The Supreme Court of Texas

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August 1, 2022

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters.

Parental Notification Rules and Forms. HB 1280, passed by the 87th Legislature, prohibits abortions, except in certain circumstances. HB 1280 does not expressly repeal or amend Chapter 33 of the Family Code, which governs parental notice of an abortion for an unemancipated minor. In 1999, following the enactment of Chapter 33, the Court promulgated rules governing proceedings to obtain a court order and forms for use in these proceedings. Those rules and forms were amended in 2015 to reflect amendments to Chapter 33. The Court ask the Committee to consider whether to repeal or amend the rules and forms in response to HB 1280 and to draft any recommended amendments. The Committee should conclude its work on this matter at the August 19, 2022 meeting.

Texas Rule of Civil Procedure 7. On May 18, 2020, in response to statutory probate court policies that prohibit executors from proceeding pro se, the Court asked the Committee to consider whether an executor has a right to proceed pro se and whether those policies impermissibly restrict that right. The Committee discussed this matter at its November 6, 2020 meeting and voted 18-3 in favor of the 1-14c subcommittee's assessment that executors have the right to proceed pro se. The Court now asks the Committee to draft amendments or a comment to Rule of Civil Procedure 7 in light of that vote. In drafting the amendments or comment, the Committee should also consider other types of pro se appearances those policies restrict, like pro se appearances by guardians and administrators.

Texas Rule of Civil Procedure 42. At least eleven states have rules or statutes that expressly address distribution of residual class action funds to legal aid. Five of those states (Indiana, Kentucky, North Carolina, Pennsylvania, and South Dakota) require a minimum distribution to legal aid. Massachusetts requires notice to legal aid before the court enters judgment or approves a settlement—similar to a 2002 proposal from the Texas Access to Justice Commission. The Court now asks the Committee to consider whether to amend Rule of Civil Procedure 42 in line with other states and to draft any recommended amendments. The Committee's discussion at its September 21-22, 2002 meeting and *Highland Homes, Ltd. v. State*, 448 S.W.3d 403 (Tex. 2014) may inform its work.

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

AN ACT

relating to prohibition of abortion; providing a civil penalty; creating a criminal offense.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. This Act may be cited as the Human Life Protection Act of 2021.

SECTION 2. Subtitle H, Title 2, Health and Safety Code, is amended by adding Chapter 170A to read as follows:

CHAPTER 170A. PERFORMANCE OF ABORTION

Sec. 170A.001. DEFINITIONS. In this chapter:

(1) "Abortion" has the meaning assigned by Section 245.002.

(2) "Fertilization" means the point in time when a male human sperm penetrates the zona pellucida of a female human ovum.

(3) "Pregnant" means the female human reproductive condition of having a living unborn child within the female's body during the entire embryonic and fetal stages of the unborn child's development from fertilization until birth.

(4) "Reasonable medical judgment" means a medical judgment made by a reasonably prudent physician, knowledgeable about a case and the treatment possibilities for the medical conditions involved.

(5) "Unborn child" means an individual living member

of the homo sapiens species from fertilization until birth, including the entire embryonic and fetal stages of development.

Sec. 170A.002. PROHIBITED ABORTION; EXCEPTIONS. (a) A person may not knowingly perform, induce, or attempt an abortion.

(b) The prohibition under Subsection (a) does not apply if:

(1) the person performing, inducing, or attempting the abortion is a licensed physician;

(2) in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced; and

(3) the person performs, induces, or attempts the abortion in a manner that, in the exercise of reasonable medical judgment, provides the best opportunity for the unborn child to survive unless, in the reasonable medical judgment, that manner would create:

(A) a greater risk of the pregnant female's death; or

(B) a serious risk of substantial impairment of a major bodily function of the pregnant female.

(c) A physician may not take an action authorized under Subsection (b) if, at the time the abortion was performed, induced, or attempted, the person knew the risk of death or a substantial impairment of a major bodily function described by Subsection

(b)(2) arose from a claim or diagnosis that the female would engage in conduct that might result in the female's death or in substantial impairment of a major bodily function.

(d) Medical treatment provided to the pregnant female by a licensed physician that results in the accidental or unintentional injury or death of the unborn child does not constitute a violation of this section.

Sec. 170A.003. CONSTRUCTION OF CHAPTER. This chapter may not be construed to authorize the imposition of criminal, civil, or administrative liability or penalties on a pregnant female on whom an abortion is performed, induced, or attempted.

Sec. 170A.004. CRIMINAL OFFENSE. (a) A person who violates Section 170A.002 commits an offense.

(b) An offense under this section is a felony of the second degree, except that the offense is a felony of the first degree if an unborn child dies as a result of the offense.

Sec. 170A.005. CIVIL PENALTY. A person who violates Section 170A.002 is subject to a civil penalty of not less than $100,000 for each violation. The attorney general shall file an action to recover a civil penalty assessed under this section and may recover attorney's fees and costs incurred in bringing the action.

Sec. 170A.006. CIVIL REMEDIES UNAFFECTED. The fact that conduct is subject to a civil or criminal penalty under this chapter does not abolish or impair any remedy for the conduct that is available in a civil suit.

Sec. 170A.007. DISCIPLINARY ACTION. In addition to any

other penalty that may be imposed under this chapter, the appropriate licensing authority shall revoke the license, permit, registration, certificate, or other authority of a physician or other health care professional who performs, induces, or attempts an abortion in violation of Section 170A.002.

SECTION 3. Section 2 of this Act takes effect, to the extent permitted, on the 30th day after:

(1) the issuance of a United States Supreme Court judgment in a decision overruling, wholly or partly, *Roe v. Wade*, 410 U.S. 113 (1973), as modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), thereby allowing the states of the United States to prohibit abortion;

(2) the issuance of any other United States Supreme Court judgment in a decision that recognizes, wholly or partly, the authority of the states to prohibit abortion; or

(3) adoption of an amendment to the United States Constitution that, wholly or partly, restores to the states the authority to prohibit abortion.

SECTION 4. The legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger.

SECTION 5. The provisions of this Act are hereby declared severable, and if any provision of this Act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of

the remaining portions of this Act.

SECTION 6. This Act takes effect September 1, 2021.

President of the Senate

Speaker of the House

I certify that H.B. No. 1280 was passed by the House on May 6, 2021, by the following vote: Yeas 81, Nays 61, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 1280 was passed by the Senate on May 25, 2021, by the following vote: Yeas 19, Nays 12.

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

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.

[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

[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,

Bob Pemberton
Chair, 1-14c Subcommittee

649 S.W.2d 300
Supreme Court of Texas.

Ex parte Craig SHAFFER.

No. C–2019.
|
April 20, 1983.

Synopsis
Relator, who was named defendant in a breach of fiduciary duty suit, brought habeas corpus proceeding seeking to be discharged from an order of Probate Court, No. 3, Dallas County, committing him to jail for contempt. The Supreme Court, Robertson, J., held that trial court's order which directed defendant to file a cost bond to indemnify plaintiff for costs of delaying trial and to retain an attorney to represent him in suit, and which provided that a failure to comply would result in an order of contempt was void, since one who involuntarily comes into court and does not seek affirmative relief cannot be required to post a cost bond, and ordering a party to be represented by attorney abridges that person's right to be heard by himself.

Relator discharged.

West Headnotes (3)

[1] **Costs** Nature and grounds of right in general

One who involuntarily comes into court and does not seek any affirmative relief cannot be required to post a cost bond. Vernon's Ann.Texas Rules Civ.Proc., Rules 143, 147.

2 Cases that cite this headnote

[2] **Attorneys and Legal Services** Pro Se Litigants; Self-Representation

Ordering a party to be represented by an attorney abridges that person's right to be heard by himself. Vernon's Ann.Texas Rules Civ.Proc., Rule 7.

12 Cases that cite this headnote

[3] **Attorneys and Legal Services** Pro Se Litigants; Self-Representation

Costs Nature and grounds of right in general

Trial court's order which directed defendant to file a cost bond to indemnify plaintiff for costs of delaying trial and to retain an attorney to represent him in suit, and which provided that a failure to comply would result in an order of contempt was void, since one who involuntarily comes into court and does not seek affirmative relief cannot be required to post a cost bond, and ordering a party to be represented by attorney abridges that person's right to be heard by himself. Vernon's Ann.Texas Rules Civ.Proc., Rules 7, 143, 147.

67 Cases that cite this headnote

Attorneys and Law Firms

***301** Dwaine Boydstun, Dallas, for relator.

John Exline, Dallas, for respondent.

Opinion

ROBERTSON, Justice.

In this original habeas corpus proceeding, the relator, Craig Shaffer, seeks to be discharged from an order of Probate Court No. 3, Dallas County, committing him to jail for contempt for failure to comply with an order of that court requiring him to post a cost bond and hire an attorney. We order relator released.

While serving as Independent Executor for the estate of Horace Yates, Shaffer was sued by the widow, Cleta Yates, for alleged breach of his fiduciary duty in that capacity. The case was set for trial and continued four times at Shaffer's request. On March 16, 1983, Shaffer appeared and once again moved for a continuance on the grounds that his attorney had been allowed to withdraw three days before trial and he had not yet been able to retain a new attorney. Two days later, Judge Ashmore ordered Shaffer (1) to file with the court a $10,000 cost bond to indemnify Cleta Yates for the costs of delaying trial; (2) to report to the court his status in retaining an attorney; and (3) to retain an attorney to represent him in

the suit. If these orders were not complied with by March 23, Shaffer would be in contempt and subject to imprisonment.

On March 25, without a formal motion for contempt, notice to Shaffer or a show cause hearing, the court adjudged him in contempt and ordered Shaffer placed in the county jail "until he purges himself of this contempt...." The court later issued findings of fact and conclusions of law in support of the contempt order including statements that: (1) a hearing was held without Shaffer being present; (2) that Shaffer had wholly failed to comply with the court's order and that such violation was intentionally designed to delay the trial; and (3) that no motion for contempt, notice, show cause order or other citation or process was required because this was a case of direct contempt.

[1] **[2]** **[3]** The issue here is whether the trial court's March 18 order exceeds its statutory authority and is therefore void, inasmuch as one may not be held guilty of contempt for ***302** refusing to obey a void order. *Ex parte Lillard,* 159 Tex. 18, 314 S.W.2d 800 (Tex.1958); *Ex parte Henry,* 147 Tex. 315, 215 S.W.2d 588 (Tex.1949). Counsel cites no authority, and indeed we can find none, which allows a court to require a bond of a defendant or to require any party to retain an attorney. Rather, in Texas the law is clear that one who involuntarily comes into court and does not seek any affirmative relief cannot be required to post a cost bond. Tex.R.Civ.P. 143, 147. Additionally, ordering a party to be represented by an attorney abridges that person's right to be heard by himself. Tex.R.Civ.P. 7. If Shaffer's lack of an attorney was being used to unnecessarily delay trial or was abusing the continuance privilege, the proper action would have been to order him to proceed to trial as set, with or without representation. Accordingly, we hold that the March 18 order is void.

The relator is discharged.

All Citations

649 S.W.2d 300

202 S.W.3d 926 (Tex.App.—Waco 2006)

Gene C. STEELE, et al., Appellants,

v.

John B. McDONALD, et al., Appellees.

No. 10-05-00266-CV.

Court of Appeals of Texas, Tenth District, Waco.

October 18, 2006

From the 77th District Court Limestone County, Texas Trial Court No. 22179-A

Brice B. Beale, The Beale Law Firm, Houston, for appellants.

James V. Fulcher, Attorney At Law, Teague, Jon Miller, Rodgers, Miller & McLain, Bryan, Clay R. Vilt, Attorney At Law, Gus G. Tamborello, Attorney At Law, W. Robert Brown, Attorney At Law, Houston, Richard L. Tate, Attorney At Law, Richmond, James C. Boone, Attorney At Law, Palestine, for appellees.

Before Chief Justice GRAY, Justice VANCE, and Justice REYNA.

ORDER

PER CURIAM.

There are four appellants in this case: Gene C. Steele as an individual, Gene C. Steele as Independent Executor of the Estate of William B. Duke, Sally Steele (Gene's wife), and Tom F. Simmons. When the appeal was perfected, all four were represented by Brice B. Beale. However, Gene has now discharged Beale, but it is unclear whether Sally or Tom has and whether Gene has in his capacity as Independent Executor of the Duke Estate. Because of the current uncertainty regarding Beale's status, we will order Beale to either (1) file a written response indicating tat he continues to represent some or all of the appellants, a notice of non-representation, or a motion to withdraw; or (2) appear in this Court and show cause why his representation of any of the appellants should continue.

The Clerk of this Court advised Beale by letter dated July 11, 2006 that the appellants' brief he filed on June 12, 2006 is deficient. The letter notified Beale that an amended brief correcting the deficiencies identified must be filed within twenty-one days or the brief would be struck. To date, Beale has not filed an amended brief or otherwise responded to the Clerk's notice. Accordingly, the brief Beale filed on June 12, 2006 is struck. *See* Tex.R.App. P. 9.4(i).

Representation of Individuals

Gene notified the Clerk of this Court by letter dated August 16 that "Brice B. Beale, attorney of record for the appellants, has been released as counsel."

"A client can discharge an attorney at any time, with or without cause." *In re Users Sys. Servs., Inc.,* 22 S.W.3d 331, 335 (Tex.1999) (orig.proceeding); *accord* Tex.

Disciplinary R. Prof'l Conduct 1.15(a)(3) & cmt. 4, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9). A formal motion to withdraw is not required

to effectuate the client's intentions in this regard. *See Users Sys. Servs.,* 22 S.W.3d at 335-36.

According to Gene at least, the appealing parties have terminated Beale's representation. Gene states that he will be representing himself. He provides his name and address as "Appellants Pro-SE contact information." However, because Gene is not licensed to practice law, he is prohibited from representing his co-appellants. *See* Tex. Gov't Code Ann. § 81.102 (Vernon 2005); *Jimison v. Mann,* 957 S.W.2d 860, 861-62 (Tex.App.-Amarillo 1997, order) (per curiam). Therefore, Sally and Tom either continue to be represented by Beale, which appears unlikely in light of Gene's letter, or they are not currently represented in this matter.[1]

Representation of the Independent Executor

It is not at all clear whether Gene may appear *pro se* as an independent executor. Rule of Civil Procedure 7 states, "Any party to a suit may appear and prosecute or defend *his rights* therein, either in person or by an attorney of the court." Tex.R. Civ. P. 7 (emphasis added). 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 on his own behalf.

Our research has not disclosed a Texas case involving the representative of a decedent's estate prosecuting a suit in behalf of the estate *pro se.* [2]

Courts in other jurisdictions which have addressed this issue have virtually all concluded that the representative of an estate may not appear *pro se* in behalf of the estate. *See Godwin v. State ex rel. McKnight,* 784 So.2d 1014, 1015 (Ala.2000); *Davenport v. Lee,* 348 Ark. 148, 72 S.W.3d 85, 90-91 (2002); *Ratcliffe v. Apantaku,* 318 Ill.App.3d 621, 252 Ill.Dec. 305, 742 N.E.2d 843, 847 (2000); *State v. Simanonok,* 539 A.2d 211, 212-13 (Me.1988) (per curiam); *Waite v. Carpenter,* 1 Neb.App. 321, 496 N.W.2d 1, 3-4 (1992); *Kasharian v. Wilentz,* 93 N.J.Super. 479, 226 A.2d 437, 438-39 (1967) (per curiam); *Brown v. Coe,* 365 S.C. 137, 616 S.E.2d 705, 708 (2005); *State ex rel. Baker v. County Ct. of Rock County,* 29 Wis.2d 1, 138 N.W.2d 162, 166 (1965); *see also Jones v. Correctional Med. Servs., Inc.,* 401 F.3d 950, 951-52 (8th Cir.2005) (representative of estate may not proceed *pro se* if estate has other beneficiaries or creditors); *Shepherd v. Wellman,* 313 F.3d 963, 970-71 (6th Cir. 2002) (same); *Iannaccone v. Law,* 142 F.3d 553, 559 (2d Cir.1998) (same); *contra Reshard v. Britt,* 819 F.2d 1573, 1582-83 (11th Cir.1987), *vacated en banc by an equally divided court,* 839 F.2d 1499 (11th Cir. 1988) (per curiam).

Consistent with these authorities, we hold that Gene may not prosecute this appeal *pro se* in his capacity as Independent Executor of the Duke Estate. Thus, Gene as Independent Executor is either

represented by Beale or not currently represented in this matter.

Determination of Representation

Beale is the person best situated to resolve the ambiguity regarding the current representation of Sally and Tom as individuals and of Gene as Independent Executor.

Accordingly, we ORDER Brice B. Beale to file, within fifteen (15) days after the date of this Order, either (i) a written response indicating that he continues to represent some or all of the appellants, (ii) a non-representation notice under Rule of Appellate Procedure Rule 6.4, or (iii) a

motion to withdraw under Rule of Appellate Procedure 6.5. If none of these documents is timely filed, Brice B. Beale must appear on November 15, 2006, at 9:00 a.m., when this Court is in session at the Tenth Court of Appeals, McLennan County Courthouse, 501 Washington, Room 404, Waco, Texas, to show cause why his representation of some or all of the appellants should continue.

FAILURE OF BRICE B. BEALE TO COMPLY WITH THIS ORDER MAY RESULT IN THE ISSUANCE OF A JUDGMENT OF CONTEMPT.

The Court orders that this Order be personally served on Brice B. Beale by overnight delivery via a commercial delivery service within the meaning of Rule of Appellate Procedure 9.5(b).

Appellant's Brief

Gene filed a *pro se* brief on July 27 which purports to have been filed on behalf of Sally and Tom as individuals and on behalf of himself as Independent Executor. However, Gene is prohibited by law from filing a brief on behalf of the other appealing parties.[3] *See* Tex. Gov' t Code Ann. § 81.102; *Jimison,* 957 S.W.2d at 861-62. Thus, no appellant's brief is currently on file for Sally, Tom, or Gene as Independent Executor.

Gene's brief also suffers from one of the same deficiencies as the brief filed by Beale—the omission of an appendix with the "necessary contents" prescribed by Rule of Appellate Procedure 38.1(j)(1).[4]*See* Tex.R.App. P. 38.1(j)(1). Therefore, Gene is hereby notified that, if he fails to file the original and five copies of an appendix containing the "necessary contents" within twenty-one (21) days after the date of this Order, his *pro se* brief will be struck, and the appeal will proceed as if no appellant's brief had been filed on Gene's

behalf. *Id.* 9.3(a)(1)(C), 9.4(i), 38.8(a), 38.9(a).

With regard to an appellant's brief to be filed on behalf of Sally and/or Tom as individuals and Gene as Independent Executor, no brief will be required until it is determined which of them is represented by counsel and which are appearing *pro se.* [5]

Appellees' Brief

Appellees filed a brief in response to Gene's brief on August 30. They have also filed a motion to dismiss the appeal, in which they request damages under Rule of Appellate Procedure 45 based on their contention that this is a frivolous appeal. However, this motion will not be considered until the issues surrounding Appellants' representation are resolved. Appellees will be permitted to file a supplemental or amended brief as necessary.

IT IS SO ORDERED.

Chief Justice GRAY dissenting.

TOM GRAY, Chief Justice, Memorandum dissenting opinion to Order.

An independent executor can do anything the decedent could do if he was still alive, unless there is some limitation upon the independent executor's powers at the time of the appointment.[1] *See generally cases cited in Kanz v. Hood,* 17 S.W.3d 311, 316-317 (Tex.App.-Waco 2000, pet. denied) (Gray, C.J., dissenting). I would include in that expansive statement of authorized acts the ability to appear on behalf of the estate and act as the decedent could with regard to being the

litigant in a judicial proceeding. Today's holding to the contrary by the majority causes me grave concern for truly cost effective independent administration of estates in Texas. For this reason and as explained below, I dissent.

Texas has long been recognized for the truly effective independent administration of a decedent's estate. Probate planning in other states frequently involves setting up trusts during the life of the decedent to own and control assets and, more importantly, keep them from becoming part of the decedent's estate subject to the administration of the probate court at the time of the decedent's death. That type planning, and its attendant costs, is avoided in Texas by our very effective and efficient administration of estates using truly independent administrators, though it may be used in Texas for other purposes. All over Texas estates are being probated, inventories prepared and filed, and estates being closed without an attorney being involved. I do not see how that can continue under the holding of the majority that although Gene had appeared as his own attorney, representing himself individually and as independent executor of Duke's Estate, "Gene, as independent executor, is either represented by Beale [an attorney] or not currently represented in this matter." Maj. Op. pgs. 928-929.

I find no help or support for this holding in the citation of out of state authorities on this issue. And I note that even that authority is divided. But unless those states provide for Texas style independent administration, and the person attempting to represent the estate in those cases was appointed as the independent executor of

the estate, and also unless the powers of the independent administrator in those states are as broad as the powers of an independent administrator in Texas, the discussion of out of state authority is suspect and the reliance on that authority is misplaced.

As I previously stated, I would already have stricken the brief filed by attorney Beale for failure to comply with the rules. *See Steele v. McDonald,* 195 S.W.3d 349, 350 (Tex.App.-Waco 2006, order) (Gray, C.J., concurring to letter order).[2] Likewise, I would now strike the brief tendered by Gene Steele for the same reason, noncompliance with the rules. I would then notify all four appellants that they have one final opportunity to file a compliant brief or their appeal will be dismissed for want of prosecution due to the failure to file a brief that complies with the rules.

Finally, to placate the concern of the majority, we could specifically notify Gene Steele in his capacity as independent executor that there may be an issue of whether, as independent executor, he can appear as the personal representative of an estate in litigation involving the estate. For certain, I would not decide this issue without briefing as the majority has done. The expansive holding of the majority means that nothing can be done by a personal representative in any judicial proceeding other than via an attorney. This is not the law. Further, this holding will come as an enormous surprise to the personal representatives of estates that have been and are currently being probated and who regularly represent the estate as independent executor in judicial proceedings without being represented by counsel.

I join no part of the majority's order.

Notes:

[1] Tom has co-signed with Gene the "Appellants' Rebuttal to Brief of Appellee Floyd Duke, Jr." and another pleading. His actions in this regard provide further indication that he has terminated Beale's representation and is representing himself. Tom identifies himself as "Thomas E. Simmons" in these pleadings. However, he was identified in the notice of appeal as "Tom F. Simmons." We will continue to use the name used in the notice of appeal, unless Tom establishes that it is a misnomer.

[2] Texas courts have consistently held that a non-attorney may not appear *pro se* in behalf of a corporation. *See, e.g., Kunstoplast of Am., Inc. v. Formosa Plastics Corp., USA,* 937 S.W.2d 455, 456 (Tex. 1996) (per curiam).

[3] Although Gene cannot engage in the unauthorized practice of law by filing a brief on behalf of his co-appellants, the appellate rules do permit parties to adopt by reference a brief filed by another party. *See* Tex. R. App. P. 9.7. However, neither Sally nor Tom has done so. Because Gene as Independent Executor cannot prosecute this appeal *pro se,* he likewise cannot, as Independent Executor, adopt by reference the *pro se* brief he filed in his own behalf. Tom's co-signature on the "rebuttal" brief does not adopt by reference Gene's *pro se* brief.

[4] Rule 38.1(j)(1) provides:

Necessary Contents. Unless voluminous or impracticable, the appendix must contain a copy of:

(A) the trial court's judgment or other appealable order from which relief is sought;

(B) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any; and

(C) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based, and the text of any contract or other document that is central to the argument.

Tex. R. App. P. 38.1(j)(1). Local Rule 13 further provides, "Every 'necessary' and 'optional' appendix must have an index and each appended document must be preceded by a numbered or lettered tab." 10th Tex. App. (Waco) Loc. R. 13.

[5] Because of the uncertainty regarding who currently represents Sally, Tom, and Gene as Independent Executor, they will each be served with a copy of this Order, as will counsel for Appellees.

[1] None of the parties have briefed this issue so we have not been provided with the documentation or discussion of case authorities that would help us resolve the scope of Gene Steele's appointment.

[2] Though, based on subsequent events, I now question the majority's resolve to apply the rules consistently to all litigants, I would at least be consistent for this proceeding.

Analysis
As of: May 14, 2012

IN RE: JAMES CRAIG GUETERSLOH, INDIVIDUALLY AND JAMES CRAIG GUETERSLOH, TRUSTEE OF THE 1984 GUETERSLOH TRUST

NO. 07-10-0375-CV

COURT OF APPEALS OF TEXAS, SEVENTH DISTRICT, AMARILLO

326 S.W.3d 737*; *2010 Tex. App. LEXIS 8730

November 1, 2010, Decided

SUBSEQUENT HISTORY: Rehearing overruled by *In re Guetersloh, 2010 Tex. App. LEXIS 9731 (Tex. App. Amarillo, Nov. 23, 2010)*

CASE SUMMARY:

PROCEDURAL POSTURE: Relator trustee filed a petition for writ of mandamus seeking to require respondent, the judge of the 121st District Court, Terry County (Texas), to set an oral hearing on his pending motion to transfer venue and to allow him to appear pro se to defend a suit filed by real party in interest beneficiaries seeking termination of the trust, distribution of trust property, and an accounting of all income and distributions from the trust.

OVERVIEW: The beneficiaries' petition named the trustee as a party to the suit both in his capacity as an individual beneficiary and in his capacity as a trustee. The trial court concluded that a trustee could not appear in court pro se because to do so would amount to the unauthorized practice of law. Accordingly, the trial court notified the trustee that no action would be taken on the motion to transfer venue until such time as the trustee obtained legal representation. The court held that *Tex. R. Civ. P. 7* did not authorize a non-lawyer trustee to appear pro se, in the capacity of trustee of a trust, because in that role the trustee was appearing in a representative capacity on behalf of the trust's beneficiaries rather than in propria persona. An appearance of a non-attorney trustee in court on behalf of the trust to represent the interests of others amounted to the unauthorized practice of law. The trustee was likewise prohibited from appearing before the court of appeals in his capacity as a trustee. The absence of legal counsel representing the trustee in his capacity as a trustee did not, however, impair his right as an individual beneficiary to have his venue motion heard.

OUTCOME: The court struck the trustee's petition for writ of mandamus as it pertained to claims asserted in his capacity as a trustee, conditionally granted the writ of mandamus as it pertained to claims asserted in his individual capacity, and directed the trial court to schedule a hearing on his individual motion to transfer venue.

LexisNexis(R) Headnotes

Estate, Gift & Trust Law* > *Trusts* > *Trustees* > *Duties & Powers* > *Claims By & Against

[HN1] The term "trust" refers not to a separate legal entity but rather to the fiduciary relationship governing the trustee with respect to the trust property. Accordingly, suits against a trust must be brought against the trustee.

Civil Procedure* > *Parties* > *Self-Representation* > *Right to Self-Representation
Estate, Gift & Trust Law* > *Trusts* > *Trustees* > *Duties & Powers* > *Claims By & Against

[HN2] The right of a party to self-representation is not absolute. A plain reading of *Tex. R. Civ. P. 7* does not suggest that a non-lawyer can appear pro se, in the capacity of trustee of a trust, because in that role he is appearing in a representative capacity rather than in propria persona. Because of the nature of trusts, the actions of the trustee affect the trust estate and therefore affect the interests of the beneficiaries. It follows that because a trustee acts in a representative capacity on behalf of the trust's beneficiaries, he is not afforded the personal right of self-representation.

Civil Procedure > Parties > Self-Representation > Right to Self-Representation
Estate, Gift & Trust Law > Trusts > Trustees > Duties & Powers > Claims By & Against
Legal Ethics > Unauthorized Practice of Law
[HN3] The Texas Legislature has defined the practice of law to include, among other things, the preparation of pleadings or other documents 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. Consistent with that legislative mandate, a trustee's appearance in a trial court in his capacity as trustee falls within this definition of the practice of law. Accordingly, if a non-attorney trustee appears in court on behalf of the trust, he or she necessarily represents the interests of others, which amounts to the unauthorized practice of law.

Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
[HN4] Mandamus is an extraordinary remedy available only in limited circumstances involving manifest and urgent necessity and not for grievances that may be addressed by other remedies. To be entitled to relief, the relator must demonstrate a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy at law. Additionally, the relator must satisfy three requirements, to-wit: (1) a legal duty to perform; (2) a demand for performance; and (3) a refusal to act.

Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
[HN5] When a motion is properly pending before a trial court, the act of considering and ruling upon it is ministerial, for purposes of determining entitlement to mandamus relief. However, the trial court has a reasonable time within which to perform that ministerial duty. Whether a reasonable period of time has lapsed is dependent on the circumstances of each case.

COUNSEL: James Craig Guetersloh, Houston, TX.

Denise Foster, Lavaca, AR.

Michael Guetersloh III, Corpus Christi, TX.

Honorable Kelly G. Moore, Judge, 121st District Court, Brownfield, TX.

M. F. Guetersloh Jr., Sandia, TX.

W. C. Bratcher, CRENSHAW DUPREE & MILAM L.L.P., Lubbock, TX.

JUDGES: [**1] PANEL A. Before CAMPBELL and HANCOCK and PIRTLE, JJ.

OPINION

[*738] ORIGINAL PROCEEDING

ON APPLICATION FOR WRIT OF MANDAMUS

OPINION

The novel issue presented by this mandamus proceeding is whether a trustee of a trust has the same right to represent himself in his representative capacity as he does in his individual capacity. We hold that he does not, strike his petition for writ of mandamus as it pertains to claims being asserted in his capacity as trustee, but conditionally grant his petition as it pertains to claims being asserted in his individual capacity.

Background

This mandamus proceeding relates to an underlying proceeding pending in the 121st District Court, Terry County, wherein the Real Parties in Interest, Michael Guetersloh, Jr., Denise Foster (formerly Denise Guetersloh Spicer), and Michael Guetersloh, III, each acting *pro se*, filed suit seeking (1) termination of the 1984 Guetersloh Trust, (2) distribution of trust property, and (3) an accounting of all income and distributions from the trust. The 1984 Guetersloh Trust is an express family trust created for the benefit of four named individuals, the three Real Parties in Interest and one of the Relators, James Craig Guetersloh. In addition [**2] to naming the Relator in his individual capacity as a [*739] party, [1] the petition named the other Relator, James Craig Guetersloh, Trustee of the 1984 Guetersloh Trust, as a party. [2]

1 A beneficiary designated by name in the instrument creating the trust is a necessary party in a suit under *Section 115.001 of the Texas Prop-*

erty Code. *Tex. Prop. Code Ann. § 115.011(b)(2)* (Vernon 2007).

2 Although the Texas Trust Code does not expressly require the joinder of the trustee as a necessary party in every suit pertaining to a trust, the trustee's presence is required in any suit requiring an accounting by the trustee. *See Tex. R. Civ. P. 39*; *Tex. Prop. Code Ann. § 115.001(a)(9)* (Vernon 2007).

On August 26, 2010, Relators, each acting *pro se*, filed an original answer, comprised of a general denial and affirmative defenses, coupled with a Motion to Transfer Venue based on provisions of the Texas Property Code. *See Tex. Prop. Code Ann. § 115.002(b)(1)* (Vernon 2007). That same day, acting *sua sponte*, the trial court found that the trustee of a trust cannot appear in court *pro se* because to do so would amount to the unauthorized practice of law. Accordingly, the trial court notified Relators that no action [**3] would be taken on their motion to transfer venue until such time as the trustee obtained legal representation. Notwithstanding the ruling of the trial court, on September 1, 2010, both Relators (with James Craig Guetersloh, Trustee of the 1984 Guetersloh Trust, still acting *pro se*) filed a motion for oral hearing concerning the motion to transfer venue. Despite being requested by Relators to do so, to date, the trial court has failed to issue a ruling on either motion. Relators now seek from this Court the issuance of a writ of mandamus ordering the trial court to set an oral hearing on Relators' pending motion to transfer venue and to allow the Relator, James Craig Guetersloh, Trustee of the 1984 Guetersloh Trust, to appear in the underlying proceeding on a *pro se* basis.

I. Trustee's Right to Self-Representation

The general rule in Texas (and elsewhere) has long been that [HN1] "the term 'trust' refers not to a separate legal entity but rather to the *fiduciary relationship* governing the trustee with respect to the trust property." *Huie v. DeShazo, 922 S.W.2d 920, 926 (Tex. 1996)* (emphasis in original). Accordingly, suits against a trust must be brought against the trustee. *See Werner v. Colwell, 909 S.W.2d 866, 870 (Tex. 1995)*; [**4] *Smith v. Wayman, 148 Tex. 318, 224 S.W.2d 211, 218 (Tex. 1949)*; *Slay v. Burnett Trust, 143 Tex. 621, 187 S.W.2d 377, 382 (Tex. 1945)*.

Relators argue that because James Craig Guetersloh, Trustee of the 1984 Guetersloh Trust, is the actual party to the suit being prosecuted by the Real Parties in Interest, under *Rule 7 of the Texas Rules of Civil Procedure* he is authorized to "defend his rights therein, either in person or by an attorney of the court." [HN2] The right of a party to self-representation is not, however, absolute. *See, e.g., Kunstoplast of Am. v. Formosa Plastics Corp., USA, 937 S.W.2d 455, 456 (Tex. 1996)* (holding that a non-attorney may not appear *pro se* on behalf of a corporation); *Steele v. McDonald, 202 S.W.3d 926, 928-29 (Tex.App.--Waco 2006, no pet.)* (holding that a non-attorney may not appear *pro se* in his capacity as independent executor of an estate). Although we have not been cited to, nor have we found, any Texas case directly dealing with the issue of whether a non-lawyer can appear *pro se* in court, in his capacity as a trustee of a trust, we believe the same logic expressed in those opinions should apply to this situation.

[*740] First, contrary to Relators' argument, the [**5] plain reading of *Rule 7* does not suggest that a non-lawyer can appear *pro se*, in the capacity of trustee of a trust, because in that role he is appearing in a representative capacity rather than *in propria persona*. Because of the nature of trusts, the actions of the trustee affect the trust estate and therefore affect the interests of the beneficiaries. It follows that because a trustee acts in a representative capacity on behalf of the trust's beneficiaries, he is not afforded the personal right of self-representation.

Secondly, [HN3] the Texas Legislature has defined the practice of law to include, among other things, "the preparation of pleadings or other documents 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 . . . ." Consistent with that legislative mandate, Relator's appearance in the trial court in his capacity as trustee falls within this definition of the "practice of law." Accordingly, if a non-attorney trustee appears in court on behalf of the trust, he or she necessarily represents the interests of others, which amounts to the unauthorized practice of law. *See Ziegler v. Nickel (1998) 64 Cal.App.4th 545, 549, 75 Cal. Rptr. 2d 312* [**6] (holding that "[a] nonattorney trustee who represents the trust in court is representing and affecting the interest of the beneficiary and is thus engaged in the unauthorized practice of law"). Therefore, we conclude the trial court did not err in prohibiting the Relator, James Craig Guetersloh, in his capacity as trustee of the 1984 Guetersloh Trust, from appearing without legal representation.

