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Supreme Court of Texas.
In re the JOHN G. & MARIE STELLA KENEDY MEMORIAL FOUNDATION, Relator.
No. 04-0607.

September 29, 2005

Appearances:
Mike A. Hatchell, (argued), Locke Liddell & Sapp, LLP, Austin, TX, for Relator the John G. & Marie Stella Kenedy Memorial Foundation.
Jacqueline M. Stroh, (argued), Crofts & Callaway, P.C., San Antonio, TX, for Intervenor: Frost National Bank.
Deborah G. Hankinson, (argued), Law Offices of Deborah Hankinson PC, Dallas, TX, for Real Party in Interest Ann M. Fernandez.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice H arriet O'Neill, Justice David Medina, Justice Paul W. Green, Justice N athan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson, Justice Scott A. Brister.

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CHIEF JUSTICE JEFFERSON: Be seated please.
The Court is ready to hear arguments in 04-0607 and 04-0608 in re the Kenedy Memorial Foundation and in re Frost National Bank.
SPEAKER: May it please the Court. Mr. Mike Hatchell and Ms. Jackie Stroh will present argument for the relators. The relators have reserved five minutes for rebuttal. Mr. Hatchell will open the first ten minutes and Mr. Hatchell will present rebuttal.

ORAL ARGUMENT OF MIKE HATCHELL ON BEHALF OF THE PETITIONER

MR. HATCHELL: May it please the court. [inaudible], I will be representing the clients in this [inaudible]. There were slight differences into the fact pattern. [inaudible] am here today.
This is a mandamus, original mandamus action to satisfy an extraordinary act in order to exhume a body for DNA testing to establish standing from bills of review. We have three very serious concerns with this order. Our first concern is, is that it is issued without any cognizable judicial controversy now before the probate judge who issued the order. Our second concern is in violation of the very statute that Ms. Fernandez says she invoked to get the exhumation

order. And the third issue, which we probably will not get to today, although is one I would like to see the Court try on and that is whether as a matter of policy an exhumation should be ordered in these circumstances even if the court were to have jurisdiction and the statute were to be complied with.

JUSTICE: Mr. Hatchell, this is a -- an extremely interesting case to me as it pertains to Texas history, in particular, South Texas history. But on this last issue on the policy issue, why should that or should that not be a significant consideration here in light of the jurisdiction issue and the standing level?

MR. HATCHELL: I think it is. It is a very serious consideration, your Honor. I know this Court to always want the bright and narrow as possible, and if the Court does not have jurisdiction to issue this order or if the order was issued in violation of the statute, I see the Court ruling there. But I think it really and I think it would be significantly unfortunate because I would like to see very much the Court rise on this progress. There had been a DNA testing and as we all know that this -- this is going to be a much greater problem. And to answer your question, I think what the policy issue is, it is whether the statute should, in line of the advent of DNA testing, permit courts the discretion to dig up bodies, pull all the teeth out, and saw off the bones. When the cause of action to which that is appended is [inaudible] so far, should the court, in that instance, have to make the determination that there is a live cause of action.

The second aspect, the second policy aspect is -- is this just simply too extreme a measure for evidence gathering? We do not, for example, allow people to bring confessions. We do not allow lie detectors. There are all means by which we draw the line and say this is simply too extreme a measure, balancing all of the interests. And it all depends on how this Court will say it--

JUSTICE: -- I guess it depends on -- it depends on which side you are on. I mean, certainly the heirs, the legal heirs to President Jefferson had an interest to determine heirship and perhaps exhuming his body or I mean DNA [inaudible] --

MR. HATCHELL: Well, I think expediency and he is approved is not the test?

JUSTICE: Well, some of the examples you gave, though, are because of the skepticism, you know, and the confession arising from a beating or the scientific reliability, lie detector test are at issue, but DNA testing, it seems that science has come very close to -- to being very accurate.

MR. HATCHELL: Now, I don't question, your Honor, DNA testing per se. The Code of Criminal Procedure, as the court knows, has accommodated this in a number of close convicted remedies. The question is the means by which in this case, when we get to DNA testing, which is to dig up a body, pull all its teeth and saw off its bones. And I have to say that I don't just [inaudible]. That's going too far in order to provide evidence for standing for a cause of action that is specially barred.

