ORAL ARGUMENT – 2-6-02
01-0353
IN RE SWEPI, ET AL

SAMORA: This case raises important questions about what limits exist on probate court jurisdiction in Texas. And more specifically, whether a statutory probate court has the authority pursuant to §5 of the Probate Code to transfer a district court lawsuit to itself when it's undisputed that no personal representative of an estate either is or ever has been a party to the DC lawsuit. And the only real issue in the DC lawsuit is whether Shell has properly been paying royalties to an individual, Gerald Bailey, and a partnership, Bridwell Oil Co.

I want to briefly go over the procedural background because it's somewhat complex case. There are essentially three lawsuits that are at issue here. The first is the Bailey lawsuit, which is represented by the Green circle in Harris Co. It was filed in June 1998 by Shell against two overriding royalty interest owners in which Shell was seeking a declaratory judgment that carbon dioxide produced up in Colorado and transferred through a 500 mile pipeline down to Texas that they had been properly paying royalties based on the source field value or the tailgate value of the carbon dioxide up in Colorado.

After Shell filed its declaratory judgment lawsuit against Bailey and Bridwell Oil Co., they served a number of counterclaims. But all of the claims essentially argued that Shell had not been properly calculating and paying royalties.

Now the second lawsuit at issue is the Shores' class action, which was filed as a nation-wide class action of overriding royalty interest owners in the statutory probate court of Denton Co., Texas.

Now the way the Shores' class action was filed in Denton Co., Texas is about 5 days before the lawsuit was filed the Elisia Bible Trust, whose situs of administration had indisputably been in Wichita Co up until that time, moved its offices to Denton Co., and then Mr. Shore argued that jurisdiction was proper because he was a named trustee. He was a party in the Shores' class action, and that venue was proper because the situs of administration of the Battle trust had now been moved to Denton Co.

And the third proceeding that's relevant here is the Margaret estate proceeding. Margaret Bridwell Battle died in 1976, and her estate was initially opened in Wichita Co. The record is undisputed though that nothing had happened in the estate proceeding since 1994 when an ancillary probate proceeding had been opened up in Colorado, and then it was ultimately dismissed.

After a series of summary judgment rulings had gone in Shell's favor in the Bailey lawsuit in Harris Co., the following then occurred: First, two of the partners of Bridwell Oil

Co. moved to appoint Mr. Shores as an administrator of the Margaret estate. The Margaret estate was thereafter immediately moved to the Denton Co. statutory probate court for the convenience of the estate. The next thing that happened was Mr. Shore and Bridwell Oil co. filed a motion to transfer the Bailey lawsuit from Harris county up to the Denton Co. probate court. Judge Wendell ultimately granted a §5B transfer, and that's what brings us before this court today.

ENOCH: To get where you want to go do we have to declare the probate court without subject matter jurisdiction to hear this case?

SAMORA: Yes. You have to find that the statutory probate court did not have - the Bailey lawsuit is not appertaining or incident to an estate.

ENOCH: In your view, that's a subject matter jurisdiction prerequisite?

SAMORA: Yes. Because §5B and we've got §5B- you've got your oral argument exhibits, it's reprinted behind Tab 3, §5B of the Probate code, permits a statutory probate court to transfer a cause of action pending in the DC if the cause of action is appertaining or incident to an estate, or if a personal representative is a party to the DC lawsuit. Here though it's undisputed that the personal representative was not a party to the Bailey lawsuit; therefore, the question has to be whether the Bailey lawsuit is appertaining or incident to the Margaret estate. And I think the place that you would start with that inquiry is this court's decision in Save(?) v. Hall, where it was construing what appertaining or incident to an estate meant. In Save(?) this court held that appertaining to and incident to language in §5A of the probate code is clearly limited to matters where the controlling issue is the settlement, partition or distribution of an estate. In Save(?) this court also recognized that in a survival cause of action where an administrator is seeking recovery that would directly benefit the estate, that is not a matter where the controlling issue is a settlement, partition or distribution of an estate.

A second reported case issued by this court is this court's decision in Palmer v. Coble Wall Trust...

