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Supreme Court of Texas.
John Kappus, Petitioner,
v.
Sandra L. Kappus, Respondent.
No. 08-0136.

December 10, 2008.

Appearances:
William C. Odeneal, Odeneal and Odeneal, Dallas, TX, for
Petitioner.
Dick Swift, Law Offices of Dick Swift, Palestine, TX, for
Respondent.

Before:

Wallace B. Jefferson, Chief Justice, Nathan L. Hecht, Harriett O
Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green,
Phil Johnson, and Don R. Willett, Justices.

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CHIEF JUSTICE JEFFERSON: We'll now here argument in 08-0136, John
Kappus versus Sandra L. Kappus.

SPEAKER: May it please the Court, Mr. Odeneal will present
argument for the petitioner. Petitioner has reserve three minutes for
rebuttal.

ORAL ARGUMENT OF WILLIAM C. ODENEAL ON BEHALF OF THE PETITIONER

MR. ODENEAL: May it please this honorable Court. Your Honors, I've
come before you today as a probate practitioner. This is a probate
matter from Anderson County Texas in East Texas and the paramount
principle in probate law is to follow the intent of the testator. Here
the testator was a man named Jim Kappus. And in his will he appointed
his brother John as his executor and his trustee of a testamentary
trust contained in his will. Under Texas Probate Jurisprudence, your
Honors, the hallowed principle of the right to pick your executor or
your personal representative or your trustee goes back over 150 years,
where you referred to the in re estate of Ruth's case out of the
Amarillo Court of Appeals, in the Allan v. Talley case and the Boyles
v. Gresham case out of this court.

JUSTICE MEDINA: Would -- would -- excuse me, what discretion if
any, does a trial judge have in a probate matter which --

MR. ODENEAL: I believe --

JUSTICE MEDINA: Is it the same type of discretion as any other estate district judge or is it different?

MR. ODENEAL: I believe it is the same, Your Honor. It's basically the standard of review would be an abuse of discretion. But the discretion, all the case law, the statutory law, everything points to we are charged in the probate legal system with following the intent of the testator if we can, if it's possible. And so, that is a significant principle. We had quoted Professor Johanson of the University of Texas Law School because when the case was reported out of the Tyler Court of Appeals he was working on his annotated probate court code for 2009 and he stated there is now a new case out of the Tyler Court of Appeals which affects this principle that the testator can pick who they want. In our case before the Court this morning, the brother, John Kappus was named by the testator, Jim Kappus. They were partners with their father in Kappus Farms going back to the --

JUSTICE BRISTER: What would be the -- for your -- so you're arguing for trial court discretion?

MR. ODENEAL: Yes, your Honor, the --

JUSTICE BRISTER: What would the factors be? Short of obviously if the executor was stealing from the estate or wasting the estate's assets and blowing them up --

MR. ODENEAL: We have --

JUSTICE BRISTER: -- they should be removed then.

MR. ODENEAL: Correct.

JUSTICE BRISTER: And there -- there wouldn't be any discretion in those situations.

MR. ODENEAL: We have a very elaborate set of statutes and case law that relate to removal. Removal is what I would call a kind of a disfavored claim. In other words, there's a high bar. It's not just that the person annoys you or you don't like them, or you don't get along --

JUSTICE BRISTER: But you'd agree with me in the examples I just gave --

MR. ODENEAL: I certainly would, your Honor.

JUSTICE BRISTER: -- there would be no discretion you would have to do it then.

MR. ODENEAL: I would agree if the --

JUSTICE BRISTER: Would one issue be the size of the estate? Because if this -- I -- I assume these fights are almost always between beneficiaries.

MR. ODENEAL: Generally speaking, but in many instances --

JUSTICE BRISTER: So the answer -- the answer is going to be if we remove the independent executor, we're probably going to have to appoint a lawyer or a bank?

MR. ODENEAL: Well, not necessarily. In most wills including this one, there is a successor named --

JUSTICE BRISTER: Which is usually a lawyer or a bank?

MR. ODENEAL: In some cases when people come in to my office and want to do a will and they want to know what they need to tell me, the first thing we talk about is the executor needs to be the most trusted person in your life, it needs to be a responsible person, it needs to be someone that you know will carry out your wishes through rain, sleet, or snow. And that's what we have here. The brother of the decedent was his partner with his father. They own this property together, there's no dispute. The record title ownership in this real estate which was basically the sole asset of the estate.

JUSTICE BRISTER: Of trustee here?

MR. ODENEAL: The successor trustee here is Ms. Kappus' brother a man named Louis McCall.

JUSTICE BRISTER: So that -- so we're kind of out of the frying pan into the fire if this is a fight between beneficiaries.

MR. ODENEAL: My father would characterize this as internecine warfare. Ouch.

JUSTICE BRISTER: And so -- and -- but I'm back again to what kind of factors the trial judge used on discretion, assuming it's normally family members and that's who the fight's between if we remove them we're going to end up appointing a bank or a lawyer which if it's a small estate it's going to eat it completely up, it's that one factor that trial judge ought to consider?

