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Supreme Court of Texas
The John G. and Marie Stella Kenedy Memorial Foundation, Petitioner,
v.
Ann M. Fernandez, Respondent. (08-0528 and 08-0529).
Frost National Bank, Former Executor of the Estate of Elena, Suess Kenedy, Deceased, and Frost National Bank and Pablo, Suess, Trustees of the John G. Kenedy, Jr. Charitable Trust, Petitioners,
v.
Ann M. Fernandez, Respondent. (08-0534).
Nos. 08-0528; 08-0529; 08-0534
December 15, 2009

Oral Argument

Appearances:Macey Reasoner Stokes, Baker Botts LLP, Houston, TX, for petitioner: The John G. and Marie Stella Kenedy Memorial Foundation in causes 08-0528 and 08-0529.
Jacqueline M. Stroh, Crofts & Callaway, San Antonio, TX, for petitioners: Frost National Bank, Former Executor of the Estate of Elena Suess Kenedy, Deceased, and Frost National Bank and Pablo Suess, Trustees of the John G. Kenedy, Jr. Charitable Trust in 08-0534.

Julia F. Pendery, Attorney at Law, Dallas, TX, for respondent: Ann M. Fernandez in Consolidated cases 08-0528; 08-0529; 08-0534.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett. Justice Harriet O'Neill and Justice Eva Guzman, did not participate.

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CHIEF JUSTICE WALLACE B. JEFFERSON: Be seated. In these consolidated cases, two of our colleagues are not sitting, Justice O'Neill and Justice Guzman are not sitting in 08-0528, 529 and 534. But the Court is now ready to hear argument in these consolidated cases involving the John G. and Marie Stella Kenedy Memorial Foundation, the Frost National

Bank, executor of the Estate of Elena Suess Kenedy, deceased versus Ann M. Fernandez.

MARSHALL: May it please the Court, Ms. Reasoner Stokes representing the Foundation, and Ms. Stroh representing the trust will present argument for the Petitioners. The Petitioners have reserved eight minutes for rebuttal. Ms. Reasoner Stokes will present the initial 12-minute argument; Ms. Stroh will present the rebuttal.

ORAL ARGUMENT OF MACEY REASONER STOKES ON BEHALF OF THE PETITIONER

ATTORNEY MACEY REASONER STOKES: May it please the Court, the Thirteenth Court of Appeals' opinions in these cases rests on three erroneous and novel holdings under Texas law. First, that the holding that one trial court must defer to another trial court to determine a matter of its own subject matter jurisdiction, the plaintiff's standing. Second, the holding that a probate court has exclusive jurisdiction over inheritance claims brought decades after the district court has probated and construed the wills and the estates have been fully administered and closed. And third, the holding that a putative illegitimate heir has a right to intrusive discovery and a full-blown evidentiary hearing on paternity in support of claims of inheritance that are clearly time barred under any conceivable statute of limitations. The idea that one court has to let another court decide an issue of standing is directly contrary to the well-established principle that the one type of jurisdiction a court always has is the jurisdiction to determine its own jurisdiction. Here the court of appeals and all the parties agree that the district court was a proper jurisdiction in which to bring bills of review seeking to set aside that court's 1949, 1975 and 1978 judgments affecting the Kenedy and East estates, that jurisdiction necessarily included the jurisdiction to determine whether Ms. Fernandez had standing as an heir to bring those bills of review. And in the particular circumstances of this case, the probate court had no such jurisdiction. While one might naturally --

JUSTICE NATHAN L. HECHT: Do you agree that it has to be established at the outset? That's the first thing that the Court has to do.

ATTORNEY MACEY REASONER STOKES: Well, I agree that heirship is a issue of standing; I don't agree that the Court has to make a factual determination of paternity. In this case the Trust and the Foundation, neither one of them challenged Ms. Fernandez' allegations of paternity, her factual allegations, in their Motions for Summary Judgment, and under this Court's opinion in Texas Association of Business vs. Texas Air Control Board, the Court was entitled to accept those factual allegations of paternity as true for purposes of standing and proceeded to grant summary judgment based on legal bars to standing or to the claims themselves.

CHIEF JUSTICE WALLACE B. JEFFERSON: Can you think of any other possible reason to defer to the probate court, other than for determination of paternity? Are there any other original matters that would be decided by that court?

ATTORNEY MACEY REASONER STOKES: No. In these circumstances, Your Honor, where we've had the decedent died many decades ago and they died

with wills that had been probated, estates that had been fully administered and closed, there is no situation in which the district court with exclusive jurisdiction over the bills of review to set aside its own judgments would have jurisdiction. I think it's natural that many people assume that, “Well, the probate court must always be the correct jurisdiction in which to bring inheritance claims. But in reality, the Probate Code only gives the probate court exclusive jurisdiction over inheritance claims when, one, the decedent died intestate without a will, and two, there is a pending estate administration in the probate court or there has never been an estate administration.” And here of course, we have decedents who dies with wills and we have fully administered and closed estates. And I think the latter fact is particularly important. There's a line of cases that we cite in our brief that where an estate has been fully administered and closed, the district court has jurisdiction over matters incident to the estate, and the probate court has no such jurisdiction, and that's the Cogley v. Welch, Texas Commerce Bank, Rio Grande Valley v. Correa, and Qualia v. Qualia case to cite a few.

