *Id.*; *Fisher,* 597 S.W.2d at 399. Second, the balance remaining from the estate of the first to die and the estate of the last to die is treated as a single estate and jointly disposed of by both testators in the secondary dispositive provisions of the will. *Id.* (citing *Dougherty v. Humphrey,* 424 S.W.2d 617, 621 (Tex. 1968)); *Fisher,* 597 S.W.2d at 399.

First, we examine whether the gift to the survivor is absolute and unconditional. Here, William's bequest vested on death "in fee simple without remainder" in Sara Jo and the children. No subsequent provision of the will altered or diminished this absolute and unconditional transfer. An interest in fee simple is "[a]n interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs; esp., a fee simple absolute." BLACK'S LAW DICTIONARY 760 (11th ed. 2019). A transfer in fee simple, "also referred to as fee simple absolute, is an estate over which the owner has unlimited power of disposition in perpetuity without condition or limitation." *Walker v. Foss*, 930 S.W.2d 701, 707 (Tex. App.—San Antonio 1996, no writ) (citing

BLACK'S LAW DICTIONARY 554 (5th ed. 1979). Because the 1968 will makes an absolute and unconditional bequest, Sara Jo was free to dispose of her share of William's property unbound by any provision of the 1968 will.

Second, we hold that the 1968 will also contains no provision for distributing the balance of the estate upon the passing of Sara Jo as the second-to-die. The bequests in the 1968 will were expressly conditioned "[u]pon the death of the one of us dying first" (except for one inapplicable exception for if William and Sara Jo had simultaneously passed away). The will makes clear the bequests were made "without remainder." This language is notably different from that at issue in *Estate of Johnson,* 781 S.W.2d 390 (Tex. App.—Houston [1st Dist.] 1989, writ denied), which Richard contends controls here. In *Johnson*, husband and wife executed a joint will that left all property to the survivor to "be owned in fee simple and full ownership by such survivor, *however, any of such property remaining at the time of the death of the survivor of us to pass and be owned in accordance with the provisions hereinafter set forth in this Will*." 781 S.W.2d at 392 (emphasis added). The First Court of Appeals held that, notwithstanding the reference to a "fee simple" bequest, the will treated the remaining balance of the joint estate as a single estate jointly disposed of by both testators through a secondary disposition. *Id.* at 393.[4] Because nothing in the 1968 will communicates any intent to retain a future interest,

[4] Similarly, Richard relies on *In re Estate of Osborne,* 111 S.W.3d 218, 220 (Tex. App.—Texarkana 2003, pet. dism'd) and *Swearingin v. Estate of Swearingin*, No. 02-05-00132-CV, 2006 Tex. App. LEXIS 5187 (Tex. App.—Fort Worth Jun. 15, 2006, no pet.) (mem. op.) for supporting his interpretation of the 1968 will. In each of these cases, a future interest was expressly identified in the will, as were the terms for distribution upon the death of the second spouse. In the present case, the 1968 will transfers the property in fee simple upon the first-to-die, only, and expressly denies a remainder constraining the interests of the second-to-die.

we hold Sara Jo's receipt of William's gift was not subject to any encumbrances or restrictions, and that she was free to dispose of the property as she wished.

Relying on *In re Estate of Osborne,* 111 S.W.3d at 220, Richard argues the 1968 will's use of the pronouns "we," "us," and "our" evinces the testators' intention to treat their property as one estate. The court in *McFatter* similarly dismissed the argument that use of these pronouns does not make a will a contract. 94 S.W.3d at 733 (citing *City of Corpus Christi v. Coleman,* 262 S.W.2d 790, 794 (Tex. Civ. App.—San Antonio 1953, no writ)). These pronouns "we," "us," and "our" do not alter our conclusion in light of the other language in the 1968 will.

We conclude the district court correctly declared the 1968 will was not a contractual will. Richard's issue is overruled.

Conclusion

We conclude as follows:

(1) the district court possessed jurisdiction upon the order of transfer of William's probate case from the county court;

(2) we lack jurisdiction over case number 07-20-00271-CV and dismiss that case;

(3) we possess jurisdiction over case numbers 07-20-00320-CV, 07-20-00321-CV, 07-20-00346-CV, and 07-20-00347-CV; and

(4) the orders appealed in case numbers 07-20-00226-CV, 07-20-00320-CV, 07-20-00321-CV, 07-20-00346-CV, and 07-20-00347-CV are affirmed.

Lawrence M. Doss
Justice