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Supreme Court of Texas.
Jack A. KANZ, Appellant,
v.
Helen A. HOOD, et al., Appellees.
No. 00-0527.

April 11, 2001.

Appearances:

Phil Robertson, Robertson, Robertson & Silas, Attorneys, L.L.P.,
Clifton, Texas, for petitioner.

Gregory B. Johnson, Malone & Johnson, Waco, TX, for appellee.

Before:

Chief Justice Thomas R. Phillips, Justice Priscilla Richman Owen,
Justice Harriet O'Neill, Justice Wallace B. Jefferson, Justice Nathan
L. Hecht, Justice Deborah G. Hankinson, Justice James A. Baker, Justice
Craig T. Enoch, Justice Greg Abbott

CONTENTS

ORAL ARGUMENT OF PHIL ROBERTSON ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF GREGORY B. JOHNSON ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF PHIL ROBERTSON ON BEHALF OF THE PETITIONER

JUSTICE: Thank you, be seated. The Court is ready to hear argument
from petitioner in Kanz v. Hood.

SPEAKER: May it please the Court. Mr. Phil Robertson will present
argument for the petitioner.

ORAL ARGUMENT OF PHIL ROBERTSON ON BEHALF OF THE PETITIONER

MR. ROBERTSON: May it please the Court. Good morning. This probate
case presents two issues for review. The first summons the independence
of the executor and the second is the ability to recover his fees and
costs following a successful defense of the lawsuit to the moving. At
the Court, both of these issues are the State's longstanding policy of
defending the independence of the executor under Section 145 of the
Probate Code. Both from those who asked the Court to control the
executor and from the executor who seeks to surrender his authority to
the Court, because it's the separation of the course from the executor
that makes independent administration in Texas so unique. Now before
the code was amended to allow an independent executor to be removed for
cause, the district court acting in equity had the ability to appoint a
receiver over a state asset.

Now since 1979, the ability to appoint a receiver is no longer
quite as important because Section 149C now allows the Court to remove

an executor. In this case, however, the trial court not only appointed a receiver over certain state assets, the last of said asset defendant's farm, but it continued to exclude the executor of control over those assets by directing the district court then to distribute the proceeds of the receiver's sale. The Tenth Court held that that was harmless error. But we know those errors that caused that form of control has never been approved by a trial court. The interference with the executor in this case is more strained than what this Court saw in the *D'Unger v. De Pena*. In that case, the trial court simply withheld the farmers that would place in the trial court register and this Court granted mandamus to correct that error. In *Collins v. Baker*, the Fourteenth Court held that the trial court's order directing a clerk to distribute funds was void because there was no statute which specifically and explicitly allowed the trial court to interfere with that executor's duties. The question then, we know this is error, the question is, can it be harmless? And Justice Gray in the Tenth Court's opinion dissent said that the order in this case to the court was made without jurisdiction and it was void. And I'm not sure that using the term jurisdiction or jurisdictional or jurisprudence in this situation but the judge's order was certainly without any statutory authority. And in that sense, it was void or voidable. And for my policy standpoint --

JUSTICE: Let me ask you a question.

MR. ROBERTSON: Yes, sir.

JUSTICE: The funds from the sale of the farm were in the registry of the Court because the Court appointed receiver deposited thereafter the sale, is that correct?

MR. ROBERTSON: That's correct.

JUSTICE: And whether the appointment of the receiver was right or wrong, it was litigated in the first appeal?

MR. ROBERTSON: Yes, sir. That's correct.

JUSTICE: But -- and so that judgment became final and the Court held that that appointment of the receiver was all right?

MR. ROBERTSON: Yes, sir.

JUSTICE: So we have a duly appointed receiver who carries out his or her duties, sells the money and what is the ordinary course of action of a receiver when they sell property under a court order?

MR. ROBERTSON: Normally to deposit the funds back into the registry --

JUSTICE: Which is exactly what happened here.

MR. ROBERTSON: That's correct.

JUSTICE: Is your argument that the court -- the trial court had absolutely no jurisdiction to order dispersal of funds within its own custody?

