Case Summaries
August 30, 2024

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DECIDED CASES

PROBATE: WILLS, TRUSTS, ESTATES, AND GUARDIANSHIPS

Will Contests

In re Estate of Brown, ___ S.W.3d ___, 2024 WL ___ (Tex. Aug. 30, 2024) (per curiam) [23-0258]

The issue is whether unsworn testimony from an officer of the court is competent evidence to establish the cause of nonproduction of an original will under Section 256.156 of the Estates Code.

Beverly June Eriks and the Humane Society of the United States each filed an uncontested application to probate a copy of decedent Brown's will, which named the Society her sole beneficiary. Although the trial court found that a reasonably diligent search for the original will had occurred, it nonetheless concluded that the Society failed to establish the cause of nonproduction and that Brown died intestate. The court of appeals affirmed, holding that unsworn testimony from Catherine Wylie—an attorney and the guardian of Brown's personal and financial estate—could not be considered evidence of the cause of nonproduction.

The Supreme Court reversed. The Court held that, as an officer of the court, Wylie's testimony is properly considered evidence because her statements were made on the record, without objection from opposing counsel, and where there was no doubt her statements were based on her personal knowledge. The Court further held that, in addition to other testimony, Wylie's testimony regarding her thorough search of Brown's home and safe deposit box established the cause of nonproduction as a matter of law. The Court remanded to the court of appeals to address whether the Society rebutted the presumption of revocation under Section 256.152 of the Code, including, if necessary, the applicable burden of proof when the proceeding is uncontested.

FAMILY LAW

Termination of Parental Rights

In re A.V., ___ S.W.3d___, 2024 WL ___ (Tex. Aug. 30, 2024) (per curiam) [23-0420]

The issue in this case is whether evidence of a parent's drug use alone is sufficient to terminate parental rights for endangerment.

The trial court terminated both parents' rights to A.V. after hearing evidence that both parents used drugs during pregnancy, did not complete court-ordered services

including drug testing and refraining from drug use, and only sporadically attended visitation. The court of appeals affirmed, citing its own precedent for the proposition that mere illegal drug use is sufficient to terminate. The Supreme Court subsequently clarified that illegal drug use accompanied by circumstances indicating related dangers to the child can establish a substantial risk of harm, in *In re R.R.A.*, 687 S.W.3d 269 (Tex. 2024).

The Supreme Court denied the parents' petition for review, reaffirming the endangerment review standards set forth in *R.R.A.* in a per curiam opinion. The evidence detailed by the court of appeals shows a pattern of behavior sufficient to support the court of appeals' decision under the *R.R.A.* standards.

PROCEDURE—TRIAL AND POST-TRIAL

Defective Trial Notice

Wade v. Valdetaro, ___ S.W.3d ___, 2024 WL ___ (Tex. Aug. 30, 2024) (per curiam) [23-0443]

The Supreme Court reversed a $21.6 million judgment rendered after a one-hour bench trial at which the pro se defendant appeared but presented no evidence.

The defendant was unprepared to mount a defense because notice of the trial setting was sent to an incorrect address. The Court held that a party who has appeared in a civil case has a constitutional right to notice of a trial, which by rule must ordinarily be at least 45 days before a first setting. Having sufficiently informed the trial court about the service defect, the defendant was entitled to a new trial. The defendant's failure to request a continuance did not constitute a voluntary, knowing, and intelligent waiver of the due process right to reasonable notice.

PROCEDURE—APPELLATE

Jurisdiction

In re S.V., ___ S.W.3d ___, 2024 WL ___ (Tex. Aug. 30, 2024) (per curiam) [23-0686]

The issue in this case is whether the petitioner timely filed his notice of appeal.

Venkatraman, a pro se litigant, missed the deadline to file a notice of appeal but timely sought an extension under Texas Rule of Appellate Procedure 26.3. His explanation for missing the deadline was that he mistakenly believed a notice of appeal was not required until after the trial court ruled on his post-judgment motions. The court of appeals denied the Rule 26.3 motion and dismissed the case.

