AFFIRM; and Opinion Filed January 25, 2024.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-22-01149-CV

IN RE THE ESTATE OF ORNELLA ELLARD, DECEASED

On Appeal from the Probate Court No. 2
Dallas County, Texas
Trial Court Cause No. PR-19-02521-2

MEMORANDUM OPINION

Before Justices Nowell, Miskel, and Kennedy
Opinion by Justice Kennedy

This appeal concerns the probate court's ratification of BOKF, N.A., d/b/a Bank of Texas's (the Bank) engagement of a personal injury firm, Hamilton Wingo, LLP (H&W), to represent the Bank on a contingent basis to pursue various claims on behalf of the Estate of Ornella Ellard, Deceased (Estate).[1] In engaging H&W, the Bank acted in its capacity as the Independent Executor of the Estate. The probate

[1] Generally, appeals may be taken only from final judgments. *Lehmann v. Har–Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). Probate proceedings are an exception to the "one final judgment" rule; in such cases, "multiple judgments final for purposes of appeal can be rendered on certain discrete issues." *Id.* at 192. The trial court's order ratifying the Engagement Agreement disposed of all issues raised in the Bank and H&W's motion and that particular phase of the proceedings. Accordingly, the order is final and appealable. *See, generally*, *De Ayala v. Mackie*, 193 S.W.3d 575, 578 (Tex. 2006).

court determined that Ellard's father, Lorenzo Cosentino, and her sister, Tiziana Cosentino, were the heirs of the Estate.[2] Lorenzo disclaimed his interest in the Estate, leaving Tiziana the sole heir. On appeal, Tiziana asserts the probate court erred in ruling on the Bank and H&W's motion to ratify because (1) the issues presented by the motion should have been submitted to a jury, and (2) it should have been consolidated with Tiziana's separate breach of fiduciary duty suit against the Bank. In addition, Tiziana challenges the sufficiency of the evidence to support the trial court's ruling on the motion to ratify, and the probate court's evidentiary rulings with respect to affidavits she submitted in response to the motion to ratify. We affirm the probate court's order ratifying the Bank and H&W's engagement agreement. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

On June 30, 2019, a small plane crashed shortly after takeoff from the Addison Airport. Among the passengers who died in that crash were Ellard, her husband and her two children. Ellard died testate. The beneficiaries of her estate were her husband and children. The contingent beneficiaries were her heirs-in-law. With the

[2] Because Tiziana Cosentino and Lorenzo Cosentino share a last name, we will refer to them by the first names for clarity in this opinion.

death of Ellard's husband and children, and the disclaimer of Lorenzo's interest in the Estate, Tiziana became the sole heir of the Estate.

With the death of Ellard's husband, the Bank became the successor Independent Executor under Ellard's will. The Bank filed an Application for Probate of Will and Issuance of Letters Testamentary on August 1, 2019 (Estate Case). On September 9, the probate court entered an Order Admitting Will to Probate and Authorizing Letters Testamentary.

Given the circumstances surrounding Ellard's death, the Estate owned survival claims and Lorenzo owned wrongful-death claims based on theories of negligence. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.004(b) (surviving spouse, children and parents of deceased may bring wrongful death action); *id.* § 71.021(b) (personal injury action survives the death of the injured person); *see also Shepherd v. Ledford*, 962 S.W.2d 28, 31 (Tex. 1998) (survival statute provides only personal representative, administrator, or heir may sue on behalf of estate). Wrongful death claims typically rely on proof of the family member's damages as a result of the decedent's death. *See Sanchez v. Schindler*, 651 S.W.2d 249, 253 (Tex. 1983). Survival claims concern the decedent's damages as a result of pain and suffering the decedent experienced prior to death. CIV. PRAC. & REM. § 71.021.

Various wrongful-death suits were filed against the airplane's operators by relatives of the passengers who perished in the plane crash. Lorenzo retained attorney Victor Poulos to represent him in his wrongful-death suit. Poulos agreed to

representation Lorenzo at a reduced contingency fee of twenty-five percent due to a prior relationship he had with Tiziana and her husband.

Eventually, the plaintiffs in the wrongful-death cases arising from the plane crash agreed to coordinate their efforts and to hire attorney Al Ellis as an independent settlement allocator to allocate among the plaintiffs any insurance proceeds recovered.

Poulos met with representatives of the Bank and advised them that he had been engaged to represent the "family" on matters arising from Ellard's death. The Bank determined that it was in the best interest of the Estate to pursue the survival claims and to hire its own counsel to represent it in pursuit of same, rather than retain Poulos, who was already representing Lorenzo, thus creating a potential conflict. On June 3, 2020, the Bank entered into the engagement agreement with H&W (Engagement Agreement), which entitled H&W to a forty percent contingency fee from all claims or recoveries, increasing to forty-five percent after expert designations.