JUSTICE: But aren't we guided by the statute here? I mean, as distasteful as it might be, the statute appears to allow for that sort of thing without regard to motivations by [inaudible]?

MR. HATCHELL: Well, I disagree entirely because the statute in question, if we trace the history of the statute in question, prior to 1934, what was going on in Texas was a considerable amount of squabbling between -- between relatives of the deceased over variance. And the courts were drawn into the matter and developed this compelling

need. Thus, the 1934 Legislature passed the equivalent of the present statute and gradually overtime, it has taken no matter out of the discretion of the court, puts the court essentially on the sidelines except for when [inaudible]. But what -- what the legislature has done is -- is to place this extreme decision into the hands of those people who are most vitally affected, the lot owner, the family of the deceased, and -- and the cemetery. The courts say, "They are in paramount fraud." And so yes, I would say, we are guided by the statute. The statute -- there is no question that the statute in this case was not complied with. They admit that they did not comply with the statute. The question then becomes -- if one of the statutory designees refuses an exhumation, do they give up their rights in doing so? And that is their position, "If I refuse your request to dig up my relative, pull her teeth and saw off her bones, I give up my statutory right."

JUSTICE: Well, maybe I missed something here. Where is it that they did not comply with -- what is it -- Section C of the statute?

MR. HATCHELL: Your Honor, Section C of the statute applies only when the permission of one of the statutory designees above cannot be obtained. Implying to me that it means it cannot physically be obtained for reasons of death, or inability to contact, or anyone of a number of circumstances. And in that instance, the judge sets not as an arbiter of the dispute to make a decision according to his own discretion, but as -- as a surrogate for one of the statutory designees. And in this particular instance, we have refusals by the cemetery and we have -- we have the failure to contact all the family members. The statute has not been complied with and cannot be invoked.

JUSTICE: So it's your contention that the consent that is talked about at sea is where nobody -- somebody has not refused. You just can't get consent some other way?

MR. HATCHELL: That is absolutely correct. That is our position.

JUSTICE: Yes, but that's not --

MR. HATCHELL: The statute says --

JUSTICE: -- but that's not what -- but that's not really what the statute says.

MR. HATCHELL: I think that is what it says. I believe that that was exactly what it says. There are -- of course there is an ability to file an actual contest and bring that in district court but not -- not in county court. If there is a dispute in the statute but the statute again has been interpreted by the best paramount authority individuals and the courts have been on the side of it. And in addition to that, another matter in which the statute has not been complied with, there is a rule of the Texas Funeral Service Commission passed in aid of this statute which says that remains cannot be removed from any cemetery without a permit from the registrar, the state registrar of Texas, and that was not complied with in this case either. My time has expired, your Honor.

JUSTICE: Counsel, one quick last question here. You keep, at several times, mentioning about pulling all the teeth and cutting off bones. Your position would change -- what if that was just a -- taking a small part of the remains?

MR. HATCHELL: It would not, but -- but that eliminates the problem with the lapse of time in this case. The reason the measures in this case are extreme is because of the lapse of time to get DNA testing from -- from a deceased that has been buried for as long as this one is requires a decision to be made which I think highlights policy problems that are raised by the lapse of time.

JUSTICE: Thank you, Counsel.

ORAL ARGUMENT OF JACQUELINE STROH ON BEHALF OF THE PETITIONER

MS. STROH: May it please the Court. I'd like to begin with the jurisdictional problems in pursuing the exhumation by real party Fernandez, and it's a good segue from Justice Green's comments on the statute and his observational comment that the statute may control under the circumstances. The statute, even assuming it -- it controls, do not replace basic jurisdictional disutility doctrines such as whiteness, standing, and mootness. And we have those problems in this case. The will construction judgment that was signed by the 105th Judicial District Court in Kenedy County controls. It controls because it expressly found that John Kennedy died testate as to all of his property. Without intestacy, Fernandez cannot be an heir and cannot recover. So, the exhumation cannot accomplish anything but abusive invasion and attempt at an [inaudible] around the jurisdiction of the 105th District Court and an attempt to determine heirship and intestacy when those issues or rather, right for determination nor within the jurisdiction of the 100 -- I'm sorry, within the jurisdiction of the county court to determine.