ENOCH: Had that claim been brought in the probate court by - say there was a mistake going on. One of the heirs of the estate brought in that probate case a claim against the tort feasor. Could the tort feasor have gotten a claim dismissed from the probate court for want of subject matter jurisdiction?

SAMORA: I guess it depends on if you're talking about whether an heir would have attempted to bring Bridwell Oil co.'s claim. Bridwell Oil company is a partnership. And so our contention is that...

ENOCH: Well I was making reference to the _____ case. You said that a wrongful death, a survivor claim is not appropriately appertained to the estate for the purposes of being transferred to the probate. I was saying the respective transcripts suppose that the heir in the probate

court brought an original lawsuit against the tort feasor for the survivor action, must the probate court dismiss that for want of subject matter jurisdiction?

SAMORA: If the personal representative of an estate is a party, no. If the personal representative of the estate is not a party, I would say probably yes, because the controlling issue there would not be the settlement, partition or distribution of an estate.

ENOCH: You've argued that the probate court does not have the authority to transfer an existing lawsuit to it. And you've said that that transfer is a subject matter jurisdiction claim.

SAMORA: Yes.

ENOCH: My question is, suppose the original claim instead of being a declaratory judgment that the original claim by just one of the beneficiaries that's already involved in this estate matter had decided to bring this claim against the oil company in the probate court, could the oil co. have asserted a dismissal in the probate matter because the probate court lacks subject matter jurisdiction?

SAMORA: I believe that they could. Since there is more bases for asserting original jurisdiction in a probate court it would depend on exactly how that claim was framed. There is jurisdiction. There is ancillary and pendent jurisdiction for example. And I don't know if the claim was sufficiently ancillary and pendent perhaps they might be able to get in on that basis. But for purposes of 5B transfer, I think if you don't have a personal representative of an estate as a party then you are limited to the appertaining or incident to an estate language. So to the extent that you're limited to that jurisdictional provision, yes, I would agree with you that we would be able to file a motion to dismiss.

HANKINSON: The Bridwell Oil Co was always the owner of the overriding royalty interest at issue in the Bailey lawsuit.

SAMORA: Yes.

HANKINSON: Neither Margaret nor her estate ever owned overriding royalty interest that are at issue there. Here individual interest were in Mobil?

SAMORA: Yes. And that's what this chart is really reflecting. When Margaret Bridwell Battle died she had individual interests that were ultimately assigned to Mobil and she also had her partnership interests. And so really the Mobil overriding royalty interests are not at issue at all in this proceeding.

Really what I think Bridwell and Mr. Shores are arguing here, that merely because Margaret Bridwell Battle was a partner at one time of Bridwell Oil Co., and merely because her estate was subsequently a partner for some period of time, and it's not clear from the record

exactly when the estate stopped being a partner, but that automatically ipso facto makes Bridwell Oil Co's claim that's being asserted in the Bailey lawsuit appertaining or incident to an estate.

And I really think there are two fundamental flaws with that argument. And the first is, it's undisputed the Margaret estate is not currently a partner in Bridwell Oil Co. After she died her personalty all went into three trusts established under her will: the Battle Trust I, the Battle Trust II, and the Battle Trust III. And ultimately those trusts have terminated and all the personalty has been distributed to Bonnie White, Allison Beehan(?), and Elisa Battle. And Mr. Shores who is the general manager of Bridwell Oil Co also the trustee of the Elisa Battle trust and also the representative of the Margaret estate now, he's admitted on the record that the current partners of Bridwell Oil Co. include - there are 10 current partners, and 7 of those are trusts that were created under the Will of J.S. Bridwell, and he originally had a 75% interest in Bridwell Oil Co. And the remaining 3 partners are Elisa Battle, Bonnie White and Alison Beehan all descendent of Margaret Bridwell Battle.

And the plaintiffs have not cited any law, and we haven't been able to find any law that says a former partner has some right to share in a claim currently being asserted by the partnership.

Another perhaps more fundamental defect with the plaintiff's theory of why this is appertaining and incident to the estate is the fact that they've completely ignored the entity theory of partnership that's long been followed in Texas. In fact during the 5B transfer hearing, the plaintiffs flat out told Judge Wendell that Texas follows the aggregate theory of partnership, not the entity theory. And I'm specifically referring to Vol. 2, behind Tab 10 on page 35-36.

