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Probate: Perfunctory Appointment of a Guardian Ad Litem Will Not Bind a Minor

Louise Ladehoff died in 1950, survived by her husband and two minor sons, Donie and his elder brother, Wayne. Six years later, the husband found a holographic will purportedly made by Louise in 1949,[1] and offered it for probate.[2] Donie was not given personal service in connection with the application for probate, because the Texas Probate Code only requires notice by posting.[3] Wayne, then 22, filed a contest to the application, but subsequently entered into a settlement with his father. The probate court, without a hearing on the merits, dismissed Wayne's contest with prejudice.[4] In July 1957, the probate court rendered judgment admitting Louise's will. Because Donie was still a minor, a guardian *ad litem* was appointed to represent his interest prior to the admission of the will.[5] The guardian appeared and heard all of the evidence, but did not take an active part in the proceedings.

In February 1966, within two years after reaching majority,[6] Donie instituted an action under sections 31[7] and 93[8] of the Probate Code to contest and set aside the original probate proceeding. He alleged that the will was a forgery. The probate court denied the contest and Donie appealed to the district court. His father moved for a summary judgment, contending that the original probate judgment was res judicata. Donie, however, argued that his right to attack the will had been preserved under sections 93[9] and 31.[10] The district court rendered summary judgment against Donie and the court of appeals affirmed.[11] *Held, reversed*: A minor

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[1] The will was a two-sentence document leaving each son $500 and "everything else" to the husband.

[2] This was done in accordance with the provisions of the Texas Probate Code. TEX. PROB. CODE ANN. §§ 1-435 (1956).

[3] *Id.* § 128(a).

[4] The brother appeared in court and announced that his claim had been settled.

[5] A guardian *ad litem* was appointed by the probate judge because he deemed it proper since there was a bequest to a minor. Ladehoff v. Ladehoff, 436 S.W.2d 334, 336 (Tex. 1968).

[6] Minors have two years after reaching majority in which to institute an action. TEX. PROB. CODE ANN. §§ 30, 31, 93 (1956).

[7] This section provides that:

> Any person interested may, by a bill of review filed in *the court in which the probate proceedings were had*, have any decision, order or judgment rendered by the court, or by the judge thereof, revised and corrected on showing error therein; . . . no bill of review shall be filed after two years have elapsed from the date of such decision, order, or judgment. Persons non compos mentis and *minors shall have two years after the removal of their respective disabilities* within which to apply for a bill of review.

TEX. PROB. CODE ANN. § 31 (1956) (emphasis added).

[8] This section provides that:

> After a will has been admitted to probate, any interested person may institute suit in the *proper court* to contest the validity thereof, within two years after such will shall have been admitted to probate and not afterward, . . . [p]rovided, however, that persons non compos mentis and *minors shall have two years after the removal of their respective disabilities* within which to institute such a contest.

TEX. PROB. CODE ANN. § 93 (1956) (emphasis added).

[9] TEX. PROB. CODE ANN. § 93 (1956).

[10] TEX. PROB. CODE ANN. § 31 (1956); *see* note 7 *supra*.

[11] The appeals court held that appellant was a party to the original probate proceeding where he was represented by a duly appointed guardian *ad litem*, and that in the absence of fraud or collusion the original judgment was final and conclusive of all issues sought to be raised. Ladehoff v. Ladehoff, 423 S.W.2d 115 (Tex. Civ. App. 1967).

who was not personally served in a prior probate proceeding, and who was represented by a guardian *ad litem* whose appointment was not required, is not barred from instituting a direct attack under section 93 of the Texas Probate Code on the order of the probate court. *Ladehoff v. Ladehoff*, 436 S.W.2d 334 (Tex. 1968).

I. Texas Probate Provisions for Minors

Tolling the Statute of Limitations. The Texas Probate Code protects minors' rights to contest the validity of wills in which they have an interest, by tolling the statute of limitations until they reach majority.[12] Three sections of the Probate Code contain such a provision. The first is section 30[13] which provides for a writ of certiorari. This is an equitable right given at the discretion of the court. Sections 31 and 93 are of principal importance in providing for attack of the judgment in the principal court as a matter of right.

Section 31, authorizing a bill of review, provides for the revision or correction of a will after it has been admitted to probate.[14] Originally it was placed in the part of the Code entitled Guardian and Ward, but in later revisions was included in the section on appeals and has been construed as a general review provision.[15] Under this section the suit may be filed in the court in which the original proceedings were had.