The Estate's survival claims were joined with other estates' survival claims and the wrongful-death claims. The claimants reached a settlement with the airplane operators and their insurers and then presented their individual claims of loss to Ellis who then assigned each claimant a portion of the settlement proceeds. The claimants entered into a confidential settlement agreement adopting Ellis' allocations of the proceeds.

On February 14, 2022, Tiziana filed a lawsuit against the Bank in the same probate court handling the Estate Case alleging various breaches of fiduciary duty, including claims that the Bank's retention of H&W to pursue the Estate's survival claims was improper, and seeking a declaration that the Engagement Agreement is void[3] and removal of the Bank as executor of the Estate (Fiduciary Duty Case).

On May 3, 2022, H&W and the Bank filed a Joint Motion to Ratify Employment of Personal Injury Attorney in the Estate Case because the Engagement Agreement conveyed a contingent interest in property recovered in excess of one-third of the property.[4] That motion was set for hearing via Zoom video conference on July 12, 2022. A day before the hearing, Tiziana filed a Motion to Consolidate Motion to Ratify Contingency Fee Agreement or, alternatively, Motion to Abate, seeking to consolidate the motion with her Fiduciary Duty Case, or at a minimum to abate the motion until final resolution of that case. In addition, on that same day, Tiziana filed a Jury Demand, a Response and Objection to Motion to Ratify

[3] In her petition, Tiziana sought a declaration that the Engagement Agreement was void, and requested that it be set aside and to disgorge the entirety of the fees paid to H&W. At the hearing before the probate court on the Bank and H&W's motion to ratify, Tiziana conceded that she has no claim against H&W because there is no privity of contract between her and the firm. Accordingly, she has no standing to seek disgorgement. *See OAIC Com. Assets, L.L.C. v. Stonegate Vill., L.P.*, 234 S.W.3d 728, 738 (Tex. App.—Dallas 2007, pet. denied). Moreover, as more fully explained *infra*, whether the Bank may seek ratification of the Engagement Agreement after legal services have been provided is a question of statutory interpretation to be determined by the court, and the court, not a jury, decides whether the Engagement Agreement should be ratified.

[4] It is undisputed that the Bank did not seek and obtain approval of the Engagement Agreement before H&W performed any legal services and that the agreement was a contract to convey for attorney services a contingent interest in property that exceeded a one-third interest in the property. Consequently, the Bank and H&W sought ratification of their agreement under the Estates Code's provision authorizing a court to ratify such an agreement. EST. § 351.152(b).

Contingency Fee Agreement, and a Notice of Lawsuit, attaching a copy of her petition in the Fiduciary Duty Case.

At the hearing, Tiziana's attorney urged the court should not proceed with the motion to ratify and instead should consolidate the motion into Tiziana's Fiduciary Duty Case or abate the motion until the conclusion of her case. Counsel for H&W advised the court that there is ongoing litigation in which H&W represents the Estate, a products-liability case, and that the firm needs a ratification of the employment contract to continue to work for the Estate. Tiziana claimed the Bank should not have hired H&W to pursue the survival claims because it did not need to do anything with respect to those claims other than adopt Poulos' presentation, or it should have hired Poulos at no additional cost to the Estate, because all of the survivorship claims would have been the same, i.e., all of the passengers died instantly. Paul Wingo, one of the named partners at H&W, was present at the hearing. He explained to the court that H&W was initially hired because of concerns over a conflict of interest between Lorenzo, on his wrongful-death claim, and Tiziana, as a beneficiary of the Estate, because funds that went to Lorenzo could deplete potential funds that might go to the Estate. He gave a little background on his firm and explained H&W was brought into the case because of a novel issue and was able to bring in one of the top experts on the issue of conscious pain and suffering. Counsel for Tiziana indicated that Tiziana did not have a "beef" with Wingo and his firm per se, her "beef" was with the Bank hiring the firm to represent

the Estate in the survivorship action in the first instance when doing so was not necessary. Tiziana's counsel proffered that there could be a new fee agreement between the Bank and H&W covering the pending products-liability case but urged the issue of the fee in the survivorship case is before the court in the Fiduciary Duty Case and should not be decided in connection with the Estate Case. At the conclusion of the hearing, the probate court requested that Wingo prepare an affidavit summarizing the work performed by H&W in the survivorship action, so that it could determine whether there was a benefit to the Estate that would justify the fee provided for in the Engagement Agreement.

