



NUMBER 13-16-00647-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

**IN THE GUARDIANSHIP OF NARCY SIMO,
AN INCAPACITATED PERSON**

**On appeal from the 197th District Court
of Willacy County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Contreras and Hinojosa
Memorandum Opinion by Justice Hinojosa**

Appellant Oscar Simo Jr. appeals from an order sustaining appellee George Simo's¹ third amended plea to the jurisdiction and dismissing Oscar Jr.'s suit with prejudice. In eight issues, which we categorize as four, Oscar Jr. complains that the trial court erred by: (1) overruling his special exceptions to George's plea, (2) sustaining

¹ We will refer to the parties by their first name for simplicity's sake.

George's plea and dismissing with prejudice all of Oscar Jr.'s claims, (3) finding George's plea to have been timely urged, and (4) concluding that the interest of justice permitted dismissal with prejudice. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND²

The underlying dispute springs from the guardianship of the person and estate of Nancy Simo. By way of family background, Nancy and Alberto Simo's marriage produced two sons, Oscar Simo (hereinafter "Oscar Sr.") and George. Oscar Jr. is Oscar Sr.'s son, and as far as we know, Oscar Sr. passed away before the dispute between Oscar Jr. and his uncle, George, developed. Before marrying Alberto, Nancy gave birth to Melba Nora Williams. See *In the Estate of Simo*, No. 13-16-0211-CV, 2017 WL 4837767 at *1 (Tex. App.—Corpus Christi, Oct. 26, 2017 no pet. h.) (mem. op.).

The trial court denied George's initial plea to the jurisdiction. After a hearing, the trial court sustained George's second plea to the jurisdiction but permitted Oscar Jr. to amend his pleading. Oscar Jr.'s third amended petition, his live pleading at the time of dismissal, alleges that:

- in April 2008, a physician evaluated Alberto and Nancy, found them both to be incompetent to handle their financial affairs, and memorialized the findings in a letter;
- in July 2008, Alberto and Nancy deeded to George and George's wife, Elizabeth Simo, certain real property in Willacy County, Texas;

² Because this is a memorandum opinion and the parties are familiar with the facts, we will not recite them here except as necessary to advise the parties of the Court's decision and the basic reasons for it. See TEX. R. APP. P. 47.4.

- in December 2008, Alberto and Nancy transferred all of their property into the George A. Simo Trust, a trust created by Alberto and Nancy that named George as its sole beneficiary and sole trustee;
- in March 2009, George applied for a guardianship of the persons and estates of both Alberto and Nancy and asked that he be appointed the permanent guardian. George attached the April 2008 letter from Alberto and Nancy's physician;
- in April 2009, George was appointed guardian of the persons and estates of both Alberto and Nancy;
- in March 2010, Oscar Jr. filed an "Affidavit of Facts" with the Willacy County Clerk's Office that, according to him "provided constructive notice to all persons and entities" that "the George A. Simo Trust and transfer of the entire estate of Albert Simo and Nancy Simo into the trust were void due to the incapacity of Albert Simo and Nancy Simo";
- on June 30, 2010, Alberto passed away; and
- in August 2010, George, as trustee, transferred certain real property to Maria Bartmess.³

Based on these allegations, Oscar Jr. asserted three claims.

First, Oscar Jr. sought a judgment declaring the following void: (a) the George A. Simo Trust, (b) the transfer of real property to Maria, and (c) the transfer of property to George. According to Oscar Jr., Alberto and Nancy lacked capacity to execute the trust and transfer documents. Oscar Jr. also sought a declaratory judgment "as to his rights as an heir to Albert Simo in Albert Simo's estate and that the above identified property more properly belongs to Oscar Simo, Jr., as an heir, at least in part."

Second, Oscar Jr. asserted that George should be removed as Nancy's guardian on the grounds that he (a) failed to file an inventory; (b) failed to properly provide notice

³ It is unclear as to who Maria is and whether she is related to any party.

to creditors; (c) failed to file an annual accounting; (d) failed to file an annual report; (e) “misapplied and embezzled the property committed to his care”; (f) “is guilty of gross misconduct and mismanagement in the performance of his duties as guardian”; and (g) “is ineligible for appointment as guardian under Texas Probate Code § 681 in that he has a claim adverse to the ward, the ward’s real and personal property, specifically that he is the beneficiary of a trust created by the proposed wards when they both were incapacitated and incapable of creating said trust.”

Third, Oscar Jr. alleged that George had “established a fiduciary relationship with his parents” before the guardianship proceedings and that fiduciary relationship extended into the guardianship proceedings. Oscar Jr. further alleged that he is “an heir of the Estate of Albert Simo,” and as such, “the breach of fiduciary duty is [a] claim squarely in the estate of Albert Simo and more properly belong[ing] to [Oscar Jr.], at least in part.”

