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Supreme Court of Texas.
Jefferson State Bank, Petitioner,
v.
Christa C. Lenk, Administratrix of the Estate of Mickey Carl Marcus, Respondent.
No. 09-0269.
February 16, 2010.

Oral Argument

Appearances:Ellen B. Mitchell, Cox Smith Matthews Incorporated, San Antonio, TX, for petitioner.

S. Mark Murray, Law Office of S. Mark Murray, San Antonio, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett, Justice Eva Guzman.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 09-0269, Jefferson State Bank vs. Lenk.

MARSHALL: May it please the Court, Ms. Mitchell will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF ELLEN B. MITCHELL ON BEHALF OF THE PETITIONER

ATTORNEY ELLEN B. MITCHELL: May it please the Court, this case involves the rights and duties under the Probate Code of persons or entities to whom letters of administration are presented. It also involves the duties imposed on bank customers by Section 4.406 of the UCC, and the bank's defenses under that same statute. I would like to first address the Probate Code issue. Section 186 of the Texas Probate Code provides that letters of administration shall be sufficient evidence of the appointment and qualification of the personal representative of an estate. Section 183 defines letters of administration as the

certificate of the clerk of the court, granting the same, attested by the seal of the court, and stating that the administrator is duly qualified, the date of the qualification and the name of the deceased. Mel Spillman presented to Jefferson Bank a document that complied with the statutory requirements for letters of administration in all respect ascertainable from the face of the document, including the Court's seal.

JUSTICE HARRIET O'NEILL: What if, and I understand this is kind of a unique situation, because there was access to the actual seal, but what if it was a bad forgery? What if it was not the clerk, there was a seal, but it was really pretty -- I don't want to say pretty obviously, but it's not clearly the seal. What burden does the bank have to test the face of the document?

ATTORNEY ELLEN B. MITCHELL: Well, Your Honor, and I think that's a very important point in this case, because the argument has been made that what we're advocating is that any document that says “letters of administration” on it, the bank ought to accept. That's not at all what our argument is, and I want to stress that in this case we have a document that is facially valid and that even the Probate Clerk of Bexar County, Gerry Rickhoff, testified in appearances was issued by his office.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, except he says that, you know, anyone who regularly deals with these documents would -- and I'm paraphrasing, but would you know that this was counterfeit.

ATTORNEY ELLEN B. MITCHELL: Well, Your Honor, I think that's an overstatement of Mr. Rickhoff's testimony. I think if you look at what he testified to as a whole, he testified he himself would not have accepted these letters. That cannot be the litmus test. He is the person who develops the letter. He says that his office periodically changes the format of the letters, periodically changes the font of the letters. But they don't let the banks know that, they don't let the business community know that, they don't let the general public know that. Really the only thing that a bank or anyone else to whom these kind of letters are presented has to go by are what's delineated in the statute. Does it have the right language, does it have a signature? For all they know, a signature of a court official.

JUSTICE EVA GUZMAN: So you can't rely on obviously fake letters, but you should be able to rely on letters that aren't as forged or fake?

ATTORNEY ELLEN B. MITCHELL: Yes, Your Honor. I think that if you're presented with a document and there is reason to believe from the face of that document that something is wrong, then, yes, that would trigger a duty inquiry. Now in this case, if the Court believes that that is a circumstance that's at play, that's a fact issue then. That's a fact issue that would require this case to go back to the probate court for a trial to determine, were these letters of administration facially valid?

JUSTICE EVA GUZMAN: And who have the burden to prove that they were or weren't? I mean what would the bank's burden if it went back, as far as the letters go?

ATTORNEY ELLEN B. MITCHELL: Your Honor, that's an interesting question. I can't say that I've specifically looked into that. My reaction would be because it's the bank who is relying on the letters, that the burden would fall on the bank to demonstrate that their reliance on these letters was reasonable because on their face, because of the elements that are ascertainable from the document itself, they complied with Section 183. If the bank holds the reasonable belief that they comply with 183, then under Section 186, the bank is entitled to rely on those as sufficient evidence of the administrator's qualifications.