JUSTICE DAVID M. MEDINA: Is there ever a circumstance where an estate can be reopened?

ATTORNEY MACEY REASONER STOKES: Well, Your Honor, our position would be we have not found cases. I don't think there are strict guidelines for when you reopen an estate. The probate code defines an estate as the property itself, the real and personal property of the decedent, and our position is you wouldn't be able to reopen an estate in terms of giving a pending estate administration of the probate court because there is no longer any property in the estate.

JUSTICE NATHAN L. HECHT: Well, what's the difference between assuming standing and subject matter ju-risdiction, which we've said we can't do, and taking the allegations on their face?

ATTORNEY MACEY REASONER STOKES: Well, I think under this Court's Texas Association of Business case, the Court needs to determine that there is standing and therefore subject matter jurisdiction, but in making that determination, it can accept the factual allegations in the petition as true for jurisdictional purposes. While in Bland Independent School District, this Court said that there may be occasions when you need to take evidence on standing. Here in the context of these summary judgments, there was not a challenge to those factual allegations, and so I believe that this Court's precedent does not put the onus on the district court to factually determine that matter in that situation.

JUSTICE NATHAN L. HECHT: But you always have to explore your own jurisdiction.

ATTORNEY MACEY REASONER STOKES: Right.

JUSTICE NATHAN L. HECHT: Because the U.S. Supreme Court has been pretty clear about this. If the Court doesn't have power to act, it shouldn't be deciding the merits.

ATTORNEY MACEY REASONER STOKES: That's right, but the Court has also said at the same time, and I think this happens in many cases, that in

determining that jurisdiction you don't have to have a full-blown trial on the factual allegations in a petition to get there. And in the Foundation's case, we assume the factual allegations of paternity, but we said there was also a legal bar to her standing, because proving an interest in an estate necessary for standing in these cases requires not only a biological relationship to the decedent but a legal right to inherit under the laws of distribution, and we argued that that legal right was barred by limitations. And this Court on prior occasions has held that type of interest can be barred on a legal theory, such as in the Trevino v. Turcotte opinion that this Court wrote in 1978 and in the context of these prior cases, the Court held that the interest in an estate of putative heirs was barred as a matter of law by estoppel.

JUSTICE NATHAN L. HECHT: And that's a time-bar separate from the time-bar on bill of review proceedings, just generally?

ATTORNEY MACEY REASONER STOKES: That's right. We argued both, Your Honor. We argued that there's a residual four-year statute of limitations that applies to her heirships' claims, which would bar her from ever proving that right and therefore ever having standing to set aside any judgments relating to the estate, but also that there's a two-year statutory bill of review statute of limitations and also a four-year equitable bill of review and that that would bar her claims on the merits as well, if she had standing.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are limitations in that regard subject to discovery, the discovery rule?

ATTORNEY MACEY REASONER STOKES: No, your Honor, I believe that the court of appeals -- oh, excuse me -- the district court correctly held that she doesn't -- she admits in this case that without the discovery rule, her claims are clearly time barred. She never argued to the contrary. And by urging the discovery rule here, she's seeking greater rights than legitimate and adopted children have in this context, which this Court has never applied the discovery rule to those claimants. And I think the same reasons that this Court has declined to apply the discovery rule to those claimants applies here, that it would be at odds with the strong public policy in favor of the finality of estates and the orderly administration of estates, as well as the policy underlying statute of limitations generally. The claims against the Foundation I think are a case in point of the need for limitations to bar stale claims. Here Mrs. Fernandez is seeking the opportunity to prove that nearly fifty years ago Mrs. East was subject to undue influence in executing her will and making mineral assignments to the Foundation. I mean it's extremely unlikely that there are even any living witnesses to such a claim, much less witnesses with intact memories or extent documents.

JUSTICE PAUL W. GREEN: Is there no venue available to a claimant seeking to establish inheritance rights after a long period of time like in this or even shorter?

ATTORNEY MACEY REASONER STOKES: I'm sorry, Your Honor, I didn't hear that.

JUSTICE PAUL W. GREEN: Well, if you have someone who claims inheritance rights --

ATTORNEY MACEY REASONER STOKES: Right.

JUSTICE PAUL W. GREEN: -- is there any venue that they have available to them to establish those rights after a lengthy period of time when they find out about it?

