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Ronald D. Sherman, appellant, v. Beverly Neth, director, Nebraska Department of Motor Vehicles, appellee.

813 N.W.2d 501

Filed May 25, 2012. No. S-10-945.

1. **Actions: Parties: Death: Abatement, Survival, and Revival: Statutes.** Despite the language of Neb. Rev. Stat. §§ 25-1401 and 25-1402 (Reissue 2008), which suggests that all pending actions other than those specifically listed in the statutes survive the death of a party, Nebraska case law has limited the list of those actions which survive to exclude those which involve purely personal rights.
2. **Actions: Parties: Death: Abatement, Survival, and Revival: Moot Question: Appeal and Error.** An appeal will abate where, by reason of the death of a party, the record presents a mere abstract or moot question, the determination of which will be of no practical benefit.

Petition for further review from the Court of Appeals, Irwin, Moore, and Cassel, Judges, on appeal thereto from the District Court for Cheyenne County, Derek C. Weimer, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Gregory J. Walklin for appellee.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, and Miller-Lerman, JJ.

Miller-Lerman, J.

NATURE OF CASE

This case involves a civil administrative operator's license revocation for refusal to submit to a chemical test. The Nebraska Department of Motor Vehicles revoked the operator's license of Ronald D. Sherman for 1 year, and the district court for Cheyenne County affirmed the revocation. The Nebraska Court of Appeals determined that the sworn report in this case failed to confer jurisdiction on the Department of Motor Vehicles because it did not sufficiently establish that Sherman was on a public road or private property open to public access

at the time of his arrest, and it reversed the district court's order. *Sherman v. Neth*, 19 Neb. App. 435, 808 N.W.2d 365 (2011). On February 15, 2012, we granted the petition for further review filed by Beverly Neth, director of the Department of Motor Vehicles (the Department). On further review, the Department argues there is no requirement that the sworn report establish that the driver was on a public road or private property open to public access.

Prior to oral argument before this court, on March 30, 2012, Sherman's attorney notified this court that Sherman died on March 14. We conclude that because this license revocation proceeding involved a right that was purely personal to Sherman, the action abated on Sherman's death, and that there is no longer a party with an interest in the resolution of this appeal. We therefore must reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions to vacate its decision and to reverse the district court's order and, in addition, to remand the cause to the district court with instructions for the district court to vacate its order and dismiss Sherman's appeal from the Department's revocation order.

STATEMENT OF FACTS

A proper sworn report confers jurisdiction on the Department in an administrative license revocation matter. Neb. Rev. Stat. § 60-6,197(2) (Reissue 2010). According to the sworn report, Sherman was "asleep behind [the] wheel with keys in ignition & vehicle off, with open beer between legs. Subject pulled parrallel [sic] with east elm street." Sherman contended that he had not been driving. Sherman refused to take a preliminary breath test and refused to take a chemical test at the Sidney Police Department. The officer completed and provided to Sherman a copy of a "Notice/Sworn Report/Temporary License" form quoted above.

Sherman filed a petition for a hearing pursuant to Neb. Rev. Stat. § 60-498.01 (Reissue 2010). Following the hearing, the Department entered an administrative order revoking Sherman's operator's license for 1 year. Sherman appealed the revocation to the district court pursuant to Neb. Rev.

Stat. § 60-498.04 (Reissue 2010). After rejecting Sherman's argument that the Department lacked jurisdiction because the sworn report was insufficient to establish a prima facie case, the court affirmed the revocation. The basis of Sherman's challenge was that the sworn report failed to sufficiently allege that he was on a public road or private property open to the public, which allegations are a necessary element of the intoxicated driver enforcement scheme. See Neb. Rev. Stat. § 60-6,108 (Reissue 2010).