MR. ODENEAL: Yes, it is, your Honor, but we have --

JUSTICE BRISTER: What others?

MR. ODENEAL: We have the grounds in the statute as to --

JUSTICE BRISTER: But they're very broad, unsuitable. What does that mean?

MR. ODENEAL: Well, your Honor, under Section 149C of the Texas Probate Code they are actually fairly specific. There are grounds for a removal of an executor, the one that generally is applied in most of the cases is gross mismanagement or gross misapplication of the estate or estate property.

JUSTICE GREEN: But -- but that's -- but that is removal. In the appointment of the executor or the -- appointing an executor pursuant to the -- to the will, a judge -- the judge has an opportunity to look at that, says, well, okay here's the one that's named and so I have the discretion to determine whether they are suitable or not.

MR. ODENEAL: Yes, your Honor. Justice Green, at the time of qualification of the executor, what applies is Section 77 of the Texas Probate Code and it lists people in order of their priority so the number one person is the person named in the will as executor.

JUSTICE GREEN: So -- so we're beyond that, I mean --

MR. ODENEAL: Yes, sir, it was not. This executor was not challenged at the time of his appointment.

JUSTICE GREEN: Aim to be suitable, not disqualified by law otherwise.

MR. ODENEAL: He -- he qualified under the probate code. The judge gave him letters, testamentary.

JUSTICE GREEN: And so, the question that remains is, under what criteria will he be removed? And -- and has there been any claim here, but he should have been removed from the factors described in 1 -- was it 149C?

MR. ODENEAL: Not by the respondent in this case, your Honor. That's been one of our points on appeal consistently is that the respondent did not plead any of the statutory grounds for removal of an independent executor or of a trustee. There are two very specific statutes, 149C of the probate code and 113.082 of the Texas Trust Code. Those are the removals --

JUSTICE GREEN: So any claim of unsuitability would have been raised at the time of the appointment?

MR. ODENEAL: That -- that is correct, Your Honor.

CHIEF JUSTICE JEFFERSON: But as a practical matter, how many other -- I mean, how about -- what is the notice to beneficiaries at the time the -- at the time the -- the trustee is appointed or named suitable?

MR. ODENEAL: Your Honor, Chief Justice Jefferson, at the time that this will was probated in May of 2005, the requirement was for a

published posted notice at the court house for 10 days and notice to creditors within 30 days under section 128A. That is since been updated but as a practical matter in this probate proceeding, everyone was aware of what was going on. It was probated shortly after Jim's death.

CHIEF JUSTICE JEFFERSON: I'm just trying to think of some other, you know, cases where there is a conflict but the -- the probate judge is not going to be aware of it. And I can imagine the circumstance were the conflict is so severe that had the judge known that -- that the trustee would not have been approved?

MR. ODENEAL: I would direct the Court, Your Honor, to the findings of fact of the trial court. Finding the fact number 20, when he executed both the 2003 will and the 2004 will, decedent, James Kappus knew that his brother respondent, John Kappus, owned an undivided one half of the 49 acre track and named him independent executor with that knowledge. And then number 21 --

CHIEF JUSTICE JEFFERSON: Whether the -- is it Sandra's interest and -- and belief that there's a conflict of interest at that time?

MR. ODENEAL: Your Honor, the basic principle here is that with our number one duty to follow the intent of the testator in the probate jurisprudence, people often pick family members that they co-owned property with. People often pick a business associate or a partner, or someone who on the face of it has what could appear to be a conflict of interest, they can even pick people who have a claim against the estate. The principle is, I believe and should be, that actual misconduct is the standard and is what is required for Draconian sanction of removal

JUSTICE HECHT: So -- so what does that -- what does that mean exactly?

MR. ODENEAL: That means actually stealing --

JUSTICE HECHT: Well, there's stealing and there's stealing. The -- but if there's a very direct conflict and the executor says the estate property belongs to me personally and not to the estate and the beneficiaries disagree with that, is that enough of a conflict?

MR. ODENEAL: It -- It's a fact specific. And in this case the executor was facing a removal action and what appeared to be a will contest in the clerk's record, or the pleadings which really go on and on about the will and only in an amended pleading followed this week before the trial was this issue of the valuation of the improvements.

JUSTICE HECHT: Like you say, fact specific but that kind of wrestling of the same question Justice Brister was asking. What facts if -- there's that direct to conflict, its' mine, no it's not. Is that enough of a conflict to disqualify a spouse or brothers alike?

MR. ODENEAL: Not here, Your Honor, because the effectiveness --

JUSTICE HECHT: Any case? Can you think of a case in which you would?

MR. ODENEAL: Oh, I certainly can, yes, sir.

JUSTICE HECHT: What would that -- what would that entail?

MR. ODENEAL: Well -- well, you have irreconcilable conflicts where you have like his, hers, and ours children and you have irreconcilable conflicts between these beneficiaries.