After Oscar Jr. filed his third amended petition, George filed a third plea to the jurisdiction. Generally, George’s third plea to the jurisdiction asserted that Oscar Jr.’s live pleading: (1) had “not demonstrated any injury to himself for which [the trial court had] jurisdiction to redress”; (2) did not establish that he was an “interested person” as that term is statutorily defined; and (3) established that he lacked standing to maintain the claims asserted.

Oscar Jr. responded by specially excepting to George’s plea on the ground that it failed to link his jurisdictional challenges to the specific claims asserted. On the merits, Oscar Jr. also argued that the court had already denied George’s first plea to the jurisdiction and it should not permit George to have “a second bite at the apple.” Oscar

Jr. also argued that he had statutory standing under the property code as an heir to Alberto's estate. According to Oscar Jr., because Alberto's will had not been probated, Alberto was deemed to have died intestate and because "there are children from a prior marriage," part of Alberto's separate property passed to Oscar Jr.

After another hearing, the trial court sustained George's third plea to the jurisdiction and dismissed Oscar Jr.'s suit with prejudice. Oscar Jr. appeals from this order.

II. SPECIAL EXCEPTIONS

In the trial court, Oscar Jr. specially excepted to George's third plea to the jurisdiction because it failed to link his jurisdictional challenges to the specific claims asserted. See *Hidalgo Cty. v. Dyer*, 358 S.W.3d 698, 704 (Tex. App.—Corpus Christi 2011, no pet.) (noting that a trial court should address subject-matter jurisdiction claim-by-claim, dismissing claims over which it lacks subject-matter jurisdiction and retaining claims in the same case over which it has jurisdiction) (citing *Thomas v. Long*, 207 S.W.3d 334, 338–39 (Tex. 2006)). On appeal, Oscar Jr. argues that George was required to specify which statutory provisions undermined his standing.

Oscar Jr.'s argument is not framed in any standard of review. Furthermore, although the prayer section of Oscar Jr.'s brief generally seeks reversal and remand as a remedy, he fails to explain how trial court error regarding his special exceptions, if any, entitles him to such relief. We conclude that Oscar Jr.'s arguments relating to his first issue are inadequately briefed. 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.").

We overrule Oscar Jr.'s first issue.

III. SUBJECT-MATTER JURISDICTION

In Oscar Jr.'s second issue, he complains that the trial court erred by sustaining George's third plea to the jurisdiction and dismissing with prejudice all of his claims.

A. Standard of Review

"A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without regard to whether the claims asserted have merit." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). A plea to the jurisdiction challenges the trial court's subject-matter jurisdiction over a pleaded cause of action. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). Subject-matter jurisdiction is a question of law. *Id.* at 226. Therefore, we apply a de novo standard of review to a trial court's ruling on a plea to the jurisdiction. *Id.* When, as here, a plea to the jurisdiction challenges the pleadings, we determine whether the pleader has alleged facts that affirmatively demonstrate the trial court's jurisdiction. *Id.* We construe the pleadings in Oscar Jr.'s favor, taking as true the facts pled to determine whether subject-matter jurisdiction exists in this case. *Id.* Oscar Jr., as the plaintiff, had the burden to plead facts that affirmatively demonstrate the trial court's jurisdiction. *Id.*

B. Request for Declaratory Relief and Breach of Fiduciary Duty

In what we deem to be George's jurisdictional challenge to Oscar Jr.'s request for declaratory relief and his claim for breach of fiduciary duty, he complains that Oscar Jr.'s third amended petition "has not demonstrated any injury to himself." George argues that Oscar Jr. "is alleging some injury to his grandmother, Narcy." George then references

the constitutional standing principles articulated in *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 154–56 (Tex. 2012).

In the trial court and before us, Oscar Jr.'s challenges to the dismissal of his request for declaratory relief and claim for breach of fiduciary duty rest on his being Alberto's grandson. Specifically, Oscar Jr.'s brief argues:

Appellant Oscar Simo, Jr. has statutory standing to bring trust claims[.⁴]