On July 15, 2022, H&W's counsel filed an affidavit signed by Wingo in support of the joint motion to ratify the Engagement Agreement. Through his affidavit, Wingo addressed the five factors listed in section 351.152(c) of the Estates Code, governing court approval of contingent interest for certain attorney's fees,[5] and established the following. H&W is a nationally recognized plaintiffs' trial firm in Dallas. It has obtained the top litigation verdicts and settlements of all Dallas

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[5] Pursuant to section 351.152(c), the court shall consider:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;

(2) the fee customarily charged in the locality for similar legal services;

(3) the value of the property recovered or sought to be recovered by the personal representative under this subchapter;

(4) the benefits to the estate that the attorney will be responsible for securing; and

(5) the experience and ability of the attorney who will perform the services.

EST. § 351.152(c).

personal injury firms. The matters in which it was engaged to represent the Estate were complex and required the employment of skilled and experienced attorneys.

Wingo further established that the Bank hired H&W on June 3, 2020,[6] to represent the Estate in two actions arising out of the plane crash that resulted in Ellard's death. By hiring H&W, the Bank obtained separate and independent counsel to represent the interests of the Estate. The Bank and H&W entered into the Engagement Agreement, which provides that H&W's fee is based on a percentage of recovery that varies depending on the stage in which litigation is resolved.

Wingo explained that the first action was filed in early 2020. In that case, the Estate and other decedents' estates asserted survival actions and the decedent's surviving family members, including Lorenzo, asserted wrongful-death actions against the airplane operators for negligent operation of the airplane. While the survival and wrongful-death claims were pursued in one case, a survival action is distinct from a wrongful-death action. A survival action concerns the decedent's damages as a result of the pain and suffering the decedent experienced prior to her death whereas a wrongful-death action concerns the family member's damages as a result of the decedent's death. The Estate's survival action required the Estate to establish different facts than those Lorenzo needed to establish to support his wrongful-death claim.

[6] Wingo indicated in his affidavit that prior to the Bank engaging H&W, Lorenzo disclaimed his interest in the Estate resulting in Tiziana being the sole beneficiary of the Estate.

Wingo further explained that survival action damages brought by an estate are often difficult to prove in plane crashes, where many victims are presumed to have died on impact. In that regard, H&W engaged Carl Adam, one of the top experts in the country. Through him and the autopsy reports, H&W was able to establish Ellard did not die as a result of the impact but rather from smoke inhalation and burns. Adams opined that Ellard was alive and conscious for an extended period of time during which she experienced horrific conscious pain and suffering and was aware of her impending death, thereby establishing a substantial survival cause of action for the Estate. After a global settlement was reached for all the plaintiffs in the negligent operation of the airplane lawsuit in April 2021, H&W prepared and presented an allocation letter and video to Ellis. According to Wingo, H&W obtained a significant settlement, one of the larger percentages of the global settlement proceeds, for the Estate, which reflects the horrendous nature of Ellard's injuries. The Estate obtained this settlement in large part due to the compelling testimony of Adams and the persuasive presentation H&W created and provided to Ellis.

Wingo further discussed the second lawsuit, which was filed in late 2020. In that case, the Estate, and the estates and surviving family members of the other passengers, asserted products-liability claims against the airplane, engine, and propellor manufacturers and a negligence claim against the airplane inspector. The second suit was ongoing at the time the probate court considered the motion to ratify

and the plaintiffs had proposed a trial date of June 5, 2023. In that case, the parties had already engaged in motion practice, discovery and document review.

Wingo further established that six different attorneys at H&W, including three partners, had worked hundreds of combined hours in all stages of litigation, as reflected by more than 800 entries in the firm's case management system and the several thousands of pages of documents reviewed. H&W will receive compensation for its services in the amount of forty percent of the recoveries prior to designation of experts, which is the industry standard in Dallas County for the provision of similar legal services. Poulos confirmed in his affidavit that forty percent is his customary fee.

On or about July 20, 2022, Tiziana filed the affidavits of attorneys Victor Poulos and Kevin Spencer. Poulos has handled aviation personal injury matters since 1997. Poulos undertook the representation of the family for a twenty-five percent contingent fee and not the usual forty percent due to his close association and prior relationship with Tiziana and her husband. The affidavits of Poulos and Spencer primarily focus on the alleged breaches of fiduciary duty Tiziana claims the Bank committed, which are the subject of the Fiduciary Duty Case.

The Bank filed various objections to the affidavits of Poulos and Spencer and H&W submitted documents concerning the settlement H&W obtained on behalf of the Estate to the probate court for *in camera* inspection.

On August 5, 2022, the probate court signed an order ratifying the Engagement Agreement.[7] The court sustained the Bank's objections to certain paragraphs of Poulos' affidavit and to a paragraph in Spencer's affidavit referencing Wingo's testimony and overruled all other objections of the Bank. On September 6, 2022, Tiziana filed a motion for new trial. The probate court denied that motion on October 29, 2022. This appeal followed.

DISCUSSION

In her first issue, Tiziana generally challenges the probate court's ratification of the Engagement Agreement, the probate court proceeding to rule on the motion to ratify without empaneling a jury, and its implied rulings on motions she filed the day before the hearing on the motion to ratify.

I. Section 351.152(b) of the Estate's Code

Tiziana contends the probate court erred in ratifying the Engagement Agreement because section 351.152(b) of the Estates Code requires that an independent executor seek ratification *before* any legal services are performed and the Bank failed to do so. The Bank responds asserting the statute does not impose such a requirement.

The first portion of Tiziana's first issue involves the interpretation of section 351.152. Statutory interpretation is a question of law that we review de novo.

[7] We note that the probate court did not sign the proposed order that the Bank and H&W submitted. It appears the probate court prepared its own order, which did not adopt every finding the moving parties proposed.

Inwood Nat'l Bank v. Wells Fargo Bank, N.A., 463 S.W.3d 228, 234 (Tex. App.—Dallas 2015, no pet.) (citing *City of Houston v. Bates*, 406 S.W.3d 539, 543 (Tex. 2013)). Our primary objective is to ascertain and give effect to the intent of the Legislature when it enacted the statute. *Bates*, 406 S.W.3d at 543. When a statute is clear and unambiguous, we presume the words chosen are the surest guide to legislative intent. *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010). We apply the statute's words according to their common meaning in a way that gives effect to every word, clause, and sentence. *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008); *see also* TEX. GOV'T CODE ANN. § 311.011(a) (requiring that words be "construed according to the rules of grammar and common usage"); *Bates*, 406 S.W.3d at 543–44. When statutory text is clear, it is determinative of legislative intent, "unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011); *see also Bates*, 406 S.W.3d at 543.

Beginning with the controlling statute's text, section 351.152 of the Texas Estates Code provides as follows:

> (a) A personal representative may, without court approval, convey or enter into a contract to convey for attorney services a contingent interest in any property sought to be recovered, not to exceed a one-third interest in the property.
>
> (b) A personal representative, including an independent executor or independent administrator, may convey or enter into a contract to convey for attorney services a contingent interest in any property sought to be recovered under this subchapter in an amount that

> exceeds a one-third interest in the property only on the approval of the court in which the estate is being administered. The court must approve a contract or conveyance described by this subsection before an attorney performs any legal services. A contract entered into or a conveyance made in violation of this subsection is void unless the court ratifies or reforms the contract or documents relating to the conveyance to the extent necessary to make the contract or conveyance meet the requirements of this subsection.
>
> (c) In approving a contract or conveyance under this section, the court shall consider:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;
>
> (2) the fee customarily charged in the locality for similar legal services;
>
> (3) the value of the property recovered or sought to be recovered by the personal representative under this subchapter;
>
> (4) the benefits to the estate that the attorney will be responsible for securing; and
>
> (5) the experience and ability of the attorney who will perform the services.

TEX. EST. CODE § 351.152. Tiziana attempts to import the phrase *before an attorney performs any services* to the portion of subsection (b) addressing ratification of a contract that was not approved before the attorney performs any legal services. Thus, she seeks to construe the statute to require that a party seek and obtain ratification of a contingency fee agreement exceeding one-third of the interest in the property sought to be recovered before the attorney performs any legal services and preventing approval of such an agreement after the attorney performs same. If the

Legislature intended the phrase *before an attorney performs any services* to apply to both preapproval of a fee agreement and ratification of an agreement, it could have easily included a phrase indicating such intent, however, the Legislature chose not to do so. We must presume that the Legislature purposefully omitted words that were not chosen. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). The plain language of the statute states, "[a] contract entered into or a conveyance made in violation of this subsection is void unless the court ratifies or reforms the contract relating to the conveyance to the extent necessary to make the contract or conveyance meet the requirements of this subsection." EST. § 351.152(b). The statute does not contain a deadline for seeking and obtaining a ratification of an agreement, and we will not rewrite the text that the lawmakers chose. *See Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009). Accordingly, we conclude Tiziana's construction of the statute to require ratification of a fee agreement before any legal services are performed is not supportable.

II. Jury Demand

Tiziana's asserts that the probate court improperly ignored her jury demand when it proceeded to rule on the Bank and H&W's motion to ratify. The jury demand Tiziana filed the day before the hearing on the Bank and H&W's motion to ratify simply stated, "Tiziana Cosentino hereby makes this jury demand for the trial of this matter." In her opening brief, Tiziana argues the issues presented in connection with the Bank and H&W's motion to ratify should be decided by a jury

in her Fiduciary Duty Case and not in the Estate Case. This is in keeping with her counsel's statements during the hearing on the motion to ratify[8] and is essentially a restatement of her argument concerning consolidation of the motion into the Fiduciary Duty Case, which we address *infra*. In her opening brief, Tiziana further contends the Texas Constitution and section 55.002 of the Estates Code provide her a right to a jury trial in connection with the Bank & H&W's motion to ratify.

