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Supreme Court of Texas.
In re Estate of Marvin Nash, Deceased.
No. 05-0538.

September 28, 2006

Appearances:
John W. Tunnell (argued), Tunnell & Cox, L.L.P., Lufkin, TX, for petitioner.
Thomas W. Deaton (argued), Deaton Law Firm, Lufkin, TX, for respondents.

Before:

Don R. Willett, Wallace B. Jefferson, Nathan L. Hecht, Dale Wainwright, Scott A. Brister, David M. Medina, Paul W. Green, Phil Johnson, Harriet O'Neill

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JUSTICE: Please be seated. The Court is ready to hear argument in 05-0538 In the Estate of Marvin Nash.

ORAL ARGUMENT OF JOHN W. TUNNELL ON BEHALF OF THE PETITIONER

COURT MARSHALL: May it please the Court. Mr. Tunnell, has an argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

MR. TUNNELL: May it please the Court. This case gives the Court an opportunity to interpret the meaning of Section 69 of the Texas Probate Code in light of the particular facts in the circumstances in this case in controversy. The facts themselves are very straightforward it could be simply stated. Mr. Marvin Nash executed a Will on January 14 of 1994. In that Will, he left his estate to his wife Vicki Nash. He also made a contingent beneficiary Shelly Tedder. Ms. Tedder, was conceived on a nu-- on number of contingencies one such contingency being, 'In the event my wife should be predecease me.' On July 8, 2002, Mr. and Mrs. Nash were divorced, they were never to remarry. Mr. Nash died on April 29, 2004, at the time of his death, Vicki Nash his former spouse was still alive. Those are the facts and circumstances of this case. Texas Legislature, an enacting Section 69 of the Probate Code has provided a lawful part of the declamation of the Will, the Testator's divorced and all provisions in the Will in favor of the Testator's former spouse, must be read as if the former spouse had failed to

survive the Testator.

JUSTICE: Why do you think they added that language? What did that add to the null and void? Should we equate that with null and void or must it mean something different because it was asked.

MR. TUNNELL: It must mean something different and that is one of the reasons we feel that our interpretation of the law was more correct. It means that the Will-- all provisions of the Will must be interpreted as if the wife have predeceased the Testator or is ...

JUSTICE: It just doesn't mean spouse. But it just doesn't say that. It says, 'All provisions in favor of the Testator's former spouse.'

MR. TUNNELL: Well, it has provided six-- it was originally enacted in 1955. The law provided that in this situation, divorce and death. The provisions favoring the former spouse were null and void, must-- the 'must be read' language. If it is limited to those provisions-- favoring the former spouse-- then it means essentially nothing and the legislature has essentially done a meaningless act in amending the statute in 1997, because if the provisions favoring the former spouse are null and void. It does not matter whether it is interpreted as if she had predeceased her husband or not because null and void is null and void. The former spouse is not going to give to the state or serve as Executor. The way it would have meaning -

JUSTICE: Of course, of course, of course ...

MR. TUNNELL: - and the-- I, I would submit ...

JUSTICE: Excuse me. This-- of course the legislature sometimes says 'things twice like null and void for instance.' So why, why is it that the-- it wouldn't-- why would [inaudible] and we really mean it [inaudible] as to the grievance in favor of Testator's spouse.

MR. TUNNELL: Well, null and void are pretty unambiguous those terms were put in, in the original statute. 'Null and void shall be of no effect,' that was in 1955. And the courts have no problem, I mean the, the decisions and there aren't that many decisions on this, on this section but they have-- there's been no controversy within that situation. The former spouse does not receive anything of the estate and cannot serve as the Executor. That was pretty clear, there was no controversy about that, so there would have been no point in saying twice, that which everyone, in every court understood in the first instance in which was by its own terms very clear. It seems to me that the construction, that the legislature must to begin in something by this language means that they intended that the provisions made in this force of life must be read, that is to say, they must be construed or interpreted as if the former spouse failed to survived the Testator. And that would have meaning towards the rest of the Will including those contingent beneficiaries such as we have in this case. Now the Beaumont Court of Appeals and the response have taken different point view which is, that these are words of limitation. The words of limitation being, all provisions in the Will in favor of the Testator's former spouse, that only those provisions are to be interpreted in that matter.

