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SUPREME COURT OF TEXAS
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No. 19-0803

IN THE
SUPREME COURT OF TEXAS

IN RE ESTATE OF JANET AMANDA MAUPIN,
Deceased,

ON PETITION FOR REVIEW FROM THE
THIRTEENTH COURT OF APPEALS AT CORPUS CHRISTI-EDINBURG, TEXAS
NO. 13-17-00555-CV

BRIEF OF *AMICI CURIAE* TEXAS COLLEGE OF PROBATE JUDGES AND PRESIDING STATUTORY PROBATE COURT JUDGE FOR THE STATE OF TEXAS IN OPPOSITION TO PETITION FOR REVIEW

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I. INTRODUCTION

Mr. Maupin, the *pro se* petitioner, has asked the Court to answer the question of whether Rule 7 of the Texas Rules of Civil Procedure requires a probate court to allow an independent administrator to appear in court *pro se* in contravention of local rules and policies of statutory county probate courts prohibiting such representation.[1]

Under Rule 11 of the Texas Rules of Appellate Procedure, and as friends of the Court, the Texas College of Probate Judges ("College" or "Probate Judges College") and the Presiding Statutory Probate Court Judge for the State of Texas ("State Presiding Probate Judge") suggest that the Court deny the review requested by Mr. Maupin. At bottom, the case presents an issue of judicial policy, not law.

Even were the policy issue raised here potentially appropriate for adjudication in a case-specific context, *this* case is not the appropriate vehicle for addressing it. At a more fundamental level,

[1] The specific policy challenged is: "individuals applying for letters testamentary [and] letters of administration . . . must be represented by a licensed attorney. The only time a pro se applicant may proceed in court is when truly representing **only** himself or herself."

the appropriateness of *pro se* representation of independent executors in probate court proceedings implicates important and nuanced matters of judicial administration better suited for the more broadly deliberative public process of judicial rulemaking. There—and, of course, at the Texas Legislature—is where debate should be joined, if the Court is inclined to give more extended deliberation to whether allowing independent executors to appear *pro se* in probate court is to be mandated.

The Probate Judges College is paying the fee for preparation of this brief.

II. STATEMENT OF INTEREST OF *AMICI CURIAE*

A. Overview of *Amici*

The Probate Judges College is a private non-profit educational organization that provides training and education to the probate courts and county clerks of Texas. After informal efforts began in 1977, the College was formally organized in 1980. Since then, it has provided continuing education in all aspects of probate law in furtherance of its mission to provide an open forum for discussions about, and explorations of, probate law, as well as other legal are-

as within the purview of probate courts. The College has a five-member board of directors. Four of them are current or former statutory probate court judges, with a combined 79 years of judicial experience

The position of State Presiding Probate Judge is a statewide, legislatively-created, judicial peer-elected office. *See* Tex. Gov't Code § 25.0022. Improving the management of statutory probate courts and the administration of justice is a core function. Tex. Gov't Code § 25.0022(d). One of the office's specifically assigned duties is to:

> ensure the promulgation of local rules of administration in accordance with policies and guidelines set by the supreme court.

Tex. Gov't Code § 25.0022(d)(1). According to the Attorney General, this provision authorizes the State Presiding Probate Judge to "adopt statewide local rules of administration for the statutory probate courts." Tex. Atty. Gen. Op. GA-0105 (2003) at 2.[2]

[2] The position is currently held by the Honorable Guy Herman, who in his other capacity as Judge of the Statutory Probate Court Number One for Travis County has been designated by the Court in this case as the respondent. In his capacity as the trial judge, Judge Herman has already filed his Response to Petition for Review on December 12, 2019. The Court has long recognized that a person may be involved in judicial proceedings as two dif-

B. Requiring That Independent Administrators Be Allowed To Act *Pro Se* In Court Would Harm, Not Help, The State System Of Independent Administration.

