1-14c Subcommittee of the Texas Supreme Court Rules Advisory Committee
Report Regarding Probate Court Policies Prohibiting Pro Se Executors
November 2, 2020

The Texas Supreme Court has requested that the Rules Advisory Committee study and make recommendations regarding the following issue:

> **Probate Court Policies Prohibiting Pro Se Executors.** Nearly all the statutory probate courts have policies prohibiting executors from proceeding pro se. The Court asks the Committee to consider whether an executor has a right to proceed pro se and whether these policies impermissibly restrict that right.

The Court provided a law review article that "may inform the Committee's work," Michael Hatfield, *Pro Se Executors—Unauthorized Practice of Law, or Not?*, 59 Baylor L. Rev. 329 (2007) ("Hatfield article"). The Chair has requested the 1-14c Subcommittee to report its views on the matter.

In response, the Subcommittee has reviewed the Hatfield article, pertinent caselaw,[1] and briefing filed in the Texas Supreme Court in Cause No. 19-0803, *In re Maupin*, in which a pro se litigant attempted to challenge the written policy of the Travis County Probate Court No. 1 that requires independent executors to be represented by a lawyer.[2] Although the Court ultimately denied the petition for review in that case, the briefing—and particularly the amicus briefs filed on behalf of the Texas Access to Justice Commission, on one hand, and the Texas College of Probate Judges and the State's Presiding Statutory Probate Judge[3] on the other[4]—provide helpful historical

[1] Principally, *Ex Parte Shaffer*, 649 S.W.2d 300 (Tex. 1983) (orig. proceeding); two court of appeals opinions that have been cited as authority for policies restricting independent executors from proceeding pro se, *Steele v. McDonald*, 202 S.W.3d 926 (Tex. App.—Waco, no pet.), and *In re Guetersloh*, 326 S.W.3d 737 (Tex. App.—Amarillo 2010, orig. proceeding); and the court of appeals opinion in *In re Maupin*, discussed below. The Subcommittee has provided copies of these cases with this report. The *Maupin* opinion is an attachment to the amicus brief filed by the Texas Access to Justice Commission.

[2] Travis Co. Probate Ct. No. 1, "Court Policy Regarding 'Pro Se' Applicants (Applicants Without a Lawyer"). The current version of this policy is provided with this report.

[3] Who also happened to be the presiding probate judge in the case.

[4] Copies of which are also provided with this report.

background regarding the question now presented, as well as illustrating (along with the Hatfield article) the issues of law and jurisprudential policy that may come to bear on the question.

To summarize our answer to the question posed, the Subcommittee is presently of the view that Texas law does permit an independent executor to proceed pro se, both in applying for court approval to act in that capacity and in subsequently so acting. This tentative conclusion follows from the legal principle that the executor is representing himself or herself, not others, and thus is not engaged in the unauthorized practice of law. However, as cautioned in the Hatfield article, the Subcommittee should add that there may be cases in which it would be extraordinarily unwise for an executor to act pro se, given the potential liability for breaching fiduciary duties. Such practical risks and disadvantages of proceeding pro se are, of course, present in any type of case where a person attempts to do so, and sometimes with stakes far higher than here. The Subcommittee has addressed only the question of a party's right to proceed pro se (the question posed by the Court) without regard to any policy concerns about the exercise of that right.

Background

At the outset, it may be helpful to begin with a brief, high-level summary of some pertinent features of Texas probate law and procedure that form the context of the question presented. Under Texas law, if a person dies leaving a lawful will, that person's "estate"—*i.e.*, his or her property[5]—vests immediately in the persons to whom it is devised under the will or otherwise to the person's heirs at law, subject to payment of and liability for the decedent's debts.[6] Since at least 1848, that Texas testator has also enjoyed the right to have the estate administered (basically paying off creditors and disposing of the property in accordance with the will) through "independent administration," in lieu of judicial supervision, including the right to pick his or her own

[5] *See* Tex. Estates Code § 22.012 ("'Estate' means a decedent's property, as that property: (1) exists originally and as the property changes in form by sale, reinvestment, or otherwise; (2) is augmented by any accretions and other additions to the property, including any property to be distributed to the decedent's representative by the trustee of a trust that terminates on the decedent's death, and substitutions for the property; and (3) is diminished by any decreases in or distributions from the property.").