MR. ROBERTSON: Yes, sir. In this sense, the only -- the only discretion the court had in our opinion is to direct those funds to be delivered to the executor.

JUSTICE: Already having found a finding of fact that the executor had grossly managed the estate?

MR. ROBERTSON: That's -- that's the irony of the case, your Honor. We have an executor who is -- who is still in authority --

JUSTICE: [inaudible] cases at all which you don't have to remove the executor before you under these circumstances.

MR. ROBERTSON: Yes, sir, and now the question is how hard can a trial court go?

JUSTICE: Well, you don't complain on behalf of your client that how they were distributed was unfair or improper or didn't give

anything which way what they were entitled to under an account --

MR. ROBERTSON: That's right, your Honor.

JUSTICE: No complaint about that.

MR. ROBERTSON: No.

JUSTICE: Which is the basis for the Court of Appeals finding no cause.

MR. ROBERTSON: Yes, sir. For the problem --

JUSTICE: So what is the real basis for your argument merely that there is, quote, no authority to interfere with an executor -- independent executor who's still there under the trial court --

MR. ROBERTSON: That's the -- that's the policy consideration. The harm now comes from the fact that this executor who's still in power has no way to close the estate administration. Well --

JUSTICE: Well, what about if he says I'm still serving, I now want to close. All the assets have been distributed. There's nothing left here and I'll just go back to the probate court or the county court in this case or the district court. My understanding everything was transferred to this Court and say "Here's the facts, Judge, give me an order discharging me."

MR. ROBERTSON: Well, he could do that but he has to do that in his own expense, out of his own pocket. And the code doesn't require an executor to do that.

JUSTICE: So that's the sole basis for his complaint that he has the right to close which is what you say you want whether it be in his policy instead of the estate's policy.

MR. ROBERTSON: Essentially yes, your Honor.

JUSTICE: And how -- how much on a simple estate with no assets, what type of cost are we talking about?

MR. ROBERTSON: It's certainly not substantial --

JUSTICE: As opposed to --

MR. ROBERTSON: -- the filing of some sort.

JUSTICE: As opposed to appealing to the Supreme Court.

MR. ROBERTSON: Well, that's correct. Yes, sir.

And so there are two considerations here. One is the policy of the state of protecting the office of the independent executor and the second is the --

JUSTICE: Well, is it really a correct statement now under the way the Probate Code scheme exist that the court's system has absolutely no supervision of an independent executor?

MR. ROBERTSON: Well sir, I think the newest series of amendments to the code, the 149(a)(b)(c)(d)(e), that series gives a trial court more authority certainly that --

JUSTICE: The court gives interested parties' beneficiary, etc., the right to the land of county --

MR. ROBERTSON: Yes, sir.

JUSTICE: -- or the right to land -- of the land distributions which is what we've asked for by the heirs in this case of that are absent. Is that correct?

MR. ROBERTSON: That's correct. Actually, your Honor, one of the requests that was made by these beneficiaries was under 149B and in my opinion at least if the Court had gone with the remedies under 149B it would be here. The second issue is somewhat related to the first and it has to do with fees and costs of the executor --

JUSTICE: May I ask you a question about that thing?

MR. ROBERTSON: Yes, sir.

JUSTICE: Whether you agree or disagree of the Court of Appeals and the majority opinion stated that the issue that you raised in the

appeal is that the trial court denied your request for attorney's fees were against the facts. The finding of facts was against the great weight and preponderance of the evidence. Is that -- was that your claim?

MR. ROBERTSON: Yes, sir. We -- we made that --

JUSTICE: That was your issue in the trial court and that's what they decided. I mean in the Court of Appeals.

MR. ROBERTSON: Court of Appeals. Yes, your Honor.

JUSTICE: Is what you're saying to us today different than that?

