Probate 'Venue' Is, and Always Has Been, 'Jurisdictional': Legislative Confirmation of *Fulks*

By Kraettli Q. Epperson

IT IS GENERALLY KNOWN that the rule in Oklahoma is that "[v]enue refers to the location where a case should be tried, and jurisdiction is the power of a court to decide an issue on its merits,"[1] and "[v]enue ... may be waived, and does not refer to jurisdiction at all."[2] However, in the case of probate proceedings, filing in the proper "venue" (*i.e.*, county) is, and always has been, "jurisdictional."[3] Failure to have jurisdiction (*i.e.*, subject matter jurisdiction) creates a void judgment, and "[a] void judgment, decree or order may be vacated at any time, on motion of a party or any person affected thereby."[4]

This rule that probate venue is not waivable was affirmed in 2020 when the Oklahoma Supreme Court, in the case of *Fulks*, overturned the 2018 Oklahoma Court of Civil Appeals case of *Walker*.[5] The Oklahoma Supreme Court explained in *Fulks* that, pursuant to 58 §5(1), a probate proceeding for a decedent who was a resident of Oklahoma at the time of death *must* be filed in the district court in the county in Oklahoma where the decedent was a resident at the time of death.[6] Other venues for probate proceedings are available but only if the decedent died while a resident in another state.[7]

Upon the issuance of the decision in the *Fulks* case, there was concern among the practicing bar that many attorneys had temporarily (from 2018 to 2020) relied on the Oklahoma Court of Civil Appeals ruling in *Walker*. *Walker* cited 58 O.S. §5(5) and relied on its language, *"5.* In all other cases, in the county *where application for letters is first made*," to conclude, "Accordingly, a priority no longer exists in the statute and a probate action may be filed in *any* of the applicable situations listed in §5. As a result, venue was proper in Osage County District Court in PB-2012-43, as it was the county where *application for letters was first made*."[8] This concern by practicing attorneys was about what happened to the validity of the probate proceedings they had conducted in the wrong county (including the validity of any deeds issued). Some attorneys hoped they were protected by the language in *Fulks* that said, "As a result, the rule suddenly *became* that probate venue was proper anywhere in the state of Oklahoma," hoping the *Fulks* court was hinting that the ruling in *Walker* was at least temporarily effective *until* expressly overturned two years later by *Fulks* (in 2020). This faint hope fails when one realizes that the state of the law before *Walker* was that probate venue was "jurisdictional."[9] [10]

However, adding to the confusion is the fact that while the *Fulks* case clearly holds that a probate proceeding for an Oklahoma resident can *only* be filed in the Oklahoma county of residence of the decedent, it repeatedly uses the word "venue" but never uses the word "jurisdiction."

To ensure that the holding of *Fulks* and the related statute (58 O.S. §5) were interpreted to mean that the requirement to file a probate proceeding in the correct county (*i.e.*, venue) was a "jurisdictional" matter, in 2022, the Oklahoma Legislature amended this statute[11] to provide:

> The district court in and for the county of proper venue has exclusive *jurisdiction* to prove a

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will or to grant letters testamentary or of administration. Proper venue for hearing in such actions shall be determined as follows:

1. If the decedent died as a resident of this state, in the county of which the decedent was a resident at the time of his or her death, regardless of where the decedent died; …

The clarification provided by this amendment to the subject statute – when considered with the *Fulks* ruling – is that all probate proceedings filed before or after the effective date of the act (Nov. 1, 2022) involving decedents who died while residents of Oklahoma must be filed – for the court to have jurisdiction – in the Oklahoma county that is the residence of the decedent. Because the probate court in the wrong county never had "jurisdiction," all actions taken in such proceedings were "void." This would mean that all orders, notices and conveyances in the proceedings were invalid and subject to challenge at any time.