ATTORNEY MACEY REASONER STOKES: No, your Honor, I think the discovery rule is applied on a categorical basis, and this Court has decided in Little v. Smith in the context of adopted children that the interest in the finality of estates which is a very important interest, as well as the interest in statute of limitations, that you have to weigh the right to establish your inheritance rights against those policies and that those policies win out in favor of not applying the discovery rule.

JUSTICE DON R. WILLETT: But adopted children know they're children. I mean --

ATTORNEY MACEY REASONER STOKES: I'm sorry?

JUSTICE DON R. WILLETT: Adopted children know they are in fact children entitled to perhaps raise a claim, but if you discover a generation later that long ago you may have acquired this inheritance right, I just don't quite see the comparison between adopted children and --

ATTORNEY MACEY REASONER STOKES: Well, adopted children know that they have unknown biological parents, that their adoptive parents are not their biological parents, but in reality I think as a general proposition adoptive children have much greater impediments to discovering their paternity and even maternity than an illegitimate child will, because an illegitimate child doesn't have the sealed adoption records and laws of confidentiality. But in this case, I think even if the Court were to apply the discovery rule, the evidence conclusively established that she was on inquiry notice of her claims outside the statute of limitations. She testified that even before Mr. Kenedy died in 1948 she believed he was her father and she did nothing in the next 50 years other than make one inquiry of her mother. And I think all the evidence that she pointed to in response to summary judgment went to when she confirmed in her mind that he really was her father, and it didn't raise a fact issue on the should have known part. But just a brief word about the injunction. We believe the Court was well within its discretion to issue anti-suit injunctions against the probate court in these circumstances, the court of appeals' holding that they were abuses of discretion was I think primarily predicated on its erroneous jurisdiction holding, and it ought to follow along with that holding. The record here is very similar to the record before this Court in Gonzalez v. Reliant. We have a plaintiff pursuing identical claims in two courts and a history of interference with the district court's jurisdiction by the probate court. The record before the district court contained Ms. Fernandez' pleadings in the probate court in which she sough the very same relief, to set aside the three judgments of the district court that she attacks here, to set aside the wills and to declare her the heir with right to a distribution of the property. He also had the, Mrs. Fernandez' counsel's express statements on the record that she would continue to pursue all these very same

claims despite his summary judgments, and he also had a history of interference by the probate court. The probate court had attempted to transfer these three bills of review to itself and the court of appeals had struck that down by a conditional writ of mandamus, and in response to that conditional writ instead of vacating the transfer orders as directed, the probate court issued an exhumation order, and also had in the record an attempt by the probate court to set a hearing on a motion to reopen the Kenedy Estate days before the hearing on the summary judgment, and that hearing would have gone forward, absent the district court's TRO. If the Court doesn't have any more questions.

CHIEF JUSTICE WALLACE B. JEFFERSON: There are no questions. Thank you.

MARSHALL: May it please the Court, Ms. Pendery will present argument for the Respondent.

ORAL ARGUMENT OF JULIA F. PENDERY ON BEHALF OF THE RESPONDENT

ATTORNEY JULIA F. PENDERY: Good morning. May it please the Court, Ann Fernandez asks this Court to affirm the judgment and opinion of the Thirteenth Court of Appeals, but for reasons not expressed therein. Fernandez asks the Court to find that once Judge Bañales said, “These cases are barred by limitations,” that was simply his first-tier finding on the bill of review that she had not made out a prima facie case and therefore has very limited jurisdiction under the bill of review closed at that point. It would stand this Court's bill of review jurisprudence on end to find that once Judge Bañales said simply, “She is barred by limitations,” that he actually could go ahead and rule on the merits of summary judgments and enter very broad anti-suit injunctions even though he had just declined to reopen by bill of review.

JUSTICE NATHAN L. HECHT: So you don't agree that the timeliness of the heirship claim is involved here?

ATTORNEY JULIA F. PENDERY: I do agree it's involved, Your Honor, very much so, but that wouldn't have been my first choice or what I would ask this Court to do in terms of why the case needed to be --

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY JULIA F. PENDERY: -- why the summary judgments and injunctions needed to be reversed.

JUSTICE NATHAN L. HECHT: If the heirship claim is time barred, there's been quite a bit of litigation, is that the end of it?

ATTORNEY JULIA F. PENDERY: If the discovery rule is not applied to allow the various causes of action here, that is the end of it. If as this Court was informed several years ago, exhumation shows that she is not the heir of John Kenedy, Jr., and not the natural daughter, that's the end of it too. But once exhumation was argued in this Court, Petitioners not liking the fact that the probate judge they had asked for had ordered exhumation because he thought that the most economical and expeditious way to get things done, they didn't like the fact that he ordered that, so they went back to the Court with limited jurisdiction over only the bills of review, did this end run and

convinced their local judge that he had the possibility or the jurisdiction to wipe out the entire litigation. That's just simply not correct. Let me point out, the Court may not realize that early on in the litigation when Judge Herman ordered exhumation, he stayed discovery. So obviously so that not everyone would spend years and years in litigation when we needed to find out the parentage, and the DNA made available to us was not of sufficient quality to get anything better than the 72 percent match, hence Judge Herman's order. Now, Judge Herman, as the probate court was the only court and remains the only court with comprehensive jurisdiction over all these matters. They are not all the same, the bills of review are very limited procedures designated and needed perhaps on an either or basis to deal with things that happened in these three prior cases.