JUSTICE HECHT: Not all the -- let's say all the beneficiaries are united, they want it and the executor says it's mine.

MR. ODENEAL: Well, then it's up for the Court to decide if the executor has violated one of the statutory grounds for removal and removal is justified --

JUSTICE HECHT: I'm just -- I'm trying to get it -- how would he do that? I mean, he said it's fine and beneficiaries said it's ours. So

it's just that simple. And now they're going to go litigate that and the beneficiaries naturally would like somebody on their side to be championing their cause and the executor is on the other side.

MR. ODENEAL: Here the executor was defending a removal action and basically at the last minute this issue of the valuation of these improvements comes up and I have to give some background. The decedent and the respondent here, Ms. Kappus, has just been through what can only be described as Hatfield's and McCoy's barn burning divorce, very hostile high conflict divorce. And so in the divorce she was awarded a lien against Mr. Kappus for what we call in family law an Ouelty lien for \$4,950 and that's reflected in the trial court's statements. So where she's asserting in her briefs and things before this Court that that should be considered here or should have been considered at the trial court that was a moot issue.

JUSTICE WILLETT: Well, speaking as -- speaking as a probate professional who handles this kind of stuff every day. What protection or recourse does a beneficiary have if the executor, you know, claims ownership, as Justice Hecht described, of an estate asset and tries to sell it? I mean, -- are you saying that unless one of the factors in the removal statute are -- are met then there's -- there's no protection whatsoever if there's any kind of clash between an executor who claims ownership of this asset and a beneficiary?

MR. ODENEAL: I believe there's significant protection, your Honor, Justice Willett, there is considerable case law on this subject. There is the elaborate statutes, you have a very commonly recognized cause of action for removal of an administrator, an executor, a trustee and it's -- you know, fairly frequently litigated item. But the bar is pretty high. It's not just that you don't like the person. Here, the executor was not ever contesting ownership of anything. He owned an undivided record title interest in this real estate. He was partners with the decedent. The evidence at trial was that they had all, their father Walter, John, and the decedent Jim had all poured in money in this thing where they all going to retire and build all kinds of little improvements. The improvements, basically, become part of the real estate. So the question would be where else would he start but to say, you know, it's 50-50. The trial court just awarded it on a different basis without explaining what that basis was.

JUSTICE WILLETT: But your position is the only sort of protection that a beneficiary has in invoking 149C.

MR. ODENEAL: That is correct, Your Honor.

JUSTICE HECHT: But if you started at 90-10, would that be a conflict? I'm -- I'm trying to get you to be less general. You said the statute, and fact specific and all of it, but I'm trying to understand what would be a conflict that you think would be disqualified? And if you say, well, they started at 50-50 because they were partners and that's natural. But what if they started at 90-10, would then -- would that be a conflict?

MR. ODENEAL: I believe it would, Your Honor, the --

JUSTICE WILLETT: But it would be a conflict that violates 149C?

MR. ODENEAL: Yes, if he said he owned 90 percent of the estate, I believe, as a matter of law it would be.

JUSTICE HECHT: Why? Why?

MR. ODENEAL: Because the beneficiaries have the right to expect the fiduciaries such as an executor to advocate for them. And that's what Mr. Kappus in this matter was trying to do for his niece and nephew, because he felt that's what his brother wanted, because he felt he was in the best position to look out for them.

JUSTICE BRISTER: So, basically, it's whether the trial judge thinks he -- the position he's asserting he is in good faith or not?

MR. ODENEAL: That is correct, Justice Brister, and the --

JUSTICE MEDINA: I'm sorry, go ahead.

MR. ODENEAL: Well, and the trial judge --

JUSTICE BRISTER: That's kind of like -- that's kind of like deciding the case before it start, isn't it?

MR. ODENEAL: Not necessarily. The trial judge heard the evidence. Now because of the controversy over the will, a second will was probated just right before this trial occurred and so the administration of this estate just really kind of started over.

JUSTICE MEDINA: This -- this may not have anything to do with the case but are the niece and the nephew in conflict with the mother or not?

MR. ODENEAL: I do not believe they are, Justice Medina.

JUSTICE MEDINA: Okay.

JUSTICE O'NEILL: So, you would agree, I think you said, that if the estate is being wasted, that removal would be appropriate.

MR. ODENEAL: Yes, it would.

JUSTICE O'NEILL: Well, if you're claiming a piece of the estate you're not entitled to, why would that not be wasting the estate?

MR. ODENEAL: Your Honor, again, that's not what occurred here. The executor, any personal administrator, once you're appointed you have to do an inventory, you have to characterize assets, as community or separate property. You have to assign values to those assets. Sometimes it's not easy. I've done it myself and it sometimes are very difficult proposition especially with different family mixes. And so Mr. Kappus had to characterize these assets and he had to assign values to them and he did the best he could under the circumstances and his presumption was clearly in good faith. He was always partners with his brother, his brother --

JUSTICE O'NEILL: But -- but that again sort of begs the question. I mean, if he were trying to carve out a bigger percentage of the property for himself, why -- why is that not wasting the estate because it's -- it's divesting the estate of a percentage of the property itself?