II. Trustee's Right to Mandamus Relief

The Real Parties in Interest contend that, because James Craig Guetersloh, Trustee of the 1984 Guetersloh Trust, does not have the authority to appear before the trial court *pro se*, that prohibition should likewise bar this Court from considering his pleadings in this proceeding. For the same reasons that he cannot appear *pro se* before the trial court in his representative capacity, Mr. Guetersloh is likewise prohibited from appearing before this Court in his capacity as trustee. Accordingly,

we hereby strike Relator's petition to the extent that it asserts claims in that capacity. That does not, however, preclude us from considering claims being asserted in his individual capacity.

III. Individual Right to Mandamus Relief

[HN4] Mandamus is an extraordinary remedy [**7] available only in limited circumstances involving manifest and urgent necessity and not for grievances that may be addressed by other remedies. *Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992)*. To be entitled to relief, the relator must demonstrate a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy at law. *See Republican Party of Texas v. Dietz, 940 S.W.2d 86, 88 (Tex. 1997)*. Additionally, relator must satisfy three requirements, to-wit: (1) a legal duty to perform; (2) a demand for performance; and (3) a refusal to act. *Stoner v. Massey, 586 S.W.2d 843, 846 (Tex. 1979)*.

[HN5] When a motion is properly pending before a trial court, the act of considering and ruling upon it is ministerial. *Eli Lilly and Co. v. Marshall, 829 S.W.2d 157, 158 (Tex. 1992)*. However, the trial court has a reasonable time within which to perform that ministerial duty. *Safety-Kleen Corp. v. Garcia, 945 S.W.2d 268, 269 (Tex.App.-San Antonio 1997, orig. proceeding)*. Whether a reasonable period of time has lapsed is dependent on the circumstances [*741] of each case. *Barnes v. State, 832 S.W.2d 424, 426 (Tex.App.--Houston [1st Dist.] 1992, orig. proceeding)*.

Here, we [**8] are not faced with a situation where the trial court has merely failed to schedule a hearing on Relator's motion to transfer venue. Instead, the trial court has affirmatively informed Relator that it would not schedule a hearing on *his* motion until the trustee (a separate and distinct party) was represented by legal counsel. The absence of legal counsel representing the trustee should not serve as an impediment to Relator's right, in his individual capacity, to have his motion heard. Accordingly, we find that Relator, James Craig Guetersloh, Individually, is entitled to mandamus relief.

Conclusion

Having determined that James Craig Guetersloh, Trustee of the 1984 Guetersloh Trust, cannot appear in court *pro se*, we strike his petition for writ of mandamus as it pertains to claims being asserted in that capacity. As it pertains to claims being asserted by James Craig Guetersloh in his individual capacity, we conditionally grant the writ of mandamus. We are confident the trial court will schedule a hearing on James Craig Guetersloh's individual motion to transfer venue and we direct the Clerk of this Court to issue the writ only in the event the trial court fails to schedule a hearing within [**9] sixty days.

Per Curiam

TRAVIS COUNTY PROBATE COURT NO. 1

Travis County Courthouse, Room 217
1000 Guadalupe Street – P.O. Box 1748
Austin, Texas 78767

October 1, 2020

Court Policy Regarding "Pro Se" Applicants (Applicants without a Lawyer)

People who represent themselves in court are called "pro se" or "self-represented" litigants. You are not required to have a lawyer to file papers or to participate in a case. You have a right to represent yourself. **However, 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 guardianship wards and probate estates.** *See In re: Guetersloh*, 326 S.W.3d 737 (Tex. App.–Amarillo, 2010) and *Steele v. McDonald*, 202 S.W.3d 926 (Tex. App.–Waco, 2006), and the authorities cited. Therefore, individuals applying for letters testamentary, letters of administration, determinations of heirship, and guardianships of the person or estate 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.

Frequently Asked Questions

Q: What is a pro se?
A: A pro se is an individual who has not hired a lawyer and appears in court to represent himself and no other person or entity.

Q: Can I still serve as an executor, administrator, or guardian even though I'm not a lawyer?
A: Yes. One need not be a lawyer to serve as an executor, administrator, or guardian. **However, the executor, administrator, or guardian must be represented by a lawyer.**

Q: But I'm the only one that needs letters testamentary. As executor, how would I be representing the interests of others?
A: As 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. The lawyer you hire represents you in your capacity as executor and assists you in representing those for whom you are responsible.

Q: If I get the paperwork from a law library or the Internet, can I fill it out and file it? Isn't that what lawyers do?
A: Lawyers don't just fill out forms. Lawyers (1) determine what method of probate or guardianship is appropriate in a particular situation, (2) create or adapt any necessary paperwork, and – importantly – (3) advise the client about the ongoing responsibilities of a fiduciary. If you are not a lawyer, your creating legal pleadings while acting as a fiduciary would constitute the unauthorized practice of law.

Q: As a pro se, what proceedings **can** I do on my own in Probate Court?
A: In Probate Court or any other court, the only proceedings you can handle as a pro se are those in which you truly would be representing **only** yourself. For example, a pro se applicant may probate a Will as a muniment of title when he or she is the sole beneficiary under the Will, and there are no debts against the estate other than those secured by liens against real estate. Note, though, that probating a Will as a muniment of title is not always a good option even if there are no debts and the applicant is the sole beneficiary. **Whether a muniment of title is the best probate procedure for a particular situation is a legal decision best made by a lawyer.**

As another example, all of a decedent's heirs may work together without a lawyer to file a small estate affidavit in the limited situations in which a small estate affidavit might be appropriate. For further information, see Texas Estates Code Chapter 205 and the Travis County Probate Court's Small Estate Affidavit Checklist. As the checklist notes, the complexity of the Code poses many pitfalls for non-lawyers attempting to comply with

the requirements for a small estate affidavit. An attorney's assistance in drafting a small estate affidavit may prevent the denial of an Affidavit where it would have been an appropriate probate procedure if the Affidavit had been prepared correctly.

Q: What procedures should I follow if I decide to probate a Will as a muniment of title as a pro se applicant?

A: As stated above, whether a muniment of title is the best probate procedure for a particular situation is a legal decision best made by a lawyer; Court staff cannot guide you or advise what you should do in your case. If you decide to proceed with your case without a lawyer, the County Law Library has reference materials that may be helpful. **If you proceed with an application to probate a Will as a muniment of title, note the following:**

All beneficiaries. In a pro se application to probate a Will as a muniment of title, **all** beneficiaries under the Will **must** be applicants, and **all** beneficiaries **must** testify at the hearing.

Must swear no debts. To probate a Will as a muniment of title, each applicant must be able to swear on personal knowledge that there are no debts against the estate other than those secured by liens against real estate – that includes credit card balances, doctor's bills, utility bills, Medicaid estate recovery claims, etc. – *anything* owed by decedent and not paid off. Anyone falsely swearing that the estate has no creditors is subject to a perjury charge.

Needed documents. The Court reviews all documents for Will prove-ups before the hearing. By reviewing the documents before the hearing, the Court can ensure that hearings go more smoothly for participants. Please see the Court's document titled "Submitting Paperwork for Will Prove-Ups and Heirships: When & How" for more information about when and how to submit documents.

Note there are additional procedural requirements with additional necessary documents in the following cases:

(1) the Will is not the original Will,
(2) the Will is not self-proved, or
(3) you are probating the Will more than four years after the decedent's death.

Court staff can give you a handout with information about what the additional procedural requirements are, but you will need to obtain all additional documents.

- ***At the time you file the application in the Clerk's Office***, also file (1) the Will and (2) the death certificate (cross out the social security number). Rule 57 of the Texas Rules of Civil Procedure requires that you include the following information for each applicant in the application: name, address, phone number, email address, and fax number (if available).

- ***Within 24 hours after you set the hearing:***
  - ✓ Email megan.inouye@traviscountytx.gov the proposed order and the proposed (unsigned) proof of death and other facts.
  - ✓ If you have additional proposed *testimony* that is required because the Will is a copy, is not self-proved, or is being probated more than four years after decedent's death, also email that proposed (unsigned) testimony.
  - ✓ Put the date of the hearing and decedent's name in the subject line of the email.
  - ✓ If you do not have access to email, deliver these documents to the Court, with the date and time of the hearing on a cover sheet or Post-It note.

- ***At least one week before the scheduled hearing,*** file with the **Clerk's Office** any additional *signed pleadings* required because the Will is a copy, the Will is not self-proved, or the Will is being probated more than four years after decedent's death.

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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

BRIEF OF AMICUS CURIAE
TEXAS ACCESS TO JUSTICE COMMISSION
IN SUPPORT OF PETITION FOR REVIEW

On Petition for Review from the
Thirteenth Court of Appeals at Corpus Christi-Edinburg, Texas
No. 13-17-00555-CV

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September 24, 2019

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Texas Access to Justice Commission (the "Commission") respectfully submits this amicus brief in support of Petitioner Patrick Maupin. In accordance with Texas Rule of Appellate Procedure 11(c), the Commission states that no fee was charged or paid for the preparation of this amicus brief.

The Texas Supreme Court created the Commission by unanimous order in 2001. Misc. Dkt. No. 01-9065, Order Establishing the Commission. In that Order, the Texas Supreme Court recognized the following deficiencies, among others, in the then-existing framework for the provision of legal services for low-income Texans:

- Many gaps exist in developing a comprehensive, integrated statewide civil legal-services delivery system in Texas;
- Inadequate funding and well-intentioned but uncoordinated efforts stand in the way of a fully integrated civil legal-services delivery system;
- While many organizations throughout the state share a commitment to improving access to justice, no single group is widely accepted as having ultimate responsibility for progress on the issues; and
- Texas needs leadership that is accepted by the various stakeholder organizations committed to achieving full access, and empowered to take action.

Id. at 1. The Court's solution was the Commission. *Id.* at 2.

To call attention to important access-to-justice issues, the Commission has regularly filed amicus briefs, including in (1) *Highland Homes Ltd. v. State*, 448

S.W.3d 403 (Tex. 2014) (propriety of cy pres disposition of unclaimed class funds); (2) *McDonald v. Sorrels*, No. 19-cv-219 (W.D. Tex., filed Mar. 6, 2019) (constitutional challenge to funding for access to justice); and (3) *Abrigo v. Ginez*, No. 14-18-00280-CV, 2019 WL 2589877 (Tex. App.—Houston [14th Dist.] June 25, 2019, no pet.) (construction of Texas Rule of Civil Procedure 145 relating to indigent litigants).

Maupin's petition for review concerns judicial policies that prevent independent executors—including those who are the sole beneficiaries of a will—from proceeding pro se to administer estates. Those restrictive policies harm low-income Texans by (1) undermining Texas's long-standing probate framework that promotes the independent administration of wills, (2) restricting access to the courts, and (3) unnecessarily increasing the costs of administering estates.

For these reasons and those outlined below, the Commission files this amicus brief in support of Petitioner Maupin.

INTRODUCTION

The Travis County probate court denied Maupin the opportunity to obtain letters testamentary to administer his deceased wife's will simply because an attorney did not sign his court filings. It did so under a local policy that bars individuals from probating wills pro se, even where the independent executor is the estate's sole beneficiary. On appeal, the court of appeals upheld this policy without analysis and simply noted that a handful of other appellate courts had upheld similar restrictions. The court of appeals' opinion and the restrictive policy it sanctioned are wrong and require reversal.

The court of appeals' opinion is the latest in an unfortunate trend over the past decade that has prohibited independent executors—most of them administering small and uncontested estates—from proceeding pro se except in the rarest of circumstances. Virtually all statutory probate courts now have issued policies prohibiting executors from proceeding pro se. *See* App., Ex. A.[1] Texas probate courts have applied these policies such that—even where an independent executor

[1] A few statutory probate courts have incorporated these policies into their local rules, *see, e.g.*, Dallas County Probate Court Local Rule 4.05; Denton County Probate Court Local Rule 1.3, but most (including the Travis County probate court) simply have "policies" preventing executors from proceeding pro se. These policies, unlike local rules, do not require this Court's approval. The chart attached as Exhibit A does not include reference to the many county courts, which impose similar restrictive policies. *See* Pet. at 9.

is the sole beneficiary of an estate—he or she must retain counsel to obtain letters testamentary to administer the estate.

These restrictive policies affect thousands of Texans each year and unnecessarily increase the costs associated with independently administering estates. Last year, over 4,000 Texans filed a probate or guardianship proceeding pro se, and that number would undoubtedly be higher but for these policies that prohibit individuals from continuing pro se after filing. *See* Tex. Jud. Council & Off. Ct. Admin. Tex. Jud. Sys. Ann. Statistical Rep. at 32-33 (2018) (noting that 3.8% of the 105,697 probate and guardianship cases were filed pro se).

Especially where executors either lack the funds to hire an attorney or recognize that the costs of fighting these restrictive policies will be prohibitive, most Texans encountering these restrictive policies capitulate. But these policies are not correct just because they are not often (or ever) challenged. They restrict an individual's Rule 7 right to proceed pro se, are in tension with this Court's precedents, and are based on an inapt attempt by courts to analogize estates to corporations. The prevalence and perniciousness of these policies—which are important to the state's jurisprudence—warrant granting review here.

ARGUMENT

A. This Court should grant the petition for review because the restrictive probate court policies undermine Texas's independent administration system, unnecessarily siphon funds from estates, and, until now, have evaded review.

The Texas probate system has long been designed to allow non-lawyers to administer an estate. *See* Michael Hatfield, *Pro Se Executors—Unauthorized Practice of Law, or Not?*, 59 Baylor L. Rev. 329, 333 (2007) (hereinafter "*Pro Se Executors*"). In the 1800s, the Texas legislature implemented a probate system that was intended to allow executors to administer an estate without entangling a court. *See Minter v. Burnett*, 38 S.W. 350, 354 (Tex. 1896) ("We think that the legislature intended, by the enactment of the law of 1876, to make plain and definite rules to govern administrators and executors in the discharge of their duties, because it is not unfrequently the case that they must perform those duties without having the instruction of the court with reference thereto."). Because of Texas's system of independent administration, lawyers are warned not to compare Texas's probate system to those systems in other states "because the Texas probate system is much different and typically much simpler." Comm. on Advert., State Bar of Tex., Interpretive Cmt. 22: Advertisement of Living Trusts, https://www.texasbar.com/AM/Template.cfm?Section=Rules_Comments_and_Opinions&Template=/CM/ContentDisplay.cfm&ContentID=13435.

Despite Texas's unique and fiercely independent administration system, its statutory probate courts have implemented policies that do not allow individuals to probate a will pro se except in the most limited of circumstances, such as presenting a will as muniment of title. *See* App., Ex. A. None of these policies allows a pro se executor to receive letters testamentary,[2] even when the named executor is the sole beneficiary of the will. *Id.*

It has not always been this way. Before 2006, Texas's statutory probate courts generally did not restrict executors from proceeding pro se. But, in late 2006, the Waco Court of Appeals held, in a split decision, that an independent executor could not probate a will pro se because it concluded that "he [wa]s litigating rights in a representative capacity rather than on his own behalf." *See Steele v. McDonald*, 202 S.W.3d 926, 928 (Tex. App.—Waco 2006, no pet.).

By 2007, *Steele* had created a split among the then-seventeen statutory probate courts, with only eight courts permitting executors to proceed pro se. *See Pro Se Executors* at 331 & n.3. Then, when other appellate court decisions, such as *In re Guetersloh*, 326 S.W.3d 737, 739-40 (Tex. App.—Amarillo 2010, orig. proceeding), adopted *Steele* without much analysis, additional statutory probate courts have

[2] Under Texas law, a muniment of title allows the transfer of estate property to the beneficiaries without the need for estate administration. *See* Tex. Estates Code, ch. 257. Letters testamentary, on the other hand, are issued by a probate court and permit an estate's executor to administer the will and act on behalf of a deceased person's estate. *See id.*, ch. 351.

restricted pro se representation. In just over a decade, executors have seen the right to proceed pro se vanish.

Despite this series of events, these restrictive policies have not been challenged in Texas courts. But that has little to do with the correctness of these restrictions and everything to do with the costs associated with such a challenge. Consider the options for executors who wish to proceed pro se. When they are told they cannot proceed pro se, they could spend hours doing legal research and argue the issue before a probate court. Then, when they lose, they could spend more time and money to file an appeal. Or, if they can afford it, they could just pay the attorneys' fees and move on.

In reality, most pro se litigants probably do not consider the notion that a court would have an illegal policy. So, for pro se executors who can afford to hire a lawyer, they just hire a lawyer and move on. For pro se executors who cannot afford to hire a lawyer, their only option is to comply with these policies and proceed in a manner that limits their rights as an executor, such as having the court probate the will as a muniment of title. *See supra* note 2. Maupin's petition for review presents the Court with a rare opportunity to consider and correct these restrictive policies.[3]

[3] The court of appeals mistakenly framed the policy at issue as a local rule promulgated under Texas Rule of Civil Procedure 3a. *See Estate of Maupin*, No. 13-17-00555-CV, 2019 WL 3331463, at *2 (Tex. App.—Corpus Christi-Edinburg July 25, 2019, pet. filed). But, unlike a handful of statutory probate courts that have adopted these

The Court's review is desperately needed because these misguided policies unnecessarily burden Texas estates, harming low-income Texans most of all. One national survey found that 11% of probate estates were valued at less than $10,000. *See* Estate Settlement Statistics, EstateExec, https://www.estateexec.com/Docs/General_Statistics (last visited Sept. 17, 2019). Despite those estates' small value, they faced average legal and accounting fees that exceeded $15,000—more than the entire value of the estate. *Id.* Costly probate court policies put thousands of Texans' inheritance at risk.

Maupin's petition for review provides this Court with an excellent vehicle to address this issue. This Court should not let this opportunity pass it by.

B. Both the court of appeals' opinion and the restrictive probate court policies rely on an erroneous comparison between corporations and estates.

The court of appeals' opinion and the restrictive probate court policy it protects wrongly analogize estates to corporations. The central tenet of this analysis is that the executor "is litigating rights in a representative capacity rather than on his own behalf." *Steele*, 202 S.W.3d at 928; *see also Maupin*, 2019 WL 3331463, at *2. That view, initially espoused in *Steele*, has caused pro se executors to lose rights and has led a handful of courts to conclude (wrongly) that an executor's administration

restrictive policies as local rules, *see supra* note 1, the Travis County policy restricting executors from proceeding pro se is only an off-the-rulebook notice on its website.

of an estate pro se would constitute the unauthorized practice of law. 202 S.W.3d at 928; *Maupin*, 2019 WL 3331463, at *2; *cf. In re Guetersloh*, 326 S.W.3d at 739-40 (addressing issue in trust context).

The practice of law is limited to legal work done "on behalf of a client." Tex. Gov't Code § 81.101. That is why Texas Rule of Civil Procedure 7 grants individuals the right to proceed pro se so long as they are prosecuting or defending their own rights. *See, e.g.*, Tex. R. Civ. P. 7 ("Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.") (App., Ex. B); *Ayres v. Canales*, 790 S.W.2d 554, 557 (Tex. 1990) (noting that Rule 7 precludes a court from "[o]rdering a party to be represented by an attorney"). Therefore, the central question raised in Maupin's petition for review is whose rights are executors representing when they attempt to probate a will.[4]

In *Pro Se Executors*, Professor Hatfield suggests three potential answers to this question: (1) the executor represents the estate, (2) the executor represents the beneficiaries, or (3) the executor represents himself or herself. *Pro Se Executors* at 348. He then reviews each of these possible answers and concludes that, under Texas law, an executor represents himself or herself. *Id.* at 370.

[4] To be clear—because the statutory probate courts have not been—the question is not whether probating the will may ***affect*** others' rights. Anytime individuals sue, they attempt to affect others' rights by imposing legal liability. If the practice of law were measured by whether others' legal rights are affected, then individuals could never represent themselves pro se.

That conclusion is correct, as explained below. But even if an executor were held to represent an estate's beneficiaries, the court of appeals' opinion cannot stand because Maupin is the sole beneficiary of his deceased wife's estate, Pet. at 17, and was attempting to represent only his own interests.

1. An executor does not "represent" the estate.

An executor does not represent an estate like an individual lawyer represents a corporation. In fact, an estate is not a legal entity, and cannot be represented like a corporation. *See Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005) (quoting *Price v. Estate of Anderson*, 522 S.W.2d 690, 691 (Tex. 1975)). Moreover, estates, unlike their executors, cannot be sued, and—under Texas law—estates are nothing more than the property owned by decedents at their death. *See Henson v. Estate of Crow*, 734 S.W.2d 648, 649 (Tex. 1987). Instead of creating a separate legal entity (like corporations), Texas law permits executors to bring the estate's claims themselves. *See Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 786 (Tex. 2006). There is simply no legal entity (called an "estate") for an executor to represent for the purposes of "practicing law."

Because estates are not entities and have no legal rights, they cannot be analogized to corporations, making the analysis conducted in *Steele* and adopted by other courts incorrect. A review of *Steele* confirms this error. The *Steele* court only cited to out-of-state cases, 202 S.W.3d at 928, but those states (unlike Texas) have

concluded an estate is a legal entity. 202 S.W.3d at 928 (citing cases). Texas law is to the contrary, and the *Steele* majority failed to consider this Court's binding precedent confirming that principle. *See infra* Sections B.2 & B.3.

2. An executor does not "represent" the beneficiaries of the estate, and even if he did, Maupin should still prevail here.

As Maupin notes in his petition for review, some states—most notably, Minnesota—have held that executors represent the interests of beneficiaries of estates. *See* Pet. for Rev. at 16; *see also In re Otterness*, 232 N.W. 318, 319-20 (Minn. 1930). In essence, the "Minnesota Rule" treats executors as legally transparent agents of the beneficiaries. But that conclusion cannot be right under Texas law, which gives executors special, specific, and statutory rights and duties above and beyond those of the beneficiaries. *See* Tex. Estates Code §§ 351.051, .052, .054. For example, the executor can decide whether to bring a malpractice claim against the testator's estate-planning attorney, but a beneficiary has no such right. *See Belt*, 192 S.W.3d at 789.

The "Minnesota Rule" also cannot apply in Texas because this Court's precedents are to the contrary. This Court has already concluded that an executor may appear pro se. *See Ex parte Shaffer*, 649 S.W.2d 300, 302 (Tex. 1983). This Court also has expressly held that the attorney-client relationship is between the executor and his or her attorney—not between the attorney and the estate or the beneficiaries. *Huie v. DeShazo*, 922 S.W.2d 920, 924, 925 (Tex. 1996). In light of

these precedents, there is no basis for the Court to conclude that executors are simply transparent legal actors that do nothing other than represent the interests of beneficiaries.

Even if the Court altered its precedents and reached that conclusion, the court of appeals' opinion cannot stand here because Maupin is the sole beneficiary. *See* Pet. at 17. Accordingly, if an executor represents the interests of beneficiaries, there is no reason why Maupin cannot proceed pro se because he would, as executor, simply be representing his interests as the sole beneficiary. That is why states that have adopted the Minnesota Rule have permitted executors to proceed pro se when they are the sole beneficiaries. *See, e.g.*, *State ex rel. Falkner v. Blanton*, 297 So.2d 825, 825 (Fla. 1974) (concluding that an individual executor would have pro se rights so long as the executor was the sole beneficiary of the estate); *cf. Nat'l Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602, 610 (11th Cir. 1984) (concluding a sole proprietorship could proceed through pro se representation). And even some of Texas's statutory probate courts used to employ a similar rule. *See Pro Se Executors* at 331 n.3.

3. Because an executor "represents" his or her own interests, Maupin must be permitted to proceed pro se.

In light of the rights and duties that Texas law places on executors, executors represent their own interests in administering an estate. That is the only answer consistent with this Court's decisions in *Ex Parte Shaffer* and *Huie*.

In *Ex Parte Shaffer*, an executor was sued by a beneficiary for breach of a fiduciary duty, and the probate court held the executor in contempt for failing to retain an attorney. 649 S.W.2d at 301. On appeal, however, this Court held that the probate judge's contempt order was void because "[c]ounsel cites no authority, and indeed we can find none, which allows a court to . . . require any party to retain an attorney. . . . [O]rdering a party to be represented by an attorney abridges that person's right to be heard by himself." *Id.* at 302. Thus, far from taking the position that an executor represents the estate or its beneficiaries, this Court has made clear that, in Texas, executors represent their own interests.

More recently, this Court confirmed that view when it decided *Huie*. In that case, which involved a trust,[5] this Court rejected the view that the attorney-client privilege belongs to the trust or its beneficiaries, and instead, held that the privilege belongs to the trustee. 922 S.W.2d at 925 ("We conclude that, under Texas law at least, the trustee who retains the attorney to advise him or her in administering the trust is the real client, not the trust beneficiaries.").

These precedents are consistent with Texas's statutory framework for the independent administration of estates. Nothing in the Estates Code forces an executor to retain an attorney and, instead, the Estates Code places duties of good

[5] *See Humane Soc'y of Austin & Travis Cty. v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975) (noting the fiduciary duty of an executor in the administration of an estate is the same as that of a trustee).

faith, fidelity, loyalty, fairness, and prudence on executors in administering the estate. *See* Tex. Estates Code §§ 101.003, 351.101; *see also Humane Soc'y of Austin & Travis Cty.*, 531 S.W.2d at 577, 580. These duties protect the beneficiaries of estates and expose executors—to the extent they act contrary to these duties—to the risk of liability because (unlike estates) executors can be sued. Although the Texas Estates Code is designed to protect beneficiaries and the assets of estates, Texas law does not provide that an executor is representing the rights of the estate or its beneficiaries. To the contrary, the executor—in performing his or her duties—has all of the rights that belonged to the decedent, *Steele*, 202 S.W.3d at 930 (Gray, C.J., dissenting), and thus can only be representing himself or herself in administering the estate. Executors, as the living agent of the decedent, should be able to proceed pro se under Rule 7 in the same way that the decedent would have been entitled. *See McKibban v. Scott*, 114 S.W.2d 213, 216 (Tex. 1938) ("We have shown enough [statutory provisions] to demonstrate that our probate laws recognize the right of a person to name in his will his own executor, and, further, to show that the person so named, barring any disqualification, has the right, by virtue of the will itself to act as executor as named."). This Court should clarify these issues and provide guidance to statutory probate and other lower courts so Rule 7 rights are not unnecessarily restricted and estates are not saddled with unnecessary expenses.

* * *

In sum, the court of appeals' opinion must be reversed:

- *First*, under *Ex Parte Shaffer* and *Huie*, Texas law provides that an executor is the living agent of the decedent, has all of the rights the decedent had, and thus is representing himself or herself in administering the estate. Rule 7 therefore permits an executor to proceed pro se. Permitting executors to proceed pro se will keep estates' assets from being depleted by unnecessary legal fees and expenses.

- *Second*, even if this Court were to adopt the "Minnesota Rule" and hold that executors represent the estate's beneficiaries, reversal is still required because Maupin is the sole beneficiary of his deceased wife's estate, and therefore was attempting to represent his own interests in administering the estate.

PRAYER

For these reasons and those in Maupin's petition for review, amicus curiae Texas Access to Justice Commission respectfully requests that the Court grant the petition for review, reverse the judgment of the court of appeals, and remand this case so that Maupin can proceed before the Travis County probate court pro se.

September 24, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document contains 3,233 words, except the portions excluded by Texas Rule of Appellate Procedure 9.4(i)(1). It was prepared in Microsoft Word using 14-point typeface for body text and 13-point typeface for footnotes. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

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CERTIFICATE OF SERVICE

I certify that, on September 24, 2019, the foregoing document was filed with the Texas Supreme Court and served on Petitioner Patrick Maupin, as indicated below. There are no other parties to be served in this case.

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APPENDIX

Exhibit A: List of Pro Se Policies by Statutory Probate Court

Exhibit B: Texas Rule of Civil Procedure

Exhibit C Court of Appeals' Opinion

EXHIBIT A

List of Pro Se Policies by Statutory Probate Court

Court	Status	Link
Bexar County Probate Court No. 1	Pro se under limited circumstances	https://www.bexar.org/3074/Probate-a-Will
Bexar County Probate Court No. 2	Pro se under limited circumstances	https://www.bexar.org/DocumentCenter/View/22499/Court-Policy-Regarding-Pro-Se-Applicants
Collin County Probate Court	Pro se under limited circumstances	https://www.collincountytx.gov/probate/Pages/general.aspx
Dallas County Probate Court No. 1	Pro se under limited circumstances	https://www.dallascounty.org/government/courts/probate/prose-policy.php
Dallas County Probate Court No. 2	Pro se under limited circumstances	https://www.dallascounty.org/government/courts/probate/prose-policy.php
Dallas County Probate Court No. 3	Pro se under limited circumstances	https://www.dallascounty.org/government/courts/probate/prose-policy.php
Denton County Probate Court	Pro se under limited circumstances	https://dentoncounty.gov/-/media/Departments/County-Courts/Probate-Court/Forms/PDFs/General/Pro-Se-Memo.pdf
El Paso County Court No. 1	Pro se under limited circumstances	https://www.epcounty.com/courts/probatefaq.htm
El Paso County Court No. 2	Pro se under limited circumstances	https://www.epcounty.com/courts/probatefaq.htm
Galveston County Probate Court	Pro se under limited circumstances	http://www.galvestoncountytx.gov/ja/pb/Documents/Rules%20of%20the%20Court/adminorder02-2007.pdf
Harris County Probate Court No. 1	Pro se under limited circumstances	https://probate.harriscountytx.gov/Documents/pro_se.pdf
Harris County Probate Court No. 2	Pro se under limited circumstances	https://probate.harriscountytx.gov/Documents/pro_se.pdf
Harris County Probate Court No. 3	Pro se under limited circumstances	https://probate.harriscountytx.gov/Documents/pro_se.pdf
Harris County Probate Court No. 4	Pro se under limited circumstances	https://probate.harriscountytx.gov/Documents/pro_se.pdf

Court	Status	Link
Hidalgo County Probate Court	Does not address the issue explicitly	https://www.hidalgocounty.us/1345/Probate
Tarrant County Probate Court No. 1	Pro se under limited circumstances	http://www.tarrantcounty.com/content/dam/main/probate-courts/probate-court-2/ProSePolicy.pdf
Tarrant County Probate Court No. 2	Pro se under limited circumstances	http://www.tarrantcounty.com/content/dam/main/probate-courts/probate-court-2/ProSePolicy.pdf
Travis County Probate Court	Pro se under limited circumstances	https://www.traviscountytx.gov/images/probate/Docs/pro_se.pdf

EXHIBIT B

Texas Rule of Civil Procedure 7

RULE 7. MAY APPEAR BY ATTORNEY

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

EXHIBIT C

NUMBER 13-17-00555-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI–EDINBURG

ESTATE OF JANET AMANDA MAUPIN, DECEASED

On appeal from Probate Court No. 1
of Travis County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Hinojosa, and Perkes
Memorandum Opinion by Justice Perkes

Patrick Evan Maupin (Patrick) appeals the trial court's order admitting his wife's will to probate as a muniment of title. *See* TEX. EST. CODE ANN. § 31.001. Patrick argues that the trial court erred when it enforced a local rule prohibiting individuals acting pro se from administering estates and denied his pro se application for letters testamentary, instead issuing sua sponte a muniment of title. We affirm.[1]

[1] Pursuant to a docket-equalization order issued by the Supreme Court of Texas, the appeal has been transferred to this Court from the Third Court of Appeals in Austin, Texas. *See* TEX. GOV'T CODE ANN. § 73.001.

I. BACKGROUND

Janet Amanda Maupin (Janet) died on June 22, 2017, at her home in Travis County, Texas. Janet left a self-proved will dated November 28, 1988. The will named Patrick as independent executor and sole beneficiary. On July 11, Patrick filed an application pro se to probate Janet's will and issue letters testamentary.

On August 7, the trial court held a hearing. Patrick appeared unrepresented and provided proof of Janet's death and residency in Travis County. When asked by the trial court why an administration was necessary, Patrick stated there were "a few assets" located out of state, "some balances on some accounts and credit cards and things," and "also a possible cause of action."

Pursuant to the Travis County Probate Court's pro se policy,[2] the court informed Patrick that he would need an attorney in order to apply for letters testamentary. In the interim, the trial court signed an order admitting the will to probate as a muniment of title sua sponte. The court decreed, in relevant part, as follows:

> that all of the necessary proof required for the probate of such will has been made; that such Will is entitled to probate; that there are no unpaid debts owing by this Estate, exclusive of any debt secured by liens on real estate; that there is no necessity for administration of this estate . . . .

Patrick appealed.

---

[2] The Travis County Probate Court No. 1 observes a pro se policy whereby individuals representing the interests of third parties must be represented by a licensed attorney. This includes executors applying for letters testamentary and prohibits individuals acting pro se from administering estates. Specifically, the policy provides:

> [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 guardianship wards and probate estates. *See In re Guetersloh*, 326 S.W.3d 737 (Tex. App.—Amarillo 2010, no pet.) and *Steele v. McDonald*, 202 S.W.3d 926 (Tex. App.—Waco 2006, no pet.), and the authorities cited. Therefore, individuals applying for letters testamentary, letters of administration, determinations of heirship, and guardianships of the person or estate must be represented by a licensed attorney.

II. APPLICABLE LAW AND ANALYSIS

A trial court's ruling on a probate application is reviewed under an abuse of discretion standard. *In re Estate of Gaines*, 262 S.W.3d 50, 55 (Tex. App.—Houston [14th Dist.] 2008, no pet.). A trial court abuses its discretion when it acts arbitrarily, unreasonably, or without regard to guiding legal principles. *Elliott v. Weatherman*, 396 S.W.3d 224, 228 (Tex. App.—Austin 2013, no pet.). A trial court, however, does not abuse its discretion in complying with a local rule that has not been previously challenged or found to contradict the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 3a(1); *see also Kenley v. Quintana Petroleum Corp.*, 931 S.W.2d 318, 320–21 (Tex. App.—San Antonio 1996, writ denied).

Generally, if an independent executor named in a will comes forward within the statutory period for probating a will, offers it for probate, and applies for letters testamentary, the court has no discretionary power to refuse to issue letters to the named executor unless he is otherwise disqualified under the provisions set out in the Texas Estates Code. *See* TEX. EST. CODE ANN. § 304.003; *see also Alford v. Alford,* 601 S.W.2d 408, 410 (Tex. App.—Houston [14th Dist.] 1980, no writ).