[6] *See id.* §§ 101.001(a), .051.

independent executor to serve as the testator's personal representative in handling these matters.[7] To effectuate this appointment (and the named executor may decline to so serve), the will must be admitted to probate (basically a judicial declaration that it is a valid will) and the executor must obtain court authorization (letters testamentary), which are generally to be issued unless the named executor is statutorily "disqualified."[8] (The statutory grounds for disqualification include "a person whom the court finds unsuitable,"[9] potentially a broad and somewhat nebulous standard,[10] but the probate court policies in question do not appear to rest upon any determination that pro se litigants are categorically "unsuitable," within the meaning of the statute, to act as executors[11]).

Depending on the language of the will, the independent executor, once authorized, may have no further interaction with the court aside from filing an oath and an inventory, appraisement, and list of claims. Basically, the independent executor goes forth and settles the estate without further court supervision or involvement. However, in performing this role, the independent executor holds the estate in trust, owing fiduciary duties to beneficiaries that include taking the same care with estate property as a prudent person would with that person's own property.[12]

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[7] *See Kappus v. Kappus*, 284 S.W.3d 831, 834-35 (Tex. 2009); Tex. Estates Code § 22.017; *see generally id.* subch. I, governing independent administration.

[8] *See* Tex. Estates Code §§ 301.051, .151, .152, 304.001-.003, 306.001; *In re Maupin*, Cause No. 13-17-0555-CV (Tex. App.—Corpus Christi 2019, pet. denied), slip op. at 3.

[9] *Id.* § 304.003(5). The other statutory grounds for disqualification are that the person is incapacitated, a felon, a nonresident natural person or corporation who has not appointed a resident agent, or a corporation not authorized to act as a fiduciary in this state.

[10] *See Kappus*, 284 S.W.3d at 835 (noting the "expansive" nature of "unsuitability").

[11] The case law in this area seems to emphasize the existence of conflicts of interest or antagonism between the named executor versus the beneficiaries.

Additional statutory requirements come into play where a person seeks to act as an independent *administrator* of an estate, as opposed to an independent executor. *Compare* Tex. Estates Code § 301.152 *with id.* § 301.153. Although the terms are sometimes used interchangeably, an independent executor more precisely refers to a personal representative appointed under a will while an independent administrator is appointed in the absence of an independent executor named in the will who can and will serve. *See id.* § 301.051. Because the Court's question refers specifically to independent executors, the Subcommittee has not attempted to address any additional or distinct issues that might arise with independent administrators.

[12] *See* Tex. Estates Code §§ 101.003, .351.101; *see also Humane Soc'y of Austin & Travis County v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975) (when applying predecessor statute, observing that "the executor of an estate is held to the same fiduciary standards in his administration of the estate as a trustee . . . [and] is subject to the high fiduciary standards applicable to all trustees").

The arguments for prohibiting independent executors from proceeding pro se are founded on the view, articulated in *Steele* and *Guetersloh*, that an independent executor attempts to "represent" persons other than himself or herself se in seeking to probate wills and obtain letters testamentary.[13] It follows, in this view, that an executor engages in the unauthorized practice of law by proceeding pro se. In this regard, the Committee should also note some of the background law regulating the "practice of law" in this State.

The Texas Supreme Court has inherent power, derived in part from the Texas Constitution's separation-of-powers provision, to regulate judicial affairs and the administration of justice within the Judicial Department, including governing the practice of law.[14] This power is "assisted" by statute, principally the State Bar Act.[15] The Act defined the "practice of law" as:

> the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.[16]

This definition, however, "is not exclusive and does not deprive the judicial branch of the power and authority under both [the Act] and the adjudicated cases to determine whether other services and acts may constitute the practice of law."[17]

Generally, only a member of the State Bar of Texas may "practice law" in this State, subject to exceptions both within and outside of the Act. One exception, which is also arguably implicit in the Act's "practicing law" definition, is that a person does not engage in the unauthorized practice of law by providing legal services for oneself. Texas Rule of Civil Procedure 7 makes this

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[13] *See* Probate Court Judges' amicus brief at 13-15; Travis Co. policy ("a pro se may not represent others. Under Texas law, only a licensed attorney may represent the interests of third-party individuals or entities, including . . . probate estates." (citing *Guetersloh* and *Steele*)).

[14] *See, e.g., In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 769-70 (Tex. 1999).

[15] *Id.* at 770.

[16] Tex. Gov't Code § 81.101(a).