Section 93 provides a means for contesting a will that has been admitted to probate. However, the section does not state specifically where the will contest should be initiated, but directs merely that it be in the "proper court."[16] In 1883,[17] the Texas supreme court dealt with the Texas statute[18] which is the predecessor of section 93 of the Probate Code. The court found that the legislature intended county courts to have original jurisdiction in probate matters and that direct attacks should be initiated in the same court.[19] The same intent continued in the adoption of section 93, the only change being the shortening of the statute of limitations from four to two years. Accordingly, there seems to be little question that a direct attack is permitted in the court of original jurisdiction until the statute of limitations has run. In many cases sections 31 and 93 may provide the same remedy, because the facts necessary for a total revision of a will can be the same as those for a will contest.[20]

The effect of these statutory provisions, combined with the tolling of the statute of limitations, is that the right of a minor to contest or revise a will is preserved until he has reached majority and is able to make decisions for himself. Therefore, in Texas, a probate judgment remains sub-

[12] *See* note 6 *supra.*
[13] Tex. Prob. Code Ann. § 30 (1956).
[14] Schoenhals v. Schoenhals, 366 S.W.2d 594 (Tex. Civ. App. 1963), *error ref. n.r.e.*
[15] 15 Baylor L. Rev. 349 (1963).
[16] *See* note 8 *supra.*
[17] Franks v. Chapman, 60 Tex. 46 (1883), and 61 Tex. 576 (1884).
[18] Tex. Civ. Stat. art. 3212 (1879).
[19] The *Franks* court stated that the legislature intended to provide a method for making a direct attack upon a probate judgment in addition to appellate attacks.
[20] Roberts, *Procedural Content of Will Contests*, 14 Baylor L. Rev. 316, 327 (1962).

ject to direct attack in the original court as long as there are minors who may have rights in the estate.[21] Because the Code is silent as to the effect of representation of minors during original probate proceedings, problems occur when a minor is thought to have been fully represented.[22]

The Guardian Ad Litem. There are several provisions in the Probate Code for the appointment of a guardian of the person of a minor or of his estate,[23] but only in section 376[24] does the Code specifically require appointment of a guardian *ad litem.* This section, however, applies only to proceedings involved with actual distribution of an estate,[25] not to those concerned with the admission of a will to probate. In the latter category of proceedings, a court is not required to appoint a guardian *ad litem*, although it will often do so as a matter of convenience. In such a situation, the guardian is generally an inactive observer of the proceedings, "representing" the minor only in a formal sense.[26] However, if the minor is either a plaintiff or defendant in a civil suit, and the persons who would normally represent him have interests adverse to his, appointment of a guardian *ad litem* is required under rule 173 of the Texas Rules of Civil Procedure.[27] Accordingly, should a minor enter a will contest, he would become a plaintiff, and rule 173 probably would apply.

It has not been clear whether appointment of a guardian *ad litem* in a probate proceeding should deprive a minor of his right to attack the probate judgment within two years after reaching his majority. It might be argued that representation of the minor in probate proceedings eliminates the need for permitting an attack after the minor reaches majority. This argument presumes that the guardian has been properly appointed. Generally, it is agreed that a guardian is properly appointed only after personal service of the minor.[28] The Probate Code requires only posted notice[29] for an application for admission of a will, so a guardian appointed at the time of the hearing, after notice has been by posting only, would not have been

[21] This has not placed a heavy burden on the community since Ladehoff v. Ladehoff, 436 S.W.2d 334 (Tex. 1968), is the first recorded case since the adoption of the revised Probate Code in 1955.

[22] This is the problem which is at issue in *Ladehoff.*

[23] Some of them are: TEX. PROB. CODE ANN. §§ 108-127, 184, 185, 189, 228, 229 (1956).

[24] This section provides that: "Where there are minors, or persons of unsound mind, having no guardian in this state, who are *entitled to a portion of an estate*, or whose guardians also have an interest in the estate, *the court shall appoint a guardian ad litem* to represent such minors . . . ." TEX. PROB. CODE ANN. § 376 (1956) (emphasis added).

[25] TEX. PROB. CODE ANN. §§ 373-87 (1956).

[26] This was apparently the case in the original probate proceeding admitting Louise Ladehoff's will. Ladehoff v. Ladehoff, 423 S.W.2d 115, 116 (Tex. Civ. App. 1967).

[27] Texas provides for the appointment of a guardian *ad litem* in the Texas Rules of Civil Procedure. The rule is as follows:

> When a minor . . . is a party to a suit either as *plaintiff, defendant or intervenor* and is represented by a next friend or a guardian who appears to the court to have an interest adverse to such minor. . . . the court shall appoint a guardian ad litem for such person and shall allow him a reasonable fee for his services to be taxed as a part of the costs.

TEX. R. CIV. P. 173 (emphasis added).

[28] A guardian is properly appointed after the court has obtained jurisdiction over the minor through personal service. Wheeler v. Ahrenbeak, 54 Tex. 535 (1880); 43 C.J.S. *Infants* § 110(b) (1945).

[29] TEX. PROB. CODE ANN. § 128(a) (1956).

properly appointed and would not bind the minor.[30] However, the language of sections 30, 31 and 93 which tolls the statute of limitations for minors, contains no provisional phrases and therefore even the representation by a properly appointed guardian *ad litem* would not seem to deprive the minor of his statutory right to attack a probate judgment on reaching majority.

