

ORAL ARGUMENT — 1/7/98
97-0684
SCHERER V. COURT OF APPEALS

LOWE: The first thing I want to do, I have the permission of my clients to waive any claim that mandamus was not an appropriate remedy. We are not pursuing that. In 1995, Mr. Milton attempted suicide. It was a failed attempt. He ended up being in a vegetative state and he lives in a nursing home. Shortly after that, his wife, Gitta Milton, applied for and became his guardian. Within about a year of that, Judge Herman, the probate judge in Travis County Probate Court No. 1, determined that there may be some problems with the guardianship and appointed an attorney ad litem. There was a hearing. He determined there were problems and he advised her she needed to go fix them. The nature of them are set out in the brief. The very next day, she went to the DC in Travis County and filed for divorce, then she resigned as guardian. There was a successor guardian then appointed, Mrs. Scherer. Mrs. Scherer filed in the probate court a motion to transfer the divorce proceeding over to the probate court. That was granted. That subsequently was halted by mandamus by the Austin CA, and we're here today to ask this court to mandamus the Austin CA to undo its order.

The issue in this case is the propriety of a transfer order executed by a probate judge in a guardianship case moving divorce proceedings of the ward from the DC over to the probate court.

Further, as a matter of introduction, the court I think should understand this case is only about property. That's really what it comes down to. There are 3 issues.

HECHT: But it might not be about property. It might be about custody or etc.

LOWE: And let me go on that. I'm talking not just about this case. I am going to talk about all guardianship cases that would get in this situation. I don't care about this case in particular. You are dealing with something bigger than that.

Divorce is no fault. It's simply a non-issue about what court grants a divorce. There's nothing to it. Child custody will never be a question for an incompetent ward. An incompetent ward is not going to have custody of a child. Cannot. The division of the property and the child support issues are the only thing that's ever going to be at issue in a case of this nature.

The court should also understand that we're talking about a limited number of cases. We are only talking about cases where we have a ward, a guardianship established in the probate court.

HANKINSON: But couldn't we have a custody dispute in a case like that? Let's say the grandparents, who are the parents of the ward of the probate court, decide that they would like to

have custody of the child rather than the spouse.

LOWE: You could have that. The probate court has ample experience to deal with that sort of thing because the probate court has to choose who is going to be a minor's guardian on many occasions and does that on the basis of the best interest of the child.

HANKINSON: Would there be anything to preclude a probate court from deciding the property issues and sending the matter back to a DC for consideration of the custody issues?

LOWE: Not as this court so decided. But I think that this court should not decide that. And, yes, I think there would be something to preclude.

HANKINSON: Why not?

LOWE: I think that the probate court has an expressed grant of jurisdiction over this matter, over this divorce proceeding, and that mandatory jurisdiction lies in the probate court. 607 of the probate code says that if this is a suit appertaining or incident to a guardianship estate it must be brought in the probate court. And if it is not brought in the probate court, it can be transferred back into the probate court just on the say so of the probate judge. If it is a suit by or against the guardian, then it must also be brought in the probate court, but it can't be transferred if it's brought elsewhere.

ABBOTT: Only if it's appertaining or incident to?

LOWE: Only if it's not appertaining or incident to.

ABBOTT: And of course, you can say it's mandatory but the statute doesn't say that a family law matter is appertaining or incident to a guardianship matter?

LOWE: The statute does not say that.

ABBOTT: So it's not mandatory on the face of the statute. It's mandatory based upon the interpretation you want to put on those words?

LOWE: Yes.

HANKINSON: Would the probate court exercise continuing jurisdiction over the children?

LOWE: Not only would, but does. This is one of the conflicts in jurisdiction. It really doesn't make any difference what the district court says about child support. The probate court has an ongoing obligation to see to it that the wards' dependents are supported. I don't know what happens if there is a child support order for \$500 a month, and the probate code tells the probate

judge that once a year you are going to do these things: you are going to examine the annual account; you are going to see how the ward is living; you have to approve all expenditures in advance; you do all of these things and you have responsibility for determining spousal and dependent support.

HANKINSON: So the probate court once it transferred a case like this would exercise continuing jurisdiction over the children of the divorce?

