In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-19-00120-CV

JANE DUNN SIBLEY AND HIRAM SIBLEY, APPELLANT

V.

ROBERT W. BECHTEL AND ALLEN G. MCGUIRE AS TRUSTEES OF THE POTTS AND SIBLEY FOUNDATION, APPELLEES

On Appeal from the 385th District Court
Midland County, Texas
Trial Court No. CV55028, Honorable Robin Malone Darr, Presiding

June 10, 2020

MEMORANDUM OPINION

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

Jane Dunn Sibley (Jane) and Hiram Sibley (Hiram) appeal from a final order entered by the trial court which, among other things, extended the life of a trust known as the Potts and Sibley Foundation. However, neither Jane nor Hiram were parties to the underlying suit. Nevertheless, they attempt to "intervene" on appeal based upon the doctrine of virtual representation and reverse the order. Robert W. Bechtel and Allen G.

McGuire, trustees of the Foundation (appellees), moved to dismiss the appeal. We dismiss the appeal.[1]

First, we address Jane's situation. Hiram informs us that she died after initiating the appeal. No one contests that factual allegation. This is of import given the basis for her purported authority to "intervene" in the appeal. That authority implicates a "power of appointment" granted her in a distinct trust. That power entitled her to direct, during her lifetime, how property of that distinct trust would be distributed upon her death. If she died without exercising that power, then the trust corpus devolved to the Foundation. Jane allegedly sought to protect that power in some way by participating in this appeal.

The death of an appellant may or may not end the appeal. That is, Appellate Rule 7.1 states that an appellate court may adjudicate an appeal even though a party dies while the matter pends for adjudication. TEX. R. APP. P. 7.1(a)(1). Though there may be no procedural bar to continuing, there may be a jurisdictional one, however, for death may negate the existence of a justiciable controversy. Without a justiciable controversy, the dispute becomes moot, requiring its dismissal. *In re C.H.S.*, No. 07-17-00117-CV, 2017 Tex. App. LEXIS 11891, at *3–4 (Tex. App.—Amarillo Dec. 20, 2017, no pet.) (mem. op). And, whether the appeal becomes moot depends upon whether the rights in controversy are personal or property. *Id.* If property rights, then the controversy remains alive. *Id.* If personal, then they die with the party. *Id.*

Generally, a power of appointment is not property but a mere power. *Doggett v. Robinson*, 345 S.W.3d 94, 99 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *Krausse*

[1] Because this appeal was transferred from the Eleventh Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this court. See TEX. R. APP. P. 41.3.

v. Barton, 430 S.W.2d 44, 47 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.). It grants the holder neither an estate, interest, nor title in the property subject to it. *Id.* Given this, the power of appointment held by Jane was not a property right, and her death rendered moot any justiciable controversy involving it and her right to exercise it. So too did it render moot that aspect of the appeal which she pursued. Thus, we dismiss it.

Next, we turn to Hiram's situation. Generally, only a party of record may appeal a final judgment. *Motor Vehicle Bd. of Tex. Dept. of Transp. v. El Paso Indep. Auto. Dealers Ass'n, Inc.,* 1 S.W.3d 108, 110 (Tex. 1999). There exists an exception, though. It permits a non-party to appeal when he, she, or it is deemed to be a party under the doctrine of virtual representation. *Id.* To invoke that doctrine, the appellant must establish that 1) it is bound by the underlying judgment; (2) it is in privity of estate, title, or interest, which privity appears of record; and 3) there is an identity of interest between the appellant and a party to the judgment. *Id.*; *accord In re Lumbermens Mut. Cas. Co.,* 184 S.W.3d 718, 722 (Tex. 2006) (orig. proceeding) (stating the same). The last prong stands as a roadblock over which Hiram cannot clear.

The suit at bar involved multiple trustees and the Foundation they represented. Furthermore, the underlying trust document vested those trustees with "full, complete and plenary powers in carrying out this trust in accordance with the terms hereof." Irrespective of whether they had the authority or standing to petition for a modification of its terms,[2] they did. And, through their petition, they sought to extend the life of the trust and add a co-trustee and a member to the trust's "Committee." Such relief was awarded them. On

[2] The trust instrument provided that: "This indenture may be amended or modified from time to time by the ***Committee*** whenever necessary or advisable . . . ." (Emphasis added). The "Committee" was a body established under the trust, which body was independent from the class of trust representatives known as trustees.

the other hand, the limited appellate record and briefs reveal that Hiram seeks not to extend the trust's life but to end it. Given these diametrically opposed purposes, it can hardly be said that there exists an identity of interests between Hiram and the Foundation, as the Foundation was and is represented by its trustees. *See In re Lumbermens Mut. Cas. Co.* 184 S.W.3d at 724 (noting that Lumbermens had an identity of interests with Cudd because both sought to reverse the judgment and protect the funds the judgment threatened). Consequently, Hiram failed to carry his burden to satisfy each prong of virtual representation and, thereby, prove himself to be a non-party within the scope of virtual representation.[3]

Accordingly, we grant the pending motion to dismiss and dismiss the appeal.

Per Curiam

[3] The same could also be said of Jane had she survived.