Affirmed and Opinion filed June 1, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00443-CV

CANDRIA AMIR COSSEY and CHAD O'NEAL COSSEY, Appellants

V.

PAMELA BREAUX-COSSEY, Appellee

On Appeal from the Probate Court No. 2
Harris County, Texas
Trial Court Cause No. 270,928-401

O P I N I O N

This is an appeal from an order to probate the last will and testament of Larry Joseph Cossey, deceased, as a muniment of title. That order was granted in favor of the appellee, Pamela Breaux-Cossey, the decedent's second wife. Appellants, Candria Amir Cossey and Chad O'Neal Cossey, the decedent's children from a prior marriage, contend that the probate court erred in admitting the will to probate as a muniment of title because there were debts owing against their father's estate at the time the order was entered. For the reasons set out below, we affirm the probate court's order.

I. Background

Larry Joseph Cossey died on October 15, 1993, in Ventura County, California, where he was a resident at that time. On the date of his death, Cossey's estate consisted of a small piece of real property in Harris County, Texas, which contained two rental houses. Cossey was divorced from his first wife, Pamela Terry Cossey, in 1985, and ordered to pay child support in the amount of $300 each month for his two minor children, Candria Amir Cossey and Chad O'Neal Cossey. Cossey executed a will on July 22, 1988, which included bequests of $5,000 to each of those children. In 1989, Cossey married his second wife, Pamela Breaux-Cossey. On November 4, 1994, following Cossey's death, Breaux-Cossey filed an application to probate her husband's will under Texas law. Appellants challenged that petition and, on August 6, 1997, Breaux-Cossey filed an amended application to probate the will as a muniment of title only. After a hearing on April 26, 1999, the probate court granted Breaux-Cossey's application to probate the will as a muniment of title. This appeal followed.

II. Issues Presented

Appellants contend that the probate court erred by admitting Cossey's will as a muniment of title for the following reasons: (1) Cossey was "indebted to a third party at the time of [his] death"; (2) the parties "stipulated and agreed" that "debts were due and owing" against Cossey's estate; (3) a "claim for child support" was filed subsequent to Cossey's death; and (4) Cossey's will "provided cash bequeaths [sic]" to appellants and the estate possessed no funds to satisfy those devises. In response to these issues, Breaux-Cossey contends that the probate court's determination was proper.

III. Probating a Will as a Muniment of Title

Under the law in effect at the time of Cossey's death, an application to probate a will as a muniment of title was governed by § 89A of the Texas Probate Code. That statute,

which was recently recodified as § 89C, provides as follows:

> In each instance where the court is satisfied that a will should be admitted to probate, and where the court is further satisfied that there are no unpaid debts owing by the estate of the testator, excluding debts secured by liens on real estate, or for other reason finds that there is no necessity for administration upon such estate, the court may admit such will to probate as a muniment of title.

TEX. PROB. CODE ANN. § 89C(a) (Vernon 1980 & Supp. 1999).[1] A testamentary instrument may be probated as a muniment of title to document ownership of certain real property. *See, e.g., In re Estate of McGrew*, 906 S.W.2d 53 (Tex. App.—Tyler 1995, writ denied) (reviewing an order to probate a will as muniment of title to perfect title to land).

A. Standard of Review

In challenging the probate court's decision to admit a will to probate solely as a muniment of title, appellants bear the burden of showing a "clear abuse of discretion" by the probate court. *See Washington v. Law,* 519 S.W.2d 953, 954 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (citing *Landry v. Travelers Ins. Co.*, 458 S.W.2d 649 (Tex. 1970)); *see also In re Estate of Hodges*, 725 S.W.2d 265, 270 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.). The test for abuse of discretion is whether the court acted without reference to any guiding rules and principles or, stated another way, whether the court's action was arbitrary or unreasonable. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex.1985), *cert. denied*, 476 U.S. 1159 (1986). In an abuse of discretion analysis, the reviewing court must consider the elements of the case and determine the following: (1) "whether the trial court's exercise of discretion was legally erroneous;" and (2) "if it was, whether the impact of the error on the case requires reversal." *Landon v. Jean-Paul Budinger, Inc.*, 724 S.W.2d 931, 937 (Tex. App.—Austin 1987, no writ). A decision is legally erroneous only if it was (1) "based on a legally irrelevant factor;" (2) "issued without consideration of a legally relevant factor;" or

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[1] Although appellants invoke § 89B of the Texas Probate Code, the relevant historical note found in the Code clearly shows that this section "applies only to the estate of a decedent who dies on or after [September 1, 1997]." TEX. PROB. CODE ANN. § 89A, historical note (Vernon 1980 & Supp. 1999) [Act of May 31, 1997, 75th Leg., ch. 540, § 6, 1997 Tex. Gen. Laws 1907, 1910]. Because Cossey died prior to September 1, 1997, we will review the elements of this case in light of Texas Probate Code § 89C(a).

(3) "entirely unreasonable in light of all the legally relevant factors." *Geeslin v. McElhenney*, 788 S.W.2d 683, 685 (Tex. App.—Austin 1990, no writ) (citing *Landon*, 724 S.W.2d at 938).