LOWE: It would. I don't see how it could not. But I don't know whether it could change the DC's order. That would be a conflict in jurisdiction. The case shall be brought in the probate court if it's by or against a guardian. And I don't think that that calls for an interpretation in this case. It's hard for me to understand how this can not be a case by or against the guardian.

ABBOTT: If a child custody matter relating to a divorce can be appertaining or incident to a guardianship matter are there any bounds, any limits on what would be appertaining or incident to a guardianship matter? As long as you have the guardianship matter filed first, I really can't see any limitations placed upon what could be brought into the probate court.

LOWE: The limitation on the appertaining and incident to is that those have to be cases in which the controlling issue is the settlement partition or distribution of the ward's estate. That's under the ruling in *Coverwall(?)* and *Seay*.

ABBOTT: Well if you're going to put that limitation on it, then child custody doesn't fall within that category.

LOWE: Our argument in this case is those really are the controlling issues. That is why I was saying to the court divorce is not a controlling issue just because it's a nonissue. Child custody, at least as between the ward and spouse, is not an issue because the ward cannot have custody. So it's strictly property and that there is no question. All of that is incident to.

ABBOTT: As we've talked about it, this incident pertaining to the guardianship and you decide that you have parents or grandparents or somebody else involved in the whole situation, it can easily be constructed in such a way that ongoing child custody issues are going to have to be resolved in a probate court?

LOWE: And it might well be. And the probate court has that jurisdiction, because it has the pendent and ancillary jurisdiction necessary for judicial economy. And that's exactly the sort of thing I think that statute is designed to get to.

ABBOTT: Applying all of that, I see no bounds on the limits of the types of matters that can be brought into probate court.

LOWE: First of all, the case itself, the controlling issue has to be the settlement _____

of distribution of the estate. Once that's determined, then there is pendent and ancillary jurisdiction that can bring in other things. This court is certainly competent to craft as cases come along so the CA's limits on what ancillary jurisdiction can bring in. But the legislature hasn't spoken and indeed this court has spoken that if it is incident and appertaining to the estate, that's where it belongs, and indeed can be transferred in there. The limitation would be under the pendent jurisdiction.

ENOCH: I understand that the property settlement has been settled?

LOWE: Not settled. There's been a decree in it and a motion for new trial filed.

ENOCH: So now all that's left is just the child support issues?

LOWE: No. Everything has been determined. A decree has been entered, but it's not a final order, because a motion for new trial has been filed and it will be appealed I understand by Mr. Graham.

ENOCH: So as a part of that, won't this issue be a part of the appeal?

LOWE: It certainly would be. And that's exactly why I'm not pursuing the question of whether mandamus is an appropriate remedy. I don't want to bring it back up and have to deal with this on appeal.

ABBOTT: What about the facts the legislature granted family law jurisdiction to courts in _____?

LOWE: I think that's a very interesting point. Let me read to you some of the jurisdictional grounds. First of all, let's start with the proposition that the family code says, it defines "court" as a district court, a juvenile court with the same jurisdiction as a DC or a court expressly given jurisdiction to take a case under this title. And the first time that appears, that's under the dissolution title, the second time it's under the parent/child title. And so you've got this question of what is the express grant of law? And does the grant to these county courts at law say, "you have the jurisdiction under these two titles." It does not say that it's the same broad kind of jurisdiction that the probate court is given. In Henderson county, for example, it says the court has concurrent jurisdiction with the DC in family law cases and proceedings. In Kaufmann county, the statutory county court has, except as limited, the jurisdiction provided by the constitution and the general law for DC's. The same jurisdiction as a DC has except there is certain things it can't do having to do with county commissioners, capital murder, suits by the state, official misconduct and contested elections.

Is that court expressly given jurisdiction under the family code? I think that certainly the Kaufmann county court would say it is. That's exactly the same kind of jurisdiction that's given to the probate court. Montgomery county is given jurisdiction over family law cases and

proceedings, and then for reasons I can't comprehend, cases under ch. 159 of the family code. That's the parent child section. I don't know why they say on the one hand there is jurisdiction over family law cases and proceedings, and then this broad language: cases and proceedings involving justiciable controversies and differences between spouses, or between parents, or between parents and child, or between any of these and third persons, corporations, trustees, or other legal entities.