Appellant's primary contention on appeal is that the trial court abused its discretion when the court, in accordance with its local rules, denied his application for letters testamentary based on his pro se status. *See* TEX. EST. CODE ANN. § 257.001. Specifically, Patrick argues that the court's policy is invalid under Rule 3a(1)[3] of the Texas Rules of Civil Procedure because it violates his right to self-representation under Rule 7. *See* TEX. R. CIV. P. 7; *see also Ex parte Shaffer*, 649 S.W.2d 300, 302 (Tex. 1983)

[3] "[A]ny proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located." TEX. R. CIV. P. 3a(1).

("Ordering a party to be represented by an attorney abridges that person's right to be heard by himself.").

However, our sister courts have established that Rule 7 only applies when a person is litigating his rights on his own behalf, as opposed to litigating certain rights in a representative capacity. *See Steele v. McDonald*, 202 S.W.3d 926, 928 (Tex. App.—Waco 2006, no pet.) (holding that a non-lawyer cannot appear pro se on behalf of an estate as an independent executor); *see also Kaminetzky v. Newman*, No. 01-10-01113-CV, 2011 WL 6938536, at *6 (Tex. App.—Houston [1st Dist.] Dec. 29, 2011, no pet.) (mem. op.). The law distinguishes between a person in his individual capacity and the same person in his representative or fiduciary capacity. *See McMahan v. Greenwood*, 108 S.W.3d 467, 487 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (providing that an executor is synonymous with administrator and legal representative); *see generally Elizondo v. Tex. Nat. Res. Conservation Comm'n*, 974 S.W.2d 928, 931 (Tex. App.—Austin 1998, no pet.) (addressing individual versus representative capacity in the context of standing). An executor of an estate serves in a representative capacity of the estate, thereby requiring an attorney to represent the interests of the third-party at the outset. *See Steele*, 202 S.W.3d at 928; *McMahan*, 108 S.W.3d at 487.

In compliance with the local rule and supported by precedence, the trial court was unable to determine Patrick's suitability as an executor for his wife's estate absent attorney representation. *See Elliott*, 396 S.W.3d at 228; *Steele*, 202 S.W.3d at 928; *Kenley*, 931 S.W.2d at 320–21. Therefore, we hold that the trial court did not abuse its discretion in denying Patrick's pro se application. *See Elliott*, 396 S.W.3d at 228.

III. CONCLUSION

We affirm the trial court's order.

GREGORY T. PERKES
Justice

Delivered and filed the
25th day of July, 2019.

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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*_____
Renea Hicks

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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PRO SE EXECUTORS—UNAUTHORIZED PRACTICE OF LAW, OR NOT?

MICHAEL HATFIELD*

I. STATUTORY PROBATE COURTS, EXECUTORS AND ESTATE ADMINISTRATION IN TEXAS

There is a well known and continuing split among Texas' seventeen statutory probate courts.[1] The split is as to the rights of the person named executor to probate a will or otherwise appear in court without hiring a lawyer. Eight of the courts permit it, while nine insist an executor doing so would be engaging in the unauthorized practice of law and, thus, cannot be permitted.[2] Depending upon how the split is resolved, either nine of the statutory probate court judges are denying executors' their *pro se* appearance rights otherwise guaranteed under Texas law or eight of the judges are assisting the unauthorized practice of law.[3] A recent Waco Court of Appeals decision denying *pro se* rights to an executor is likely to widen

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[1] See *infra* p. 8.

[2] *See, e.g.*, Travis County Court Policy Regarding Pro Se Applicants available at http://www.co.travis.tx.us/probate/pdfs/pro_se.pdf. (last visited September 19, 2006). The eight courts permitting executors to appear *pro se* are Bexar County Probate Court Number 1; Bexar County Probate Court Number 2; Dallas County Probate Court Number 3; El Paso County Probate Court; Galveston Country Probate Court; Harris County Probate Court Number 1; Harris County Probate Court Number 4; and Tarrant County Probate Court Number 1. Dallas County Probate Court Number 1, Harris County Probate Court Number 3 and Hidalgo County Probate Court each allows the executor to appear pro se so long as the executor is the sole beneficiary. A special thanks to Nicholas Davis of Texas Tech University School of Law for discussing these court policies with the court clerks. His report (including the contact information of the individuals he spoke with) is in my files.

[3] The issue of pro se appearances is analyzed in detail *infra* pp. 16-32. As to assisting in the unauthorized practice of law, *see* TEX. DISCIPLINARY R. PROF'L CONDUCT 5.05, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. 10, §9)

the split.[4]

In practical terms, the court split also means that whether or not an executor is required by a court to hire a lawyer depends on a matter of geography. To exacerbate the role of chance, it is not simply a matter of geography but a matter of docket ordering for some executors because some of the probate judges in counties with more than one probate court have conflicting policies. Thus, for example, an executor appearing to probate a will in Harris County may or may not be forced to hire a lawyer depending upon which one of the four Harris County probate court's docket his or her case lands when the court clerk accepts the filing. One Houstonian in a clerk's office is told he or she has different legal rights than the Houstonian ahead or behind him or her in a bureaucratic queue.

This Article clarifies why under Texas law an individual named as executor in a will has the right to offer the will for probate and otherwise appear in a probate court without hiring a lawyer.[5] This Article first provides an overview of the independent administration provisions of the Texas probate code before reviewing the unauthorized practice of law prohibition and the *pro se* exception. After establishing that Texas executors qualify for the *pro se* exception in Texas because executors appearing in court are exercising their own management rights (rather than the rights of "the estate" or the beneficiaries), the Article explores suggestions of court reform to be considered in light of these *pro se* rights. The Article concludes with the suggestion that it is probably unwise for most executors to proceed *pro se* regardless of their right to do so.

A. Historical Model of Ease

The term "probate"[6] should not have the same connotations to Texans[7]

[4] Steele v. McDonald, 202 S.W.3d 926 (Tex.App. – Waco 2006).

[5] As it is the most common form of estate administration, the paradigm considered in the Article will be an independent administration in which there is no will contest or other litigation. Throughout this Article, the presumption is that there is no contest between which of more than one alleged wills is the valid one. All references to probate and estate administration are to those not involving legal contests or disputes of any kind. The term "probate court" is intended to mean those courts with original probate jurisdiction whichever court that may be in a particular county. *See infra* p. 8.

[6] The term "probate" refers to both the court procedure by which a will is proved to be valid or invalid (the technical meaning) and to the legal process wherein the estate of a testator is administered (the popular meaning). *See* BLACK'S LAW DICTIONARY 1202 (6th ed. 1990). Generally, in this Article, the latter meaning will be intended except when reference is specifically

as it does to those living or owning real property in many other states. Texas has provided a "plain" and "layman"-friendly probate system since the 19th century.[8] While the expenses and complications of probate systems elsewhere sustain substantial probate avoidance planning, Texans have never had the same generalized need to avoid probate.[9] Indeed, because the Texas probate system is "much different and typically much simpler" than other systems, the State Bar of Texas considers it unethical for Texas lawyers to make undue comparisons between the Texan system and others.[10] It is also unethical for Texas attorneys to claim that the Texas probate system is inherently lengthy, expensive, complicated, or always to be avoided.[11] Texas has long had the type of probate system other states are now moving towards.[12]

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made to probating the will.

[7] The term "Texan" is used to refer to individuals residing in Texas or owning real property located in Texas. *See* TEX. PROB. CODE ANN. §6 (Vernon 2003); 17 M.K. WOODWARD ET. AL., TEXAS PRACTICE, PROBATE & DECEDENTS' ESTATES §§44-45 (2006.); 2 JUDGE NIKKI DESHAZO ET. AL., TEXAS PRACTICE GUIDE PROBATE §14:36 (2006).

[8] *See* W.S. SIMKINS, THE ADMINISTRATION OF ESTATES IN TEXAS 9 (1934). ("[T]he Legislature, August 9, 1876, framed a complete system of procedure and laws for the administration of estates in Texas. It will be seen. . . that the law of 1876 is only a reproduction of the law of 1848. . . This Act of 1876 was intended by the Legislature *to be a plain and definitive system of rules* to govern executors and administrators, *and to make it possible for the layman to perform his duties without appealing for instruction from the court in the various steps to be taken*" (emphasis added).) Minter v. Burnet, 90 Tex. 245, 251, 38 S.W. 350 (1896) ("We think that the legislature intended, by the enactment of the law of 1876, to make plain and definite rules to govern administrators and executors in the discharge of their duties, because it is not infrequently the case that they must perform those duties without having the instruction of the court with reference thereto.")

[9] Of course, specific Texas clients may be well advised to avoid probate in certain situations but in other states avoiding probate is a near-universal estate planning objective. *See, e.g.*, Thomas M. Featherston, Jr. *Wills and Living Trusts – What's Best for the Client?,* p. 3 *in* WILLS TRUSTS AND ESTATE PLANNING 2000 (Texas Bar CLE 2000); Bernard E. Jones, *Revocable Trusts*, p. 28 *in* BUILDING BLOCKS OF WILLS, TRUSTS AND ESTATE PLANNING 2002 (Texas Bar CLE 2002).

[10] State Bar of Texas Advertising Review Committee *Interpretive Comment No. 22: Advertisement of Living Trusts* available at http://www.texasbar.com/Template.cfm?Section=Advertising_Review&template=/ContentManagement/ContentDisplay.cfm&ContentID=8559#ALT (last visited September 18, 2006).

[11] *Id.*

[12] For example, Texas has chosen to keep its own, comprehensive probate code rather than adopt the Uniform Probate Code being considered and adopted in other states because the improvements made in probate law by the Uniform Probate Code have long been part of Texas law, such as the streamlined, independent administrations of decedents' estate. C. Boone

B. Probating Wills in Texas

Probating a will in Texas requires only three separate documents, typically consisting of no more than four total pages. The will and a written application for its probate are delivered to the court clerk who posts public notice.[13] A court hearing is usually scheduled for the first Monday following ten days after the notice is posted.[14] The court hearing rarely takes more than five minutes and consists of no more than a recitation of the facts necessary to support the application (*e.g.*, that the decedent was domiciled in the county).[15] A simple order is presented for the judge's signature, and, when signed, the will is admitted to probate.[16] The efficiency of the Texas system routinely results in dozens of wills to be admitted to probate at each uncontested docket session.[17]

It is with the court's admission of a will to probate that the testator's directions become legally operative.[18] Ensuring a document to be a valid will is the responsibility of the probate courts.[19] With the court's order that a will is admitted to probate, the testator's intentions for his or her property are effected. These intentions may include deviating from the intestacy scheme, providing certain tax benefits for the beneficiaries, or providing certain specific benefits for minor or disabled beneficiaries or others needing management assistance or creditor protection.

Because the effects of a will are so important, whoever possesses the will when the testator dies is required to deliver the document to the probate court clerk.[20] The person in possession is not required to begin the process of probating the will, only to make it available for anyone qualified to probate it.[21] In order to be qualified to probate a will, a person must be

Schwartzel, *Is the Prudent Investor Rule Good for Texas?* 54 BAYLOR L. REV 71 n.472 (2002).

[13] TEX. PROB. CODE ANN. §§81(a), 128(a) (Vernon 2003); *see*, *generally*, 17 WOODWARD, *supra* note 7, §282.

[14] This is the earliest time at which a hearing can be scheduled. §§ 128(c), 33(ff), (g).

[15] § 88.

[16] § 89.

[17] This is based upon my personal experience of the well established routines of the Bexar County Probate Courts as well as my interviews with other attorneys who are Board Certified in Estate Planning and Probate.

[18] § 94; *more generally, see* WILLIAM J. BOWEN AND DOUGLAS H. PARKER PAGE ON WILLS § 26.8 (2004).

[19] §§ 84, 88.

[20] § 75.

[21] There is no requirement that a will ever be probated. *See, e.g.*, Stringfellow v. Early, 15

named as the executor in the will or have a beneficial interest in it (that is, be a beneficiary or a creditor of the estate).[22]

C. Administration Independent of Court Oversight

The vast majority of estates in Texas—over 80%—are administered under the independent administration provisions of the probate code.[23] These provisions are "one of the most significant developments in American probate law" because of their simplicity.[24] Independent administration means that the independent executor rather than the probate court judge bears sole responsibility for the administration.[25] The expectation of independent estate administration is so well-established as the norm in Texas, that suggestions of court-dependent administration are limited to problematic estates.[26]

The only court proceeding required under independent administration is

Tex. Civ. App. 597, 40 S.W. 871 (Tex. Civ. App. 1897, writ dism'd).

[22] § 3(rr), § 76.

[23] Young Lawyers Association Needs of Senior Citizens Committee, *Living Trust Scams*, 62 Tex. B.J. 745 (1999); Sara Patel Pacheco, *et al*. *The Texas Probate Process from Start to Finish*, p. 12 *in* 5TH ANNUAL BUILDING BLOCKS OF WILLS, ESTATES AND PROBATE 12 (Texas Bar CLE 2004). Estates may be administered independently of court involvement beyond the probate hearing in two situations. The most common situation is that the will requires independent administration. § 145(b). Otherwise, in the case of wills that do not require it or in the case of intestate estates, the sole condition for independent administration is consent of the beneficiaries or, as in the case of an intestate estate, the heirs. § 145(c) – (e).

[24] 17 WOODWARD, *supra* note 7, § 491. However, independent administration is not the only simple means of estate administration in Texas, even if it is the most common. The Texas probate code provides several alternatives for simple estate administration. Wills can be admitted as muniments of title rather than being offered for probate with title being passed to beneficiaries without the need for any estate administration. § 89A. Surviving spouses can administer community property without any court proceedings at all. §§ 156, 160, 177. And the use of affidavits in connection with certain estates and contractual settlement agreements for any estate can be substituted for court involvement in estate administration. §§52, 137; *see, e.g*., *Stringfellow*, 40 S.W. 871, Estate of Morris, 677 S.W.2d 748 (Tex. Civ. App.–Amarillo 1979, writ ref'd n.r.e.). Thus, in Texas, the general expectation is that the probate system is one of flexibility, simplicity, and efficiency.

[25] §§36, 145 (h), (q); 17 WOODWARD, *supra* note 7, § 75; *Id.* § 497; 1 DESHAZO, *supra* note 7, § 1:24.

[26] For example, dependent administration might be favored when the estate is insolvent or where disputes between the executor and beneficiaries are expected. *For discussion see,e.g.,* Pacheco, *supra* note 23, at 18.

the hearing to probate the will.[27] Thereafter, the independent executor ("the executor") must submit three additional documents usually consisting of no more than five pages total: a single-paragraph oath,[28]a short affidavit regarding notice to creditors,[29] and an inventory of the estate's assets.[30] These documents are submitted to the court clerk. No additional contact between the executor and the court is required. For example, there is no requirement that the judge oversee the executor or review the fees or that the executor close the administration.

D. Attorneys' Involvement in Independent Administration

Executors offering a will for probate are entitled to hire a lawyer at the estate's expense.[31] While estate administration may become complex in terms of dealing with third parties (*e.g.*, those with custody of estate assets) or in terms of dealing with tax or asset management issues (*e.g.*, locating and valuing assets or managing active businesses), there is little complexity in the probate court work required by an independent administration. In a law firm, the requisite documents can be prepared by a legal assistant and then reviewed by the attorney who may expect to offer multiple wills for probate in one docket session. While lawyers in other states often charge high fees for probate court, Texas lawyers' fees are far more likely to be charged for the practical, non-court work involved in an estate administration rather than probate court appearances.[32]

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[27] §145(h); 17 WOODWARD, *supra* note 7, § 75; *Id.* §497; 1 DESHAZO, *supra* note 7, § 1:24.

[28] § 190; 18 M.K. WOODWARD ET AL., TEXAS PRACTICE, PROBATE & DECEDENTS' ESTATES §642 (2006); 1 DESHAZO, *supra* note 25, § 7:7.

[29] § 294; 17 WOODWARD, *supra* note 7, §500; 1 DESHAZO, *supra* note 25, § 1:30.

[30] §§45(h), 250, 251. Of the three court filings required, the inventory is the most legally complex. It requires not only valuation but a characterization of marital property as either separate or community. This characterization can be complex whenever a decedent was married and (a) either or both spouses at any time lived outside of Texas while married and acquired significant property during such time; (b) either or both spouses inherited or were given significant property; (c) either or both spouses owned significant property prior to marriage; or (d) there was a pre-marital or post-marital property agreement between the spouses. 18 WOODWARD,*supra* note 28, §791; *Id.* § 800; 1 DESHAZO, *supra* note 7, § 1:29; 2 DESHAZO, *supra* note 7, § 9:30.

[31] § 242; 18 WOODWARD, *supra* note 28, §729; 2 DESHAZO, *supra* note 7, § 10:21.

[32] While total lawyers fees for an estate administration may vary from about $1,200 to about $10,000 in Texas (depending upon the nature of the estate and the issues it raises), even in the state's largest city total legal fees *and court costs* for the probate hearing (independently of other estate administration legal fees) should not be expected to exceed $800. *See* David P. Hassler *et*

E. Probate Courts

A will may be offered for probate in the county in which the decedent resided, if any, otherwise in the county in which the decedent's property is located.[33] In counties without a statutory probate court, wills are offered for probate in the constitutional county court (or, in certain instances, the statutory county court).[34] However, in a county with a statutory probate court, the statutory probate court is the only court with probate jurisdiction.[35]

With original and exclusive jurisdiction over probate matters, the statutory probate courts of Texas are located in ten of the states most populated counties: Bexar (two courts), Collin, Dallas (three courts), Denton, El Paso, Galveston, Harris (four courts), Hidalgo, Tarrant (two courts), and Travis.[36] The exclusive nature of the jurisdiction means that in probate-related cases, parties do not have recourse to a district court.[37] About half of Texans live in the high population counties with specialized statutory probate courts.[38] As mentioned above, eight of the specialized courts currently permit executors to appear without a lawyer, while nine require it.[39]

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al., *Getting Down to Bidness: A Survey on Economics, Practice Management and Life Quality Issues for Texas Estate Planning and Probate Attorneys At The Turn of the Century* p. 16 *in* ESTATE PLANNING AND PROBATE 2000 (Texas Bar CLE 2000) and Jones, *supra* note 9, at 29.

[33] For a more complete overview of venue, *see, e.g*., § 6; 17 WOODWARD, *supra* note 7, §§ 44-45; 2 DESHAZO, *supra* note 7, § 14:36.

[34] §4; §5; s*ee* TEX. GOV'T CODE ANN. §25.0003(d) (Vernon 2003); 17 WOODWARD, *supra* note 7, § 1.

[35] TEX. GOV'T CODE ANN. §25.0003(e) (emphasis added).

[36] The Statutory Probate Courts contact and other information is available at http://www.courts.state.tx.us/trial/probate.asp (last visited June 26, 2006).

[37] For a review of the history of the statutory probate courts from the 1970s onward, *see* Joseph R. Marrs, *Playing the Probate Card: A Plaintiff's Guide to Transfer to Statutory Probate Courts*, 36 ST. MARY'S L.J. 99 (2004).

[38] The population of Texas is estimated to be about 23,000,000 with about 11,700,000 Texans living in the following counties each of which having one or more specialized statutory probate court: Bexar, Collin, Dallas, Denton, El Paso, Galveston, Harris, Tarrant, and Travis. The population estimates may be found on the U.S. Census Bureau web site available at http://quickfacts.census.gov/qfd/states/48000.html (last visited April 28, 2006) while the current list of statutory probate courts (with their contact information) may be found on the Texas Judiciary Online web site available at http://www.courts.state.tx.us/trial/probate.asp (last visited June 26, 2006).

[39] *Supra* note 3.

On October 18, 2006 the Waco Appeals Court spread the confusion beyond the most populous counties by denying an executor the right to proceed *pro se* in a hearing unrelated to the probate of a will.[40] A vigorous dissent by the Chief Justice argued that the majority had adequately considered neither the law nor the consequences.[41] The Chief Justice lamented the ending of the independent administration system in Texas heralded by such pro se denials,[42] which is a concern echoed elsewhere — and now in this Article.

II. AN OVERVIEW OF THE UNAUTHORIZED PRACTICE OF LAW PROHIBITION

Though providing legal services for oneself has never been considered "unauthorized," no one is entitled to engage in the unauthorized practice of law.[43] This prohibition is the general norm in the United States (though not necessarily elsewhere),[44] and it prevents non-lawyers from representing others in court or advising others as to the law. Though well established in general terms, there are many exceptions to the rule, and the organized bar's interest in enforcing it has waxed and waned over the past century.

A. The 20th Century Ebb and Flow

The organized bar's campaign against the unauthorized practice of law[45] was born, matured, and all but retired into an un-enforced letter during the course of the 20th century.[46] The historical concern was so low that when

[40] Steele v. McDonald, 202 S.W.3d 926 (Tex.App. – Waco 2006).

[41] Steele, 930-931.

[42] Id.

[43] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §4, especially Comment C (2000) [hereinafter RESTATEMENT]

[44] Perhaps also surprising to Americans would be knowing that the prohibition against "the unauthorized practice of law" is unknown in most of the world, including Europe. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS, LAWYER'S. DESKBOOK PROFESSIONAL RESPONSIBILITY §5.5-3 (2005-6 ed.).

[45] *Id.*

[46] From the American Revolution through the Civil War, there was no substantial effort by the bar to stop "unauthorized" practice. Deborah L. Rhode, *Policing The Professional Monopoly: A Constitutional And Empirical Analysis Of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 7-10 (1981); Derek A. Denckla, *Nonlawyers And The Unauthorized Practice of Law: An Overview of Legal and Ethical Parameters*, 67 FORDHAM L. REV 2581, 2583-2586 (1999); *see also* STANDING COMMITTEE ON LAWYERS' RESPONSIBILITY FOR CLIENT PROTECTION,

the American Bar Association adopted its first Canons of Ethics in 1908, the issue was not even addressed.[47] The campaign against unauthorized practice began in 1914 as an effort to curtail competition with lawyers from banks and title companies.[48] This campaign gained momentum during the Great Depression when the American Bar Association organized its first unauthorized practice committees, which eventually were successful at divvying-up legally-significant work through negotiations with the banks and title companies, as well as the insurance companies, realtors, accountants, and other competing industries and professions.[49] By the 1960s, federal anti-trust issues raised by these negotiated professional boundaries began to weaken the bar's campaign.[50] By the end of the 20th century, the campaign had weakened to the point that the American Bar Association and many states disbanded their committees on unauthorized practice; legal reformers began calling into question whether or not the rule actually provided any public benefit (or only provided an economic benefit to lawyers); and even members of the bar began calling for the minimization rather than the defense of the professional walls encircling the law.[51]

AMERICAN BAR ASSOCIATION 1994 SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/NONLAWYER PRACTICE p. xii – xv (1996) (hereinafter [ABA Survey]). After the Civil War, bar associations did begin lobbying for passage of legislation that prohibited non-lawyers from making court appearances. Denckla, *supra*, at 2582-2583. Roscoe Pound's theory of the evolution of legal systems begins with the first step of a desire to administer justice without lawyers which manifests itself in a hostility to a formal bar. The appropriate role of lawyers in the American justice systems has been the subject of debate since the beginning, even though it is hard for contemporary lawyers to imagine how that could even be possible. Pound's orientation to the lawyers and the administration of justice sets the tone for the ABA Survey. *Id.* at xi.

[47] Denckla, *supra* note 43, at 2583.

[48] *Id.* at 2582-2584.

[49] Rhode, *supra* note 43; Denckla, *supra* note 43, at 2584-2585. Initially articulated by the bar in terms of economic self-interest, the public justification for the prohibition was eventually changed to protecting the public (though the public itself has not given much support to the bar's efforts and the empirical research indicates the public has suffered little, if any, as a result of non-lawyers practicing law). Rhode, *supra* note 43, at 3; RESTATEMENT, *supra* note 40, Note on Comment A, Comment b, and Comment C.

[50] Denckla, *supra* note 43, at 2584; ABA Survey, *supra* note 43, at p. xv-xvi.

[51] Denckla, *supra* note 43, at 2585. *See, e.g.,* Michael W. Price, *A New Millennium's Resolution: The ABA Continues Its Regrettable Ban On Multidisciplinary Practice*, 37 HOUS. L. REV. 1495 (2000); Stuart S. Prince, *The Bar Strikes Back; The ABA's Misguided Quash of the MDP Rebellion*, 50 AM. U. L. REV. 245 (2000); Bradley G. Johnson, *Ready or Not, Here They Come: Why The ABA Should Amend The Model Rules To Accommodate Multidisciplinary Practices*, 57 WASH. & LEE. L. REV. 951 (2000).

Coinciding with the national Great Depression-era campaign, Texas enacted its first statute against the unauthorized practice of law in 1933.[52] The statute was drafted by the first unauthorized practice of law committee to be appointed by the Texas Bar Association (the predecessor of the State Bar of Texas).[53] As did the national campaign, the Texas campaign began to falter in the latter part of the 20th century, which ended with the failure of a high profile unauthorized practice prosecution against a national accounting firm —- and many Texas lawyers advocating a fundamental re-thinking of the sharp divide between the practice of law and other professions.[54]

B. Defining the Unauthorized Practice of Law

An enduring problem in enforcing the unauthorized practice prohibition has been defining the practice of law.[55] Within a given a state, definitions and standards may be found in statutes, case law, and the disciplinary rules of the bar.[56] These are often not uniform within the state and are not consistent between the states.[57] As the problems of vagueness and

[52] *See In Re* Nolo Press/Folk Law, 991 S.W.2d 768, 769-70 (Tex. 1999); Rodney Gilstrap and Leland C. de la Garza, *UPL: Unlicensed, Unwanted and Unwelcome*, 68 TEX. B.J. 798 (October 2004).

[53] *See In Re* Nolo Press, 991 S.W.2d at 769-70; Gilstrap and Garza, *supra* note 49. In 1939, the State Bar of Texas created the Unauthorized Practice of Law Committee. The Texas Supreme Court initially adopted rules that authorized the UPLC to assist local grievance committees to investigate UPL but did not authorize the UPLC to prosecute lawsuits. The UPLC's role was largely advisory. The investigation and prosecution of UPL was left to the local grievance committees. In 1952, the Texas Supreme Court adopted rules establishing the UPLC as a permanent entity and giving the UPLC investigative and prosecutorial powers, as well as the duty to inform the State Bar and others about UPL. From 1952 to 1979, the UPLC's members were appointed by the State Bar. In 1979, the UPL statute was amended to require that members of the UPLC be appointed by the Supreme Court. *See In Re* Nolo Press, 991 S.W.2d at 769-70; Gilstrap and Garza, *supra* note 49.

[54] Jack Baker et al., *Professionals Clash on What Is The Practice of Law*, PRAC. TAX STRATEGIES (May 1999).

[55] ROTUNDA & DZIENKOWSKI, *supra* note 41, § 39-1.2.

[56] For example, for Texas law *see* TEX. PEN. CODE ANN. §38.122 – 38.123 (Vernon 2003); TEX. GOV'T CODE ANN., § 81.103, 81.104. (Vernon 2005); Crain v. UPLC, 11 S.W.3d 328, 333 (Tex. App.—Houston [1st Dist.] 2000, pet. denied), *cert. denied*, 532 U.S. 1067 (2001); Davies v. Unauthorized Practice Committee, 431 S.W.2d 590 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); Stewart Abstract Co. v. Judicial Commission, 131 S.W.2d 686, 689 (Tex. Civ. App.—Beaumont 1939, no writ)*; see* Gilstrap and Garza, *supra* note 49.

[57] ROTUNDA & DZIENKOWSKI, *supra* note 41, § 39-1.2; Denckla, *supra* note 43.

circularity in definition appear insurmountable, the contemporary trend is to avoid any attempts at a precise or exhaustive definition, preferring instead an *ad hoc* approach somewhat similar to Justice Stewart's "I know it when I see it" approach to defining pornography. [58]

Some of the difficulties in defining unauthorized practice involve Constitutional concerns, but others involve accepting the practical needs of public access to law-related services.[59] Across jurisdictions, a variety of activities that seem likely to be the practice of law by conceptual standards are exempted from the definition of unauthorized practice, including allowing non-lawyers to prepare documents related to real estate transfers,[60] the sale of legal forms,[61] and even assistance in preparing forms.[62] More substantial practical deviations are to be found in exceptions for allowing non-lawyers to represent others in legal proceedings: many states permit non-lawyers to represent others in administrative proceedings (*e.g.*, workers' compensation proceedings), and some states permit non-lawyers to appear in court on behalf of others in specific situations – such as small claims courts, law clinic representations, and domestic violence situations.[63]

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[58] *See, e.g.*, Linda Galler, "*Practice of Law" in the New Millennium: New Roles, New Rules But No Definitions*, 72 TEMP. L. REV. 1001 (1999); REST Reporters Note C; see, e.g., Miller v. Vance, 463 N.E.2d 250, 251 (Ind. 1984); *In re* Campaign for Ratepayers' Rights, 634 A.2d 1345, 1351 (N.H. 1993); *In re* Unauthorized Practice of Law Rules, 422 S.E.2d 123, 124 (S.C. 1992).

[59] For a critical assessment in terms of Constitutional and public policy concerns, *see, e.g.*, Rhode, *supra* note 43.

[60] Denckla, *supra* note 43, at 2590; RESTATEMENT, *supra* note 40; Compare, *e.g.*, Pope County Bar Ass'n v. Suggs, 624 S.W.2d 828 (Ark. 1981) (real-estate brokers may complete standardized forms for simple real-estate transactions); *Miller*, 463 N.E.2d 250 (both banks and real-estate agencies may fill in blanks on approved mortgage forms, so long as no individual advice given or charge made for that service); *In re* First Escrow, Inc., 840 S.W.2d 839 (Mo. 1992) (escrow closing companies, real-estate brokers, lenders, and title insurers may use standard forms for standardized real-estate transactions, so long as no advice given or separate fee charged for that service); *In re* Opinion No. 26 of the Comm. on Unauthorized Practice, 654 A.2d 1344 (N.J. 1995) (despite fact that many aspects of residential real-estate transaction involves practice of law, real-estate brokers and title-company officers may control and handle all aspects of such transactions, after fully informing parties of risks of proceeding without lawyers), with, *e.g.*, Arizona St. Bar Ass'n v. Arizona Land Title & Trust Co., 366 P.2d 1 (Ariz.1961) (real-estate agents may not fill out standardized forms in land-sale transactions); Kentucky St. Bar Ass'n v. Tussey, 476 S.W.2d 177 (Ky. 1972) (bank officer's act of filling out mortgage forms constitutes unauthorized practice).

[61] Denckla, *supra* note 43, at 2591.

[62] *Id.*

[63] ABA Survey, *supra* note 43, at 34-43, see especially the study of California, Delaware, the District of Columbia, Iowa, Maryland, Massachusetts, New Hampshire, New York, Oregon,

The federal rules even permit non-lawyers to represent others in the United States Tax Court, which travels across the country holding trials in states with local laws that prohibit non-lawyer representation in court.[64]

C. The Texas Approach to the Unauthorized Practice Prohibition[65]

The Texas Supreme Court has the ultimate authority to regulate the practice of law in Texas, including the definition of the unauthorized practice of law.[66] However, the Texas legislature has enacted both criminal and civil statutes prohibiting the unauthorized practice of law. The criminal statute very narrowly addresses only the issue of individuals falsely holding themselves out as lawyers.[67] The civil statute is Chapter 81 of the State Bar Act and is intended to be the primary deterrent. It authorizes the Supreme Court to appoint a committee charged with eliminating the unauthorized practice of law,[68] which it defines 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

Pennsylvania, Virginia, and Washington.

[64] Attorneys, accountants, actuaries, and other agents are permitted to represent others before the Internal Revenue Service, though actuaries and other agents are subject to specific limitations on their practice. 5 U.S.C. §500 (2006); 31 C.F.R. § 1.03(a), (b), (d) (2005); *Id.* §10.4. Non-lawyers are also allowed to practice before the U.S. Tax Court as a result of Internal Revenue Code of 1986, as amended, §7452. The provision states that no person is to be denied admission to practice before the Tax Court because of failure to be a member of a particular profession (i.e., an attorney). The provision gives the Tax Court the right to make the rules regarding practice before the court. Tax Court Rule §200(a)(3) allows nonattorneys to practice before the court by passing a written examination. Baker, *supra* note 51. The federal law permitting the non-lawyer practice pre-empts the state law prohibiting it. *See* Sperry v. Florida, 373 U.S. 379 (1963).

[65] A good overview of these laws can be found in the October 2004 Texas Bar Journal article authored by the chair of the Texas Unauthorized Practice of Law Committee. *See* Gilstrap and Garza, *supra* note 49.

[66] TEX. CONST. art. II, § 1; *see In Re* Nolo Press/Folk Law, 991 S.W.2d 768, 769-70 (Tex. 1999).

[67] TEX. PEN. CODE ANN. §§38.122 – 38.123 (Vernon 2003).

[68] TEX. GOV'T CODE ANN., §§ 81.103. 81.104 (Vernon 2005).

must be carefully determined.[69]

Even though the statute defines the practice of law, it acknowledges that the issue is ultimately one for the Texas Supreme Court rather then the legislature.[70] In its rules for admission to the bar, the Texas Supreme Court has defined the practice of law as "drafting and interpreting legal documents and pleadings, interpreting and giving advice regarding the law, or preparing, trying or presenting cases before courts, departments of government or administrative agencies." [71] In case law, Texas courts have defined the practice of law to include "all advice to clients, express or implied, and all action taken for them in matters connected with the law."[72]

However, non-lawyers in Texas are now legally entitled to represent others in a variety of situations: the U.S. Tax Court; certain specialized Texas courts;[73] and before specific Texas and federal agencies. [74] Non-lawyers enrolled in law school have a limited license to practice law.[75] As for providing legal advice and document preparation, in certain situations non-lawyers are authorized to provide services to transfer mineral or mining interests in real property[76] and other real property interests, [77]as well as provide advice and document preparation assistance for medical powers of attorney and the designation of guardians (two legally powerful documents, it should be noted).[78]

D. Pro Se Representation and the Unauthorized Practice of Law

The prohibition against the unauthorized practice of law only prohibits

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[69] *Id.* § 81.101.

[70] *Id.* § 81.101(b).

[71] TEX. R. GOVERN. BAR ADM'N XIII(c)(1).

[72] Crain v. UPLC, 11 S.W.3d 328, 333 (Tex. App.—Houston [1st Dist.] 2000, pet. denied), *cert. denied*, 532 U.S. 1067 (2001); Davies v. Unauthorized Practice Committee, 431 S.W.2d 590 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.): Stewart Abstract Co. v. Judicial Commission, 131 S.W.2d 686, 689 (Tex. Civ. App.—Beaumont 1939, no writ).

[73] *See* TEX. GOV'T CODE ANN. § 28.003(d); Op. Tex. Att'y Gen. Nos. C-82 (1963), C-283 (1964) and II-538 (1975) (small claims court cases); TEX. R. CIV. P. 747a; TEX. PROP. CODE ANN, § 24.011 (Vernon 2000); Op. Tex. Att'y Gen. No. JM-451 (1988) (FED cases).