Similarly, Appellant Oscar Simo, Jr. had at the time the petition was filed standing under the Trust Code. Standing is determined at the time of filing. See *Heckman v. Williamson Cty.*, 369 S.W.3d 137 (Tex. 2012). At the time of filing, Albert Simo had been deceased. Accordingly, once Albert Simo passed away, Appellant Oscar Simo, Jr. became an heir to his estate under the rules of intestacy. Since a child was born outside of the marriage of Albert Simo and Nancy Simo, a portion of Albert Simo's estate would pass to his children and their heirs. See TEX. ESTATES CODE § 201.002(b). Since Appellant Oscar Simo, Jr. is the heir of one of Albert Simo's son, Oscar Simo, he stands to inherit a part of his estate. Said inheritance was immediate upon the death of his grandfather. See TEX. ESTATES CODE § 101.001(b). Because the trial court had found that George A. Simo Trust was void ab initio, the trust res placed in the void George A. Simo Trust now more properly belongs, at least in part, to Appellant Oscar Simo, Jr. Accordingly, Appellant Oscar Simo, Jr. has a claim as an interested person under the Texas Property Code § 111.004(7). This is in contrast to the right to inherit under a will which is not effective until the will has been properly admitted into probate. TEX. ESTATES CODE § 256.001. Admittedly, at the time Appellant Oscar Simo, Jr. filed his petition, no probate proceeding had been filed seeking to administer the estate of Albert Simo. Nor had one been filed four years after his death even though, as guardian of Nancy Simo, Appellee George A. Simo had a duty to do so. Accordingly, at the time of the petition, Oscar Simo, Jr. had standing under the Texas Trust Act.

Appellant Oscar Simo, Jr. has standing to bring breach of fiduciary duty claims[.]

This same argument provides a basis for Appellant Oscar Simo, Jr. to sue under the Texas Trust Act [sic] applies equally for the claim for breach of

⁴ As best we can tell, Oscar Jr.'s argument regarding his "trust claim" relates to his request for declaratory relief.

fiduciary duty. A claim for breach of fiduciary duty is an asset belonging to the estate of Albert Simo. As an heir to Albert Simo, Appellant Oscar Simo, Jr. has an interest in Albert Simo's estate. Further, Appellant Oscar Simo, Jr. has a right to bring an action as heir to the estate when no one else, including the guardians, are unwilling or unable. See *Chandler v. Wellborn*, 294 S.W.2d 801, 806 (Tex. 1956); also see, *Kirkpatrick v. Cusick*, No. 13-13-00149-CV (Tex. App.—Corpus Christi 2013). Appellee George A. Simo, as guardian for Albert Simo when he was living, neither could or would sue himself for the breaches of his fiduciary duty he owed to Albert Simo, a duty he admitted existed and was owed even before the creation of the guardianship or the George A. Simo Trust. Because no one could or would step-up to assert claims the breach of fiduciary claims on behalf of the Estate of Albert Simo, Appellant Oscar Simo, Jr. is permitted to bring suit. Accordingly, reversal is required.

In response to Oscar Jr.'s arguments, George argues that Alberto's last will devised and bequeathed all of his property to Nancy. In our memorandum opinion in *In the Estate of Simo*, we wrote that "[i]t is undisputed that Albert[o] bequeathed his entire estate to Nancy in his will." 2017 WL 4837767 at *2. George further argues that Alberto's will was probated as a muniment of title. According to George, Oscar Jr. could therefore not use his status as an heir to Alberto to maintain standing in Nancy's guardianship proceeding. The question of standing is a question of law. See *Miranda*, 133 S.W.3d at 226. We have already confirmed that Oscar Jr. has no interest in Alberto's estate in *In the Estate of Simo*, 2017 WL 4837767 at *3, where we affirmed the trial court's judgment admitting Alberto's will to probate as a muniment of title.

While Oscar Jr.'s pleadings evoke statutory standing his allegations as to standing were negated by the jurisdictional record before the trial court. See *Miranda*, 133 S.W.3d at 227 (providing that if a plea to the jurisdiction challenges the existence of jurisdictional facts, an appellate court considers relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do).

Indeed, the same trial court signed the order admitting Alberto's will to probate as a muniment of title. Moreover, our decision in *Estate of Alberto Simo*, 2017 WL 4837767 at *3, confirms that Oscar Jr. maintains no interest in Alberto's estate.

Having addressed Oscar Jr.'s arguments as presented to us, we conclude that the trial court did not err in sustaining George's third plea to the jurisdiction as to Oscar Jr.'s request for declaratory relief and claim for breach of contract.

C. Removal of George as Guardian

In what we deem to be George's jurisdictional challenge to Oscar Jr.'s request to remove George as guardian of the person and estate of Nancy, he argued that,

Texas Estates Code Section 1055.001 disallows any person with an interest adverse to the ward from filing an application to appoint a guardian of the person and estate of a proposed ward, or challenging the appointment of another person as guardian of the person or estate of a proposed ward. That provision even bars the person with a conflict from commencing a guardianship proceeding.

Oscar Jr. responds that his standing is rooted in the statutory framework governing guardianship proceedings. Standing may be conferred legislatively, in which case the statute provides the framework for a standing analysis. See *Tex. Dep't of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861-62 (Tex. 2001) (noting that sections 102.003(3)(9), (11) of the family code grant standing to certain persons).

