Affirmed and Opinion Filed May 26, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-01530-CV

IN THE ESTATE OF ROBERTO REFUGIO DE JESUS GONZALEZ BARRERA, DECEASED

On Appeal from the Probate Court No. 1
Dallas County, Texas
Trial Court Cause No. PR-14-02697-1

MEMORANDUM OPINION

Before Justices Partida-Kipness, Nowell, and Evans
Opinion by Justice Nowell

This is an appeal from an order dismissing an application for determination of heirship. The decedent died on August 25, 2012 and his will was admitted to probate proceedings in Mexico. Appellant alleges she was the common law wife of the decedent. Appellees are the Co-Executors of the decedent's estate appointed in Mexico. Appellant contends the probate court erred by dismissing the application without a formal hearing and without sufficient evidence. Appellees contend the record establishes that there is no property in Texas in need of administration and the probate court lacked jurisdiction. We agree with appellees and affirm the

probate court's order.

BACKGROUND

Appellant, Patricia Lorena Gomez aka Lorena Tassinari (Lorena), claims to be the common law wife of Roberto Refugio De Jesus Gonzalez Barrera. They met in 2009 after his divorce from Graciela Moreno Hernandez. Sometime before Barrera's death in 2012, his ex-wife initiated proceedings in Mexico to nullify the divorce for lack of process. She was successful and the divorce was declared null. Barrera filed an appeal, but the appellate court affirmed the nullification after his death.

Barrera, a Mexican citizen, died on August 25, 2012 in Houston. His will, executed August 25, 2010, is the subject of probate proceedings in Mexico filed on September 25, 2010. Barrera stated in the will that he was married only once to Graciela Moreno Hernandez and fathered six children. Barrera left his estate to his children and grandchildren as his "sole and universal heirs." Barrera did not mention Lorena in the will, which was executed after their relationship began.

Barrera named Eduardo Livas Cantu and Juan Antonio Quiroga Garcia as co-executors of his estate (the Co-Executors). They were appointed as co-executors by the Mexican court on November 6, 2012.

Lorena filed applications in the Mexican courts to establish her claims, but was unsuccessful. Dissatisfied with the Mexican probate proceedings, Lorena filed an application for letters of independent administration in Texas on August 4,

2014. She attached Barrera's will and stated that probate proceedings were pending in Mexico. Lorena alleged she was Barrera's common law or putative spouse at the time of his death, he was domiciled in Dallas, and that he owned substantial assets in Texas. She also alleged the heirs were mismanaging Barrera's assets.

On September 23, 2014, Lorena filed an application appointment of a temporary administrator to find and preserve assets of the estate in Texas. The trial court appointed Jay David Hartnett as temporary administrator on October 3, 2014. *See* TEX. EST. CODE ANN. § 452.001. The probate court directed Hartnett to assist the court in determining whether there were assets of the decedent in Texas and whether the court had jurisdiction.

Hartnett filed his first report on March 2, 2015. He received and reviewed a large amount of information from the parties, but he still desired to subpoena bank records about the decedent from Chase Bank, Comerica Bank, and Grupo Financiero Banorte to investigate possible claims for funds in any accounts Barrera may have had in those banks. Hartnett was unable to locate any real property owned by Barrera in Texas, but found Barrera owned personal property in the form of possible claims for funds withdrawn from bank accounts after his death. In his inventory, appraisement, and list of claims, Hartnett listed no community property, no personal property, and no real property, and valued the estate at $0. Harnett listed a claim against Bank of America and four individuals in the amount of $48,546.28 for funds withdrawn after Barrera's death. This account was not

administered by the Co-Executors in Mexico and it was unknown what happened to the funds. He also found a possible claim for an account at BBVA Compass Bank in the amount of $4,162.25. It was unknown what happened to these funds after Barrera's death, but they were purportedly transferred to an estate account in 2013.

On June 1, 2015, Hartnett filed a second report stating he had received and reviewed information from the parties and subpoenaed records about Barrera's bank accounts from Chase Bank, Comerica Bank, Grupo Financiero Banorte, Bank of America, and Compass Bank. Chase, Banorte, and Comerica were unable to locate any accounts related to Barrera. Hartnett's inventory, appraisement, and list of claims was unchanged from his first report except for additional information about the Bank of America and BBVA Compass Bank possible claims.

The Co-Executors filed a motion to dismiss Lorena's application for letters of independent administration on June 29, 2015. They argued there was no necessity for an administration because there was no property in Texas, Lorena's application was barred by orders in the Mexican probate proceedings, and she lacked standing to bring the application. They argued Hartnett's reports confirmed there was no property in Texas to be administered or that would be affected by Barrera's will. Regarding the Bank of America claim identified by Hartnett, the Co-Executors stated that after Hartnett identified the claim, they investigated and determined that the funds were withdrawn before their appointment and delivered

to Gruma S.A.B. de C.V., Barrera's former company. At their request, Gruma returned the funds to the Mexican estate for administration. Regarding the BBVA Compass claim, the Co-Executors argued the account was included in the inventory and appraisement in the Mexican probate proceeding and the funds were voluntarily delivered to the Co-Executors while no ancillary administration was pending in Texas. The Co-Executors attached affidavits and certified copies of documents in support of their motion.