MR. ODENEAL: At 50-50, he was not doing that, Justice O'Neill. That -- that just did not occur here.

CHIEF JUSTICE JEFFERSON: Any further questions?

Thank you, Counsel.

MR. ODENEAL: Thank you.

CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument from the respondent.

ORAL ARGUMENT OF DICK SWIFT ON BEHALF OF THE RESPONDENT

SPEAKER: May it please the Court, Mr. Swift will present argument for the respondent.

MR. SWIFT: Thank you. Good morning, it's nice to be here again it's been a while. But gentleman before I was here with Justice Hecht was Cipriano v. Ozarka Water. Let me begin this with an executor of fiduciary, a trustee of fiduciary. This case involves attention between the conflict that arises when an executor is exercising his fiduciary duty and that fiduciary duty gets intertwined with his own personal interest. Mr. Kappus --

JUSTICE HECHT: Here -- here there was no finding of a breach of

fiduciary duty. What -- what -- what's the significance of that?

MR. SWIFT: Well, the Appellate Court made one.

JUSTICE HECHT: I know but the trial court didn't.

MR. SWIFT: The trial court found that the conflict between the two of them over the ownership of the property created a breach of that fiduciary duty that he can't -- that Mr. Kappus' executor cannot serve two masters.

JUSTICE HECHT: The trial court didn't find that.

MR. SWIFT: That's correct; the trial court erroneously believed and says so in its statement that cannot resolve this conflict by making a division of the property.

JUSTICE O'NEILL: Well, that was going to be my question. What way -- let's say there is a conflict and the executor has a conflict, why can't the executor represent himself in that conflict and let the trial court sort it out which is apparently what happened here? The trial court heard his sort of conflicting claim and decided the percentages based on what he thought.

MR. SWIFT: But -- but he was -- he had the same lawyer as executor and as an individual, they presented the claims together. Okay, he's not a beneficiary under the will. He's not a beneficiary. His claim is as a co-tenant adverse to the beneficiaries.

JUSTICE O'NEILL: I understand, but -- but so you got a fact issue is to what where --

MR. SWIFT: Uh-huh.

JUSTICE O'NEILL: -- this property goes and why can't that trial court say, look, I recognized you all are conflicted, but I'll -- I'll resolve that. I'll look at the facts and I'll hear the evidence, and I'll decide that here's 48 percent and here's 52 percent. Why does removal have to result?

MR. SWIFT: Well, because he's breached his fiduciary duty and once the breach has occurred you can't un-ring the bell. The courts have been clear on that. There's a case that --

JUSTICE BRISTER: He's breached his fiduciary duty because it was wrong?

MR. SWIFT: Excuse me, because it's --

JUSTICE BRISTER: Wrong.

MR. SWIFT: Yes.

JUSTICE BRISTER: Well, I mean, being wrong is not necessary a breach a fiduciary duty.

MR. SWIFT: Well, he took a position adverse to the beneficiaries of the estate.

JUSTICE BRISTER: It turned out to be wrong. But is -- there -- is there any evidence he was in bad faith, he was making this up, he knew it was wrong?

MR. SWIFT: Parts of it, yes. I asked him for example, okay, what kinds of benefit are the kids getting for the dog -- for the dog's kennels that -- that is clear Ms. Kappus built. It's included in the price of the property. You're getting half of that? Correct. Do you think that's fair to the kids? My brother and I owned the estate and I owned half -- and I owned half of the estate. So I think he was in -- in bad faith --

JUSTICE GREEN: For what?

MR. SWIFT: -- I'm sorry.

JUSTICE GREEN: You know, he builds a -- a fixture on a piece of real estate and maybe some contribution back and forth, but -- but why wouldn't that be part of the estate? Why is that a wrong argument to make in terms of breach of fiduciary duty?

MR. SWIFT: Because it was property that was owned by the estate.

JUSTICE GREEN: And he owned part of the property.

MR. SWIFT: He owned part of the property. In the case law clear you don't get what you put in and you get an increase in the valuation. But more importantly -- in -- in this case we heard about 149C. What happened in this case is Ms. Kappus got an injunction to prevent the sale of the property and the distribution of the proceeds on the 50-50 basis. The distribution's clear from the inventory and appraisalment on its own file but that's how they intend to distribute it. 149C said in Section 2, sufficient grounds appear to support -- I'm sorry, sufficient grounds appeared to support belief that he has misapplied or embezzled or that he is about to misapply or embezzle all or any part of the property committed to his care.

JUSTICE HECHT: The -- you know, he said he owned 8.5 percent more than the trial court found. And she said she owned 4.5 percent more than the trial court found and why aren't those just opposite sides of dispute over where to draw the line that -- that it doesn't have anything to do with the breach of fiduciary duty?

