

**Writ of Mandamus Conditionally Granted; Opinion issued March 4, 2010**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-10-00155-CV**

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**IN RE BAC HOME LOANS SERVICING, LP F/K/A COUNTRYWIDE  
LOAN SERVICING, LP, Relator**

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**Original Proceeding from the 101st Judicial District Court  
Dallas County, Texas  
Trial Court Cause No. 09-02613-E**

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**MEMORANDUM OPINION**

Before Justices Bridges, Richter, and Murphy  
Opinion by Justice Bridges

In this original mandamus proceeding, relator contends the district judge's sua sponte order transferring the case from the 101st Judicial District Court to the Probate Court No. 2 was void. Real parties affirmatively declined to respond to the petition. Because we conclude the judge of the district court had no authority to transfer the case from the district court to the probate court, the transfer order was void. We conditionally grant mandamus relief.

**BACKGROUND**

Real parties are two minor children who are appearing in court proceedings through their natural guardian and next friend, Jennifer Strange. Michael Todd Kirschner, the father of the two children, died intestate in an automobile accident on September 30, 2007. In 2007, an application for independent administration was filed in the Dallas County Probate Court No. 2, and was assigned

cause no. 07-3780-P2. In the second amended application for independent administration filed March 24, 2008, Strange, as managing conservator of the two children, sought to be appointed administratrix of Kirschner's estate and to have letters of administration issued to her.

There are several docket sheet entries that follow:

- March 25, 2008: Issue Notice
- March 25, 2008: Notice (Service)
- April 15, 2008: Application for Court-Created Independent Administration
- April 25, 2008: Original Answer
- October 16, 2008: Motion-Withdraw Attorney
- October 16, 2008: Order-Miscellaneous (on motion for withdrawal of counsel)

There are no docket sheet entries after October 16, 2008. Relator asserts that no one qualified as personal representative for the estate and the action became dormant. Relator further asserts there are no pending settings in the dormant action.

On March 4, 2009, relator filed an *in rem* proceeding in the 101st Judicial District Court seeking to assert its right to superior title to real property that is secured by a vendor's lien reserved in a warranty deed and deed of trust executed by Kirschner. On May 21, 2009, the judge of the 101st Judicial District Court issued an order transferring the case from the District Court to Dallas County Probate Court No. 2. Relator filed a motion to reconsider on June 22, 2009, which was denied on August 3, 2009. Pursuant to the transfer order, the case was transferred to the Probate Court and assigned a new cause no. PR-09-01757-2. On September 8, 2009, relator filed a motion, pursuant to section 25.00222(b)(2) of the government code, seeking to have the case transferred back to district court.<sup>1</sup> Relator asserts a hearing was held on the motion, but the judge of the probate court has not

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<sup>1</sup> This subsection provides

- (b) If the judge of a statutory probate court that has jurisdiction over a cause of action appertaining to or incident to an estate pending in the statutory probate court determines that the court no longer has jurisdiction over the cause of action, the judge may transfer that cause of action to:

issued an order transferring the case back to district court.

Relators filed this original mandamus proceeding on February 10, 2010, six months after the judge of the 101st Judicial District Court denied the motion to reconsider, and what appears to be four months after any hearing in the Probate Court No. 2 on the motion to transfer the case back to district court.

#### STANDARD OF REVIEW AND APPLICABLE LAW

Generally, to be entitled to mandamus relief, a relator must show the trial court clearly abused its discretion and relator has no adequate remedy by appeal. *See In re Prudential In. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004); *Walker v. Packer*, 827 S.W.2d 833, 839-42 (Tex. 1992) (orig. proceeding). Mandamus will also lie to correct a void order—one the trial court had no power or jurisdiction to render. *See Urbish v. 127th Judicial Dist. Court*, 708 S.W.2d 429, 431 (Tex. 1986) (orig. proceeding); *In re Suarez*, 261 S.W.3d 880, 882 (Tex. App.—Dallas 2008, orig. proceeding). If an order is void, a relator need not show it does not have an adequate remedy to be entitled to mandamus relief. *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (per curiam); *In re Suarez*, 261 S.W.3d at 882. A court order is void if it is apparent the court ““had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act.”” *Hines v. Villalba*, 231 S.W.3d 550, 552 (Tex. App.—Dallas 2007, no pet.) (quoting *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005)).