So the grants of jurisdiction to these county courts at law that are awarding divorces all over the state are these same kinds of broad general grants that have already been given to the probate court in the probate code both under the guardianship section, and under the decedent's estate section.

HECHT: What harm is likely in a case if it involves a guardianship or ward under a guardianship, and the divorce proceedings are conducted in the DC? What jurisprudential problems are there?

LOWE: And by divorce proceedings how much are you including that, the whole thing, the property and everything?

HECHT: Yes.

LOWE: Well one of the questions is what happens about on-going child support orders? Another thing is the DC is in no position to maintain any sort of monitoring over the condition of the wards of the estate and that's exactly what the probate court does. It's a dependent administration. A much more appropriate thing and sensible thing in terms of the structure of the probate code and general jurisprudence would be, the divorce court can handle the divorce and dissolve that marriage if you're going to split this up. And the divorce could even say: Here's how I am going to divide the community property. But the determination of the property should come from the probate court who is charged by law in determining what assets that heir has.

The damage to the ward in such a case is that his rights are being determined by a court that is not accustomed to it, that is not charged by law to do certain things, such as balancing the interest. The probate court is charged to balance the interest between the ward and the child. His entire case is being taken over by a court that is dealing with a whole different set of standards from what the guardianship was set up for.

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RESPONDENT

LAWYER: Before I start my argument, I would like to correct some factual statements

that were made by Mr. Lowe that are not correct. While I don't think that it has much bearing on what this court has to decide, Gitta Milton did not file for divorce the next day after the hearing in probate court. The hearing in probate court was held Dec. 11, 1996. She filed for divorce on Jan. 27, 1997. Also with respect to what is going on right now in the DC, it is absolutely not correct that there is an appeal going on of the property issues. The parties entered into a written rule 11 agreement on Sept. 5, 1997, settling all property issues at that time. That rule 11 was filed with the court the same day. It was a mediated, non-revocable binding settlement agreement. It settled all property issues in the case. It was filed with the DC. And in that rule 11 agreement, which has been provided to this court, the parties specifically agreed that the guardian would not contest jurisdiction in the DC of the divorce matter. That was specifically agreed to in the rule 11. They have agreed. That's not an issue anymore as far as they are concerned.

SPECTOR: I don't understand. Is this moot?

LAWYER: I filed a motion claiming it is.

SPECTOR: Do you still maintain that?

LAWYER: Yes, I do.

ABBOTT: Do you say it's moot because of the rule 11 agreement, or why?

LAWYER: Yes, because of the rule 11 and the subsequent decisions by Judge Cooper.

GONZALEZ: Let me understand the mootness issue, because that concerns me. What is in controversy other than a dispute between a district judge and the county court at law probate judges? I mean the parties have settled their dispute.

LAWYER: That's correct except for one issue. On Sept. 15, we had a hearing in front of Judge Cooper, that was the trial date. At that time, she rendered judgement. The only thing that was not absolutely rendered at that time was the issue of child support. The parties had agreed to set up a trust with some separate property stock owned by Mr. Milton. There were 420 shares of stock in a company called Power Mark, that everybody agreed were his separate property. It was agreed a trust would be set up, but if a trustee could not be found within 20 days, then the parties would have to revisit that issue and have a contested hearing before Judge Cooper on child support. We were not able to set up a trust or find a trustee within 20 days. We had a hearing on Dec. 17, 1997 in front of Judge Cooper. Mr. Graham wanted to set up a trust that was a special needs trust for the ward where the children were not the only beneficiaries, but also the ward, which was not the agreement. So we had a contested hearing on child support. Judge Cooper ordered that $\frac{3}{4}$ of the stock be given outright to Gitta Milton as an advance lump sum payment of child support under the family code.

I would also note and reply to what Mr. Lowe said, Judge Herman himself

entered an order on Oct. 7, incorporating all the property settlement agreements that were reached in the DC and revising his prior order of July 30, to rescind that order and to incorporate all the property settlement agreements reached in the DC.