Both the Probate Judges College and the State Presiding Probate Judge have an abiding commitment to maintaining and enhancing Texas's longstanding system of independent administration of estates. It has proven itself over time as a way to make the State's probate system more affordable and easier to navigate, which in turn is an incentive for Texans to use it as a way to bring order and closure to the estates of their deceased loved ones.

The *Amici* are concerned, however, that the proposed resolution of the issue urged upon the Court by Mr. Maupin and his supporter, *Amicus Curiae* Texas Access to Justice Commission ("TAJC"), is not the way to improve this aspect of the Texas probate system. Rather, it would be a step backwards, pushing probate courts into a burdensome, time-consuming, and complicated

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ferent legal entities. *Heckman v. Williamson County*, 369 S.W.3d 137, 158 (Tex. 2012) (distinguishing suit against judges in their official capacities from suit against them in their personal capacities); *see also Castleman v. Internet Money Ltd.*, 546 S.W.3d 684, 689 (Tex. 2018) ("person may possess various capacities in which they can be sued, and not all those capacities are relevant to every suit"); *Texas Oil & Gas Corp. v. Vela*, 429 S.W.2d 866, 876 (Tex. 1968) (noting a person was "party to the suit in two different capacities," royalty owner and partial owner of working interest). To lessen the potential for confusion, this brief will use the official title of the *amicus* presiding judge.

tight-rope walk. Texas probate courts and their staff are prohibited from giving legal advice. *See* Tex. Gov't Code Ann. tit. 2, subtit. G, app. B (Tex. Code Jud. Conduct, Canons 2(B), 3(B)(8), 4(G). But invalidating a requirement that independent administrators have lawyers for court proceedings would inevitably—and frequently—confront probate courts with a quandary: try move the courtroom process along by assisting *pro se* independent administrators unfamiliar with legal procedures and niceties, while simultaneously avoiding the provision of legal advice forbidden by the canons of judicial conduct. This will be a routine dilemma for probate courts if the Court adopts Mr. Maupin's proposed rule.[3]

And it would be an especially perilous course, given the heightened obligations imposed on probate courts in particular. They are legislatively required to use "reasonable diligence" to ensure that independent administrators perform their legal duties.

[3] Mr. Maupin appears to seek a broad rule, extending beyond the situation of an independent executor who is the sole beneficiary under a will. *See* Maupin Pet. at 21 (requesting ruling that "executors administering wills explicitly stating that executors may act without approval of any court should be permitted to proceed pro se, *especially* where those executors are the sole beneficiaries of the estate"); *and* TAJC Br. at 8 (characterizing the challenge as being to "judicial policies that prevent independent executors—*including* those who are the sole beneficiaries of a will— from proceeding pro se to administer estates") (emphases added).

Tex. Estates Code § 351.352. They are in the unique position of facing personal liability for judicial acts if they fall short—through "gross neglect"—of meeting, for example, the "reasonable diligence" standard of seeing that independent administrators meet their legal duties. Tex. Estates Code § 351.354.

Requiring that an independent administrator be represented by a lawyer when administration of an estate requires turning to a probate court for judicial action is one way for probate courts to satisfy this standard. At the same time, such a requirement does not undermine the system of independent administration. Lawyers serve as lubricants to the probate system, as the interface between lay people serving as independent administrators and the courts. As discussed further below, *see* Part III.B, *Amici* here do not endorse the legal analysis in the law review article touted by *Amicus* TAJC,[4] but they strongly subscribe to the article's warning that proceeding *pro se* as an independent executor is a dubious proposition. Hatfield article at 375 ("it is unclear when, *if ever*,

[4] *See* M. Hatfield, Pro Se Executors—*Unauthorized Practice of Law, or Not?*, 59 Baylor L. Rev. 329 (2007) ("Hatfield article").

they should" try proceeding *pro se*) (emphasis added). As the article forthrightly, and accurately, acknowledges:

> The executor lacks the information, strategies, and experience of a good lawyer, which means the executor is quite unlikely to discern the real dangers of proceeding pro se.

Id.

Against the backdrop of their long and deep experience in Texas probate law and administration of the State's statutory probate courts, *Amici* are deeply concerned about the potential adverse impact on Texas probate courts of the rule urged by Mr. Maupin and *Amicus* TAJC. There is good reason that "[v]irtually all statutory probate courts," TAJC Br. 9, have adopted the policy challenged here. The Probate Judges College and the State Presiding Probate Judge urge the Court to deny the petition for review. *If* the policy issue needs addressing, there are far better ways to do it than through this particular case.

III. ARGUMENT

Mr. Maupin, joined by TAJC, presses the Court to decide the question of whether an independent executor *must* be allowed to proceed *pro se* in statutory probate court proceedings. The only *le-*

gal, as opposed to policy-based, argument offered in support of an affirmative answer is Rule 7 of the Texas Rules of Civil Procedure.

The Rule 7 argument is not legally viable. *See* Part III.B, below. But the Court need not, and should not, even reach the substantive legal issue. The probate court admitted Mr. Maupin's deceased wife's will to probate as a muniment of title because it found "no need for administration of Decedent's estate." CR 15-16 (Order Admitting Will to Probate as Muniment of Title); Conclusions of Law 3-4. It is only if the court erred in admitting the will to probate as a muniment of title that the way in which an independent administrator may proceed in court—represented by an attorney or acting *pro se*—becomes an issue. Mr. Maupin, though, has waived any challenge to the muniment of title issue by not bringing the issue forward in his petition for review.[5] *See* Part III.A, below.

A. The *Pro Se* Issue Is Not Properly Before the Court.

Mr. Maupin and TAJC's stated objective directly clashes with the relief Mr. Maupin already has been afforded in this case: a

[5] *Amicus* TAJC does not address this problem.

cost-effective way to probate a will. The policy premise of Mr. Maupin and TAJC's challenge is that the probate court's policy can impose an unnecessary financial burden on estates. Maupin Pet. 19 ("financially harm[s] . . . estates"); TAJC Br. 10 ("unnecessarily increase[s] . . . costs"). The probate court, though, admitted the will to probate as a muniment of title, adopting an even less financially burdensome alternative for Mr. Maupin than if he had been issued the letters testamentary he wanted, along with the ability to appear *pro se* in court as independent administrator. The muniment of title route to probating a will is a way to "quickly and cost-efficiently" handle the matter when administration of the estate is not needed (as was the case here). *In re Kurtz*, 54 S.W.3d 353, 355 (Tex.App.—Waco 2001, no pet.); *see also Chabot v. Estate of Sullivan*, 583 S.W.3d 757, 759 n.2 (Tex.App.—Austin 2019, pet. denied) (same).

It is not clear why Mr. Maupin would want to challenge admission of the will to probate as a muniment of title rather than through issuance of letters testamentary and designation of an independent administrator. Mr. Maupin had the burden of estab-

lishing the necessity of an administration of the estate. Tex. Estates Code § 301.153(a). Yet, he has identified nothing in the trial record showing he met his burden. Nor does his petition present a challenge to the probate court's finding that there was no need for administration of the estate.

He does appear to have presented in some fashion such a challenge in the appeals court below. It was his first issue, arguing that "[t]he trial court abused its discretion and harmfully erred by not granting letters testamentary to Appellant." Brief of Appellant at 11 (filed May 7, 2018, in No. 13-17-00555-CV).[6]

By not raising this issue in his petition for review, Mr. Maupin has abandoned it. *Guitar Holding Co. v. Hudspeth Cty. Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 918 (Tex. 2008) (legal challenge waived if not raised in petition for review). The fact that Mr. Maupin is appearing in this Court *pro se* does not relieve him of his waiver. *Pro se* litigants are no less required to follow judicial rules of procedure than are licensed attorneys. *Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005) (*per curiam*).

[6] Available online at http://www.search.txcourts.gov/Case.aspx?cn=13-17-00555-CV&coa=coa13.

If admitting the will to probate as a muniment of title was appropriate, then legal questions about an independent administrator cannot be reached. Because a challenge to the order on muniment of title has been waived, the issue raised here by Mr. Maupin and TAJC cannot be reached.[7]

B. Rule 7 Does Not Require Probate Courts To Allow *Pro Se* Independent Administrators.

It is not sufficient to argue that some legal policy *should* be adopted. Rather, an argument that a policy *must* be followed must has to arise from an underlying legal right. The only identified source of a legal right to appear in probate court as a *pro se* independent administrator is Rule 7 of the Texas Rules of Civil Procedure, which provides:

> Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.

Mr. Maupin's argument is that this court-made rule means that he must be allowed to appear "in person" and prosecute "his rights" as an independent executor of his deceased wife's estate.

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[7] Even setting aside the waiver issue, the Response to Petition for Review extensively addresses why probating the will as a muniment of title in this case was legally proper. Resp. 9-16.

This is a misreading of Rule 7 as applied to independent administrators in probate courts. The several flaws in Mr. Maupin's Rule 7 argument are detailed below.

1. Governing This Case Is The Common Law Rule That Independent Administrators Are Fiduciaries Functioning In A Different Capacity Than Individual Persons Serving In That Capacity.

First, momentarily setting aside the import of its text, Rule 7 does not displace the common law governing the "rights" and "powers" of administrators. The Legislature has provided that the rights and powers of administrators are "governed by the common law" to the extent common law principles do not conflict with a statute. Tex. Estates Code § 351.001. A judicial rule is not a statute, and Rule 7 as interpreted by Maupin and TAJC would be inconsistent with Section 351.

In the probate context, for over a century Texas common law has distinguished between a person's capacity as an independent executor and that same person's personal capacity. *See Tison v. Glass*, 94 S.W. 376, 377 (Tex.Civ.App. 1906) (explaining that a judgment in a probate dispute was against an individual personally not "in his capacity of independent administrator). This is not a

relic. In *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983), the Court distinguished between holding a person liable as independent administrator and as individual. *See also Beck v. Beck*, 841 S.W.2d 745, 746 (Tex. 1991) (juxtaposing individual capacity of person with his capacity as independent executor of estate).

This well-established common law principle has not been altered by the Legislature (which, of course, has the power to do so). Consequently, Rule 7 cannot be the source of a right of independent administrators to appear *pro se* in judicial proceedings in probate court.

Mr. Maupin as an individual and Mr. Maupin as independent administrator are two different legal entities because they appear in court in two different capacities. Their legal duties are different, too. As independent administrator Mr. Maupin serves in a fiduciary role, but Mr. Maupin as himself does not. An independent administrator is "subject to the high fiduciary standards applicable to all trustees." *Humane Society of Austin and Travis County v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1976). In that ca-

pacity with those legal duties, he is not (to use Rule 7's language) in probate court to "defend *his* rights."

This principle is not deflected at all in the arguments of Mr. Maupin, TAJC, and the law review article that in Texas an estate is not a legal entity. *See* Maupin Pet. 14; TAJC Br. 16; Hatfield article at 118. Their narrow point—that estates are not separate juridical entities—is certainly correct. But describing what the relationship of the independent executor to the estate is *not* does not answer the question of what it *is*. It is a fiduciary relationship with the duties exercised by a different juridical entity than the person in and of himself. This is a core principle of probate law, and the policy or rule that such fiduciaries may only appear in court through a licensed attorney is one of the key ways that principle is regularly driven home and kept at the forefront of the considerations of probate courts and independent administrators alike.