JUSTICE PAUL W. GREEN: But you know, and I know this isn't the Probate Code Section, but I mean banks routinely take in instruments, checks, that are facially valid, that is to say, the check says, “Account of Paul W. Green,” and it's signed Paul W. Green. It may not be my signature, but somebody looking at it, it looks valid, the signature matches the name on the account. And we know that if those forged checks are paid by the bank, then the bank is responsible because it is a forgery. Now why wouldn't the same rule apply with respect to letters of administration? If they all look facially valid, but there's no underlying order, what would be the difference?

ATTORNEY ELLEN B. MITCHELL: Well, Your Honor, in the case of checks, and my understanding is that there are chains of responsibility as the checks go through, but ultimately the responsibility is on the bank of that customer. And there are reasons to impose on the bank a duty to know and verify the signatures of its own customer. And that --

JUSTICE PAUL W. GREEN: But wouldn't it be easier for a bank -- I mean there are tons more checks come through banks than letters of administration, and to simply pick up the phone and call or get online and look and see whether there's an underlying order supporting that document. Failing that, maybe you have the responsibility with that document.

ATTORNEY ELLEN B. MITCHELL: Well, again, Your Honor, with the checks, I think we have a factual distinction as far as the bank's ability to determine if there's a forgery, the bank's ability to verify --

JUSTICE DAVID M. MEDINA: But signature cards are on file so you can compare that if there's any doubt that someone may present --

ATTORNEY ELLEN B. MITCHELL: Yes, Your Honor. There's no mechanism for a bank to verify the signature of court personnel. And again I think --

CHIEF JUSTICE WALLACE B. JEFFERSON: How about just a telephone call to the probate court saying, “Is this, were letters of administration issued?” Or as Justice Green suggested, and I don't know if this is the case, but if they're online, look it up online to see if there's actually a true matter pending?

ATTORNEY ELLEN B. MITCHELL: Well, Your Honor, I think, first, the problem with looking it up online is that that's not available in all counties, and obviously this Court needs to look at this case with a broad view, because its holding is going to affect all of the State of Texas.

CHIEF JUSTICE WALLACE B. JEFFERSON: How about a telephone call?

ATTORNEY ELLEN B. MITCHELL: Well, Your Honor, I think in that case there are two problems. One is that you're not only imposing a burden on the banks -- and again, this actually goes further than the banks, it really is anyone to whom letter of administration are presented. You're also imposing a burden then on the probate courts.

JUSTICE EVA GUZMAN: Well, if you made a phone call and the clerks of the court were involved in the fraud, would that phone call alleviate the problem?

ATTORNEY ELLEN B. MITCHELL: Your Honor, that was my second point, is I hate to use the phrase, but it's almost a slippery slope. Because if you say, “Bank, you cannot rely on this document in front of you with the signature of a court clerk and the official court seal, you have to verify that.” Well, certainly if I pick up the phone -- what if the clerk is in on it? Well, then that's not going to be good enough.

JUSTICE HARRIET O'NEILL: Well, but that's going to be --

ATTORNEY ELLEN B. MITCHELL: If they bring an order --

JUSTICE HARRIET O'NEILL: That's going to be the exception rather than the rule. Let's say it's a third-party forgery, and it has all the same indicia that this one did. It's a clerk who's left the court and took the seal or copied the seal. The broader problem would be rectified by -- or that 99.99 percent of cases would be rectified by a phone call.

ATTORNEY ELLEN B. MITCHELL: Well, Your Honor, again, I think that's something of an

oversimplification, because perhaps on the bank's part, it's a question of picking up the phone and calling the clerk's office. However, the clerk who answers that phone isn't necessarily going to know off the top of his or her head what's been happening in this particular case. And even in this case, there was, ultimately by Jerry Rickhoff, a search of the court's records, an affidavit that was signed. There's a process that you're going to be putting in play then that really is going to shift this burden to the probate courts, and Jerry Rickhoff testified that his office issues thousands of letters of administration every year. So if you look at it as a burden on the bank to pick up the phone, it doesn't sound like that much, but if you follow the trail of what that puts in motion, I think you are presenting an onerous burden to the probate courts. And then also, because my assumption is that probate court clerks have other things that they need to be doing, they may not be able to do this right away, then you're delaying the administration of estates. And as you say, this is an unusual case, but if this Court were to hold that a bank presented with, again, facially valid letters of administration has to stop, wait, go back, check with the court, get it verified in 99 percent of the cases where those letters actually are valid, all you're doing is building expense and delay into the process.