Sherman appealed the district court's affirmance to the Court of Appeals. He claimed that the district court erred when it found that the sworn report was sufficient to confer jurisdiction for the revocation. Although the Court of Appeals acknowledged the absence of case law so holding, it held that "the sworn report must contain sufficient assertions to allow an inference that the motorist was on a public road or private property open to public access." *Sherman v. Neth*, 19 Neb. App. 435, 440, 808 N.W.2d 365, 370 (2011). The Court of Appeals agreed with Sherman's argument that the assertions in the sworn report in his case failed to sufficiently establish that he was on a public road or private property open to public access at the time of his arrest and that therefore, the sworn report was insufficient to confer jurisdiction on the Department. The Court of Appeals reversed the district court's order and remanded the cause with directions to reverse the revocation. *Id.*

We granted the Department's petition for further review. As noted above and discussed further below, after we granted further review but before oral argument, we were notified of Sherman's death.

ASSIGNMENT OF ERROR

For its sole assignment of error on further review, the Department asserts that the Court of Appeals erred when it concluded that the sworn report lacked the necessary recitations and was insufficient to vest the Department with jurisdiction to revoke Sherman's license. However, because of Sherman's death while this case was pending before this court on further review, we do not address this issue.

ANALYSIS

On March 30, 2012, prior to oral argument before this court on further review, Sherman's attorney filed a "Motion to Dismiss Petition for Further Review for Mootness," informing this court that Sherman had died on March 14. The motion included a copy of Sherman's death certificate. We treat the motion as a suggestion of death.

We note that neither Sherman's attorney nor any other person has filed a motion to revive the action herein or to continue the appeal. As a general matter, when a party to appellate proceedings dies and the party's interest in the litigation passes to his or her heirs, the heirs are necessary parties to the proceedings. *Urlau v. Ruhe*, 63 Neb. 883, 89 N.W. 427 (1902). However, because of the personal nature of the rights associated with a license revocation, neither Sherman's heirs nor any other person has a continuing interest in the disposition of this appeal, and therefore this action appealing the revocation of Sherman's operator's license abated on his death and we must issue orders accordingly.

Nebraska statutes provide that certain types of actions survive the death of a party. Neb. Rev. Stat. § 25-322 (Reissue 2008) provides in relevant part: "An action does not abate by the death . . . of a party . . . if the cause of action survives or continues. In the case of the death . . . of a party, the court may allow the action to continue by or against his or her representative or successor in interest." Neb. Rev. Stat. § 25-1401 (Reissue 2008) provides:

> In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same.

Further, Neb. Rev. Stat. § 25-1402 (Reissue 2008) provides: "No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, or for a nuisance, which shall abate by the death of the defendant."

[1] In *Bullock v. J.B.*, 272 Neb. 738, 741, 725 N.W.2d 401, 404 (2006), we stated that despite the language of §§ 25-1401 and 25-1402, which suggests that all pending actions other than those specifically listed in the statutes survive the death of a party, "Nebraska case law has limited the list of those actions which survive to exclude those which involve purely personal rights." In *Bullock*, we noted cases in which this court concluded that specific types of actions did not survive the death of a party. We cited *Holmberg v. Holmberg*, 106 Neb. 717, 184 N.W. 134 (1921), and *Williams v. Williams*, 146 Neb. 383, 19 N.W.2d 630 (1945), in which this court concluded that a divorce action did not survive the death of a party to the marriage because of the personal nature of a divorce action and because further proceedings after a party's death would be useless when the death itself dissolved the marriage. We also cited *Fitzgerald v. Clarke*, 9 Neb. App. 898, 621 N.W.2d 844 (2001), in which the Nebraska Court of Appeals concluded that a suit seeking to enjoin regulations limiting an inmate's ownership of personal property was personal to the inmate and did not survive the inmate's death.

