Opinion issued June 23, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00266-CV

IN THE ESTATE OF HARMON BRYAN POFF, DECEASED

Scott Smith, as Independent Executor of the Estate of H. Bryan Poff, Appellant

v.

Timothy E. Malone, Receiver, and Poff Family LLC, Appellees

On Appeal from the Probate Court No. 2
Tarrant County, Texas[1]
Trial Court Case No. 2015-PR02569-2

---

[1] The Texas Supreme Court transferred this appeal from the Court of Appeals for the Second District of Texas. *See* TEX. GOV'T CODE § 73.001 (authorizing transfer of cases between courts of appeals).

MEMORANDUM OPINION

The Estate of Harmon Bryan Poff, Sr. is being probated in Probate Court Number Two of Tarrant County. Within that matter, the probate court held a hearing to consider recommendations of a related entity's receiver and entered an order adopting some of the receiver's recommendations. The Estate of Poff, through its representative, Scott Smith,[2] appeals the probate court order, raising nine issues.

Because the probate court had a statutory obligation to have a court reporter transcribe oral testimony at the hearing, it failed to do so, and the error was harmful, we reverse.

Background

The estate being probated is that of Harmon Bryan Poff, Sr. He had three children: Harmon Bryan Poff, Jr. (Bryan), Nathalee Annice Poff Smith (Nathalee), and Nina Harriett Poff Bright (Nina).[3]

---

[2] Timothy Malone argues, without citation to legal authority or the record, that Scott Smith was removed as a representative of the Estate of Poff after filing this appeal, the removal negates standing to pursue this appeal on behalf of the Estate, and as a result, this Court lacks jurisdiction. Removal raises an issue of capacity, not standing, and, thus, is not jurisdictional. *Cf. Armes v. Thompson*, 222 S.W.3d 79, 82 (Tex. App.—Eastland 2006, no pet.) (stating that decedent's estate has standing to sue but lacks capacity because "only the estate's representative has the capacity to act on behalf of the estate"). Malone's lack of citation to appropriate authority and to the record waives the non-jurisdictional argument. TEX. R. APP. P. 38.1(i).

[3] For ease of reading, we will refer to Harmon Bryan Poff, Sr. as Poff, and we will refer to his children and other family members by their given names.

Poff held an ownership interest in an entity named H. Bryan Poff LLC (Poff LLC). It is unclear from the record who else held ownership interests in Poff LLC, but a person with an unknown relationship to Poff, Edward Hulsey, is listed as a manager.

On August 18, 2015, one week before Poff's death, Hulsey, as manager of Poff LLC, relinquished the entity's operating rights to the "Scamardo well" in Burleson County and resigned the entity as operator of that well. Hulsey told the Railroad Commission he understood that Poff's son, Bryan, would be applying to be appointed the new operator.

On August 25, Poff died at the age of 104.

On September 11, Bryan wrote to Hulsey that he believed the "family" should "buy the LLC out" of its interest in the Scamardo well at a price of $1,000 per percent ownership. In turn, on September 18, Hulsey, as manager of Poff LLC, granted and quitclaimed to Poff Family LLC (Family LLC) the interest in Scamardo well that had been held by Poff LLC. It is unclear from the record who, besides Bryan, holds an ownership interest in Family LLC.

On September 25, Bryan applied to probate Poff's will in Tarrant County Probate Court Number Two.[4] His application stated that Poff had a valid will dated

[4] Probate Court Number Two of Tarrant County is one of two statutory probate courts in that county. *Estate of Stegall*, No. 02-17-00410-CV, 2019 WL 6205244, at *5 n.6

October 29, 2009 and held an ownership interest in Poff LLC, "which has a probable negative value." The assertion of a negative value, it appears from the record, is based on the September 18 transaction that transferred interest in the Scamardo well from Poff LLC to Family LLC.

Bryan attached a copy of Poff's will to his application. The will specified that each of Poff's three children would receive one-third of Poff's ownership interest in Poff LLC. Bryan and Nathalee would receive theirs directly, but Nina would have her interest held in trust for her benefit. Further, Bryan would serve as trustee, and Nathalee would be the successor trustee.

On November 9, Nathalee's son, Scott Smith, filed a first amended application to probate Poff's will and for issuance of letters of dependent administration. Scott stated that both Bryan and Nathalee had declined to serve as independent executors, administrators, or trustees and had agreed for him to serve as the estate's dependent administrator and Nina's trustee. He attached his sworn statement to his pleading.

In December, the trial court named Scott the dependent administrator of Poff's will. Scott later informed the court that the primary estate asset was Poff's interest in Poff LLC. Scott requested court authority to operate Poff LLC and obtain its business records, and the court granted his request in January 2016.

(Tex. App.—Fort Worth Nov. 21, 2019, no pet.) (mem. op.) (citing TEX. GOV'T CODE § 25.2221(c) and TEX. ESTATES CODE § 22.007(c)).

Just two months later, Bryan filed a motion for show cause hearing, contending Scott wrongfully caused Sunoco Oil Co. to pay Poff LLC $7,578.22 for oil removed from the Scamardo well in January 2016. According to Bryan, Scott knew at the time that Poff LLC "had resigned as operator of the well, having been replaced by" Bryan and that Poff LLC "had conveyed any and all of its interest in the lease to the . . . Family LLC." Bryan argued Scott wrongly converted funds and should be removed from his position as Manager of Poff LLC. Bryan attached his own affidavit, which stated that Poff LLC had resigned as operator in August 2015, that Bryan had posted bond and was designated the new operator, that he "has operated the well since August 27, 2015," which was two days after Poff's death, and that Poff LLC "sold and quit claimed to the . . . Family LLC any and all of its remaining interest in the Scamardo well" the following month, in September 2015. Bryan denied receiving any notice that Scott had sought to be appointed Managing Partner of Poff LLC.

In April 2017, Bryan alleged that, a full year before their father's death, Nathalee had conveyed interests in the Scamardo well to Poff LLC—both her own interests and those of her sister which she held in trust. Bryan alleged the assignments were never recorded. He requested they be filed for record. Bryan also moved for the removal of Scott as Nina's trustee, requesting that he be the new trustee.

Scott moved for authority to hire counsel on behalf of Poff LLC to consider bankruptcy. In September 2017, the court appointed Timothy Malone as Poff LLC's receiver. Malone's appointment specified eight acts he was authorized to do, including managing Poff LLC and transferring and selling its assets, as necessary.

Malone, in his capacity as Poff LLC's receiver, requested the court to transfer to itself a suit Bryan had recently filed on behalf of his own company, 3585 LLC, against Poff LLC in Burleson County. In that suit, 3585 LLC alleged that Poff LLC owed it money from the sale of oil and gas. Specifically, Bryan alleged that 3585 LLC owned a 26% working interest in the Scamardo well, yet Poff LLC failed to pay 3585 LLC the profits owed. He alleged that he previously demanded payment from Scott, as the managing partner of Poff LLC, but Scott had not paid the $35,175.80 debt. Tarrant County Probate Court Number Two granted Malone's motion and transferred 3585 LLC's suit against Poff LLC to itself on May 8, 2018.[5]

[5] A judge of a statutory probate court—on the motion of a party or person interested in an estate—may transfer to that judge's court from a district, county, or statutory court, a cause of action "related to a probate proceeding" pending in the statutory probate court or a "cause of action in which a personal representative of an estate pending in the statutory probate court is a party" and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to the estate. TEX. ESTATES CODE § 34.001(a); *see Estate of Stegall*, 2019 WL 6205244, at *5. A transfer under this section is "essentially a specialized form of venue transfer for matters relating to a probate proceeding pending in a probate court." *Id.* (citing *In re Estate of Aguilar*, 435 S.W.3d 831, 833 (Tex. App.—San Antonio 2014, no pet.)).

Some six months later, in November 2018, Malone, as Poff LLC's receiver, filed a motion for approval of his report and eight receiver recommendations, including for the court "to confirm that the assignments" from Nathalee individually and as Nina's trustee are valid and to recognize those assignments as transferring their interests in the Scamardo lease to Poff LLC. He stated that the "transfers will be effective as of the date of approval of the Court."

Nina objected to Malone's filing and moved to intervene.

Scott, in his capacities as Poff Estate's representative and Nina's trustee, moved for a continuance because he was scheduled to be out of state and needed time to retain legal counsel. Scott also filed objections to Malone's recommendations. Nathalee moved for a continuance as well, contending her newly hired attorney needed additional time to prepare.

The court granted a continuance on some issues and proceeded with others. This led to two hearing. At the second hearing, Scott requested the trial be on the record, but no court reporter was provided. After the second hearing, the trial court issued an order, which, among other things, found two transfers valid: (1) the October 27, 2014 deed from Nathalee, individually and as Nina's trustee to Poff LLC, and (2) the September 18, 2015 quitclaim deed from Husley, as Poff LLC manager, to Family LLC. The probate court further found that Bryan "shall continue as the Operator of the Scamardo Well." Finally, the probate court noted that all heirs

had "stated their approval of the settlement of litigation between" the 3585 LLC and Poff LLC in the amount of $10,000. All other requested relief was denied.

Scott requested findings of fact and conclusions of law. Thereafter, White, who was Scott's former attorney, filed a motion to modify judgment, in which White contended he was an "interested party" and a creditor of both the Estate and Poff LLC. White argued the court's orders did not match the relief Malone had requested. Family LLC filed proposed findings of fact and conclusions of law, as did 3585 LLC, Nina, and White.

The trial court entered its findings and conclusions. It found that Poff had assigned Nathalee a percentage ownership of the well in 2014 and that Nathalee had executed a quitclaim deed conveying those rights to Poff LLC a few months later. It found that, at the time of Poff's death, Poff LLC's members were Poff and Hulsey and that Hulsey, as managing partner of Poff LLC, executed a quitclaim deed in favor of Family LLC just after Poff's death. According to the court, Hulsey was authorized and entitled to sell Poff LLC's assets. Plus, the court held, the transaction was an "arms-length transaction" for "fair consideration." The court's two final holdings were that Bryan was operating the well and that the litigation between 3585 LLC and Poff LLC had settled for $10,000.

Scott, in the capacity of representative of the Estate of Poff, appealed.

Court Reporter Requirement

Scott raises nine issues in the Estate's challenge to the probate court's rulings. We consider, first, issue number four because it is dispositive. In issue four, Scott contends the trial court erred when it held the final trial on disputed facts without a court reporter present to make a record of oral testimony. The determination of this issue turns on statutory interpretation of Section 52.046 of the Government Code.

A. Standard of review

Statutory interpretation presents a question of law we review de novo. *See Aleman v. Tex. Med. Bd.*, 573 S.W.3d 796, 802 (Tex. 2019). Our objective when construing statutory language is to give effect to the Legislature's intent, "which we ascertain from the plain meaning of the words used in the statute" because the best indicator of what the Legislature intended is what it enacted. *Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 404 (Tex. 2016); *see Combs v. Roark Amusement & Vending, L.P.*, 422 S.W.3d 632, 635 (Tex. 2013). Thus, "[w]here text is clear, text is determinative of that intent." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009).

We presume lawmakers chose statutory language "with care and that every word or phrase was used with a purpose in mind." *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010). We read these words and phrases in context and construe them according to the rules of grammar and common

usage. TEX. GOV'T CODE § 311.011; *see TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) ("Undefined terms in a statute are typically given their ordinary meaning [unless] a different or more precise definition is apparent from the term's use in the context of the statute . . . . "). Importantly, we do not consider those words and phrases in isolation; rather, "we consider the statute as a whole, giving effect to each provision so that none is rendered meaningless or mere surplusage." *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016). Moreover, "[s]tatutory terms should be interpreted consistently in every part of an act." *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002). Finally, we presume that the Legislature intended the statute to comply with the Texas Constitution. TEX. GOV'T CODE § 311.021(1); *In re Allcat Serv., L.P.*, 356 S.W.3d 455, 468 (Tex. 2011) (orig. proceeding).

