
No. 09-0411

In the Supreme Court of Texas

**IN THE GUARDIANSHIP OF RAQUEL CANTÚ DE VILLARREAL,
AN INCAPACITATED PERSON**

*Interlocutory Appeal of Temporary Injunction
from the Court of Appeals for the Thirteenth District of Texas
Court of Appeals No. 13-08-00408-CV*

PETITIONERS' REPLY BRIEF ON THE MERITS

Mike A. Hatchell
State Bar No. 09219000
Sarah B. Duncan
State Bar No. 06219250
Susan A. Kidwell
State Bar No. 24032626
LOCKE LORD BISSELL & LIDDELL LLP
100 Congress Avenue, Suite 300
Austin, Texas 78701
Telephone: (512) 305-4700
Facsimile: (512) 305-4800

Attorneys for Petitioners

TABLE OF CONTENTS

	<u>Page</u>
Index of Authorities.....	iii
Argument.....	1
1. Jurisdiction	2
2. Waiver	2
3. Applicability of rules governing temporary injunctions	4
4. Sanctions	5
Conclusion and Prayer.....	6
Certificate of Service	8

INDEX OF AUTHORITIES

	<u>Page</u>
CASES	
<i>AutoNation, Inc. v. Hatfield</i> , 186 S.W.3d 576 (Tex. App.—Houston [14th Dist.] 2005, no pet.).....	3
<i>Brazzel v. Murray</i> , 481 S.W.2d 801 (Tex. 1972).....	3
<i>City of Navasota v. Nationstar Mortgage, LLC</i> , No. 91-08-00915-CV, 2009 WL 103510 (Tex. App.—Houston [1st Dist.] Jan. 9, 2009, no pet.)	3
<i>City of Sherman v. Eiras</i> , 157 S.W.3d 931 (Tex. App.—Dallas 2005, no pet.).....	3
<i>Ex parte DeLeon</i> , 972 S.W.2d 23 (Tex. 1998).....	4
<i>Ex parte Jordan</i> , 787 S.W.2d 367 (Tex. 1990).....	3
<i>Hagen v. Hagen</i> , 282 S.W.3d 899 (Tex. 2009).....	3
<i>In re Cantú</i> , No. 08-0553 (Tex. July 18, 2008, orig. proceeding)	3
<i>InterFirst Bank San Felipe, N.A. v. Paz Constr. Co.</i> , 715 S.W.2d 640 (Tex. 1986).....	2
<i>Jones v. Garcia</i> , 538 S.W.2d 492 (Tex. Civ. App.—San Antonio 1976, no writ)	4
<i>Lancaster v. Lancaster</i> , 291 S.W.2d 303 (Tex. 1956).....	3
<i>McDonnell v. A-1 Ornamental, Inc.</i> , No. 05-07-00899-CV, 2008 WL 3906410 (Tex. App.—Dallas Aug. 26, 2008, no pet.)	3
<i>McKee v. City of Mt. Pleasant</i> , 328 S.W.2d 224 (Tex. Civ. App.—Texarkana 1959, no writ).....	4

<i>Murchison v. White</i> , 54 Tex. 78 (1880).....	3
<i>Onoray Davis Trucking Co. v. Lewis</i> , 635 S.W.2d 622 (Tex. App.—Houston [14th Dist.] 1982, writ dismiss'd).....	4
<i>Qwest Commc'ns Corp. v. AT&T Corp.</i> , 24 S.W.3d 334 (Tex. 2000) (per curiam).....	1, 2, 3, 7
<i>Zanes v. Mercantile Bank & Trust Co. of Texas</i> , 49 S.W.2d 922 (Tex. Civ. App.—Dallas 1932, writ ref'd)	4

OTHER AUTHORITIES

TEX. R. APP. P. 29.4.....	4
TEX. R. APP. P. 43.6.....	5
TEX. R. APP. P. 52.11(a)-(d)	6
TEX. R. CIV. P. 2	5
TEX. R. CIV. P. 682	1, 2, 5, 6
TEX. R. CIV. P. 684	1, 2, 5, 6

TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondent appears to concede the only facts that are material:

- √ Her application for a temporary injunction was not verified. (*See* Tab 6.)¹
- √ No evidence was admitted at the hearing. (*See* 06/09/08 RR at 26.)
- √ The temporary injunction fails to set a bond. (*See* Tab 1.)