With regard to the specific action at issue in *Bullock*, we concluded that a paternity action was personal and did not survive the death of the putative father. We reasoned that the primary purposes of a paternity action were to establish a parental relationship and to impose a support obligation and that such relationship was undoubtedly personal to the putative father, because the personal representative of his estate could not be made the child's father nor could a support obligation be imposed on the personal representative of his estate. *Id.*

We note that courts in other jurisdictions have reached similar conclusions regarding proceedings that involve purely personal rights of parties who died during an appeal. In *Olson v. Com'n for Lawyer Discipline*, 901 S.W.2d 520 (Tex. App. 1995), the Texas Court of Appeals concluded that the appeal of a discipline action in which an attorney's license was suspended became moot upon the attorney's death, because the case was limited to personal rights and no property rights were involved. Similarly, in *Gee v. Bess*, 132 S.W.2d 242, 243 (Mo.

App. 1939), the Missouri Court of Appeals determined that an action to determine the competency of a person to manage his affairs abated when the person died during a pending appeal, because the action involved "only his personal rights or status and [did] not involve any property rights." In *State ex rel. Turner v. Buechele*, 236 N.W.2d 322, 324 (Iowa 1975), which involved the death of a county supervisor during his appeal of a proceeding to remove him from office, the Iowa Supreme Court concluded that "where the subject matter of the controversy is personal to the decedent the action does abate" and that the "right to hold office is generally considered personal so that the death of the office holder on appeal in a removal action abates the proceeding."

We rely on our previous reasoning and that of other courts such as those noted above and conclude that the present action, in which Sherman challenged the Department's revocation of his operator's license, involved rights that were purely personal to Sherman and that therefore, the action did not survive his death. The purpose of this court action was to determine whether or not the Department properly ordered a revocation of Sherman's license. Sherman's right to his license was clearly personal to him; neither the personal representative of Sherman's estate, Sherman's heirs, nor any other person would have a right to his operator's license after his death. Further proceedings after Sherman's death would be useless, and we therefore conclude that this action challenging the Department's revocation order abated on Sherman's death.

[2] Because the action abated on Sherman's death, there is no present case or controversy upon which this court may opine on appeal. It has been stated that "[a]n appeal will abate where, by reason of the death of a party, the record presents a mere abstract or moot question, the determination of which will be of no practical benefit." 4 C.J.S. *Appeal and Error* § 343 at 334-35 (2007). The Department argues that even though this case is moot, we should consider the appeal under the public interest exception to mootness. However, as the Court of Appeals previously noted, and we agree, there exists "no authority in Nebraska where a cause was continued upon the death of a party pursuant to the public interest exception,"

and it would not be appropriate to apply the public interest exception to mootness "to a situation where the only plaintiff . . . died after the appeal was perfected." *Fitzgerald v. Clarke*, 9 Neb. App. 898, 901-02, 621 N.W.2d 844, 847 (2001). Where the sole party with an interest in a proceeding involving purely personal rights dies, not only are the issues in that proceeding moot but there is no longer a party to continue the litigation and there is no one with a justiciable interest who may take that party's place. We therefore conclude that the public interest exception to mootness does not apply when an appeal abates because of the death of the sole party with an interest in a proceeding that involves purely personal rights of the deceased party.

Because Sherman's death abates this appeal, it is clear that this court ought not consider the merits on further review or opine on the issues raised. But because the Court of Appeals issued an opinion, we must also determine the effect of Sherman's death on the court proceedings to date in this appeal, including the Court of Appeals' decision.

In criminal cases, we have stated that "the death of the decedent pending appeal abates not merely the appeal, but also the proceedings had below in the prosecution from its inception and therefore the correct procedure is to vacate the conviction, and reverse and remand with directions to dismiss the indictment or information." *State v. Campbell*, 187 Neb. 719, 720, 193 N.W.2d 571, 572 (1972). See, generally, *Bevel v. Comm.*, 282 Va. 468, 477, 717 S.E.2d 789, 794 (2011) (reviewing current status of abatement in criminal cases in federal and state courts when defendant dies during pending appeal and concluding that "most courts and commentators agree that abatement in some form is the majority position in the federal and state courts" but recognizing minority view "to limit or modify the application of the doctrine, or dispense with it entirely").