[74] *See, e.g.*, TEX. LAB. CODE ANN. § 401.011(37) (Vernon 2006) (Workers' Compensation Comm.); 28 TEX. ADMIN. CODE § 1.8 (West 2006) (Tex. Dep't of Ins.).

[75] TEX. GOV'T CODE ANN. § 81.102; TEX. R. GOVERN. BAR ADM'N XIX.

[76] TEX GOV'T CODE ANN. §83.001.

[77] *Id*.

[78] *Id.* §81.101.

the *unauthorized* practice of law by non-lawyers.[79] So even though it is the practice of law, providing legal services for oneself has never been considered *unauthorized*.[80] For example, one can draft one's own will or appear in court on one's own behalf, even when doing either of those for another would be the unauthorized practice of law.[81] The unauthorized practice prohibition only applies to a person seeking to advise or represent another person.[82]

A historical principle of British common law, the right to advise or represent oneself in legal matters – *pro se* representation –[83] was statutorily codified at the federal level with the Judiciary Act of 1789 and then adopted by states – including Texas—with either their adoption of the British common law or by statute.[84] American Courts have described the right as fundamental[85] and moral.[86] However, because it has always been given statutory protection, the issue of a Constitutional right to appear *pro se* has never arisen for review (except for in criminal cases, in which it has been recognized.)[87] The Texas statute recognizing the right follows both the

[79] RESTATEMENT, *supra* note 40, §4.

[80] *Id*. Comment C

[81] *Id*, Comments C and D.

[82] ROTUNDA & DZIENKOWSKI, *supra* note 41, § 39-4.2; RESTATEMENT, *supra* note 40.

[83] Tiffany Buxton, *Foreign Solutions To The U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 107 (2002).

[84] *Id. at* 109. Congress re-enacted a revised version of this Act in 1948, granting parties the right to "plead and conduct their own case personally" in any court of the United States. *Id.*at 110.

[85] U.S. v. Dougherty, 473 F.2d 1113, 1127, 154 U.S.App.D.C. 76, 90 (D.C.Cir. Jun 30, 1972).

[86] *Id.* at 1128, 91.

[87] The Supreme Court needed to specifically recognize a Constitutional right to proceed *pro se* in criminal cases because the pro se right can conflict with the Constitutional right to competent counsel in criminal cases. Since the Supreme Court has recognized the right as a more fundamental Constitutional right than the right to competent counsel, it would be hard to argue the Supreme Court would not recognize the right in a civil context in which there is no competing Constitutional right. Nevertheless, the court has never had the opportunity and given the statutory protection of the right, it seems an issue unlikely to ever arise for review. The seminal decision extending the federal constitutional right of *pro se* representation to an accused in a criminal case is Faretta v. California, 422 U.S. 806 (1975). In effectuating the right, the court is required to warn a defendant adequately of the dangers and disadvantages of self-representation in order that the waiver of the right to counsel be knowing and voluntary. *Id.* at 2541; *e.g.*, United States v. Sandles, 23 F.3d 1121 (7th Cir. 1994), and authority cited. On the power of the court to appoint "standby counsel" for an accused proceeding pro se, even over objection by the accused, see *Faretta*, 422 U.S. at 834 n.46; McKaskle v. Wiggins, 465 U.S. 168, 184 (1984). On the general desirability of doing so, see, *e.g.*, United States v. Moya-Gomez, 860 F.2d 706, 740 (7th Cir.

federal statute and other state statute formats, simply stating that [88] "any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court."[89]

The right to proceed *pro se* is a personal right and can only be exercised by the person having the right. This means, for example, that a non-lawyer owner, officer, or other agent of a business entity does not have the right to appear in court in order to prosecute or defend the business entity's rights.[90] Texas courts have followed this general rule with respect to corporations finding that the corporation's non-lawyer agents are not appearing to defend

1988), *cert. denied*, 492 U.S. 908 (1989). There is, however, no constitutional right to the assistance of standby counsel. *E.g.*, United States v. Betancourt-Arretuche, 933 F.2d 89 (1st Cir. 1991), *cert. denied*, 502 U.S. 959 (1991); United States v. La Chance, 817 F.2d 1491, 1498 (11th Cir. 1987), *cert. denied*, 484 U.S. 928 (1987). An accused also has no right to a "hybrid" representation, part *pro se* and part standby counsel. *See McKaskle*, 465 U.S. at 178. On the rule that a mid-trial election by an accused to invoke the right to proceed *pro se* does not relieve long-standing counsel from responsibility to continue as standby counsel, see United States v. Cannistraro, 799 F.Supp. 410 (D.N.J. 1992). RESTATEMENT, *supra* note 40. *See also* Comment, *Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules*, 132 U. PA. L. REV. 1515 (1984); Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659 (1988); Edward M. Holt, *How To Treat "Fools:" Exploring The Duties Owed To Pro Se Litigants In Civil Cases*, 25 LEGAL PROF.. 167 (2001); Buxton, *supra* note 80, at 103.

[88] The Texas Constitution specifically provides that Texas criminal defendants have the right to appear without counsel.

[89] Texas Rules of Civil Procedure 7 applies to probate proceedings. TEX. R. CIV. P. 2.

[90] Restatement, *supra* note 40, Comment E. *See* generally C. Wolfram, MODERN LEGAL ETHICS § 13.7 (1986). On the rule that a corporation or similar entity can appear in court only through an attorney, *see, e.g.*, Osborn v. Bank, 22 U.S. (9 Wheat.) 738, 830 (1824); Commercial & R.R. Bank v. Slocomb, Richards & Co., 39 U.S. (14 Pet.) 60, 65 (1840); Capital Group, Inc. v. Gaston & Snow, 768 F.Supp. 264 (E.D. Wis. 1991) (president and sole shareholder of professional-services corporation could represent himself *pro se*, but could not represent corporation in either of those capacities or by assignment of its cause of action), citing authority; Nicollet Restoration, Inc. v. Turnham, 486 N.W.2d 753 (Minn. 1992) (corporation appearing in trial court must be represented by attorney despite fact that court proceeding originated in small-claims court where no such rule applied); Salman v. Newell, 885 P.2d 607 (Nev. 1994) (trust could not proceed *pro se*, and non-attorney trustee could not represent trust); E & A Assocs. v. First Nat'l Bank, 899 P.2d 243 (Colo. Ct. App. 1994) (nonattorney general partner could not represent partnership). Some courts have made narrow exceptions where the proceeding would not be unduly impaired, in view of the nature of the litigation, or where enforcing the rule would effectively exclude the entity from court. *E.g.*, *In re* Unauthorized Practice of Law Rules, 422 S.E.2d 123 (S.C. 1992) (business may be represented in civil-magistrate proceedings by nonattorney); Vermont Agency of Natural Res. v. Upper Valley Reg'l Landfill Corp., 621 A.2d 225 (Vt. 1992), and authority cited. RESTATEMENT, *supra* note 40, Comment D.

their personal rights but rather the corporation's and, thus, do not qualify under the *pro se* exception.[91]

The corporate variety of the *pro se* right allows the corporation's in house, employee-lawyer to represent it in court rather than requiring the corporation to hire outside legal counsel. Since the in house, employee-lawyer is an agent of the corporation, his or her appearance in court is considered to be the corporation's appearance. Even though corporations cannot practice law, they are allowed this type of *pro se* appearance so long as the subject of the legal proceedings is the corporation's own rights and not the rights of others. To allow the latter would be to allow the corporation to practice law for another's benefit.

III. TEXAS EXECUTORS AND THE UNAUTHORIZED PRACTICE OF LAW

A. Whose Rights Are At Stake

Texas courts that deny executors' *pro se* rights do so out of an unauthorized practice of law concern.[92] There is no law that explicitly mandates the retention of an attorney by an executor. The probate code authorizes executors to hire attorneys with estate funds, but it is otherwise silent as to the attorney-executor relationship.[93] There are innumerable cases involving this right to use estate funds to hire an attorney for the executor, but none of these cases premise the right on the legal necessity of the hire.[94] The allowance of the expense has never been construed to mean it is obligatory.

The unauthorized practice of law concern with respect to executors is whether or not they qualify for the *pro se* exception in Texas. The legal

[91] Kunstoplast of Am., Inc. v. Formosa Plastics Corp., 937 S.W.2d 455, 456 (Tex. 1996) (generally, a corporation may be represented only by a licensed attorney). *But see*, Custom-Crete, Inc. v. K-Bar Services, Inc., 82 S.W.3d 655 (App. 4 Dist. 2002) (letter of non-attorney corporate representative, which denied breach of contract claims against corporation, was sufficient to avoid no-answer default judgment).

[92] *See, e.g.*, Travis County Court Policy Regarding Pro Se Applicants available at http://www.co.travis.tx.us/probate/pdfs/pro_se.pdf (last visited September 19, 2006).

[93] TEX. PROB. CODE ANN. § 242 (Vernon 2003); 18 WOODWARD, *supra* note 28 § 729; 2 DESHAZO, *supra* note 7, § 10:21.

[94] *Id*.; *See, e.g*., Callaghan v. Grenet, 66 Tex. 236 (1886); Williams v. Robinson, 56 Tex. 347 (1882); Dallas Joint Stock Land Bank v. Maxey, 112 S.W.2d 305 (Civ.App.1937, n. w. h.); *see* W.S. Simkins, THE ADMINISTRATION OF ESTATES IN TEXAS 3D. § 270 (1934).

question is whether or not an executor as *the party appearing* in court would be *the person with rights* being prosecuted or defended.[95] The statute guarantees the right to appear in person without an attorney so long as the party appearing is the party with the rights at stake. When an executor appears in a Texas probate court, is the executor appearing in person to prosecute or defend *the executor's* rights? Or is the executor appearing in person to prosecute or defend another person's rights? If so, who is this other person? Is the estate this other person? Are the beneficiaries this other person?

Conceptually, there are three options for settling the rights of executors to appear *pro se*. One option – the entity approach—is to claim that the rights at stake in probate court proceedings belong to the estate. The second option – the "Minnesota rule"—is to claim that the rights belong to the beneficiaries. The third option is to claim that the rights belong to the executor. In chart form, the options are as follows:

Executors and Pro Se Representation: Whose Rights Are At Stake?

Party Appearing	**Party With Rights**	**Pro Se Representation?**
Executor	Estate	No
Executor	Beneficiaries	No
Executor	Executor	Yes

Thus, whether or not the executor qualifies for *pro se* representation depends upon whether the executor is representing his or her own rights in the proceeding. This Article argues that the third option is required under Texas law. It rejects both the entity approach (the first option) and the Minnesota rule (the second approach).

B. Rejecting The Entity Approach

As discussed above, the general rule in Texas and elsewhere is that a non-attorney owner, officer, or other agent of a business entity does not have the right to appear in court to prosecute or defend the business entity's rights.[96] There is no *pro se* right in the entity's non-attorney agents because those agents' rights are not at stake in any court appearance. In Alabama,[97]

[95] TEX. R. CIV. P. 7: "Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court."

[96] *See supra* pp. 15-16.

[97] The Alabama Supreme Court adopted the reasoning that an estate is a legal entity in Ex

Maine[98] and South Carolina,[99] the courts have extended the reasoning of this business entity rule to estates without addressing the fundamental question.

When solving the *pro se* rights equation for an executor, the fundamental question is whether or not a non-attorney executor relates to the estate in the way that a corporation's non-attorney officer or other agents relate to the corporationWhile we may casually speak of an executor representing "the estate," the question with respect to *pro se* representation is how legally similar are the two relationships.

An estate is very much unlike a corporation because it is not a legal entity. It can neither sue nor be sued. [100] The "estate" is no more than the property owned by the decedent at death and is legally defined as such.[101] Because estates are not entities with legal rights, the Texas cases in which corporate agents are prohibited from appearing on behalf of the corporation are not analogous.

Proponents of the entity approach could point to the exceptions to the general rule. It is true that there are limited exceptions to the general rule, such as giving estates entity-like rights to be a partner in a Texas partnership.[102] However, the Texas Supreme Court has consistently dismissed any claims that an estate should be treated as an entity as *a general rule* in Texas and has specifically denied that an estate is the party with rights in a law suit.[103]

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parte Ghafary, 738 So.2d 778, 780 (Ala. 1998) and affirmed it in Godwin v. McKnight, 784 So.2d 1014, 1014 (Ala. 2000) in which it asserted without further analysis that the executor's filings were "on behalf of" the estate.

[98] The Supreme Judicial Court of Maine adopted the reasoning that an estate is a legal entity in State v. Simanonok, 539 A.2d 211, 212 (Me. 1988).

[99] The Supreme Court of South Carolina adopted the reasoning that an estate is a legal entity in Brown v. Coe, 616 S.E.2d 705, 707-708 (S.C. 2005).

[100] Dueitt v. Dueitt, 802 S.W.2d 859 (Tex.App.—Houston [1st Dist.] 1991, no writ); Henson v. Estate of Crow, 734 S.W.2d 648 (Tex. 1987); Price v. Estate of Anderson, 522 S.W.2d 690 (Tex. 1975); *see also* JUDGE ADELE HEDGES & LYNNE LIBERATO, TEXAS PRACTICE GUIDE: CIVIL APPEALS §5:38 (2006); 17 WOODWARD, *supra* note 7, § 178; 29 TEX. JUR. 3D DECEDENTS' ESTATES §544 (2006).

[101] § 3(l).

[102] For discussion of estates as partners, *see, e.g.*, 19 ROBERT W. HAMILTON ET. AL., TEXAS PRACTICE, BUSINESS ORGANIZATIONS §6.5 (2005).

[103] *Dueitt*, 802 S.W.2d 859; *Henson*, 734 S.W.2d 648; *Price*, 522 S.W.2d 690; ; *see also* HEDGES & LIBERATO, *supra* note 94; 17 WOODWARD, *supra* note 7, § 178; 29 TEX. JUR. 3D DECEDENTS' ESTATES §544. For a discussion of the general rule that only the executor has the

C. The Minnesota Rule

At the height of the organized bar's twentieth century campaign against banks providing legal services,[104] the Minnesota Supreme Court held that a bank serving as executor does not have the right to proceed *pro se*.[105] This kept the bank's lawyers from appearing in probate court on behalf of the bank, which required the bank to hire outside legal counsel. This "Minnesota rule" has been followed in the Supreme Courts of Arkansas, Wisconsin, Kentucky and Florida but rejected by the Supreme Court of Ohio (even though it was considering the same issue in the same Great Depression-era anti-bank legal environment).[106]

1. Minnesota

The seminal Minnesota case was a 1930 professional discipline case, *In Re Otterness*.[107] An attorney who was a salaried employee of a bank turned

right to be the party to the suit and some of the exceptions to the general rule, *see* 17 WOODWARD, *supra* note 7, § 171; AUTHOR, TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION §§ 46.01-0.2 (year); HEDGES & LIBERATO ,*supra* note 94; 17 WOODWARD, *supra* note 7, § 178; 29 TEX. JUR. 3D DECEDENTS' ESTATES §544.

[104] *See supra* p. 9.

[105] *In Re* Otterness, 181 Minn. 254, 223 N.W. 318 (Minn. 1930).

[106] A too brief review of 19 A.L.R.3d 1104 regarding the "necessity that executor or administrator be represented by counsel in presenting matters in probate court" could leave the impression that the Minnesota rule is more settled law than it is. This secondary source cites all of the cases described but, for example, cites the Ohio case (described below) in support of the proposition even though the Ohio case rejected the Minnesota rule. As to the other cases the American Law Reporter cites, none are on point even though close: Wright, State *ex rel.* v. Barlow, 132 Neb. 166, 271 N.W. 282 (1937) (this was a criminal case against a man who held himself out as a lawyer and given advices to executors and administrators; the *pro se* exception was not relevant); Detroit Bar Ass'n v. Union Guardian Trust Co., 282 Mich. 707, 281 N.W. 432 (1938) (this was a case of a corporation using non-lawyers to appear in court on its behalf, which is not permitted since the non-lawyers are representing the corporation, not themselves; the issue was a corporation's general *pro se* rights rather than an executor's specific *pro se* rights); Grand Rapids Bar Ass'n v. Denkema, 290 Mich. 56, 287 N.W. 377 (1939) (this is the case of a real estate broker providing legal services; although dicta recites the Minnesota rule, the broker had provided legal advice to executors and administrators but had not himself appeared as such; the *pro se* exception was not relevant). This *Denkema* case cites several older cases along with the *Otterness* case, but the older cases are all examples of someone who was not a lawyer holding himself out as a lawyer—and not cases in which an executor's right to appear *pro se* was relevant. Similarly, see, for example, Ferris v. Snively, 19 P.2d. 942 (Wash. 1933) and In re Brainard, 39 P.2d. 769 (Ia. 1934).

[107] *In Re Otterness*, 223 N.W. 318.

over to the bank his legal fees charged for the probate court work he did.[108] The Minnesota Supreme Court censured the attorney. [109] The bank was not permitted to practice law in Minnesota, and the attorney was facilitating its practice because the probate court work profited the bank.[110] The *pro se* exception was a potential defense since had it qualified, the bank would not have been engaged in the unauthorized practice of law, and the attorney would not have been guilty of assisting it.[111] That is, while the bank could not appear in probate court on behalf of the beneficiaries of the estates, if its court appearances were for its own benefit as executor of the estates, it would not be engaged in the *unauthorized* practice of law but rather covered by the *pro se* exception. Dismissing the potential *pro se* defense, the court cited, explained, and distinguished the *pro se* exception in a single short paragraph: as the bank had no beneficial interest in the estate, it had no right to appear *pro se*.[112] The only exception according to the Minnesota court would be if the bank were to defend personal rights as an executor, such as if it were to defend against a fiduciary misconduct charge.[113]

2. Arkansas

In the 1954 case *Arkansas Bar Ass'n v. Union Nat'l Bank of Little Rock*, the Arkansas Supreme Court followed the Minnesota rule when it too considered a bank's use of salaried attorneys to engage in the practice of law in the probate courts. Again addressing the *pro se* exception in a situation in which it could be used defensively by a bank, the court opined that the bank executor was not acting on its own behalf but on behalf of the beneficiaries. Thus, the court concluded the bank-executor did not qualify for the *pro se* exception.[114] (Almost fifty years later, the Arkansas Supreme Court re-affirmed this as the rule in Arkansas.)[115]

[108] *Id.* at 256.

[109] *Id*. at 258.

[110] *Id.* at 257.

[111] *See supra* pp. 15-16.

[112] *In Re Otterness*, 223 N.W. 318 at 258.

[113] *Id.*

[114] Arkansas Bar Ass'n v. Union Nat'l Bank of Little Rock, 224 Ark. 48, 273 S.W.2d 408 (1954).

[115] Davenport v. Lee, 72 D.W.3d. 85 (Ark. 2002).

3. Kentucky

As in Minnesota and Arkansas, it was banks allegedly engaged in the practice of law in the probate courts that brought the issue of *pro se* executors to the Supreme Court of Kentucky in the 1965 case *Frazee v. Citizens Fidelty Bank & Trust Company*.[116] Specifically, the court was considering contempt proceedings against five banks for the unauthorized practice of law through their salaried employee-attorneys.[117] The banks claimed protection under a Kentucky statute explicitly confirming *pro se* rights to fiduciaries.[118] The court invoked its superiority over the legislature on these issues and disregarded the statute.[119] Citing its own cases against unauthorized practice but offering no further analysis, the court simply stated that "fiduciaries are in no different position" than other unlicensed persons without a "beneficial interest in the corpus of the estate."[120] Thus, the court denied the banks the right to appear *pro se*.

4. Wisconsin

The first state supreme court to consider the *pro se* executor issue outside the context of preventing banks from practicing law for profit was the Wisconsin court in the 1965 case *Baker v. County Court of Rock County*.[121] An individual executor fired his attorney and then made *pro se* filings.[122] The courts rejected the filings and ordered the executor to hire an attorney.[123] As was required in the Wisconsin probate process, the executor had requested the probate court to review and adjudicate the rights of the beneficiaries in certain distributions.[124] The probate court thought that it was rare for beneficiaries to hire their own attorneys to review these procedures, and, thus, the court reasoned it was incumbent upon the executor to hire an attorney; otherwise, the legal rights of the beneficiaries would go un-represented by an attorney, which would place an undue

[116] Frazee v. Citizens Fidelty Bank & Trust Co., 393 S.W.2d 778 (Ky. 1965).

[117] *Id.* at 781.

[118] *Id*. at 781-782.

[119] *Id.* at 783.

[120] *Id*. at 782.

[121] Baker v. County Court of Rock County 29 Wis. 2d 1, 138 N.W.2d 162 (1965).

[122] *Id*. at 164.

[123] *Id*.

[124] *Id*. at 165.

burden of review on the court.[125]

The Wisconsin court deviated from the Minnesota rule in two significant ways, however. First, it opined that not all *pro se* court filings by an executor are prohibited but only those that raise complex legal questions.[126] Second, the court made clear that it rejected the notion that even a beneficially interested executor could appear *pro se*. [127] The court's reasoning was that executors are officers of the probate court, and as part of their management by the court, they must obey any orders to hire an attorney, which the court has good reason to do in order to manage its own burden of reviewing pleadings.[128]

5. Florida

The Florida Supreme Court followed the Minnesota rule in its 1974 case *Falkner v. Blanton*.[129] Like the Wisconsin court, the Florida Supreme Court considered the *pro se* appearance rights of an individual executor outside of the context of prohibiting banks from practicing law in the probate court.[130] However, in its single paragraph opinion, the court distinguished itself from the Wisconsin court by holding that an individual executor would have *pro se* rights so long as the executor was the sole beneficiary of the estate.[131] Unlike the Wisconsin court, it did not distinguish between simple and complex proceedings.

6. Ohio's Rejection of the Minnesota Rule[132]

Similarly to the situations considered in Minnesota, Kentucky, and Arkansas, in the 1937 case, *Judd v. City Trust Savings Bank* the Ohio Supreme Court considered banks that were engaged in estate planning and probate court work in Ohio.[133] It held that the bank could not provide estate

[125] *Id*. at 167.

[126] *Id.*

[127] *Id.* at 171-172.

[128] *Id.*

[129] State *ex rel*. Falkner v. Blanton, 297 So.2d 825 (Fla. 1974).

[130] *Id.* at 825.

[131] *Id.*

[132] The Supreme Court of Indiana also rejected the Minnesota approach to the *pro se* exception but with respect to trustees (*i.e.*, the case did not address executors' rights). Groninger v. Fletcher Trust Co., 220 Ind. 202, 41 N.E.2d 140 (1942).

[133] Judd v. City Trust Sav. Bank, 133 Ohio. St. 81, 12 N.E.2d 288 (1937). In Ohio, once the

planning for clients, even if it were named as the fiduciary in the estate planning documents.[134] However, it held that banks were covered by the *pro se* exception (and thus not engaged in the unauthorized practice of law) if their salaried attorney-employees appeared in probate court on behalf of the banks as executors.[135] The court noted that executors are bound to fulfill various duties and that they are personally liable for mismanagement, misconduct, or neglect in connection with these duties.[136] The attorneys employed by the banks were thus employed so that the bank could discharge its duties without being subject to suit.[137] The court noted that any beneficiary dissatisfied with the way in which the executor discharges its duties can sue the executor.[138] Nevertheless, as a result of their *pro se* rights, the bank-executors could represent themselves in court (through their salaried-employee attorneys) without being engaged in the unauthorized practice of law.[139] Thus, the Ohio Supreme Court rejected the notion that the executors were only representatives of the beneficiaries' interests and focused instead on the executor's personal liability in discharging its duties.

D. Rejecting the Minnesota Rule in Texas

Texas courts should reject the Minnesota rule for multiple reasons, especially because it is inconsistent with contemporary Texas Supreme Court jurisprudence.

1. The Historical Battle Between Banks and the Bar

The Minnesota rule emerged during the turf battle between attorneys and bank trust officers over who had what capacities in estate administration.[140] This turf battle was the 20th century genesis of the campaign against the unauthorized practice of law, and the initial

bank is appointed "it can handle all probate and other legal work necessary to execute the trust." 2 ANGELA G. CARLIN, BALDWIN'S OHIO PRACTICE MERRICK-RIPPNER PROBATE LAW §53:6 (2006).

[134] *Id.* at 85, 291.

[135] *Id.* at 94, 294.

[136] *Id.* at 90-92, 292-294.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *See supra* p. 9.

Minnesota case, the Kentucky case, the Ohio case, and the Arkansas case all have to be seen in this greater historical context. The Kentucky court was not only siding with the bar over the banks in the contempt proceeding against the banks, but also was defending its own turf against the legislature; the court was asserting its rights over the legislature's when it rejected both the substance and the form of the legislature's permission for fiduciaries to appear *pro se* (permission one surmises that may have been granted after the banks' lobbying). [141]

As the *pro se* exception was a potential defense for the banks, it was removed with cursory reasoning by those courts following the Minnesota rule. As discussed above, corporations cannot appear *pro se* through their non-lawyer employees.[142] Thus, the right for a corporation to appear *pro se* is simply the right not to spend their funds on *outside* legal counsel. The banks that were providing probate services did so with their in house legal counsel in order to make a profit. Had the courts concluded that it was the bank's rights at stake in the probate proceedings, the banks could have continued to make a profit with their in house legal counsel. But by concluding the banks were not acting for their own benefit but for the beneficiaries, the banks were not permitted to proceed with their in house legal staff in competing with lawyers for probate services.

The Minnesota rule courts were explicitly interested in stopping bank competition for probate services. There is nothing said about protecting the public from ill-prepared non-lawyers since, after all, those who were representing the banks were, indeed, lawyers. Historically, this type of economic defensiveness by the bar eventually led to anti-trust concerns, which eventually led to the decline in the zealousness of unauthorized practice prosecutions.[143] In the early days, it was not shameful for the bar to assert that economic interests were behind its unauthorized practice prosecutions.[144] Eventually, of course, this did become shameful, and the

[141] Frazee v. Citizens Fidelty Bank & Trust Co., 393 S.W.2d 778, 783 (Ky. 1965).

[142] *See supra* pp. 15-16.

[143] *See supra* pp. 9-12.

[144] Rhode, *supra* note 43; Denckla, *supra* note 43, at 2584-2585. Initially articulated by the bar in terms of economic self-interest, the public justification for the prohibition was eventually changed to protecting the public (though the public itself has not given much support to the bar's efforts and the empirical research indicates the public has suffered little, if any, as a result of non-lawyers practicing law). Rhode, *supra* note 43, at 3; RESTATEMENT, *supra* note 40, Note on Comment A, Comment B, and Comment C.

justification gave way to expressing concerns about protecting the public.[145] In an age in which access to justice is a greater concern than economic protectionism, and in an age in which there are so many exceptions to the unauthorized practice prohibition, the zealousness of the Minnesota rule courts to restrict judicial access is anachronistic.

2. Failure to Respect the Executor-Beneficiary Fiduciary Relationship

Focusing on denying banks their profit-center of employed probate court attorneys, most of the Minnesota rule courts did not focus on the uniqueness of the executor-beneficiary relationship.[146] However, the uniqueness of the executor-beneficiary relationship is essential to understanding the *pro se* rights of executors. What the Minnesota rule courts have done is to treat executors as legally transparent–as agents of the beneficiaries—just as the employee-attorneys were agents of the banks. This made their reasoning syllogistic but at odds with the intentional division of management rights from beneficial interests. None of the courts discussed this division. These courts' conclusion that the executors have no right to appear in court followed directly from their observation that the beneficiaries have the beneficial interests.[147]

However, by definition, executors have special, specific, and statutory rights and duties that are not derived from beneficial interests. The unique rights of the executor are reflected in the specific statutory entitlement of the person nominated to be executor to probate the will (even though the only other persons entitled to probate the will are those who have a beneficial interest in the estate.)[148] When a nominated executor appears in court to probate the will, he or she is acting pursuant to a specific statutory definition distinct from any beneficial interest.[149] While the beneficiaries of the will may receive a benefit by its probate, the executor's choice to

[145] *Id.*

[146] The exception was the Wisconsin court which focused on the executor's relationship to the court during estate administration. Baker v. County Court of Rock County 29 Wis. 2d 1, 8 138 N.W.2d 162, 166 (1965).

[147] *In Re* Otterness, 181 Minn. 254, 258 223 N.W. 318, 320 (1930); Arkansas Bar Ass'n v. Union Nat'l Bank of Little Rock, 224 Ark. 48, 52, 273 S.W.2d 408, 411 (1954); Frazee v. Citizens Fidelty Bank & Trust Company, 393 S.W.2d 778, 782 (Ky. 1965); Falker v. Blanton, 297 So.2d 825, 825 (Fla. 1974).

[148] TEX. PROB. CODE ANN. §76 (Vernon 2003); 17 WOODWARD, *supra* note 7, § 243.

[149] *Id.*

probate the will is personal.[150] There is no duty to probate the will.[151] Thus, the nominated executor cannot be forced to do so by the beneficiaries. Failing to probate the will does not reduce his or her qualification to be appointed executor.[152] Furthermore, the beneficiaries' rights are not affected either way. 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. And in the Texas independent administration system, this is the only court appearance required.

Additionally, under the Texas probate code, even though not a beneficiary of the estate, the executor has the sole right to collect, possess, and manage the assets of the estate in his or her personal prudent discretion.[153] This is true even though title to the assets of the estate vests immediately in the beneficiaries upon the testator's death (which is necessary to avoid a lapse in legal title at death.)[154] The executor's management right includes the exclusive right to bring estate-related law suits.[155] Those law suits must be brought by the executor *in the name of the executor* rather than in the name of the estate or the beneficiaries.[156] Since the beneficiaries do not have the right, the executor certainly does not

[150] *Id*.

[151] The custodian of the will upon the testator's death should deliver it to the proper court clerk, but there is no duty to probate a will in Texas. §75. 74 TEX. JUR. 3D WILLS §361.

[152] § 78 provides the only grounds on which an executor can be disqualified from serving. 17 WOODWARD, *supra* note 7, § 252; 1 DESHAZO, *supra* note 25, § 5:14.

[153] §37, §230, §232. Blinn v. McDonald, 92 Tex. 604, 612, 46 S.W. 787 (1898); Morris v. Ratliff, 291 S.W.2d 418 (Civ. App. 1956, writ ref'd n. r. e.); Freeman v. Banks, 91 S.W.2d 1078 (Civ. App. 1936, writ ref'd.) *See* 18 WOODWARD, *supra* note 28, § 693; 18 TEXAS PRACTICE, PROB. & DECEDENTS' ESTATES §697; 17 WOODWARD, *supra* note 7, § 171; TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION §47.01[2].

[154] *Id*.

[155] For a discussion of the general rule and the rare exceptions, *see* §233A; Gannaway v. Barrera, 74 S.W.2d 717 (Civ. App. 1934), *aff'd on other grounds*, 130 Tex. 142, 105 S.W.2d 876 (1937). Gaston v. Bruton, 358 S.W.2d 207 (Civ. App. 1962, writ ref'd n. r. e.). *See* 17 WOODWARD, *supra* note 7, § 171; TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION §§46.01-0.2; HEDGES & LIBERATO , *supra* note 94; 17 WOODWARD, *supra* note 7, § 178; 29 TEX. JUR. 3D DECEDENTS' ESTATES §544.

[156] *Id.*

derive the right from them. The beneficiaries have no right to manage the executor, and even by pooling all of their rights, the beneficiaries cannot remove the executor for the exercise of his or her discretion one way rather than another so long as he or she discharges the legal duties and abides by fiduciary principles.[157] For example, the executor can decide whether or not to pursue a malpractice claim against the testator's estate planning attorney.[158] Not any one of the beneficiaries and not all of the beneficiaries acting jointly could bring such a claim, nor could they force the executor to bring such a claim. It is the statutory authorities given exclusively to the executor that are at stake when the executor appears in court.Conceptually, the executor might be said to be an agent of the testator but cannot be said to be the agent of the beneficiaries. Though the beneficiaries are destined to be the ultimate recipient of the property, it does not follow the executor is their mere representative: the executor's rights to manage the estate are distinct from the beneficiaries' interests and are not derived from them.

As the Ohio court noted, the executor is given these management rights subject to high fiduciary duties, and the beneficiaries are given no rights at all other than to sue if the duties are unfulfilled.[159] This is the essence of the fiduciary relationship between the executor and the beneficiaries. Under Texas law executors are given the exclusive management rights but owe the beneficiaries the highest duties of good faith, fidelity, loyalty, fairness, and prudence.[160] The Minnesota rule reduces the executor's court appearance rights in an apparent attempt to ensure the beneficiaries' interests are protected, but this ignores the role of fiduciary duties for that purpose. These duties are imposed by the law precisely because the law gives the executor the exclusive rights to manage the estate. Because of these duties,

[157] § 222; 17 WOODWARD, *supra* note 7, § 508.

[158] Belt v. Oppenheimer, 192 S.W.3d 780 (Tex. 2006) (malpractice claim in the estate-planning context may be maintained in Texas only by the estate planner's client or the client's personal representative)

[159] *Id*. at 90-92, 292-294. The Minnesota rule courts could have protected both the historical understanding and their objective of denying *pro se* rights to bank executors simply by finding it a violation of the executor's fiduciary duties to proceed *pro se*. However, the courts did not give this type of fiduciary analysis. Instead, the courts derived the right to appear in court from beneficial interests– deciding who had the right to appear with reference to who had the rights to benefit.

[160] Humane Soc. of Austin & Travis County v Austin Nat'l Bank, 531 S.W.2d 574 (Tex. 1975), *cert. denied*, 425 US 976, 48 L Ed 2d 800, 96 S Ct 2177 (1976); McLendon v McLendon, 862 SW2d 662 (Tex. App.—Dallas 1993, writ denied); Ertel v O'Brien 852 SW2d 17 (Tex. App.—Waco, writ denied).

the executor's bond or personal assets protect the beneficiaries. It is this liability that ensures the executor's prudent exercise of the management rights. Because of this liability exposure, the Ohio court described the executor's interest in avoiding a fiduciary suit as "very real, vital, and substantial."[161] In contrast, the Minnesota rule cases do not mention these duties or analyze the fiduciary relationship. Instead, they simply reject the executor's management rights by reciting the un-disputed fact that it is the beneficiaries who receive the property.

3. Inapplicability of Wisconsin Rationale

The unique reasoning of the Wisconsin court deserves special mention as to why Texas courts should reject it specifically along with the Minnesota rule generally.

