NO. 12-10-00276-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN THE ESTATE OF	***§***	***APPEAL FROM THE***
SADIE BERRY WOOTEN,	***§***	***COUNTY COURT AT LAW***
DECEASED	***§***	***HOUSTON COUNTY, TEXAS***

MEMORANDUM OPINION

John Wooten appeals the trial court's decree ordering partition of real property in Houston County, Texas. He presents three issues. We affirm.

BACKGROUND

Sadie Berry Wooten died on July 5, 2002. In her will, Sadie divided her estate into three equal parts: one part to her son Knolton Wooten and upon his death, to his living issue; one part to her son John Lloyd Wooten and upon his death, to his living issue; and one part to her grandson, Frederick Flowers Sr. and upon his death, to her great-grandson, Darrien D. Flowers. John Lloyd Wooten predeceased Sadie, and Frederick Flowers Sr. died in 2003. Because the independent executor appointed in Sadie's will predeceased her, Knolton Wooten, Sadie's son and successor independent executor, filed an application to probate her will and for letters testamentary. An order admitting Sadie's will to probate and authorizing letters testamentary was signed on May 21, 2004, appointing Knolton Wooten as independent executor of Sadie's will and estate. In October 2004, Knolton filed an inventory, appraisement, and list of claims, alleging that the estate had a claim due and owing against John Wooten (Appellant) for unauthorized harvest and sale of timber from property of the estate. The trial court approved Knolton's inventory, appraisement, and list of claims. However, Knolton died on October 26, 2004. Subsequently, Appellant, who is John Lloyd Wooten's son, filed an application to appoint a successor administrator and for issuance of letters testamentary.

On December 14, 2004, the trial court held a hearing on Appellant's application. The parties, Appellant and Knolton's heirs, stated that they had entered into a Rule 11 agreement to resolve Sadie's estate based upon an oral agreement to partition her real property. They also agreed upon a successor independent executor. The trial court approved the Rule 11 agreement and entered an order appointing a successor administrator of Sadie's estate. Motions to approve the partition of the estate and to clarify the Rule 11 agreement were filed. After a hearing on both motions, the trial court entered a decree, but later vacated it after being notified that the order failed to include all necessary parties.

On March 27, 2007, Tanya Wooten and Renita Wooten (formerly Carr) filed an application for partition and distribution of the estate and for a bill of review, requesting that the real and personal property of Sadie's estate be partitioned. Further, Tanya and Renita alleged that Appellant and two of Sadie's heirs, Michael Wooten and Darrien D. Flowers, had sold timber from the property and retained the proceeds. Tanya and Renita also claimed that Appellant leased the property for hunting and retained those proceeds. Moreover, they alleged that Tanya and her niece, JaQuann Wooten, were omitted from the listing of Sadie's heirs in a previous order and were not served with process. Appellant filed a general denial to the application, objecting to the partition. He also denied that Tanya and JaQuann were Sadie's legal heirs, alleging that Tanya's paternity had not been established.

On February 18, 2010, Appellant filed a motion for continuance, arguing that he was unable to proceed in the final hearing because he had filed an heirship proceeding in a probate court in Harris County, Texas. He stated that proceeding was to determine the heirs of John Lloyd Wooten. Appellant alleged that until that heirship determination was resolved, there "is a need for additional time to prepare for this case." However, Appellant's motion did not contain an affidavit.

At the hearing on the motion for continuance and the application for partition and distribution, the trial court stated that it had called Harris County that morning regarding the heirship proceeding of John Lloyd Wooten, deceased. According to the trial court, the record showed that an application to determine heirship was filed in 1998, but was "dropped" from the active docket in 2002. However, the trial court noted that an "independent administration" was filed in January 2010, and the record showed a recent service of process. No ad litem had been appointed and no trial date had been set. The trial court denied Appellant's motion for continuance.

Then, the trial court heard testimony regarding Sadie's and John Lloyd Wooten's heirs, and the timber sales and leases made by Appellant. At the conclusion of the hearing, the trial court granted Tanya and Renita's application for partition and distribution of Sadie's estate, and identified the real and personal property to be partitioned and the interests of the heirs of Knolton Wooten, John Lloyd Wooten, and Frederick Flowers Sr. The trial court also determined that the heirs of John Lloyd Wooten included Tanya, Renita, and JaQuann. The trial court did not appoint commissioners in order to allow the parties to reach an agreement on the partition, and reserved ruling on the timber sales and lease proceeds issues.