We begin by addressing Tiziana's assertion with regard to the Texas Constitution. The Judiciary Article of the Texas Constitution provides, "[I]n the trial of all causes in the district courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury." TEX. CONST. art. V, § 10. Whether there is a right of trial by jury under the Judiciary Article is whether the disputed matter is a question of fact that must be submitted to a jury or a question of equitable discretion to be decided by the court. *In re of Troy S. Poe Tr.*, 646 S.W.3d 771, 784 (Tex. 2022) (Busby, J., concurring). The Judiciary Article "cause" does not encompass every legal proceeding involving a contested factual question or every adversary proceeding. *Id.* at 779; *In re Troy S. Poe Tr.*, 673 S.W.3d 395, 403 (Tex. App.—El Paso 2023, pet. filed). In fact, the Texas Supreme Court has held that a jury-trial right does not exist under the Texas Constitution in a variety of proceedings, including, but not limited to, "civil contempt proceedings, election

[8] At the hearing, Tiziana's counsel stated, "We can't have the same issue going forward and pending in - - even though it's the same court, in two different cause numbers. Plus, we filed a jury demand and are entitled to a jury on this issue which is part of the other case."

contests, habeas corpus proceedings for custody of minor children, suits for the removal of a sheriff, and appeals in administrative proceedings." *Id.* (citing *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 293 (Tex. 1975)). Yet there is no doubt many of these cases will involve factual disputes or contested issues. As our sister court recently recognized, the term "cause" as used in the Judiciary Article contemplates the existence of a plaintiff who is seeking justice against a defendant who has committed some wrongdoing as opposed to a special proceeding. *See Kruse v. Henderson Tex. Bancshares, Inc.*, 586 S.W.3d 118, 124 (Tex. App.—Tyler 2019, no pet.).

If a proceeding is one created by statute or rule that lacks the essential characteristics of a cause, the disputed matter need not be tried to a jury unless a statute provides otherwise. *In re Troy S. Poe Tr.*, 646 S.W.3d at 787. One example is receiverships. A receivership is generally a remedy rather than a separate cause and is imposed and administered in ongoing proceedings incidental or ancillary to a cause, with a jury available to try disputed issues of fact in that cause. *See, e.g.*, CIV. PRAC. & REM. §§ 31.002(b), 62.001, 62.061, 64.001; *Cocke v. Southland Life Ins. Co.*, 75 S.W.2d 194, 198 (Tex. App.—El Paso 1934, writ ref'd) (concluding right to jury did not extend to "incidental and supplemental hearing" on final accounting of receiver appointed following default judgment). Another example is in estate administration. A court handling a dependent administration exercises control over the personal representative and estate that is at least as extensive as the control it has

over a receiver and receivership property, and the court also exercises substantial control over certain aspects of an independent administration, including various aspects set forth in chapter 351. *In re Troy S. Poe Tr.*, 646 S.W.3d at 788 n.28 (citing EST. chs. 301, 305, 306, 309, 251, 255–360, 402; *Eastland v. Eastland*, 273 S.W.3d 815, 821–22 (Tex. App.—Houston [14th Dist.] 2008, no pet.)).

It is readily apparent that the statute requiring court approval for a contingent interest in property that exceeds a one-third interest in the property is a proceeding that does not have any of the attributes of a cause for which a Judicial Article jury-trial right exists. In this proceeding, there is no plaintiff seeking a right of recovery or a judgment against a defendant who has committed some wrong. It is an administrative matter.

Moreover, the text of the statute supports the conclusion that the Legislature did not otherwise intend to provide a right to a jury trial when a probate court makes a determination under that statute. Section 351.152 of the Estates Code is titled "Contingent Interest for Certain Attorney's Fees; *Court Approval*."[9] EST. § 351.152 (emphasis added). Nowhere in section 351.152 is the term "jury" used. Rather, the statute repeatedly references the "court," and provides the judicial authority for ratification of fee agreements. Tiziana has not identified any authority, and we have

[9] Chapter 351 is entitled "Powers and Duties of Personal Representative in General," and section 351.152 is included under the subtitle "Continuation of Administration."

found none, suggesting the Legislature intended the term "court," as it is used in section 351.152, to include both the court and a jury.