The Supreme Court reversed and remanded the case to the court of appeals for further proceedings. The Court pointed out that a movant must offer a reasonable explanation for needing an extension. Then the appellate court's focus should be on a lack of deliberate or intentional failure to comply with the deadline. Here, Venkatraman operated under a genuine misunderstanding of the deadlines. There was no argument or evidence that he intentionally disregarded the rules or sought an advantage by waiting for the trial court to decide his post-judgment motions. In these circumstances, the court of appeals erred in denying his Rule 26.3 motion and dismissing the case for want of jurisdiction.

GRANTED CASES

OIL AND GAS

Royalty Payments

Myers-Woodward, LLC v. Underground Servs. Markham, LLC, ___ S.W.3d ___, 2022 WL 2163857 (Tex. App.—Corpus Christi–Edinburgh 2022), *pet. granted* (Aug. 30, 2024) [22-0878]

This case raises questions of who owns the right to use underground salt caverns created through the salt-extraction process and how a salt royalty interest is calculated.

USM owns the mineral estate of the property at issue, together with rights of ingress and egress for the purpose of mining salt. Myers owns the surface estate and a 1/8 nonparticipating royalty in the minerals. USM sued Myers, seeking declaratory relief regarding the royalty's calculation and the right to use the underground salt caverns, in which it stored hydrocarbons. Myers countersued, seeking, among other things, a declaration that USM cannot use the subsurface to store hydrocarbons. The parties filed competing summary-judgment motions.

The trial court granted USM's motion in part, declaring USM the owner of the subsurface caverns, and granted Myers's motion in part, holding USM may only use the caverns for the purposes specified in the deed, effectively denying USM the right to use the salt caverns for storing hydrocarbons. The trial court then held that Myers's royalty is based on the market value of the salt at the point of production, and it entered a take-nothing judgment on Myers's remaining claims. Both parties appealed.

The court of appeals reversed the judgment declaring that USM owns the subsurface caverns and rendered judgment that they belong to Myers. The court expressly declined to follow *Mapco, Inc. v. Carter*, 808 S.W.2d 262, 278 (Tex. App.—Beaumont 1991*), rev'd in part on other grounds*, 817 S.W.2d 686 (Tex. 1991) (per curiam) (holding that the salt owner owns and is entitled to compensation for the use of an underground storage cavern), holding instead that most authority in Texas requires a conclusion that the surface estate owner owns the subsurface. It affirmed the remainder of the judgment, including the holding that the Myers's royalty interest is 1/8 of the market value of USM's salt production at the wellhead.

Both Myers and USM petitioned for review, raising issues regarding the calculation of Myers's royalty interest and the ownership of the caverns. The Supreme Court granted both petitions.

CONSTITUTIONAL LAW

Due Process

Stary v. Ethridge, ___ S.W.3d ___, 2022 WL 17684334 (Tex. App.—Houston [1st Dist.] 2022), *pet. granted* (Aug. 30, 2024) [23-0067]

This case concerns the proper burden of proof to support a permanent protective order that prohibits contact between a parent and minor child.

Christine Stary and Brady Ethridge divorced in May 2018. In March 2020, Ethridge filed an application for a protective order, alleging that Stary had committed acts of family violence and abuse against their children, including an arrest for third-degree felony offense of injury to a child. The trial court granted the protective order, prohibiting Stary from having any contact with the children, stating that the order would remain in effect "in permanent duration for [Stary's] lifetime" subject to the children filing a motion to modify the order.

Stary appealed, and the court of appeals affirmed. It held that the "permanent" protective order did not effectively terminate Stary's parental rights, and, thus, due process did not require application of the "clear and convincing evidence" standard of proof; that the evidence is legally and factually sufficient to support the order; and that the trial court's exclusion of Ethridge's history of domestic violence was not reversible error.

Stary petitioned for review, arguing that due process requires a heightened standard of proof and that the evidence adduced does not rise to that level. The Supreme Court granted the petition.

TAXES

Sales Tax

GEO Grp., Inc. v. Hegar, 661 S.W.3d 470 (Tex. App.—Amarillo 2023), *pet. granted* (Aug. 30, 2024) [23-0149]

The issue is whether companies that own and operate correctional and detention facilities qualify for a sales-tax exemption under state law.