On May 18, 2010, the trial court held a hearing to determine the amount to be paid into the registry of the court by Sadie's heirs before appointing commissioners to partition the property. The trial court also considered whether Appellant owed money to the estate. At the conclusion of the evidence, the trial court determined that each heir group, i.e., the heirs of Knolton Wooten, John Lloyd Wooten, and Frederick Flowers Sr., must deposit $3,500 into the registry of the court for the estate. The trial court also found that Appellant owed Sadie's estate a total of $49,000 for timber cuttings and hunting leases. On June 21, 2010, the trial court entered an order, stating that "[a] final judgment had not been entered" and that "there is no final judgment on the matters currently before the Court." Further, the trial court stated that it would appoint commissioners to partition the property when Sadie's heirs tendered funds into the registry of the court to cover the expenses of the estate, and to provide compensation and expenses for the commissioners. The trial court also identified the real property to be partitioned, the interests of Sadie's heirs, the monies to be paid by Sadie's heirs into the registry of the court, and the monies Appellant owed the estate. This appeal followed.

JURISDICTION

In his first issue, Appellant asks this court to determine that it has jurisdiction over this appeal despite the trial court's assertion that "[a] final judgment has not been entered" and that "there is no final judgment on the matters currently before the Court." Appellees affirmatively state in their briefs that they do not challenge this court's jurisdiction.[1]

[1] The appellees are Tanya Wooten, Renita Wooten, Knolton Wooten Jr., Kenneth Wooten, Theola Wooten, Cheryl Morrisette, and Dana Wooten.

Applicable Law

We must independently determine whether we have jurisdiction over an appeal, even if no party contests jurisdiction. ***M.O. Dental Lab v. Rape***, 139 S.W.3d 671, 673 (Tex. 2004) (per curiam); ***Tex. La Fiesta Auto Sales, LLC v. Belk***, 349 S.W.3d 872, 878 (Tex. App.–Houston [14th Dist.] 2011, no pet.). Generally, an appeal may be taken only from a final judgment. ***Lehmann v. Har-Con Corp.***, 39 S.W.3d 191, 195 (Tex. 2001). Probate proceedings are an exception to the "one final judgment" rule; in such cases, "multiple judgments final for purposes of appeal can be rendered on certain discrete issues." ***De Ayala v. Mackie***, 193 S.W.3d 575, 578 (Tex. 2006) (quoting ***Lehmann***, 39 S.W.3d at 192). A probate proceeding consists of a continuing series of events, in which the probate court may make decisions at various points in the administration of the estate on which later decisions will be based. ***Logan v. McDaniel***, 21 S.W.3d 683, 688 (Tex. App.—Austin 2000, pet. denied). In probate proceedings, the need to review controlling, intermediate decisions, before an error can harm later phases of the proceedings, justifies modifying the "one final judgment" rule. ***Id.***

Because of the "potential confusion" in determining whether a probate order is appealable, the Texas Supreme Court has adopted the following test for determining finality:

> If there is an express statute, such as the one for the complete heirship judgment, declaring the phase of the probate proceedings to be final and appealable, that statute controls. Otherwise, if there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or parties not disposed of, then the probate order is interlocutory.

De Ayala, 193 S.W.3d at 578 (quoting ***Crowson v. Wakeham***, 897 S.W.2d 779, 783 (Tex. 1995)). In other words, where no express statute addresses finality, courts may assess it by determining whether the order to be challenged "dispose[d] of all parties or issues in a particular phase of the proceedings" for which it was brought. ***Young v. First Community Bank, N.A.***, 222 S.W.3d 454, 457 (Tex. App.–Houston [1st Dist.] 2006, no pet.) (quoting ***De Ayala***, 193 S.W.3d at 579).