I don't know where counsel is coming up with this idea that he has any ability at this point to represent that there is an appeal of the property issues. There is none. The only thing they can appeal, the only thing that was not agreed in rule 11 that we had a contested hearing on before Judge Cooper was how that stock would be paid out as child support. That's the only issue to my mind that I know of that they haven't reached an agreement that was a binding agreement in that court.

SPECTOR: Do we have two final judgements in this case?

LAWYER: Yes. We have one in probate court, and we have one in DC. We have a final judgment in the guardianship case by Judge Herman discharging the guardian.

SPECTOR: Granting a divorce?

LAWYER: No. The CA ordered him not to do anything further in the divorce. And while it's our position he didn't completely honor that order, he did not purport to grant the divorce in that order. He simply purported to wind up the guardianship estate. And then Judge Cooper in the DC entered an order divorcing the parties, not Gitta Milton and the guardian, but Gitta Milton and her husband.

ENOCH: Won't the probate court have to approve the transfer of the ward's property to his ex-wife?

LAWYER: The probate court has to approve any settlement that is reached by the guardian. If the guardian wishes to reach a settlement with Mrs. Milton, that has to be approved by the probate court. But no, I think the DC has the right to make any order it chooses regarding either division of the community estate or payment of child support, and Judge Herman does not have to approve that.

ENOCH: Let's talk about this. On the payment of child support, can the probate court refuse to transfer the ward's assets to pay child support?

LAWYER: In my opinion, no.

ENOCH: But doesn't the probate court make that call?

LAWYER: No, it does not. I think the DC does.

ENOCH: Under the probate statute dealing with the ward's assets, doesn't the probate

code say, "The probate court makes that call?"

LAWYER: First of all, child support is an obligation of the ward, and if a DC has ordered that child support be payable by the ward, I think the probate court has no jurisdiction to countermand that.

ENOCH: But isn't that the reason the probate code was written the way it was to avoid conflicts between the court to assign the specific task of assessing a ward's estate as opposed to claims made against the individual who is now the ward of the probate court?

LAWYER: I think you're right, that it was intended to avoid conflict. And the only way conflict would occur would be if a probate judge attempted to overstep his or her jurisdiction, and in effect make an order that child support was not going to be payable out of the ward's estate when clearly under the family code it was entitled to be paid.

BAKER: This whole matter started out because of the transfer order the probate judge entered taking jurisdiction of the divorce case, is that correct?

LAWYER: That's why we are here.

BAKER: But we have two courts both operating in the same area over the same issues: the divorce, the property, the child support, etc. Is it your position that the probate court doesn't have jurisdiction to do that assuming that that's where this whole thing could start, that the probate court couldn't take a divorce case because it doesn't have that power?

LAWYER: That's right.

BAKER: So in your view, it doesn't have the power to transfer?

LAWYER: That's correct.

HECHT: Why isn't this a suit by or against a guardian?

LAWYER: First of all, under §607 of the probate code, I don't think that is one of the areas defined as a suit by or against a guardian. So under the probate code itself, it's not a suit by or against a guardian. Second, then if it is, then there is no bound to what is a suit against a guardian assuming there's a guardianship and the guardian is involved in a lawsuit.

HANKINSON: Isn't that because the ward has no capacity to sue or be sued under the law?

LAWYER: Yes, that's correct. But there are some instances...

HANKINSON: How can he be a party to a lawsuit?

LAWYER: In the matter of a divorce, first of all a divorce between a husband and wife is an in rem action. It's divorcing two people. You can't divorce the guardian. The guardian is the representative of the ward because clearly the ward has to have someone representing his interests. And if there had not been a guardianship already in this case, then clearly the DC would have had to appoint a guardian ad litem for the ward and an attorney ad litem for the ward.

BAKER: So what's the difference then if you've already got one in place?

LAWYER: Not a problem except the guardian has to appear in DC in order to get the ward divorced. The guardian does not have the power to transfer it to the probate court.

HECHT: Well you say that, but it depends on what the statute says. Even we can't say that.

LAWYER: Right. And it's our position that the statute, the probate code, does not say that. It does not include family law jurisdiction.