II. LADEHOFF V. LADEHOFF

In *Ladehoff* the Texas supreme court upheld the statutory right of a minor to contest a will by a direct attack after he has reached majority. Although this case was brought under both sections 93 and 31 of the Texas Probate Code, the court treated the suit solely as a will contest under section 93. The initial question with which the court dealt was whether the appointment of a guardian *ad litem* in the probate proceeding deprived the minor, Donie, of his statutory right to institute a direct attack under that section.[31] The court seemed to find significant the fact that the guardian did not join in the will contest instituted by Donie's brother, but did not explain its relevance. It simply declared that Donie's right to a direct attack of the probate order was *not conditioned* upon the absence of a guardian *ad litem*. Donie's father relied upon section 376[32] of the Texas Probate Code, and rule 173[33] of the Texas Rules of Civil Procedure as authority for the appointment of the guardian *ad litem*. He contended that if appointment of the guardian had been required under either of these provisions, Donie was barred from instituting an attack under section 93. The court did not find it necessary to decide whether the mandatory appointment of a guardian could preclude a later action under section 93, because it found neither section 376, nor rule 173, applicable to the original probate proceeding.

Another question was presented to the court which it found unnecessary, and indeed expressly declined, to decide.[34] In both section 376 and rule 173, personal service of the minor is required. Had the court found either of these provisions to have been applicable to the original probate proceeding, it might have commented on the effect of personal service, which they require. The court, by declining to decide the effect of either the required appointment of a guardian, or personal service of a minor, gives no suggestion as to the relative importance of either of these factors. Although personal service is necessary in a situation where a guardian must be appointed, it is clear that there may be personal service in situations not re-

[30] "Since the service of process on an infant is a condition precedent to the appointment of a guardian *ad litem*, as discussed in § 110, as a general rule a failure to serve an infant is not cured by the appointment of a guardian *ad litem* who appears or answers for him." 43 C.J.S. *Infants* § 115(b)(2)(a) (1945).

[31] The court cited Franks v. Chapman, 61 Tex. 576, 582 (1884) as authority for the right of direct attack.

[32] TEX. PROB. CODE ANN. § 376 (1956); *see* note 24 *supra*.

[33] TEX. R. CIV. P. 173; *see* note 27 *supra*.

[34] The court said: "[w]e reserve judgment with respect to the effect of such an appointment following personal service when required or authorized by a number of provisions of the Probate Code." 436 S.W.2d 334, 336 (Tex. 1968).

quiring the appointment of a guardian. Indeed, there are sections of the Texas Probate Code which require personal service, but not the appointment of a guardian.[35] The court could have held that the actions of a properly appointed guardian, after personal service of the minor, would be binding, although the appointment was not specifically authorized by statute. In *Ladehoff* the court stressed that Donie was neither named nor personally served as a party in the original probate action. Finding that this was the first direct attack by Donie and that the statute of limitations had not run, the court held that the original probate judgment was voidable and still subject to attack.

III. Conclusion

The Texas supreme court chose to construe strictly section 93. Accordingly, a probate judgment remains open to attack for the statutory period despite the appointment of a guardian *ad litem*. This section has been part of Texas probate procedure for almost 100 years and has survived numerous revisions of the Probate Code.[36] The possible instability of title to property, which this decision seems to permit, is precluded by court decisions holding that innocent third parties can rely on a final judgment even though it is later successfully attacked.[37]

Unfortunately, the court did not take advantage of *Ladehoff* to rule on several important issues implicit in the case. The first, although not directly presented to the court, is whether a probate proceeding is valid where citation is only by posting. The decision of the United States Supreme Court in *Mullane v. Central Hanover Bank*[38] has been thought to cast doubt on the constitutionality of this aspect of Texas probate procedure. The second issue is whether appointment of a guardian *ad litem*, whose appointment is required by statute, will serve to deprive a minor of his right to institute an attack on a prior probate order. Whether a given proceeding is subject to a provision requiring the appointment of a guardian *ad litem*, is a matter over which a minor has no control. It might be difficult to justify denial of a minor's section 93 rights merely because he was represented by a guardian whose appointment is mandatory, but the court seemed to admit such a possibility. Finally, the court failed to decide whether a minor's right to attack a prior probate order could be destroyed by personal service of the minor in the probate proceeding. This factor

[35] *See* Tex. Prob. Code Ann. §§ 33(c), 33(f), 50, 75, 86(a), 121(b), 130(c), 131(d), 136(e), 148, 172(a), 374, 385, 407 (1956).

[36] Tex. Civ. Stat. art. 3212 (1879), Tex. Rev. Civ. Stat. art. 5534 (1911), now Tex. Prob. Code Ann. § 93 (1956).

[37] Jones v. Sun Oil Co., 137 Tex. 353, 153 S.W.2d 571 (1941); Steele v. Renn, 50 Tex. 467 (1879); Potka v. Potka, 205 S.W.2d 51 (Tex. Civ. App.. 1947), *error ref. n.r.e.*; Gardner v. Union Bank & Trust Co., 159 S.W.2d 932 (Tex. Civ. App. 1942), *error ref. w.o.m.*; Harden v. Harden, 63 S.W.2d 362 (Tex. Civ. App. 1933).

[38] 339 U.S. 306, 319 (1950), in which the United States Supreme Court held that:

> The statutory notice [by publication] to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand . . . [and it] is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights.