Estate Planning, Probate and Trust Section Note: Probate Venue (aka Jurisdiction) Is Important: *Fulks* Overules *Walker*

By Kraettli Q. Epperson

THERE IS A SPECIFIC statute in Title 58: Probate Procedure, Chapter 1: Jurisdiction, Section 5: Venue of Probate Acts, that identifies the proper county (venue) for filing a probate or administration case in the district courts in Oklahoma. This probate venue statute contains a five-part list that is divided between 1) decedents who are Oklahoma residents when they die, regardless of where they die (58 O.S. §5(First))[1] and 2) decedents who are not Oklahoma residents at the time of their death but leave a part of their estate in Oklahoma (58 O.S. §5(Second)-(Fourth)), with a category for "all other cases" for other non-resident circumstances (58 O.S. §5(Fifth)).[2]

ERRONEOUS RULING IN *WALKER*

A 2018 Oklahoma Court of Civil Appeals case (*Walker*) held that the state Legislature had (in 1941) eliminated the need to determine which county was the proper venue and declared that – for any person dying while a resident of Oklahoma – venue was proper in any county in the state of Oklahoma, without regard to the county of residence of the decedent.[3]

It is easy to understand that, for the convenience of the probate attorney and their client, it would be useful if the selection of the venue (i.e., county) for filing a probate action in an Oklahoma District Court could be made at the discretion of the attorney. The attorney could take cases involving a deceased person whose residence was located across the state but file the proceeding in the county where the attorney's law office is located. This use of a local venue would save time and fees for the client by eliminating travel time. An attorney would presumably be more willing to take probate cases that would be unappealing if filed and prosecuted outside the county of their office. This option would also expand the pool of attorneys available to the client. In addition, a client (*e.g.*, personal representative) would usually find it convenient to be able to attend hearings in the county where they reside instead of traveling across the state to the county of the decedent's last residence.

The *Walker* decision relied on a perceived change made in the probate venue statute (58 O.S. §5) whereby the original numbers for each of the subsections in the statute were changed from a *written* to a *numerical* designation (*i.e.*, from "FIRST," "SECOND," etc., to "1," "2," etc.). The *Walker* COCA decision concluded such "numbering" change had occurred and reflected a "legislative" intent in 1941 to alter the process for determining the proper venue, so any county became acceptable.[4]

FULKS OVERRULING *WALKER*

However, this same issue – as to which county was the proper jurisdiction and venue for a probate proceeding – was recently addressed in 2020 by the Oklahoma Supreme Court in the case of *Fulks*.[5]

In the *Fulks* decision, the Oklahoma Supreme Court held: 1) there was no *legislative* change in the priority "numbering" of the subsections of the probate venue statute (such numbering change was made unilaterally by the *publisher*), 2) the probate venue selection priorities never changed and 3) *Walker* was expressly "overruled."[6]

CONTINUING PROPER PROBATE VENUE FOR A RESIDENT OF OKLAHOMA

So, if *Walker* was overruled, what was the existing law – before *Walker* – regarding 1) which county

was the proper venue for the conduct of a probate – in particular for a decedent who was a resident of Oklahoma at the time of death – and 2) the consequences if the wrong venue is selected and judgments and orders are issued?

The case law that guided such (pre-*Walker*) question is found in a case discussed in *Walker* and then discarded because the underlying statute had allegedly been changed. The court in *Walker* admitted, "The Oklahoma Supreme Court held in *Presbury*, 1923 OK 127, at ¶7, 213 P. at 312, that wills must be proved, and letters testamentary or of administration granted, first in the county of which the decedent was a resident at the time of his death."[7]

The 1923 *Presbury* case provided: "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 his 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 of which the decedent was a resident at the time of his death."[8] Note, *Presbury* speaks specifically to jurisdiction without limiting the discussion to venue.

At least one Oklahoma Supreme Court case infers that 58 O.S. §5 is prescribing more than just proper venue. "We think certain provisions of 58 O.S. 1971 §5 are more applicable to a consideration *regarding the extent of the general grant of probate jurisdiction* made in 58 O.S. 1971 §1 et seq."[9]

In summary, the holding of *Fulks* confirms that probates must be filed in the proper county as identified in the probate venue statute (58 O.S. §5), and not in just any county. Specifically, if the decedent died as a resident of Oklahoma, the probate proceeding must be filed in the county of residence. Consequently, an attorney needs to file any probate proceeding in the correct county as set forth in the probate venue statute, as guided by the holdings in *Presbury* and *Fulks,* and must disclose to the court the residence of the decedent at their death. Under *Presbury*, for an Oklahoma resident decedent, the *only county* with "*jurisdiction*" is the county in which the decedent resided.

POSSIBLE VOID NATURE OF JUDGMENTS AND ORDERS FILED PURSUANT TO *WALKER*

The *Fulks* decision was based on an appeal raised in a timely manner, and it reversed the trial court that had erroneously followed *Walker*. Due to its facts, the holding in *Fulks* fails to address the situation as to whether a judgment or order issued by a probate court in the wrong venue is jurisdictionally void and, therefore, subject to being vacated "at any time" beyond the appeal window.[10]

As to the ability to vacate such improper judgment or order after the period of time allowed for an appeal has lapsed, at least one case has held that a probate judgment could be vacated after the appeal time: "We have repeatedly held that the false allegation of the jurisdictional fact of residence in probate proceedings constitutes a fraud upon the court such as will justify the vacation of an order or judgment under Section 1031(4) above … The basis of jurisdiction in both probate and divorce cases is residence."[11] "Our statute fixes a limitation of two years to commence a proceeding to vacate a judgment because of fraud, 12 O.S. 1941 §1038."[12] In *Meyers*, the appellant additionally pleaded that the offending underlying order was jurisdictionally void *ab initio* for lack of residency. Having resolved the appeal on the initial fraud contention, the Supreme Court did not address the remaining assertions of error.[13]

Until the Oklahoma Supreme Court speaks directly to this remaining point – as to vacating a probate judgment and order two years beyond the appeal window for a judgment or order that was rendered in a court without proper venue – the answer will remain unclear.

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ENDNOTES

1. "Wills must be proved, and letters testamentary or of administration granted: First. In the county which the decedent was a resident at the time of his death, regardless where he died."

2. "Fifth, in all other cases, in the county where letters for administration is first made."

3. *In re Estate of Walker*, 2018 OK CIV APP 63, 439 P.3d 424; *Walker* ¶9, "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*." *See* 58 O.S. §5, "Fifth, in all other cases, in the county where letters of administration is first made." In *Walker*, a probate was completed in Osage County, although the decedent's residence was in Mayes County (proper county); decedent's wife sought to dismiss the second probate (filed in the correct county) due to non-appeal of the first probate; the trial court refused to dismiss the second probate; on appeal the Oklahoma Court of Civil Appeals reversed the trial court and held the first probate was valid because the probate venue statute was amended in 1941 to allow a probate for a resident of Oklahoma to be filed in any county.

4. *Walker* ¶8, "Thus, the Legislature prioritized venue in which a probate action should be filed by its use of 'First, Second, …' The *Legislature subsequently amended the statute*, specifically removing the priority language."

5. *In the Matter of the Estate of Fulks*, 2020 OK 94, 477 P.3d 1143; in *Fulks*, a probate was initiated in Nowata County by the decedent's spouse with no averment of the decedent's residency; the decedent's daughter (an heir and devisee), objected to the probate being conducted in Nowata County because the decedent died in Osage County, all of the decedent's real and personal property was in Osage County and, she asserted, proper venue was in Osage County under the probate venue statute; the daughter sought to transfer the probate to Osage County; the trial court denied the request; the daughter appealed and the Oklahoma Supreme Court reversed and remanded the case to the trial court directing that the case be transferred to the county of the decedent's residence, Osage County.

6. *Fulks* ¶12: "The 1982 amendments were small changes intended to clarify language relating to residency requirements. Title 58 O.S. Supp. 1982 §5, reads the same as the current version. Consequently, the *publisher's* changes from words such as "First" to "1" has no affect (sic) on the statutes' substantive meaning. Our precedents vary on construction of §5 based on the variation in facts and circumstances. The present question has never been addressed by this Court based on the change from written to numerical designations. We would not do so now but for the recent opinion of the Court of Civil Appeals in *In re Estate of Walker*, 2018 OK CIV APP 63, 439 P.3d 424, in which *the Court of Civil Appeals held that the Legislature had amended the statute so that probate could be filed in any county*. We do not agree with this premise, it is overly broad and statutorily inconsistent." AND *Fulks* ¶23: "In *In re Estate of Walker*, 2018 OK CIV APP 63, 439 P.3d 424, the Court of Civil Appeals addressed the venue of probates. Like this cause, *Walker*, supra, also involved the request to transfer a probate case based upon a change of venue after administration of letters were first made. The Walker Court noted the original statutory change enactment of 1910, but *it incorrectly assumed that the Legislature subsequently amended the statute to removing priority language* of 'First, Second,' etc. Thus, *Walker's* holding that a priority no longer exists in the statute because of a legislative amendment, and that a probate action may be filed in any of the applicable situations listed in §5, was based on an incorrect assumption. As a result, the rule suddenly became that probate venue was proper anywhere in the State of Oklahoma. To the extent that *Walker* is inconsistent with this opinion it is hereby overruled. Because we hold that Osage is the only proper county in which this probate may proceed, we need not address the intrastate forum non conveniens arguments made by the daughter." The *Walker* case was not approved by the Oklahoma Supreme Court and, therefore, was not precedential. 20 O.S. §305, "No opinion of the Court of Civil Appeals shall be binding or cited as precedent unless it shall have been approved by the majority of the justices of the Supreme Court for publication in the official reporter."

7. *Fulks*, ¶8.

8. *Presbury*, 1923 OK 127, ¶11, 213 P. 311,312. In *Presbury*, a probate was filed in Osage County; a second probate was subsequently filed in Kay County; the relator in Osage County filed a Motion to Dismiss the Kay County Court proceedings solely because the Osage County probate was filed first, although it was found the decedent was a resident of Kay County at the time of his death; the trial court held that the case filed in Osage County was the proper jurisdiction because it was filed first, without regard to where the decedent's residence was located; the relator on the Kay County probate (a county court) appealed to the District Court which reversed and held that Kay County was the proper jurisdiction (as decedent's residence); on appeal the Oklahoma Supreme Court denied the application for a writ of probation and affirmed the District Court's determination that the probate court of Kay County was the proper jurisdiction, as decedent's residence; *See also*, *Seifert v. Seifert*, 1921 OK 282, 200 P. 230.

9. *Mitchell v. Cloyes*, 1980 OK 184 ¶27, 620 P.2d 398, 402.

10. 12 O.S. §1038, "A void judgment, decree or order may be vacated at any time, on motion of a party or any person affected thereby."

11. *Meyers v. Meyers*, 1948 OK 246, ¶8, 199 P.2d 819, 820-821.

12. *Meyers*, ¶18; *See* 12 O.S. §1038, "Proceedings to vacate or modify a judgment, decree or order, for the causes mentioned in paragraphs 4 [fraud], 5 and 7 of Section 1031 of this title must be commenced within two (2) years after the filing of the judgment, decree or order …"

13. *Meyers*, ¶19.