MR. ROBERTSON: I don't believe so, your Honor. What we're complaining about today is the Tenth --

JUSTICE: How long do you know --

MR. ROBERTSON: Yes, sir. What we're complaining about today is the Tenth Court's treatment and how it reviewed the evidence in order to reach the answer to that very question. Under the code, there is no distinction made between an executor who has mismanaged an estate, embezzled from the estate, or even been sentenced to the penitentiary. There's no difference between that filed executor and the one who's merely failed to file a notice or following the county. All of them are subject to removal and all of them also qualify for reimbursement of the costs and fees if they conducted good faith in defense. The focus of the subsection and our problem with the Tenth Court's opinion is that this subsection focuses on not on the conduct of the administration of the estate, but the conduct of the defense and that's where the error came from. The trial court found all sorts of errors -- all sorts of problems with this executor -- things that he failed to do, things he could have done in relation to the title to defend it from. It characterized that as misconduct on examining that when it came to the defense of the removal action, the trial court only did two things. The first thing was that it did not remove the executor.

JUSTICE: Well, let me ask you this, can the trial court -- 149C says that the trial court may remove the independent executor as discretionary.

MR. ROBERTSON: Yes.

JUSTICE: And so let's say you vote down to subsection 40 fails to timely file the notice required by 128(a). If -- if the notice has not been timely filed, can the trial court not remove him but order him to file? Or would you say on your argument that the court would have no jurisdiction to do that? Court can only remove the executor or not remove the executor.

MR. ROBERTSON: You request to the trial court this: "Trial court, this executor has done these things, please remove him." Then the court can say "Only we remove him on the double."

JUSTICE: No choice. The court cannot order him and say, "I'm not gonna remove you but you're ordered to file what you're required to file under Subsection 4 within 30 days."

MR. ROBERTSON: If the action is only under 149C, yes, 149C. If it's under 149D, however, there are other orders that the trial court can make. The trial court has a number of things that it can do and in this case it just failed to do the right one. The trial court could leave the executor in place under 145. I believe they were wrong. He could leave the executor in place and order him to distribute under 149B because removing, remove the executor and dispose of the asset under 149C with subsection (b). Or he could remove it and appoint a new executor to do -- to do the trial. This trial court did none of those. They left him in place but then do so in power and that's the problem.

JUSTICE: Why?

MR. ROBERTSON: I'm sorry?

JUSTICE: Why? Why -- do you have any idea why?

MR. ROBERTSON: No. I speculate that the judge was merely trying to achieve a result and so with the fastest route appear today was [inaudible] himself.

JUSTICE: But to the beneficiaries, it makes no difference. Here, the trial judge accomplished this.

MR. ROBERTSON: That's right.

JUSTICE: We're -- it's like your case is really advanced for this offense it's advance for principle essentially.

MR. ROBERTSON: Well --

JUSTICE: Because in another case, it might make a difference if he had been put on executor's we can --

MR. ROBERTSON: This is a real policy case, your Honor. The court has got to decide if the policy under the probate code of leaving an independent executor in the end is what we still intend to do and that has been such a strong policy under the probate code. It is what makes Texas independent administration to me. It was designed to be simple. It was designed to be inexpensive. And it's that way only because the executor is protected from in principle.

JUSTICE: The -- in this case, there's a family farm so I guess it's a family business that's involved here --

MR. ROBERTSON: Essentially, your Honor.

JUSTICE: -- and if these were not an independent executor, if this was just, I don't know, the person to whom the responsibility was given and the will to run the business on behalf of the family, you'd have no difficulty with the trial court based on the proper pleadings appointing a receiver to oversee the operation of the business.

MR. ROBERTSON: If this were not an independent administration, that's true.

JUSTICE: And no matter what the assigned responsibility by contract or by will to this person who's trying this business, by the appointment of the receiver, the trial court could care less about who is the ostensible responsible party or the person who has been assigned just by contract. The receiver now takes over the business and there's no -- the judge at that point doesn't need to remove the owner or the operator or anything else. It's just the receiver who now takes over and he operates just the same sidelines --

MR. ROBERTSON: Well, as to that particular lease of property, yes, your Honor.

JUSTICE: So except for the fact that this man independent executor under the Probate Code, the trial court doesn't necessarily have -- is not necessarily treating this independent executor in any other way than he's treating the other owner of business who's been shunted aside once he's appointed the receiver.