B. Unpaid Child Support

Here, several of appellants' issues raise the question of whether it was error to probate Cossey's will as a muniment of title because Cossey had failed to pay child support. The record shows that, at the April 26, 1999 hearing, appellants alleged that Cossey owed $10,027.02 in unpaid child-support at the time of his death on October 15, 1993. The probate court noted that the applicable limitations period for filing a proper claim for unpaid child support in this case was four years from the date of Cossey's death. Appellants argued that this limitations period was suspended for twelve months because, following Cossey's demise, there was no one to whom they could present the debt. Nevertheless, the probate court found the limitations period had run and, because the time for filing a claim had expired, there was no valid debt against Cossey's estate for unpaid child support so as to preclude probating the will as a muniment of title.

Typically, the time limitation for filing a claim for unpaid child support in Texas is "not later than the fourth anniversary after the date . . . on which the child support obligation terminates under the order or by operation of law." TEX. FAM. CODE ANN. § 157.005(b) (2) (Vernon 1996), *formerly codified as* § 14.41(b) (2) [Acts of 1995, 74th Leg., ch. 20, § 1, 1995 Tex. Gen. Laws 113, 177]. Texas law mandates further that, unless "expressly provided in the order, the child support order terminates on the marriage of the child, removal of the child's disabilities for general purposes, or death of the child or a parent ordered to pay child support." TEX. FAM. CODE ANN. § 154.006. A review of the child support order found in Cossey's divorce decree shows that it contains no posthumous duty to pay child support. Accordingly, Cossey's obligation to pay child support terminated on the date of his death, and the limitations period began to run on October 15, 1993. *See* TEX. FAM. CODE ANN. § 154.006. It follows that a proper motion related to appellants' unpaid child support was due by October 15, 1997. Because appellants waited to raise the issue of unpaid child support until well after that date, any claim for those debts is barred. *See In re Cannon*, 993 S.W.2d 354, 355 (Tex. App.—San Antonio 1999, no pet.); *Carlson v. Carlson*, 983 S.W.2d 304, 308 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

At the hearing, appellants argued that the statute of limitations was tolled for one year under § 16.062 of the Texas Civil Practice & Remedies Code. That provision states that the "death of a person against whom or in whose favor there may be a cause of action suspends the running of an applicable statute of limitation for 12 months after the death." However, Texas courts have held that the limitations period for filing a claim for unpaid child support set out in § 157.005 of the Family Code is a jurisdictional restriction which is not the same as the traditional statutes of limitation found in the Texas Civil Practice and Remedies Code. *See In re M.J.Z.*, 874 S.W.2d 724, 726 (Tex. App.—Houston [1st Dist.] 1994, no writ) (interpreting former Texas Family Code § 14.41(b) as a jurisdictional statute which can bar an untimely claim and, therefore, not subject to tolling rules that are "typically applied to statutes of limitations"); *see also In re C.L.C.*, 760 S.W.2d 790, 792 (Tex. App.—Beaumont 1988, no writ) (same). Accordingly, and contrary to appellants' suggestion at the April 26, 1999 hearing, the instant claim for unpaid child support is not subject to the tolling provisions found in the Texas Civil Practice and Remedies Code. *See In re M.J.Z.*, 874 S.W.2d at 726; *In re C.L.C.*, 760 S.W.2d at 792.[2]

From a review of the facts in the record and the applicable law, appellants have not shown that there was a valid unpaid debt for child support owed by the decedent's estate at the time the will was admitted to probate as a muniment of title. Accordingly, we cannot conclude that the probate court abused its discretion by finding that there was no debt for unpaid child support owing by Cossey's estate, and appellants' issues related to that point are overruled.

C. "Stipulated and Agreed" Debt

Appellants complain further that the probate court's order was erroneous because the parties supposedly "stipulated and agreed" at the hearing that the child support owed was a debt against Cossey's

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[2] Even if tolled for one year, from October 15, 1997, to October 15, 1998, the record shows that the first verified pleading raising the issue of unpaid child support was not filed in this case until the date of the hearing, on April 26, 1999. This pleading is likewise not within the requisite time limitation set out in Texas Civil Practice and Remedies Code § 157.005, nor does it constitute a valid claim for child support. In that respect, an action for child support such as the one contemplated by § 157.005 is "a motion filed in a matter over which the [family] court has continuing jurisdiction." *In re M.J.Z.*, 874 S.W.2d at 726. Appellants have failed to demonstrate that such a claim was filed with the family court within the time allowed by Texas law.

estate. In so arguing, appellants point to the "Agreed Findings of Fact" signed by the parties' counsel and suggest that a certain stipulation waived any argument by Breaux-Cossey that the claim for unpaid child support was time-barred.