BAKER: But does it exclude it? Doesn't it just usually say: In these cases, the probate court has the same jurisdiction as a DC in matters involving guardians?

LAWYER: Yes. But this is a matter under the Texas family code to divorce the parties, make a just and right division in the community estate.

BAKER: But up until '87, only DC's could exercise jurisdiction for divorces, is that right?

LAWYER: That's right.

BAKER: But that's not the case since 1987?

LAWYER: DC's are courts of original jurisdiction that have broad jurisdiction under the Texas constitution. A probate court is a statutory creation; therefore, it only has what jurisdiction is given it by the legislature.

BAKER: And the legislature has elected to give it this jurisdiction, the same as a DC?

LAWYER: Yes. But the legislature did not give it family law jurisdiction. The Travis County probate court no. 1 has not been given family law jurisdiction by the legislature. The probate code says nothing about it.

BAKER: Is it your position then that there has to be a statutory statement that says: We give this Travis county probate court divorce family law powers?

LAWYER: Yes.

BAKER: And without that statement it doesn't have any jurisdiction?

LAWYER: That's correct. I think the probate code implicitly acknowledges that the legislature did not intend to give family law jurisdiction to the probate court. If you go further in the probate code past §§ 607 and 608 regarding transfer, §609b of the probate code specifically states that a probate court can transfer a case out of the probate court to the court of jurisdiction. And it specifically then mentions family law cases and says, "The probate court can transfer a family law case to the DC." But it says nothing about it flowing the other way. It says, "If it's a matter in a suit affecting parent/child relationship, and there's a DC out there already hearing the _____, then the probate court in effect can take whatever is affecting the ward or the guardianship in the probate court, transfer it to the DC.

HECHT: But if it may transfer that sort of assumes it has jurisdiction.

LAWYER: But, transfer it away from itself.

HECHT: Or it could keep it?

LAWYER: Yes.

OWEN: Well how could it transfer it if it doesn't have jurisdiction in the first place?

LAWYER: No. A DC would have competent jurisdiction.

OWEN: No, I'm talking about a probate court. How can it transfer something over which it does not have jurisdiction?

LAWYER: Let me pull §609. What it specifically says: Contested guardianship of the person or the minor; and then it states that an interested person can test an application for appointment of a guardian or seeks removal of a guardian of a minor, the judge on the judge's own motion may transfer all matters relating to the guardianship of the person, the minor to a court of competent jurisdiction in which a suit affecting the parent/child relationship under the family code is pending. So it can't reach into the DC and touch that case and bring it into the probate court, but it does have the power to transfer it to the DC.

HANKINSON: Which means it must have had the power to have the case vested in it within its jurisdiction in the first place?

LAWYER: In any guardianship of a person or minor, yes, I would agree with that. Certainly that's what a probate court does. But that's very different from a Saps(?).

HECHT: So you say it has to transfer it then?

LAWYER: No. It's permissive language.

ABBOTT: Is that particular provision contemplating the situation where you have a guardianship proceeding, and after the guardianship proceeding is already in existence, then a family law matter arises? So in other words, at the time that jurisdiction invest in the probate court, that family law matter doesn't exist so the probate court doesn't have jurisdiction over that matter already is a matter that comes up and then it's incumbent upon the probate court to transfer that matter out to the DC when that matter does arise?

LAWYER: I think what it's saying is it's the discretion of the probate judge whether to transfer it to the DC or not. That's how I read it.

HANKINSON: Which means that the probate court could keep it?

LAWYER: Yes.

HANKINSON: And have jurisdiction over the family law matter?

LAWYER: No. Under 609, what the probate court can keep is only matters that already came under its jurisdiction. It's saying, if there is a contested guardianship or removal of a guardian, which nobody is arguing here is not under the probate court's jurisdiction, that could be transferred to the DC. It's a one-way street. This statute says nothing about giving family code jurisdiction to a probate court. Nothing. It flows the other way.

ABBOTT: In that particular provision you are citing it pertains to all statutory county courts, all statutory probate courts, correct?

LAWYER: All statutory probate courts. It uses the word "probate court."