Unlike the other Minnesota rule cases, the Wisconsin court did not attempt to settle who had the right to appear in court merely by reciting who had the beneficial interest. Instead, the Wisconsin court's reasoning invoked the complexity of the Wisconsin probate system and the need of the executor to have the court make determinations. But the Texas probate system has been designed without undue complications, and executors do not seek the type of determinations that the Wisconsin system requires.[162] Indeed, the premise of complexity is essential to the Wisconsin holding because the court reasoned that not all court appearances required a lawyer, only the ones involving complex issues.[163]

The Wisconsin court also based parts of its reasoning on the fact that most beneficiaries do not hire an attorney to review their rights.[164] The court then concluded that the executor must hire one so that the beneficiaries' rights are protected.[165] This, too, is specifically unpersuasive in Texas because under Texas law an executor's attorney has no duty to the beneficiaries but only to the executor. [166]

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[161] Judd v. City Trust Sav. Bank, 133 Ohio. St. 81, 91, 12 N.E.2d 288, 293 (1937).

[162] Baker v. County Court of Rock County 29 Wis. 2d 1, 8 138 N.W.2d 162, 166 (1965). Texas probate court judges are not responsible for the acts of independent executors. §§ 145(q), 36, 145(h); 17 WOODWARD, *supra* note 7, § 75; *Id.* § 497; 1 DESHAZO, *supra* note 25, § 1:24. Young Lawyers Association Needs of Senior Citizens Committee, *supra* note 23; Pacheco, *supra* note 23.

[163] *Baker*, 9 138 N.W.2d at 167.

[164] *Id.*

[165] *Id.*

[166] Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996).

4. "Practice of Law" Outside the Courtroom

Under the Minnesota rule, executors are engaged in the unauthorized practice of law whenever an attorney fails to represent them *in court*. A consequence of this rule is that executors are engaged in the unauthorized practice with respect to a variety of *non-courtroom tasks* as well. As discussed above, the Texas standards for unauthorized practice include, not only court appearances, but providing services that have a "legal effect" that must be "carefully determined"[167] or taking any action in a matter that is "connected with the law."[168] Delineating which of the executor's management tasks did not require the executor to obtain a legal opinion would be considerably impractical if every legally significant decision the executor made might be considered the practice of law. Defending the executors' right to appear *pro se* in probate court also defends the executors' right to manage the estate without the obligation of anxiously securing legal opinions to avoid the unauthorized practice of law *outside of the courtroom*. Individuals managing their own affairs have the right to make legally significant decisions for themselves, and so do executors (who can be sued by the beneficiaries for failing to act as a prudent individual would in managing those affairs).

In some of those states adopting the Minnesota rule, the courts have been forced to consider which of an executor's out-of-court tasks do require an executor to hire an attorney.[169] Historically, as explained above, the goal of the Texas probate system has been to allow non-lawyers to administer the estate without seeking permission at every turn.[170] Prohibiting the executor's performance of non-courtroom tasks would defeat the purpose of the simplified independent administration system by replacing the judge's management of the estates in Texas with attorneys'. Legal fees and complications would certainly increase beyond the current level if there were a legal obligation of an attorney to review all of an executor's legally significant letters, agreements, and decisions to ensure that the executor is

[167] TEX. GOV'T CODE ANN. § 81.101 (Vernon 2004).

[168] Crain v. UPLC, 11 S.W.3d 328, 333 (Tex. App.—Houston [1st Dist.] 2000, pet. denied), *cert. denied*, 532 U.S. 1067 (2001); Davies v. Unauthorized Practice Committee, 431 S.W.2d 590 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); Stewart Abstract Co. v. Judicial Commission, 131 S.W.2d 686, 689 (Tex. Civ. App.—Beaumont 1939, no writ).

[169] *See.,e g*., Frazee v. Citizens Fidelty Bank & Trust Co., 393 S.W.2d 778, 784-785 (Ky. 1965).

[170] TEX. PROB. CODE ANN. §6 (Vernon 2003); 17 WOODWARD, *supra* note 7, §§ 44-45; 2 DESHAZO, *supra* note 7, § 14:36.

not engaged in the unauthorized practice of law.

5. Professional Responsibility and Liability Issues Under the Minnesota Rule

The Minnesota rule has disturbing, unintended ethical consequences for Texas lawyers, which is another set of reasons to reject it.

a. Executors Practicing Law Outside the Courtroom

A Texas attorney cannot ethically assist anyone engaged in the unauthorized practice of law.[171] If the executor is at risk for engaging in the practice of law by making legally significant out-of-court decisions during the estate administration, the attorney has an obligation in order to ensure that his or her client has not crossed the line into the practice of law in order to ensure he or she is not assisting in unauthorized practice. As a practical matter, the attorney's job would be transformed from advising the executor when requested to supervising the executor at all times. This would be necessary to make sure the attorney has not unwittingly helped the executor engage in the practice of law. Thus, it is not only a matter of increased legal fees for the attorney reviewing all of the executor's legally significant decisions but also a question of what level of supervision and detailed instruction is ethically required of the Texas lawyer in order to keep the client from engaging in the practice of law.

b. Unbundled Probate Services

If an executor has the right to proceed *pro se*, then a Texas attorney is able to provide unbundled legal assistance in probate court without breaching any ethical duties. For example, if an executor has the right to proceed *pro se*, an attorney might draft the application for the probate of the will and send the executor to court with it. However, if the executor does not have the right to proceed *pro se*, drafting the documents for the proceeding would be ethically prohibited.[172] This type of unbundled assistance might provide a significant cost savings for some clients and may even be provided *pro bono*, especially to the attorney's friends and family.

[171] TEX. DISCIPLINARY R. PROF'L CONDUCT 5.05.

[172] *Id.* 5.05.

c. Knowing the Client's Identity

The fundamental issue in the executor's right to proceed *pro se* is whether the executor is prosecuting the executor's rights or the beneficiaries' rights. Under the Minnesota rule cases, the claim is the executor is prosecuting the beneficiaries' rights when he or she appears in court. This, those cases conclude, is why the executor cannot appear *pro se*. This would mean that when the executor's attorney appears in court, it is to represent the estate's beneficiaries. Thus, if the executor does not have *pro se* rights, then the executor does not have the right to an exclusive attorney-client relationship with his or her attorney. As discussed below, the right of the attorney and the executor to an exclusive attorney-client relationship is well established in Texas law.[173] The attorney's certainty that he or she is advising the executor as to the executor's rights is a corollary to knowing the attorney is not obligated to advise all of those with beneficial interests in the estate (including creditors) as to their rights. It is this certainty that allows the attorney to behave both ethically and competently, knowing who the client is—and, just as importantly, who the client is not.

6. Texas Supreme Court Jurisprudence and the Minnesota Rule

The Minnesota rule cases are also inconsistent with contemporary Texas Supreme Court jurisprudence. One Texas Supreme Court case explicitly affirms the right of an executor to appear *pro se* while another makes clear that the attorney-client relationship is between the executor and the attorney (not the estate or the beneficiaries).

a. Pro Se Rights of an Executor

In the 1983 case *Ex parte Shaffer* the Texas Supreme Court considered whether a Texas executor had *pro se* rights in probate court. [174] In the case, the executor was sued for an alleged breach of his fiduciary duty.[175] Before the trial, the executor's attorney withdrew. The Dallas County Probate Court Number 3 ordered the executor to retain a new attorney, which the executor failed to do.[176] The judge ordered the executor to be held in the

[173] *See infra* pp. 31-32.

[174] *Ex parte* Shaffer, 649 S.W.2d 300 (Tex. 1983).

[175] *Id*. at 301.

[176] *Id*.

county jail in contempt of court until he hired an attorney.[177] The Texas Supreme Court held the probate judge's order void.[178] The Texas Supreme Court's reasoning was short and blunt:

> counsel cites no authority, and indeed we can find none, which allows a court to . . . require any party to retain an attorney. . . [O]rdering a party to be represented by an attorney abridges that person's right to be heard by himself.[179]

Presumably because the Texas Supreme Court believed the facts were directly covered by the *pro se* rule, it did not detail its application of the rule. The court's brevity provides an ambiguity for those who favor the Minnesota rule. Those proponents can argue the case simply affirms that an executor is permitted to proceed *pro se* when he or she is "personally liable"—allegations of fiduciary duty breaches—and not when it involves "estate claims." The initial Minnesota case indeed cites this as a *pro se* right. [180]

While superficially plausible, this Minnesota rule distinction is inherently problematic. It makes a distinction between an attorney "for the estate" (when no one is claiming the executor has mismanaged it) and an attorney "for the executor" (whenever there is a claim of mismanagement). It envisions two attorneys for each executor: one to advise the executor on how to prudently handle estate business and one to defend the executor from any suits claiming the executor failed to prudently handle estate business. It is impossible to segregate the executor's need for legal advice in this way. The executor is always exposed to personal claims of wrongdoing when making decisions in administering the estate, and Texas law does not require the hiring of a second attorney to advise the executor when a fiduciary claim is made. Texas law permits the executor's use of estate funds in defense against claims of his or her personal wrongdoing; even if the executor fails in his or her defense, so long as the executor defended the actions in good faith, the executor is entitled to use estate funds for the attorney.[181] There is no such person as the "attorney for the estate." The estate funds legal representation for the executor for routine

[177] *Id*.

[178] *Id*.

[179] *Id*.

[180] *In Re* Otterness, 181 Minn. 254, 358 223 N.W. 318 (1930).

[181] TEX. PROB. CODE ANN. §149C(c) (Vernon 2003); 1 DESHAZO, *supra* note 25, § 5:75.

advice and for defense against fiduciary claims. It is the executor's rights at stake in both situations.

b. Whose Rights Are At Stake?

In the question of the 1996 case *Huie v. DeShazo*, the Texas Supreme Court answered whose rights are the subject of legal representation when a trustee hires an attorney.[182] The Texas court rejected the trends in other states to make the beneficiaries' rights or the trust estate's rights the subject of the legal representation and continued instead with the historical view that it is the fiduciary's rights.[183] The court held that trustees have a right to confidential legal advice in how to manage their trust estates and how best to discharge their duties to the beneficiaries.[184] The trustee is the personal client of the attorney, not a legally transparent representative of the beneficiaries. This is true even when trust estate funds are used to compensate the attorney and even when the beneficiaries are bringing legal claims against the trustee personally.[185]

The right of trustees to pay the attorney with trust estate funds while expecting the attorney to represent the trustee to the exclusion of the beneficiaries is indistinguishable from the right of executors to do so. Executors' standards of performance are the same as those of trustees, and nothing in the Texas Supreme Court's reasoning would mark a difference between executors and trustees. [186] As the executor's—rather than the beneficiaries'—rights are the subject of any legal representation of the executor, it follows that these are the relevant rights at stake when an attorney appears in probate court. Since an attorney would appear in court to prosecute or defend the executor's exclusive right to manage the estate, the executor has the right to appear *pro se* in court with respect to his or her same rights.

The Texas Supreme Court did not hesitate to reject the view that the

[182] Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996).

[183] *Id*. at 924-927.

[184] *Id*.

[185] *Id*.

[186] *See, e.g*., Geeslin v. McElhenney, 788 S.W.2d. 683, 684 (Tex. App—Austin 1990, no writ); Humane Soc. of Austin & Travis County v Austin Nat'l Bank, 531 SW2d 574 (Tex. 1975), *cert denied*, 425 US 976, 48 L Ed 2d 800, 96 S Ct 2177 (1976); McLendon v McLendon, 862 S.W.2d 662 (Tex. App.—Dallas, writ denied); Ertel v O'Brien, 852 S.W.2d 17 (Tex. App.—Waco 1993, writ denied).

beneficiaries are the "real" clients with the "real" interests at stake, which is the principle of the Minnesota rule cases.[187] Instead, the Texas Supreme Court reasoned along the lines of the Ohio Supreme Court focusing on the legal rights to manage rather than the rights to benefit. As the Ohio court made explicit, it is the executor's personal liability for mismanagement that ensures proper management—and not a requirement that the executor hire an attorney to represent the beneficiaries' interests.

E. Waco Court of Appeals

On October 18, 2006, the Waco Court of Appeals considered a ruling in the 77th District Court (Limestone County) in which an independent executor had discharged his attorney after the appeal was perfected.[188] Having no attorney appearing before them prompted the court to consider whether or not an independent executor had the right to appear *pro se*.[189] Without the benefit of a briefing, the court answered itself.[190]

Claiming in one sentence that it was "not all clear" whether or not an independent executor could appear *pro se* under Texas Rule of Civil Procedure 7, the court began the next sentence by concluding that "a plain reading" of the rule suggests the independent executor cannot appear *pro se*.[191] There was not any reasoning between the sentences, which introduced and attempted to resolve the issue without asking the fundamental question as to *whose* rights are at stake when an independent executor appears *pro se*. Begging the question it did not even ask, the court wrote and concluded that the independent executor "is litigating rights in a representative capacity rather than on his own behalf."[192] In dissent, the Chief Justice clarified that the independent executor has all the rights of the decedent, including the right to appear *pro se*.[193] The majority did not consider this claim, nor otherwise investigate whose rights were involved in managing the estate.

[187] "We concluded that, under Texas law at least, the trustee who retains the attorney to advise him or her in administering the trust is the real client, not the trust beneficiaries." *Huie*, 922 S.W.2d at 925.

[188] Steele, 927.

[189] Steele, 928.

[190] Steele, 931.

[191] Steele, 928.

[192] Id.

[193] Steele, 930.

Except for a case denying *pro se* rights to non-attorney representatives of corporations, no Texas cases were cited in the opinion. No mention was made of *Ex parte Shaffer* nor *Huie v. DeShazo*. Further, much to the dismay of the dissenting Chief Justice, no mention was made of the Texas independent estate administration system or the rights of independent executors.[194]

Instead of considering Texas law, the opinion cites a jumble of out-of-state cases, including lower state appellate cases and federal circuit cases rather than authoritative statements from the respective state supreme courts.[195] The Waco court did cite the supreme courts of Alabama, Maine and South Carolina, which each had concluded the estate is a legal entity.[196] Being persuaded by this reasoning, the Waco court failed to cite the Texas law to the contrary.[197] It did cite the Wisconsin supreme court case that adopted the Minnesota rule and the recent Arkansas case that re-affirmed the Minnesota rule in Texas – but it failed to consider the distinction between the two (*i.e.*, that the Wisconsin rationale presumed legal complexities).[198] It also failed to cite any opposing authorities (such as the Ohio supreme court) or Texas-specific considerations (such as the peculiarities of the Texas independent administration system).

The Chief Justice addressed many of these shortcomings. He reminded the majority that the independent executor has the management rights that belonged to the decedent.[199] He criticized the majority for deciding an issue without any briefing, and for its misplaced discussion of and reliance on out-of-state authority, which, he pointed out, the court failed to acknowledge is divided. [200] The Chief Justice's primary concern was the

[194] Steele, 930-931.

[195] For example, rather than considering the case law issued by the Minnesota, Kentucky, Florida, and Ohio supreme courts discussed above, the court cited lower court rulings from Illinois and Nebraska, as well as cases from the 6th, 8th, and 11th federal circuits without acknowledging that only the supreme court of a state speaks authoritatively as to its law. With no shortage of state supreme court cases, this is a curious string of citations. Steele, 928.

[196] Steele, 928.

[197] Dueitt v. Dueitt, 802 S.W.2d 859 (Tex.App.—Houston [1st Dist.] 1991, no writ); Henson v. Estate of Crow, 734 S.W.2d 648 (Tex. 1987); Price v. Estate of Anderson, 522 S.W.2d 690 (Tex. 1975); *see also* JUDGE ADELE HEDGES & LYNNE LIBERATO, TEXAS PRACTICE GUIDE: CIVIL APPEALS §5:38 (2006); 17 WOODWARD, *supra* note 7, § 178; 29 TEX. JUR. 3D DECEDENTS' ESTATES §544 (2006).

[198] Steele, 928.

[199] Steele, 930-931.

[200] Steele, 930-931.

majority's failure to consider the peculiarities and value of the independent administration system and how their expansive holding would mean nothing could be done in any probate judicial proceeding without an attorney. [201] With considerable justification, as explained above, the Chief Justice concluded his dissent:

This is not the law. Further, this holding will come as an enormous surprise to the personal representatives of estates that have been and are currently being probated and who regularly represent the estate as independent executor in judicial proceedings without being represented by counsel.[202]

F. Conclusion

Under Texas law, the executor is representing his or her own rights when he or she (or his or her attorney) appears in probate court. Because under *Huie v. DeShazo*, an attorney could appear in court on behalf of the executor's exclusive right to manage the estate, the executor has the right to appear *pro se* in court with respect to those same rights. *Ex parte Shaffer* must be interpreted as the Texas Supreme Court specifically guaranteeing this right. The Minnesota rule has never been adopted in Texas and is inconsistent with both *Huie v. DeShazo* and *Ex parte Shaffer*. Independently of these Texas Supreme Court cases, the Minnesota rule should be rejected because it obliterates the distinction between vesting management rights in executors and beneficial interests in beneficiaries. It also disregards the role of fiduciary duties in regulating the executor-beneficiary relationship. Adopting the Minnesota rule in Texas would raise professional responsibility issues for Texas attorneys involved in estate administration, such as forcing them into hyper-vigilant supervision of their executor-clients to ensure their clients were not inadvertently practicing law outside of the courtroom. More importantly, the adoption of the Minnesota rule's reasoning that it is the beneficiaries' interests that are the subject of legal representation would contradict the reasoning in *Huie v. DeShazo* that the executor's attorney owes no duties to the beneficiaries.

IV. IMPLICATIONS OF *PRO SE* RIGHTS

Having demonstrated that executors have *pro se* rights in Texas, it is

[201] Steele, 930-931.

[202] Steele, 931.

timely to consider the implications. The chief implication for the probate court system is how best to accommodate *pro se* executors. Attorneys need to be aware of the professional responsibility implications that denying *pro se* rights to executors would have, as discussed above, but should also discuss with their clients their desires regarding permitting, prohibiting, or regulating their chosen executors' *pro se* activities. For executors, the question becomes not whether or not they can proceed *pro se* but under what, if any, circumstances they ought to.

A. Probate Court System Reforms

With some limited exceptions, the general rule is that a *pro se* litigant is held to the same courtroom procedures and standards as an attorney.[203] Thus, there is no legal mandate of special accommodations. However, the judicial trend is towards providing special accommodations in a way calculated to balance both access to justice and judicial efficiency.[204]

Any accommodation of *pro se* executors must reflect the obvious fact: non-lawyers are unlikely to know as much about the law as lawyers. With respect to executors appearing *pro se*, one concern is that the interests of the beneficiaries will not be well served because the executor does not know what to do when. The other concern is that executors not knowing what to do when increases the work load of judges and court staff and decreases the efficiency of the probate system.

Considering how best to respond to the concerns for beneficiaries' interests and judicial efficiency when executors proceed *pro se* requires an understanding of how other jurisdictions accommodate *pro se* petitioners and the uniqueness of the Texas probate court systems.

1. National Experience

The problems of *pro se* representation are well studied, and many different courts are experimenting with solutions. *Pro se* representation is on the rise both at the federal and state levels, with more than 1/3 of the cases filed in federal district court being *pro se*.[205] There is abundant

[203] In a civil proceeding in which plaintiff determined to proceed pro se, no allowance would be made for the fact that plaintiff was not a lawyer. *See, e.g.*, Bailey v. Rogers, 631 S.W.2d 784 (Tex. App.—Austin 1982). (litigants who represent themselves must comply with applicable procedural rules). But *see, e.g.*, Bradlow, *supra* note 84; Holt, *supra* note 84.

[204] *Id.*

[205] Buxton, *supra* note 80, at 112.

scholarly and professional literature on *pro se* representation, including correlating the increase in *pro se* cases with a financial inability to hire counsel.[206] Almost every state participated in a recent national conference on making the judicial system more accessible to *pro se* litigants,[207] and 45% of all jurisdictions have established some sort of *pro se* assistance program or service to increase the ability of *pro se* litigants to participate effectively in the judicial system and, thereby, increase both the effectiveness and the efficiency of the judicial system as a whole.[208] These programs range from providing basic information and forms to providing on-site, *pro bono* legal counsel.

2. Unique Texas Probate Court Considerations

Accommodating *pro se* executors requires acknowledging the uniqueness of the simplified executor-centered independent administration provisions Texas probate.[209] It is relatively informal and easy to use. The purpose of the probate proceedings is simply to publicize basic information about the decedent, the decedent's will, and the property the decedent owned.[210] As mentioned above, the court proceeding to probate a will in Texas requires only about four pages of simple documents and five minutes of time with the judge.[211] These provide basic information and do not require articulating legal doctrines or theories.

Additionally, we have to remember that the probate court's work is not optional. Because of death's universality, the probate court's jurisdiction is also universal. It affects Texans of the lowest and highest economic situations. In this context, given that the national rise in *pro se* appearances has been correlated with the financial inability to retain an attorney,[212] the dominant concern should be to ensure that estates of insufficient value to secure legal services are able to secure legal access.

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[206] *See, e.g.*, Lois Bloom & Helen Hershkoff *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 17 NOTRE DAME. J.L. ETHICS & PUB. POL'Y 475 (2002); Bradlow, *supra* note 84; Holt, *supra* note 84; Kevin H. Smith, *Justice for All?: The Supreme Court's Denial of Pro Se Petitions for Cetiorari*, 63 ALB. L. REV. 381 (1999); Buxton, *supra* note 80, at 103.

[207] Buxton, *supra* note 80, at 118.

[208] *Id.*

[209] *See supra* pp. 4-8.

[210] *Id.*

[211] *Id.*

[212] Buxton, *supra* note 80, at 106.

3. Potential Court Responses

Bearing in mind the uniqueness of the Texas probate system, several reforms and experiments in other jurisdictions might be useful to increasing the effectiveness of *pro se* executors and judicial efficiency without decreasing the financial efficiency of the courts.

a. Education and Orientation

The most basic accommodation for *pro se* executors would be for the court to provide generic information through a web site or otherwise, including explanations of laws and court procedures, as well as form pleadings.[213] Another simple accommodation that is used in some courts is to provide video recorded programs providing the basic information, while other courts sponsor courses for *pro se* litigants in which lawyers, paralegals, or court staff provide orientation to the court system and basic instructions.[214]

b. Assistance

A more involved level of accommodation for *pro se* executors would be to provide assistance in completing specific forms or addressing specific issues. This level of accommodation might range from the use of a document examiner to review documents to ensure they comply with basic requirements to the use of a staff attorney to serve as a "facilitator" to provide more specific information on procedure and assistance in preparation of court documents.[215] In some states, lawyers providing pro bono representation or law students enrolled in law clinics are also used to provide this level of assistance in some courts.[216]

c. Covering Expenses

A fee charged to *pro se* executors should cover the courts' costs for such programs and, perhaps, even offset other court expenses.

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[213] *Id.* at 112.

[214] *Id.* at 123.

[215] *Id.* at 121.

[216] *Id.* at 123.

4. Coordinated Legislative Response

While the probate courts could undertake these reforms on their own, the legislature could play a substantial role in ensuring the willingness of judges, court staff, and lawyers to be involved in these reforms. The legislature should statutorily limit causes of actions against lawyers or others that might arise from providing assistance to *pro se* representatives.

B Advising the Testator and Drafting the Will

Because the testator's intention is the guide in estate administration, the will should reflect the testator's intention with respect to *pro se* estate administration. The risks of *pro se* administration—that is, the executor's exposure to fiduciary litigation and the beneficiaries' exposure to losing property due to the executor's mistakes—as well as the potential cost savings of it should be discussed with the testator. The testator should be left with the final word.

1. Prohibiting Proceeding *Pro Se*

The will could prohibit *pro se* representation by conditioning the executor's appointment on his waiving any right to proceed *pro se*. Since the "practice of law" is not limited to courtroom appearances (which can be easily prohibited), the complication in drafting would be to define the prohibition in a way that would not impair the out-of-court activities an executor might be qualified to do without legal assistance but that might arguably fall within the definition of the "practice of law." For example, would preparing forms to make an insurance claim on estate property be the practice of law when the benefit of the insurance would be for the beneficiaries? While conceptually identical to prohibiting *pro se* representation, requiring the executor to hire an attorney for representing the executor in court would avoid the hard task of defining what exactly the executor could and could not do.

2. Providing Flexibility

The testator may prefer to provide flexibility to the executor. For example, if the testator's child is sophisticated and the testator's estate is relatively simple, the testator might wish to appoint the child as executor and allow her to make the decision at the time. If the testator is not adverse to the executor proceeding *pro se*, he might consider explicit provisions

addressing the situation. For example, perhaps he would like to prohibit the beneficiaries from suing unless the executor was grossly negligent in deciding to proceed *pro se*, or perhaps he would permit the executor to proceed *pro se* only if she posted a bond. Perhaps the most practical provision would be to allow the executor to proceed *pro se* only with the beneficiaries' consent.

C. Should Executors Appear Pro Se?

While it is clear that executors have the legal right in Texas to proceed *pro se*, it is unclear when, if ever, they should. Executors choosing to go without legal counsel run the risk of being sued for breaching duties to the beneficiaries. An inherent disadvantage to defendants of such suits is that the plaintiffs have the benefit of hindsight, which is denied at the time the balancing of risks and benefits must be made. Complicating any sort of risk-benefit calculus by the executor is that the executor never knows what he or she does not know. 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*. The real danger is not that an application for probate will have to be amended to include some overlooked information, but that the executor might, for example, misinterpret a clause in the will in a way that benefits one beneficiary at the expense of another. The most serious estate administration risks for executors are not mistakes in the probate courtroom but mistakes with beneficiaries, creditors, and third parties.

1. Fiduciary Duties and Infallible Hindsight

An executor is charged with duties of good faith, fidelity, loyalty, fairness, and prudence.[217] Presumably a *pro se* executor can act in good faith and with fidelity, loyalty, and fairness towards the beneficiaries.[218] The key question is whether or not an executor would ever be acting prudently by proceeding *pro se*.[219] If the executor cannot establish that his

[217] Humane Soc. of Austin & Travis County v Austin Nat'l Bank, (1975, Tex) 531 S.W.2d 574 (Tex. 1975), *cert denied*, 425 US 976, 48 L Ed 2d 800, 96 S Ct 2177 (1976); McLendon v McLendon, (1993, Tex App Dallas) 862 S.W.2d 662 (Tex. App.—Dallas 1993, writ denied); Ertel v O'Brien,852 S.W.2d 17 (Tex. App.—Waco 1993, writ denied).

[218] Herschbach v. City of Corpus Christi, 883 S.W.2d 720 (Tex. App.—Corpus Christi 1994, writ denied).

[219] TEX. PROB. CODE ANN.. § 230(a) (Vernon 2003); 18 WOODWARD, *supra* note 28, § 693;

or her decision to proceed *pro se* evidenced the prudence an ordinarily capable and careful person would have used in making the decision, he or she can be sued for breaching a duty to the beneficiaries. Such a suit would only be brought if there had been damage to the beneficiaries' interest, so it follows that the executor would only be called to prove the prudence of proceeding *pro se* in the event of some significant problem with the estate's property or beneficiaries. Inevitably, as fiduciaries often discover only after such a claim is brought, the plaintiffs have the benefit of hindsight in second-guessing the executor's decisions. If the executor proceeds *pro se* without a hitch, no one will care. But if any problems arise during the estate administration, the executor has taken the risk that the beneficiaries will sue claiming he or she is responsible on the theory that the problem would have been avoided had the executor been sufficiently prudent to hire legal counsel. Hiring counsel insures against this claim.

2. The Real Work of Estate Lawyers and the Real Risk of *Pro Se* Executors

Appearing in court to probate a will is a necessary but obviously insufficient part of estate administration. The most substantial work of estate administration and the most substantial role of estate lawyers occur outside of the brief probate hearing. Estate lawyers use their practical experience in helping the executor locate and value assets, which may involve choosing between competing appraisals or determining if the executor has an ownership interest in assets the testator may not even realized were owned, such as legal claims.[220] Estate lawyers guide executors through income tax, estate tax, gift tax, generation-skipping transfer tax, and property tax issues. Estate lawyers prepare deeds or other assignments to the beneficiaries, as well as settlement agreements that memorialize the distributions from the estate and the beneficiaries' acquiescence in their propriety. Estate lawyers advise the executor in dealing with creditors' claims. Perhaps most importantly, estate lawyers provide both legal and practical guidance when one or more beneficiaries appear likely to become cross-wise with one another or the executor. The

Int'l First Bank Dallas, N.A. v. Risser, 739 S.W.2d 882 (Tex. App.—Texarkana 1987) (disapproved of on other grounds by, Texas Commerce Bank, N.A. v. Grizzle, 96 S.W.3d 240 (Tex. 2002)).

[220] For example, the testator may have a malpractice claim against his or her estate planning attorney. *See, e.g.*, Belt v. Oppenheimer, 192 S.W.3d 780 (Tex. 2006).

five or so minutes of the routine probate hearing very quickly becomes a distant memory in the estate's administration.

There is a continuum of technical and practical difficulty between the uncontested probate of a will destined for independent administration and a multi-year contested estate litigation. Whether or not a prudent person would proceed *pro se* in estate administration depends upon the person's estimation of where on that continuum the estate's administration will be. While even the most experienced lawyers may misjudge the complications of a particular estate's administration, the *pro se* executor's judgment is presumably going to be made without the benefit of much experience. This lack of experience is likely to miss any number of potential complications a competent lawyer would spot.

a. Complications with Uncontested Probate

The application for the uncontested probate of a will is a simple and relatively informal court proceeding only so long as the original will is offered and was duly executed. A *pro se* executor might not make much of the fact that there is only a photocopy of the will[221] or that one of the witnesses signed the self-proving affidavit attached to the will but not the will itself.[222] The executor may also miss that there is no self-providing affidavit attached to the will.[223] Any of these deviations might require significant additional work to have the will probated; though, to the untrained eye, none of them are likely to seem significant at all. And these are all complications that can arise in uncontested hearings with all of the beneficiaries' supporting both the executor and the will. Yet, their consent and support is legally insufficient to overcome the deficiencies.

b. The Unavoidable Risk of Contest

The contest of a will is very unlike the simple uncontested proceeding requiring knowledge of procedure and strategy in addition to substantive legal information. The risk of the *pro se* executor being defeated on procedural rather than substantive grounds is substantial.[224] However,

[221] *See* WOODWARD, *supra* note 7, § 284.

[222] *See* §59; Boren v. Boren, 402 S.W.2d 728 (Tex. 1996).

[223] *See* §59.

[224] *See, e.g.*, Bloom & Hershkoff, *supra* note 184; Bradlow, *supra* note 84; Holt, *supra* note 84; Smith, *supra* note 184.

unlike most *pro se* litigants whose defeat is consequential only to them, the estate's beneficiaries stand to lose. This is a loss the beneficiaries may seek to recover from the executor. Unfortunately for the *pro se* executor, there is never certainty that a probate hearing initially scheduled for the uncontested docket will remain so.

c. Interpreting the Will

One of the most common legal services lawyers provide during an estate administration is explaining the will's meaning to the executor so that the executor can follow its terms. Although a *pro se* executor might mistake clear wording for clear meaning in a will, an estate lawyer knows better. Is a distribution to be *per stirpes* or *per capita*?[225] Is an individual adopted as an adult a "child?"[226] Is a step-child?[227] What if the testator was divorced from his wife but never changed his will—does she still benefit?[228] How are taxes and expenses to be charged among the beneficiaries' shares?[229] Do non-probate assets bear any of these?[230] The answer to each of these questions will shift benefits and burdens among the beneficiaries, and the answer may not be as clear to the executor as the words of the will. The duty to be fair to the beneficiaries is one the *pro se* executor can risk transgressing when he interprets the will without a lawyer even if the interpretation is in good faith and reasonable.

d. Estate Assets

The job of the executor is to collect the testator's assets and to distribute the assets to the beneficiaries. Like most jobs, it is easier said than done. The ease of this task depends in part on how well organized the testator was, but even the most organized testator's assets might not be so easily collected and distributed. The testator may have legal claims he never considered pursuing, such as claims against beneficiaries for unpaid debts owed. May, must or should the executor pursue such a claim? [231] The

[225] *See* §43.

[226] *See* Lehman v. Corpus Christi Nat'l Bank, 668 S.W.2d 687 (Tex. 1984).

[227] *See* Guilliams v. Koonsman, 279 S.W.2d 579, 583 (Tex. 1955).

[228] *See* §69.

[229] *See* §§ 322A, 322B.

[230] *Id.*

[231] *See, e.g.*, Russell v. Adams, 299 S.W. 889, 894 (Tex. Comm'n App. 1927); Oxsheer v. Nave 40 S.W. 7 (Tex. 1897).

testator's assets are likely to have changed between the date of the will and the date of death. What if assets specifically bequeathed to a beneficiary cannot be found or were sold and replaced with other assets?[232] None of these issues are likely to become evident until after the probating of the will, yet these types of issues are common complications to an executor's attempt to locate and distribute the testator's assets.

e. Summary

It is impossible to catalog the potential complications of an estate administration, even one that seems simple on first review. Even an experienced estate lawyer never knows what all he or she does not know when considering whether or not to take on advising an executor with respect to an estate administration. As a practical matter, a *pro se* executor bears the risk personally when he or she estimates where upon the continuum of ease and trouble the estate's administration will be; disgruntled beneficiaries will be armed with both the rights of those owed the highest duties and the certainty of hindsight as to how problematic the administration became.

D. Conclusion

Executors have the right to proceed *pro se* to probate a will and otherwise administer the estate. However, given the inherent uncertainties of estate administration and the executor's fiduciary duties to the beneficiaries, it is likely unwise for most executors to do so. Nevertheless, the probate courts should consider how best to accommodate *pro se* executors in a way that maximizes judicial access without decreasing judicial efficiency. Since, by definition, Texas attorneys will not be advising *pro se* executors, we should consider advising our testator clients as to the risks and potential benefits of *pro se* probate and ensuring that the testator's balancing of those risks and benefits is reflected in the will governing the executor.

[232] *See, e.g.*, Shriner's Hospital etc. v. Stahl, 610 S.W.2d 147, 150 (Tex. 1980).

West's Ann.Cal.C.C.P. § 384

§ 384. Distribution of unpaid cash residue and unclaimed or abandoned funds in class action litigation

Effective: January 1, 2019
Currentness

(a) It is the policy of the State of California to ensure that the unpaid cash residue and unclaimed or abandoned funds in class action litigation are distributed, to the fullest extent possible, in a manner designed either to further the purposes of the underlying class action or causes of action, or to promote justice for all Californians. The Legislature finds that the use of funds for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes.

(b) Except as provided in subdivision (c), before the entry of a judgment in a class action established pursuant to Section 382 that provides for the payment of money to members of the class, the court shall determine the total amount that will be payable to all class members if all class members are paid the amount to which they are entitled pursuant to the judgment. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue or unclaimed or abandoned class member funds, plus any interest that has accrued thereon, to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent. The court shall ensure that the distribution of any unpaid residue or unclaimed or abandoned class member funds derived from multistate or national cases brought under California law shall provide substantial or commensurate benefit to California consumers. For purposes of this subdivision, “judgment” includes a consent judgment, decree, or settlement agreement that has been approved by the court.

