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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA09-108

JOHN TRUITT APPELLANT V. MARY JANE FREEMAN APPELLEE	**Opinion Delivered** June 2, 2010 APPEAL FROM THE POINSETT COUNTY CIRCUIT COURT [NO. PR06-115] HONORABLE BARBARA HALSEY, JUDGE AFFIRMED

LARRY D. VAUGHT, Chief Judge

This is an appeal from a judgment denying appellant John Truitt's motion to set aside an order admitting a will to probate entered December 1, 2006. Specifically, the trial court found that it was without authority to set aside the order because no challenge to the order had been lodged until after the time to appeal the order had long expired. Appellant now contends that because the probate proceeding did not occur in the county where the decedent resided at the time of her death, the court was without jurisdiction to enter the December 1, 2006 order in the first place and that the trial court "cannot lose jurisdiction to correct an error when the error is lack of jurisdiction." We see no error and affirm.

A petition for probate of will was filed by appellee, Mary Jane Freeman, on November 22, 2006, in the Poinsett County Probate Division. She was seeking to admit the will of the

deceased, Annette Truitt Brown, a resident (at the time of her death) of Powhatan, Lawrence County, Arkansas. A small-estate notice was filed on November 22, 2006. An order admitting the will to probate was filed on December 1, 2006. The notice was published in the Modern News, a weekly newspaper distributed in the City of Harrisburg, Poinsett County, Arkansas. An "Affidavit of No Administration" was filed on July 20, 2007.

The appellant filed a "Motion to Set Aside Order of Administration" on November 19, 2007, alleging that Poinsett County did not have jurisdiction over the estate of Annette Truitt Brown because she was a resident of Lawrence County. Appellant argued Lawrence County was the proper county for filing and publication of notice. Appellee (as executrix of the estate) timely filed an answer to the motion. The answer admitted that at the time of the decedent's death her residence was Lawrence County, but also alleged that she owned property in Poinsett County. Appellee also countered that appellant had actual notice of the proceeding yet failed to appear within the time required by law.

On October 22, 2008, an order denying appellant's motion to set aside the order of administration was entered. At this time, the trial court found that jurisdiction was not defeated regardless of whether a probate proceeding began in a county that was not the proper venue; that the probate code provided procedures for dealing with the filing in the wrong county during the period of administration; that the trial court lost jurisdiction to deal with the issue of filing in the wrong county after the period allowed for appeal from the final termination of the administration of the estate; and that the court had no power to set aside the final orders entered

in the process of the administration of the estate.

We review probate matters de novo on appeal. *Reynolds v. Guardianship of Sears*, 327 Ark. 770, 940 S.W.2d 483 (1997). Furthermore, this court will not disturb the probate judge's decision absent an abuse of discretion or a finding that the judge's decision is clearly erroneous. *Id.* With respect to the circuit court's authority to modify or vacate prior orders, the Arkansas Probate Code provides for procedures that are different from the relevant rules of civil procedure. Specifically, section 28-1-115 of the probate code sets out the following rules governing the circuit court's power to vacate or modify an order in probate proceedings:

> (a) For good cause and at any time within the period allowed for appeal after the final termination of the administration of the estate of a decedent or ward, the court may vacate or modify an order or grant a rehearing. However, no such power shall exist as to any order from which an appeal has been taken or to set aside the probate of a will after the time allowed for contest thereof.

Ark. Code Ann. § 28-1-115 (Repl. 2004).

Appellant asserts that because he raises a question of the court's jurisdiction rather than venue, section 28-1-115 is inapplicable. Appellant cites Arkansas Code Annotated section 28-40-102 (Repl. 2004) as authority for his contention that he has in fact raised a question of jurisdiction. However, this section of the probate code sets out the rules governing venue not jurisdiction.

Appellant's attempt to convert this straightforward venue question to one of jurisdiction is unavailing. In fact, his position that "venue equates to jurisdiction" is fundamentally flawed. Filing a case in what is alleged to be the "wrong" county creates an issue of venue not

jurisdiction. The question of the decedent's place of residence in relation to the county where the probate action was filed does not impact the unequivocal fact that the ability to probate a will is squarely within the circuit court's jurisdiction, as is plainly stated in Arkansas Code Annotated sections 28-1-104 (2). Under the facts of this case, the will must have occurred in conjunction with the probate order entered on December 1, 2006. The motion to set aside the order was not filed until November 19, 2007. Accordingly, we affirm the trial court's conclusion that it was without power to set aside the December 1, 2006 order after the time for appeal from that order had expired.

Affirmed.

HART and GLADWIN, JJ., agree.