Next, we consider whether section 55.002 of the Estates Code, nevertheless, provides a basis for a jury determination of the issue the Bank and H&W presented to the probate court in seeking to ratify the Engagement Agreement. Section 55.002 provides that in a contested probate or mental illness proceeding in a probate court, a party is entitled to a jury trial as in other civil actions. *Id.* § 55.002. We recognize that among other things, probate proceedings are defined to include a claim arising from an estate administration and any *action* brought on the claim. *Id.* § 31.001(5) (emphasis added). Thus, while Tiziana may not be entitled to a jury with respect to the Bank and H&W's pursuit of ratification of the Engagement Agreement, she is entitled to a jury with respect to her claims against the Bank that arise from the administration of the Estate that are pending in the Fiduciary Duty Case.[10]

For the foregoing reasons, we conclude the probate court did not err in proceeding to determine the motion to ratify without a jury.

III. Motion to Consolidate or Abate

Next, Tiziana urges the motion to ratify should have been consolidated into her Fiduciary Duty Case, or abated pending resolution of that case, because it was filed after she filed her lawsuit against the Bank.

[10] We note that had the Engagement Agreement been in accord with section 351.152(a) and thus, been authorized without approval of the probate court, Tiziana would still be able to challenge the propriety of the Bank having hired H&W in the first instance if she chose to do so.

We review a trial court's rulings on motions to consolidate or abate under an abuse-of-discretion standard. *See Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988); *Allison v. Ark. La. Gas Co.*, 624 S.W.2d 566, 568 (Tex. 1981). An abuse of discretion occurs when a trial court acts without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

Rule 174(a) governs consolidation of actions. It provides:

> When actions involving a common question of law or fact are pending before the court, it *may* order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

TEX. R. CIV. P. 174(a) (emphasis added). Rule 174 gives the trial court broad discretion in deciding whether to consolidate cases. *In re Gulf Coast Business Dev. Corp.*, 247 S.W.3d 787, 794 (Tex. App.—Dallas 2008, orig. proceeding). Courts must balance the judicial economy and convenience that may be gained by consolidation against the possibility that consolidation may cause delay, prejudice, or confuse. *In re Shell Oil Co.*, 202 S.W.3d 286, 290 (Tex. App.—Beaumont 2006, orig. proceeding).

Before entering its order on the motion to ratify, the probate court allowed the parties to argue their positions regarding if, and how, a decision on the motion to ratify would impact the Fiduciary Duty Case. Tiziana's counsel urged the issue of whether the Engagement Agreement is void is part of Tiziana's Fiduciary Duty Case.

Counsel for H&W urged the issue before the court on the motion to ratify is completely separate from any issues in the Fiduciary Duty Case concerning whether or not the Bank breached a duty. The probate court had before it the petition in the Fiduciary Duty Case establishing the issues and claims in that case far exceeded the discrete issue presented in the motion to ratify. In addition, at the hearing, counsel for Tiziana acknowledged that "if this is ratified and Hamilton & Wingo is paid more money then I suppose then our damage model with the current [] lawsuit just grew" but urged if the court ratified the Engagement Agreement in the Estate Case, then it necessarily determined the claim in the Fiduciary Duty Case. Wingo responded that a ruling on the motion to ratify would not impact Tiziana's ability to pursue the issue raised in the Fiduciary Duty Case and that a ruling would not change anything. Wingo further urged that delaying a decision on the motion to ratify would prejudice H&W and the Estate with respect to pursuing the products-liability case that remained pending because H&W needed some clarity as to whether the fee specified in the Engagement Agreement would be approved or modified by the court before moving forward in that case. Based upon the record before us and our conclusion that it was the probate court and not a jury that was to determine the issue of ratification, we conclude the probate court did not abuse its discretion in impliedly denying Tiziana's motion to consolidate.

With respect to Tiziana's complaint regarding an implied ruling against her on her alternative request for an abatement of the motion to ratify, we note that if the

parties in two cases filed in different courts are the same, and if the same claim is presented in both cases, then the court in which the case was first filed acquires dominant jurisdiction to the limit of its authority. *Cleveland v. Ward*, 285 S.W. 1063 (Tex. 1926). To establish dominance necessitating abatement, the movant must show: (1) a suit in another court was commenced first; (2) the first-filed suit remains pending; (3) the first-filed suit does include or could be amended to include all of the parties; and (4) the controversies are the same or the first-filed suit could be amended to include all of the claims. *In re King*, 478 S.W.3d 930, 933 (Tex. App.—Dallas 2015, orig. proceeding).