(c) This section shall not apply to any class action brought against any public entity, as defined in Section 811.2 of the Government Code, or against any public employee, as defined in Section 811.4 of the Government Code. However, this section shall not be construed to abrogate any equitable cy pres remedy that may be available in any class action with regard to all or part of the cash residue or unclaimed or abandoned class member funds.

Credits

(Formerly § 383, added by Stats.1993, c. 863 (S.B.536), § 2. Renumbered § 384 and amended by Stats.1994, c. 146 (A.B.3601), § 19. Amended by Stats.1994, c. 237 (S.B.2105), § 1, eff. July 18, 1994; Stats.2001, c. 96 (S.B.1218), § 2; Stats.2017, c. 17 (A.B.103), § 4, eff. June 27, 2017; Stats.2018, c. 45 (S.B.847), § 2, eff. June 27, 2018; Stats.2018, c. 776 (A.B.3250), § 6, eff. Jan. 1, 2019.)

Sections 378 to 381 appear in this volume

Notes of Decisions (20)

West's Ann. Cal. C.C.P. § 384, CA CIV PRO § 384
Current with urgency legislation through Ch. 16 of 2022 Reg.Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Hawai'i Revised Statutes Annotated
Hawai'i Court Rules
Hawaii Rules of Civil Procedure
IV. Parties

Hawai‘i Rules of Civil Procedure, Rule 23

Rule 23. Class Actions

Currentness

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Distribution. Prior to the entry of any judgment under subdivision (c)(3) or the approval of any compromise under subdivision (e), the court shall determine the total amount payable to each class member. The court shall set a date when the parties shall report to the court the total amount actually paid to class members. After the report is received, the court shall direct the defendant, by order entered on the record, to distribute the sum of any unpaid residue after the payment of approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements. Unless otherwise required by governing law, it shall be within the discretion of the court to approve the timing and method of distribution of residual funds and to approve the recipient(s) of residual funds, as agreed to by the parties, including nonprofit tax exempt organizations eligible to receive assistance from the indigent legal assistance fund under HRS section 607-5.7 (or any successor provision) or the Hawai'i Justice Foundation, for distribution to one or more of such organizations.

Credits

[Amended effective January 1, 2000; July 1, 2011.]

Rules Civ. Proc., Rule 23, HI R RCP Rule 23

Current with amendments received through May 1, 2022. Some rules may be more current, see credits for details.

End of Document

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 735. Civil Procedure
Act 5. Code of Civil Procedure (Refs & Annos)
Article II. Civil Practice (Refs & Annos)
Part 8. Class Action (Refs & Annos)

735 ILCS 5/2-807

5/2-807. Residual funds in a common fund created in a class action

Effective: July 1, 2008
Currentness

§ 2-807. Residual funds in a common fund created in a class action.

(a) Definitions. As used in this Section:

“Eligible organization” means a not-for-profit organization that:

(i) has been in existence for no less than 3 years;

(ii) has been tax exempt for no less than 3 years from the payment of federal taxes under Section 501(c)(3) of the Internal Revenue Code;

(iii) is in compliance with registration and filing requirements applicable pursuant to the Charitable Trust Act and the Solicitation for Charity Act; and

(iv) has a principal purpose of promoting or providing services that would be eligible for funding under the Illinois Equal Justice Act.

“Residual funds” means all unclaimed funds, including uncashed checks or other unclaimed payments, that remain in a common fund created in a class action after court-approved payments are made for the following:

(i) class member claims;

(ii) attorney's fees and costs; and

(iii) any reversions to a defendant agreed upon by the parties.

(b) Settlement. An order approving a proposed settlement of a class action that results in the creation of a common fund for the benefit of the class shall, consistent with the other Sections of this Part, establish a process for the administration of the settlement and shall provide for the distribution of any residual funds to one or more eligible organizations, except that up to 50% of the residual funds may be distributed to one or more other nonprofit charitable organizations or other organizations that serve the public good if the court finds there is good cause to approve such a distribution as part of a settlement.

(c) Judgment. A judgment in favor of the plaintiff in a class action that results in the creation of a common fund for the benefit of the class shall provide for the distribution of any residual funds to one or more eligible organizations.

(d) State and its political subdivisions. This Section does not apply to any class action lawsuit against the State of Illinois or any of its political subdivisions.

(e) Application. This Section applies to all actions commenced on or after the effective date of this amendatory Act of the 95th General Assembly and to all actions pending on the effective date of this amendatory Act of the 95th General Assembly for which no court order has been entered preliminarily approving a proposed settlement for a class of plaintiffs.

Credits

P.A. 82-280, § 2-807, added by P.A. 95-479, § 5, eff. July 1, 2008.

Notes of Decisions (1)

735 I.L.C.S. 5/2-807, IL ST CH 735 § 5/2-807

Current through P.A. 102-730 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated Indiana Code
Title 34 Court Rules (Civil)
State Court Rules (Civil)
Rules of Trial Procedure
IV. Parties

Trial Procedure Rule 23

Rule 23. Class Actions

Currentness

(A) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(B) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of:

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(d) the difficulties likely to be encountered in the management of a class action.

(C) Determination by Order Whether Class Action to be Maintained--Notice--Judgment--Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court, upon hearing or waiver of hearing, shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (B)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that:

(a) the court will exclude him from the class if he so requests by a specified date;

(b) the judgment, whether favorable or not, will include all members who do not request exclusion; and

(c) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (B)(1) or (B)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (B)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (C)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate:

(a) an action may be brought or maintained as a class action with respect to particular issues; or

(b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(D) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) dealing with similar procedural matters.

The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time. The court shall allow reasonable attorney's fees and reasonable expenses incurred from a fund recovered for the benefit of a class under this section and the court may apportion such recovery among different attorneys.

(E) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(F) Disposition of Residual Funds.

(1) “Residual Funds” are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the trial court from approving a settlement that does not create residual funds.

(2) Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of residual funds, unless otherwise agreed. In matters where the claims process has been exhausted and residual funds remain, not less than twenty-five percent (25%) of the residual funds shall be disbursed to the Indiana Bar Foundation to support the activities and programs of the Coalition for Court Access and its *pro bono* districts. The court may disburse the balance of any residual funds beyond the minimum percentage to the Indiana Bar Foundation or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.

Credits
Amended effective January 1, 2011; September 21, 2018.

Notes of Decisions (311)

Trial Procedure Rule 23, IN ST TRIAL P Rule 23
Current with amendments received through May 15, 2022. Some rules may be more current, see credits for details.

End of Document

Baldwin's Kentucky Revised Statutes Annotated
Rules of Civil Procedure
IV Parties
CR 23. Class Actions (Refs & Annos)

Kentucky Rules of Civil Procedure (CR) Rule 23.05

CR 23.05 Dismissal or compromise

Currentness

The claims, issues, or defenses of a certified class may be settled, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under CR 23.02(c), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (5); the objection may be withdrawn only with the court's approval upon a showing of good cause.

(6) Disposition of residual funds.

(a) “Residual Funds” are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from agreeing to, or the trial court from approving, a settlement that does not create residual funds.

(b) Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than twenty-five percent (25%) of the residual funds shall be disbursed to the Civil Rule 23 Account maintained by the Kentucky IOLTA Fund Board of Trustees pursuant to Supreme Court Rule 3.830(20). Such funds are to be allocated to the Kentucky Civil Legal Aid Organizations based upon the

current poverty formula established by the Legal Services Corporation to support activities and programs that promote access to the civil justice system for low-income residents of Kentucky.

Credits

HISTORY: Amended by Order 2013-14, eff. 3-6-14; prior amendments eff. 1-1-14 (Order 2013-14); 1-1-11 (Order 2010-09); adopted eff. 7-1-69

Notes of Decisions (10)

Rules Civ. Proc., Rule 23.05, KY ST RCP Rule 23.05
Current with amendments received through April 15, 2022. Some sections may be more current, see credits for details.

End of Document

Massachusetts General Laws Annotated
Massachusetts Rules of Civil Procedure
IV. Parties (Refs & Annos)

Massachusetts Rules of Civil Procedure (Mass.R.Civ.P.), Rule 23

Rule 23. Class Actions

Currentness

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. The court may require notice of such proposed dismissal or compromise to be given in such manner as the court directs. The court shall require notice to the Massachusetts IOLTA Committee for the purpose set forth in subdivision (e)(3) of this rule.

(d) Orders to Insure Adequate Representation. The court at any stage of an action under this rule may require such security and impose such terms as shall fairly and adequately protect the interests of the class in whose behalf the action is brought or defended. It may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment, or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. Whenever the representation appears to the court inadequate fairly to protect the interests of absent parties who may be bound by the judgment, the court may at any time prior to judgment order an amendment of the pleadings, eliminating therefrom all reference to representation of absent persons, and the court shall order entry of judgment in such form as to affect only the parties to the action and those adequately represented.

(e) Disposition of Residual Funds.

(1) “Residual Funds” are funds that remain after the payment of all approved class member claims expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement that does not create residual funds.

(2) Any order, judgment or approved compromise in a class action certified under this rule that establishes a process for identifying and compensating members of the class may provide for the disbursement of residual funds. In matters where the

claims process has been exhausted and residual funds remain, the residual funds shall be disbursed to one or more nonprofit organizations or foundations (which may include nonprofit organizations that provide legal services to low income persons) which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, or to the Massachusetts IOLTA Committee to support activities and programs that promote access to the civil justice system for low income residents of the Commonwealth of Massachusetts.

(3) Where residual funds may remain, no judgment may enter or compromise be approved unless the plaintiff has given notice to the Massachusetts IOLTA Committee for the limited purpose of allowing the committee to be heard on whether it ought to be a recipient of any or all residual funds.

Credits

Amended November 25, 2008, effective January 1, 2009; April 24, 2015, effective July 1, 2015.

Editors' Notes

REPORTER'S NOTES--1973

Prior Massachusetts practice in the area of class suits was governed entirely by case law. The requirements for maintaining a class suit in Massachusetts were set out as follows:

> "Class bills may be maintained where a few individuals are fairly representative of the legal and equitable rights of a *large number* who cannot readily be joined as parties. The persons suing as representatives of a class must show by the allegations of their bill that all the persons whom they profess to represent have a common interest in the subject matter of the suit *and a right and interest to ask for the same relief against the defendants.* It is not essential that the interest of each member of the class be identical in all aspects with that of the plaintiffs. The interest must arise out of a common relationship to a definite wrong. There must be a joint prejudice to all the class whom the plaintiff seeks to represent. The wrong suffered must be subject to redress by some common relief beneficial to all. The plaintiffs must be fairly representative in all essential particulars of the class for which they seek to act.... Mere community of interest in the questions of law or of fact at issue in a controversy or in the kind of relief to be afforded does not go far enough to warrant a class suit. Avoidance of multiplicity of suits is not enough." Spear v. H.V. Greene Co., 246 Mass. 259, 266-267, 140 N.E. 795, 797-798 (1923). (emphasis supplied)

This rule likewise applies where the action was brought *against* a class. Thus in Thorn v. Foy, 328 Mass. 337, 338, 103 N.E.2d 416, 417 (1952) a suit was held properly brought against the officers of a labor union, individually and as representatives of the members of the union, because it was found that the members were too numerous to be sued individually and the named defendants adequately represented the entire membership.

Rule 23(a) sets out four prerequisites to a class action. These prerequisites, which are also contained in Federal Rule 23(a) as amended in 1966, closely parallel prior Massachusetts practice as stated in Spear v. H.V. Greene Co., supra.

> *"(1) the class is so numerous that joinder of all members is impracticable."*

Federal courts have drawn very few lines with respect to how large a class must be in order to allow the class action. Most courts would agree that mere numbers should not be the sole test of practicability of joinder.

"But courts should not be so rigid as to depend upon mere numbers as a guideline on the practicability of joinder; a determination of practicability should depend upon all the circumstances surrounding a case." Demarco v. Edens, 390 F.2d 836, 845 (2d Cir.1968).

The Supreme Judicial Court has never attempted to set any minimum number which would be necessary for a class suit. The opinions use such language as "large number who cannot readily be joined as parties," Spear v. H.V. Greene Co., 246 Mass. at 266, 140 N.E. at 797; "When the parties interested are very numerous, so that it would be difficult and expensive to bring them all before the court ... the court will not require a strict adherence to the [general] rule [that all interested persons be made parties]." Stevenson v. Austin, 44 Mass. (3 Metc.) 474, 480 (1842).

Rule 23(a)(1) will have little effect on prior Massachusetts practice.

"(2) there are questions of law or fact common to all."

The requirement of common questions of law or fact is the same as that established for joinder under Rule 20 and intervention under Rule 24. It should, however, be noted that Rule 23(a)(2), unlike Rules 20 and 24, does not also require a single transaction or series of transactions or a single occurrence or series of occurrences. However, the language of Rule 23(b) concerning the predominance of the questions of law or fact over questions affecting individual members would imply the need for a single transaction or occurrence or a series of transactions or occurrences.

Rule 23(a)(2) should have little effect on prior Massachusetts law. "The persons suing as representatives of a class must show by the allegations of their bill that all the persons whom they profess to represent have a common interest in the subject matter of the suit and a right and interest to ask for the same relief against the defendants." Spear v. H.V. Greene Co., 246 Mass. at 266, 140 N.E. at 797.

"(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will adequately protect the interests of the class."

Prerequisite (3) was written into Federal Rule 23 when it was amended in 1966. It should be read with prerequisite (4). Both requirements state the need for the ability of the representatives of the class to protect its interests. The word "typical" does not require that all members of the class be identically situated. Siegel v. Chicken Delight, Inc., 271 F.Supp. 722, 726-727 (N.D.Cal.1967). This is similar to the language of the Supreme Judicial Court in the *Spear* case: "It is not essential that the interest of each member of the class be identical in all respects with that of the plaintiffs. The interest must arise out of a common relationship to a definite wrong." Spear v. H.V. Greene Co., 246 Mass. at 266, 140 N.E. at 797.

Rule 23(a)(3) and (4) should have little effect on prior Massachusetts law.

Rule 23(b) deletes substantial portions of Federal Rule 23(b) which are unnecessary to state practice. Beyond the four requirements set out in Rule 23(a) for maintaining a class action the only further requirements set out in Rule 23(b) are findings by the Court: (1) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Rule 23(c) and (d) are designed to afford protection to absent members of the class.

Unlike Federal Rule 23, the Massachusetts class action rule does not *require* the giving of notice to members of the class; nor does it provide to members of the class the opportunity to exclude themselves. Instead Rule 23(d) provides that the court may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment, or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. No doubt the trial judge will order the giving of appropriate notice to members of the class, of the commencement of the action where fairness and justice so require, particularly where the failure to give notice may raise subsequent problems of res judicata.

REPORTER'S NOTES--1996

With the merger of the District Court civil rules into the Mass.R.Civ.P., Rule 23 of the Mass.R.Civ.P. governing class actions is made applicable to District Court proceedings.

REPORTER'S NOTES--2008

The 2008 amendment, effective January 1, 2009, added Rule 23(e) concerning residual funds in class action proceedings. This amendment was recommended to the Supreme Judicial Court by the Massachusetts IOLTA Committee.

Notes of Decisions (114)

Rules Civ. Proc., Rule 23, MA ST RCP Rule 23

Current with amendments received through April 15, 2022. Some rules may be more current; see credits for details.

N.C. Gen. Stat. § 1-267.10

Current through Session Law 2022-6

Section 1-267.10 - Distribution of unpaid residuals in class action litigation

(a) It is the intent of the General Assembly to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action or to promote justice for all citizens of this State. The General Assembly finds that the

use of funds collected by the State courts pursuant to this section for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes.

(**b**) Prior to the entry of any judgment or order approving settlement in a class action established pursuant to Rule 23 of the Rules of Civil Procedure, the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment or settlement. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court, unless it orders otherwise consistent with its obligations under Rule 23 of the Rules of Civil Procedure, shall direct the defendant to pay the sum of the unpaid residue, to be divided and credited equally, to the Indigent Person's Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents.

N.C. Gen. Stat. § 1-267.10

Added by 2005 N.C. Sess. Laws 420, s. 1, eff. 10/1/2005.

West's New Mexico Statutes Annotated
State Court Rules
1. Rules of Civil Procedure for the District Courts
Article 4. Parties

NMRA, Rule 1-023

RULE 1-023. CLASS ACTIONS

Currentness

A. Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

B. Class actions maintainable. An action may be maintained as a class action if the prerequisites of Paragraph A of this rule are satisfied, and in addition

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include

(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(d) the difficulties likely to be encountered in the management of a class action.

C. Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subparagraph may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under Paragraph (B)(3) of this rule, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that

(a) the court will exclude the member from the class if the member so requests by a specified date;

(b) the judgment whether favorable or not, will include all members who do not request exclusion; and

(c) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under Paragraph (B)(1) or (B)(2) of this rule, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under Paragraph (B)(3) of this rule, whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Paragraph (C)(2) of this rule was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate

(a) an action may be brought or maintained as a class action with respect to particular issues; or

(b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

D. Orders in conduct of actions. In the conduct of actions to which this rule applies, the court may make appropriate orders

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in the manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) dealing with similar procedural matters. The orders may be combined with an order under Rule 1-016 NMRA, and may be altered or amended as may be desirable from time to time.

E. Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in the manner as the court directs.

F. Appeals. The Court of Appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within fifteen (15) days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the Court of Appeals so orders.

G. Residual funds to named organization.

(1) For purposes of Paragraph (G)(2) of this rule, “residual funds” are

(a) unclaimed funds, including uncashed checks and other unclaimed payments, that remain after payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements or dispositions to implement the relief granted, whether the payments are drawn from a common fund or directly from the judgment debtor's own funds; or

(b) if it is impossible or economically impractical to distribute the common fund to the class at all, the entire common fund after payment of all approved expenses, litigation costs, attorneys' fees, and other court-approved disbursements or dispositions to implement the relief granted, whether the payments are drawn from a common fund or directly from the judgment debtor's own funds.

(2) Either in its order entering a judgment or approving a proposed settlement of a class action certified under this rule that establishes a process for identifying and compensating members of the class or by a subsequent order entered when residual funds are determined to exist, the court shall provide for the disbursement of residual funds, if any, to one or more of the following entities:

(a) nonprofit organizations that support projects that benefit the class or similarly situated persons consistent with the goals of the underlying causes of action on which relief was based;

(b) educational entities that provide training, teaching and legal services that further the goals of the underlying causes of action on which relief was based;

(c) nonprofit organizations that provide legal services to low income persons;

(d) the entity administering the IOLTA fund under Rule 24-109 NMRA, to support activities and programs that promote access to the civil justice system for low income residents of New Mexico; and

(e) the entity administering the pro hac vice fund under Rule 24-106 NMRA, to support activities and programs that promote access to the civil justice system for low income residents of New Mexico.

(3) Nothing in this paragraph is intended to prevent the parties to a class action from proposing, or the trial court from approving, a settlement that does not create residual funds.

Credits
[Amended effective July 1, 1995; Dec. 4, 2000; May 11, 2011; Dec. 31, 2016.]

Notes of Decisions (226)

NMRA, Rule 1-023, NM R DIST CT RCP Rule 1-023
Current with amendments received through April 15, 2022.

Purdon's Pennsylvania Statutes and Consolidated Statutes
Pennsylvania Rules of Civil Procedure (Refs & Annos)
Class Actions (Refs & Annos)

Pa.R.C.P. 1716

Rule 1716. Residual Funds

Currentness

(a) Any order entering a judgment or approving a proposed compromise or settlement of a class action that establishes a process for the identification and compensation of members of the class shall provide for the disbursement of residual funds.

(b) Not less than fifty percent (50%) of residual funds in a given class action shall be disbursed to the Pennsylvania Interest on Lawyers Trust Account Board to support activities and programs which promote the delivery of civil legal assistance to the indigent in Pennsylvania by non-profit corporations described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. The order may provide for disbursement of the balance of any residual funds in excess of those payable to the Pennsylvania Interest on Lawyers Trust Account Board to the Pennsylvania Interest on Lawyers Trust Account Board, or to another entity for purposes that have a direct or indirect relationship to the objectives of the underlying class action, or which otherwise promote the substantive or procedural interests of the members of the class.

Credits
Adopted May 11, 2012, effective July 1, 2012.

Rules Civ. Proc., Rule 1716, 42 Pa.C.S.A., PA ST RCP Rule 1716
Current with amendments received through May 1, 2022. Some rules may be more current; see credits for details.

End of Document

South Dakota Codified Laws
Title 16. Courts and Judiciary
Chapter 16-2. The Unified Judicial System

SDCL § 16-2-57

16-2-57. Settlement of class action lawsuit

Currentness

Any order settling a class action lawsuit that results in the creation of a common fund for the benefit of the class shall provide for the distribution of any residual funds to the Commission on Equal Access to Our Courts. However, up to fifty percent of the residual funds may be distributed to one or more other nonprofit charitable organizations that serve the public good if the court finds there is good cause to approve such a distribution as part of the settlement. For the purposes of this section, residual funds are any funds left over after payment of class member claims, attorney fees and costs, and any reversions to a defendant agreed upon by the parties and approved by the court. This section does not apply to any class action lawsuit against the State of South Dakota or any of its political subdivisions.

Credits
Source: SL 2008, ch 104, § 3.

S D C L § 16-2-57, SD ST § 16-2-57
Current through laws of the 2022 Regular Session effective March 18, 2022 and Supreme Court Rule 22-10

End of Document

T. C. A. § 16-3-821

§ 16-3-821. Tennessee voluntary fund for indigent civil representation

Effective: August 11, 2009
Currentness

(a) This section shall be known and may be cited as the "Tennessee voluntary fund for indigent civil representation."

(b)(1) There is established in the state treasury a separate account known as the Tennessee voluntary fund for indigent civil representation. It is the intent of the general assembly that this fund be used to provide supplemental funding for the provision of civil legal representation for indigents. Distribution of the fund as provided in this section shall be administered by the administrative office of the courts (AOC).

(2) Contributions to the Tennessee voluntary fund for indigent civil representation are voluntary and this section shall not be construed to require an appropriation from the general fund to establish, maintain, operate, or disburse money from the fund, if done in accordance with this section.

(c) The Tennessee voluntary fund for indigent civil representation is authorized to receive contributions from the following sources:

(1) The unpaid residuals from settlements or awards in class action litigation in both state and federal courts; provided, that the litigation has been certified as a class action under Tenn. R. Civ. P. 23 or Rule 23 of the federal rules of civil procedure;

(2) Awards from other actions in a state or federal court, when specifically designated by the judges in those actions;

(3) Monetary settlements, whether through mediation, arbitration or otherwise, when so designated by a party authorized to do so;

(4) Gifts, contributions, bequests, donations, devises and grants from any legal and appropriate source to effectuate the purpose of the fund. If these contributions to the fund are not in the form of money or other negotiable instrument, any income, rents or proceeds generated from the items contributed shall be deposited into the fund; and

(5) Any other legitimate funding source that is now available or may in the future become available.

(d) Amounts remaining in the fund at the end of the fiscal year shall not revert to the general fund, but shall remain available for use as provided in this section. Moneys in the fund shall be invested by the state treasurer pursuant to title 9, chapter 4, part 6, for the sole benefit of the fund.

(e) Any cost associated with the Tennessee voluntary fund for indigent civil representation shall be paid for by the proceeds of this fund.

(f) When the corpus of the Tennessee voluntary fund for indigent civil representation reaches or exceeds one million dollars ($1,000,000), the interest on the corpus shall be distributed in accordance with § 67-4-806(2).

(g)(1) The AOC and the Tennessee Alliance for Legal Services may make the judiciary and legal profession aware of and promote the existence and purpose of this fund.

(2) The Tennessee Alliance for Legal Services may also make any materials explaining and promoting the fund available to charitable or philanthropic foundations and other groups or persons who might be interested in contributing to the fund.

(h) Nothing in this section shall be construed to repeal or affect the operation of the civil legal representation of indigents fund created in § 16-3-808. It is the intent of the general assembly that the two (2) funds remain distinct and separate methods to achieve the same goal of providing quality legal representation to indigents in civil actions.

Credits

2006 Pub.Acts, c. 589, § 1.

T. C. A. § 16-3-821, TN ST § 16-3-821

Current with laws from the 2022 Second Regular Sess. of the 112th Tennessee General Assembly, eff. through April 28, 2022. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

End of Document

TEXAS ACCESS TO JUSTICE COMMISSION

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MEMORANDUM

TO: **Supreme Court Rules Advisory Committee**

FROM: John R. Jones, Chair, Texas Access to Justice Commission

DATE: September 12, 2002

RE: **Texas Access to Justice Commission Recommendations on Rule 42**

Enclosed please find a proposed amendment to Rule 42 designed to improve access to justice for the 3.1 million Texans who fall below federal poverty guidelines.

The rule change would affect the settlement process in class action lawsuits so as to encourage the parties and the courts to consider whether funds that cannot be distributed directly to class members may be instead used to expand access to the courts. While the rule requires the *consideration* of such awards when *cy pres* funds may be available, it does not obligate the parties nor the court to ultimately order that funds be awarded to civil justice programs.

The Joint Texas Access to Justice Commission/Texas Equal Access to Justice Foundation Resource Committee, working with the staff of Texas Legal Services Center, developed the draft rule and supporting materials. Several other state planning commissions have developed similar recommendations, although Texas is now in the lead in formally requesting the Court to implement the rule change. As noted in background materials, a statutory requirement already exists in California that is similar in scope.

Texas is facing a crises situation with recent drops in interest rates that have heavily impacted IOLTA revenue. Staff at the Texas Equal Access to Justice Foundation are now expecting a total revenue drop in excess of $1.2 million that will likely result in sharp grant reductions to legal aid and pro bono organizations. In addition, federal funding for Texas programs will be reduced as a result of census adjustments. On behalf of the members of the Texas Access to Justice Commission, I respectfully request that your Committee assist us on an expedited basis in placing this rule change before the Court for their consideration early this fall.

Please contact me if you have any questions about the proposed rule change or the supporting materials. Thank you for your assistance and courtesy.

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September 12, 2002

Honorable Andrew Weber
Clerk of the Supreme Court of Texas
201 W. 14th, Room 104
Austin, Texas 78701

Re: TATJC Policy Recommendation No. 3: Amendment to Texas Rules of Civil Procedure 42

Dear Mr. Weber:

The purpose of this letter is to file with and forward to the Supreme Court of Texas Policy Recommendations No. 3 of the Texas Access to Justice Commission ("TATJC") proposing an amendment to Rule 42 of the Texas Rules of Civil Procedure governing class actions. In cases involving class action settlements, there may be funds available for which there is no primary designated beneficiary. Using the *cy pres* doctrine, the parties, subject to court approval, normally designate a substitute beneficiary for funds that may not be economically distributed to class members. This amendment establishes a standard procedure whereby courts will consider whether or not orders approving settlements will provide for the distribution of funds to assist in the delivery of civil legal services to the poor.

Background

1. ***Why is such an amendment needed?*** Without such an amendment, trial courts may not realize that such distribution is permissible, and they may believe that undistributable funds should revert back to the party(ies) found liable in the class action. Such an amendment would be another step toward meeting the civil legal needs of poor persons in Texas. On January 27, 2000, the State Bar of Texas presented to the Texas Supreme Court a Status Report on Civil Legal Services to the

Poor (Appendix A to this letter). In that report, the State Bar made clear that existing resources are vastly inadequate to meet the needs for civil legal services for low-income Texans. Current resources include funds from the Legal Services Corporation (LSC), the Interest on Lawyers Trust Accounts (IOLTA), a civil court filing fee add-on (which generates the Basic Civil Legal Services fund, known as BCLS), state funding for crime victims assistance, and even license plates ("And Justice for All"). Despite these multiple resources, the State Bar informed the Supreme Court, in its report, that "[F]or approximately 70% [of identified legal problems of low-income Texans] no legal advice or assistance was available." Status Report on Civil Legal Services to the Poor in Texas, p. 6, submitted by the State Bar of Texas to the Supreme Court of Texas on January 27, 2000 (Appendix A). More recently, the IOLTA funds available for civil legal services have been cut from record levels of approximately $10 million to the 2003 projected level of $4.9 million due to interest rate cuts and increases in bank service charges. Voluntary contributions, and other Bar sponsored measures have helped to somewhat ameliorate the revenue drops, but the fact remains that large shortfalls remain and applicants for civil legal assistance continue to be denied help on a daily basis.

2. ***How has this matter been dealt with up to now?*** Court after court has had to grapple with the problem of distributing funds recovered in class actions, when it has not been feasible and economical to make distribution to each absent class member. They have had to answer the question: What can a Court do with Leftover Class Action Funds? As one expert has responded: "Almost Anything!" Article by Kevin M. Forde, What Can a Court Do with Leftover Class Action Funds? Almost Anything!, The Judges' Journal, Summer, 1996, pp. 19 - 22, 44-45 (Appendix B). (With extensive citations to court cases.) In the *federal* court system, there is precedent for distributing otherwise undistributable class action awards to law-related entities. For instance, in *In re Corrugated Container Antitrust Litigation*, MDL 310, 53 Antitrust & Trade Regulation Reports, 711 (S.D. Tex. Oct. 6, 1987), six Texas law schools shared in a distribution of over $1 million. In *In re Folding Carton Antitrust Litigation*, 687 F.Supp. 1223 (N.D.Ill. 1988), aff'd in part, rev'd in part 881 F.2d. 494 (7th Cir. 1989), cert. denied, 494 U.S. 1027 (1990), undistributable funds were used to establish a fellowship fund to support lawyers serving low-income persons. Appendix C has pertinent excerpts from the Orders of the Hon. Ann Claire Williams, then a District Court Judge, and now a Judge on the U.S. Court of Appeals for the 7th Circuit. California has dealt with the matter of undistributed class recoveries by means of its Code of Civil Procedure. Section 384 of the California Code of Civil Procedure, Appendix D, provides for the "Distribution of unpaid residuals in class action litigation." Nonprofit organizations providing civil legal services to the indigent are included among the permissible distributees. Section 384 (b), California Code of Civil Procedure (Appendix D).

The proposed amendment is a recognition that in many duly certified class actions, the monetary recovery cannot be feasibly and economically distributed to the absent class members. Likewise, in some instances, known as "entrepreneurial class actions," the relief provided to class members who can be located is limited to a discount coupon while the cash portion of the

settlement ends up elsewhere or is not distributed. This is unfortunate and thwarts the courageous efforts of trial judges who have properly determined that a recovery is due from the defendant(s), but cannot feasibly distribute that recovery in cash to the absent class members.

Class actions require the use of the legal system for resolution and often involve substantial amounts of judicial resources for which the general public receives no benefits. When these class actions generate monetary recoveries that cannot be distributed economically to absent class members, it is equitable for the legal system to receive recognition for its role in creating the recoveries. Thus, the TATJC believes it would be appropriate, in cases where distribution to absent class members is not feasible and economical, for the trial court to determine whether undistributable funds should be used to support and/or expand access to civil legal services for the poor. To this end, we propose that the Supreme Court of Texas enter an order amending the class action rule, T.R.C.P. 42, adding to present paragraph (c) a new subparagraph (4), namely:

Proposed Texas Rule of Civil Procedure 42 (c) (4):

> In any action certified pursuant to T.R.C.P. 42 in which the settlement or judgment includes a monetary award (by way of damages, equitable restitution, or other payment due from the defendant(s) to the class(es)), each party must serve on the Texas Equal Access to Justice Foundation notice of any hearing for preliminary approval of the settlement or judgment and notice of any final hearing to approve the settlement or judgment, and such notice must be served concurrent with notice to any other party of any such hearing. In any such action in which actual distribution to each affected class member is not reasonably and economically feasible, or in which there may be unclaimed funds by virtue checks that are not cashed or proofs of claim not submitted, the court shall have the discretion to issue a finding of fact as to whether those funds should be used to support access to civil legal services to the poor. If the court makes a finding of fact that those funds should be used to support access to civil legal services for the poor, the court shall direct the appropriate party to remit such undistributable funds to the Texas Equal Access to Justice Foundation. The Foundation shall use the remitted funds to support increased access to civil legal services for the poor.

The proposed rule change only has effect *after* the trial court has certified a case as a class action, and *after* any monetary award has already been determined. Thus, the proposal does not affect whether a case should be certified as a class action, nor does it affect the amount of any recovery. The proposal does not interfere with distributions to absent class members, when such distributions are feasible and economical. Even then, the proposal does not require that the trial court make any distribution for civil legal services for the poor. Rather, the trial court would make a finding of fact as to whether such a distribution for civil legal services for the poor should occur. If and only if the trial court rules in the affirmative, are the undistributable funds remitted to the Texas Equal Access to Justice Foundation. The funds would then be administered by the Texas Equal Access to Justice Foundation pursuant to existing, time-tested standards. This would enhance resources for civil legal services for the poor and address the current and expected additional shortages in IOLTA funding.

Respectfully submitted,

John R. Jones

John R. Jones, Chair
Texas Access to Justice Commission

Hon. Thomas R. Phillips, Chief Justice
Hon. Nathan L. Hecht, Justice
Hon. Craig T. Enoch, Justice
Hon. Priscilla R. Owen, Justice
Hon. Mike Schneider, Justice
Chris Greisel, Rules Attorney

Hon. Deborah G. Hankinson, Justice
Hon. Harriet O'Neill, Justice
Hon. Wallace B. Jefferson, Justice
Hon. Xavier Rodriguez, Justice

briefly, about the cy pres rules, because Stephen, I think, you still -- you have to leave early, don't you?

MR. YELONOSKY: Well, I have a meeting that starts at 10:00. I'd like to get to it before it's over -- different meeting, but if you can take it up, I'd appreciate it.

CHAIRMAN BABCOCK: Yeah. That's the last item on the agenda, but there's no reason we can't bump it up here in light of the fact that Stephen is co-chair of the Access to Justice Committee, which is a Supreme Court created body that people have been appointed to. And Justice Hankinson is very interested in this issue. The rule -- it would be Rule 42, and that's been referred to Richard Orsinger's subcommittee, but just recently. And I don't know, Richard, if you or Stephen want to talk about it.

MR. ORSINGER: I think it would be good to have Steve lay the background.

MR. YELONOSKY: Well, that's scary.

MR. ORSINGER: Are you willing to?

MR. YELONOSKY: Let me correct the record. First, I think you've overstated my position, Chip. I'm co-chair of the subcommittee of the

committee of the Equal Access to Justice Commission. It's like four levels down, and as you know, you're the co-chair of that subcommittee as well, Chip.

CHAIRMAN BABCOCK: I thought we were bigger deals than you just said.

(Laughter)

MR. YELONOSKY: I thought we were, too, until I followed all that --

CHAIRMAN BABCOCK: You looked at the flow chart.