MR. SWIFT: Well, in one sense they are opposite sides of the dispute. I -- I agree with you. But he -- he has a duty isn't it -- he came in to court not -- not just as an executor but also as the co-tenant brother. And in both capacities fought the estate. If he had come to court simply as the co-tenant brother and said I have a personal interest in this, I'm a brother, I'm a co-tenant and I own this part. Here's my lawyer and you all go do battle, that would be fine. And to answer the question you -- you spoke earlier, everybody agreed that Louis McCall would be a suitable substitute executor. Nobody had any problem with it.

JUSTICE BRISTER: Who is that?

MR. SWIFT: The brother -- Ms. Kappus brother in law, everybody agree he'd be fine. That's in the record; there is no dispute about that.

JUSTICE HECHT: But suppose he had come in -- suppose John had come in and said the estate owns 58.59 percent and Sandra had come in and said no it owns 63.45 percent which was her position, right? And the trial court --

MR. SWIFT: Well, in general, yes, your Honor.

JUSTICE HECHT: And -- and, so John had not started it 50. If he'd started at the number that the trial court found, would that be a breach of fiduciary duty?

MR. SWIFT: Well, in the sense that he continued to contend even -- even through the appellate system that he was over 50 percent.

JUSTICE HECHT: Yeah, but if he -- if not, if he --

MR. SWIFT: If each --

JUSTICE HECHT: If that beneficiary is still just wanted more and he started out where the trial court ended up, would that be breach of fiduciary duty?

MR. SWIFT: Well, I -- I think that when you are pitted just as -- as a lawyer is pitted against his client, that's a breach a fiduciary position, if a partners pitted against his partner, you can't do that.

JUSTICE HECHT: So the answer is yes?

MR. SWIFT: The answer is yes.

CHIEF JUSTICE JEFFERSON: Some -- some of us had Johanson during law school and everyone that took him for Barbary, you know treated every word he said is gospel, but it seems like you are -- you and -- and the professor are in conflict on this.

MR. SWIFT: We are.

CHIEF JUSTICE JEFFERSON: Why is he wrong?

MR. SWIFT: Well, one he's got the facts wrong. Seriously wrong. In his comment he says that the -- that the appellate court basically affirmed all of its -- upheld the independent executor decisions are upheld on every substantive issue including the issue as to prorative ownership of the land, that's not true, okay. They still came with the appellate court claiming 50 percent, page 6 of their brief in the appellate court. Ultimate justice would require that the estate share be held to be 50 percent leaving John his 50 percent share. Johanson's further says the central issue was whether you stay on 58.59 or 63.45. That wasn't the central issue. The central issue was this contract for sale that -- that's -- and the inventory and appraisal, he was going to divide the proceeds 50/50. The hearing was so contentious that the judge forced Mr. Kappus through his lawyer to admit that the single-wide mobile home had been a gift from the partnership. He either had to admit that they have been committing fraud on the -- on the facts of the RV or it was a gift and they chose gift. The title to the mobile home was in the estate's name. The title of double-wide was in the estate's name. That's in the record. There was -- there were disputes about the improvements, but clearly the porches. And there are appraisals in here that during -- that they put in to evidence that the land was only worth 70,000.

JUSTICE BRISTER: Let's get back to the independent executor. If we'd have had a different independent executor put in, they would've picked a number and you'll both would've sued them anyway, and the only difference would've been would have somebody extra charging fees. Why is that matter?

MR. SWIFT: Well, Your Honor, the only -- the reason it's better is that the estate would not be paying Mr. Kappus' private attorney's fees which they've done so far. Okay, which I think is a blatant conflict of interest. And he would've had to pay them privately, and it would've been a private dispute between the beneficiaries.

JUSTICE JOHNSON: Well, doesn't the statute allow for -- for claim of his attorneys for this case?

MR. SWIFT: It's -- it's up to the trial court.

JUSTICE JOHNSON: Well, it's -- I thought there is one of them who says shall and one of them says may. Yeah, your client may get her attorney's fees. He shall get his. Am I misremembering the statute?

MR. SWIFT: I didn't study up on that, Judge.

JUSTICE JOHNSON: And I have another -- Okay, I have another question, though. Is there a difference between a conflict of interest and a breach of fiduciary duty?

MR. SWIFT: I don't believe so.

JUSTICE JOHNSON: Okay. So, you are saying the fact that their positions might be -- he might take a different position than the estate, so that there is the potential for this evaluation or different evaluation is the same thing as an actual position taken that's different?

MR. SWIFT: I think there has to be an actual position taken that's different.

JUSTICE JOHNSON: Okay. So, it's not a breach simply to have the conflict?

MR. SWIFT: No, it's not a breach simply to own the property and co-tenants.

JUSTICE JOHNSON: And it's not a breach for him to be executor if -- if there is a potential that he is going to evaluate it differently than your client, just a potential.

MR. SWIFT: I don't think so. No.

JUSTICE JOHNSON: It's when he actually makes the valuation with which she disagrees that your position is breach when there's actual action taken?

MR. SWIFT: That's correct.

JUSTICE BRISTER: How about step further then. It's a friendly dispute, instead of hating each other.

