The Limits of a Docket Control Order In Will Contest Disputes: *In re Ybarra* Preserves Pleading and Discovery Rights

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In re Ybarra provides important procedural guidance for probate practitioners and litigators concerning the limits of a court's discretion to control its docket in a will contest. The Third Court of Appeals held that docket management did not permit the probate court to strike a pleading under a deadline imposed after the pleading was filed. Nor did it permit the court to foreclose an expert deposition by importing a physician-licensure requirement from guardianship law. The court conditionally granted mandamus on both rulings, but it declined to consider a separate issue that the probate court raised *sua sponte* because counsel failed to preserve the complaint.

A deadline enacted by the Court after a party's filing cannot make the filing late.

In *In re Adelide Ybarra and Leon Barba*, No. 03-26-00497-CV (Tex. App.—Austin Sept. 29, 2026, orig. proceeding) (mem. op.), the parties sought to probate competing wills executed by Juan Rosales Perez. Ybarra and Barba initially sought probate of a 2018 will, later nonsuited that application, and pursued a 2012 will instead. On February 2, 2026, the probate court granted partial summary judgment against the 2012 will and noted that no live pleading sought probate of the 2018 will.

Ybarra filed a new application concerning the 2018 will on February 11. Six days later, on February 17, 2026, the probate court signed a docket-control order that set February 1 as the deadline for amended pleadings. The court then struck the February 11 application as untimely.

The Third Court focused on the rules that governed when Ybarra filed the application. No court-ordered pleading deadline existed on February 11, and Rule 63's seven-days-before-trial restriction did not apply. Under Rule 21(f)(5), an electronically filed document is deemed filed when transmitted to the filing party's electronic-filing service provider. The application therefore stood "deemed in law" filed on February 11. A later docket-control order could not retroactively make the filing untimely. *See also Warner v. Glass*, 135 S.W.3d 681, 684 (Tex. 2004) (per curiam); *In re Saddles Blazin, LLC*, No. 09-19-00302-CV, 2019 WL 5607905, at *3–4 (Tex. App.—Beaumont Oct. 31, 2019, orig. proceeding) (mem. op.).

Nor could an alleged prior agreement to the proposed deadline support the striking order. Rule 11 requires a signed and filed writing or an agreement made in open court and entered of record. The record contained neither. A draft docket-control order, even one discussed months earlier, did not authorize the probate court to strike a pleading that complied with every deadline in force when filed. Accordingly, the Third Court conditionally granted mandamus and directed the probate court to vacate the striking order.

Guardianship licensure requirements do not govern will-contest experts.

Ybarra and Barba designated Dr. Keith Klein, a California physician, to offer opinions about the decedent's cognitive abilities when he executed the 2022 will. The probate court quashed Dr. Klein's remote deposition after concluding that his lack of a Texas medical license prevented him from testifying about capacity in a Texas will contest. When the relators later noticed an in-person deposition in California, the court sanctioned their counsel $1,800. Together, the protective order and sanction effectively prevented any deposition of Dr. Klein.

The Third Court rejected the probate court's premise. The Texas Estates Code expressly requires a Texas-licensed physician for certain guardianship determinations. *See* TEX. EST. CODE §§ 1101.103(a)(1)–(2), 1202.152(a). A will contest, however, is not a guardianship proceeding. Neither the Estates Code provisions governing testamentary capacity nor Rule of Evidence 702 imposes any licensure requirement on an expert addressing whether a testator possessed a sound mind.

As the Fourteenth Court previously explained, "there is no language in Rule 702 which can be construed as requiring a witness to have a license in order to testify as an expert." *State v. Northborough Center, Inc.*, 987 S.W.2d 187, 194 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). As such, a credential that the Legislature expressly requires in one type of proceeding does not automatically govern another proceeding merely because both involve questions of capacity.

Possible inadmissibility does not eliminate discoverability.

The Third Court separately addressed the distinction between admissibility and discoverability. Even if the probate court might later exclude Dr. Klein's opinions at trial, that possibility did not justify preventing the deposition altogether. Rule 192.3(a) permits discovery of relevant matter even when the information may not itself be admissible, and Rule 192.1(g) expressly recognizes oral depositions as an available discovery method.

"Irrespective of whether his testimony will be admissible at trial," the court held, Dr. Klein's testimony remained "undisputedly discoverable." *See also In re Dodson*, No. 12-23-00207-CV, 2023 WL 5969609, at *3–4 (Tex. App.—Tyler Sept. 13, 2023, orig. proceeding) (mem. op.); *Smith, Wright & Weed, P.C. v. Stone*, 818 S.W.2d 926, 928 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding).

The absence of a deposition also made an ordinary appeal inadequate. Without the deposition, Dr. Klein's testimony would never enter the record, leaving an appellate court unable to evaluate the effect of its exclusion after trial. The Third Court therefore directed the probate court to allow the deposition.

A *sua sponte* issue still requires an immediate objection.

The relators did not preserve every complaint. At the first hearing on the motion to quash, the probate court announced that all trial testimony had to occur live and in person. Counsel requested clarification but did not object that the court had raised the issue *sua sponte* without notice or an opportunity to prepare. When the relators later asserted a due-process violation, the Third Court held that Rule of Appellate Procedure 33.1 applies in mandamus proceedings and that the complaint came too late.

Lack of advance notice may supply the basis for an objection, but it does not excuse the failure to object. When a court raises an unbriefed issue during a hearing, counsel should identify the lack of notice before the hearing ends, state the concern, request a recess or supplemental briefing, and obtain a ruling. A later motion may develop the argument, but it may not cure the original preservation failure.

In re Ybarra allows a court to enforce deadlines and regulate discovery, but it does not permit a court to impose deadlines retroactively or impose expert qualifications beyond that required under Texas law. Moreover, the case again establishes that counsel may easily waive objections not made timely on the record. Based on these concepts, the relators obtained mandamus where the probate court exceeded its discretion, but the court did not reach an issue they failed to preserve.