JUSTICE PAUL W. GREEN: Well, is there another example of a probate court deciding by sweeping in a bill of review from a district court and deciding that bill of review in the probate context?

ATTORNEY JULIA F. PENDERY: Yes, and that's not uncommon at all. It's why Probate Code Section 5(b) exists. What had happened in this case is that the estates were not reopened. In fact John Kenedy, Jr.'s estate never was closed, so we initially had asked the probate court to reconsider what had happened in that estate. However, when he ordered exhumation -- I'm sorry, before that, when the mandamuses went on the transfer in of these bills of review in 2004, the Thirteenth Court said, “Well, he couldn't transfer in under 5(b) until he had reopened the estate.” For the first time the Thirteenth Court says, “We're going to treat John Kenedy's estate as closed because of the passage of time,” which was news to us.

JUSTICE PAUL W. GREEN: Okay, you're saying there are cases out there were this has happened?

ATTORNEY JULIA F. PENDERY: Yes, there are and they are all under Probate Code 5(b). And even in the mandamus of 2004 the Court said, “Once he reopens the estate, he can pull all of it in to him,” that's why 5(b) give the probate judge that much leeway so that he can get everything in front of him, and ultimately that's what was going to happen here. But when we realized we had to do a formal motion to reopen the estate, we filed that, that's when our opponents ran to Judge Bañales and said, “We need a TRO and an anti-suit injunction to prevent reopening.”

CHIEF JUSTICE WALLACE B. JEFFERSON: You mentioned a couple ways in which this matter would be concluded, one was if the discovery rule didn't apply, another is if exhumation occurred and paternity was not established or was clearly ruled out. Would a third be if the probate code provision that was in effect back in 1948 that said, “Nonmarital children may not inherit.” If that were enforced and enforceable, would that end this matter as well?

ATTORNEY JULIA F. PENDERY: Well, perhaps, but the U.S. Supreme Court has very strongly said that such provisions are unconstitutional and so against public policy that they should be found unconstitutional retroactively and applied retroactively. Actually, let me discuss that for a few minutes, because while we believe that the 105th did not have jurisdiction to go forward with deciding whether the discovery rule

applied, et cetera, here's why we think that was incorrect. Again, let's place the bills of review in context, they are essentially what I would call the suspenders where the belt in the litigation was already these motions and the four cases pending in the probate court which would have taken care of everything, and which also would encompass potential collateral attacks as to the voidness of the judgments in 48 and 75, and the reason those collateral attacks would be very meritorious attacks is because of the Reed v. Campbell line of cases. Now, the U.S. Supreme Court, as you know, said, in Trimble v. Gordon that nonmarital children were entitled to inherit from their parents and statutes that prevented otherwise were unconstitutional. Then the Supreme Court follows up with Reed which came out of this state and says, it is so bad to discriminate against children who didn't ask to be born of out wedlock that you could apply retroactively. Now Reed definitely said reasonable restrictions could be placed on that and that is, of course, where your general policy in favor of finality of estates comes forward. We agree reasonable restrictions could be placed on that, we even have some suggestions of what those could be. For example, preventing use of the discovery rule to assert inheritance claims if there's already been a determination of heirship in the estate, or if there was an ad litem appointed for unknown heirs --

CHIEF JUSTICE WALLACE B. JEFFERSON: I thought there was a determination. Wasn't in the Humble Oil contest wasn't there a will construction that said there are no other heirs, no children whatsoever?

ATTORNEY JULIA F. PENDERY: That's not a determination of heirship. Yeah, part of the problems --

CHIEF JUSTICE WALLACE B. JEFFERSON: “There are no heirs” is not a determination of heirship?

ATTORNEY JULIA F. PENDERY: No, it's not a determination of heirship. In fact, first you have to get to the finding of intestacy, but that's where we were trying to get in the very beginning. No, there was no determination of heirship and no appointment of ad litem for unknown heirs. That's what gives us the opening in these probate pro-ceedings.

JUSTICE DAVID M. MEDINA: Now you said I think you said the discovery rule should apply perhaps?

ATTORNEY JULIA F. PENDERY: Yes.

JUSTICE DAVID M. MEDINA: Well, Ms. Reasoner Stokes said that as far back as 1948 there may have been an allegation or some belief that she was the daughter of Mr. Kenedy. So what significance, if any, does that play?