ABBOTT: And there are some statutory county courts where the legislature has specifically said those courts may entertain jurisdiction over family law matters?

LAWYER: That's correct.

ABBOTT: And they have said nothing in that regard with regard to probate courts in Travis county?

LAWYER: It specifically says nothing about it. In fact, §25.2293 of the Gov't Code, which is the enabling legislation for the Travis county probate court No. 1, not only does not mention family law jurisdiction, but it says, "the probate judge must obtain the permission of the district

judge in whose court the case pending before it can transfer any case to itself.” And that was not done here either. It simply entered an order transferring the case. So that provision was also not complied with.

HANKINSON: Do you agree with Mr. Lowe's characterization that the controlling issue in the divorce case was a matter appertaining to or incident to the guardianship estate?

LAWYER: No, I strongly disagree.

HANKINSON: In its brief, he lists the various issues relating to property that were at issue. Is it your position that those were not the predominant issues and that the predominant issues had to do with a contest over the divorce, or over the child custody matters?

LAWYER: No, that's not what I am saying. I think clearly a just and right division of community property was the predominant issue, and setting child support for the child. Mr. Lowe is correct but certainly there was no dispute in custody between Gitta Milton and her husband. There was always the potential for a grandparent's suit, but it didn't happen. But the difference is that the probate court, I think, and the CA agreed, is probably under a duty to protect the ward and divide the community estate 50/50. The probate judge in this particular instance was not familiar with the Texas family code.

HANKINSON: My question is, I want to know what the controlling issues in the case that she filed in the DC were?

LAWYER: The just and right division of community property and what are in the best interest of the child.

HECHT: Was there a determination of what was community at issue?

LAWYER: No, because the parties settled that issue in rule 11. And so it would have been a contested issue, but it was settled before trial, and Judge Herman approved that. Other than waiving competing reimbursement claims against each other, the settlement pretty much followed Judge Herman's characterizations, which had in part been agreed to by the parties before the hearing in front of Judge Herman.

I would certainly disagree with Mr. Lowe that the case was only about property. And we have to distinguish between what a probate court does, which is characterize property in death cases and often in guardianship cases, and divide property. The probate court has no jurisdiction to make a just and right division of property. Only the DC or a court given family law jurisdiction has the ability 1) to make a just and right division of property, which does not require 50/50 division; and 2) to look to other assets that may be in the estate to make decisions about what is available for child support for the child. The child was not a focus in the probate court

at all, nor was preservation of the community estate.

ENOCH: There is not a specific grant of family law to a probate court. But why isn't a property contest in divorce a claim against an estate of an adult person who's _____ but happens to be in a marriage relationship? So there's a guardianship, there's an estate, why isn't a claim by one spouse against the other on the assets of the marriage a claim against the estate?

LAWYER: It is.

ENOCH: So why isn't the probate code which very clearly says, "The probate court has this jurisdiction of claims appertaining to an estate," put that jurisdiction in the probate court?

LAWYER: Well for one thing, the probate court has a conflict of interest in this matter where it's already taken a position in favor of protection of the ward. That I think first of all renders it possibly unable to make a just and right decision if the just and right decision would require anything other than a 50/50 division of community property in this matter.

BAKER: All of your comments are based on the assumption that there is no jurisdiction of a family law case in a probate court, is that correct?

LAWYER: That's correct.

BAKER: So any argument that the probate judge based on the opposite assumption that he or she can't make those decisions that are required by the family law in connection with the divorce or division of property don't stand up then, because that judge has got to follow the family law if it had jurisdiction and do what that law says vis-a-vis whatever the issues are between the two parties even though one of them is a ward because that particular spouse is not _____. Would you agree with that if you take that original presumption?

LAWYER: Yes, because that would be the county court at law situation where they got a specific grant of family law jurisdiction, and under those situations clearly they would.

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REBUTTAL

PHILLIPS: Can you waive the issue of adequate remedy at law?

LOWE: I can say I will. I honestly don't know whether I can or not.

PHILLIPS: Is there a right of controversy here?

LOWE: Yes. Now that's a part that I do want to talk of. There definitely is a live controversy.