JUSTICE: Why doesn't it give Ms. Fernandez standing to ask that that judgment be set aside? Why doesn't the exhumation, proof of heirship give her standing to ask that the judgment be set aside?

MS. STROH: Well, first of all, your Honor, the exhumation wouldn't give her standing because even if it established a paternity relationship, you still have the fact that there is a judgment determining that John Kennedy died testate as to all this property. So even if you had an exhumation and a paternity determination, it would be meaningless unless and until the Bill of Review procedures were followed, the Bill of Review were granted and then, the will construction judgment set aside in a determination of intestacy.

JUSTICE: She's going the reverse.

JUSTICE: She's not [inaudible].

JUSTICE: I confess I'm a little perplexed by some of the briefing because you just -- it seems to me like it's a chicken and egg thing and it's just an argument about who is going to go first, and the argument is, we should prove heirship first and then go to the Bill of Review. And the other argument is, "No, we should go to the Bill of Review first and determine heirship."

MS. STROH: And I think it's important if -- if the Court gets to that point and bases that kind of a balancing act, to go back to the public policy issues that Mr. Hatchell raised. There are cases before the statute 711004 and after the statute that all state that disinterment and exhumation are against the public policy of Texas. And if you're going to do that, you better have a good reason, you better show that it's going to answer an important question, and you also have to show that you've exhausted less intrusive alternatives --

JUSTICE: -- And I think those are legitimate concerns, but -- but now tell me why they don't sort of eclipse the jurisdictional issue?

MS. STROH: Well I think, I -- I don't necessarily know that they eclipse. I think they go hand in hand, where the jurisdictional argument says, "Look, you have to determine the issue of intestacy, you have to determine the Bill of Review on the will construction judgment

first," or, "the issues of heirship are not right," the public policy aren't but it fits well with that because it says based on the public policy of Texas, against disinterment and exhumation, the Court should go forward and determine whether the Bill of Review in the will construction judgment is legally barred, which it is. I mean, as part of Fernandez's prima facie case on her Bill of Review, she has to show that she has a meritorious defense and that that defense is not barred as a matter of law. That's her burden, that's not our burden. Why should you go to the extreme measure of an exhumation that may or may not prove paternity? DNA results may or not -- DNA may or not be successfully extracted. We're gonna go through that when on its face, her Bill of Review is barred, and she can't even back her prima facie showing on her Bill of Reviews. Not to mention the fact that on the fraud element, there are substantial problems. And, so for those reasons, the public policy comes in and fits well with the whiteness arguments and the standing arguments that we've made.

JUSTICE: I think the public policy issue is significant here, as you know, perhaps all cases like this, but let's say Fernandez loses on the procedural issues and she is barred from pursuing her claim, yet there is this issue that it does significantly involve public policy in exhumation, exhumation of this, this Mr. Kenedy. How is she able to pursue that? And her -- is the door forever closed on her claim because she has failed in the procedure aspects of this statute?

MS. STROH: Well, if the Bill of Review would be barred, her claims will be barred as a matter of law. What -- What could her possible interest in pursuing an exhumation be? She said we wouldn't have one. And the reason is that --

JUSTICE: Sure, sure she would have one. She would have one --

MS. STROH: Maybe she just simply wants to know her -- her lineage and genealogy?

JUSTICE: Well I think it's obviously more than that, otherwise we wouldn't be here?

MS. STROH: Well, if -- if the Bill of Review is barred, then that, that is all she would be left with. Because she wouldn't have any claims that could be determined because they would all be barred.

JUSTICE: What will be a less intrusive alternative?

MS. STROH: Well, we suggest -- it's said in our brief -- one of which would be certainly to defer to the 105th District Court and allow the Bill of Review proceedings on the will construction judgment to go forward and put Fernandez to the test, make her make a prima facie showing on the Bill of Review elements including the meritorious defense showing that her defense, if any, is not barred as a matter of law.

JUSTICE: Why -- why hasn't the District Court gone forward?

MS. STROH: Well because, my guess would be that, until recently, the county court, the certiorari probate court JUSTICE had transferred those Bill's of Review into his court.