As a result, Respondent’s brief only obliquely addresses the merits of the serious issue of first impression presented by this appeal: Whether this Court’s longstanding and well-established precedent holding that a temporary injunction is void if it is issued without complying with the mandatory requirements of Texas Rules of Civil Procedure 682 and 684 applies to a temporary injunction that is purportedly issued to enforce a previous order and so renders the temporary injunction void *ab initio*. *See, e.g., Qwest Commc’ns Corp. v. AT&T Corp.*, 24 S.W.3d 334, 337 (Tex. 2000) (per curiam).

Crippled in her ability to address the merits, Respondent’s brief instead attempts to prejudice the Court against Petitioners and their legal position in this appeal by the use of three strategies notable only for their transparency:

- (i) using “charged language” – like calling Petitioners “the Ignacio Faction” (*e.g.*, Resp. Br. at 1) as though this unfortunate family dispute were a war and Petitioners were a minority of Doña Raquel’s children when neither is the case – and argumentative labels – like calling the June 11 Order that is the subject of this

¹ Throughout this brief, “Tab _” refers to the materials behind the tabbed appendix to Petitioners’ Brief on the Merits.

appeal “the June 11 Compliance Order” (*e.g.*, Resp. Br. at 20) rather than the temporary injunction that it is in form and in substance (*see* Pet. Br. at 15-16);

(ii) presenting her contentions, accusations and supposition as though they are material facts supported by the record on appeal (*e.g.*, Resp. Br. at 3) when they are not; and

(iii) arguing that Petitioners waived the procedural defects in Respondent’s application, the hearing, and the temporary injunction (Resp. Br. at 23-26) when the defects that render an order void cannot be waived.

Petitioners refuse to stoop to Respondent’s level of discourse. Instead, Petitioners will make four simple points:

1. ***Jurisdiction*** – In response to Petitioners’ argument and detailed table demonstrating that the Court has jurisdiction over this interlocutory appeal because the June 11 Order imposes different obligations than the order it purports to enforce (Pet. Br. at 9-11), Respondent merely asserts the converse in an entirely conclusory fashion. (*See* Resp. Br. at 20-23.) Unsupported assertion is not argument.

2. ***Waiver*** – Respondent appears to concede that the June 11 Order is a temporary injunction and makes only one legal argument in its support – that Petitioners waived their complaints by failing to raise them in the trial court. (*See* Resp. Br. at 23-35.) But Respondent fails to recognize this Court’s precedent holding that the failure to follow the mandatory procedures of Texas Rules of Civil Procedure 682 and 684 for issuance of a temporary injunction renders the injunction not voidable but void *ab initio*. *See, e.g., Qwest*, 24 S.W.3d at 337 (citing *InterFirst Bank San Felipe, N.A. v. Paz Constr.*

Co., 715 S.W.2d 640, 641 (Tex. 1986) and *Lancaster v. Lancaster*, 291 S.W.2d 303, 308 (Tex. 1956); *Ex parte Jordan*, 787 S.W.2d 367, 368 (Tex. 1990). As this Court recently reiterated: “‘A void act is one entirely null within itself, not binding on either party, and which is not susceptible of ratification or confirmation. Its nullity cannot be waived.’” *Hagen v. Hagen*, 282 S.W.3d 899, 907 (Tex. 2009) (citing *Brazzel v. Murray*, 481 S.W.2d 801, 803 (Tex. 1972) (quoting *Murchison v. White*, 54 Tex. 78 (1880))). Thus, more recent courts of appeals’ opinions recognize that procedural “‘defects that render an injunction order void cannot be waived.’” *City of Navasota v. Nationstar Mortgage, LLC*, NO. 91-08-00915-CV, 2009 WL 103510, at *1 (Tex. App.—Houston [1st Dist.] Jan. 9, 2009, no pet.) (quoting *AutoNation, Inc. v. Hatfield*, 186 S.W.3d 576, 581 (Tex. App.—Houston [14th Dist.] 2005, no pet.)); *McDonnell v. A-1 Ornamental, Inc.*, No. 05-07-00899-CV, 2008 WL 3906410, at *1 (Tex. App.—Dallas Aug. 26, 2008, no pet.) (citing *Qwest*, 24 S.W.3d at 337; *City of Sherman v. Eiras*, 157 S.W.3d 931, 931 (Tex. App.—Dallas 2005, no pet.); *AutoNation*, 186 S.W.3d at 581). Any other holding would defy logic.