The Waco court of appeals correctly understood this important point in *Steele v. McDonald*, 202 S.W.3d 926 (Tex.App.—Waco 2006, pet. denied):

> A plain reading of Rule 7 suggests that Gene may not appear *pro se* as Independent Executor of the Duke Estate because in this role he is litigating rights in a representative capacity rather than in his own behalf.

Id. at 928; *cf. In re Gutersloh*, 326 S.W.3d 737, 739 (Tex.App.—Amarillo 2010, no pet.) (same, but as to trustees).

2. *Shaffer* Is Not On Point.

Mr. Maupin and TAJC tout *Ex parte Shaffer*, 649 S.W.2d 300 (Tex. 1983), as already establishing that independent executors must be allowed to proceed *pro se* in probate courts. Maupin Pet. 12-13; TAJC Br. at 17. *Shaffer*, though, is not sufficient authority for the proposition they urge.

Yes, there is clearly language in the opinion reciting that Rule 7 gives a party a right to represent himself in court. 649 S.W.2d at 302. But that language was at best a mere observation stating a truism from Rule 7. It does not grapple with, or address itself specifically to, independent executors and whether they can bring themselves within Rule 7's language. It was not even important to disposition of the case. The question in *Shaffer* was whether a court could hold someone in contempt without advance formal no-

tice to them. 649 S.W.2d at 301. *Shaffer* does not establish the legal principle Mr. Maupin urges.

3. Under Rule 3a(1), The Court's Formal Approval Of Local Rules Containing Policies Identical To The One Challenged Here Means That Rule 7 Does Not Prohibit The Policy.

Finally, administrative actions by this Court implicitly refute Maupin's argument. Under Rule 3a(1) of the Texas Rules of Civil Procedure, "[e]ach . . . probate court may make and amend local rules governing practice before such courts, provided . . . that any proposed rule or amendment *shall not be inconsistent with these rules*." (emphasis added).

At least twice in recent years, this Court has approved local probate court rules containing the very policy of Travis County Probate Court Number One. *See* Misc. Docket No. 19-9079 (Aug. 23, 2019) (approving local rules of Dallas County probate courts); Misc. Docket No. 12-9173 (Oct. 22, 1012) (approving local rules of Denton County probate courts). Rule 4.05(a)(1) of the Dallas County probate rules that this Court approved provides: "An individual shall be represented by an attorney if the individual is . . . applying to serve as an . . . administrator of an estate[.]" Rule

1.3(a)(1) of the Denton County probate rules that this Court approved provides: "An individual must be represented by an attorney if the individual is . . . applying to serve as an . . . administrator of an estate[.]"

Under Texas Rule of Civil Procedure 3a(1), the Court is not supposed to approve these local *pro se* rules concerning independent administrators if they are inconsistent with other extant rules of civil procedure. It follows from this that the *pro se* rules for the Dallas and Denton County probate courts are not in this Court's eyes inconsistent with Rule 7. It likewise follows that Travis County Probate Court Number One's *pro se* policy is not inconsistent with Rule 7.

CONCLUSION AND PRAYER

The Court should deny the petition for review. The Estates Code authorizes probate court to use "reasonable diligence" to ensure that personal representatives of estates administered under court orders perform their legal duties. Tex. Estates Code § 351.352. Not allowing independent administrators to appear in

court *pro se* is an exercise of the "reasonable diligence" the Legislature has demanded of probate judges.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2)-(3), I certify that this brief contains 3,409 words, excluding the portions of the brief exempted by Tex. R. App. Proc. 9.4(i)(1). This is a computer-generated document created in Microsoft Word 2010 using 14-point Century Schoolbook (12-point for footnotes), with 14- and 15-point Franklin Gothic for headings. In making this certification, I relied on the word count provided by the software used to prepare the document.

_/s/ *Renea Hicks*_____
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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2019, the foregoing Brief of *Amici Curiae* was served electronically in accordance with the Texas Rules of Appellate Procedure on all counsel of record and, for petitioner *pro se*, the party of record:

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