JUSTICE: But then they got transferred back?

MS. STROH: But it was only, roughly two weeks before we instituted this proceeding. So, no the district court along with the stature of probate court judge may simply be adopting a wait-and-see and too.

JUSTICE: Has anybody asked the district court to go through all of this?

MS. STROH: No. So again, with respect to following up on Justice Medina's question, if the Bill of Review is barred, and all Fernandez is claiming at that point is simply a -- a curiosity about her lineage or paternity, we have cited case law in our brief that explains that

that is not a judicially enforceable right. It must be tied to some sort of legal claim seeking recovery.

Now, also following up on Mr. Hatchell's argument with respect to the statute in Justice Green's question, if you look at subsection C, you can see clearly that the county court is simply to step in for the statutory designees and give consent for an exhumation when one of the statutory designees is not available to give consent. And not when one of them expressly objects; and then you have, essentially a dispute or contest over exhumation.

JUSTICE: But isn't that the reason now that, everybody agrees. That's my problem and that would be a -- so, C is where everybody agrees so the judge has to decide and then weighs the circumstances and apparently without any real standard, makes a decision?

MS. STROH: May I answer? Does not, in our opinion, a correct reading of the statute. If you look at first subsection, it requires written consent. So C would begin, "We are unable to obtain written consent." It's not a merely when you, you don't get the consent --

JUSTICE: Can -- cannot be obtained, could go either way?

MS. STROH: Well, I don't think "cannot be obtained" equates with an outright refusal of consent and an objection to the exhumation.

JUSTICE: Well, under what circumstance would there be consent with a case like this? Probably never. Right?

MS. STROH: Well, certainly. I mean if, if you have a dispute between someone who is not an interested party under the statute and someone who inherited proved an interested party in the statute, you are not going to have consent. But under their interpretation, if you look at subsection C, they would give the county court absolutely unfettered discretion to order an exhumation that could not be reviewable by any court because you will have absolute discretion and that simply can't be [inaudible].

JUSTICE: Thank you, Ms. Stroh.

MS. STROH: Thank you.

JUSTICE: The Court is now ready to hear argument from the Real Party.

SPEAKER: May it please the court. Ms. Deborah Hankinson will present argument for the Real Party.

ORAL ARGUMENT OF DEBORAH HANKINSON ON BEHALF OF THE RESPONDENT

MS. HANKINSON: May it please the Court. The issue before the Court today is narrow and straightforward. Did the trial court clearly abuse its discretion when it ordered the exhumation? The answer to that is similarly clear. No. The analytical path to that answer is also straightforward. If the Court respects and abides by the well-established principles of appellate decision making that govern this mandamus proceeding. Well, the heirs don't want you on that path. They tampered with the traffic signals to throw you off that path. As Justice Hecht said, they've made the chicken and the egg problem. They ask you to use this limited proceeding to address the merits of issues not before the Court to foreclose Ann Fernandez's right to be heard on the merits of her claims and their defenses to the claims. The Court should stop, look, and listen, and decline to do so. The issues in this case are complex, and they don't want you to think about the impact of your deciding those complex issues. And the effect they will have on

this case and also on the jurisprudence of the state. To do so --

JUSTICE: I will say -- I take it that the impediment to go on forward on the Bills of Reviews is standing?

MS. HANKINSON: That's correct, your Honor, but --

JUSTICE: From -- from their position.

MS. HANKINSON: They have. They have raised the issue to the trial court that she has no standing to be able pursue the issues presently pending in Kenedy County, the statutory probate court that is there.

JUSTICE: And, and I take it your position in response then is that since that's a jurisdictional issue, it has to be decided as I have said and ahead of these other merits in this issue?

MS. HANKINSON: Well, your Honor, I think that's what you wrote when you wrote for the Court in Lyon v. Gibbs . You said, "And because the court does not act without determining that it has subject matter jurisdiction to do so, it should hear evidence as necessary to determine the issue before proceeding with the case." In writing for the Court you also said, "Standing is a prerequisite to subject matter jurisdiction and subject matter jurisdiction is essential to the Court's power to hear the case." Here, according --

JUSTICE: Of course, a Bill of Reviews is similarly a preliminary matter and plan didn't involve a go, you --

MS. HANKINSON: It did not, your Honor, but the proceeding -- our -- your -- I think it's important to clarify what proceedings are in the county, in Kennedy County Court. Yes, there's a Bill of Review but there are also an application to determine heirship under the probate court. There are separate -- You have to look at the pleadings to see the nature of the action that's pending. This is not just a Bill of Review proceeding.