During the relevant tax period, GEO operated correctional and detention facilities in Texas under contracts with both the State of Texas and the United States, providing services such as housing, feeding, monitoring, and transporting detainees held in government custody. The Comptroller later audited GEO's payment of sales and use tax for the relevant period and assessed a deficiency. GEO requested redetermination, refunds, and audit reductions, but the Comptroller rejected GEO's contention that certain purchases were exempt from taxation and denied the request. GEO then brought a taxpayer suit for refund.

In the trial court, the parties stipulated that GEO would be entitled to a refund of more than $3 million if it is an entity or organization eligible for exempt status under Rule 3.322(c) in Title 34 of the Administrative Code. So qualifying would then make GEO's purchases eligible for the exemptions set forth in Section 151.309 of the Tax Code. Following a bench trial, the trial court rendered judgment that GEO is not entitled to the claimed refunds. The court of appeals affirmed.

GEO petitioned for review, arguing that the lower courts applied the wrong evidentiary standard and misconstrued the term "instrumentality" in Rule 3.322(c). The Supreme Court granted the petition.

ADMINISTRATIVE LAW

Judicial Review

Tex. Dep't of Fam. & Protective Servs. v. Grassroots Leadership, Inc., 665 S.W.3d 135 (Tex. App.—Austin 2023), *pet. granted* (Aug. 30, 2024) [23-0192]

This case concerns the validity of an administrative rule governing immigration detention centers and the mootness and reviewability of the rule challenge.

In 2014, U.S. Immigration and Customs Enforcement began to detain undocumented families with children at two immigration-detention centers in Texas. But a federal court ruled that ICE violated a consent decree requiring detained minors to be placed in facilities with appropriate state childcare licenses. After the ruling, the Texas Department of Family and Protective Services promulgated Rule 748.7, establishing licensing requirements for family residential centers.

The advocacy group Grassroots Leadership, several detained mothers, and a daycare operator sued the Department to challenge Rule 748.7. The private operators

of the two detention centers intervened. After the trial court declared the rule invalid, the court of appeals dismissed the case for lack of standing. The Supreme Court reversed and remanded, holding that the detained mothers (and their children) sufficiently alleged concrete personal injuries traceable to the rule's adoption.

On remand, the Department and private operators argued that the dispute is now moot because the plaintiff–detainees are no longer detained and are not reasonably likely to be detained at the centers again. The court of appeals agreed but applied a public-interest exception to the mootness doctrine and affirmed the trial court's judgment that Rule 748.7 is invalid because the Department lacked statutory authority to promulgate it.

The Department and the private operators petitioned for review, arguing that the rule challenge is moot, there is no public-interest exception in Texas, and Rule 748.7 is valid. The Supreme Court granted the Department's and the private operators' petitions for review.

JURISDICTION

Ripeness

City of Houston v. The Commons of Lake Hous., Ltd., ___ S.W.3d ___, 2023 WL 162737 (Tex. App.—Houston [1st Dist.] 2022), *pet. granted* (Aug. 30, 2024) [23-0474]

This case concerns the application of the futility doctrine to inverse-condemnation and takings claims.

Commons is the developer of a master-planned community, parts of which are located within the City's 100-year or 500-year floodplains. In 2017, the City approved Commons' plans for the community utilities and paving. The following year, the City passed the 2018 floodplain ordinance. The 2018 ordinance requires new residential structures within the 100-year floodplain to be built a foot higher above the flood elevation than the previous ordinance required.

Commons sued the City for inverse condemnation and takings, alleging that the City's amended floodplain ordinance interferes with Commons' use and enjoyment of its property and deprives it of economically productive use of the land. The City filed a plea to the jurisdiction arguing that Commons' regulatory takings claim is not ripe because the City has not made a final decision on a permit or plan application. Commons responded that the City had ample opportunity to issue a final decision, but unreasonably withheld one, making Commons' claim under the futility doctrine ripe.

The trial court denied the City's plea, but the court of appeals reversed. The court of appeals held that Commons' regulatory takings claim is barred by governmental immunity because the 2018 ordinance was a valid exercise of the City's police power and therefore could not constitute a taking.