JUSTICE EVA GUZMAN: And why should we treat this differently? Banks are presented with letters of credit and all sorts of instruments every day all day long and you don't stop to pick up the phone to verify that. Isn't this really a question of who should bear the loss for those cases in which fraud -- it just occurs, it's part of the industry?

ATTORNEY ELLEN B. MITCHELL: It is a case of allocating responsibility, yes, and of allocating loss. And in this situation, again, if the loss is allocated to the estate involved in the unusual case, it may seem a harsh result, but it's a less harsh result than imposing the burden on all of the valid estates.

JUSTICE PAUL W. GREEN: Well, but wait a minute. Let's see which one of these parties is in a position to being able to do something. The estate can't do anything. I mean the decedent is gone, he can't, his family doesn't know what's going on. That's all invisible to them, the only party who has the ability to do anything in this situation is the bank.

ATTORNEY ELLEN B. MITCHELL: Your Honor, I would disagree. And I think this point is also important to our 4.406 argument, because the UCC obviously involves a lot of careful thought into the allocation of responsibility in trying to allocate responsibility for preventing loss to the party best able to do so. It would seem simple to say in this case, “The customer is dead, what could he have done?” I believe it still makes sense in these circumstances to allocate that loss and to say it's the customer who is in the best position to prevent this. And I don't mean to sound callous, but the means by which you do that are by taking care of your affairs, by making some arrangement. All of the estates that Mel Spillman victimized were estates of, I think they were generally elderly people with no family. The customer can't do anything about being elderly or not having any family, but they had no wills, they had no provision, they had not made any provision to protect their own estate. So, yes, there is an allocation of responsibility there that makes sense.

JUSTICE NATHAN L. HECHT: Are you aware of another case like this in the past, anywhere in the country?

ATTORNEY ELLEN B. MITCHELL: Well, Your Honor, the only other cases I'm aware of are the cases stemming from Mel Spillman himself, and I know there's another case pending before this Court, the Guaranty Bank case.

JUSTICE NATHAN L. HECHT: But other than those, has this arisen anywhere else ever, as far as you know?

ATTORNEY ELLEN B. MITCHELL: Your Honor, I was not able to find another situation in the Probate Code area. Now once we turn and start looking at 4.406 of the UCC, yes, this has happened a number of times.

JUSTICE NATHAN L. HECHT: I mean when there were letters of administration involved.

ATTORNEY ELLEN B. MITCHELL: Well, not in the forgery, no. In the sense of determining does it make sense to allocate responsibility to a deceased customer? That issue has arisen. I have not found a case where we've had a bank or anyone else who has been presented with falsified letters of administration. And part of that is because much our argument rests on the fact that Texas has a statute that says that letters of administration are sufficient evidence. Now, I understand the argument is, well, that only counts if the letters of administration really were issued by the court. But that renders Section 186 meaningless, because if you have to go back and check with the court, if you have to get some sort of verification from the court, then by definition those letters that you were presented are not sufficient evidence of anything. So under Section 186, the bank had statutory authority, and really faced with something that they could not tell -- and, again, my assumption in this case is they could not tell that this was a forgery. They had authorization from the Probate Code to accept them, and I would argue they had a duty under the Probate Code to accept them, because the Probate Code imposes a duty on administrators, as soon as they're appointed, to take possession of the decedent's estate.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, what about the next case? Let's say there's another Spillman case out there and the same thing occurs, or one that the bank knows that there's been this taking over illegitimately of these accounts. You're saying that they would, even under those circumstances with an apparently valid letter of administration, have to process it as if it were real even today?

ATTORNEY ELLEN B. MITCHELL: Your Honor, I would say not if the bank actually has knowledge that there is something wrong. That's not the circumstance in this case. It was quite some time after all of these transactions that Spillman was caught, that all of this came to light and that he was eventually convicted. In this record, there's nothing to show on the face of the document or even outside of the document anywhere else, any other information available to Jefferson Bank that it should have had any idea whatsoever that there was a problem with these letters. And again, as I say, the administrator had the obligation to take possession of the estate. So in Jefferson Bank's position, you have a statute authorizing you to rely on these letters, you know that the administrator has the duty. You have a corresponding obligation to give access to the decedent's assets.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Ms. Mitchell. The Court is ready to hear argument now from the Respondent.