[17] *Id.* § 81.101(b).

explicit in the context of proceedings before Texas justice, district, and county courts (and therefore in courts that exercise probate jurisdiction[18]): "Any party to a suit may appear and prosecute or defend his rights therein, either in person or by attorney of the court."[19]

On the other hand, as the Probate Court Judges pointedly noted in their amicus brief, the Texas Supreme Court has previously approved some local rules of probate courts that require executors (with some exceptions) to be represented by counsel.[20] This Subcommittee is charged with assessing this issue, therefore, both under Rule 7 (right to appear on one's own behalf) and Rule 3a (adoption of local rules).

Analysis

Although the distinction seems to be overlooked frequently, the issue of whether an independent executor has the right to proceed pro se (or, conversely, engages in the "unauthorized practice of law") would more precisely concern two distinct sets of acts: (1) when a named executor brings the court proceedings required to effectuate his or her power to act in that capacity; and (2) when the executor acts in that capacity thereafter. As for the first stage, the Subcommittee agrees with the Hatfield article that the nominated executor would seem only to be prosecuting only his or her own rights under the will to obtain the status of executor.[21] It is the second phase—once the independent executor begins to act in that capacity (a role that can entail paying off creditors, selling property, dealing with taxing authorities, etc.) that would give rise to potentially closer questions as to whether the independent executor's actions in that capacity, at least some of which would arguably constitute the "practice of law," would be unauthorized because deemed to be performed for or on behalf of persons other than the executor.

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[18] Tex. R. Civ. P. 2.

[19] *Id.* R. 7.

[20] Probate Court Judges' amicus brief at 16-17.

[21] Hatfield article at 126 ("The nominated executor prosecutes his or her *personal* rights when probating the will. To put an even finer point on it, when the nominated executor probates the will, he or she, by definition, has yet to assume the role of executor and thus has no duties or obligations to the beneficiaries. Thus, it is incoherent to claim the executor's right to probate the will is somehow derived from the beneficiaries' interests.").

In resolving this question, it seems clear that one cannot merely equate "the estate" to a distinct legal entity like a corporation, although this was a component of the divided *Steele* court's reasoning.[22] As the Hatfield article points out, it is established Texas law that the "estate" of a decedent is not itself a legal entity and cannot properly sue or be sued as such.[23] In fact, the amicus brief filed by the probate judges in *Maupin* conceded that the "narrow point—that estates are not separate juridical entities—is certainly correct."[24] They reasoned, rather, that (1) under Texas statutory and common law, an independent executor, acting in that capacity, is nonetheless a "juridical entity" distinct from that person individually; and (2) by virtue of the fiduciary relationship that exists in the independent-executor capacity, the person in that capacity is "representing" the persons to whom the fiduciary duties are owned, and not only "himself" or "herself," and thus cannot proceed pro se.[25]

While Texas law certainly recognizes a distinction between a person's individual capacity and his or her capacity as an independent executor, it is far less clear that a person acting the independent-executor capacity is thereby proscribed from proceeding in that capacity pro se. In *Ex parte Shaffer*,[26] the Texas Supreme Court held that an independent executor, acting in that capacity, had the right under Tex. R. Civ. P. 7 to proceed in court pro se in defending against claims that he breached his fiduciary duties in that capacity. The relator, "[w]hile serving as Independent Executor for the estate of Horace Yates," was sued in a Dallas County probate court by Mr. Yates's widow "for alleged breach of fiduciary duty in that capacity."[27] After multiple continuances and the withdrawal of Shaffer's attorney, Shaffer sought yet another continuance, prompting the trial court to order Shaffer to post a bond to indemnify the widow for the costs of

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[22] *See Steele*, 202 S.W.3d at 928 & n.2 (citing *Kunstoplast of. Am., Inc. v. Formosa Plastics Corp., USA*, 937 S.W.2d 455, 456 (Tex. 1996) (per curiam), for the proposition that "Texas courts have consistently held that a non-attorney may not appear pro se in behalf of a corporation.").

[23] Hatfield article at 117-18 (citing, *e.g.*, *Henson v. Estate of Crow*, 734 S.W.2d 648 (Tex. 1987), and *Price v. Estate of Anderson*, 522 S.W.2d 690 (Tex. 1975)).

[24] Brief at 14.

[25] *Id.*; *see also* Travis Co. Probate Ct. No. 1 policy (providing that "the executor . . . must be represented by a lawyer" because "[a]s executor of a decedent's estate, you don't represent only yourself. An executor represents the interests of beneficiaries and creditors. This responsibility to act for the benefit of another is known as a fiduciary relationship. It gives rise to certain legal obligations and responsibilities that require legal expertise.").