ATTORNEY JULIA F. PENDERY: Not much. Let me tell you first there were significant differences of opinion in fact within the deposition itself, however it doesn't matter what she suspected back then for a couple of reasons. The first is that under Johnson and Higgins the discovery rule doesn't begin or the cause of action doesn't accrue until the fact comes into existence that gives you a right to seek a legal remedy. Clearly she did not have a legal a right to seek a legal remedy back when she was a teenager and the laws prevented illegitimate

children from inheriting. Also, it's interesting that Petitioners want to say this Court should apply limitations to a situation where the depo testimony said she suspected she might be his daughter. She asked her mother, the one person who would know the truth of that fact and her mother said no. So even if somehow you could start it back when she had no rights to assert, she did make reasonable inquiry, the fact was denied, and I really don't think this Court wants to say she had to sue back then anyway when she couldn't sue for anything. So to me that's sort of a red herring issue.

JUSTICE DAVID M. MEDINA: Well, but to do otherwise, it seems to just for all of these type of issues and to upheaval where someone can forever come and make these type of claims, and there's never a finality for these type of estates.

ATTORNEY JULIA F. PENDERY: Well, now for a couple of reasons that is one reason I'm suggesting some reasonable restrictions here.

JUSTICE DAVID M. MEDINA: Okay.

ATTORNEY JULIA F. PENDERY: And we do have an unusual case in the way things went down, et cetera. Some of those other reasonable restrictions I was going to suggest was to require reopening of an estate first, which is of course what we were trying to do, or even to limit to first generation claims. That might at least give you some sort of time limitation. But blanketly saying if --

JUSTICE DAVID M. MEDINA: So you say the estate was never closed, correct?

ATTORNEY JULIA F. PENDERY: The John Kenedy, Jr. Estate was never closed. The Sarita Kenedy East Estate was formerly closed pursuant to a settlement agreement. Blanketly saying if the truth was successfully concealed for four years, then you're flat out of luck, I think that is not a reasonable restriction. Now this Court waived these polices back in Little v. Smith, and the Petitioners rely heavily on this Court's determination that the finality of estates was paramount. However in Little v. Smith the Court was comparing or weighing, if you will, the general interest and finality of estates with a very specific interest in encouraging adoption. And in fact Catherine Smith wanted something that went against that strong public policy. Catherine Smith was relying on reopening secret adoption records. This Court found very clearly that when making that balancing determination, it was so important to encourage adoption and secrecy was such an important part of that that in fact the long legislative scheme encouraging that secrecy indicated an intent that that was a much more important policy. Here we have just the opposite. We have Ann Fernandez seeking to do something that is in line with a policy that is very strong here. It's very strong policy for the U.S. Supreme Court to say, “Remedying past discrimination against nonmarital children is so important, it needs to be applied retroactively,” and this Court recognized that. In Dickson v. Simpson this Court recognized how important it was to allow illegitimate children to assert their inheritance rights. In this type of situation where you don't learn that you are a child with potential inheritance rights until many years later, there is absolutely no other way but the discovery rule to give an opportunity to assert those important rights.

JUSTICE PHIL JOHNSON: Counsel, you've asserted that she's a child and you pled that in the district court, and we've been struggling with jurisdiction up here. We've had several cases on what does it take to get jurisdiction and you've pled into jurisdiction, and opposing counsel has not said they ever challenged that. So if there is a pleading, as you have said, we have an illegitimate child, we are an illegitimate child in regard to the bills of review, and not setting those aside, and that's not been challenged, does a Court not necessarily take those at face value and operate on those and go forward? And then if it does that, can we sometime later come in when that Court has done that, you've pled that there's jurisdiction, they've not challenged it, and then later can we come in with the probate court and make that into a void judgment by a determination that no one has ever challenged? That's a troubling situation to me.

ATTORNEY JULIA F. PENDERY: Well, actually they've both challenged it and not challenged it. That was part of our problem. The petitioners in the 105th District Court said, “She doesn't have standing here.” And then they said --

JUSTICE PHIL JOHNSON: But for what reason?

ATTORNEY JULIA F. PENDERY: Across the board, she doesn't have standing here and probably because the estates hadn't been reopened, she hadn't been -- intestacy hadn't been determined.

JUSTICE PHIL JOHNSON: Well, we're talking probably, is there anything in the record that says what standing issue was raised and actually discussed and debated in the trial court? Do we have a record of that?

ATTORNEY JULIA F. PENDERY: A general issue of standing, then on summary judgment a statement that, “Well, actually let's assume she's the heir.” And then even if we're assuming, I think we shouldn't, that Judge Bañales had right to determine that standing, first off, what we focused on in the court of appeals was the fact that this Court had jurisdiction over that standing issue exclusively at that time.

JUSTICE PHIL JOHNSON: Okay, but you did plead that she had standing? You did plead she was a child?

ATTORNEY JULIA F. PENDERY: We pleaded she was a child and that that was going to be what would give her standing to bring a bill of review if the discovery rule could be applied.

JUSTICE PHIL JOHNSON: So was there evidence anywhere that she was not a child in that proceeding?