MARSHALL: May it please the Court, Mr. Murray will present argument for the Respondent.

ORAL ARGUMENT OF S. MARK MURRAY ON BEHALF OF THE RESPONDENT

ATTORNEY S. MARK MURRAY: May it please the Court, I think that while there are differences in the ways the parties characterize some of the facts of this case, and may unquestionably differ in their opinions about the legal effect of those facts, there is no dispute regarding the material facts of this case. In fact, it was decided on the basis of competing summary judgments. The first crucial fact regarding the -- the Petitioner makes two arguments essentially. One is what they refer to as their 186 argument, the second is what they refer to as their 4.406 argument. The truth is that on the basis of pieces of paper which were not letters of administration, Jefferson Bank paid out to someone other than its depositor all of the money from Mickey Carl Marcus' account after his death in the amount of approximately $186,000.

JUSTICE HARRIET O'NEILL: But that wasn't his money, right?

ATTORNEY S. MARK MURRAY: It was his money.

JUSTICE HARRIET O'NEILL: Well, I noticed there was money put in after the original balances. What money was that?

ATTORNEY S. MARK MURRAY: It came largely from other accounts of his that Mr. Spillman had also -- I think it was a certificate of deposition -- one or more certificates of deposit he then put into this account.

JUSTICE NATHAN L. HECHT: But does it matter to your argument whether it was or not?

ATTORNEY S. MARK MURRAY: Under the depository claim, no.

JUSTICE NATHAN L. HECHT: Yeah, it could have been anybody's money.

ATTORNEY S. MARK MURRAY: Well, that's right, that's right. But under the 34.103 that's correct.

JUSTICE PHIL JOHNSON: So he apparently had more than one letter of credit -- or letter of administration issued?

ATTORNEY S. MARK MURRAY: In this estate, you mean? Or he, he looted --

JUSTICE PHIL JOHNSON: If he went to other banks and other institutions, and got money from them --

ATTORNEY S. MARK MURRAY: He did.

JUSTICE PHIL JOHNSON: -- he probably took letters over there also?

ATTORNEY S. MARK MURRAY: He probably did.

JUSTICE PHIL JOHNSON: So I wonder how many letters are issued in the ordinary estate?

ATTORNEY S. MARK MURRAY: Well --

JUSTICE PHIL JOHNSON: In other words, how many people around town are going to be getting these letters and calling the probate office if we make them have to call and check every time they get a letter of administration?

ATTORNEY S. MARK MURRAY: Well, that frankly is, as the Court has -- as the questions have indicated, that's really a risk that the banks undertake. It's no different from a power of attorney. Power of attorneys are routinely executed --

JUSTICE PHIL JOHNSON: No, but my question was, I wonder, do we know how many phone calls banks and other places that are dealing with these administrators, when they bring in a letter of administration? Because usually, as I understand, most times the clerk will say, “How many letters do you want?”

ATTORNEY S. MARK MURRAY: That's correct.

JUSTICE PHIL JOHNSON: Ten of them, fifteen of them, whatever. Generally you're going to have a purpose for those letters, and that is to take them around to different places.

ATTORNEY S. MARK MURRAY: That's right.

JUSTICE PHIL JOHNSON: So if everywhere they take one of those letters around town calls the clerk's office, do we have any idea how many calls that's going to generate?

ATTORNEY S. MARK MURRAY: Well, some won't generate any calls. For example, it may be somebody that's simply making funeral arrangements. They put themselves at risk if they rely on those

letters. I mean it's not everybody turning over $186,000, and --

JUSTICE PHIL JOHNSON: Well, but we're kind of making a rule for everyone here, are we not? Or are we just making a special rule for banks?

ATTORNEY S. MARK MURRAY: Well, no. I think what you're doing is stating exactly like you would, for example, in the check situation or in a situation like a power of attorney. There's a risk associated with accepting these documents. If you accept these documents without any verification at all, then you run some risk. There is some degree of risk involved in accepting these documents. Just like there is if you accept a check, which the banks do every day.