Similarly, Respondent asserts that Petitioners had notice of the contempt hearing and have, in any event, “waited much too long to complain” about the trial court’s order of contempt and for issuance of the writs of attachment.² (Resp. Br. at 31-33.) Their first argument regarding notice is not supported by the record – the order for issuance of the writs of attachment expressly states that it was issued “without notice to [Petitioners].”

² Contrary to Respondent’s assertion (Resp. Br. at 31), Petitioners did seek relief from the invalid orders of contempt and for issuance of the writs of attachment through a petition for writs of mandamus, habeas corpus, and prohibition filed July 11, 2008, but relief was denied. See *In re Cantú*, No. 08-0553 (Tex. July 18, 2008, orig. proceeding).

(Tab 3.) Nor is it supported by Petitioners having sought temporary emergency relief from the trial court's enforcement efforts in the June 27, 2008 hearing pursuant to Texas Rule of Appellate Procedure 29.4. (*See* Resp. Br. at 32.) Seeking to stop all of the trial court's enforcement efforts while the temporary injunction was on appeal in no way indicates Petitioners had notice that the trial court would hold a hearing to decide whether to hold them in contempt. Certainly, the constitutional requirement of pre-deprivation notice is not satisfied by the after-the-fact "notice." *See, e.g., Ex parte DeLeon*, 972 S.W.2d 23, 25 (Tex. 1998).

More fundamentally, however, Respondent's arguments again fail to recognize that if the temporary injunction is void, so too are the orders of contempt and for issuance of the writs of attachment. As Petitioners have previously explained, whether the orders were appealable is immaterial; a temporary injunction that is void of "legal effect" "will not support an order of contempt." (Pet. Br. at 21.)

3. ***Applicability of rules governing temporary injunctions*** – Misplacing her reliance on decades old opinions from the courts of appeals,³ Respondent further contends that the temporary injunction rules are inapplicable when a probate court acts "to preserve the assets of an estate and effectuate its decrees." (*See* Resp. Br. at 25 (quoting *Onoray*, 635 S.W.2d at 625).) But neither *Onoray* nor any other of the cited

³ Respondent cites two cases this Court was not given the opportunity to review – *Jones v. Garcia*, 538 S.W.2d 492 (Tex. Civ. App.—San Antonio 1976, no writ) and *McKee v. City of Mt. Pleasant*, 328 S.W.2d 224 (Tex. Civ. App.—Texarkana 1959, no writ) – and one in which the application for a writ of error was dismissed for want of jurisdiction – *Onoray Davis Trucking Co. v. Lewis*, 635 S.W.2d 622 (Tex. App.—Houston [14th Dist.] 1982, writ dismissed). Respondent also relies upon *Zanes v. Mercantile Bank & Trust Co. of Texas*, 49 S.W.2d 922 (Tex. Civ. App.—Dallas 1932, writ refused). In *Zanes*, however, the temporary injunction was preceded by an evidentiary hearing in which all the parties participated. *See id.* at 927 (on motion for rehearing). Here, on the other hand, the hearing was non-evidentiary.

authorities explain *why* a probate court is not bound by the rules governing injunctions. Petitioners have previously explained why it is necessary for the Court to interpret the rules governing injunctions to apply to all injunctions – regardless of whether they are issued before or after judgment and regardless of the issuing court: the procedural requirements are mandatory not for the sake of procedure but to protect the substantive rights of those sought to be enjoined. (Pet. Br. at x, 19-20.) And this Court expressly provided that county courts are bound by the rules governing injunctions in Rule 2: “These rules *shall* govern the procedure in the justice, *county*, and district courts of the State of Texas *in all actions of a civil nature.*” TEX. R. CIV. P. 2 (emphasis added).