B. The parties' arguments

Scott argues it is reversible error that the trial court did not ensure the trial was transcribed by a court reporter.

Malone and Family LLC (collectively, Family LLC) argue there is no record of Scott having requested a court reporter for the December 13 hearing or objected to the lack of a court reporter. Family LLC argues Section 52.046(a) of the Government Code placed the obligation on Scott, not the probate court, to ensure that a court reporter recorded oral testimony. *See* TEX. GOV'T CODE § 52.046(a)

(requiring an official court reporter to take full shorthand notes of oral testimony "on request"). Despite this obligation, according to Family LLC, Scott failed to properly request a court reporter or object to the lack of a court reporter. Family LLC contends that Scott's failures prevent review of the alleged error, citing Rule 33.1(a) of the Texas Rules of Appellate Procedure. Family LLC also argues that, without a record, this "Court may affirm the decision of the trial court without reviewing the dispute." In other words, according to Family LLC, this Court should affirm the probate court's order for the sole reason that no record exists on appeal.

As to the first argument, Scott states he requested at the hearing that it be on the record, but the probate court refused, citing Smith's failure to make his request in advance of the hearing date. As to the second argument, Smith argues a request for a court reporter was unnecessary because the Government Code required the probate court to ensure oral testimony was transcribed at the hearing, citing Subsection (d) of the same statute. *See* TEX. GOV'T CODE § 52.046(d).

An official court reporter must take full shorthand notes of oral testimony "on request." *Id.* § 52.046(a). As Smith notes, Section 52.046(d) of the Government Code creates an exception to the "on request" language found in 52.046(a). Subsection (d) mandates that a "judge of a county court or county court at law shall appoint a certified shorthand reporter to report the oral testimony given in any contested probate matter in that judge's court." *Id.* § 52.046(d); *see Herrera v.*

Martinez, No. 04-12-00787-CV, 2014 WL 1714011, at *1 (Tex. App.—San Antonio Apr. 30, 2014, no pet.) (mem. op.).

Family LLC argues that the statute's references to "county court" and "county court at law" do not include a "statutory probate court" such as Probate Court Number Two.

To determine if the term "county court" includes a statutory probate court, we must consider additional provisions of the Government Code, as well as the Estates Code.

C. The court-reporter requirement applies to statutory probate courts

There is a statutory hierarchy for probate jurisdiction in various courts. At the most basic level, where a county has a county court but no county court at law or statutory probate court, the court with original probate jurisdiction is the county court. TEX. ESTATES CODE § 32.002(a). If the county also has a county court at law that exercises original probate jurisdiction but no statutory probate court, then both the county court and the county court at law will have concurrent original jurisdiction of probate matters, unless otherwise provided by law. *Id.* § 32.002(b). If the county has a statutory probate court, then the statutory probate court is the court with original probate jurisdiction. *Id.* § 32.002(c) ("In a county in which there is a statutory probate court, the statutory probate court has original jurisdiction of probate proceedings."); *see id.* § 21.006 ("The procedure prescribed by Title 2 of the

Estate Code," which includes all sections from 31.001 through 753.002, "governs all probate proceedings"). Under these provisions, a county's statutory probate court will hold original probate jurisdiction, if such a court exists.

It is undisputed that Probate Court Number Two is a statutory probate court. *See* TEX. GOV'T CODE § 25.2221(c) ("Tarrant County has the following statutory probate courts: (1) Probate Court No. 1 of Tarrant County; and (2) Probate Court No. 2 of Tarrant County."); *see also Estate of Stegall*, 2019 WL 6205244, at *5 n.6 (noting that Tarrant County's two probate courts are statutory probate courts). The term "statutory probate court" is defined in the Estates Code along with other types of courts.