JUSTICE: And I take it, you don't argue that the conditional bequest is one of the provisions.

MR. TUNNELL: No, it is not. Okay. But, but I believe the legislature has done here, has done two things. First of all, it provide a rule of construction. It says, 'This provisions must be read as if,' that's the rule of construction and rather than being language of limitation, the language all provisions in the Will in favor to Testator's former spouse. What that does is it identifies those

portions of the Will which are to be the subject of this interpretation and if you read it in that language, the plain language of the statute could be interpreted and I think reasonably should be interpreted to mean, that those provisions are perceived that interpretation. Having interpreted that provision, in that particular manner, then that naturally would affect other provisions of the Will and as I stated earlier, I really believe that is the only way that this 'must be read' language can be given any significance or whatever and otherwise would simply be useless act by the legislature which is not something this Court should presume and interpreting the Will of the legislature.

JUSTICE: And do you agree that your position is inconsistent with the Uniform Probate Code?

MR. TUNNELL: As it exists now.

JUSTICE: As it exists now.

MR. TUNNELL: That's right. It is into Uniform Probate Code. But the legislature of course ...

JUSTICE: I was going to ask you, is there any indication that the legislature intended to depart from Uniform Probate Court's approach.

MR. TUNNELL: I think when you look at the judicial landscape that existed at that time in 1997, amendment was a way. There were two different counts, so to speak, from the intermediate appellate's court. Now, keep in mind the 'must be read' language at that point did not exist. It was just null and void and the question came up in circumstances, such as we have here. Well, what does that mean as far as the rest of the Will. In particularly, as far as contingent beneficiaries and there were decisions particularly, the Houston and the Eastland Court of Appeals came up with their decision which was, 'The literal survival of a spouse precludes anyone from receding under the estate.' The Tyler Court of Appeals in Calloway versus Estate of Gasser(558 S.W.2d 571), they came up with a different interpretation. They sa 'Look. In this situation, you should look as if-- we should treat it as if the former spouse had predeceased the husband. Therefore, satisfying the contingent beneficiary who has perceived in that event.' And at that time, this 'must be read' language did not yet exist. They did this for a number reasons including the presumptions against intestacy because after all we have a situation where the person named in the Will-- the wife-- is not going to receive the estate. The only other person named is the contingent beneficiary closest to the intent of the Testator. That was essentially the reason of the Tyler Court of Appeals in Calloway. So you have these two different counts. In Calloway, also fall this time-- that time the Uniform Probate Code reached that result, since the change. At that time, the legislature was faced with these two different counts from judicial opinions from the intermediate appellate's courts. And it appears to me that the argument must be made it-- in enacting this 'must be read' language. What the court-- what the legislature did was select and essentially codify the result that was made in Calloway because the language is in essentially does the same thing. Calloway says, 'In this situation, read it as if, the former spouse had failed to survive.' The legislature says, 'Must be read as if the former spouse failed to survive the Testator.' So it certainly appears, looking at the judicial history that the legislature made a choice in deciding to go with this line of cases rather the ones that had preceded it.

JUSTICE: Are you aware of anything in the legislative history to support that?