MR. SWIFT: Okay.

JUSTICE BRISTER: They just have a friendly disagreement. I -- I think I'm entitled to 50...58 percent. You think you're entitled 62 percent. I tell you what, let's take this to the Judge and we'll each pay our own lawyers, so let's take the attorney's fees issue out of it, and whoever wins wins. Will we have to remove the executor then?

MR. SWIFT: No.

JUSTICE BRISTER: And so the difference is whether the people hate each other or not?

MR. SWIFT: No, your Honor, no. Because what I've said a minute ago, Judge --

JUSTICE BRISTER: This sounds exactly like my hypothetical except the people hate each other.

MR. SWIFT: No. No. Your Honor, what I said earlier was if -- if he was there as a private individual as a co-tenant and she was there representing --

JUSTICE BRISTER: The only reason he is not is because of attorney's fees.

MR. SWIFT: I -- I don't know why -- why they did that. I mean that -- that issue has not been address by the trial court.

JUSTICE BRISTER: But in my hypothetical, if you have a friendly dispute, you'd both be there individually.

MR. SWIFT: We'd both be there individually, but the idea --

JUSTICE BRISTER: So the -- so the only difference is the hate and who -- who pays the attorney's fees which as I understand it is the trial Judge can decide. The trial judge can decide whether he is acting in good faith as an executor or selfishly as an individual, and the justice fee is accordingly, right?

MR. SWIFT: Sure.

JUSTICE BRISTER: So, why -- why is my friendly hypothetical dispute any different from this one?

MR. SWIFT: Well, because -- because once you breached -- have a breach of fiduciary duty, you can't un-ring the bell, okay. It's -- it's done. You can't undo it.

JUSTICE BRISTER: But you don't think there's a free to fiduciary duty if it's an honest good faith mistake. I think this is it. You think that's it.

MR. SWIFT: So in your -- your hypothetical, Your Honor, what you're doing is your taking the executor out of the equation and you're taking the executor over here and say you sit on the sidelines --

JUSTICE BRISTER: No, I'm assuming he's --

MR. SWIFT: -- watch people fight.

JUSTICE BRISTER: I'm assuming he is the executor. And he says, you know, we just have an honest disagreement as to how to split up these assets, we need a judge to settle this. So he goes in as executor and his -- and this is his own self saying, I think I'm entitled on more than she thinks I'm going to get. She thinks otherwise we just need you to decide this, Judge.

MR. SWIFT: Well, I think -- I don't think you can do that.

JUSTICE BRISTER: What then?

MR. SWIFT: I don't think -- I don't think you can do that, Judge.
JUSTICE BRISTER: Can't even do that?
MR. SWIFT: It's a -- it's a -- JUSTICE -- your Honor, it's a conflict of interest. It is -- it is a breach of fiduciary duty it's a grade tenant under Probate law --
JUSTICE JOHNSON: Well, wait -- wait a minute.
MR. SWIFT: -- in fiduciary relationships.
JUSTICE JOHNSON: I thought what you just said there's a difference between a conflict of interest and a breach of fiduciary duty?
MR. SWIFT: I said they are the same.
JUSTICE JOHNSON: They are the same?
MR. SWIFT: Yeah.
JUSTICE JOHNSON: Okay. So when he takes it, when he has an interest and his brother appoints him as executor, and there he's got an interest, that is a conflict of interest that there at that point it seems like.
MR. SWIFT: Potential.
JUSTICE JOHNSON: A potential?
JUSTICE WILLETT: But are you -- are you asking for a categorical rule of that nobody can ever be an executor if they claim an ownership interest in the estate?
MR. SWIFT: No.
JUSTICE WILLETT: Only when they assert an interest or when does it become?
MR. SWIFT: When -- when they assert -- when -- when an individual that is not a beneficiary asserts a private claim to more of the estate than the benefit, and against the beneficiaries.
JUSTICE WILLETT: And does it matter one iota, in your view whether James knew about this potential conflict when he appointed his brother?
MR. SWIFT: I think that's why he appointed an alternative executor that was Sandy's brother.
JUSTICE GREEN: Why isn't this case controlled by Boyles v. Gresham? Are you familiar with that case?
MR. SWIFT: No, your Honor.
JUSTICE GREEN: They said in 1958 an assertion of a claim against the estate under the will, which is conflict of interest of potential, would not render the -- the name independent executor unsuitable to that office.
MR. SWIFT: Well, and I think that that case -- that that was addressed in Sammonds v. Elder talks about that case. And I think the distinction is about beneficiaries, where there's beneficiaries feuding versus an outside party feuding.
JUSTICE GREEN: Well, you got -- you got the named executor who is also got a claim against the estate. Isn't that what we have here?
MR. SWIFT: That is what we have here.
JUSTICE GREEN: And we said in that case that that doesn't make him unsuitable.
MR. SWIFT: Well, unsuitability is different than -- than this situation. Unsuitability is where you qualify, but it is a less of the burden, Your Honor. Unsuitability is. There've been -- there've been many cases written.
JUSTICE GREEN: So then you would say he made this suitable, but he's removable because of the conflict?
MR. SWIFT: He's removable because of the conflict and also because he's in violation of 149(c)(2), okay.
JUSTICE MEDINA: What's the value of this, \$110,000?
MR. SWIFT: That's all it is, Judge. When, Ms. Kappus and her two

small children walked in my office, I never dreamed I'd be before this honorable Court.