The Estates Code defines the generic term "court" to include "a court created by statute and authorized to exercise original probate jurisdiction." TEX. ESTATES CODE § 22.007(a)(2). The Code provides that the terms "county court" and "probate court" are synonymous and both include "a court created by statute and authorized to exercise original probate jurisdiction." *Id.* § 22.007(b)(2). The Estates Code defines a "statutory probate court" as

> a court created by statute and designated as a statutory probate court under Chapter 25 [of the] Government Code. For purposes of this code, the term does not include a county court at law exercising probate jurisdiction unless the court is designated a statutory probate court under Chapter 25 [of the] Government Code.[6]

Id. § 22.007(c).

We have not found any case analyzing whether the mandatory court-reporter provision of Section 52.046(d) of the Government Code applies to statutory probate courts. The parties do not direct us to any either. But a plain reading of these statutory provisions leads us to conclude it does. A statutory probate court is a court created by statute and authorized to exercise original probate jurisdiction. *See id.* §§ 22.007(c), 32.002(c). As such, a statutory probate court meets the definition of a "county court." *Id.* § 22.007(b)(2). And the Government Code directs that a judge of a "county court . . . shall appoint a certified shorthand reporter to report the oral testimony given in any contested probate matter in that judge's court." TEX. GOV'T CODE § 52.046(d); *see Herrera*, 2014 WL 1714011, at *1; *In the Estate of Hayes*, No. 10-09-00212-CV, 2010 WL 2135636, at *1 (Tex. App.—Waco May 26, 2010, no pet.) (mem. op.).

---

6 Government Code section 25.0021(b) provides that a statutory probate court has both "(1) the general jurisdiction of a probate court as provided by the Estates Code [discussed above]; and (2) the jurisdiction provided by law for a county court to hear and determine actions, cases, matters, or proceedings instituted under" various Health and Safety Code provisions. TEX. GOV'T CODE § 25.0021(b) (citing the Health and Safety Code sections 166.046, 192.027, 193.007, 552.015, 552.019, 711.004, 714.003; Chapter 462, and Subtitle C and D of Title 7).

We generally construe the word "shall" in a statute as mandatory unless legislative intent suggests otherwise. *Robinson v. Budget Rent-A-Car Sys., Inc.*, 51 S.W.3d 425, 428 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (citing *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999)). In determining whether the legislature intended a provision to be mandatory, we consider the plain meaning of the words used, as well as the entire act, its nature and object, and the consequences that would follow from each construction. *Robinson*, 51 S.W.3d at 428. The plain meaning of the term "shall" in Section 52.046(d) supports a mandatory construction when considered in contrast to the "on request" language found in Section 52.046(a). *Compare* TEX. GOV'T CODE § 52.046(a), *with id.* § 52.046 (d).

The requirement of a court reporter was mandatory on the statutory probate court under Section 52.046(d). The court did not have a court reporter to record the testimony. This was error.[7] Further, because the obligation was on the court to supply the court reporter, and not on Scott to request a court reporter, we reject Family LLC's argument that Scott waived error by either failing to object or failing to request a court reporter. *See Herrera*, 2014 WL 1714011, at *2 (holding that party

[7] No party argues any other basis for excusing the need for a court reporter.

did not waive appointment of court reporter under Section 52.046(d), in part, because statutory obligation for court reporter was on court, not party).

The statutory probate court erred in failing to appoint a court reporter. The absence of a record probably prevents Smith from properly presenting his appeal to this court. TEX. R. APP. P. 44.1(a)(2). The inability to properly present the appeal is highlighted by Family LLC's repeated argument in its brief that every issue raised by Smith is waived absent a record to support his arguments.

We conclude the lack of a court reporter was error and the error was harmful. Thus, the error is reversible. *See id.*; *Hayes*, 2010 WL 2135636, at *2 (concluding lack of record in violation of Section 52.046(d) probably prevented party from presenting case to appellate court). We sustain Smith's fourth issue.

We do not reach the remainder of Smith's issues.

Conclusion

We reverse and remand for additional proceedings consistent with this opinion.

Sarah Beth Landau
Justice

Panel consists of Justices Lloyd, Landau, and Countiss.