ATTORNEY JULIA F. PENDERY: No.

JUSTICE NATHAN L. HECHT: But my question to Petitioner is, well, is there a time component to standing as well as genetic, the physical component?

ATTORNEY JULIA F. PENDERY: Right.

JUSTICE NATHAN L. HECHT: There's a time component to bringing a bill of review.

ATTORNEY JULIA F. PENDERY: Right.

JUSTICE NATHAN L. HECHT: But there's a time component I suppose to bringing a claim of heirship. Is there a time component to standing to assert something as an heir? It's a fairly fine distinction.

ATTORNEY JULIA F. PENDERY: It is, I understand.

JUSTICE NATHAN L. HECHT: But we're troubled here because we have to decide subject matter jurisdiction at the outset and we can't assume it. So the question I guess boils down to is there a way to do that apart from exhumation? And you probably think not, but I wondered.

ATTORNEY JULIA F. PENDERY: Well, actually it's unclear from the evidence that was before Judge Herman whether there is other evidence of a sufficient quality that wasn't made available to us.

JUSTICE NATHAN L. HECHT: I'm just talking about as a legal matter, is there a component to or how-- has standing been established to do as a predicate to decide for the trial court's decision? That's I guess that's the question.

ATTORNEY JULIA F. PENDERY: Well, again I don't think so because you are back to the probate court is the one that has the right to determine is she an heir and the exclusive right to determine that, is she an heir. But as far as is there a limitations component there to heirship, it's going to be the four years, but again the discovery rule should be applied.

JUSTICE PHIL JOHNSON: Let me go through and follow what we were discussing here. So if we have a suit where someone sues and says, “I am a child,” and then no one challenges that and they go through and they do get a bill of review opened and redistribute property, and then six or seven years later someone challenges the relationship of that child that no one challenged, in that we've already got a final judgment, they've gone back, they've gathered the property, redistributed it, and now five or ten years later someone can come and say, “We don't think they were a child to start with.” That judgment is void and we've got to go back and redo it again and again and again it seems like where we may be putting ourselves if we don't go on the jurisdictional allegation with no proof otherwise.

ATTORNEY JULIA F. PENDERY: Well now in that instance you do have a res judicata affect. If the determi-nation was actually made, if that child had a day in court and somebody could come in and challenge it, and actually that kind of does bring me to considering the effect of what's happening here. Now I think the easiest question before the Court today is the anti-suit injunctions and how improper and way beyond the jurisdiction of the trial court they went. And let me say that Fernandez has been prevented by those anti-suit injunctions from clarifying her pleadings in the probate court and has said though in open court several times that she is not looking to undue any deeds to any-thing, to redistribute any property, to disturb present charities. Yes, the probate court mechanisms by which she must plead to get to a

right to inherit do require her to say, “I need to make some judgments void, or I need a bill of review and I need to reopen some estates.” But she has clearly said that the effect of what she's doing here is looking forward and not looking to unravel things.

CHIEF JUSTICE WALLACE B. JEFFERSON: You talked about res judicata a moment ago, and I referred to the 1949 or so will contest judgment and I just want to read one part of it to you. And you tell me why that was not a conclusive determination that Fernandez is not an heir back when that trial court judgment was signed. The trial court held it was, quote, “Conclusively established by the evidence herein that said John G. Kenedy, Jr. was not survived by any children, no children having ever been born to or adopted by him,” and all necessary and interested parties were included in the proceeding. Why is that not conclusive as to whether Fernandez may be an heir or not?

ATTORNEY JULIA F. PENDERY: Okay, that isn't a determination of heirship, that's -- in the context of --

CHIEF JUSTICE WALLACE B. JEFFERSON: Why would that not be res judicata though of this question?

ATTORNEY JULIA F. PENDERY: No.

CHIEF JUSTICE WALLACE B. JEFFERSON: Why not?

ATTORNEY JULIA F. PENDERY: Well, it's based on, first, a finding of no intestacy. You understand that was an agreed judgment. Humble Oil started it because they could see that will provided an intestacy as to real estate. So the whole finding of there being no heirs is, number one, an agreed judgment with only the wife and the sister participating, and number two, you don't get to the determination of heirship because the finding of no intestacy was incorrect and it leaves the judgment open and vulnerable to us. Now I don't want to forget that the Trust started this litigation. The Court may not be aware of the fact that back after in May of 2000 when Ann Fernandez learned that Kenedy was in fact her father, her son Ray Fernandez started making inquiries to help her understand and learn about this man, at which point the Trust claimed she was a necessary party in the De Llano v. Suess litigation and brought her into litigation. At that point, clearly she was on notice and she started filing proceedings. So I would like this Court to understand that she has still not had her day in court. She has still had this quick end run taken in these limited cases that are a secondary way of getting to where she needs to get and she has had that cut off by these very broad anti-suit injunctions. So we are asking the Court to affirm the decision of the Corpus Christi Court of Appeals and find that the bill of review jurisdiction window closed once the judge found that limitations barred it, an alternative --

JUSTICE PAUL W. GREEN: Just a brief question.