MR. ROBERTSON: And that's the -- that's the unfortunate thing, Judge, because this was [inaudible] and was entitled to section in that office under the Probate Code.

JUSTICE: Any other questions? Thank you, Counselor. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Gregory Johnson will present argument for the respondent.

ORAL ARGUMENT OF GREGORY B. JOHNSON ON BEHALF OF THE RESPONDENT

MR. JOHNSON: May it please the Court. Addressing first the issue regarding the distribution of the funds by the clerk, I believe the Tenth Court addressed the fact that it was appropriate and well said and the Court has the power to appoint the receiver and as opposed to the way that the petitioner doesn't matter looks at it. It's our position that the distribution was just an outcome of the receivers that when the Court said, "Okay, here I am the one who appointed this receiver. We're gonna hold the money and then again register to court." In case there's any kind of claims, this Court's gonna have to rule over what this Court did. And at that point, once those are done, the money will be distributed just as exactly the same way as they should have been done under the will.

JUSTICE: But as I understand Mr. Robertson's argument, the Court has no power to appoint a receiver unless it removed the independent executor?

MR. JOHNSON: Well, and as the question was asked, that was an issue that was that Mr. Robertson brought in the Tenth Court of Appeals about. The fact that they could not -- there should not have been a receiver appointed. The Tenth Court found that there had been and that was the final judgment in this case, because it was inappropriate for a receiver to be appointed. I believe it's correct and I believe Mr. Robertson is correct that this will be a lot easier if the Court has made the additional step of -- and caused removing the independent executor but I --

JUSTICE: But he asked you -- to do so, right?

MR. JOHNSON: [inaudible]

JUSTICE: The trial court was asked to do that and refused to do it?

MR. JOHNSON: That's my understanding. That is correct and as a --

JUSTICE: Why would he -- why would he do that and then just take over the independent executor job?

MR. JOHNSON: That's a very good question, your Honor.

JUSTICE: And why --

MR. JOHNSON: That's exactly why -- why he did that. I can't get into the case after that one. It was not involved in those decisions, etc. However, it's clear that this is the way the court said: "I know I have the ability to appoint a receiver, one asset left. I can appoint a receiver to get rid of that asset." He appointed the receiver, the receiver sold the asset, the land distributed and everybody came out exactly the same.

As far as the Court's harm analysis, their objection to it is simply that the [inaudible] estate and they could dispose of estate. But that ignores the fact that there's no asset in this estate. It ignores the fact that there's no requirement that any closing affidavit be filed. There's no -- there's no responsibility for this executor. This estate is done and over with. There's no reason for anything that happened and that's exactly what the trial court was faced with. Trial court did everything that they had to do by getting this property sold and spread out and thought, you know, there's no reason to remove the executor because I'm taking caring of, there's one piece of property and everything else. There's --

JUSTICE: There might be -- there might be harm if the independent executor is entitled to this or for the defense of the attempt to remove him from the position.

MR. JOHNSON: Well --

JUSTICE: That may -- that may -- it may need just \$50 or \$100 to

close the estate out and they would say de minimis but the petitioner's claim is that there's a lot more than that involved.

MR. JOHNSON: Yes. I understand that. If that -- if that was the -- if that was the case and there's not any claim that the -- that there was any harm and how the money was distributed other than the fact of their claim that the administrator was entitled to recover his fees and as I stated in the beginning. that it's our position that that was just part of the receiver's transaction to begin with, that there was one asset that was left. Of course, we're gonna get rid of this by this receivership and as soon as that money has come in and you might explain your want and then it's gonna be distributed out. It makes no difference. There's not any way for the court to determine or any way that anything could have been different. If both parties made their claims to the court for recovery from this fund whether or not the money was in the hands of the independent executor of the district court, the court made the ruling that it may adhere, you know, here's what belongs to you, here's what belongs to you, here's what belongs to you. That would make no difference whether it was done by the district court or if the receiver himself had done that before and as an executor had to do that.