As a technical matter we note, the motion to ratify was part of the Estate Case, which was filed before the Fiduciary Duty Case. It was not a separate suit. Nevertheless, Tiziana's counsel acknowledged H&W could not be made a party to the Fiduciary Duty Case and the probate court could have readily determined the controversies are not the same because the ratification issue in the Estate Case dealt with whether a forty percent contingency fee was warranted considering the factors listed in section 351.152(c); whereas the Fiduciary Duty Case attacks the employment of separate counsel in pursuing the Estate's survival claims.[11] Accordingly, we conclude the trial court did not abuse its discretion in denying Tiziana's request for abatement.

[11] Tiziana asserted that the contingency fee payment to H&W could have and should have been avoided all together.

IV. Sufficiency of the Evidence

Tiziana contends that the Bank and H&W presented legally and factually insufficient evidence because the Bank and H&W made no effort to segregate the time spent on the survival case versus the products-liability case, which remains pending. The Bank and H&W sought ratification under section 351.152. As is more fully explained *infra*, this statute is not a codification of the lodestar method of determining a reasonable and necessary attorney's fee award and ratification does not equate to a fee-shifting situation. Accordingly, a segregation of time was not necessary and not practical given the products-liability case was ongoing.

Neither party cited, nor did we find, any authority for the standard of review of a trial court's order ratifying an agreement conveying a contingent interest in property in excess of one-third pursuant to section 351.152. We are persuaded that our review is for an abuse of discretion. *See, e.g.*, 18 M.K. Woodward et al., *Texas Practice: Attorney's Fees* § 729 (2022) (citing *Wittner v. Scanlan*, 959 S.W.2d 640, 642 (Tex. App.—Houston [1st Dist.] 1995, writ denied)). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Downer*, 701 S.W.2d at, 241–242. Under an abuse of discretion review, the appellate court is not free to substitute its own judgment for the trial court's judgment. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002). In its role as fact-finder, it is within the trial court's sole province to judge the credibility of the witnesses and the weight to be given their testimony. *Clancy*

v. Zale Corp., 705 S.W.2d 820, 826 (Tex. App.—Dallas 1986, writ ref'd n.r.e). Under an abuse of discretion standard of review, an appellate court must make an independent inquiry of the entire record to determine if the trial court abused its discretion. *In re Estate of Clark*, 198 S.W.3d 273, 275 (Tex. App.—Dallas 2006, pet. denied) (citing *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 853 (Tex. 1992) (orig. proceeding)). Under the circumstances presented here, we conclude legal and factual sufficiency are relevant factors in assessing whether the probate court abused its discretion. *See In re C.H.C.*, 392 S.W.3d 347, 349 (Tex. App.—Dallas 2013, no pet.) (op. on motion fore reh'g).

With respect to the Bank and H&W's section 351.021 motion to ratify, the probate court was only called upon to consider the five factors listed in section 351.021(c) of the Estates Code.[12] It was not called upon to resolve Tiziana's breach of fiduciary duty claims or to determine an award of attorney's fees in a fee-shifting situation[13] that would implicate *Rohrmoos*, and the proof required under the lodestar

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[12] The five factors the court shall consider are:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;

(2) the fee customarily charged in the locality for similar legal services;

(3) the value of the property recovered or sought to be recovered by the personal representative under this subchapter;

(4) the benefits to the estate that the attorney will be responsible for securing; and

(5) the experience and ability of the attorney who will perform the services.

EST. § 351.152(c).

[13] The idea behind awarding attorney fees in fee-shifting situations is to compensate the prevailing party generally for its reasonable losses resulting from the litigation process. *See In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 173 (Tex. 2013) (orig. proceeding).

method. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 501 (Tex. 2019) ("[T]he lodestar method . . . applies for determining the reasonableness and necessity of attorney's fees in a fee-shifting situation); *see also El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 762 (Tex. 2012) (in fee-shifting cases, meaningful review of hours claimed is particularly important because the usual incentive to charge only reasonable attorney's fees is absent when fees are paid by opposing party).

In the present case, the evidence adduced in connection with the Bank and H&W's motion to ratify included the affidavit of Wingo in which he addressed the five factors listed in section 351.021(c) of the Estate's Code. More particularly, Wingo established the attorneys at H&W are experienced and qualified to handle the matters the Bank entrusted to the firm, that significant time and labor were required to handle those matters, which were complex and involved novel issues, and that the Engagement Agreement contains fees customarily charged in the Dallas Fort Worth areas for similar legal services and is reasonable, customary and appropriate. In addition, H&W submitted documents concerning the confidential settlement in the wrongful death and survival case to the court for *in camera* inspection. Those documents, as well as statements in Wingo's affidavit, established the value of the property recovered and the benefit to the Estate that H&W was responsible for securing.