JUSTICE PHIL JOHNSON: If we make someone verify that, what's the difference between having a letter of administration and someone just coming in and saying, “I'm the administrator for the Estate of Mr. Smith, so then I want Mr. Smith's property,” and we make that person who has the property call. Why do we even issue letters if we're going to have to have someone call and verify them whenever someone shows up with a letter?

ATTORNEY S. MARK MURRAY: Well, I would say because in the routine situation most people will accept them. Most banks, depending upon the amount involved, most transactions, depending on the amount involved, they would accept them. And to be just frank about it, most of the time you're dealing with the son, the daughter, the wife, and the person who's on the other end of that knows that the person who is presenting that is in all likelihood the logical person to be the administrator of the estate.

JUSTICE EVA GUZMAN: Your position is that the bank is entitled to rely on those letters of administration and should not have to make other calls, they just bear or assume the risk that there could be a forgery involved? Is that correct?

ATTORNEY S. MARK MURRAY: If it's not a letter of administration, then if that person had no authority to receive that, and if they pay out that person the money from that bank account, then they have not discharged their obligations under the depository statute.

JUSTICE EVA GUZMAN: With the advent of technology and the ability to forge documents, there could be a letter of administration presented to a bank that is completely identical to a proper letter of administration. The bank is entitled under 186 to rely on those letters and conduct its business. If it turns out to be a forgery, your position is they've assumed that risk by relying on or by accepting that letter?

ATTORNEY S. MARK MURRAY: Yeah, I don't think I would agree with the characterization that they are entitled to rely on it. They make the business judgment about whether they are going to rely on it or not, and if they do without some verification, then they have a risk associated with that.

JUSTICE EVA GUZMAN: So if they're not entitled to rely on it, are you then advocating that the bank be required to take additional steps to verify authenticity then?

ATTORNEY S. MARK MURRAY: Absolutely. And they did in fact. That's how Mel Spillman was caught, a bank called.

JUSTICE EVA GUZMAN: The initial outset though, we're talking about a broad rule. So then your position is any time a bank gets a letter, they have an obligation to verify its authenticity by some means or form?

ATTORNEY S. MARK MURRAY: Or to take the risk associated with accepting that. That's right. The same as it would be, or as was discussed earlier, a check or a power of attorney. A power of attorney would be much more difficult to verify, but they accept them all the time. When you take a power of attorney, you

run the risk that the person who gave that died between the time they gave it and the time you accept it if you don't do some verification process. Banks take those all the time. There's a certain amount of risk that is assumed in conducting business and accepting items such as --

JUSTICE PAUL W. GREEN: What then can a bank rely on with respect to Section 186?

ATTORNEY S. MARK MURRAY: I'm sorry, I missed the first part of that.

JUSTICE PAUL W. GREEN: But what then can a bank rely on with respect to Probate Code Section 186?

ATTORNEY S. MARK MURRAY: Well, if it is in fact a valid letter of administration, then, in other words not a phony letter of administration, and if there was an order appointing that person, they're entitled to rely on that even if that person who comes in and takes the money out of the account and steals it. If he was in fact the authorized person for them to turn that over to, then that's not the bank's risk.

JUSTICE PAUL W. GREEN: But it's sufficient evidence of the statute, sufficient evidence of the appointment and qualification of that person. So even though you don't have -- and if somebody had brought in a copy of the order, maybe that would be helpful. But a bank, a typical bank looking at this language will say, “Well, as long as we get the original letters, we're in pretty good shape.” Why wouldn't they be able to rely on that statute?

ATTORNEY S. MARK MURRAY: Because it doesn't meet the definition under 183. They're asking you to make a distinction about -- and one of the interesting things was, what Ms. Mitchell does -- she's not arguing that they shouldn't have to make the phone call, because she says at some point they should. If it looks on the face of it that it raises some issue, they should.

JUSTICE PAUL W. GREEN: Well, wouldn't it be sufficient to defeat a summary judgment if it says it is sufficient evidence, some evidence that they --

ATTORNEY S. MARK MURRAY: Well, in this case there was summary judgment evidence that this was in fact not a letter of administration. Clerk Rickhoff's affidavit stated there was no administration pending under that cause number. There was none issued to Mel Spillman, there was no order appointing him, none of the things that would be a prerequisite to this being a valid order of administration under the definition of Section 183 of the Probate Code.