On the date the transfer order was signed, section 5B of the Texas Probate Code stated,

- (a) A judge of a statutory probate court, on the motion of a party to the action or on the motion of a person interested in an estate, may transfer to his court from a district, county, or statutory court a cause of action appertaining to or incident to an estate pending in the statutory probate court or a cause of action in which a personal representative of an estate pending in the statutory

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- (2) the court from which the cause was transferred to the statutory probate court under Section 5B or 608, Texas Probate Code.

probate court is a party and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to that estate.

Act of May 23, 1983, 68th Leg., R.S., ch. 958, § 1, 1983 Tex. Gen. Laws 5228, 5228, *amended by* Act of May 20, 1999, 76th Leg., R.S., ch. 1431, § 1, 1999 Tex. Gen. Laws, 4876, 4876, *amended by* Act of May 31, 2009, 81st Leg., R.S., ch. 1351, § 12(c), 2009 Tex. Gen. Laws 4276, 4276-77 (current version at TEX. PROB. CODE ANN. § 5B(a) (Vernon Supp. 2009)).

#### ANALYSIS

Relator asserts both that the district court had no authority to transfer the case to the probate court and the probate court had no jurisdiction because there is not an active administration of the estate pending. Relator asks that we order the judge of the 101st Judicial District Court to vacate the order transferring the case to probate court and to direct the county clerk to transfer the case back to the district clerk.

By its plain language, section 5B(a) vests the authority to transfer a case in the judge of the probate court, not the judge of any other court. *Id.* The language of section 5B is clear and unambiguous. *In re The John G. & Marie Stella Kenedy Memorial Foundation*, 982 S.W.2d 548, 550 (Tex. App.–San Antonio 1998, orig. proceeding). Because only section 5B grants transfer authority to statutory probate courts, a district court could only exercise that authority if it qualifies as a statutory probate court. *Id.*

The probate code defines a statutory probate court to be a statutory court designated as a statutory probate court under chapter 25 of the government code. TEX. PROB. CODE ANN. § 3(ii) (Vernon Supp. 2009). Section 25 of the government code provides that “in a county that has a statutory probate court, a statutory probate court is the only county court created by statute with probate jurisdiction.” TEX. GOV’T CODE ANN. § 25.003(e) (Vernon Supp. 2009). Dallas County has

three statutory probate courts. See TEX. GOV'T CODE ANN. §§ 25.0591(d), 25.0595 (Vernon 2004). Because a district court is a constitutional court, not a statutory court, it cannot be a statutory probate court.<sup>2</sup> See *In re The John G. & Maria Stella Kenedy Mem. Found.*, 982 S.W.2d at 550-51. See also TEX. CONST. art. V, § 8 (jurisdiction of district court).

The district judge did not have statutory authority to transfer the case to the probate court; therefore, the judge of the 101st erred by transferring the case to Probate Court No. 2. Because the district judge lacked authority to transfer the case, we conclude the transfer order is void. See *Hines*, 231 S.W.3d at 552. Mandamus will lie to correct an order that is void because the trial court had no power or jurisdiction to render it. See *Urbish*, 708 S.W.2d at 431; *In re Suarez*, 261 S.W.3d at 882. Moreover, because the order is void, relator need not show it does not have an adequate remedy to be entitled to mandamus relief. *In re Suarez*, 261 S.W.3d at 882.

#### CONCLUSION

We conclude the May 21, 2009 order transferring the case from the 101st Judicial District Court to the Probate Court No. 2 is void. We conditionally grant mandamus relief.

We **ORDER** the Judge of the 101st Judicial District Court to vacate his May 21, 2009 “Order of Transfer.” We further **ORDER** that the case be returned from the Dallas County Probate Court No. 2 to the 101st Judicial District Court. We **ORDER** the Judge of the 101st Judicial District Court to file, within **THIRTY DAYS** of the date of this opinion and order, a certified copy of his order showing compliance with this opinion and order. Mandamus will only issue if the Judge of the 101st Judicial District Court fails to comply.

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DAVID L. BRIDGES

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<sup>2</sup> Nor does the general authority of a district court to assign a case to a county court at law provide the district court in this case with authority to make this transfer. A district court may only assign a case to a county court at law that has jurisdiction over the claims. See *Carroll v. Carroll*, No. 08-0644, 2010 WL 144020, at \* 2 (Tex. Jan. 15, 2010). Because Dallas County has statutory probate courts, the county courts at law do not have probate jurisdiction. See TEX. GOV'T CODE ANN. § 25.003(e), (f).

JUSTICE

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