JUSTICE: Well, but it -- It was almost 60 years ago that he died?

MS. HANKINSON: That's correct, your Honor. But let me tell you, if I could, your Honor --

JUSTICE: So, it's probably outside the Bill of Review?

MS. HANKINSON: Well, the, the current state of the proceedings in the Kenedy County Court is that John Kennedy, Jr.'s estate has never been officially closed. It is still open. Apparently, as I understand it, that is not unusual in Texas when estates contain oil and gas properties. Apparently, Professor Johanson has acknowledged that that is commonplace in Texas. So, it is -- it may be deemed closed or it is still open, but in any event, there are still probate proceedings that were there. And as a result of that, an action has been brought, your Honor, within the jurisdiction of the probate court. Now remember, they asked for a statutory probate judge to be assigned to handle the matters in the Kenedy County Court. And Section 48 allows proceedings to be instituted under the very circumstances that we're dealing with here. So, it's not just the Bill of Review. That is before the Court in that regard. Now, what they want to say is that there is interference with the jurisdiction of the 105th District Court, but there is not. Ann Fernandez was not a party to that lawsuit. Back when it was a friendly suit in order to do a will construction or interpretation issue. And the only issue decided there was intestacy but she didn't participate. The probate court allows her to go back into the probate court and do what she is doing in Kenedy County. It is specifically there. And the issues that will be decided in that proceeding, heirship and her status as his nonmarried daughter, have never been decided by any court. And the legislature has specifically given the jurisdiction that Kennedy County Court to decide that. So, when we talk about having to go in and do the Bill of Review, she wasn't a party to that. There

is a question about estates in that and as -- as Counsel pointed out, they haven't moved forward with that.

JUSTICE: The Bill of Review?

MS. HANKINSON: Yes, for --

JUSTICE: But neither of you?

MS. HANKINSON: No, Sir. --

JUSTICE: No one. No one is?

MS. HANKINSON: We're in the -- we're in the -- The first trial proceedings, Justice Hecht, happened in the probate court. And we are in somewhat an unsettled area on some issues. And my understanding is just that the lawsuits in district court were also filed in an effort to make sure that there where not any questions about which court or limitations issues that would be raised by ultimately decisions made later. The -- the cases that we are proceeding with are the ones that are in County, the Kenedy County for. Legally, those are the ones that where the issue is [inaudible].

JUSTICE: To paraphrase, the other side is saying that what you're seeking here is so extraordinary and -- and disrespectful to the deceased. The courts opt to look at the trial court order like this with great suspicion and find ways, of less than extraordinary cases met that did not permit this sort of disinterment exhumation and invasive procedure. And what's your answer to that?

MS. HANKINSON: Well, I will say that the legislature has already spoken on this, your Honor. First of all, in chapter -- section 42 of the Probate Code which is the provision on inheritance rights of children. Interestingly, the legislature has just recently changed the standard in determining paternity. One of the many places that have -- is they're unconvincing. And they did so because DNA evidence is now the gold standard for making that determination. So the legislature has acknowledged in this context. If that standard applies to this case which I'm not sure if it does or not but if it did, it's clearly legislative attempt on that. Clearly, under the sections of the Probate Code, "Giving the probate court the ability to make paternity determinations, to be able to consider applications to determine heirships." Under section 5 and 5A of the Probate Code, they give it jurisdiction. The legislature obviously contemplated that this kind of proceeding might be necessary to determine. So then the question becomes, "We know under the statute that the county court where the cemetery is located has jurisdiction unless a consent from a court is required." We also noted that under chapter 7 to chapter 25 of the government code, the Statutory Probate Code, courts have that jurisdiction, the same jurisdiction of the county court. That looks like to me to be clear legislative intent to give courts jurisdiction to do this. Now, then the question becomes, "What did this court have before it and did the judge abuse his discretion in making the decision." The answer is, no. Would you look at the record in this case --

JUSTICE: But it seems to me that under that analogy, in all contested issue such as this --

MS. HANKINSON: I'm sorry, your Honor?

JUSTICE: It seems to me that under your analogy in your reading of the statute and legislative intent that in all contested issues such as this, that a party can go directly to the county court and request the body to be exhumed without following the procedural mechanisms to get there, even if they do not have standing.

MS. HANKINSON: But the procedural mechanisms were followed here, your Honor, and --

JUSTICE: That's dispute --
MS. HANKINSON: Pardon?
JUSTICE: That's, that's dispute.
MS. HANKINSON: Well, the record -- the record before the probate court. First of all, these parties who are here arguing today don't even have standing under the statute to complain about the order of exhumation. The legislature has indicated in statute, who the priority -- who has -- where consent comes from, the people who have a voice. These parties, other than the Oak Lake Fathers who own the cemetery, got through [inaudible] will and with the right to lot of the family to be buried on the Lamar Ranch. They're not listed as even having a voice. And it's not a question of anything being absolute. Look at the record in this case. What the court had before with the undisputed circumstance of Ann Fernandez' birth which I'm sure the Court is aware of in looking at the briefs. Look at the evidence that was offered that they have now in support of their claim that Ann is the biological daughter of John -- John Kenedy, Jr. Dr. Fernandez's affidavit about his grandmother's statements, the enveloped DNA, the photos, the [inaudible] affidavit and the Tracy affidavit regarding Max Dryer. We also had expert testimony about the -- this kind of procedure, and how bones and teeth are the best way to give the DNA evidence and then it was more likely than not that DNA could be a test. And the trial court was very frank, your Honor in -- in order to alleviate their concern, he tried everything else that was available, less intrusive means, and there wasn't anything. They tested the hair that they could find. There were no roots on the hair, so they were not able to follow through.
JUSTICE: Let -- let me ask you --
MS. HANKINSON: Yes.
JUSTICE: Sooner or later, we'll have to go to the Bill of Review proceedings. Is it possible?
MS. HANKINSON: Not necessarily, your Honor.
JUSTICE: The exhumation won't end it?
MS. HANKINSON: That's correct, your Honor. That will resolve the -- the issue that has been joined by them that she is not the biological daughter of John Kenedy, Jr. which is necessary being [inaudible].
JUSTICE: And while that issue has to be confronted by the Court at the threshold of the litigation, it doesn't have to be once and for all resolved? In fact, it might not be. It might not be resolved until the close of the evidence. And those kinds of things can change. What impediment is there to go on forward to having the trial judge to say, "Well, this other evidence that you got is good enough for me so far, and I'm going to go to -- to the merits. I think, based on what you've said, you made the case standing and, sure, there may be some other evidence out there that may be convincing, but that's enough for now and let's go to the merits." Do you think the trial judge could do that? Whichever trial judge it turns out to be?
MS. HANKINSON: Well, I suppose the trial judge could do that, but I'm not sure why the trial judge would do that since the subject matter jurisdiction is implicated first. And second of all, we know it's an issue in the case --
JUSTICE: Right. But there --
MS. HANKINSON: -- because they had been adamant --
JUSTICE: If he thinks --
MS. HANKINSON: -- about that.
JUSTICE: -- If he thinks there's enough evidence -- this is not just a spurious assertion or statement. This is a -- there is a few -- you made all these other offers of proof with how it was discovered and

so on, so that's -- that's good enough. I think that show standing.

MS. HANKINSON: Is it good enough for clear and convincing? And I think that's the concern, because the -- the statute --

JUSTICE: -- Well, it might not be good enough for heirship, but it's good enough for standing.

MS. HANKINSON: Well, I don't know if that's the case, your Honor --

JUSTICE: -- Ok. --

MS. HANKINSON: -- If it's a contested issue. And I think it -- it presents a question of law for the Court to decide that there is standing based on the underlying facts. And as long as that is a disputed issue in the case, and as long as the law requires standing to be proved, then I believe that Ann Fernandez is entitled to the best evidence obtainable to be able to prove her standing. Particularly, in the face where we don't have any substantial objection from a part within the legislature has given a voice in it.

JUSTICE: But I'm just unclear of all of that because if the trial judge says, "She's put on enough evidence to win standing at this point as a threshold matter," how can we object to that?

MS. HANKINSON: [inaudible] --

JUSTICE: -- [inaudible] which then I can say, "Well, we won."

MS. HANKINSON: But he hasn't done that.

JUSTICE: Right.

MS. HANKINSON: I mean, he made the determination in the face of their answer and the summary judgment motions that they have taken beforehand that it was going to be a dispute of fact issue. And he wasn't satisfied. And I think that as the fact finder that is within his discretion to make that determination. And I don't -- I think that if we apply principles of review in trial court decisions, then I think that that is an honorable deference for him to decide that that information needs to be developed. Then, I think in light of the jurisdiction given to the probate courts, to be able to do what is here and given this record in terms of the trying to use less intrusive means, there is no substantial objection from a party who has a voice in an exhumation matter.

JUSTICE: But, but the Bill of Review is an equitable proceeding. A court in equity -- couldn't a court in equity say, "Before we dig anybody up, whether there is anybody here to object or not, before I dig or popper up from John Doe's grave, I want to know why you, 60 years later, never asked who your grandfather was until you found out they were rich, and if -- if you don't have a good answer to that," then a court in equity says, "Not only no inheritance but no digging people up."

MS. HANKINSON: Well, but this judge has heard enough to decide that he wants an answer to the standing question before looking at the merits. I mean, I think that was what my cautionary statement was to begin, your Honor. All of that -- that type of record information is not before the Court. It's not here for the Court to evaluate. What we have is the record tied to the exhumation proceeding. In Oak Lake Fathers, through their counsel, said, "We don't want to disturb the peace of the cemetery," and that's it. That's all he had in front of him. Their expert testified, "Let's test the hair samples first," and the judge said, "Fine, that's what I'm going to do." The bottom line is -- is that what they're really asking you to do Judge is to delve into all of those issues that you've just mentioned. When you don't have a record before you, when you don't have briefing on all of those issues before you, and when your decision on them might unsettle established

probate law, it might also --

JUSTICE: But I -- but I get it, their position is, the body was about to be dug up is why we didn't go forward with the -- we want to stop that for a minute and we'll go to the Bill of Review and we'll risk it?

MS. HANKINSON: But it's not just a Bill of Review, your Honor. It is -- it is a centered --

JUSTICE: -- Okay. Once we've dug a body up -- the Bill of Review, we can do earlier or late. Once the body is dug up, we can't undo that.

MS. HANKINSON: I -- I am not reclaiming that there is no adequate -- that there is an adequate remedy at law that the Court should not be considering it. I'm just asking the Court to stay with the standards for reviewing the indictments, which is to review whether this judge, faced with a -- a challenge to standing in a matter in which he clearly has jurisdiction of, and there is no interference with the jurisdiction of another court, and when the legislature has set out a clear and convincing standard, and has, in addition, specified a procedure that was followed in this particular case, and with there being no substantial objection from anyone having a voice where he carefully has laid out a very specific procedure, so that this is done respectfully and in -- in accordance with good scientific practice, whether that judge under these circumstance in these probate matters has abused his discretion. And the answer to that is no. The other questions that you raised are exactly questions that will be before the Court at some point and perhaps before this Court. And all we are saying to the Court is they're not the questions that should be answered here. There are constitutional issues pending below. There are questions about charitable trusts and what they can or cannot do. There are questions about interpreting the Probate Code. There are questions obviously about limitations, adverse possession, and all of those other things on this issued has been joined. They are joined not just in the context of a Bill of Review pending in the lower court. They are in connection with probate proceedings that the legislature allows people to bring. As this Court recognized in an earlier opinion, the legislature has been fairly liberal about allowing later proceedings after earlier proceedings have occurred. Whether this is one of those cases or not remains to be seen. But it is in the context of the probate proceedings that we are here before the Court.