The *Walker* opinion may have misguided the public, attorneys and judges into innocently conducting these probate proceedings for Oklahoma residents in the wrong county for this two-year interim period (2018-2020). Consequently, it appears the Legislature provided a cutoff deadline to challenge these wrongly filed "final decrees":

3. In all cases of administration of estates of deceased persons in this state where *final decrees* have been entered prior to the effective date of this act [November 1, 2022], and for which the final decrees are or may be defective or invalid for lack of jurisdiction *because the administration was in a county other than the county of proper venue as prescribed by this section*, such final decrees shall be deemed valid; provided, however, the provisions of this paragraph:
   a. shall not apply to any case where an action is instituted and maintained to modify or vacate the final decree within one (1) year of the effective date of this act, …"[12] [13]

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Some attorneys suggest you could avoid the transfer process by filing a totally new case in the correct county. The question then arose as to whether any money (*i.e.*, court costs) could be saved by pursuing one course of action rather than the other: 1) transfer and dismiss or 2) simply refile.

The result of this validating provision was:

1) All probate proceedings a) that were filed in the wrong county and b) that *did have* a final decree (and had passed the 30-day appeal deadline) would be "deemed valid" unless they were challenged – "to modify or vacate" – in court before the passage of one year from the effective date of this act, meaning the challenge must be filed before Nov. 1, *2023* (meaning this "final decree" and all other actions in the proceeding are "voidable"); *and*
2) All probate proceedings a) that were filed in the wrong county and b) that *did not have* a final decree (past the 30-day appeal period) by the effective date of this act, Nov. 1, *2022*, are still pending and must be transferred to the correct county and dismissed in the wrong county.

It should be noted that part 3(b) of this amended Section 5 preserves the basic due process rights of heirs and devisees/legatees who do not receive notice of the probate proceeding by providing:

> 3. In all cases of administration of estates of deceased persons in this state where final decrees have been entered prior to the effective date of this act, and for which the final decrees are or may be defective or invalid for lack of jurisdiction because the administration was in a county other than the county of proper venue as prescribed by this section, such final decrees shall be deemed valid; provided, however, the provisions of this paragraph: ...
>
> b. shall not bar the claim of a person claiming an interest in a decedent's estate if the person did not receive notice of the probate or estate administration, actual or constructive, as required by this title.

A series of additional practical questions have arisen among the practicing bar on how to proceed regarding cases filed in the wrong county 1) that were still pending (not finalized) on the effective date of this amendment – Nov. 1, *2022* – or 2) that were finalized before that Nov. 1, *2022*, date but are still within the one-year window – meaning until Nov. 1, *2023*.

In *Fulks*, the court ordered, "The matter is remanded [*sic*] Nowata County with directions for the trial court to transfer the cause to Osage County, and to dismiss the Nowata County proceedings."[14] Therefore, the initial impression is that such "still-pending" cases – no final decree, or a final decree but within the one-year window – must be transferred.

Some attorneys suggest you could avoid the transfer process by filing a totally new case in the correct county. The question then arose as to whether any money (*i.e.*, court costs) could be saved by pursuing one course of action rather than the other: 1) transfer

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and dismiss or 2) simply refile. Because all the steps already undertaken in the initial case were done without the court having jurisdiction, they were all arguably void and would have to be redone in the transferred or new case. These would include actions such as an order admitting the will, an order appointing a personal representative, notice to interested parties (*e.g.*, heirs, devisees/legatees) and creditors, and orders authorizing or confirming the sale or distribution of assets, etc. The only apparent benefit to choosing between 1) transferring it to the right county and dismissing it in the wrong county or 2) simply refiling it in the right county is to avoid repaying the initial filing fee when filing it in the right county. All other actions (other than such payment) would have to be retaken under either course of action. In addition, if the proceeding in the wrong county had resulted in a "final decree," the parties must challenge the wrong proceeding presumably in the same "wrong" court – before Nov. 1, 2023 – otherwise, it would become "deemed valid." This is because simply filing a new proceeding in the right county would not vacate the prior proceeding.

CONCLUSION

When dealing with a probate proceeding for a decedent who dies while a resident of Oklahoma, 1) be sure to file the proceeding in the county of the decedent's residence on the date of the decedent's death (this information is provided on the face of the decedent's death certificate, which is probably a strong piece of evidence), 2) if a completed proceeding (final decree) is to be challenged, be sure the challenge is made before Nov. 1, *2023*, by transferring it to the right county and dismissing the prior proceeding (with prejudice) and (presumably) redoing all actions in the new proceeding, and 3) be sure to a) transfer any and all still-pending proceedings (*i.e.*, not completed) to the right county, b) dismiss the wrong proceeding and c) (presumably) redo all the usual steps, even if already completed.