MR. TUNNELL: I have read the legislative history as far as it's

been done on this case and the-- as to sometimes the case are found not very helpful. It basically restated what the language of the statute says and I would submit to the court really that the legislative history probably does not saying anything more than one could gather from reading the Section 69 as it formally exist. Unfortunately, but that's sometimes the case. Of course, there is talk in discussion of concern that well, what we're doing here is rewriting the Will which is something that we all want to do. That is the main argument which is made by the respondent. I think it's important to recognize that what the legislature has done has been changing they-- the, the, the literal language of the Will. And the approach that should be followed, is that the Will should read into it, the statute, as the time exists. In doing that, under this case if we were to follow the literal wording of the Will then the estate would not pass to my client and it would not pass to the respondent's client. It would pass to Vicki Nash, whose still alive. The literal wording of the Will is not an option in this case or any similarly situated case. In that sort situation the intent has been changed essentially by the legislature. With the Testator has presumed to have known. So then the question becomes, you know, 'What are we going to do which best effectuates the intent of the Testator at that time?' And in doing so Section 69 provides the judgment which has been made by the legislature as to how this ought to be treated and they have-- basically, the given us the same thing that Calloway gave us in the Tyler Court of Appeals many years ago. And that is that we are construed the situation as if the former spouse had predeceased. In that sort of situation, it would satisfy the contingent beneficiary. So it is not a question of whether we are to rewrite the Will, it is a question of, 'Are we going to give effect to the intent of the legislature?' And also, I would say this, there has been this judicial provision which had existed before this statute was amended which I alluded to earlier. And it seems to me that the issue now is not whether McFarlen versus McFarlen(536 S.W.2d 590) was the best reason decision or whether Calloway v Gasser is the best reason decision but rather it is, have you examined those decisions and have you made their choice. What was the intent of the legislature? And the only way the legislature's language can give a meaning and effect, is to follow the interpretation which a petitioner has advanced in this case.

JUSTICE: If the 'must be read' phrase were not in the statute, do you agree that respondents were right?

MR. TUNNELL: I would probably in that instance still argue-- I would, as counsel argued that Calloway was the better reason decision. But under this circumstance, I would say, that is no longer-- that is no longer the question. The question now is, 'What did the Texas Legislature mean?' When they added this language. Obviously, I think the addition of this language which so closely parallels Calloway is the controlling issue now. I will entertain any other questions of the Court.

JUSTICE: Seems there are no further questions. Thank you very much, -

MR. TUNNELL: Thank you.

JUSTICE: - Mr. Tunnell and the Court is now ready to hear argument from the respondent.

ORAL ARGUMENT OF THOMAS W. DEATON ON BEHALF OF THE RESPONDENT

COURT MARSHALL: May it please the Court. Mr. Deaton will present argument for the respondents.

MR. DEATON: May it please the Court. Greetings from East Texas, it seems as though this is a, a Lufkin thing. I knew the clerk was [inaudible] from Lufkin or his parents were. And, and because it is a small town, I had the privilege of knowing Marvin Nash and Judge Moore who handed the Calloway-Gasser decision and was also a judge in our, in our great Court of Texas. Turning first to the Will, you know, I think Judge Greenhill said it so well, we were all raised on Judge Greenhill in law school. He said, 'you know the intent of the Testator should be drawn from the Will.' Not the Will from the intent of the Testator and, and I think that's what the state counsel was trying to do. The Will is clear. The Will, Marvin Nash and Vicki Nash divorced. Marvin Nash actually lost control of the the Wills. They were in Colorado and Marvin Nash came into my office to draw another Will. We drew another Will, he was out of town. He died while he was-- before he could execute it. I don't think, knowing that there was [inaudible] that the Wills were still in place. But the Will is clear, the Will has three contingencies. What he really said to his, to his stepdaughter, who he loved, he said, 'If your mother survives me, then I don't want you to get anything. However, if your mother predeceases me then I will take care of you in my Will.' He said that in three different ways. He said the-- he said, 'If we die in a simultaneous accident then ...'

JUSTICE: Did he use the term 'mother,' or did he use the term 'wife?'

MR. DEATON: I'm sorry. If you-- it was his wife at the time that Wills were executed ...

JUSTICE: There certainly is a difference here. Right?

MR. DEATON: The stepdaughter's mother, I'm sorry, your Honor.

JUSTICE: There's certainly a difference.