JUSTICE MEDINA: But -- and it's very interesting issue, but it's -- from a practical stand point it seems maybe perhaps money not well spent.

MR. SWIFT: Well --

JUSTICE MEDINA: Well, I'm talking about maybe 50 percent of that or 60 percent of \$110,000.

MR. SWIFT: Well, Ms. Kappus and I been friends a long time, your Honor, so.

JUSTICE MEDINA: That's none of my business. It seems like something that could have been resolved maybe in mediation.

MR. SWIFT: We weren't able to get there, Your Honor.

JUSTICE HECHT: On the -- the valuation -- the ownership problem, nobody has challenged the Court of Appeals ruling on that, so that's over.

MR. SWIFT: That's -- that's over, your Honor, I don't think this, I think that's a factual dispute that this Court's not going to hear anyway.

JUSTICE HECHT: So, are there other grounds for alleging a conflict or breach of fiduciary duty?

MR. SWIFT: No.

JUSTICE HECHT: So, if we were looking at it now there isn't a conflict? I take your position that you can't un-ring the bell, but the bell is not going to ring anymore. I guess to follow through.

MR. SWIFT: Well, it couldn't as long as he's a trustee.

JUSTICE HECHT: Right. But be -- be something new.

MR. SWIFT: That's true, your Honor.

JUSTICE HECHT: There was a reference to handling the debt on a vehicle and I couldn't be clear exactly what else, but I take it all of that's kind of gone away and we're really here on the conflict breach of fiduciary question.

MR. SWIFT: I -- I think the central issue is the conflict on the breach of fiduciary duty and the 149(c) (2). I think those are the primary issues and I -- and --

JUSTICE O'NEILL: So, why isn't it more of a declaratory judgment he should or shouldn't have been removed but the property's been adjudicated, so why is it not an advisory opinion?

MR. SWIFT: Well, the property wasn't adjudicated until we got to Tyler.

JUSTICE O'NEILL: But I mean that's done and that's not contested.

MR. SWIFT: That's true.

JUSTICE O'NEILL: So, whatever we say about the removal, it's just sort of advisory isn't it -- because it didn't make any difference to the --

MR. SWIFT: No the estate still needs to be administered, your Honor.

JUSTICE O'NEILL: But you're not claiming a conflict as to other estate assets.

MR. SWIFT: No, your Honor, we're not.

JUSTICE BRISTER: Has the mandate gone from the Court of Appeals ordering his removal yet?

MR. SWIFT: It was sent and they timely perfected this appeal.

JUSTICE BRISTER: But they usually don't send them if they don't perfect appeal.

MR. SWIFT: It was very close.

JUSTICE HECHT: But a --

MR. SWIFT: Time wise. At least that's my -- my remembrance, okay.

JUSTICE HECHT: Clearly, your position is since he did have a conflict and he did breach his fiduciary duty even though all the other matters have been resolved, he still should be removed.

MR. SWIFT: I -- I don't think you can undo the bell.

JUSTICE HECHT: Right.

MR. SWIFT: And -- and that's Yturri v. Yturri and this Court's written on fiduciary duty I don't know how many times. And -- and you know, the problem is, okay, if we're going to -- we're going to say, gosh, it's okay to breach it a little bit and then you'd fight it all the way to Court of Appeals and resolve it, and now it's okay. I don't know what kind of message that sends to the practitioners across the State of Texas about what fiduciary duty really means.

JUSTICE WILLETT: It's a bit unclear to me as I read the -- the CA opinion. Which are the factors in 149C they sort of shoehorn conflict of interest into it seems to be -- seems to be (A)5 which is the gross misconduct or gross mismanagement in performance of those executor duties, but do you have any insight on that?

MR. SWIFT: Well, I think they weren't very clear and that's another problem with the good professor's analysis of the -- of the case because he obviously had --

JUSTICE WILLETT: I'm talking about the Court of Appeals analysis -

MR. SWIFT: I -- I know. The court of appeals analysis they lumped it all together, Your Honor. And -- and they -- they talk -- their talk main -- their main decision is about the property. But they lumped in the \$4,000 issue over the car and not sending the letter to the secured creditors. They lumped in the conflict of interest and they lumped in the 149(c) (2).

JUSTICE WILLETT: Well, it mentions that, you know, John's shared ownership of this property creates a conflict and under the circumstances of the trial court had no alternative but to remove him as executor and I'm just trying to figure out which are the factors in the statute do you sort of -- where do you shoehorn a conflict of interest and these factors that are laid out in the statute.