The standard for deciding whether the court has abused its discretion is whether it failed to follow guiding principles. It didn't, in light of this Court's decision in Blanton . We can't say that the Court failed to do that. The Court also followed the statute. They did give evidence that was required. It's in the record. The family member remained sought. The Oak Lake Fathers who own the cemetery and operate it objected and through their counsel stated to the court, "We don't want to disturb the peace up in our ranch." That was all he had to work with. There is no requirement under either the government code, or the health and safety code provisions that are an issue, that require exhumation to be pendant of a litigation or that required at some threshold issue under a cause of action to be definitively decide before the decision is made on exhumation. Nor does this trial court order constitute active interference with the jurisdiction of the district court. There is no way that they can put this square peg in that round hole, and claim that this judge has done anything to interfere by issuing this order. He is active within his jurisdiction on the trial language of this statute as well as the provisions of the probate court that govern the underlying proceedings.

The matter was required to be brought for exhumation in the county court that the county at which the cemetery is located. That is this Court. There is no question about that. They hinged their argument on "cannot be obtained," only means you just can't find them, I guess, or something to that effect. That is not looking at the text of the legislation. It is not abiding by the clear line into the statute or the claim in common name of the words before -- of the words included in the statute.

JUSTICE: Thank you, Ms. Hankinson.

MS. HANKINSON: Thank you, your Honor.

REBUTTAL ARGUMENT OF MIKE HATCHELL ON BEHALF OF THE PETITIONER

JUSTICE: Mr. Hatchell. What do you claim is your standing on this issue? Challenge this.

MR. HATCHELL: The order for exhumation is in violation of the statute and void. It is being viewed by the admission in their own plea. First standing set aside who we are, to set aside here [inaudible], by which my client, the foundation has all of the properties. That is the whole point. This, that is the whole point of this litigation. And they say time and time and time again in their papers that they're seeking the exhumation to get evidence and first standing to set aside what's written in his will and reclaim the properties that after [inaudible].

JUSTICE: Pardon me. In terms of the statutory right of the claimant here, your client's not one of them?

MR. HATCHELL: We're not one of them, but we -- but we could certainly complain of a void order of [inaudible].

JUSTICE: In fact though, exhumation confirms and the genetic test proves that she is not a daughter? You win.

MR. HATCHELL: We win. Sure.

JUSTICE: Then all the other proceedings are down the line, secondary to [inaudible] to have a part-time attorney. Why did you complain about even a void order?

MR. HATCHELL: Because that void order is being used as a means to set aside the will and the [inaudible] was transferred that which we own the property and it is all bound up. It is essentially a discovery order entered in -- in the midst of that case. And I certainly can also be able to complain of -- of a void discovery order. Whether it's an abuse of discretion or whether it's relief.

I want to address two of the questions and any other questions the Court wishes to ask. First is, Mr. Justice Hecht's chicken and egg problem. Justice Hecht, as we perplexed you with our briefing, I apologize because we recognized the chicken and egg argument very early on. Our briefing is constructed to avoid that. Viewing the -- the current heritage claims referred to in plea which is sometimes referred in this case as -- as determination of heirship, it could have two prongs: one could be as a determination that Ms. Fernandez was an heir. But this Court has held, and many other courts have held that heirship alone is absolutely -- is an absolutely meaningless determination until you prove and test this. So that's why, in this particular case, the 42B parentage determination is a means to determine standing. In order of this, speaking from a [inaudible], in order for Ms. Fernandez to succeed, she must set aside [inaudible] will. She must set aside the

[inaudible] was transferred. She must establish that the order of the district court or [inaudible]. Those are matters pending in district court and it has already been determined that Judge Herman's order transferring those cases to him was an interference with those courts' jurisdiction. And I must disagree strongly with my good friend, Justice Hankins that there is no interference because where in Texas do we say it is not interference for one court to the court to act to determine standing of the party in another court? That's how we approach the chicken and egg problem. We say, number one, from the heirship standpoint it's a totally meaningless act and we don't dig up bodies in order for someone to simply satisfy some genealogical curiosity. And number two, looking at it from the standard point of standing, that is a matter to be filed in another court. I also want to address Mr. Justice Green's claims concern about the statute -- My time has expired.

CHIEF JUSTICE JEFFERSON: Thank you, Mr. Hatchell. The trial has been submitted [inaudible].

SPEAKER: All rise. O yes, o yes, o yes. The honorable Supreme Court Justices now stand adjourned.

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