In short, if the Court agrees with Petitioners that Rules 682 and 684 mean what they say and therefore govern the issuance of “every” temporary injunction (Pet. Br. at 19-20) – and Respondent has not proffered any logical reason they should not – the June 11 Order is void.

4. ***Sanctions*** – After having avoided addressing the merits of Petitioners’ arguments, Respondent attempts to invoke Texas Rule of Appellate Procedure 43.6⁴ and asks the Court to award her “her appellate fees in retaining Bryan A. Garner as lead appellate counsel in this matter” (Resp. Br. at 39.) Apparently, Respondent adheres to the view that when one is unable to defend an order on the merits, “the best defense is a good offense.”

However, as more fully set forth in Petitioners’ brief, this case presents the Court with important issues of first impression. (Pet. Br. at xi-xiii.) Petitioners’ appeal of a

⁴ Rule 43.6 applies in the courts of appeals, not this Court.

temporary injunction that is void on its face thus fits none of the grounds for sanctions set forth in the procedural rule that properly applies in this Court. *See* TEX. R. APP. P. 52.11(a)-(d). It is Respondent's argument for sanctions – not Petitioners' case – that is without merit.

CONCLUSION AND PRAYER

Contrary to the thrust of Respondent's brief, Petitioners have maintained throughout this protracted nightmare that all of the property at issue is their mother's. (*See, e.g.*, Pet. Br. at 2 n.6.) And, unlike Respondent, Petitioners have steadfastly credited the testimony of Respondent's Mexican attorney, who admitted that the 34 million pesos was released to its owner, the Mexican corporation San Pedro Impulsora, after Ignacio ceased being its administrator. (*See, e.g.*, Pet. Br. at 2-3 n.7 & acc. text.) And, unlike Respondent, they have repeatedly questioned how the seven children can purport to divide property that is owned by their mother or San Pedro Impulsora, the corporation of which she owns 99%, when she is still very much alive, and how it is that the trial court can force them into the Catch-22 in which they find themselves: Either they comply with the judgment by committing the offense of stealing the Mexican corporation's money; or they do not commit that offense and instead continue to violate the court's order. (*See, e.g.*, Pet. Br. at ix-x.)

But none of those underlying facts are material in this appeal. The only question – and it is a straight-up question of law – is whether to demand compliance with the procedural requirements in Rules 682 and 684 of the Texas Rules of Civil Procedure before issuing the injunction. If the answer to that question is “yes,” as Petitioners have

consistently argued for two years, the temporary injunction, the order of contempt, and the order for the issuance of the writs of attachment, as well as the writs themselves, are all void. *See, e.g., Qwest*, 24 S.W.3d at 337.

Accordingly, Petitioners renew their prayer that the Court grant their Petition, dissolve the trial court's orders of June 11 and June 27, and order the writs of attachment withdrawn. Petitioners also pray for all such additional relief to which they may be entitled.

Respectfully submitted,

LOCKE LORD BISSELL & LIDDELL LLP

By: _____

Mike A. Hatchell

State Bar No. 09219000

Sarah B. Duncan

State Bar No. 06219250

Susan A. Kidwell

State Bar No. 24032626

100 Congress Avenue, Suite 300

Austin, Texas 78701

(512) 305-4700 Telephone

(512) 305-4800 Facsimile

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I certify that on July 2, 2010, a true and correct copy of the foregoing was served on the following counsel of record for Respondent by United States mail, postage prepaid:

Bryan A. Garner
Tiger Jackson
14180 Dallas Parkway, Suite 280
Dallas, Texas 75254

Gilberto Hinojosa
1713 Boca Chica Boulevard
Brownsville, Texas 78520

Craig S. Smith
LAW OFFICES OF CRAIG S. SMITH
14493 S.P.I.D., Suite A, P.M.B. 240
Corpus Christi, Texas 78418

Susan A. Kidwell