[26] 649 S.W.2d 300 (Tex. 1983) (orig. proceeding).

[27] *Id.* at 301.

delaying trial, to retain an attorney to represent him in the suit, and to report on his status in procuring an attorney.[28] Subsequently, the trial court adjudged Shaffer in "direct" contempt for failing to comply with its order and ordered him jailed until he purged himself of the contempt by hiring an attorney and posting bond.[29] On Shaffer's application for habeas relief, the Court held that the underlying order was void and ordered Shaffer discharged.[30]

Regarding the requirement that Shaffer obtain an attorney, the Court could find "no authority" allowing a court "to require any party to retain an attorney," and to the contrary, it held that "ordering a party to be represented by an attorney abridges that person's right to be heard by himself" under Tex. R. Civ. P. 7.[31] "If Shaffer's lack of an attorney was being used to unnecessarily delay trial or was abusing the continuance privilege," the Court added, "the proper action would have been to order him to proceed to trial as set, with or without representation."[32]

Although there was no dispute before the Court as to whether Shaffer was engaging in the unauthorized practice of law by appearing pro se in his capacity as independent executor, the Court's analysis is inconsistent with that notion. Namely, the Court reasoned that Shaffer, even while appearing in his capacity as independent executor, was nonetheless representing "himself" for purposes of Rule 7, and therefore had the right to proceed pro se. And while it is true that Schaffer was defending against claims for allegedly breaching his fiduciary duties, the opinion does not suggest that Shaffer was representing "himself" only because of the nature of the claim. Rather, the Court makes clear that these claims were asserted against him in his capacity as independent executor.[33] In the very least, the reasoning of *Shaffer* is difficult to reconcile with the notion that an independent executor does not represent "himself" or "herself" when proceeding in that capacity pro se.

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[28] *Id.*

[29] *Id.*

[30] *Id.* at 301-02.

[31] *Id.* at 302.

[32] *Id.*

[33] *Id.* at 301 ("While serving as Independent Executor for the estate of Horace Yates, Shaffer was sued . . . for alleged breach of fiduciary duty in that capacity").

Also instructive is *Huie v. DeShazo*,[34] in which the Texas Supreme Court held that an attorney hired by a trustee represents the trustee rather than the trust's beneficiaries under Texas law. As the Hatfield article suggests, *Huie* tends to refute the notion that an independent executor (a type of trustee), by virtue of the fiduciary duties owing to the beneficiaries, is deemed to be "representing" the beneficiaries' interests, as opposed to the executor/trustee's own unique rights and interests in administering the estate.[35]

These Texas Supreme Court decisions would, of course, control over any contrary holdings of lower courts. The Subcommittee would also note that Texas law does not hold generally that a person who owes some sort of fiduciary duty to another cannot, for that reason alone, proceed pro se. Were that the rule, any married person would arguably be unable to proceed pro se, at least to the extent the marital estate might be affected, as the marital relationship between spouses is a fiduciary relationship.[36]

In light of these considerations, the Subcommittee concludes that the better view of Texas law is that executors have the right to proceed pro se, both in initiating the court proceedings necessary to effectuate their rights under a will and thereafter in performing that role. That being said, the Subcommittee hastens to acknowledge that its members consist of three generalist appellate lawyers or judges and a county clerk, all of whom disclaim expertise in Texas probate practice. Because our analysis may have overlooked some nuance or wrinkle of that sometimes-complicated area of the law, the Committee or the Court may desire input from other persons having deeper subject-matter expertise and/or broader range of perspective, including those involved in preparing the materials appended to this report or others with genuine expertise. (The same would be true if the Court desires a broader discussion encompassing the policy and practical implications of executors exercising their right to proceed pro se, and/or possible responsive measures[37]). On the other hand, the Subcommittee has at least offered the best efforts of four

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[34] 922 S.W.2d 920, 925 (Tex. 1996).

[35] Hatfield article at 131-34.

[36] *See Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998). The Subcommittee should acknowledge that it borrowed this observation from Mr. Maupin's pro se reply in support of his petition for review (at 9-10).

[37] The Hatfield article suggests several such topics at 136-45.

objective observers with "fresh eyes" and no particular "history" or agendas regarding the legal question posed or how it is answered. We hope that these efforts are of benefit to the Committee and to the Court.

Respectfully submitted,

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