BAKER: What does it exactly mean when you say we're going to waive the claim that mandamus is inappropriate?

LOWE: The original brief filed in this case alleged that mandamus was not an appropriate remedy to issue from the 3rd court, and therefore, that was one of the reasons why this court should mandamus the 3rd court to lift its order, because there's an adequate remedy on appeal. And I'm saying, I don't want to talk about that if I can avoid it.

ABBOTT: Is that not a jurisdictional issue?

LOWE: I don't think so.

BAKER: Well if there is no problem with the mandamus that the CA entered against the probate judge, what is there for us to decide if you're saying, "we don't want you to overturn the mandamus. We just want you to look at a jurisdictional issue."

LOWE: No, I do want you to overturn the mandamus, but not on the grounds that it shouldn't have been decided by mandamus, not on the grounds that there was an adequate remedy at law.

HECHT: On the grounds that it was wrong?

LOWE: On the grounds it was wrong, yes.

ABBOTT: On abuse of discretion.

LOWE: On abuse of discretion because it violated the law. It instructed upon them jurisdiction that was wrong, that was contrary to the law.

BAKER: So then as suggested can you waive adequate remedy on appeal?

LOWE: I will brief the court on that, and I don't know the answer right now.

OWEN: So as it stands now, you're in the DC?

LOWE: Yes.

OWEN: In the judgment you would be appealing from is from the DC, and there is no question the DC has jurisdiction. No one is saying it doesn't. The only issue is could the probate court take it away from the DC. How would you raise that on appeal of the DC judgment?

LOWE: You would raise it on appeal that the DC in fact doesn't have jurisdiction because if a proper plea in abatement on motion to transfer is filed, then assuming let's say that the DC has concurrent jurisdiction, and one of our _____ says it doesn't have jurisdiction because it had to be filed in the probate court. But let's assume that the DC had concurrent jurisdiction on it, once a proper plea is filed to move it to the court with dominant jurisdiction, the probate court, then any order issued by the DC is a void order.

OWEN: Except we have a mandamus here directing the probate court to withdraw its order.

LOWE: And that mandamus is not a final mandamus until this court says so. I do want to respond to whether this is moot. We filed in this court, it's part of the record on Jan. 5, a motion for new trial that's been filed by Mr. Graham, the successor guardian, saying: That the court erred in the way it applied a property settlement agreement, erred in awarding separate property as a lump sum child support, erred in not crediting the child support obligation of social security disability. So there is a motion for new trial filed on the basis of what the court did with reference to any sort of rule 11 agreement. This case is not moot and is not final in the DC.

GONZALEZ: Do you represent the interest of either Gitta or Richard Milton?

LOWE: I represent the interest of Richard Milton.

GONZALEZ: I thought Richard Milton had settled in the DC in a rule 11 proceeding, with a rule 11?

LOWE: Whatever Mr. Milton did in the DC it did not get incorporated properly into the judgment.

GONZALEZ: Did you represent Mr. Milton when he entered that rule 11 agreement in DC?

LOWE: No, I had nothing to do with the divorce.

GONZALEZ: Who do you represent here other than Judge Herman who wants to say, Well the CA whatever he did in terms of the law, you stripped me of jurisdiction when you shouldn't have done it?

LOWE: I represent the successor guardian whose position is, he should never have been forced to do anything in the DC, and he did it over protest, and it's not final in the DC anyway

because the judge did not incorporate properly any sort of any agreement that was reached. I represent the only party on Mr. Milton's side who can appear before this court, and that is Sam Graham, the successor trustee.

OWEN: When will the motion for new trial be overruled by operation of law? What's the outside date?

LOWE: It's quite sometime off. It was filed on Dec. 31.

OWEN: And judgment was entered?

LOWE: The date of the judgment was Dec.17.

ENOCH: To transfer the personal assets of the ward, the stock, does that require approval of the probate court? Does Judge Herman have to sign off on a transfer of assets of the ward to be transferred to somebody else?

LOWE: Absolutely.

ENOCH: So regardless of the DC judgment, does Judge Herman retain the authority under the probate code to sign off on a transfer of assets?

LOWE: The authority and the duty.