(Laughter)

MR. YELONOSKY: And the reason it's scary for me to give the background on this is because until, I think, maybe a month ago, I didn't know what cy pres meant. Now I know that it is Old French for "the next best thing."

And this has been proposed -- I think, really, the champion of this -- and Chris could speak to this probably better than I could, was Randy Chapman with Texas Legal Services Center, and I don't know whether -- Chris, was there some impetus prior to that or was it Randy who --

MR. GRIESEL: No. There was some impetus with Randy's intervention in the lawsuit down in the valley on a class action in which the Legal

Services group received a cy pres award that otherwise would have lapsed to a different fund.

MR. YELONOSKY: Okay. Well, Chris, I hope you'll fill in on this, but, basically, the proposal -- and there's a suggested rule here. The goal here is to see if some of the funds that are available and are distributed pursuant to the cy pres doctrine, that, in those instances, the judges might be encouraged to consider whether an appropriate recipient of those funds would be legal services for the poor in the form of an award to the Equal Access to Justice Foundation.

There's a lot of background material here. In California, it was done by statute, I believe. The proposal here is to do by rule, and since it is by rule, it isn't as compulsory, I guess, as it is by statute in California, but, basically, the idea is to give notice to the Equal Access to Justice Foundation that there is a cy pres award under consideration and for the judge acting within his or her discretion to decide if that would be an appropriate recipient.

And, Chris, please pick up from there.

MR. GRIESEL: No. I think that outlines the basis -- It's got, I think, three prongs, one of

which is a requirement that the parties serve notice on the commission of any hearing for preliminary approval of the settlement of judgment and notice of any final hearing to approve settlement or judgment. And then it allows the court to make a finding that the funds should be used to support access to the civil legal services to the poor and it allows the court to direct the appropriate party to remit the undistributable funds to the foundation, with the restriction that it can only be used for legal services. I think that's the three major components of the rule.

MR. YELONOSKY: I think it's worth pointing out that the subcommittee that redrafted the proposed rule as you see it here included Chip, myself, a number of people connected with Legal Services, and also Judge Jake Patterson from Dallas and Mack Kidd from the Third Court of Appeals.

And subsequent to our last meeting, Chris Griesel asked me a question that I think this committee will have the answer and is not answered by this rule, which -- the proposed rule, which is, "What happens if the judge doesn't do what it says here the judge should do?" And since that really wasn't discussed in the meeting, as far as I remember it,

unless Chip knows the answer to that, it may have purposely been left unsaid, largely -- as originally drafted, the rule was even -- didn't even require the judge to give notice, I don't think, to Equal Access to Justice Foundation, just to consider whether an award to the foundation would be appropriate. So there really was no way of telling whether the judge had considered it or not.

The way this rule is proposed, there's a requirement of notice, and, obviously, there would be a way of telling whether that had happened or not, but there's no consequence stated if it's not done.

MR. EDWARDS: Just as a point of information, could we get a show of hands of those here who have been through a fairness hearing on a settlement of a class action?

(Show of hands)

MR. EDWARDS: Because if you haven't been through one, you won't understand what this proposal means -- been through one that is contested in any way. I would assume that the foundation could show up and do something at the hearing. Is that the thrust of it?

MR. YELONOSKY: I don't -- I mean, my understanding, now, of the cy pres doctrine is that

it's really separate from the considerations that are made in a fairness hearing, because the fairness hearing -- and somebody here will correct me if I'm wrong, but the fairness hearing, I would think, is to determine whether or not the interest of the class members have been served, and the predicate for a cy pres award is that there's money that can't be given to either the class members or the intended beneficiary for some reason.

MR. EDWARDS: Yeah. The reason that I raise the issue is that any class actions I've been involved in, the settlement proposal itself determines what happens to excess funds. They go to some specified place. They go to the state. They go back to the person who's putting up the money.

These things are negotiated and they're not -- most people are not very happy with either side with the way they come down. And sometimes, if the class is spread and you're not sure you're going to get all of them and somebody is willing to pay X dollars a head and if you can't find them all, what's not found goes back to the payor. It's not like they're admitting doing anything wrong -- giving up that they did something wrong or anything, but it's just, how the funds are moved, they're usually taken

care of in the settlement. And if you limit this rule to where there's no provision for leftover funds made as a part of the settlement, I don't have any problem with it; although the state might, because you have the escheat statute.

CHAIRMAN BABCOCK: Harvey had his hand up a minute ago, and then Ralph.

HON. BROWN: I was going to say that point, and, additionally, I think giving notice is totally separate from requiring a judge to make a fact-finding about it. I do think there are cases where the leftover money gets distributed to some charity that at least has some connection directly to the case, and that can be a negotiated point over what charity it is. I don't think the judge should have to make a fact-finding, "I think this charity is more appropriate than the Texas Equal Access Foundation in this particular case." I think notice, if they can come in and argue if they want, that's fine, but requiring a fact-finding, I think that's a bit much.

CHAIRMAN BABCOCK: Okay. Ralph had his hand up, and then --

MR. DUGGINS: I'm not sure that notice is not going to make the commission a party to every class action, kind of like TECA did when they said,

"The DOE is going to be a party in every overcharge suit," and it just created a real problem.

I think the concept is great, but it concerns me that you're going to make this commission that -- the commission will be able to inject itself in every class action settlement, and I don't know if that's appropriate.

CHAIRMAN BABCOCK: Frank, and then Richard. And then Stephen.

MR. GILSTRAP: Is it correct that we're just talking about notice? We're not trying to pass the rule that says that the judge, under the cy pres doctrine, has the power to give funds to Equal Access for Justice. Am I correct?

PROFESSOR ALBRIGHT: To make a finding.

MR. YELONOSKY: I think the brief answer is "Yes." And I guess it's "yes" in part because the court, as I understand the cy pres doctrine, already has that power.

MR. GILSTRAP: I think there's got to be some relation between the purpose -- I mean, under the cy pres doctrine, there had to be -- the trust had to be for a purpose. For example, it was to educate Joe Blow's kids and Joe Blow didn't have any kids, so we educated his nieces and nephews. So it was related.

But I think when you come in and you say -- you get to the point that you mandate it, then I think you have some real problems with the doctrine of escheat, and, you know, who distributes the state's money. It seems to me, at some point, that decision goes across the street to the legislature.

If we're not saying that the court has the power, I don't have a problem with it. I mean, if we're just letting people get notice and they can come in and make their case as to why they think Equal Access for Justice should get this money, I don't have a problem with that.

MR. ORSINGER: I'd like to respond to several things that have accumulated. First, to Bill's point, the supporting information for this proposal, which, there's a piece of paper over here that's entitled "Background for Amendments to Rule 42" -- I don't know who authored it, but it's offered up as an explanation for this --

MR. YELONOSKY: I think Randy did. I think Randy Chapman.

MR. ORSINGER: All right. On the second page, the backside, in the middle of the page is the question, "Why will the parties be required to notify the foundation prior to approval of a settlement?"

And this explanation sheet goes on to say, "In class actions, there is a hearing on a settlement in which affected parties may question the fairness of the agreement. With advance notice, advocates for civil justice may work with attorneys in settling cases to recommend how settlements may be structured to meet priority civil justice needs. Conversely, if settlements appear to provide no material benefits to class members (and only benefit plaintiff's counsel), those advocates could appear at a fairness hearing to question whether the agreement should be approved and recommend alternatives to the court."

I'm not a class action lawyer, but that says, to me, that this rule is giving standing to advocates for this foundation to appear and object to a settlement, even though they are not a party to the settlement, in order to get the settlement rejected if they're not satisfied with what's happening to the unclaimed funds.

Another thing I would like to point out is that the California statute, if you look at it, and it's in a packet of materials that I have, and, I don't know if, frankly, if it's over there, but the California statute, I think, probably is a little broader in terms of what it tells the court it could

do with the unclaimed funds than this proposed Rule 42, because the California statute says that the court can consider the money going to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying class action to child advocacy programs or to nonprofit organizations providing civil legal service to the indigent.

So the California legislature -- and the sequence of the wording, maybe, is not that significant, but the first two factors they list is more consistent with the traditional cy pres doctrine, that you would try to find a charity that has the same purpose as the original designated beneficiary of the trustee. And I think what's happening, both with this statute and with this rule, is that we are also engrafting on a concept, "Well, even if the intent of the donor was to benefit a certain individual -- certain type of individual, that's no longer possible. We're now going to consider a gift that's for an entirely different purpose that was never manifested as the charitable intent for the person who set the trust aside."

And then thirdly -- and I don't have

authority to read this into the record, so let me just speak generally that we only had time to poll my subcommittee by e-mail. One member of my subcommittee, up until yesterday, was Judge Scott McCown, and he sent an e-mail saying that his wife works for the state comptroller's office and that the comptroller's official position was that unclaimed funds belong to the state. And he said, in so many words, "I'm not taking a position whether this is a good public policy or a bad public policy," but he did refer us to the legislation on unclaimed funds escheating to the state and said, "Take into account the fact that the state may take the position that they control these funds and that we don't have the freedom to do whatever we want with it."

MR. YELONOSKY: On a couple of those points -- on that last point -- and it may be here in the background material, I think there was some attempt to address that particular question, whether the state had a right to the funds, but the examples that I've heard of were that, at least up until now, typically those funds were being distributed by agreement between counsel, and, you know, they may agree on a charity or whatever. So if they're able to do that, then, evidently, the state has been taking

the position that it's entitled to those funds.

An earlier point you made -- I'm actually less familiar about the state's class action than federal class actions, but in the federal context, you know, a fairness hearing, anybody who is a member of the class can come in and object, and entities that have a membership that fall within the class or represent people who fall in the class can come in and object even though they're not named parties to the suit. That's always been true.

And if I understand it correctly, there's a recent US Supreme Court decision saying, "Not only can these individuals do what they've always been able to do and come in and object, but an objector, at a fairness hearing, has a right of appeal." It may be limited, but in any event, in the federal context, it wouldn't be creating any new rights upon people who fall within the definition of the class than we have now in people who represent them.

For example, Advocacy, Inc., has stopped more than one settlement recently on behalf of people with disability. We were not involved in the lawsuit until the point where we got notice of a class settlement that seemed inadequate for people with

disabilities -- or seemed an attempt to settle something nationwide that was beneficial to the plaintiff's counsel and the defendant but not to people with disabilities across the country, and so that, at least in the federal context, happens now.

MR. EDWARDS: Yeah, but that's only with regard to members of punitive class who intervene after the class approval, they can do all sorts of things, according to the US Supreme Court.

MR. YELONOSKY: Right.

MR. EDWARDS: But they still must be members of the punitive class in order to have those rights.

MR. YELONOSKY: Right. That certainly is true, and that's a point well taken. I guess in some of these cases the thought was that if you're talking about injury to consumers, that maybe they are a member of the punitive class, but you're right.

MR. EDWARDS: If they're not members of the punitive class, they don't have standing.

MR. ORSINGER: Well, now, if you look at the logic of it, the logic behind the rule change is to give the Equal Access to Justice Foundation the right to speak because it has a stake in unclaimed funds, but the rationale to support the notice

requirement gives them the right to actually appear and oppose the settlement, insofar as the benefits to the members of the class are concerned.

So their stake is in the unclaimed funds, but at least in the conception of somebody involved in the process, they have the standing to challenge the settlement itself, meaning not just the unclaimed funds, but what's actually being paid to the class members. And so without speaking to whether we should be doing that, I think we should be aware that at least some people who are proposing the rule feel like there will be an expanded role on the part of the foundation to say, "Nobody is being enriched here but the plaintiffs' lawyers. You get some sort of trivial coupon for everybody in the class, and, in reality, it ought to be structured in a different way and there ought to be $1.5 million in unclaimed funds and we ought to get it."

MR. YELONOSKY: I think that's a good point.

Chip, though -- you know, from the meetings that we've had, I guess -- and if you look at the actual language of the rule, other than the notice provision applying, once -- beyond that, it talks about the foundation being involved in which the

actual distribution to each affected class member is not reasonably and economically feasible, which is a subset, obviously, of all class actions, and that's what the discussion of the subcommittee was about, and, frankly, the part that you're talking about really may not have been what everybody on the subcommittee had in mind, because you're talking about an objection to the settlement with respect to the class.

MR. ORSINGER: By the way, the rule doesn't say that, but the interpretation given in support of the rule says that, which means that somebody must intend it, which means that it will be advocated and it may well happen.

CHAIRMAN BABCOCK: Bill?

MR. EDWARDS: Is the problem solved by requiring the court to give notice to the commission if there are unclaimed funds before signing an order distributing the unclaimed funds?

MR. YELONOSKY: It may be.

MR. EDWARDS: I mean, if you limit it to that, I don't have a problem.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Well, I think what I'm going to say is not going to be very popular, but I'm having

trouble with the basic concept here. I understand that we're lawyers and we have an obligation to fund legal services for people who can't afford it, but I'm not sure that that gives us a mandate to give special privileges to organizations that do that as opposed to other organizations that serve equally beneficial purposes in fighting disease or hunger or all of the other needs that are out there, and this whole concept, I'm having trouble just buying into -- I don't agree with it.

CHAIRMAN BABCOCK: That's obviously a threshold issue. Anybody else share that view?

(Show of hands)

MR. DUGGINS: What's the question?

CHAIRMAN BABCOCK: I said, did anybody else share the view that Pam just --

(Show of hands)

CHAIRMAN BABCOCK: So out of the people here, maybe 60 percent share Pam's thinking about that.

MR. GILSTRAP: Chip, I mean, I share the concern, but as I understand, the purpose of the rule is not to say that the judge has power. I mean, the judge may not have the power under the doctrine of cy pres. And I know he has broad power, but, you know,

he may not be able, for example, to give a settlement that benefits people who's had their phone slammed -- long distance phone slammed to schoolteachers. I mean, he just may not have the power, and I don't think that by this rule we're saying that the judge has the power to give to legal services. Legal services just has -- excuse me, Equal Access just has the power to come in and make its case.

CHAIRMAN BABCOCK: Sarah.

HON. DUNCAN: Right. We're being very selective about who's going to get the notice, and having the notice goes a long way towards being able to make an appearance and make a case. And as I understood Pam's point, it was not so much that the foundation would get the money but that the foundation, alone, is singled out to receive this notice.

MS. BARON: Right.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: Well, in addition, there has to be a finding -- "The court shall issue a finding of fact as to whether those funds should be used to support access to civil legal services." That means in every order there has to be a finding that justifies whether it's going to this group or some

place else, and that really gives a leg up to giving it to this group as opposed to some other group.

CHAIRMAN BABCOCK: Stephen.

MR. YELONOSKY: Well, I can see, on the surface, those concerns, and, in fact, we talked about the ongoing litigation that is now again at the US Supreme Court about funding for the Equal Access to Justice Foundation, which largely comes from compulsory IOLTA. And the question as to whether or not compulsory IOLTA will continue is being handled by the US Supreme Court on the basis of the property rights or not of the clients, but there hasn't really been any question about the Supreme Court's authority to require the lawyers to provide funds for legal services to the poor through that system, and particularly to go into that entity.

So we're here. We're not talking about property rights of any individual. The funds have been determined to be no longer, I guess, the property of the defendant, and the only question is where they go. You don't have that property interest question and you have the same entity that the Texas Supreme Court has identified as the one that it, ultimately, administers and through which it largely, if not exclusively, dispenses with the profession's

obligation to provide legal service to the poor. I mean, the Equal Access to Justice Foundation is under -- and I'm not sure of the legal relationship. Maybe Chris can say that, but, essentially, under the control of the Texas Supreme Court. Other funds that the Attorney General's Office -- victim of crimes funds that the Attorney General's Office distributes have been delegated to the Texas Supreme Court who then delegated them to the Equal Access to Justice Foundation to distribute. So it's not just "an organization among many."

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: One of the differences between this proposed rule and the California statute is that the California statute lists their equivalent of Services to the Poor Foundation as one of the possible beneficiaries, and not the first in the list. The earlier part of the list are charities who are more in line with the trust, or, if you will, the class that's being protected. But there is no notice requirement in the version of the California statute that I have. There is a notice requirement in this rule, and I think it implies that there's some standing on the part of the Texas Equal to Access to Justice Foundation, because if you have a right to

notice, presumably, you have a right to show up at the hearing and to speak.

And so we're inferentially giving them standing. But what are we giving them standing to do? Are we giving them standing to argue to the court that instead of a charity for people who have, you know, been injured as a result of a dangerous product or something of that nature or an educational operation to public service announcements for people who are in similar danger -- whatever, are they entitled to say, "We don't believe there's enough in this settlement that's going into the unclaimed fund. We want to oppose what the plaintiff and defendant have agreed on. We have a different structure proposed on the settlement which will result in more money coming"?

If we're going to do this -- and maybe we won't do this, but if we're going to do this, I think we ought to make it clear what they have the standing to do. And then if they do have the standing to come in and fight over more than just the unclaimed funds, I think we have to ask the question, "Well, are other charities entitled to that notice, too, so that they can come in and fight over the class settlement or fight over the unclaimed funds?" And maybe what we should do is, we ought to set up a repository of

notice of settlement of all class actions that all charities could sign on a Web site and monitor closely so that if there's going to be a settlement, maybe they want to send somebody over there and say, "You know, blind children ought to get this money instead of poor people." And is there an equal protection problem?

You know, a lot of questions, but the rule as drafted, I think, creates a lot of unanswered questions for me that should be explicitly discussed and then written into the rule so we know the parameters of what we're implementing rather than just guessing.

CHAIRMAN BABCOCK: Pam.

MS. BARON: I agree with Richard. There's a difference between -- and I think it's fine to say, "This is an option for the court to consider, along with many other options." There's a difference between that and then providing some special notice only to one option in a long list. And then when we cross that line, we're showing a preference for one service over another kind of service, and I don't know that that really reflects what our job is. I think that's, maybe, more a legislative function, would be my view.

Also, I'm concerned, like Richard, too, that this does occur to give them a roving commission to come in and generally object to settlements in which they would otherwise have no interest. And it's one thing if you're there on behalf of a class member who has some interest in the litigation and then just to have a third party who wants to get their hands on unclaimed funds. You know, we could have lines from here to Dallas of people who would want to do that.

CHAIRMAN BABCOCK: Harvey. Then Nina. And then Ralph.

HON. BROWN: Well, the more I've heard, the more I'm convinced that the notice isn't a good idea. It's just too unclear. But I do think listening to the possibilities that the judge could consider in the rule is probably a good idea. It sounds like California does something like that.

Frankly, I had one of these, and we had to figure out where to go to charity and I never even thought about this group.

MR. YELONOSKY: Exactly.

HON. BROWN: Now reflecting on it, they may have been perfectly appropriate to receive some of that money when the parties hadn't worked it out in advance, and, frankly, we were kind of negotiating in

the courtroom what to do with any left over money, what charity should get it. So it wouldn't be bad to list them, I think, but maybe not give notice so that we don't have to go through all of the standing issues of who gets the notice, et cetera.

MS. BARON: I also think that the foundations that are in a particularly good position essentially go out and lobby with class action counsel, people who do this work routinely to say, "Put us on your list. Keep us in mind. We're trying to fund very useful projects." So there is the ability to do that, or speak with trial judges at CLE conferences to give your pitch, whatever.

I think that, actually, the foundations that are in a particularly good position make that request of the people who are engaging in the settlement negotiating process, and so they've got that ability right now. And then reminding them that this is an option would also help that goal of trying to get settlements to include this kind of contribution to that organization, but to give them some special privilege, I just thinks goes too far.

CHAIRMAN BABCOCK: Nina, do you still want to say something?

MS. CORTELL: Well, basically, I agree

with what's being said. It seems to me that a rule is not a proper vehicle, but that the objective is a good one. And I hate, if we do vote down the rule, that -- I don't want to throw out the baby with the bath water, and I would like to see us encourage some process; albeit, not -- my own opinion, not through a rule, whereby notice is given across the board to any charities that want to avail themselves of these funds so that they can make their pitch. I think it's an educational process. I think there is a notice issue, but I don't think it belongs in the rule.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: Just to add to what Pam said, the problem with the rule as written is that it requires this cause to be considered in every situation. It singles it out. And I don't think that's appropriate for a rule or for us to decide. But I do think that the concept of a notice -- follow up on your comment, is good, but so that you don't single out an individual cause, maybe the thing to do is to require some advance notice of any settlement where you've got this trigger on the Supreme Court Web site so that anybody can check it on an ongoing basis and make a determination on whether or not they should make a pitch for the unclaimed funds.

CHAIRMAN BABCOCK: You know, we seem to be having trouble with putting this entity first in line, giving them preferential treatment. Is there an argument to be made that because of the nexus between the work that this group does and our legal system, our judicial system, that it's perfectly appropriate to put them first in line and to give them preferential treatment? I mean, is that something we ought to just, you know, embrace and say, "Yeah. We are about providing equal access to justice, and that's something we ought to embrace and we ought to, frankly, favor?"

Sarah.

HON. DUNCAN: I don't think it's appropriate for us to use the rulemaking process to make that linkage.

CHAIRMAN BABCOCK: You think it's a legislative function.

PROFESSOR ALBRIGHT: Even less than that, I think there are -- people who are on this group can go to talk to judges in groups and say, "Hey, don't forget about this group. It's part of the judicial system. We have this obligation as lawyers and judges to think about these people," and do it, like Pam was saying, educational process, but to stick

it in a rule, it just doesn't make any sense to me.

CHAIRMAN BABCOCK: Well, the argument, I guess, would be that the Supreme Court, as the leaders of our judicial system, feel an obligation to encourage access to justice for people who can't afford it.

PROFESSOR ALBRIGHT: And they have lots of bully pulpits other than the rules.

CHAIRMAN BABCOCK: Yeah. I mean, that's true. They have a bully pulpit -- if that's the right word, but this is one mechanism that they could use, perhaps. I mean, that would be the argument in favor of it, I would guess.

Yeah, Richard.

MR. ORSINGER: Another suggestion that might not meet as much resistance would be for the Supreme Court to issue a comment to this rule in which they point out the special obligation that the law system feels to provide legal services for the poor and that courts should consider that in exercising their cy pres powers, whatever they may be, and that may not be as disturbing to us as having a rule requirement that there be a finding in every settlement that "I have considered your special charity and have decided not to give money to it."

CHAIRMAN BABCOCK: Yeah. Stephen Tipps.

MR. TIPPS: I think that's a far preferable approach to the one that's in the proposed rule. And one thing I like about it is that it explicitly recognizes that the expectation is that the judge, in deciding where these funds go, will follow basic rules of cy pres, which I don't think is clear from this language in the rule. I mean, the language in the rule simply says that the court shall have discretion to make a finding. I'm not sure whether that is intended to modify the basic cy pres rules or not. I mean, I think you could read this to say, "Well, normally, under cy pres, I couldn't direct the funds to go to the poor, but because of this rule, I can." And I don't think that's what we're trying to accomplish, but I'm not sure that the rule is clear in that regard. But I think a comment that simply reminds judges that this organization exists would be an appropriate thing to do.

CHAIRMAN BABCOCK: Carlyle.

MR. CHAPMAN: I think the comment -- the concept is a good one. I would lobby to tie it to the kind of comment or suggestion that Richard has said comes out of the California experience; that is to say, to remind the court that it would be appropriate

to give to charity -- give that to charities and to the foundation, but, also, I think that the comment needs to make it clear that that consideration only comes once the fund has been created and that there are excess funds -- undistributed funds.

The other problem that I see with the proposed rule is that there's some real problems in terms of giving notice before the fund determination has been made as to whether there are excess funds available. That gives some -- this entity an opportunity to appear, and as Richard has suggested, make comments or even give them standing to comment on the settlement itself. I think the comment, if we proceed with a comment or recommend a comment, needs to make it clear that none of these considerations come into play until the fund -- excess undistributed fund is created and is available -- exists.

CHAIRMAN BABCOCK: Okay. Stephen.

MR. YELONOSKY: Well, Chip, I don't know how you want to proceed. I guess from the -- wearing my hat from this Access to Justice Subcommittee, I guess what I'd want to do is call our committee back together with this excerpt of our transcript from this meeting and have the committee meet and discuss what's been said here, which I'm sure they'll take very

seriously and take into account, talk with Richard, whose subcommittee has now been assigned this issue, and take it from there.

CHAIRMAN BABCOCK: Yeah. Let me get a sense of our group. How many people are in favor of a comment as opposed to a rule?

(Show of hands)

MS. CORTELL: What would the comment sound like?

CHAIRMAN BABCOCK: Well, we don't know. In keeping with our protocol yesterday, we don't know.

(Laughter)

CHAIRMAN BABCOCK: Let me get your hands up on that again, on the comment as opposed to rule.

(Show of hands)

CHAIRMAN BABCOCK: How many people would prefer a rule as opposed to a comment?

(Show of hands)

PROFESSOR ALBRIGHT: How about "nothing"? Is that an option?

MR. EDWARDS: I'd like to know what the comment is going to be before I vote.

MR. ORSINGER: That's the way I felt yesterday about a statewide rule on cameras in the courtroom.

(Laughter)

MR. CHAPMAN: Well, if the comment comes back and it's not something that's palatable, we can always vote --

CHAIRMAN BABCOCK: Yeah. You can vote the comment down.

MR. EDWARDS: I would vote for -- if we want to talk concept -- comment or a rule, I vote -- add my vote to comment.

CHAIRMAN BABCOCK: Okay. So that would be 15 to 1 in favor of comment as --

PROFESSOR ALBRIGHT: But nothing is not an option?

CHAIRMAN BABCOCK: How many people want to do nothing.

(Show of hands)

CHAIRMAN BABCOCK: Five people want to do nothing. How many people want to do something?

(Laughter)

CHAIRMAN BABCOCK: Pam doesn't want anymore votes.

(Simultaneous discussion)

MR. CHAPMAN: Is that the same as the call for the comment vote?

(Laughter)

CHAIRMAN BABCOCK: Okay. If we do anything, the preference of the committee of the people assembled here today, by a vote of 15 to 2, is that -- the Chair not voting, is that we have a comment as opposed to a rule. That's the concept today.

Now, as always, if the court wants a rule, then we'll try to do a rule, but, Stephen, I think your method of proceeding is a wise one. Let's get the transcript. Let's go back to the Access to Justice Subcommittee, tell them what the thinking of this group is.

In addition, I think I need to talk to Justice Hankinson who has called me about this, and tell her what our feeling is, what our sense is, and see what the court's thinking is.

MR. ORSINGER: Can I also make a request that if the your committee, Steve, is interested in pursuing a rule route, that I would certainly feel more comfortable if we would define who has what standing to do what rather than leave that ambiguous, because if we more clearly understand who's getting what role, it allows us to make a better decision on whether to recommend it or not.

This has a lot of unanswered questions

that it raises, and you have a lot of fine minds on your committee and they may come up with some solutions that would make people like this better.

CHAIRMAN BABCOCK: Okay. Well, that --

MR. EDWARDS: One other thing. I have a little trouble understanding how there would be anything left over if you're dealing with equitable restitution. You might see if you can come up with a notion on that.

MR. YELONOSKY: As usual, you're way above me, and I'll have to get you to explain that to me.

(Laughter)

MR. EDWARDS: Well, I don't -- I can't explain it. That's why I asked the question.

CHAIRMAN BABCOCK: Okay. Here's what I have that we have left to do today. The Rule 21 amendment to include discovery; that's Richard. The Rule 13 visiting judge peer review; that's Justice Duncan. The Rule 202 issue, which is Bobby Meadows, who just left. And the Rule 76A, which is Alex and Richard Orsinger.

Does that comport with what everybody else thinks?

(No response)

448 S.W.3d 403
Supreme Court of Texas.

HIGHLAND HOMES LTD., Petitioner,

v.

The STATE of Texas, Respondent.

No. 12–0604.
|
Argued Nov. 7, 2013.
|
Decided Aug. 29, 2014.
|
Rehearing Denied Dec. 19, 2014.

Synopsis

Background: Subcontractors brought class action against general contractor for improper deductions from paychecks based on contractor's alleged misrepresentation that deductions were used to obtain liability insurance for subcontractor. Contractor reached settlement with class representatives. State intervened and argued that cy pres provision of agreement regarding unclaimed settlement funds violated Unclaimed Property Act. The 166th District Court, Bexar County, Martha Tanner, J., approved settlement agreement, and then denied State's motions for partial new trial and to modify judgment. State appealed. The El Paso Court of Appeals, 417 S.W.3d 478, reversed and remanded with instructions. Contractor's petition for review was granted.

[Holding:] The Supreme Court, Hecht, C.J., held that Unclaimed Property Act did not apply to cy pres provision of class action settlement agreement, disapproving *State v. Snell,* 950 S.W.2d 108 and *All Plaintiffs v. All Defendants,* 645 F.3d 329.

Judgment of the Court of Appeals reversed; judgment of the District Court affirmed.

Devine, J., filed dissenting opinion in which Johnson, Willett, and Boyd, JJ., joined.

West Headnotes (5)

[1] **Judgment** Form and requisites of judgment

A final judgment which is founded upon a settlement agreement reached by the parties must be in strict or literal compliance with that agreement.

1 Cases that cite this headnote

[2] **Appeal and Error** Who are "aggrieved" in general

When a party agrees to one judgment and a materially different one is rendered, the party is personally aggrieved and has standing to complain.

[3] **Abandoned and Lost Property** Constitutional and statutory provisions

The Unclaimed Property Act defines property that is presumed abandoned and prescribes a process for reporting and delivering it to the Comptroller to be held perpetually for the owner. V.T.C.A., Property Code § 71.001 et seq.

1 Cases that cite this headnote

[4] **Compromise, Settlement, and Release** Distribution to third parties; cy pres

Abandoned and Lost Property Property subject

Provisions of Unclaimed Property Act that property held on behalf of owner was not presumed abandoned unless owner failed to claim or exercise control over property for period of three years, and which prohibited private escheat agreements, did not apply to cy pres provision of class action settlement agreement that settlement proceed checks not negotiated within 90 days would be void, and that unallocated funds would be then

donated to agreed-upon charitable organization, in class action by subcontractors against general contractor for improper deductions from paychecks; disapproving *State v. Snell,* 950 S.W.2d 108 and *All Plaintiffs v. All Defendants,* 645 F.3d 329. V.T.C.A., Property Code §§ 74.308, 74.309.

3 Cases that cite this headnote

[5] Res Judicata Class actions

Class representatives' actions are those of class members, and are therefore binding on class members, including absent class members, so long as the requirements of due process are met. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

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Opinion

Chief Justice HECHT delivered the opinion of the Court, in which Justice GREEN, Justice GUZMAN, Justice LEHRMANN, and Justice BROWN joined.

Rule 42(a) of the Texas Rules of Civil Procedure provides that when its requirements are met, "[o]ne or more members of a class may sue ... as representative parties on behalf of all".[1] It often happens that many class members do not personally appear in the action in any way,[2] and Rule 42 prescribes procedures to ensure that those whose claims are settled or adjudicated *in absentia* are afforded due process. Such procedures include court approval of class representatives and class counsel, notice to class members, and court approval of a proposed settlement after an opportunity to be heard.[3] When the rule is followed, class representatives may assert —and agree to disposition of—claims on behalf of the class, including claims on behalf of absent members.[4]

Under the Texas Unclaimed Property Act ("the Act"),[5] as we shall explain more fully, property that goes unclaimed for three years may be presumed abandoned and must then be delivered to the Comptroller to hold for the owner. The issue in this case is whether damages and settlement proceeds claimed by class representatives on behalf of absent members are nevertheless unclaimed property, presumed abandoned, and therefore subject to the Act. In other words, does the Act ***406** prohibit what Rule 42 permits—the disposition of absent class members' claims by their representatives with court approval? We hold that the Act, by its own terms, does not apply. Accordingly, we reverse the judgment of the court of appeals[6] and affirm the judgment of the trial court.

I

Petitioner, Highland Homes, Ltd., a homebuilder in the Austin, Dallas–Fort Worth, Houston, and San Antonio areas, employs hundreds of subcontractors. In 2003, Highland Homes began docking subcontractors' pay if they did not furnish proof of adequate general liability insurance coverage. Highland Homes contends that the deductions were to cover its own increased exposure from working with uninsured subcontractors. But in 2006, one subcontractor, Benny & Benny Construction Company, sued, alleging that Highland Homes had represented it would use the paycheck deductions

to obtain liability insurance covering the subcontractor. Highland Homes denied Benny & Benny's claim but clarified its policy for the future.

In 2009, Benny & Benny amended its pleadings to add another subcontractor, Richard Polendo, and together they asserted claims on behalf of a class of more than 1,800 other subcontractors from whose pay Highland Homes had deducted amounts for insurance before clarifying its policy. The trial court certified the class under Rule 42(b)(3),[7] found Benny & Benny and Polendo to be adequate class representatives, appointed their lawyers as class counsel, and adopted a trial plan. Highland Homes appealed, but while the appeal was pending, the parties settled, subject to notice to the class and the trial court's review and approval.

The proposed terms were as follows. Highland Homes agreed to pay Benny & Benny $28,000 and to refund to the settlement class—members who did not opt out[8]—the total amounts withheld, plus each member's pro rata share of the difference between that total and $3,672,000 (less the amount for opt-outs). Highland Homes was to prepare from its records a list of class members with last known addresses and the amounts withheld from each. An administrator designated by the parties would then use computer software and other means to update the addresses. With the trial court's approval, formal notice would be sent to class members at the addresses thus determined, describing the claims being made on their behalf in the action, setting out the settlement terms, informing members of their rights, offering them the opportunity to opt out of the class, and setting a hearing for final approval of the settlement. If the settlement was finally approved, Highland Homes would issue refunds checks, sending them to existing subcontractors as it would their paychecks or by mailing checks to former subcontractors last known addresses.

The parties recognized that despite these efforts, some class members would not be located, and that others might refuse refunds. The class representatives agreed, on behalf of the settlement class members, that refund checks not negotiated within 90 days of issuance would be void, and that those and other undistributed refunds—referred to in the settlement as "unclaimed funds"—would be given to The Nature Conservancy ("the ***407** Conservancy") as a *cy pres* award.[9] The Conservancy is a well-known, nonprofit, charitable organization operating worldwide and in Texas, whose stated mission is "to conserve the lands and waters on which all life depends."[10] According to Highland Homes, the Conservancy was chosen because it "share[s] Highland Homes' vision of green building and commitment to the environment." The State points out another connection—that Highland Homes' president was on the Conservancy's Texas volunteer board of trustees. In any event, Highland Homes received no tax deduction or other benefit from the award,[11] and the appropriateness of the Conservancy as the beneficiary of the award is not at issue.