With regards to the question of the attorney's fees will get paid, there was a specific timing and that's the key under 149C of whether or not the defense was in good faith. There was a specific timing by the trial court --

JUSTICE: We're not reviewing that issue here, right? I mean the Court of Appeals reviewed that for factual insufficiency. That issue is not before us.

MR. JOHNSON: Well, the -- I believe that the question Mr. Robertson has raised is whether or not -- I want to quote it exactly -- "Whether or not he was entitled to the recovery of his attorney's fees." And that hinge exactly on the question of defense in good faith.

JUSTICE: But again, can we -- can we hear that? I mean we have no jurisdiction of a factual sufficiency and we're not here to weigh the evidence on that point, are we?

MR. JOHNSON: Well, I think that's exactly what Mr. Robertson is asking you to do in making determination about whether or not the independent executor was entitled to the recovery of his attorney's fees. Making -- he's taking the position that if he's not actually removed then his defense must be in good faith and if you -- as you know, he stated that the analysis by the Tenth Court of Appeals was incorrect because they kept referring to things he did wrong during his management of the estate but didn't refer to things that were wrong with his defense. Of course, that was his position. But that's how they -- that they review those matters were incorrect. The court did make a specific finding that the defense was not in good faith.

JUSTICE: And how -- how could that be if you win?

MR. JOHNSON: Well, that can be -- that's our essential difference between --

JUSTICE: I think you're in bad faith but you win. I mean what kind of a ruling is that?

MR. JOHNSON: That's the essential difference between the first -- from the very beginning what Mr. Robertson stated what our position is. They did not win. Exactly they did not win. The court made a different direction when removing -- getting rid of his asset instead of actually removing him. We're on a different direction actually appointing a receiver as the Tenth Court in their opinion stated there were only two cases, I believe a O'Connor case and the Manning case and they stated

that to -- at that point go ahead and remove the independent executor would be duplicative and unnecessary. So I mean that's exactly what anybody who read the trial court's order and [inaudible] trial court judge in that case, no one would ever say that they won. To say that you're not actually removed, to me -- I mean I have no idea why the court did it, but to me it's just an oversight. But to say that they won is certainly an incorrect statement because the independent executor thought he had done whatever he wanted to do and was done with it. The court took a completely different view, said you can smash this and I'm gonna take it over and I'm gonna point a receiver and take care of this. And so that's exactly what the court did in making that finding. Now with regard --

JUSTICE: Do you think the Court of Appeals' opinion could be used by courts of authorities to justify judicial interference with the job of the independent executor in other instances where it comes out all right?

MR. JOHNSON: The only thing that I think that -- only with regard to the harm analysis and I guess that could apply to any case where you say, well, everybody turns out exactly the same then why exactly are we here arguing about? But that's gonna apply in any case whether it's a probate case or any other case where you're talking about that you have to make a harm analysis. However, what's important in this case is that you still have the equitable powers of the trial court. This Court has the equitable powers to appoint the receiver. And once that had been done, there are different rules that apply, etc., as to other than exactly what's in the probate code. And because it took that unusual step, it made this a different case than probably most in any case that would appear before other trial courts. And I don't think that they would be able to look at this unless they have those particular facts that were of particular form.

I believe that this case with regard to the attorney fees, there's not any question that the court made the finding that they did. I think that there's not any. Although there is not a great deal of evidence, nothing in the opinion with regard to what evidence did they waive other than the facts and things that they looked at with regard to what the trial court inferred with regards to the mismanagement of the estate. And those things were listed out. And that's explicitly what the trial court found was, look, I found all these things that you did very, very wrong. You didn't even try to tend those. The transcript shows that very well the record is barren of him attempting to defend his lot, doing what he needed to do to manage the estate. And that's essentially what the trial court said. "Look, if you're not even gonna try and defend what you did, I'm not gonna find that that's in good faith. In fact, I'm gonna find it's not in good faith." And the point that it's not in good faith, once that finding is made, that's the end of the story. Thank you very much.