ATTORNEY JULIA F. PENDERY: You bet.

JUSTICE PAUL W. GREEN: You say that she didn't find out until her mother told her, and yet we know that her mother denied it some years

earlier. Now that wasn't the estate that was concealing that from her, it was her mother. What affect would that have on the estate?

ATTORNEY JULIA F. PENDERY: Well, first off we're not saying that the Estate or the Trust or anything did anything wrong back then. We are saying that a discovery rule applies not because somebody did something wrong, but because --

JUSTICE PAUL W. GREEN: But wouldn't the discovery rule apply to something that the defendant below had done, like conceal, fraudulent concealment or whatever that would be keeping her from getting that information, when in fact it was her mother that did that?

ATTORNEY JULIA F. PENDERY: I don't think that should affect her right to go forward, especially because at the time her mother denied it, there was no legal right to pursue. There was no legal right to pursue. The fact comes into existence in May of 2000 at a time when she has a legal right to pursue. And we believe equity requires the discovery rule to do right and ask the Court to affirm the court of appeals' opinion.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counselor.

ATTORNEY JULIA F. PENDERY: You're welcome.

REBUTTAL ARGUMENT OF JACQUELINE M. STROH ON BEHALF OF PETITIONER

ATTORNEY JACQUELINE M. STROH: May it please the Court, Your Honors, I would like to start with the 1949 will construction judgment which this Court and Fernandez has recognized as the impediment to her ability to proceed. First of all, it was not an agreed judgment. If the Court would look at the pleadings, it's clear that there was a dispute between Humble Oil and Elena Seuss and Sarita Kenedy East over whether a will construction was even necessary. Furthermore, as the Court noted, the 1949 will construction judgment did determine that Mr. Kenedy had no heirs other than those that were involved in the will construction proceeding. Fernandez now states that that was not an heirship determination, yet she, based on the court of appeals' erroneous holding, would state that her bill of review attacking that judgment does involve issues of heirship that are within the exclusive jurisdiction of the probate court which is wholly inconsistent. The probate court does not have jurisdiction over issues of heirship in any event, because there is no open and pending estate. And I would like to point out that not only did the Thirteenth Court of Appeals hold that the estates of both Mr. Kenedy and his wife Mrs. Kenedy were closed by virtue of complete administration and long periods of inactivity. But in --

JUSTICE NATHAN L. HECHT: If the estates had been reopened but for the injunction, would the probate court have jurisdiction or exclusive jurisdiction?

ATTORNEY JACQUELINE M. STROH: No, Your Honor, the court would not have jurisdiction. I'd like to first point out that Fernandez didn't challenge the TRO or temporary injunction on appeal. But no we would not. We cited case law in our brief holding that once an estate has

been completely administered and all bills paid, there's no more property, the probate court actually loses jurisdiction over the case and has no jurisdiction. Furthermore, if you look at Section 48 of the Texas Probate Code, which is the section that discusses heirship, it talks about intestacy, the need for intestacy, pending administrations. None of those circumstances exist here that would give the probate court juris-diction of heirship.

JUSTICE PHIL JOHNSON: Ms. Stroh, if say you had a spouse or widow or widower and another party who wanted not to recognize that there were children of the decedent and they went to court and made those representations, and based upon that testimony the court made a finding or determined that there were no heirs of the decedent, no children. How does how would someone where there's conclusive proof that there was a child, how does someone several years later then come back in and challenge that? Is there any method?

ATTORNEY JACQUELINE M. STROH: I'm not aware of any method, I'd first like to point out, of course, there's no evidence like that in this record.

JUSTICE PHIL JOHNSON: This is not your case.

ATTORNEY JACQUELINE M. STROH: That's right.

JUSTICE PHIL JOHNSON: If that were to happen because there's a contention that this was an agreed judgment and there are suits where people go in and say, “We have a controversy, we need the court's approval to work it out,” and then the testimony is there are no children when in fact there was a child and they knew there was a child. It's almost a fraud on the court, but the court's finding, the only evidence before the court is no children.

ATTORNEY JACQUELINE M. STROH: Not by bill of review. Bill of review one of the elements is that extrinsic fraud has to exist. That kind of fraud would not be extrinsic fraud, and in fact there are numerous cases, I think some of them are cited in the exhumation briefing, dealing with allegations of paternity, where a mother represents to the court that so and so is the father of a child allegedly fraudulently so, and the court's say, “Sorry, but that's extrinsic fraud and you cannot reopen that paternity determination by bill of review.”

JUSTICE PHIL JOHNSON: Well, part of the judgment that the Chief Justice read then, assuming it was completely wrong because both of the ladies involved there knew that there was a child, illegitimate or legitimate. Probably not legitimate, but an illegitimate child that was alive and they knew that, and so we have -- there's just no vehicle for that child to ever claim an inheritance from his or her father?