ABOUT THE AUTHOR

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ENDNOTES

1. *Atchison, Topeka & Santa Fe Ry. Co.*, 1961 OK 290, ¶23, 368 P.2d 475, 478.

2. *Robinson v. Oklahoma Employment Sec. Com'n*, 1997 OK 5, ¶8, 932 P.2d 1120, 1123.

3. *Presbury*, 1923 OK 127, ¶11, 213 P.311, 312: "Where the decedent is a resident of the state, the court having *jurisdiction* to probate his will is specifically fixed by this statute in the county court of the county in which the decedent was a resident at the time of this death, and such *jurisdiction* cannot be shifted about to any other county, near or remote, merely by being diligent in making the first application for the probate of the will in some other county than that of the residence of the decedent. *Only one county can have jurisdiction in such cases*, and that is the county in which the decedent was a resident at the time of his death." (emphasis added).

4. 12 O.S. §1038. However, it should be noted that: *"Unless void upon the face of the judgment roll, no judgment may be modified or vacated under the provisions of 12 O.S. 1991 §§ 1031 et seq. if proceedings for this relief are brought after expiration of the applicable time limits prescribed by 12. O.S. 1991 §§ 1031 and 1038. If evidence is needed to show a lack of some jurisdictional element, a three-year time bar applies." Stark v. Stark*, 1995 OK 61, ¶10, 898, P.2d 732, 737. Therefore, even without the provision of the 2022 amendment to 58 O.S. §5 (discussed below), which will treat these potentially void decrees as being "deemed valid," in the absence of a defect on the "face of the judgment roll" – if enough time goes by (three years) – any "void" decrees will become unassailable.

5. *In re Estate of Walker*, 2018 OK CIV APP 63, 439 P.3d 424.

6. *In the Matter of the Estate of Fulks*, 2020 OK 94, ¶24, 477 P.3d 1143, 1152: "Pursuant to §5, venue is prioritized and lies first and foremost in the county where the decedent resided at the time of death … Here, only one county, Osage County, is the proper venue. The trial court is reversed, and the matter is remanded [*sic*] Nowata County with directions for the trial court to transfer the cause to Osage County, and to dismiss the Nowata County proceedings"; *see* 58 O.S. §5 1; *also see* "Probate Venue (aka Jurisdiction) is Important: *Fulks* Overrules *Walker*"; 92 *OBJ* 28 (April 2021) by Kraettli Q. Epperson. It should be noted that under 59 O.S. §714 – Proceedings to Probate Jointly Two or More Wills as Estates, provides: "the court may grant letters testamentary and/or letters of administration, as the case may be, upon such estates in any county where venue would be proper for any of the estates so joined and they may be administered in one proceeding."

7. 12 O.S. §5 (2)-(5).

8. *Walker* §9.

9. *Fulks* §23.

10. *See* footnote 6.

11. 58 O.S. §5 (effective Nov. 1, 2022).

12. §5(3).

13. Note that it is necessary to have a "final decree" issued before the Nov. 1, 2022, date arrived in order to be entitled to such actions being "deemed valid"; for the "final decree" to be final, it presumably must be past the 30-day appeal date; also, failure to have reached that stage of the proceeding – producing anything less than a "final decree" – does not appear to trigger the saving clause. 12 O.S. §681 *Judgment defined:* "A judgment is the final determination of the rights of the parties in an action." "Since the merger of courts of law and equity, 'the terms "decree" and "judgment" are interchangeable,'" *Whitehead v. Whitehead,* 1999 OK 91, n. 6, 995 P.2d 1098, 1101 n.6.

12 O.S. §990A. "Appeal to Supreme Court by filing petition in error ..." "A. An appeal to the Supreme Court of Oklahoma, if taken, must be commenced by filing a petition in error with the Clerk of the Supreme Court of Oklahoma within thirty (30) days from the date a judgment, decree, or appealable order prepared in conformance with Section 696.3 of this title is filed with the clerk of the trial court."

14. *Fulks* ¶24.

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