Class representatives—again, on behalf of settlement class members—acknowledged that Highland Homes denied all liability in the action and agreed to a global release of Highland Homes and its affiliates[12] from liability on all claims either brought or that could have been brought. The parties agreed to use their best efforts to obtain judicial approval of their agreement, and that if it was substantively altered, a party adversely affected could terminate the agreement.

In 2010, the parties presented their agreement to the trial court, which ordered that a detailed notice of the proposed settlement be mailed to class members at the addresses determined by the administrator. Of the 1,849 notices sent, 346 were returned as undeliverable, and 121 were re-mailed to different or forwarding addresses. After a final hearing, the trial court found that this notice was "the best ... practicable under the circumstances", was "reasonable ... fair, adequate, and sufficient", and "fully complie[d]" with Rule 42. The court also ***408** found that the settlement was "reasonable, fair, just, ... adequate, [and] in the best interest of the Settlement Class Members, and that it satisfie[d] [Rule 42] and other applicable law". Finally, the court determined "that Plaintiffs and Class Counsel ... have adequately represented the interests of the Settlement Class".[13]

Only eight class members requested exclusion. One explained that it had "suffered no losses from Highland Homes", and another stated that it did not "wish to participate in this legal matter." The trial court approved the settlement and rendered final judgment accordingly, "binding on all parties to the Settlement Agreement and on all Settlement Class Members ... includ[ing] all ... who did not timely request exclusion from the Settlement Class".

Aware that the State had once challenged a *cy pres* award as violative of the Unclaimed Property Act,[14] the parties notified the Attorney General of their proposed award of undistributed refunds to the Conservancy. Shortly after judgment was

rendered but before it became final, the State intervened to object to the award, arguing that the undistributed residue should be retained for three years and then paid to the Comptroller to hold for any owners who eventually surfaced. The trial court refused to modify the judgment, and the State appealed.

The court of appeals agreed with the State that Section 74.308 of the Act prohibits the imposition of a 90–day deadline for negotiating settlement checks, and that Section 74.309 prohibits the *cy pres* award.[15] The court reversed and remanded the case to the trial court with instructions to strike those provisions from the settlement, and to order the claims administrator to hold undistributed refunds—totaling $465,557, according to the State—for three years and then remit them to the Comptroller.[16]

[1] **[2]** We granted Highland Homes' petition for review.[17]

II

[3] The Unclaimed Property Act defines property that is presumed abandoned and prescribes a process for reporting and delivering it to the Comptroller to be held perpetually for the owner. Two provisions, Sections 74.308 and 74.309, are aimed at preventing evasion of the Act. Under Section 74.308, a recovery of property ***409** cannot be barred before the statutorily prescribed time passes for the property to be presumed abandoned—three years. The section states:

> § 74.308. Period of Limitation Not a Bar
>
> The expiration, on or after September 1, 1987, of any period specified by contract, statute, or court order, during which an action or proceeding may be initiated or enforced to obtain payment of a claim for money or recovery of property, does not prevent the money or property from being presumed abandoned property and does not affect any duty to file a report required by this chapter or to pay or deliver abandoned property to the comptroller.[18]

Section 74.309 broadly prohibits any method of circumventing the Act. It states:

> § 74.309. Private Escheat Agreements Prohibited
>
> An individual, corporation, business association, or other organization may not act through amendment of articles of incorporation, amendment of bylaws, private agreement, or any other means to take or divert funds or personal property into income, divide funds or personal property among locatable patrons or stockholders, or divert funds or personal property by any other method for the purpose of circumventing the unclaimed property process.[19]

The State argues that these provisions prohibit the *cy pres* award in this case. Specifically, under Section 74.308, the 90–day period for negotiating settlement checks does not preclude a presumption that amounts not paid to class members are abandoned, and Section 74.309 prohibits the diversion of settlement funds to the Conservancy.

[4] But under the Act's express terms, neither provision applies in the circumstances before us. Chapter 74 of the Property Code, where the provisions are found, "applies to a holder of property that is presumed abandoned under Chapter 72, Chapter 73, or Chapter 75."[20] Under Chapter 72—of the three, the only one involved in this case[21]—a "holder" is a person "in possession of property that belongs ***410** to another" or "indebted to another"[22] and tangible or intangible personal property is presumed abandoned

> if, for longer than three years:
>
> (1) the existence and location of the owner of the property is unknown to the holder of the property; and
>
> (2) according to the knowledge and records of the holder of the property, a claim to the property has not been asserted or an act of ownership of the property has not been exercised.[23]

Thus, Sections 74.308 and 74.309 apply only to a person who has property that the owner has not claimed or exercised ownership over for more than three years. In this case, the State asserts that the settlement administrator is holding payments owned by settlement class members.

[5] The State's argument assumes that absent class members have neither asserted claims nor exercised acts of ownership in the litigation. But they have—through the class representatives. On behalf of all class members, including absent members, the class representatives asserted claims for refunds in the litigation, controlled the prosecution of those claims as owners, negotiated the terms for settling the claims, asserted claims for payments under the settlement agreement, and then released all claims. Class representatives' actions

are those of class members, and are therefore binding on class members, including absent class members, so long as the requirements of due process are met. The United States Supreme Court has explained those requirements as follows:

> If [a] State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.[24]

The judgment approving the settlement agreement in this case met all these conditions, and the State does not contend otherwise. The judgment approving that settlement is binding on all settlement class members.

Section 74.308 provides that a limitation on the time for initiating or enforcing a claim does not prevent property from being presumed abandoned. But that provision is inconsequential here. The property—settlement payments on refund claims—cannot be presumed abandoned, not because of the 90–day limitation on negotiating settlement checks, but because ***411** the property was not unclaimed. To the contrary, this property was claimed by the owners—all settlement class members—through their representatives. For the same reason, Section 74.309 does not apply in these circumstances. Chapter 74 does not apply when a claim to property has been asserted or an act of ownership exercised. It is of no consequence that several owners have not *collected* their property within the time period to which they agreed through class representatives. An owner need not actually *collect* his property to rebut the presumption of abandonment and render the Act inapplicable; he need only *claim* it. Nor is the settlement's labeling of undistributed refunds as "unclaimed funds" determinative; the refunds were, in fact, claimed.

The following example illustrates the flaw in the State's argument. Suppose Benny & Benny had never asserted class claims, had settled its own claims on the same terms, and then had decided to tear up the $28,000 settlement check in hopes of getting more business from Highland Homes. Surely the State could not insist that Highland Homes was nevertheless obligated to pay the $28,000 to the Comptroller until Benny & Benny broke down and took it. Suppose Benny & Benny made the same decision for Polendo, acting as his attorney-in-fact. The Act would not apply in either instance because Benny & Benny and Polendo claimed the property, and thus it could not be presumed abandoned. The example is not far-fetched. One class member requested exclusion from the class because it had not been injured and another because it did not want to participate. Under Rule 42, the absent settlement class members participated in the litigation and settlement through their representatives as fully as the representatives did in person. The absent members agreed to the 90–day limitation on taking property they claimed, just as the class representatives individually did, and are as fully bound.

Furthermore, the settlement administrator no longer has property belonging to the settlement class members and is not indebted to them because they have agreed, through class representatives, to exercise their right to payment under the settlement agreement within 90 days. With court approval, class representatives were no less authorized to negotiate and agree to the terms of settlement than they were to agree to the amounts paid. Thus, the settlement administrator is no longer a "holder" to which Chapter 74 applies.

The State concedes that the Act would not apply to class settlement payments made only on application of class members, rather than mailed to last known addresses. "Because the unallocated funds are not owned by any identified individual," the State explains, "the Act would not apply...."[25] We agree with the State's conclusion but not its reason. As noted above, one requirement for property to be presumed abandoned under the Act is that "the existence and location of the owner of the property is unknown to the holder of the property".[26] Class members in the situation the State posits certainly meet this requirement and are thus those for whom the Act's protections are intended. They own property in the same sense as the class members in this case, and most importantly, they ordinarily agree, through class representatives, to release all claims against the settling parties. If anything, the opposite of the State's argument should be true: the better the identification of class members, the fewer instances in which the Act applies. But class

members who are hard to identify ***412** are no less owners of claims that class representatives are authorized to prosecute, settle, and release than are those class members who are easy to identify. Whether settlement payments are mailed to class members or must be applied for, the Act is inapplicable for the same reason: absent class members have asserted claims and exercised ownership through their class representatives. In both situations, there is no holder of abandoned property.

In support of its position the State cites several cases involving other states' laws in which the courts rejected a holder's efforts to retain property, pending the owner's compliance with specified conditions, rather than deliver it to the state as unclaimed.[27] In each of these cases, a potential future holder of property attempted to limit the conditions under which a potential future claimant to that property would be able to obtain it, an attempt held to be in derogation of the jurisdiction's unclaimed property law. Here, the settlement agreement does not purport to govern future claims to as-yet unidentified property—rather, it itself establishes the class's claim to reimbursement. The State also relies on a prior decision of the court of appeals[28] and a recent decision of the Fifth Circuit,[29] both of which concluded that *cy pres* awards in class actions violate the Unclaimed Property Act. In neither case did the court appear to consider the arguments we find persuasive here. To the extent the two cases conflict with our decision today, they are disapproved.

The State's argument for the application of the Unclaimed Property Act in these circumstances cannot succeed unless class representatives' authority to act for class members under Rule 42 is disregarded. For that reason, the argument fails. The State warns that *cy pres* awards can be abused when they are nothing more than a judicial giveaway of private property, while Highland Homes and its *amici curiae* plead that *cy pres* awards benefit deserving, charitable causes. We need not take sides on this disagreement today. Though the State seems to consider the award to the Conservancy inappropriate, it does not make that challenge, assuming that it could. We agree with the State, however, that trial courts must be careful in class actions to protect class interests and scrutinize settlements. No one suggests that the trial court in this case failed in that responsibility.

* * * * * *

Accordingly, the judgment of the court of appeals is reversed and the judgment of the trial court is affirmed.

Justice DEVINE filed a dissenting opinion, in which Justice JOHNSON, Justice WILLETT, and Justice BOYD joined.

Justice DEVINE, joined by Justice JOHNSON, Justice WILLETT, and Justice BOYD, dissenting.

The Unclaimed Property Act (UPA) protects the property rights of identifiable ***413** owners whose property cannot be delivered or returned because the owner cannot be found. *Melton v. State,* 993 S.W.2d 95, 97–98 (Tex.1999). Generally, when those circumstances persist for three years, the property in the possession of another is presumed abandoned by its owner and must be turned over to the State for safekeeping under the UPA. Tex. Prop.Code § 72.101. The State then assumes responsibility for holding the property until the rightful owner can be located. *Id.* § 74.304.

Texas Rule of Civil Procedure 42, on the other hand, "is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment." *Sw. Refining Co. v. Bernal,* 22 S.W.3d 425, 437 (Tex.2000). As a mere procedural device, the class-action rule is not intended "to enlarge or diminish any substantive rights or obligations of any parties to a civil action" but to facilitate the efficient adjudication of such rights and obligations. *Id.* Here, however, the Court uses our class-action rule to diminish the substantive property rights of the missing property owners and in so doing also marginalizes the UPA's public policy concerns. Because the Court's application of Rule 42 conflicts with the UPA's explicit language, I respectfully dissent.

As the Court acknowledges, the UPA prohibits private limitation and escheat agreements that seek to evade the process for reporting and delivering abandoned property to the State. *See* 448 S.W.3d at 410 (quoting Tex. Prop.Code §§ 74.308–.309). Section 74.308 states that a contractual limitation period cannot be used to defeat the abandoned-property presumption and thus circumvent the UPA:

> The expiration [ ] of any period specified by contract, statute, or court order, during which an action or proceeding may be initiated or enforced to obtain payment of a claim for money or recovery of property, does not prevent the money or property from being presumed abandoned property and does not affect any duty to file a report required by this chapter or to pay or deliver abandoned property to the comptroller.

Tex. Prop.Code § 74.308. Section 74.309 prohibits private escheat agreements that seek to divide funds among locatable interest holders, while disenfranchising owners who cannot be found, and generally prohibits the circumvention of the unclaimed property process through the diversion of funds by any method:

> An individual, corporation, business association, or other organization may not act through amendment of articles of incorporation, amendment of bylaws, private agreement, or any other means to take or divert funds or personal property into income, divide funds or personal property among locatable patrons or stockholders, or divert funds or personal property by any other method for the purpose of circumventing the unclaimed property process.

Id. § 74.309. Highland and the class representative negotiated a settlement of the class claims that included the following *cy pres* provision for the disposition of any class members unclaimed share of the settlement fund:

> The parties agree to a *cy pres* distribution of unclaimed funds owed to class members that cannot be located or who fail to negotiate the settlement check within ninety (90) days of its issuance. The amount of these unclaimed funds will not be paid to individual Class Members. Such *cy pres* distribution shall be made to the Nature Conservancy, a non-profit, charitable organization operating in Texas.

***414** In my view, the above provision includes both a limitation period and private escheat agreement prohibited under the UPA.

The Court apparently agrees that the UPA would invalidate the settlement agreement's 90–day limitation period and private escheat provision, if it applied to the agreement. The Court concludes, however, that Highland is no longer a "holder" of any identified class member's property and that the settlement agreement does not concern abandoned property, and thus, the UPA does not apply. The Court reasons that unclaimed settlement funds have not been abandoned because the class representative has exercised ownership over the property on the class members' behalf by entering into the agreement with Highland. Such reasoning renders the statutory prohibitions against private escheat agreements and contractual time limits meaningless. Section 74.308 expressly prohibits prospectively setting contractual time limits on when property can be claimed, and section 74.309 expressly prohibits private agreements that divert prospective property interests to someone other than the true owner.

While I agree that the class representative exercised authority over the class claims and was authorized to settle, its authority did not extend to the subsequent disposition of the settlement checks, which are the individual class members' property rights created under the settlement agreement. Quite simply, the class representative lacked authority to claim, spend, or give away any other class member's settlement check. The Court mistakenly conflates the representative's authority over the class claims with the settlement proceeds it negotiated on behalf of the individual class members. Because the class representative could not assert any missing class member's ownership interest in the fund or cash their individual checks, in my view, it did not exercise ownership over such property. When the property went unclaimed, it was abandoned within the UPA's meaning, notwithstanding the *cy pres* provision. Remarkably, the Court's explanation is that the " 'unclaimed funds' ... were, in fact, claimed," 448 S.W.3d at 411, even though the class representative lacked authority to endorse the checks or otherwise claim the funds belonging to another class member.

The Property Code provides that property is presumed abandoned (and thus subject to the UPA) if "for longer than three years," no claim has been asserted or act of ownership exercised. Tex. Prop.Code § 72.101(a). Because the property interest here is represented by a check, the question is when does the three-year period begin to run on a check. For purposes of the UPA and the three-year period, at least, a check represents a property right that is distinct from the underlying obligation or transaction it represents. Property Code section 73.102 specifically addresses the commencement question, stating that the period begins running on the date (1) "the check was payable," (2) "the issuer or payor of the check last received documented communication from the payee," or (3) "the check was issued." At the earliest then, the three-year period commenced when the checks were issued.

Now the Court argues that Chapter 73 of the Property Code does not apply in this case because it applies only to "holders" that are "depositories," such as a bank, credit union or the like, *see* 448 S.W.3d at 409 n. 21, but Chapter 73 does not say that. Although parts of Chapter 73 specifically address depositories as holders, section 73.102 does not. It discusses checks—and the abandonment of checks—in terms of the conduct and knowledge of the "issuer" or "payor," rather ***415** than the conduct or knowledge of the depository on which the checks are drawn. That only makes sense, of course, because for purposes of unclaimed property, the bank has no

way of knowing whether a customer has written a check and if so, to whom, until the payee presents the check for payment. Section 73.102 can only apply to (and therefore define the three-year period for) scenarios in which the issuer/payor is the "holder," not the depository.

The Court ultimately concludes that the unclaimed checks are not abandoned property because the class representative has asserted a claim or exercised a right of ownership over the class members' claims by negotiating the class settlement. *See* 448 S.W.3d at 411 (noting that "the class representatives asserted claims for refunds in the litigation, controlled the prosecution of those claims as owners, negotiated the terms for settling the claims, asserted claims for payments under the settlement agreement, and then released all claims"). But that all occurred before the three-year period for determining abandonment of the checks even commenced. The assertion of a claim or the exercise of an act of ownership occurring *before* the three-year period begins is, I submit, meaningless. Because the class representative asserted a claim or exercised ownership, if at all, before the checks were issued, and because the class representative cannot assert a claim or exercise ownership over the checks *after* they were issued, the checks must be presumed abandoned under section 72.101(a), if not cashed within three years.

The UPA prevents individuals or entities that hold property belonging to others from prospectively contracting for the disposition of such property, if unclaimed by the rightful owner. Thus, for example, landlords, banks, utilities, and insurance companies cannot contract for the future disposition of unclaimed funds owed to their respective tenants, customers, or policyholders in circumvention of the UPA. The Court here, however, imbues the class representative in class-action litigation with special power to make such disposition. The UPA does not permit this exceptional treatment.

The Act clearly prohibits parties from making an agreement that prevents "money or property from being presumed abandoned." Tex. Prop.Code § 74.308. But the Court reasons that this case does not concern abandoned property and thus does not implicate the UPA because the parties have previously agreed to the disposition of unclaimed property. The UPA's prohibitions against contractual time limits and private escheat agreements are meaningless, however, if they can be manipulated so easily. It makes no sense to hold that the UPA, which prohibits contractual limitations on unclaimed property and the presumption of abandonment, does not apply when the parties have agreed to the future disposition of unclaimed property. Contrary to the Court's analysis, such an agreement is not an exercise of ownership over the unclaimed property and does not prevent a presumption of abandonment.

No other court has taken such a fanciful approach to private escheat agreements. *See Conn. Mut. Life Ins. Co. v. Moore,* 333 U.S. 541, 546, 68 S.Ct. 682, 92 L.Ed. 863 (1948) (rejecting forfeiture of life insurance proceeds in favor of New York's unclaimed property law); *People ex rel. Callahan v. Marshall,* 83 Ill.App.3d 811, 38 Ill.Dec. 944, 404 N.E.2d 368, 373 (1980) (rejecting contractual time limitations on gift cards and credit memoranda in favor of Illinois' unclaimed property law); *Div. of Unclaimed Prop. v. McKay Dee Credit Union,* 958 P.2d 234, 240 (Utah 1998) (finding that Utah's unclaimed property law takes ***416** precedence over statute allowing businesses to purge debt records). For example, a California appellate court struck down a provision in a contract between a health insurer and its subscribers, requiring the subscribers to cash their claim checks within six months or forfeit their right to the funds. *Blue Cross of N. Cal. v. Cory,* 120 Cal.App.3d 723, 739–40, 174 Cal.Rptr. 901 (1981). The court reasoned that "[California's UPA], as a law established for a public reason, cannot be contravened by a private agreement." *Id.* at 740, 174 Cal.Rptr. 901. Similarly, the court reasoned that a union representative, acting on behalf of union members, could not agree to divert the value of individual members' royalty checks into an account for the union's general benefit, if the checks were not cashed within a designated time. *Screen Actors Guild, Inc. v. Cory,* 91 Cal.App.3d 111, 115–16, 154 Cal.Rptr. 77 (Cal.Ct.App.1979). And despite the approval of a majority of shareholders, the New Jersey Supreme Court struck down an amendment to a corporation's charter that allowed the corporation to retain stock dividends if they went unclaimed for three years. *State by Furman v. Jefferson Lake Sulphur Co.,* 36 N.J. 577, 178 A.2d 329, 338–39 (1962), *cert. denied,* 370 U.S. 158, 82 S.Ct. 1253, 8 L.Ed.2d 402 (1962). The court reasoned that even with the assent of shareholders, the amendment violated New Jersey's UPA, because a corporation cannot alter its charter to give itself powers that are "obnoxious to any applicable general law or to public policy." *Id.* at 335–36.

The Court attempts to distinguish these cases by suggesting that the class members' property interests here were conditional and thus subject to forfeiture under the settlement agreement, unlike the shareholder's right to a dividend check, the union member's right to the royalty check, or the insured's

right to a benefits check. 448 S.W.3d at 412 & n. 27. I fail to see how the class members' property interests here are any different or why they are entitled to any less protection under our UPA. Highland acknowledged in the settlement agreement that it "owed" the identified class members the funds represented by the checks and that, if a check were "not negotiated within ninety (90) days of its issuance, the funds owed to that class member [would] be considered 'unclaimed funds.' " The agreement provided further for "a *cy pres* distribution of unclaimed funds owed to class members that cannot be located or who fail to negotiate within ninety (90) days of [the check's] issuance." The agreement thus acknowledges the members' property interests and seeks to redirect those interests under the *cy pres* provision. Although parties generally have the right to contract as they see fit, they do not have the right to make agreements that violate the law or public policy. *In re Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 129 & n. 11 (Tex.2004). This agreement violates the law because the parties have substantively agreed to the redisposition of future, unclaimed property—a private escheat agreement prohibited by the UPA.

Finally, the Court argues that the UPA should not apply because it intrudes on the class representative's authority to act for class members under Rule 42. 448 S.W.3d at 409. Again, I disagree. As already discussed, the class representative's authority extends to the settlement of the class claims but not to the disposition or forfeiture of the individual class member's vested property rights. The class action rule may authorize the representative to settle the class member's claim, but it does not authorize the representative to take away the member's share of that settlement once it has vested.

***417** I question whether the Court would be so favorably disposed to the class representative's power to redistribute unclaimed settlement proceeds if such proceeds were payable to the representative rather than a charity. I suspect that the Court's analysis is influenced more by where the unclaimed funds end up than by how they got there. Why should money escheat to the State, if a charity can benefit from unclaimed settlement proceeds? The problem, as I see it, is two fold. First, and foremost, under the terms of this settlement agreement, the money belongs to the missing class members, not to Highland or the class representative. The missing parties' property rights can only be preserved if the State is permitted to act as their custodian under the UPA. Second, even if this were an appropriate case for a *cy pres* distribution (and I do not believe it is), the *cy pres* distribution here is contrary to existing law on the subject.

As to this latter point, the Court acknowledges the State's warning that *cy pres* awards "can be ... nothing more than a judicial giveaway of private property" but suggests that the State either lacked standing to challenge the appropriateness of the award in this case or waived the complaint. 448 S.W.3d at 412. Again, I disagree. The State has standing to, and did in fact, challenge the *cy pres* distribution to The Nature Conservancy in both the court of appeals and this Court. *See In re Lease Oil Antitrust Litig.,* 570 F.3d 244, 250–51 (5th Cir.2009) (determining that State of Texas had "direct, substantial, legally protectable interest" to challenge *cy pres* distribution in class action suit); *see also* Brief for Respondent at 40 ("The requisite nexus between the mission of the *cy pres* recipient and the purpose of the class action is absent here.").

Cy pres distributions in class actions are appropriate when there is money remaining in a settlement fund after identifiable class members have been compensated. *Klier v. Elf Atochem N. Am., Inc.,* 658 F.3d 468, 474–75 (5th Cir.2011). Typically, this might occur when a defendant does not have sufficient information or resources to determine the precise size of the class or the identity of its members and thus relies on a claims-form process to qualify membership. In that situation, any unallocated surplus in the settlement fund might appropriately be disposed of under a cy pres provision. *See, e.g., Wilson v. Sw. Airlines, Inc.,* 880 F.2d 807, 813 (5th Cir.1989) (allocating remainder of settlement fund where 500 potential class members were notified, but only 228 proved their right to the fund by filling out a claim form and all 228 were fully compensated). In this case, however, all of the identifiable class members were not compensated.

Highland used its business records to precisely tailor the size of the settlement fund, reserving the right to reduce the fund by the amounts attributable to class members who opted-out. Highland then used these same records to issue checks to each settling class member, who under the settlement agreement were designated as the owners of their particular share of the fund and were issued checks representing that share. The *cy pres* provision then subsequently forfeited that property interest if the class member did not cash the issued check within 90 days. Highland did not require, nor need, the class members to prove their right to the fund as Highland possessed all the relevant information in its own business records. It therefore allocated the entire fund to identifiable class members by issuing each of them a check for the specific amount owed. There accordingly was no unclaimed surplus to which an appropriate *cy pres* distribution could attach.

***418** Even had there been a surplus, the *cy pres* provision in this agreement was clearly inappropriate for yet another reason. In class actions, the doctrine of *cy pres* is supposed to distribute funds "for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." *Klier,* 658 F.3d at 474. At the very least, the *cy pres* distribution should "reasonably approximate" the class members' interests. *In re Lupron Mktg. & Sales Practices Litig.,* 677 F.3d 21, 33 (1st Cir.2012). Whether the *cy pres* distribution reasonably approximates the class members' interests is determined by analyzing a number of factors such as the purposes of the underlying statutes violated, the nature of the class members' injury, the class members' characteristics and interests, the geographical scope of the class, the reasons why the settlement funds have yet to be claimed, and the relationship of the *cy pres* recipient to the class. *Id.* at 33.

The Court acknowledges that The Nature Conservancy was chosen as the *cy pres* recipient because it "share[s] Highland Homes' vision of green building and commitment to the environment." 448 S.W.3d at 407 (alteration in original). But Highland's vision or preferences are irrelevant because the settlement fund does not belong to Highland. It belongs to the class members whose claims created the fund. *See Klier,* 658 F.3d at 474 ("The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members.") (citing *Principles of the Law of Aggregate Litigation,* 2010 A.L.I. § 3.07 cmt. b). As much as I respect and admire the mission of The Nature Conservancy, I fail to see its connection to the subcontractors' suit, which alleged that Highland misrepresented that liability insurance would be provided for uninsured subcontractors through payroll deductions.

The UPA provides that property is presumed abandoned if ownership is not exercised for a period of three years. It requires that such property be turned over to the State. The UPA further prohibits contracts that seek to limit the presumptive period or otherwise dispose of unclaimed property through private escheat agreements. In this regard, the Act prohibits agreements that "divert funds" or "divide funds ... among locatable" persons or use "any other method for the purpose of circumventing the unclaimed property process." Tex. Prop.Code § 74.309. Highland and the class representative agreed "to a cy pres distribution of unclaimed funds owed to class members" who, although known, could not be found to cash their settlement checks within 90 days of issuance. I agree with the court of appeals that this *cy pres* provision is essentially a private escheat agreement prohibited by the UPA. 417 S.W.3d 478, 486–87 (Tex.App.–El Paso 2012). I accordingly would affirm the court of appeals' judgment. Because the Court does not, I respectfully dissent.

All Citations

448 S.W.3d 403, 57 Tex. Sup. Ct. J. 1315

Footnotes

1 Tex.R. Civ. P. 42(a). The rule is similar to Rule 23 of the Federal Rules of Civil Procedure.

2 *See* Ethan D. Millar & John L. Coalson, Jr., *The Pot of Gold at the End of the Class Action Lawsuit: Can States Claim It as Unclaimed Property?,* 70 U. Pitt. L.Rev.. 511, 514 (2009) ("It is not uncommon in class action settlements for a significant amount of the settlement checks to never be cashed.").

3 Tex.R. Civ. P. 42(a)(4) (class representatives), 42(c)(2) (notice to certified class), 42(e) (approval of settlement, after the requisite notice, hearing, and findings), 42(e)(4)(A) (class members' right to object to settlement), 42(g) (appointment of class counsel).

4 *Taylor v. Sturgell,* 553 U.S. 880, 894, 904, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008) (recognizing that "[r]epresentative suits with preclusive effect on nonparties include properly conducted class actions," but refusing to extend nonparty preclusion); *Martin v. Wilks,* 490 U.S. 755, 762 n. 2, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989) (noting a recognized, limited exception—to the general rule that a judgment "does not conclude the rights of strangers to [the] proceedings"—in "class" or "representative" suits, but refusing to extend nonparty preclusion to white firefighters challenging employment decisions made under a consent decree in a civil rights action), *superseded by statute,* Civil Rights Act of 1991, Pub.L. No. 102–166, § 108, 105 Stat. 1074, 1076–1077, codified at 42 U.S.C. § 2000e–2(n); *Hansberry v. Lee,* 311 U.S. 32, 41–44, 61 S.Ct. 115, 85 L.Ed. 22 (1940) (noting a recognized, albeit imprecisely defined exception allowing judgments

in "class" or "representative" suits to "bind members of the class or those represented who were not made parties" but refusing to extend nonparty preclusion to an injunctive decree enforcing a restrictive covenant agreement); *Citizens Ins. Co. of Am. v. Daccach,* 217 S.W.3d 430, 450 (Tex.2007) ("Basic principles of res judicata apply to class actions just as they do to any other form of litigation.") (citations omitted).

5 Tex. Prop.Code §§ 71.001–76.704.

6 417 S.W.3d 478 (Tex.App.–El Paso 2012).

7 Tex.R. Civ. P. 42(b)(3).

8 Also excluded were persons with whom Highland Homes had already settled, its employees, and class counsel.

9 The phrase, *cy pres,* "derives from the Norman–French phrase, *cy pres comme possible,* meaning 'as near as possible.' " Wilbur H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and* Cy Pres *Awards: Emerging Problems and Practical Solutions,* 21 Va. J. Soc. Pol'y & L. 267, 269 (2014). The Restatement (Third) of Trusts explains the *cy pres* doctrine as follows: "Unless the terms of the trust provide otherwise, where property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose, or to the extent it is or becomes wasteful to apply all of the property to the designated purpose, the charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose." Restatement (Third) of Trusts § 67 (2003). In the class action context, *cy pres* refers to awards "to an entity that resembles, in either composition or purpose, the class members or their interests" when "direct distributions to class members are not feasible—either because class members cannot be reasonably identified or because distribution would involve such small amounts that, because of the administrative costs involved, such distribution would not be economically viable." Principles of the Law of Aggregate Litigation § 3.07, cmt. b (2010). Despite the *Principles'* endorsement of such awards, *id.* § 3.07, issues regarding their legality and propriety have been raised. *See Marek v. Lane,* —— U.S. ——, 134 S.Ct. 8, 9, 187 L.Ed.2d 392 (2013) (Roberts, C.J., statement respecting denial of certiorari). We have not had occasion to address such issues, and none is raised in this case.

10 *About Us: Vision and Mission,* The Nature Conservancy, http:// www.nature.org/about-us/vision-mission/-index.htm (last visited August 22, 2014).

11 Highland Homes was authorized to deduct from the award any administration expenses that exceeded $30,000. It has made no such claim.

12 Those affiliates were Horizon Homes, Ltd., Sanders Custom Builder, Ltd., Highland Homes–Houston, Ltd., Sanders Custom Builder–Houston, Ltd., Highland Homes–San Antonio, Ltd., and Highland Homes–Austin, Ltd.

13 Highland Homes paid class counsel's fee, set by the trial court at $1.8 million, over and above the $3,672,000 it paid the settlement class.

14 *State v. Snell,* 950 S.W.2d 108 (Tex.App.–El Paso 1997, no writ).

15 417 S.W.3d 478, 488 (Tex.App.–El Paso 2012).

16 *Id.* at 488.

17 56 Tex. Sup.Ct. J. 864, —— S.W.3d —— (Aug. 23, 2013). The plaintiffs did not participate in the proceedings in the court of appeals. The State argues that because Highland Homes has now disclaimed any interest in settlement funds, it lacks standing to complain of the court of appeals' modification of the settlement and the judgment predicated on it. But "[a] final judgment which is founded upon a settlement agreement reached by the parties must be in strict or literal compliance with that agreement". *Vickrey v. Am. Youth Camps, Inc.,* 532 S.W.2d 292, 292 (Tex.1976) (per curiam) (citations omitted). It should go without saying that when a party agrees to one judgment and a materially different one is rendered, the party is personally aggrieved and has standing to complain. *See DaimlerChrysler Corp. v. Inman,* 252 S.W.3d 299, 304

(Tex.2008) ("For standing, a plaintiff must be personally aggrieved...."). The *cy pres* award was a significant part of the settlement, and we cannot assume that Highland Homes would have reached the same agreement without it.

18 Tex. Prop.Code § 74.308.

19 *Id.* § 74.309.

20 *Id.* § 74.001(a); *accord id.* § 72.001(d) ("A holder of property presumed abandoned under this chapter is subject to the procedures of Chapter 74.").

21 Chapter 75 "applies to mineral proceeds". *Id.* § 75.001(b). No mineral proceeds or depositories are involved in this case. Chapter 73 applies to "property held by financial institutions", the title of the chapter, and defines a "holder" as "a depository", *id.* § 73.001(a)(4)—that is, "a bank, savings and loan association, credit union, or other banking organization", *id.* § 73.002. The dissent argues that Section 73.102 in the chapter, defining when a check is presumed to be abandoned, nevertheless applies to all holders of checks. *Id.* § 73.102 ("A check is presumed to be abandoned on the latest of: (1) the third anniversary of the date the check was payable; (2) the third anniversary of the date the issuer or payor of the check last received documented communication from the payee of the check; or (3) the third anniversary of the date the check was issued if, according to the knowledge and records of the issuer or payor of the check, during that period, a claim to the check has not been asserted or an act of ownership by the payee has not been exercised."). We think the application of that section is limited along with the rest of the chapter. *See* Tex. Gov't Code § 311.023 ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the ... title (caption)...."). Moreover, even if Section 73.102 applied, it would not nullify the class representative's authority. Having the authority on behalf of the class to arrange for payments of claims by check in the first place, the class representative also had the authority to prescribe the terms under which the checks would be paid.

22 Tex. Prop.Code § 72.001(e)(1), (3).

23 *Id.* § 72.101(a). In *Melton v. State,* 993 S.W.2d 95, 98 (Tex.1999), we stated that " 'unknown,' as used in section 72.101(a) of the Property Code, does not mean completely unidentified."

24 *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811–812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (footnote and citations omitted).

25 State of Texas Brief on the Merits at 45.

26 Tex. Prop.Code § 72.101(a)(1).

27 *See Connecticut Mut. Life Ins. Co. v. Moore,* 333 U.S. 541, 546, 68 S.Ct. 682, 92 L.Ed. 863 (1948) (insurer sought to retain life insurance benefits until proof of entitlement made); *State by Furman v. Jefferson Lake Sulphur Co.,* 36 N.J. 577, 178 A.2d 329, 333–339 (1962) (corporation sought to retain dividends until claimed); *Screen Actors Guild, Inc. v. Cory,* 91 Cal.App.3d 111, 154 Cal.Rptr. 77, 79–80 (1979) (union sought to retain unclaimed royalty checks); *People ex rel. Callahan v. Marshall Field & Co.,* 83 Ill.App.3d 811, 38 Ill.Dec. 944, 404 N.E.2d 368, 371–374 (1980) (merchant sought to retain gift cards).

28 *State v. Snell,* 950 S.W.2d 108, 113 (Tex.App.–El Paso 1997, no writ).

29 *All Plaintiffs v. All Defendants,* 645 F.3d 329, 331–332 (5th Cir.2011).