JUSTICE NATHAN L. HECHT: The trouble I have with your reading of 186 is it doesn't seem to say much. As I understand it, you say that 186 says that valid letters of administration are evidence that a representative has been validity appointed. But of course that's true. That wouldn't say anything, it would just be nonsense. I mean it seems to me the whole point is that if you show up with a sheet of paper that looks like a letter of administration, that's the evidence that there's been a valid appointment, and then 186 really says something. It says, well, you don't need a court order and you don't need to ask the judge and you don't need to file other proceeding, all you need is this sheet of paper.

ATTORNEY S. MARK MURRAY: Well, except 186 contains the language, “letters testamentary or of administration or of the certificate of the clerk under seal of court shall be sufficient evidence.” That refers back to Section 183, which defines what constitutes letters.

JUSTICE NATHAN L. HECHT: Right. But if you read it that way, then 186 really says almost nothing. It says that a valid letter is evidence of a valid appointment.

ATTORNEY S. MARK MURRAY: That's right.

JUSTICE NATHAN L. HECHT: Which is simply nothing.

ATTORNEY S. MARK MURRAY: Well, going back to my earlier answer, I think what it says is, if you take it and it is in fact a valid letter of administration, then I think that the bank is entitled to turn over the money to that person even if, and this goes to Section 188, even if that person's power is later revoked, for example. And for example, even if, under the Renn case I cite in my brief, even if the will, which was admitted to administration, to probate, was a forgery. In the Renn case, the claim there was that the letters and the order appointing the representative of the estate was invalid because the will itself was a forgery. The Court said, “You know, it may be a forgery, but if there's an order of the court admitting it to probate and appointing this person to act as representative of the estate, then he's entitled to act as representative of the estate.” So I disagree that I think 186 has no effect, I think it does have effect.

JUSTICE NATHAN L. HECHT: But you do agree that, as you read it, it in essence means that a valid letter is evidence of a valid appointment?

ATTORNEY S. MARK MURRAY: If it meets the definition of Section 183, I agree.

JUSTICE PHIL JOHNSON: Counsel let me ask you, if you're dealing with the properly appointed administrator and you don't have them give you a letter, are your dealings with the administrator still valid?

ATTORNEY S. MARK MURRAY: Well, I guess it would -- as long as the administrator has --

JUSTICE PHIL JOHNSON: And properly appointed.

ATTORNEY S. MARK MURRAY: Properly appointed, and administration is a little more complicated than an independent executorship, because the powers of the administrator are limited to the powers contained in the order that appoints him.

JUSTICE PHIL JOHNSON: All right. But let's say there was an order appointing, giving the administrator power to deal with the bank, with the money that the bank had in this case.

ATTORNEY S. MARK MURRAY: Right.

JUSTICE PHIL JOHNSON: The administrator comes in and says, “I don't have any letters,” and the bank says, “We're going to deal with you anyway,” and gives him the money. Now, has the bank validly dealt with the administrator?

ATTORNEY S. MARK MURRAY: As long as what he -- as long as the business he conducts is within the scope of his power, yes.

JUSTICE PHIL JOHNSON: Without any letter of administration?

ATTORNEY S. MARK MURRAY: That's right. It doesn't say that it's -- 186 doesn't say that it's a prerequisite.

JUSTICE PHIL JOHNSON: So why would an administrator -- why would a bank ever even want letters of administration then? If someone walks in and says, “I'm the administrator,” the bank has to pick up the phone and call and find out if they're the administrator, whether they have letters or not, it seems like.

ATTORNEY S. MARK MURRAY: Well, it is some evidence that they at least know who to -- the Bexar County Clerk --

JUSTICE PHIL JOHNSON: Some evidence?

ATTORNEY S. MARK MURRAY: Well, it's who issued, who purports to have issued it, the Bexar County Probate Clerk as opposed to the Kendall County Probate Clerk.

JUSTICE PHIL JOHNSON: But if it's some evidence, at what point do we say it's -- it's forgery in this case?

ATTORNEY S. MARK MURRAY: That's right.

JUSTICE PHIL JOHNSON: How can it be evidence? I thought your position was it can't be evidence because it's a forgery?