If the court determines that an estate should be partitioned and distributed, it shall enter a decree that states the name and address, if known, of each person entitled to a share of the estate, the proportional part of the estate to which each is entitled, and a full description of all the estate to

be distributed.[2] *See* TEX. PROB. CODE ANN. § 378 (West 2003). The court must also "appoint three or more discreet and disinterested persons as commissioners, to make a partition and distribution of the estate." *See* TEX. PROB. CODE ANN. § 380(a) (West 2003). But Section 380 does not require that the appointment of commissioners be included in the decree of partition. *Cf.* TEX. R. CIV. P. 761 (requiring appointment of commissioners to be included in decree of partition entered in partition suit brought under Texas Rules of Civil Procedure).

Analysis

Here, there is no express statute that controls whether a decree of partition entered pursuant to Section 380 is final and therefore appealable. Consequently, the question is whether the order disposed of each issue raised in the pleadings for that portion of the proceeding, or whether the order conclusively disposed of that phase of the proceeding. *See* ***Logan***, 21 S.W.3d at 688. The June 21, 2010 order decreed that the property should be partitioned, described the property to be partitioned, determined the interests of the persons entitled to a share of Sadie's estate, found that Tanya and JaQuann were heirs of John Lloyd Wooten, and found that Appellant owed Sadie's estate a total of $49,000 for timber cuttings and hunting leases. The trial court addressed all the relief requested by Tanya and Renita in their application for partition and distribution of the estate and bill of review. *See* ***id.*** Therefore, the June 21 order is a final order and is appealable. *See* ***In re Estate of Padilla***, 103 S.W.3d 563, 566 (Tex. App.—San Antonio 2003, no pet.) (holding that decree of partition and distribution disposed of each issue raised in pleadings for that proceeding and thus was appealable); *see also* ***Griffin v. Wolfe***, 610 S.W.2d 466, 466 (Tex. 1980) (decree of partition entered under Texas Rules of Civil Procedure is final judgment). Accordingly, this court has jurisdiction of the appeal.

MOTION FOR CONTINUANCE

In a portion of his second issue, Appellant contends that the trial court abused its discretion by denying his motion for continuance. Appellees Tanya and Renita disagree.

[2] The decree required by Section 378 is similar to the decree of partition required by Texas Rule of Civil Procedure 761.

Applicable Law

The denial of a motion for continuance is reviewed under an abuse of discretion standard. ***Garner v. Fidelity Bank, N.A.***, 244 S.W.3d 855, 858 (Tex. App.—Dallas 2008, no pet.). The denial will be reversed only if the trial court's action was arbitrary, unreasonable, or without reference to any guiding rules and principles. ***Id.*** (citing ***BMC Software Belg. N.V. v. Marchand***, 83 S.W.3d 789, 800 (Tex. 2002)).

A motion for continuance must include an affidavit stating sufficient cause. TEX. R. CIV. P. 251 ("No application for a continuance shall be heard before the defendant files his defense, nor shall any continuance be granted except for sufficient cause supported by affidavit, or by consent of the parties, or by operation of law."). Generally, when a movant fails to comply with Rule 251's requirement that the motion for continuance be "supported by affidavit," an appellate court must presume that the trial court did not abuse its discretion in denying the motion. ***Villegas v. Carter***, 711 S.W.2d 624, 626 (Tex. 1986). In other words, if a motion for continuance is not verified or supported by affidavit, we will presume the trial court did not abuse its discretion in denying the motion. ***Garner***, 244 S.W.3d at 858.

Analysis

Here, Appellant filed a motion for continuance, arguing that he was unable to proceed in the final hearing set for February 25, 2010, because he had filed an heirship proceeding in a probate court in Harris County, Texas, to determine the heirs of John Lloyd Wooten. However, Appellant's motion does not include an affidavit stating sufficient cause for the motion. *See* TEX. R. CIV. P. 251. Because Appellant's motion for continuance was not verified or supported by an affidavit, the trial court did not abuse its discretion in denying the motion. *See* ***Garner***, 244 S.W.3d at 858. Accordingly, the portion of Appellant's second issue relating to his motion for continuance is overruled.

HEIRSHIP DETERMINATION

Appellant also argues in his second issue that the trial court erred by including an heirship determination in its June 21, 2010 order because another heirship proceeding was filed earlier in Harris County, Texas. Appellees disagree.

Section 8(a) of the Texas Probate Code states that

> [w]hen two or more courts have concurrent venue of an estate or a proceeding to declare heirship under Section 48(a) of this code, the court in which the application for a proceeding in probate or determination of heirship is first filed shall have and retain jurisdiction of the estate or heirship proceeding, as appropriate, to the exclusion of the other court or courts. The proceeding shall be deemed commenced by the filing of an application averring facts sufficient to confer venue; and the proceeding first legally commenced shall extend to all of the property of the decedent or the decedent's estate.

Act of May 15, 2007, 80th Leg., R.S., ch. 1170, § 2.01, 2007 Tex. Gen. Laws 4000 (amended 2011) (current version at TEX. PROB. CODE ANN. § 8(a) (West Supp. 2011)). While proceedings are pending in the first court, any action taken in another court on the same matter is void. ***Fernandez v. Bustamante***, 305 S.W.3d 333, 341 (Tex. App.–Houston [14th Dist.] 2010, orig. proceeding) (citing ***Derrick v. McGrew***, 636 S.W.2d 860, 861 (Tex. App.–Texarkana 1982, writ ref'd n.r.e.).

Here, Appellant alleged that there was an ongoing heirship proceeding filed in 1997 in a probate court in Harris County, Texas, to determine the heirs of John Lloyd Wooten. Thus, Appellant contended, the proceedings in the trial court should be stayed pursuant to Section 8(a) until the Harris County court determines the heirs of John Lloyd Wooten. However, Section 8(a) does not apply in this case because there were not two formal heirship proceedings for John Lloyd Wooten. *See* Act of May 15, 2007, 80th Leg., R.S., ch. 1170, § 2.01, 2007 Tex. Gen. Laws 4000 (amended 2011). Instead, the record reflects that there was an heirship proceeding for John Lloyd Wooten, in Harris County, and a probate proceeding for Sadie's estate in Houston County. Accordingly, the portion of Appellant's second issue relating to the heirship determination of John Lloyd Wooten is overruled.

MONIES OWED TO ESTATE

In his third issue, Appellant contends that the trial court abused its discretion by finding that he owed Sadie's estate monies. More specifically, he argues Appellees employed an improper procedure to seek relief from the trial court.

As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion stating the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent

from the context. TEX. R. APP. P. 33.1(a)(1)(A). Complaints and arguments on appeal must correspond with the complaint made at the trial court level. ***Knapp v. Wilson N. Jones Memorial Hosp.***, 281 S.W.3d 163, 170 (Tex. App.—Dallas 2009, no pet.). In other words, to preserve an issue for appeal, a party's argument on appeal must comport with its argument in the trial court. ***Id.***

In his answer to Tanya and Renita's application for partition, Appellant denied that Tanya and JaQuann were Sadie's legal heirs and objected to the partition. At the conclusion of the hearing on the application, he argued that there was no evidence or documentation of the amount of funds he was paid for the timber or the leases. On appeal, however, Appellant has not presented either of these arguments. Instead, he argues that Tanya and Renita employed an improper procedure to seek relief from the courts, alleging that their application was, for all intents and purposes, to have the trial court recognize or approve an additional claim due and owing to Sadie's estate. He contended that Renita and Tanya should have filed a written complaint with the trial court describing the wrongfully excluded property, and cited the personal representative of Sadie's estate to appear and show cause why he should not be required to file an additional inventory, appraisement, and list of claims. *See* TEX. PROB. CODE ANN. § 257 (West 2003). Appellant did not complain at trial that Tanya and Renita used an improper mechanism to seek relief from the court. Because Appellant's argument on appeal does not comport with his complaint at trial, he has waived this issue. *See* ***Knapp***, 281 S.W.3d at 170. Accordingly, Appellant's third issue is overruled.

DISPOSITION

The judgment of the trial court is ***affirmed***.

BRIAN HOYLE
Justice

Opinion delivered January 25, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(PUBLISH)

COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

JANUARY 25, 2012

NO. 12-10-00276-CV

IN THE ESTATE OF SADIE BERRY WOOTEN, DECEASED

Appeal from the County Court at Law
of Houston County, Texas. (Tr.Ct.No. 8453)

THIS CAUSE came to be heard on the oral arguments, appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the Appellant, **JOHN WOOTEN**, for which execution may issue, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.