And in fact if you will turn to Tab 7 in the oral argument exhibits, you will see that under the Texas Uniform Partnership Act, which is the act that's been in existence even before the revised partnership act, Prof. Bromberg says the uniform partnership act clearly embraces the entity idea. And the Texas versions goes even further in that when cases aren't clear, they should be decided in accordance with the entity theory of partnership.

Now Shell believes that the revised partnership act applies here and it applies to any partnership after Dec. 31, 1998 regardless of when it's formed.

HANKINSON: Could you go to why there's not an adequate remedy at law. I know that you take the position that a 5B transfer order such as this should be subject to mandamus for one reason, because the court is without subject matter jurisdiction. But there is certainly plenty of law in Texas that indicates that just because a court acts outside its jurisdiction does not mean it's subject to mandamus. For example, if a case was filed and failed to meet the minimum amount of controversy requirement for the jurisdictional requirement for that court, I don't know of any law that allows mandamus for the TC to dismiss the case. How do we get to the point where that element of mandamus relief be satisfied in this case?

SAMORA: The cases that we've cited from the CA's, mostly they have relied on two rationales. The first, is the void order rationale. And I think that a 5B transfer is not at all like an incidental trial ruling where you're just filing a plea to the jurisdiction. It's where you're asking one court to rest jurisdiction away from another coordinate court. And so not only is the transfer order itself void, it's an affirmative order that's void, but you've got a conflict in jurisdiction between two coordinate courts. And so I think that's yet another basis that would...

BAKER: Bt they're not coordinate except for this little...

SAMORA: Yes.

BAKER: Well I got your argument as to the transfer order is abuse of discretion, therefore, it's void. But I don't think that's a good statement of what the law is just because the court might have abused its discretion and entered an order that it makes the order void. As Justice Enoch's question suggest a subject matter jurisdiction issue, then is your complaint in the probate court you don't have jurisdiction. So it's a plea to the jurisdiction that you made in Denton county. Is that right?

SAMORA: We didn't file anything in Denton county. We were the respondents to a motion filed by other parties. They were asking the Denton county court to take an action to enter an order that...

BAKER: Which they did. And now have you gone to the probate court judge and said, well you shouldn't have done that because you don't have subject matter jurisdiction?

SAMORA: We raised that argument in response to their motion to transfer the case.

BAKER: So if it's a jurisdictional plea what about Abor v. Black that says those kind of pleas are not mandamusable as you have an adequate remedy for an appeal?

SAMORA: I guess my disagreement is that this is not like a plea to the jurisdiction. It's not an incidental trial ruling. Section 5B transfer power itself is extraordinary and it is a jurisdictional issue, but it's a court granting affirmative relief...

BAKER: You can only claim a court doesn't have jurisdiction basically for two reasons: no subject matter; or no personal jurisdiction. Those are the two parts to jurisdiction isn't it?

SAMORA: Yes.

BAKER: And so if your basis for your complaint is you should dismiss this because you don't have jurisdiction it seems to me is nothing more or less than a plea to the jurisdiction.

SAMORA: I would analogize this to an instance where a TC doesn't have jurisdiction to

act after its plenary power has expired and it issues an order...

BAKER: But that's a totally different thing. By law they don't have jurisdiction to anything if their plenary power has-but that's not the issue in this case. That's what was the issue in Southwestern Bell that you rely on.

SAMORA: I believe that the probate court did not have the jurisdiction to enter the order that...

BAKER: And so you complained. And Abor says that's an incidental trial _____ and you don't get mandamus because you've got a right of appeal.

SAMORA: Yes. I realize that. But I still think...

BAKER: But you haven't asked us to overrule Abor.

SAMORA: I think that §5B transfer is different than an ordinary plea to the jurisdiction.

BAKER: Well could you articulate why you think it's different?

SAMORA: The court has not just denied a plea to the jurisdiction. The court has affirmatively taken jurisdiction away from another court, a case where there was...

BAKER: But it has a statutory authority to do that.

SAMORA: Yes.

BAKER: But you're ignoring that, that it has statutory authority. You're saying be that as it may, we don't think you should have done it. You made a mistake and abused your discretion because 1) there's no personal representative as a party; and 2) it's not appertaining to the estate. Is that correct?