ATTORNEY S. MARK MURRAY: Well, it's not -- it is some indication to the person to whom it's presented as to who, where they go to verify the information, if nothing else. In other words, that could be a letter of administration from a county court in Texarkana.

JUSTICE PHIL JOHNSON: Okay, so it's no evidence because it's a forgery?

ATTORNEY S. MARK MURRAY: It is no evidence of authorization, that's correct, because it fails to meet the definition of Section 183 or 181, which would require a court order appointing somebody. The power, as the Renn case talks about, actually emanates from the order of the court, not from the letters themselves. They carry no power whatsoever. They, even if they're valid, are only a reflection of the order of the court that ordered those letters to be issued.

CHIEF JUSTICE WALLACE B. JEFFERSON: But the practical impact of your argument is that every bank or anyone else that has to act upon receipt of a letter of administration has to go back and make a telephone call or check the website or call the family members or something like that, which would indeed add to expense and delay in the resolution of these estate cases.

ATTORNEY S. MARK MURRAY: Your Honor, it is my position that the prudent banks are already doing this. I don't think this is a new procedure.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is there a protocol that shows that they're doing this? Where do we -- how do we know that that's the current custom?

ATTORNEY S. MARK MURRAY: Well, I happen to know because I deal with banks and represent them, as does Mr. Krause. So this is not something that's a new burden. Some banks, I'm not saying all, but it is not above industry standard to require the banks to do this. This is in fact something that's fairly routine.

JUSTICE NATHAN L. HECHT: The Amici seem to disagree.

ATTORNEY S. MARK MURRAY: I don't doubt that. I'm shocked to hear that.

JUSTICE NATHAN L. HECHT: Right. Do you know, I asked your opponent, do you know of another case like this in the country?

ATTORNEY S. MARK MURRAY: Other than the companion case to this one? You're talking about with forged letters?

JUSTICE NATHAN L. HECHT: Yes.

ATTORNEY S. MARK MURRAY: No, I do not.

JUSTICE NATHAN L. HECHT: In the probate context.

ATTORNEY S. MARK MURRAY: Not one. I've run across none. The other argument that they make, if I may move on to that, is the 4.406 argument. I think that on that one the Court needs to take a look at the structure of Section 4.406, because it's very important. The overall, if you take the 30,000-foot view of 4.406 for just a moment, it's broken down into several sections. Section A is the one that imposes the obligation on the bank. Section C is the one that imposes the obligation on the customer. Subsection D is the one that spells out the consequences, and Subsection F is the one-year limitation or the cut-off period for reporting. Particularly the focus needs to be on Subsection A, because contrary to what Ms. Mitchell indicated to you in her opening comments, 4.406 doesn't just deal with the obligations of the customer, it deals with the obligations of the bank. In fact, the obligations of the customer are not even triggered until the bank fulfills its obligations under Subsection A. That says, “That a bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to the customer the items paid or provide information in the statement of account.” Subsection B says, “If a bank sends or makes available a statement of account,” and goes on to describe the investigation that's required of the customer. The comments to Section 4.406 specifically state, and this was also written by this Court in the American Airlines case, “The duty stated in Subsection C becomes operative only if the bank sends or makes available a statement of account or items pursuant to Subsection A.” So the question of whether or not the customer made an investigation is completely contingent upon the bank having fulfilled its obligations.

JUSTICE EVA GUZMAN: What does “makes available” mean? At least in the late '80s when I worked in the banking industry, routinely the trust department would hold statements, they were not mailed, they were held and made available for the customers if they came in periodically to review their statement.

ATTORNEY S. MARK MURRAY: And there are some cases that say if at the customer's instruction, you hold those statements, then that is making them available. And we don't disagree with that. What happened in our case was, Mel Spillman went in and commandeered the account using the phony letters of administration and told the bank to send the statements to him at his address. So none of the statements that contained any of the fraudulent transactions were sent -- they were all sent to Mel Spillman's address. Sending a bank statement to an address as instructed by the customer, at least under existing case law, and I'm not going to say that I agree with this in every instance, but at least under existing case law, sending it to the last address as provided by the customer is satisfaction of the “send” portion of that Subsection A. As to “making available,” the cases cited by Petitioner all were ones where they held the statements at the direction of the customer. That's not what happened here. They held them at the direction of Mr. Spillman, the customer never ordered them to send, to hold the statements. So that is not making available. Now, there's a whole fiction that -- frankly, 4.406 is a statute designed to, as the Petitioner advocates, bring certainty to this --

JUSTICE PHIL JOHNSON: Can I interrupt you for just a second?