"A stipulation is an agreement or contract between the parties made in a judicial proceeding with respect to some matter incident thereto and for the purpose, ordinarily, of avoiding delay, trouble and expense." *United States Fire Ins. Co. v. Carter*, 468 S.W.2d 151, 154 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e.*, 473 S.W.2d 2 (Tex. 1971). While stipulations are, for this reason, "favorites in the law," they must yet possess the essential characteristics of a binding agreement in order to be effective. *See id.* For example, "the stipulation must truly express the intentions of the parties making same." *Id.* In that regard, "[a] court will not construe a stipulation so as to effect an admission of something intended to be controverted or so as to waive a right not plainly agreed to be relinquished." *Id.* (citing *King v. Elson*, 30 Tex. 246 (Tex. 1867)).

A review of the Agreed Findings of Fact that were signed by the parties' attorneys on April 26, 1999, and presented to the probate court at the hearing on that date, shows only that, at the time of Cossey's death, "he was in arrears in such child support payments in the amount of $10,027.02." There is no stipulation regarding a waiver of the applicable limitations provision. At the outset of the April 26, 1999 hearing, counsel for Breaux-Cossey argued that, notwithstanding the stipulation, "now it has been more than four years, and the statute of limitations has run on that claim for debt." As noted above, the probate court agreed and found that the amount of unpaid child support was not a valid debt against the decedent's estate.

It is well-settled that an effective waiver requires "an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987). From these facts and circumstances, there is no evidence that Breaux-Cossey's counsel intended to relinquish or waive the statute of limitations defense that was raised at the hearing. We have already concluded that the probate court's decision on the issue of unpaid child support was not erroneous. Because appellants have not shown that the probate court's determination was improper, appellants' issue on whether a limitations defense was barred due to a stipulation is overruled

as well.

D. Unpaid Cash Bequests

In addition, appellants contend that the will's bequest of $5,000 to each of the children constitutes an unpaid debt owed by the estate. At the April 26, 1999 hearing, the probate court held that because "[a] bequest is not a debt," the unpaid cash gifts would not prohibit probate of the will as a muniment of title. The probate court added further that Texas law provides other means for disposing of cash bequests when the estate has no funds.

As the probate court correctly noted, bequests of cash are not treated as debts in the State of Texas. *See, e.g., Lesikar v. Rappeport*, 809 S.W.2d 246, 250 (Tex. App.—Texarkana 1991, no writ) (noting that cash gifts are "not estate debts, but bequests subject to distribution"). Instead, Texas law recognizes that testamentary bequests or legacies are divided into the following four categories: specific, demonstrative, general, and residuary. *See Hurt v. Smith*, 744 S.W.2d 1, 4 (Tex. 1987). Because the Cossey children's gifts are not "charged to a particular fund or piece of property," these legacies are categorized as "general bequests" and are satisfied out of the decedent's general assets.[3] *See id.* The property owned by Cossey at the time of his death is not mentioned in the will and, as such, it is a part of his estate's residuary. *See, e.g., Johnson v. Moore*, 223 S.W.2d 325 (Tex. Civ. App.—Austin 1949, writ ref'd) (observing that property not specifically disposed of in a will falls within the residuary clause). In this instance, all rights to the specific and general assets of Cossey's estate, including its residue, were assigned to Breaux-Cossey. Realty found in an estate's residuary is generally charged "with the payment of debts and legacies if the residuary personalty is not sufficient to pay same." *Sinnott v. Gladney*, 159 Tex. 366, 322 S.W.2d 507, 510 (1959). Thus, while the general bequests to Cossey's children remain

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[3] The classification of a bequest depends upon the intent of the testator. *See Lake v. Copeland*, 82 Tex. 464, 17 S.W. 786, 787 (1891). In contrast to a general bequest, a legacy is classified as specific if it is described with such particularity that it can be distinguished from all of the testator's other property and the testator intended for the beneficiary to receive that particular item, rather than cash or other property from his general estate. *See Hurt*, 744 S.W.2d at 4. Demonstrative legacies are bequests of sums of money, or of quantity or amounts having a pecuniary value and measure, which the testator intended to be charged primarily to a particular fund or piece of property. *See id.* A legacy is classified as a residuary bequest if the testator intended for the gift to bequeath everything left in the estate, after all debts and legal charges have been paid and after all specific, demonstrative, and general gifts have been satisfied. *See id.*

payable from the residuary of his estate, any remedy must stem from another, more appropriate proceeding.

Appellants have not shown that the unpaid cash bequests were a debt owed by the estate and, therefore, they have not demonstrated that the probate court's determination on this point was erroneous. Accordingly, appellants' issue regarding this matter is also overruled.

E. Necessity for Administration

In response to the issues raised in appellants' brief, Breaux-Cossey contends that, even if debts were owing against Cossey's estate, the probate court's order was still valid, under § 89C(a) of the Texas Probate Code, because the court found that an administration was not necessary. However, as we have found that the probate court's order was proper because there were no outstanding debts owed by the estate, Breaux-Cossey's contention on this issue is moot and we need not consider it further.

IV. Conclusion

Having found each of appellants' issues to be without merit, we conclude that the probate court did not abuse its discretion and we therefore affirm the order to admit Cossey's will as a muniment of title.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed June 1, 2000.

Panel consists of Justice Yates, Fowler, and Edelman.

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