Commons petitioned for review, arguing that its claim is ripe under the futility doctrine and that governmental immunity does not bar its inverse-condemnation claim because a valid exercise of police power can still constitute a taking. The Supreme Court granted the petition.

NEGLIGENCE

Causation

Werner Enters., Inc. v. Blake, 672 S.W.3d 554 (Tex. App.—Houston [14th Dist.] 2023) (en banc), *pet. granted* (Aug. 30, 2024) [23-0493]

This car-crash case involves arguments about the sufficiency of the evidence, charge error, and damages.

The December 2014 crash occurred on I-20 in Odessa, while a Winter Storm Warning issued by the National Weather Service was in effect. The warning cautioned that driving conditions would be extremely hazardous due to freezing rain and icy roads. Shiraz Ali, a novice driver employed by Werner Enterprises, was driving an 18-wheeler on I-20 westbound. He was accompanied by his supervisor, who was sleeping. In the eastbound lanes, Trey Salinas drove Jennifer Blake and her three children. Salinas hit black ice, lost control of his vehicle, and spun across the 42-foot-wide grassy median into Ali's westbound lane. Ali promptly braked, but the vehicles collided, resulting in the death of one child and serious injuries to the rest of the Blakes.

The Blakes sued Ali and Werner for wrongful death and personal injuries. The trial court rendered judgment on the jury's verdict, which found Ali and Werner liable and awarded the Blakes more than $100 million in damages. Sitting en banc, the court of appeals affirmed over two dissents.

Ali and Werner filed a petition for review. They argue that Ali did not owe a duty to reasonably foresee that the Blakes' vehicle would cross the median into his path; that no evidence supports a finding that Ali's conduct proximately caused the crash; that Werner cannot be held liable for derivative theories of negligent hiring, training, and supervision when it accepted vicarious liability for Ali's conduct; that the court of appeals erred by rejecting petitioners' claims of charge error on grounds of waiver; and that the jury's comparative-responsibility findings are not supported by legally sufficient evidence.

The Supreme Court granted the petition.

TEXAS CITIZENS PARTICIPATION ACT

Applicability

Whataburger Rests. LLC v. Ferchichi, ___ S.W.3d ___, 2022 WL 17971316 (Tex. App.—San Antonio 2022), *pet. granted* (Aug. 30, 2024) [23-0568], *consolidated for oral argument with Pate v. Haven at Thorpe Lane, LLC*, 681 S.W.3d 476 (Tex. App.—Austin 2023), *pet. granted* (Aug. 30, 2024) [23-0993]

The issue in these cases is the applicability of the Texas Citizens Participation Act to a motion to compel discovery that includes a request for attorney's fees.

In *Whataburger*, Sadok Ferchichi sued Crystal Krueger after she rear ended Ferchichi while driving a Whataburger-owned vehicle. Ferchichi learned during mediation that Whataburger had evidence that it did not produce in discovery. Ferchichi moved to compel production of the evidence and to award reasonable attorney's fees as sanctions. Whataburger and Krueger filed a TCPA motion to dismiss the motion to compel.

Pate involves a suit for common-law fraud and DTPA violations by fifty plaintiffs who signed leases to live in Haven's student-housing apartment complex. Before the lawsuit, Jeretta Pate and April Burke, the mothers of two plaintiffs, created a Facebook group, conveyed information to media outlets who ran stories about the Haven complex, and asserted grievances with governmental authorities. Haven served subpoenas duces

tecum on the nonparty mothers, seeking documents and communications about Haven and the lawsuit. The mothers objected to many requests for production and included a privilege log. Haven filed a motion to compel and for attorney's fees, and the mothers responded by filing a TCPA motion to dismiss that motion.

In both cases, the trial court denied the motion to dismiss. And in both cases, the court of appeals reversed. Both courts of appeals held that the discovery motion before it is a "legal action" under the TCPA that was made in response to the exercise of the right to petition (*Whataburger*) or to "communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses" (*Pate*). Additionally, both courts held that the movant did not establish a prima facie case for sanctions so as to avoid dismissal.