ATTORNEY S. MARK MURRAY: Yes, sir.

JUSTICE PHIL JOHNSON: I think Justice Guzman asked, “What does it mean to make available?” So have you answered that the best you can?

ATTORNEY S. MARK MURRAY: Well, I think what she asked me was about holding statements. If you are asking me for every iteration, I don't know that I can articulate every situation of making available, but I can tell you it takes some affirmative action by the bank. Simply having it stored, the information stored in the computers at the bank, such that a customer could come in and ask for it to be printed out, is not making it available.

JUSTICE EVA GUZMAN: Well, there are many financial institutions that no longer mail statements.

“Making available” literally means holding the data on a server somewhere and allowing access. So the fact that I guess in the modern financial industry, mailing statements is not necessarily the only way to make things available.

ATTORNEY S. MARK MURRAY: It is not, and I appreciate that. I think a lot of people have -- sign up to receive them electronically. I think that's making them available, obviously. It's the same thing only in an electronic form, but the customer tells the bank that that's how they want to -- they wish to receive those statements. They subscribe to it, they get a password to go on and be able to do that, and they tell the bank that's how they want to receive it. I don't think the static situation of the bank simply, as is advocated by Petitioner, simply holding that information in their computers at the bank such that somebody could come in and ask for it is making it available. I see that my time is up.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counselor.

REBUTTAL ARGUMENT OF ELLEN B. MITCHELL ON BEHALF OF PETITIONER

ATTORNEY ELLEN B. MITCHELL: I would like to address the last point that Counsel was talking about, Section 4.406, and what does it mean to make a bank statement available to the customer. And Counsel says, if the customer instructs the bank to hold a statement, that constitutes making the statement available, and, in fact, the Georgia case that the Court of Appeals relied on also said as much. “Well, if the customer had asked you to do this.” In the circumstances of this case, I think what happened is tantamount to the customer asking for the account statements to be held at the bank. Mickey Carl Marcus was dead, and the bank knew that. It cannot be that the bank had a duty to continue to send account statements to the address of a deceased customer, which I think could possibly have raised other problems for the bank. I mean these are not technically confidential information, but you don't want to be sending financial information to the address of someone you know is deceased. So when Mel Spillman comes along, this shoots us back to the letter of administration, if they properly relied on those letters, then they did the right thing, they sent the account statements to Mel Spillman. But I think the most important thing here is that Christa Lenk was appointed as the administrator in September of 2003. At the very least, at that time she became the bank's customer. Now at that time, Jefferson Bank had already been informed of Spillman's forgery, so it could not send the statements to Mickey Carl Marcus, it could not send the statements to Mel Spillman, the only person to whom it could have sent the statements or made them available was Christa Lenk. She didn't bother to tell Jefferson Bank that she had been appointed even after she knew. And she testified to this herself, after she knew that Marcus had accounts at Jefferson Bank, she did not identify herself to the bank, she didn't go to the bank, she made no inquiry. In those circumstances, that's tantamount to asking the bank to hold those account statements because the bank has nothing else to do with them. Now, as far as saying, “Well, this is just static activity by the bank,” again, there was nothing else the bank could have done. However, there was a lot that Christa Lenk could have done as the administrator and there was a lot that she was expected to do and obligated to do under the Probate Code. The Probate Code imposed an obligation on her to find Marcus' assets and take possession of them. And again, she testified she knew that there was an account at Jefferson Bank. She knew that all she had to do was go to the bank and present her letters of administration, and she would be given access to that account and access to those account statements. In those circumstances, I think certainly at the very latest, Jefferson Bank made available to its customers its account statements in September 2003. No demand was made until June of 2005, far too late.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Ms. Mitchell. The cause is submitted. That concludes the arguments for this morning, and the Marshall will adjourn the Court.

MARSHALL: All rise.

[End of proceedings.]

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