In addition, the affidavits of Poulos and Spencer were before the probate court. In Poulos' affidavit, he generally established his qualifications as an attorney, and established he did not charge Onella's family his usual rate of forty percent for his representation because he was a friend of the family. Poulos's affidavit did not directly address the five factors set forth in section 351.021(c). Rather, it appears to postulate Tiziana's claim of breach of fiduciary duty, which will be decided in the separate Fiduciary Duty Case, and to question the Bank's motives in hiring H&W and in seeking to ratify the Engagement Agreement. To the extent any of the statements in Poulos's affidavit touched upon the section 351.021(c) factors, the probate court, as the factfinder, determined the weight to be given them in ruling on the Bank & H&W's motion. *See In re Estate of Miller*, 243 S.W.3d 831, 839 (Tex. App.—Dallas 2008, no pet.).

With respect to Spencer's affidavit, it likewise did not directly address the five factors listed in section 351.152(c). It primarily contained legal arguments of counsel including Spencer's interpretation of section 351.152 of the Estates Code. The affidavit essentially restated Tiziana's breach of fiduciary duty claim with respect to the Bank's engagement of H&W. The affidavit also asserts that the motion to ratify is an attempt to eliminate Tiziana's voidness and unconscionability claim in her Fiduciary Duty Case. None of Spencer's criticisms establish the evidence presented by Wingo is too weak to support the trial court's finding on the issue of ratification.

Under all the evidence presented, we conclude the evidence before the probate court was more than a scintilla to support its approval of the Engagement Agreement and its ruling was not so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *See Preferred Heating & Air Conditioning Co. v. Shelby*, 778 S.W.2d 67, 68 (Tex. 1989) (when considering legal sufficiency, "the no-evidence challenge fails if there is more than a scintilla of evidence to support the finding."); *see also Tempest Broadcasting Co. v. Imlay*, 150 S.W.3d 861, 868 (Tex. App.—Houston [14th Dist.] 2004, no pet.); (quoting *In re King's Estate*, 244 S.W.2d 660, 661 (Tex. 1951) (When factual sufficiency is challenged the trial court's decision may only be set aside if "its ruling is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust.")). Accordingly, the probate court did not abuse its discretion in ratifying the Engagement Agreement.

For all of the reasons set forth *supra*, we overrule Tiziana's first issue.

V. Evidentiary Rulings

In her second issue, Tiziana asserts the trial court erred in sustaining certain objections the Bank made to the affidavits of Poulos and Spencer. We review the trial court's evidentiary rulings for an abuse of discretion. *Owens–Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). We may not reverse based on an erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment. *Id.* "[A] successful challenge to evidentiary

rulings usually requires the complaining party to show that the judgment turns on the particular evidence excluded or admitted." *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000); *see also* TEX. R. APP. P. 44.1(1).

In her opening brief, Tiziana did not assert or demonstrate that the probate court's rulings caused the court to make an improper ruling on the merits of the Bank and H&W's motion to ratify. In her reply brief, Tiziana asserts the exclusion of the statements probably led to the rendition of an improper order because the Bank "had the burden to show, among other things, the reasonableness of both the H&W fee contract and the fee actually charged. Yet the excluded statements from the Poulos and Spencer Affidavits show the unreasonableness of hiring H&W in the first place, their duplication of effort, and the enormously large value of the fee in comparison to the work performed." Generally, "We do not consider arguments raised for the first time in a reply brief." *Hunter v. PriceKubecka, PLLC*, 339 S.W.3d 795, 803 n. 5 (Tex. App.—Dallas 2011, no pet.).

Even if we concluded Tiziana did not waive this complaint by failing to address the harm component in her opening brief, and that the probate court abused its discretion in striking portions of the affidavit, we cannot conclude that any such error probably caused the rendition of an improper order because, even considering the affidavits of Poulos and Spencer, including the portions the probate court struck, we have concluded the probate court did not abuse its discretion in ratifying the Engagement Agreement and the evidence is legally and factually sufficient to

support the probate court's ruling in that regard. Accordingly, we overrule Tiziana's second issue.

CONCLUSION

We affirm the probate court's August 5, 2022, order ratifying employment of personal injury attorney.

/Nancy Kennedy/
NANCY KENNEDY
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN RE: THE ESTATE OF ORNELLA ELLARD, DECEASED, No. 05-22-01149-CV	On Appeal from the Probate Court No. 2, Dallas County, Texas Trial Court Cause No. PR-19-02521-2. Opinion delivered by Justice Kennedy. Justices Nowell and Miskel participating.

In accordance with this Court's opinion of this date, the probate court's August 5, 2022 order ratifying employment of personal injury attorney is **AFFIRMED**.

It is **ORDERED** that appellee BOKF, N.A., d/b/a Bank of Texas recover its costs of this appeal from appellant Tiziana Cosentina.

Judgment entered this 25th day of January 2024.