On November 23, 2015, Lorena filed a cross-application for ancillary probate and application for determination of heirship.[1] She alleged she was Barrera's surviving common law spouse and that he owned personal property and resided in Dallas County at the time of his death. She attached Hartnett's first and second reports, which found no assets in Texas. Lorena also filed a response to the motion to dismiss, but attached no evidence supporting the jurisdictional facts attacked by the Co-Executors.

Hartnett filed a third report on February 2, 2016. He was unable to locate any real estate owned by Barrera in Texas, but was able to identify personal property in the form of a claim for recovery of one or more bank accounts. Although the Co-Executors filed documents showing the claim for recovery of the bank account was resolved by payment of the funds to the Co-Executors, Hartnett

[1] The Co-Executors filed an application for ancillary probate on March 30, 2015, before they filed the motion to dismiss. The Co-Executors later withdrew the application.

stated the payment should have been made to the temporary administrator absent a court order approving resolution of the claim. He investigated Lorena's claim that other assets were located in Dallas County, but Hartnett was unable to locate any other assets of the estate in Texas. Hartnett reported to the court that he would be submitting a claim for his fees and expenses in excess of $49,000.00, which may make the estate in Texas insolvent.

The probate court held a hearing on the temporary administrator's fees and signed an order authorizing payment of the temporary administrator's fees and expenses in the amount of $50,694.39 on April 5, 2016. Following the court's order, the Co-Executors tendered the amount of the Bank of America claim to the probate court. On May 23, 2016, the probate court ordered the amount of the claim, $48,546.28, deposited in the registry of the court and then used as partial payment of the temporary administrator's fees and expenses.

At a hearing on March 15, 2017, the probate court granted the motion to dismiss Lorena's application for letters of independent administration without prejudice. The court signed an order to this effect on March 17, 2017. Lorena appealed the order, but this Court dismissed the appeal because the order was a non-appealable interlocutory order. *See In re Barrera*, No. 05-17-00774-CV, 2017 WL 3614145, at *1 (Tex. App.—Dallas Aug. 23, 2017, no pet.) (mem. op.).

Then in July 2018, the Co-Executors and other parties submitted a proposed agreed final judgment to the probate court. Lorena filed an objection to the agreed

final judgment on August 17, 2018. She argued her application for determination of heirship remained pending, she did not agree to the proposed judgment, and it failed to dispose of her application. A week later, Lorena filed her first amended application to determine heirship. The Co-Executors responded on October 19, 2018. They argued that Lorena lacked standing to object to the proposed agreed final judgment and, if she had standing, her objections lacked legal merit for the same reasons the court considered when it entered the March 17, 2017 order of dismissal.

The probate court held a status conference on October 25, 2018. The probate court granted an extension of thirty days for Lorena to request a transcript of a March 15, 2017 hearing in order for Lorena to develop her arguments and state her case. Afterwards, however, Lorena did not request the transcript or file anything in support of her pending applications. On December 3, 2018, the probate court signed an order dismissing Lorena's application for determination of heirship and all of her claims and cross-actions with prejudice. The order is a final order stating there will be no administration of the estate in Texas.[2] Among other things, the probate court found that the temporary administrator determined there were no funds or property remaining in the Texas estate and the estate was insolvent, there

[2] The Co-Executors voluntarily dismissed their application for ancillary probate during the March 15, 2017 hearing and in the proposed agreed final judgment. The record reflects that the probate court signed an agreed order discharging the temporary administrator on March 13, 2019. On March 26, 2019, the court signed two orders dismissing pendent proceedings filed by Lorena.

was no necessity to open an ancillary administration in Texas, the court lacked jurisdiction to consider Lorena's application for determination of heirship and her claims and cross-actions, and no administration of Barrera's will should be opened in Texas. Lorena appeals.

DISCUSSION

In her first issue, Lorena argues the Co-Executors did not file a pleading requesting dismissal of her application to determine heirship. However, the record does not show that she ever raised the lack of pleadings to the probate court in response to the proposed agreed judgment, the Co-Executors' response to her objection to the agreed judgment, or the order of dismissal. Lorena objected to the proposed agreed judgment on the basis that the court had not disposed of her request for a determination of heirship, but nowhere did she object to a lack of pleadings to support dismissal of that request. We overrule Lorena's first issue. *See* TEX. R. APP. P. 33.1(a).

In her second issue, Lorena argues the trial court erred by rendering final relief without forty-five days' notice of the trial setting. *See* TEX. R. CIV. P. 245. The Co-Executors contend that Lorena failed to preserve this issue by objecting to the lack of notice, the dismissal was not a final trial setting, and she received adequate notice of the court's intent to dismiss unless she took action within thirty days of the October 25, 2018 status conference.