MR. DEATON: Yes. I, I agree with you and, and I, I should have said, 'Wife, I guess.' After-- and of course, he said that in three different ways. He said if-- if she, if she, if she happens-- if she survives and then, then I, then of course I wan't my stepdaughter to be-- for her to take care of her own child, I guess. But he said it in three different ways in the Will. He said, 'If she, if she survives me. If we die in a common accident or she survives me for, for thirty (30) days.' In other words, if, if anytime in the-- in this situation. If she predeceased me-- and, and I think it's very clear in the Will then Shelly Tedder was not to take under the terms and conditions of the Will. So to, to honor Judge Greenhill, the intent's very clear in the Will, as to what he meant, he said what he meant and, and I reminded of a-- of this Court's decision in the recent case I just came across, that would be Enterprise Leasing versus-- of Houston versus Barrios(156 S.W.3d 5 and, and you used words such as unambiguous, clearer, words that were-- cases that are hard cases to decide of the-- but when the, when the wording is clear, the decision has to be made in that regard. I think this case, the Will definitely is clear and, and has no ambiguity.

JUSTICE: Turning, you got the idea of why the legislature added the 'must be read' to Section 69?

MR. DEATON: You know, I don't Judge. I, I too, have believed that the legislative intent and I looked at the Uniform Probate Code, the Model Probate Code. I looked at all those statutes. I know, how they are now Judge Wainwright, I agree with you there are not that what-- they certainly don't require that reading now I even attatched a copy

of the Montana Probate Code, which I think is a-- probably a pretty uniform model part of that. I do not know why they put that in there other than for redundancy. I'm, I'm a pilot and-- was a pilot for awhile and I realized I was always happy when there was a redundant system onboard and the-- and so that was the-- that may have been the reason behind it.

JUSTICE: So they said it three times and they thought maybe a fourth was -

MR. DEATON: Would.

JUSTICE: - would help.

MR. DEATON: I, I think so Judge. I-- But, but in looking at that statute, now the statute itself is clear. It, it says that, it only has application to your-- to his, that pertaining to the, to the spouse it does not apply to contingent beneficiaries and of course what, what I think, opposing counsel would ask is that we deserve-- basically we throw 175 years of, of 'stare decisis' and what we know in Texas to be true, that we mean what we're saying, saying what we mean and what this Court has a reputation for doing, is that we throw it out the window. We take this, this statute and, and basically make it and re-import for opposing counsel, wanted to. Mr., Mr. Tunnell and I are good friends, we-- our office is right next to each other and so I-- but-- and I don't think we can do this. I, I, I think of-- I don't think that, that bears fruit for Texas, bears fruit for these situations. But the-- I do think it's clear and I want to tell you, I-- I'm going to give you some time back now and I appreciate that you putting a-- sort of closing this chapter in Marvin Nash's life which I-- as I told you was a good friend and some of his relatives are in the courtroom today. Thank you very much.

JUSTICE: Thank you, Mr. Deaton. Rebuttal.

REBUTTAL ARGUMENT OF JOHN W. TUNNELL ON BEHALF OF PETITIONER

MR. TUNNELL: May it please the Court [inaudible]. I suppose it is said that Mr. Nash, said what he meant, meant what he said, when he provided that on his death, he wished for his estate to pass to his wife Vicki Nash. It taints no provisions saying, except in the event the-- that we should get divorced or anything of that nature. And so is not going to Vicki Nash. Why not? Because Texas Legislature, as enacted Section 69, it applied to this Will. And that when you interpret the meaning of the Will, the things you look at is not whether you know Mr. Nash or any of those circumstances. It's not whether he loss-- had another Will, he was going to execute but did not. You look at the law and you look at the Will. The law provides that fav-- provisions favoring Vicki Nash must be read if she-- as if she had predeceased her husband. The Will says, 'Shelly Tester is to receive the estate-- Shelly Tedder is to receive the estate in the event, my wife should predecease me.' You apply that law, you look at the Will, they match and dove tail perfectly, that is clear and unambiguous.

JUSTICE: Is it-- What do you say to Mr. Deaton's argument that the Will says, 'If my, then wife survives. If she's alive, she takes care of her daughter.'