SAMORA: I think we're saying that he did not have the authority to grant this order. We're not saying he just abused his discretion. He did abuse his discretion, but he also entered a void order. He entered a void order that is subject to mandamus relief.

BAKER: And why is it void?

SAMORA: Because he did not have jurisdiction to transfer the case to himself.

BAKER: For what reason?

SAMORA: Because the matter is not appertaining or incident to an estate.

BAKER: So there he abused his discretion because he relied on something and made a wrong decision?

SAMORA: Well he entered a void order where he exceeded his jurisdiction...

BAKER: So this order has to be void for your position to be effective is that correct?

SAMORA: It is under the void order rationale. I also think that by interfering with the jurisdiction of another court who had jurisdiction over the matter that that is sufficient to warrant mandamus review. And we also are arguing that this is an extraordinary circumstance case.

BAKER: Under CSR and in In Re Masonite?

SAMORA: Yes.

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RESPONDENT

HANKINSON: Mr. Hartnett will you start off by telling us how the controlling issue in the Bailey lawsuit involves the settlement, partition or distribution of an estate?

HARTNETT: I think what we have to do is we have to step back and look at what is left in this estate. The only thing left in the estate are these claimants.

HANKINSON: What I want to know is what the controlling issue is in the suit that's being transferred. So what's the controlling issue in that suit that involved the settlement, partition or distribution of the estate?

HARTNETT: The estate's right to underpaid royalties to that partnership throughout the 80's.

HANKINSON: But that's not a settlement of the estate, that's not partitioning the estate, and that's not distributing the estate.

HARTNETT: It is part of the settlement of the estate because that's how the estate gets the only assets that are left in the estate. The only thing it has is the claim.

HANKINSON: But the estate doesn't have the claim anymore because it no longer owns it.

HARTNETT: We take issue with that. I think what's left out of this is all of these cases that are going on in Denton and in Houston involve the underpayment of royalties for a period from 1984 to the present, and continues. And there is no dispute that the estate was a partner in Bridwell Oil Co. during the period of overpayment. The estate has a right to the underpayment of its income

during that period of time.

HANKINSON: But under Texas partnership law it's the partnership that has that. Bridwell Oil Co., not the partners.

HARTNETT: The way partnership law is is the partners own their respected interest in the partnership property itself. And so she was entitled to the income during that period of time. It wouldn't go to the successor.

HANKINSON: But that's for the estate to settle up after the recovery goes to the partnership. Bridwell Oil Co. owns the claim. So if there is an underpayment of royalties that claim belongs to Bridwell Oil Co, and if it's recovered for a period of time and there is some interest that the estate has, then that would be a matter of settling up with the partnership.

HARTNETT: I believe the law is that it belongs to the partnership and the partners, because again the law is clear that the partners own their specific share in the partnership property. I think a real good example of that, the entity aggregate theory I think kind of confuses everybody here. But if you look at some of the cases individual partners can gather together and file a claim on behalf of the partnership without the partnership ever being named. Because it's the partners that own the interest. And Margaret Bridwell Battle owns the right to that income that we're fighting about in the Bridwell Oil Co. lawsuit. They are trying to ignore the fact there is a claim for income during the period of time that Margaret Battle owned any percent of that partnership.

ENOCH: Connect this up. It may be that the partners of Bridwell Oil Co. could have maintained this cause of action in their own right underpayment royalties. But there's a different question than whether someone who was a partner in 1985 can maintain an action for underpayment of royalties to the partnership.

HARTNETT: I think absolutely they can because I think it's a personal right. One of the issues...

ENOCH: But they are not a partner. So how do they establish the personal right?

HARTNETT: Because they were a partner during the period of time at issue. Now there's not any Texas cases...

ENOCH: But if they transferred their partnership interest, you've got a receivable out there. The partnership is doing business and there is some receivable out there that may be known or not known that's not paid. And I give my partnership interest to the person who succeeds me. And I disappear. And the partnership then determines there's an underpayment. What authority do I have to then sue for an underpayment to the partnership in which I have no interest?

HARTNETT: The fact that you did have the interest during the period of the underpayment.

Let me give you another example. Let's say that I'm a partner in a partnership for 30 years and I sell my interest in the partnership to you in year 31. And in year 32 it's found that during years 1-30 my interest in the partnership didn't receive income from a brokerage account that it was supposed to receive income of $5 million over a 30 year period. Is the person I sold that interest to entitled to that $5 million that I was supposed to get during the 30 years? No, because I didn't sell that to them. I sold my interest in the partnership that I had at the time, but not my personal right to the income.

JEFFERSON: Do you take liability _____ at the transfer after you sell your interest?

HARTNETT: Absolutely. I would stay liable for the acts that occurred while I was a partner during the period that I was a partnership, that I was part of the partnership. You can't shirk your personal liability by selling the partnership interest because then anybody who knew they had a claim against them that's unmatured out there would go sell his partnership interest to someone else. And thereby avoid liability. Those rights against you, those claims against you and your right to the income stay with you.

HECHT: So you would say that if a lawyer leaves a firm and a couple of years later decides that a client of the firm underpaid the firm in fees, and if they paid what they should have paid, she would have got more money, he could sue that client for what he claims he should have gotten in underpaid fees?

HARTNETT: I think he could on behalf of the partnership.

HECHT: It seems kind of disruptive.

HARTNETT: That's a very fertile area for this is law partnerships. You find fee disputes arising after the partnership has broken up all the time.

HECHT: I understand that you might sue your former partners claiming that you didn't get what you were entitled to. But to be able to sue a client of the firm saying that the client underpaid the firm and you would have gotten a part of it, that seems a little remote.

HARTNETT: I think you absolutely carry that right with you.

HANKINSON: What you just said in answer to Justice Hecht's question was that he would sue on behalf of the partnership, not as a partner in his own right. And that seems to me to be the distinction. Similarly, a corporate shareholder does not own the claims of the corporation. The corporation does although they may benefit once the corporation pursues the claim.

HARTNETT: Let me tell you how that's done. What I would do is I would file in my individual capacity, because the partnership is not going to do it, and I would have to name the partnership or all of the partners to the lawsuit. Really if you look at the law of litigation involving

partnerships, there are many cases...

HANKINSON: If that's the case then, then I have a hard time seeing how the controlling issue in the Bailey lawsuit involves distribution of the estate because you've taking it back to the partnership level which means Bridwell's interest is what's at issue, even though the estate may have some claim to the proceeds that Bridwell ultimately recovers.

HARTNETT: The settlement because that is the asset of the estate. We are fighting about the only asset of the estate.

HANKINSON: I understand but the issue under 5B is what the controlling issue is in the Bailey lawsuit. And it seems to me that you are one step removed, that in fact, looking at the settlement of the estate is not a controlling issue in Bailey, but in fact, the controlling issue involves Bridwell's claim of underpayment of royalties. That's the problem I'm having and I need for you to address because I understand that ultimately if Bridwell recovers, then they may have to settle up with the estate. But that seems to me to be one step removed and our test is controlling the issue. So would you explain how you are going to get there on that?

HARTNETT: One thing, I think the controlling issue test is an inappropriate test. And I think that's more a fundamental issue, and I'm going to come to that in a little bit. But if you think about it, the controlling issue - Justice Hankinson I think you hit the nail on the head - you said the controlling issue is the Bridwell's claim. And in any controlling issue - I will give you a perfect example would be the estate's contract claim that they are trying to fight. The controlling issue in a contract claim is not the settlement, partition and distribution of the estate. The controlling issue is is there a contract and is it valid. The bottom line is the courts have not applied the controlling issue test in that way. They focused on direct impact, which is what we have here and the Bridwell case directly impacts the estate.

ENOCH: If we decide that under partnership law and you are incorrect that a former partner does not have the authority to maintain a claim on behalf of the partnership, then do you lose?

HARTNETT: No, I don't think we lose and I will tell you another reason why we don't lose and another reason why the case is appertaining and incident. And that is that - remember and we don't have this on the board. It would clarify it a little bit. The estate owns its own interests that it is suing on in Denton, and these are Mobil interests. But the Mobil interests and the Shell interests are combined in a unit. And so there is interplay between the two of them. Because the estate was a partner during the period of time at issue its claims can be wiped out. It's claims in Denton can arguably be wiped out by collateral estoppel by what happens to it or what happens to Bridwell. It's partnership that it was a partner in until late in the 1980s. And that is another reason why the Bridwell case, the controlling issue is the settlement of the estate because the Bridwell case could, and I assure you will be argued to wipe out the estate's claim that it owns outside the partnership.

HANKINSON: But again you have to go back to the controlling issue.

HARTNETT: Well I think that would be the controlling issue...

HANKINSON: The controlling issue in Bailey is not are we going to wipe out the claim in Denton.

HARTNETT: Well it's a controlling issue because it will or could control the Denton case. And I found this really interesting when I went back and looked at all the cases involving controlling issue tests, and in CV Hall in fact when this court addressed the controlling issue test, the court was trying to limit probate court jurisdiction finding that the recent change in the probate code were intended to be more limited. Since then we've determined that no they were actually trying to broaden. But in analyzing why it had to be limited this court on page 25 dealt with the issue of res judicata and collateral effect and said, picture a car accident involving multiple plaintiffs. Probate jurisdiction cannot handle all of the multiple plaintiffs, therefore, the estate plaintiff has to be in the DC, cannot be in the probate court because of res judicata and collateral estoppel issues. Here, we've got the flip side. The estate has to be in the probate court, the estate has a claim that could be wiped out arguably by collateral estoppel, collateral effect, by the Bridwell lawsuit.

HANKINSON: But the estate doesn't have to be in the probate court.

HARTNETT: It does have to be in the probate court. I think the law is clear...

HANKINSON: But if you're dealing with the distribution of the estate can the estate go out and make a claim and then go to court? And it could.

HARTNETT: I don't think it can, because I think the law is clear that all claims by the estate shall be brought in the statutory probate court.

HANKINSON: Go to any major county where there are statutory probate courts and you will find the estate being listed as parties in DC.

HARTNETT: If we look at probate court §5A it provides that all cases appertaining to an estate shall be filed in the probate court. There's been a lot of discussion about whether it's exclusive jurisdiction or some kind of dominant jurisdiction. I don't know that the DC's have been divested of jurisdiction. So they obviously still have some jurisdiction. But the statute is clear that they shall be filed in a probate court.

HANKINSON: And they need to drag everybody else who may be involved in the lawsuit with them. The others have no choice then in terms of what court that they are in. For example if there are 100 other royalty interest owners they don't have any choice of where they bring their lawsuit just because one of their number happens to be an estate have to go to the probate court where the estate is?

HARTNETT: No, I don't think that's true, because there is no privity between the estate royalty owner and those hundreds of other royalty owners. If there is privity like in a partnership, I think that's probably correct. And I've recited some cases in our brief that hold that a partnership case estopps the partner from bringing his own case. It has collateral effect. And that's what the defendants are going to argue in our case, that it collateral estopps the estate claims.

OWEN: Well you might have a claim as a former partner that the partnership didn't exercise proper fiduciary responsibilities and they blew it but that shouldn't affect should it the ability of the partnership to pursue its own claims?

HARTNETT: No, I don't' think it would affect the partnership...

OWEN: Where it chooses to do so.

HARTNETT: The partnership didn't choose to be in Houston. The partnership chose to be in Dallas...

OWEN: Or wherever it gets sued. In other words, if the partnership gets sued in Harris county and it has to litigate in Harris county, the former partner may have a subsequent claim the partnership didn't adequately defend, whatever breach of fiduciary duty, but why should the former partner just because it's an estate be able to drag that whole lawsuit into probate court?

HARTNETT: Because I think the estate has claims. Remember we're dealing with a general partnership, not a limited partnership where this limited partnership has the power to make decisions. In the general partnership all the partners can come into that lawsuit in Houston and state their positions. Whatever they want. Everybody can come in. And so it's not - we don't have some controlling body that makes all the decisions that are going to bind us. All the partners are wrapped up together. And so the estate could come into Harris county court and protect its interests if it wanted to. It's chosen to do so in Denton, which it has the right to do under the probate code.

Not all cases and going to get dragged in. The court makes the decision and it says may transfer as long as it's appertaining and incident. And that's what the court did here. He was very thoughtful about what he did. He waited 4 months. He waited till Judge Benton denied summary judgment to give Judge Benton a chance to rule. He didn't just reach out and sneak it away from him before Judge Benton could do anything without a thought. He talked to Judge Benton. It was a very thoughtful, carefully thought out process.

But I can't minimize how important the issue of collateral effect is in this case. We say it's important because we have another case that we've already won on against the defendants that we think binds the defendants. So collateral effect is a big issue.

Let me go back to what Justice Hankinson and Justice Baker were dealing with at the beginning, and that's whether or not this is a mandamusable event. And it's not. And

because of the practical nature, I think this is the time for the court to really address it. And the reason I say that is because we're adding probate courts and all have 5B transfer power. We added two of them this year, and so there is going to be more and more of these as the population grows. This is a jurisdictional issue. And all courts that don't have jurisdiction render void orders if they don't have jurisdiction. But yet, you give that court the opportunity to determine its own jurisdiction and then say it's an incidental ruling subject to appeal.

HANKINSON: But Ms. Samora said that this is different because it's not affecting just this court's jurisdiction. In fact it's interfering with the jurisdiction of another court which takes it into a different arena.

HARTNETT: Interference is a different arena, and there are cases about mandamus is appropriate when there is interference in cases of dominant subservient jurisdiction. This isn't interference. It takes the whole case.

HANKINSON: That's pretty heavy duty interference if you're taking my case from me don't you think? I don't have it anymore.

HARTNETT: But when you think about interference you're really focusing on the party's rights, and here the parties aren't interfered with. In the case of dominant subservient where there is interference, somebody has got a claim in that subservient case and the prosecution of that claim is being interfered with by the dominant court.

HANKINSON: But I thought that Shell had a claim. They filed a deck action in that court and now they've been told they are moving to another county.

HARTNETT: They do. But the entire claim as is...

HANKINSON: I don't understand the distinction in terms of this isn't interference. _____ both the jurisdiction of the court in Harris County. And now it will no longer be able to pursue its claims in Harris county. It's going to be in Denton county statutory probate court. Why isn't that interference?

HARTNETT: If you look at the interference cases there is impeding of the prosecution of the claim. Here, there is no impeding of the prosecution of the claim because the claim is moved to another court, prosecuted in the same fashion it's prosecuted in Harris county. So there is absolutely no distinction. They are just in a different court. It wouldn't be really much different than the administrative judge in Harris county saying, okay I'm going to move it from this court over to this court. The case is the same. There is no interference. And that's why we think it's different here. This is a jurisdictional issue...

HANKINSON: What about the fact that the case is so developed in the point in time that it was transferred? I can't recall how long it has been pending, but the TC judge in Houston obviously

had had a great deal of experience and history with the case, had ruled on numerous motions, had managed discovery, had of done all of this, and now later the case is being moved. How does that fit with your analysis?

HARTNETT: I don't think that hurts it at all because Judge Windle takes the case as he finds it. And so he takes the case with all the discovery, all the prior rulings, everything is in place.

HANKINSON: None of the institutional memory?

HARTNETT: Well none of the institutional memory, but I don't think - I mean judges step down, and new judges come in, and judges get recused, moved, and we deal with that everyday.

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REBUTTAL

SAMORA: I first want to deal with the argument that the Bailey lawsuit will somehow have collateral estoppel effect on the Margaret estate's claims in the Shores' class action. Even assuming that it would have collateral estoppel effect, and I'm not really prepared to render an opinion on that, because really you've got two totally separate, overriding royalty interests. You've got the Margaret estate's interest, and Gary Shores has said they are totally separate. So I'm not sure any judgment rendered with respect to Bridwell Oil Co.'s claims could bind the Margaret estate to the extent that it's trying to pursue its rights to this overriding royalty interests vis a vis Mobil.

In any event, as Judge Hankinson recognized merely because something might have collateral estoppel effect doesn't make that lawsuit the controlling issue in that lawsuit be the settlement, partition and distribution of an estate.