Rule 245 requires the trial court to give the parties reasonable notice of not

less than forty-five days of the first setting for trial. *Id*. Assuming this rule applies to the dismissal order, we conclude Lorena failed to preserve error. At the October 25, 2018 status conference, the probate court gave Lorena thirty days to request a transcript of prior hearings to develop her arguments and state her case. The record does not show that Lorena objected to the lack of forty-five days' notice of a trial setting after the status conference. We overrule her second issue. *See* TEX. R. APP. P. 33.1(a); *Odam v. Texans Credit Union*, No. 05-16-00077-CV, 2017 WL 3634274, at *4 (Tex. App.—Dallas Aug. 24, 2017, no pet.) (mem. op.) (complaint of lack of adequate notice must be brought to trial court's attention); *Stallworth v. Stallworth*, 201 S.W.3d 338, 346–47 (Tex. App.—Dallas 2006, no pet.) (party waived complaint about lack of notice under rule 245 by failing to object to lack of notice).

In her third issue, Lorena argues the probate court applied the wrong standard in dismissing her amended application to determine heirship. She contends her heirship proceeding was properly brought under 202.002(2)(A) because property in Texas was omitted from the will or administration in Mexico. In her sixth and seventh issues, she argues there is no evidence or factually insufficient evidence to support the finding of no necessity for an ancillary administration. *See* TEX. EST. CODE ANN. § 501.001 (will of testator not domiciled in Texas at time of death may be admitted to probate if the will would affect any property in this state). We discuss these issues together.

As applicable in this case, section 202.002(2)(A) provides that a court may conduct a proceeding to declare heirship when there has been a will probated elsewhere, but "property in this state was omitted from the will." TEX. EST. CODE ANN. § 202.002(2)(A).[3] An ancillary probate proceeding also requires "property in this state." *See id.* § 501.001. Thus, a common element of a proceedings under sections 202.002(2)(A) and 501.001 is the existence of estate property in Texas.

The probate court addressed the existence of property in Texas through the temporary administration and in deciding the motion to dismiss. Lorena alleged in her application for independent administration that there was a necessity for administration because Barrera had substantial property in Texas. The court appointed the temporary administrator specifically to investigate and aid the court in determining whether there were assets of the decedent in Texas, whether Texas courts have jurisdiction and venue, and whether there is a necessity for administration of decedent's estate in Texas. Hartnett found no real property owned by Barrera in Texas and the only personal property was the claim for

[3] In full, the section provides:

> A court may conduct a proceeding to declare heirship when:
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> (1) a person dies intestate owning or entitled to property in this state and there has been no administration in this state of the person's estate;
>
> (2) there has been a will probated in this state or elsewhere or an administration in this state of a decedent's estate, but:
>
> (A) property in this state was omitted from the will or administration; or
>
> (B) no final disposition of property in this state has been made in the administration; or
>
> (3) it is necessary for the trustee of a trust holding assets for the benefit of a decedent to determine the heirs of the decedent.

recovery of the Bank of America account. That claim, however, was resolved by the order for payment of the funds into the registry of the court and the use of those funds as partial payment of the temporary administrator's fees and expenses. This left the estate in Texas insolvent.

Thus, the existence of property in Texas in need of administration, an essential element of Lorena's heirship and ancillary probate applications, was already resolved against her. Her recasting of the application for administration as an application for determination of heirship or for ancillary probate did nothing to change the probate's court's determination that no property remained in Texas in need of administration. *See Callahan v. Vitesse Aviation Servs., LLC*, 397 S.W.3d 342, 350–51 (Tex. App.—Dallas 2013, no pet.) (noting summary judgment proper as to amended petition where amendment essentially reiterates previously pleaded causes of action, motion for summary judgment negates common element of newly and previously pleaded claims, or original motion is broad enough to encompass newly asserted claims); *see also Simmons v. Texoma Med. Ctr.*, 329 S.W.3d 163, 177–78 (Tex. App.—El Paso 2010, no pet.) (applying same rule to motion to dismiss).

CONCLUSION

We conclude Lorena failed to raise an issue of fact on the existence of property in Texas that was omitted from the will or would be affected by the will in response to the Co-Executors' motion to dismiss, which challenged her

jurisdictional facts. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227–28 (Tex. 2004). We overrule issues three, six, and seven. Because this conclusion supports the probate court's order and disposes of this appeal, we need not address Lorena's remaining issues. TEX. R. APP. P. 47.1. We affirm the trial court's order.

/Erin A. Nowell/
ERIN A. NOWELL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE ESTATE OF ROBERTO REFUGIO DE JESUS GONZALEZ BARRERA, DECEASED	On Appeal from the Probate Court No. 1, Dallas County, Texas Trial Court Cause No. PR-14-02697-1.
No. 05-18-01530-CV	Opinion delivered by Justice Nowell. Justices Partida-Kipness and Evans participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees Eduardo Livas Cantu and Juan Antonio Quiroga Garcia recover their costs of this appeal from appellant Patricia Lorena Gomez aka Lorena Tassinari.

Judgment entered this 26th day of May, 2020.