Ferchici and Haven each petitioned for review. They argue that a motion to compel discovery that includes a request for attorney's fees is not a legal action under the TCPA, that their motions were not made in response to the exercise of a protected right, and that they established their prima facie cases for sanctions. The Supreme Court granted both petitions.

ATTORNEYS

Disciplinary Proceedings

In re Lane, Cause No. 67623 (BODA Nov. 16, 2023), *argument granted on disciplinary appeal* (Aug. 30, 2024) [23-0956]

The main issue in this disciplinary appeal is whether the four-year limitations period in Texas Rule of Disciplinary Procedure 17.06 applies to a judgment imposing reciprocal discipline under Part IX of the rules.

In early 2023, the Illinois Supreme Court issued a final judgment suspending Lane for inappropriate emails she sent to a federal magistrate judge in 2017. After Lane sent a copy of that judgment to Texas's Chief Disciplinary Counsel, the Commission for Lawyer Discipline filed a petition for reciprocal discipline with the Board of Disciplinary Appeals. In November 2023, after a hearing, BODA issued its judgment of identical discipline with two members dissenting.

The BODA majority and dissent disagree whether Rule 17.06 applies to reciprocal-discipline proceedings and, if it does, whether Lane waived the defense by failing to raise it in her response to the Commission's petition or at the hearing. Rule 17.06 states a general rule prohibiting discipline "for Professional Misconduct that occurred more than four years before the date on which a Grievance alleging Professional Misconduct is received by the Chief Disciplinary Counsel." The rule contains express exceptions for compulsory discipline under Part VIII and for prosecutorial misconduct.

The arguments presented by Lane and the Commission in this appeal address whether reciprocal discipline is initiated by a Grievance, whether the limitations rule is compatible with the procedure for reciprocal discipline in Part IX, whether the lack of an express exception for reciprocal discipline in Rule 17.06 is meaningful, and whether the limitations rule is an affirmative defense that is waived if not timely raised.

The Supreme Court set the appeal for oral argument.

JUVENILE JUSTICE

Juvenile Court

In re J.J.T., ___ S.W.3d ___, 2023 WL 7311217 (Tex. App.—Houston [1st Dist.] 2023), *pet. granted* (Aug. 30, 2024) [23-1028]

The issue is whether the juvenile court erred in transferring a case to criminal district court where the defendant was a minor at the time of the murder but was charged after his 18th birthday.

After Melchor Gutierrez was murdered in October 2020, Deputy David Crain learned that Gutierrez had phoned Alfonso Hernandez Tovar about a drug deal. Investigators interviewed J.J.T., a minor who was friends with Tovar and lived next door. J.J.T. denied any involvement. Later, Tovar was arrested and claimed that J.J.T. shot Gutierrez. In November 2021, one month before J.J.T.'s 18th birthday, Tovar asked for a proffer meeting. He provided the passcode for his phone; the phone's contacts included J.J.T.'s number. Seven months later, Crain obtained records for J.J.T.'s phone that included data showing J.J.T. and Tovar were together the night of the murder. A month after that, J.J.T. admitted his involvement in the crime. J.J.T. was charged with murder in December 2022.

The juvenile court waived jurisdiction and transferred the case to criminal district court under Section 54.02(j)(4) of the Family Code. Subpart (A) permits transfer if "for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday." Subpart (B) permits transfer if "after due diligence . . . it was not practicable to proceed in juvenile court" because "the state did not have probable cause to proceed" before the 18th birthday. The juvenile court's order did not specify whether it was based on (A) or (B).

A split panel of the court of appeals held that the juvenile court lacked jurisdiction to make the transfer and dismissed the case for lack of jurisdiction. The majority concluded that (B) is not implicated because the trial court did not make a due diligence finding and that the evidence is insufficient under (A) because the State had probable cause to proceed before J.J.T.'s 18th birthday.

In the Supreme Court, the State argues that the transfer was appropriate under (A); the court of appeals unduly focused on probable cause; and, even if probable cause existed, that does not mean it was "practicable" to proceed in juvenile court if, for example, the State could not reasonably expect to secure a conviction based on the evidence available before the juvenile's 18th birthday.

The Supreme Court granted the State's petition for review.