Counsel for the real parties in interest has suggested that somehow the controlling issue test really isn't applied anymore, and that somehow this court relaxed the controlling issue test in In Re Graham. And in fact if this court will look at its decision in In Re Graham it specifically cites its earlier decision in Palmer v. Coble Wall Trust. And the court said that the controlling issue test will be met, the appertaining or incident to test will be met, if the probate code specifically defines the matter as being appertaining or incident to an estate, or if the controlling issue in that case involves a settlement, partition or distribution of the estate. So the court in In Re Graham was merely reapplying the controlling issue test. And when it said that the wife's divorce lawsuit had a direct impact on the estate, what it was saying was that the controlling issue in the divorce lawsuit where the wife was fighting to get the property from her husband's guardianship estate, that was an issue they were actually fighting over the property in the estate, but the controlling issue in that was the settlement, partition and distribution of an estate.

ENOCH: So if the estate has an interest, if the estate has a former partner of Bridwell Oil could bring a claim on behalf of the partnership for its interest, then that's tantamount to the wife suing against the estate for that interest in the estate. This would be appertaining to, and so it would

be appropriate in the probate court?

SAMORA: I don't think so. First of all, I don't think that even a current partner has the right to bring a partnership claim. I think under the entity theory that the partnership has to bring the claim, and I think that's what the 5th circuit held in the Cates case.

ENOCH: Is the real nuts and bolts of this case whether or not a former partner of a partnership can maintain an action upon their own for their portion of a partnership asset?

SAMORA: I think that's really a secondary or third issue. I think the first issue is that you look at the claim that's reporting to be transferred and see whether in the pleadings in that case the controlling issue is the settlement, partition and distribution of the estate.

ENOCH: If the estate has some real estate interests and there is landlord and tenant issues going on and the estate is the landlord, and there's a claim against one of the tenants for payment of rent, could that be brought in the probate court? I'm trying to retrieve some money that's an estate asset, does that belong in the probate court?

SAMORA: I think it does if it's brought by a personal representative of the estate, but that doesn't mean that it's appertaining or incident to. Those are really two separate issues. Because if you're talking about something that the personal representative himself brings, I think you automatically get to the probate court of jurisdiction by virtue of the fact that the legislature has given...

ENOCH: So the real issue in this case is whether or not the Margaret estate has a claim against Shell because of its former partnership interest? That's the real question. And can it maintain an action against Shell for a partnership interest because it was a former partner?

SAMORA: I do think that is one of the key issues. But I guess I really have three problems with the appertaining or incident to finding in this case. The first is, that just looking at the controlling issues in the underlying lawsuit it's not appertaining or incident to an estate regardless of whether the partner can assert a claim on behalf of the partnership. And then beyond that you've got the problem that the Margaret estate were is no longer a partner. And beyond that, I think even if the Margaret estate were a partner in Bridwell Oil Co., I don't think under the entity theory of partnership that the estate would be entitled to bring a cause of action on behalf of the partnership.

BAKER: Are you saying that the Margaret estate has no remaining claims against Shell?

SAMORA: With respect to Shell/Bridwell Oil, I'm saying the Margaret estate never had an claims even as a partner. Certainly she doesn't have any claims now that she's no longer a partner, that the estate is no longer a partner.

BAKER: But Justice Enoch asked you if part of the unpaid royalties, assuming that theory is correct and money is owed, is owed for a period of time when the Margaret estate was in fact a partner and had an interest in that entity for the underpayments, then just because they are no longer a partner does that mean the estate no longer has a claim if the litigation is successful? Is it your view well all the money goes to Bridwell, and Bridwell then has to pay the estate 25%.

SAMORA: I think actually under the uniform partnership act what the comments say that were written by Allen Braumburg, he says that there is a clear distinction between a partner's interest in the partnership, which would be your right to receive distributions, and a partner's interest in partnership property. And a partner's interest in partnership property is not assignable, and on death it doesn't ever go through the estate. It goes to the remaining surviving partners. So to the extent we're talking about a claim, a cause of action belonging to the partnership, which I think the Bridwell Oil Co. claim is a partnership claim, when the estate cease being a partner whatever right it had in a partnership claim, which is some limited interest even under the Uniform partnership act went to the remaining partners. It didn't even go to the estate. It didn't stay with the estate.