MR. SWIFT: Well, you shoehorn it in under the -- the 149(c) (2) which is the attempted misapplication of funds and -- and Section 5, and the case law that talks about fiduciary duty that the Court of Appeals cites Hitt v. Hitt and any other case that cited there. And -- and the other cases that they've cited talk about separate versus community, and husband and wife, and those issues arising and the -- and the executor should be removed, and -- and there's a litany of cases there that -- that talked about that. But our main thrust is those two sections and the probate code and that one should occurs, I mean I don't know if -- if I breach a fiduciary duty to my client and he sues me, and I say, oh, gosh I was wrong, here's your money, I think I'm still in breach of my fiduciary duty. I mean, that -- that's the tension in this case. And I -- and I think it is an important case to define that relationship of the testator and -- and the executor and the fiduciary duty --

CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

MR. SWIFT: -- when the conflict arrives.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

Are there any further questions? Thank you.

MR. SWIFT: Thank you, your Honor.

CHIEF JUSTICE JEFFERSON: The Court will hear rebuttal.

JUSTICE MEDINA: We give our trial courts great discretion in

making decisions, I think that's good. How is this such a clear abuse of discretion that the trial court's decision needs to be -- we're obviously reviewing it, but needs to be changed?

REBUTTAL ARGUMENT OF WILLIAM C. ODENEAL ON BEHALF OF THE PETITIONER

MR. ODENEAL: Actually, your Honor, I'm here --

JUSTICE MEDINA: It seems like the matter's worked out.

MR. ODENEAL: I'm here in support of -- the trial court's decision. I think the trial court made the correct decision that there were insufficient grounds, under the statutes and the case law for removal. The court that erred is the 12th court of appeals in Tyler by making blanket statements that John's shared ownership of the real estate creates a conflict of interest. The mere joint ownership of estate property by itself is not grounds for removal.

JUSTICE JOHNSON: Is there a difference in your mind between the conflict or potential conflict of interest in joint ownership and breach of fiduciary duty.

MR. ODENEAL: Yes, there's a big difference, your Honor.

JUSTICE JOHNSON: And your position is it takes an actual breach.

MR. ODENEAL: Yes.

JUSTICE JOHNSON: The --

MR. ODENEAL: Professor Johanson states that in his outline and in his annotated commentary to the Texas Probate Code which refers to an old case from 1953 in -- in New York In Re Fosse's will, which we've cited in the briefs which says the joint ownership or a potential conflict is not enough. It should only be the standard for removal, should be actual misconduct not just a conflict of interest on its face.

JUSTICE O'NEILL: But in actual, conflict is a breach of fiduciary duty, isn't it? I mean as a fiduciary you're supposed to put your -- the person you have a duty to put their interest above your own. So, if you're asserting an interest that conflicts with that isn't that by definition a breach of fiduciary duty?

MR. ODENEAL: Justice O'Neill in probate practice where we appoint family members, where we named family members in our wills and in our trust, we kind of have to take the good with the bad. We have to except that a lot of these people are going to have a potential conflict --

JUSTICE O'NEILL: Potential, I'm talking about an actual conflict. That once he asserted more than 50 percent ownership then isn't that an actual conflict?

MR. ODENEAL: Your Honor, he never asserted more than 50 percent. He just said we were partners, we were brothers, we owned everything together. In his inventories that he filed with the probate court pursuant to his duties as executor and trustee, he just characterized the property as jointly owned 50 percent. And that's -- the disagreement was only over the value --

JUSTICE O'NEILL: Well, that I get -- let me rephrase my question then.

MR. ODENEAL: Certainly.

JUSTICE O'NEILL: If his -- if his claim of 50 percent is not an accurate reflection that doesn't take into account the improvements on the property, and -- and he is therefore by getting 50 percent, getting more than he is entitled to isn't that an actual conflict, not a potential one?

MR. ODENEAL: Under these circumstances, he accepted -- he did not

appeal the judges's resolution of that issue and so the matter was resolved in his mind and he proceed with the administration of the estate and from the trust of these two kids, Casey and James that he's, you know, sworn to take care of.

JUSTICE O'NEILL: Who's administrating the estate now?

MR. ODENEAL: It's basically locked up. The litigation has continued unabated during the appeal and it's just at a standstill awaiting the decision of this Court. We would respectfully pray that this Honorable Court issue an opinion and reverse and render the Tyler Court of Appeals. And let stand the trial court's decision and let stand the time tested Texas probate jurisprudence and the statutory law that the testator, Jim, here gets to pick who he wants to be his executor. And I believe, Justice Willett stated it correctly that *Boyles v. Gresham* controls here and that is a long-standing rule next to probate jurisprudence that we try to follow the intent of the testator and even if the testator made a bad choice of -- we're charged with trying to follow what they wanted done.

CHIEF JUSTICE JEFFERSON: Any further questions?

Thank you, Counsel.

The cause is submitted. And that concludes arguments for this morning. The martial will adjourn the court.

2008 WL 5203849 (Tex.)