MR. TUNNELL: Well, the language is, 'In the event my wife and I died at the same time' or 'In the event she does not survive me by thirty (30) days' or 'In the event that my wife should predecease me.

Then in an-- either of these events, I give, so forth.'

JUSTICE: Under the Will, what happens in the event she is alive?

MR. TUNNELL: In the event ...

JUSTICE: That she's living. He dies and she's living. What happens?

MR. TUNNELL: Well, in this situation, I think you have to read provisions favoring her as if she had predeceased.

JUSTICE: But in the Will, what would the result be?

MR. TUNNELL: The Will-- under the Will, they would go to-- under the Will it would go to Vicki Nash his wife -

JUSTICE: Uh mm.

MR. TUNNELL: - because it makes no provision for disqualifying her in the event of divorce. That is provided by the law. So that would be the result, if you went strictly by the Will.

JUSTICE: We can see-- He had a problem, it seems to me, that what do you do-- obviously going back-- when a-- when someone dies and, and their been divorced. And the-- and the Will, as in this case, still has the ex-wife there. So the legislature intended-- seems to me-- to fix that but it-- to go beyond fixing that itself would be-- in terms of changing the intent of the Testator which-- what you, don't you think?

MR. TUNNELL: Well, they can't provided it before that the wife-- the divorce spouse, is not to receive the estate, that is already there. So that had been there since 1955 and uniformly held by the courts to be the case.

JUSTICE: Exactly that was to fix that problem.

MR. TUNNELL: But then in 1997, they had this to fix the problem that had come up through the courts, of what you do about contingent beneficiaries and I think that is the intent. And if that is not the intent, then this language is pure and simple of redundancy and I think it goes against the Carter Rules of Construction for the last hundred years or so of this Court, to say that the legislature did a meaningless and fruitless thing.

JUSTICE: But the first alternate disposition is not in favor of the former spouse.

MR. TUNNELL: That's correct.

JUSTICE: And so why does Section 69 apply at all?

MR. TUNNELL: It should apply because the-- those, those provisions that did favor the former spouse are those provisions which are subject to the rule of interpretation that the legislature has provided. And that Will of interpre-- it identifies which provisions are to be interpreted. And the interpretation is that, must be read as if the former spouse had predeceased ...'

JUSTICE: But, but it's-- once that they're in favor with the former spouse must be read that way.

MR. TUNNELL: That's correct.

JUSTICE: In ...

MR. TUNNELL: Must be interpreted that way is how I would [inaudible]

JUSTICE: But the first alternate is not in favor with the former spouse.

MR. TUNNELL: That is correct. That is correct.

JUSTICE: And there's no question that Ms. Nash didn't die at the same time.

MR. TUNNELL: She did not die at the same time. She is living at the time of Mr. Nash's death.

JUSTICE: Didn't, didn't-- did survive by 30 days.

MR. TUNNELL: That's correct.

JUSTICE: And the ...

MR. TUNNELL: That is correct. The historical fact is that Ms., Ms. Nash survived her husband and that none of those contingencies came forth. It is our position that the contingencies for which Ms. Tedder would receive the estate is satisfied by the language of Section 69 and this was ...

JUSTICE: Initially, is it your view that Section 69 changes the Will or fills in a-- missing term.

MR. TUNNELL: I think if you have to read about the Section 69 as if it was part of the Will. I think that when you read the Will, you must read those provisions which requires interpretation at the same time and as part of the Will. That's my position.

JUSTICE: Without Section 69 the result would be different though.

MR. TUNNELL: Without Section 69, the result would be, that Ms. Nash would receive the estate, his former wife.

JUSTICE: No, it would be-- that this-- that, that bequest would be then null and void.

MR. TUNNELL: Well, I, I believe the question was Section 69 did not exist. In that event, Ms. Nash would receive the estate.

JUSTICE: Any further questions?

MR. TUNNELL: Thank you.

JUSTICE: Mr. Tunnell. The case has been submitted and the Court will take another brief recess.

COURT MARSHALL: All rise.