We conclude that George's reliance on section 1055.001 is misplaced. Oscar Jr. did not seek to *commence* or *appear and contest* a guardianship proceeding. See TEX. EST. CODE ANN. § 1055.001(a) (West, Westlaw through 2017 1st C.S.). Instead, Oscar Jr. sought to remove George as Nancy's guardian. The court may remove a guardian on the "complaint of an interested person." *Id.* § 1203.052(a-1) (West, Westlaw through

2017 1st C.S.). Under the guardianship title of the estates code, “interested person” or “person interested” means, among other things, “a person interested in the welfare of an incapacitated person.” *Id.* § 1002.018(2) (West, Westlaw through 2017 1st C.S.). In Oscar Jr.’s live pleading, he claims to be an interested person. We conclude that Oscar Jr.’s kinship to Nancy as her grandson coupled with his assertion of being an “interested person” is sufficient to establish standing under the estates code. *See id.*; *see also Tex. Dep’t of Protective & Regulatory Servs.*, 46 S.W.3d at 861-62. Therefore, the trial court erred in sustaining George’s third plea to the jurisdiction as to Oscar Jr.’s request to remove George as Nancy’s guardian.

Oscar Jr.’s second issue is overruled in part and sustained in part as set forth above.

IV. OTHER ISSUES

A. Timeliness of George’s Third Plea to the Jurisdiction

In Oscar Jr.’s third issue, he argues that George’s third plea to the jurisdiction was untimely. Specifically, he argues that George “sat idly by watching [him] spend time, money and effort conducting discovery and depositions and filing motions, before [George] first raised the issue of standing.” Oscar Jr.’s only legal authority for his argument is section 1055.002 of the estates code, which provides,

A court may not invalidate a pleading in a guardianship proceeding, or an order based on the pleading, on the basis of a defect of form or substance in the pleading unless a timely objection has been made against the defect and the defect has been called to the attention of the court in which the proceeding was or is pending.

TEX. EST. CODE ANN. § 1055.002 (West, Westlaw through 2017 1st C.S.). But Oscar Jr.'s reliance on this provision is misplaced.

George's third plea to the jurisdiction is rooted in standing, which is a component of subject-matter jurisdiction. See *Tex. Ass'n of Bus.*, 852 S.W.2d at 445. And, "[a]s a general rule, a court cannot acquire subject-matter jurisdiction by estoppel." *Wilmer–Hutchins Indep. Sch. Dist. v. Sullivan*, 51 S.W.3d 293, 294 (Tex. 2001). Indeed, it can be raised by a court on its own at any time. See *Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 580 (Tex. 2013) ("Because standing is required for subject-matter jurisdiction, it can be—and if in doubt, must be—raised by a court on its own at any time.").

Oscar Jr.'s third issue is overruled.

B. Propriety of Dismissal with Prejudice

In Oscar Jr.'s fourth issue, he complains that the trial court erred in dismissing his claims with prejudice. Oscar Jr. contends that "equity abhors fraud" and that "Texas courts will not permit a wrong or injustice be done by sticking to[o] closely to the letter of the law." Oscar Jr. then argues,

The above wrongs have been committed against Albert Simo and Nancy Simo. The question which this Court addressed in its order dismissing Appellant Oscar Simo, Jr.'s petition is who has the right to seek redress for these wrongs from the Court on behalf of Nancy Simo and Albert Simo. Who other than the man who committed the wrongs should bring this to the attention of this Court and make Appellee George A. Simo responsible for the wrongs actionable under the law? The answer apparently is no one for, if not Appellant Oscar Simo, Jr., who will advocate for the rights of his grandparents Albert Simo and Nancy Simo. A reversal of the order dismissing Appellant Oscar Simo, Jr.'s petition in order to address the wrongs done to Nancy Simo and Albert Simo and to avoid injustice.

Oscar Jr. fails to reference any on-point authority for how the trial court may have erred in dismissing his claims with prejudice. We conclude that Oscar Jr.'s argument relating to his fourth issue is inadequately briefed. 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.").

Oscar Jr.'s fourth issue is overruled.⁵

V. CONCLUSION

The order sustaining George A. Simo's third plea to the jurisdiction is affirmed as to its dismissal with prejudice of Oscar Simo Jr.'s request for declaratory relief and claim for breach of fiduciary duty. It is reversed as to Oscar Simo Jr.'s request to remove George A. Simo as guardian of the person and estate of Nancy Simo. The case is remanded for further proceedings consistent with this opinion.

LETICIA HINOJOSA
Justice

Delivered and filed the
7th day of December, 2017.

⁵ Our affirmance of dismissal with prejudice is a function of Oscar Jr.'s inadequate briefing and it inures to only Oscar Jr. Our holding in no way limits a successor guardian of Nancy's estate, cloaked with the standing and capacity to bring and defend suits by or against Nancy, see TEX. EST. CODE ANN. § 1151.101(a)(4) (West, Westlaw through 2017 1st C.S.), from pursuing any legal remedy the successor guardian, if any, deems appropriate.