ATTORNEY JACQUELINE M. STROH: There's no vehicle, and certainly not in the circumstances of this case.

JUSTICE PHIL JOHNSON: And are they barred by the judgment?

ATTORNEY JACQUELINE M. STROH: They are barred by the judgment.

JUSTICE PHIL JOHNSON: What basis, res judicata?

ATTORNEY JACQUELINE M. STROH: Res judicata, also it's a jurisdictional impediment to the probate court going forward because absent intestacy there can be no determination of heirship, so she's barred for that additional reason. And I'd also like to point out to the Court, I know that Fernandez has made some arguments that the judgment does not bind her because she was not a party, but we have cited case law for the proposition that a will construction proceeding is a proceeding in rem and that in rem proceedings bind the whole world. And furthermore that it would turn bill of review procedure on its head to require parties to give notice to someone under a statute that may under some future set of circumstance be declared unconstitutional when the parties are entitled to presume that -- excuse me -- that the statutes in existence at that time are constitutional and when those statutes did not allow her a right of in-heritance or did not require her to be notified and to participate in this will construction proceeding.

JUSTICE DALE WAINWRIGHT: You pointed out that the 1949 judgment was not an agreed judgment.

ATTORNEY JACQUELINE M. STROH: That's right.

JUSTICE DALE WAINWRIGHT: It was it did however occur because of a settlement of the dispute, right?

ATTORNEY JACQUELINE M. STROH: No.

JUSTICE DALE WAINWRIGHT: At least a partial settlement.

ATTORNEY JACQUELINE M. STROH: Not a partial settlement, Sarita Kenedy East and Ms. Kenedy or Mrs. Kenedy did not dispute among themselves that the will completely disposed of Mr. Kenedy's estate. But Humble Oil proceeded and contended that a will construction was actually necessary, and there was a dispute between Humble Oil and Ms. Kenedy, Mrs. Kenedy and Ms. East that a will construction was even necessary in the first instance.

JUSTICE DALE WAINWRIGHT: So some of the material findings, or were the material findings in the judgment then the result of an adversarial process or --

ATTORNEY JACQUELINE M. STROH: Yes, there was testimony presented, there was an evidentiary hearing and a witness testified, Mr. Kenedy's attorney testified as to what he thought the meaning of the will was.

JUSTICE DALE WAINWRIGHT: Was it adversarial? You said there was evidence taken --

ATTORNEY JACQUELINE M. STROH: Yes.

JUSTICE DALE WAINWRIGHT: Was it an adversarial proceeding?

ATTORNEY JACQUELINE M. STROH: I don't know what you mean by “adversarial.” I mean the parties did not agree in the sense that -- the parties did not agree in the sense that a will construction was necessary.

JUSTICE NATHAN L. HECHT: Did the trial court in this case, was the effect of its summary judgment to de-termine that Ms. Fernandez does not have standing or that she has standing but can't prevail?

ATTORNEY JACQUELINE M. STROH: I'm sorry, could you repeat? I'm sorry.

JUSTICE NATHAN L. HECHT: Was the effect of the trial court's summary judgment that Ms. Fernandez does not have standing or that she has standing but cannot prevail?

ATTORNEY JACQUELINE M. STROH: Well, Your Honor, there were alternative grounds raised in the motion for summary judgment, some of which did address her standing and some of which did not.

JUSTICE NATHAN L. HECHT: He granted it all?

ATTORNEY JACQUELINE M. STROH: And he granted it on a broadly worded order.

JUSTICE DAVID M. MEDINA: What significance, if any, does Ms. Pendery's statement that it was the Trust who started this litigation have on all of this?

ATTORNEY JACQUELINE M. STROH: It has no relevance whatsoever. It would be disingenuous for her to suggest that had the Trust not originally tried to bring her into litigation, which was in any event unsuccessful, she would not have pursued the litigation. Although I was not involved in the case at the time, it would be my guess that the reason was simply to get it resolved at that time knowing that litigation would be pending by Ms. Fernandez. Questions?

CHIEF JUSTICE WALLACE B. JEFFERSON: Any questions? Thank you, Ms. Stroh. That cause, the consolidated causes are now submitted and the Court will take a brief recess.

MARSHALL: All rise.

[End of proceedings.]

The John G. and Marie Stella Kenedy Memorial Foundation, Petitioner, v. Ann M. Fernandez, Respondent. (08-0528 and 08-0529). Frost National Bank, Former Executor of the Estate of Elena, Suess Kenedy, Deceased, and Frost National Bank and Pablo, Suess, Trustees of the John G. Kenedy, Jr. Charitable Trust, Petitioners, v. Ann M. Fer-nandez, Respondent. (08-0534).
2009 WL 5113428 (Tex. ) (Oral Argument )

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