JUSTICE: Any other questions? Thank you. Counsel.

SPEAKER: May it please the Court. Mr. Phil Robertson to present rebuttal for the petitioner.

REBUTTAL ARGUMENT OF PHIL ROBERTSON ON BEHALF OF THE PETITIONER

MR. ROBERTSON: Justice Baker, I would like to expand on the answer to the question although you asked if we have raised the great weight

and preponderance of issue in the Court of Appeals. And I hope I didn't find my answer to exclude other complaints that we made and one of those was the question of -- since the executor was not removed in this case. He was entitled to reimbursement of his fees and expenses as a matter of law. We also addressed that issue in the Court of Appeals if that makes a difference to your consideration of that particular point in this case.

I also want to talk about the fact that there was no good faith finding before the executor by the trial court. And I don't believe that that injures this executor's position in this Court based on this Court's decision in *Neil v. Anderson*. In that case, this Court's question was whether the attorney or the executor was entitled to his claim or this trial to have [inaudible] admitted the probate. That's under a different section, 245 --

JUSTICE: [inaudible] you present that.

MR. ROBERTSON: Yes, sir. Apologies.

JUSTICE: You stated on your brief pages 6 and 7, "I think that your argument that the trial court did not specifically find the executor's defense either in bad faith or not in good faith. It said the courts found that in attempting to defend its own gross misconduct and gross mismanagement it's not an action taken in good faith." So that's a quote from your brief, isn't it right?

MR. ROBERTSON: Yes.

JUSTICE: And the Court of Appeals said the trial court expressly held that you did not defend the removal action in good faith. I presume that they were talking about what you disclosed. Is that right?

MR. ROBERTSON: Yes, sir. That's the same. It's the same finding, and I think you'll just have to look at the court's findings of facts which are also of course in the record to see how that was worded.

JUSTICE: Okay. Thank you.

MR. ROBERTSON: Yes, sir.

JUSTICE: On attorney's fees in this Court, you structured this argument pretty much as a legal point.

MR. ROBERTSON: Yes, sir.

JUSTICE: The Court of Appeals treats that solely as a zero attorney's fees which is got settled against the great weight and preponderance of the evidence. Is it -- did the Court of Appeals -- you briefed to the Court of Appeals to treat this as a legal point as well?

MR. ROBERTSON: Yes, sir, and that's what I'm trying to point out to Justice Baker to address both points as a matter of law and sufficiency of the evidence --

JUSTICE: What -- am I correct your argument is he was entitled to attorney's fees as a matter of law because he wasn't removed as the independent executor?

MR. ROBERTSON: Yes, sir. And we're also saying that the finding of the trial court is not a finding of bad faith. What the trial court found, -- I mean you have to read the record very carefully, was that his attempt to defend was not an act in good faith. And I'm gonna be dancing on the head of a pin here that attempting to defend a removable act cannot by itself be in bad faith. And that's the cause even an unsuccessful defense can qualify for reimbursement under the statute.

JUSTICE: But you have to get some findings of the legal predicate to your attorney's fees, don't you? A finding lower than --

MR. ROBERTSON: [inaudible]

JUSTICE: -- negative. I mean you have -- you would need a finding of good faith, did you know?

MR. ROBERTSON: And that's what I'm trying to point out to the

Court, that lack of a good faith finding does not injure our position because of this Court's opinion in Neil v. Anderson. And again, that was under a different section. What the Court found in that, under that section, under 243 that the admission of a rule to probate was itself a finding that the action was taken in good faith. And I think the same logic applies in this case. We don't presume that someone has been hailed in the Court as a defendant appears there in bad faith. We just don't do it. Rule 13 says pleadings are presumed to have been filed in good faith. So that someone who appears in court and wins the lawsuit is -- is not removed. You can't, again with the presumption that he's in good faith, he wins the lawsuit and now is in bad faith. It doesn't [inaudible] --

JUSTICE: Any other questions? Thank you, Counsel. That concludes the argument in the second case. We'll take another brief recess.

SPEAKER: Please rise.

2001 WL 36160896 (Tex.)