Although there is little authority, we find some authority for a similar result in civil cases such that the death abates not merely the appeal but also requires that outcomes in proceedings below be vacated. In dissolution actions, this court has stated that "'where the cause of action does not survive, the

action abates as if the death had occurred before the verdict or interlocutory judgment or decision, unless saved by a statute.'" *Williams v. Williams*, 146 Neb. 383, 387, 19 N.W.2d 630, 632 (1945) (quoting *Holmberg v. Holmberg*, 106 Neb. 717, 184 N.W. 134 (1921)). We find no statute that saves the instant action, and therefore the action abates as if Sherman's death had occurred before the district court's judgment. As noted above, in *Olson v. Com'n for Lawyer Discipline*, 901 S.W.2d 520 (Tex. App. 1995), the Texas Court of Appeals determined that the appeal of an attorney discipline proceeding became moot when the attorney died during the pendency of the appeal. The court further concluded that not only was it required to dismiss the appeal but that it was also "required to set aside the judgment of the trial court and dismiss the underlying cause of action." 901 S.W.2d at 525. In *Gee v. Bess*, 132 S.W.2d 242 (Mo. App. 1939), the trier of fact had found the appellant to be of unsound mind, and the appellate court stated that the "appeal duly filed acted as a supersedeas and brought the cause to this court for final determination." The appellate court determined that the appeal abated on the death of the subject of the proceeding and that the judgment of the lower court should be reversed. The appellate court remanded the cause with orders accordingly.

We conclude that because this appeal abated on Sherman's death, the decision of the Court of Appeals, for which we granted further review, as well as that of the district court, should be vacated and that the district court should dismiss the action.

CONCLUSION

We treat Sherman's "Motion to Dismiss Petition for Further Review for Mootness" as a suggestion of death and, in light of this opinion, overrule such motion. Because of Sherman's death, we conclude that this appeal on further review and Sherman's action challenging the Department's revocation of his operator's license have abated, because the proceedings involve rights purely personal to Sherman and the action did not survive his death. We therefore reverse the decision of the Court of Appeals. We remand the cause to the Court of Appeals

with directions to vacate its decision. We also direct the Court of Appeals to reverse the decision of the district court which affirmed the revocation order and to remand the cause to the district court with instructions to the district court to vacate its order and dismiss Sherman's action in district court.

REVERSED AND REMANDED WITH DIRECTIONS.

BUTLER COUNTY SCHOOL DISTRICT 12-0502, ALSO KNOWN AS EAST BUTLER PUBLIC SCHOOL DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, AND BRENDA COUFAL, AN INDIVIDUAL RESIDENT TAXPAYER OF BUTLER COUNTY SCHOOL DISTRICT 12-0502, ALSO KNOWN AS EAST BUTLER PUBLIC SCHOOL DISTRICT, APPELLEE, V. FREEHOLDER PETITIONERS 1 THROUGH 10: FERN JANSA ET AL., APPELLEES.

814 N.W.2d 724

Filed May 25, 2012. No. S-11-562.

1. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case.
2. **Jurisdiction: Appeal and Error.** An appellate court reviews de novo jurisdictional determinations that do not involve a factual dispute.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law that an appellate court independently reviews.
4. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes that are appropriately resolved through the judicial process.
5. ____: ____. Standing requires that a litigant have a personal stake in the outcome of a controversy that warrants invocation of a court's jurisdiction and justifies exercise of the court's remedial powers on the litigant's behalf.
6. **Standing: Claims: Parties: Proof.** To have standing, a litigant must assert its own rights and interests and demonstrate an injury in fact, which is concrete in both a qualitative and temporal sense. The alleged injury in fact must be distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical.
7. **Standing.** To have standing, a party must have some legal or equitable right, title, or interest in the subject of the controversy.
8. **Actions: Standing: Proof.** Standing requires that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision.