

**Texas Supreme Court
Advisory Committee**

Memo

To: Texas Supreme Court Advisory Committee (SCAC)

From: Rules 1-14C Subcommittee

CC: Chip Babcock, Jacqueline Daumerie, Shiva Zamen

Date: February 15, 2023

Re: TRCP 7

Our committee was asked to draft amendments or a comment to Rule of Civil Procedure 7—which governs the appearance of counsel in a case—in light of SCAC 18-3 vote at its November 6, 2020 meeting that the rule should be amended to clarify that independent executors have the right to proceed pro se. This committee, which was then under the leadership of Bob Pemberton, provided the SCAC with its memo dated November 20, 2020 (Ex. B). It concluded, “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.”

Along with that memo, the subcommittee provided SCAC with , Michael Hatfield, *Pro Se Executors—Unauthorized Practice of Law, or Not?*, 59 Baylor L. Rev. 329 (2007) (Ex. C), a number of cases (Ex. D) and two Amicus briefs submitted to SCOTX 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 (Ex. E and F).

Exhibit A contains our proposed revision to comply with SCOTX’s request. It is straightforward change in the rule that states that persons not appearing in a representative capacity may appear pro se. The comment states that an independent executor may appear pro se.

Should the comment also state that trustees may appear pro se?

The committee conferenced with Connie Pfeiffer’s appellate colleague, Andrew Ingram, who recently taught law school classes on community property. He agreed with our proposed revisions to the rule but also recommended that the committee change the Rule regarding trustees. The discussion below contains his recommendation that the comment also make clear that trustees may appear pro se. The issue of trustees was not submitted to our committee, but we found his

analysis persuasive. Here is Andrew's analysis:

The comment should be amended to list trustees along with independent executors as people who represent themselves when they appear in court. The fiduciary in *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996), was a trustee, and the case is a key authority identified in the Report for treating independent executors as representing themselves in court.

Going back to first principles, a trustee is someone who holds legal title to property for the benefit of someone else who holds the equitable title. When a trustee sues or is sued in relation to trust property, she is the named plaintiff because she holds the legal title.

This is more like an independent executor than a guardian. An independent executor receives letters testamentary and thereafter has the power to stand in the shoes of the deceased and manage the property of the deceased. So, like a trustee, she is always appearing in her own right but in a special capacity through which she controls estate property as a fiduciary.

On the other hand, guardians should be left as examples of people who do not represent themselves in court. When a guardian goes to court in her capacity as guardian, she is suing on behalf of the ward who is the real party in interest.

We note that the November 2020 Subcommittee report does not address this issue but does discuss *Huie v. DeShazo* (Ex. G) and states that an independent executor is "a type of trustee."

Should the comment also state that dependent administrators may appear pro se?

Andrew also noted that the draft comment does not address dependent administrators, but only independent executors. He believes there are "good arguments for and against treating dependent administrators the same as independent executors and allowing them to proceed pro se."

There is a simple argument for parity: a personal representative/administrator in a dependent administration functions much like an independent executor. She is still someone with letters testamentary/letters of administration empowered to take possession of the property of the deceased. When she sues or has been sued and appears in court, she appears as herself, in her capacity as personal representative. Unlike an independent administrator though, she must seek the approval of the court that appointed her before carrying out most major decisions.

On the other hand, there are two counterarguments for treating a dependent administration different from an independent one. The first is that a dependent administrator and the court must work together more closely, and this will be easier if the dependent administrator is represented by an attorney. The second is that a dependent administrator, like a guardian, is much more a creature of the court than an independent administrator.

To understand how a guardian or dependent administrator is a "creature of the court," consider that trustees and independent administrators usually take their authority by private actions. A trust can be created without any judicial involvement. An independent executor takes her right to serve from the will, and the court, while it has the power to reject an independent executor, usually approves what the testator has done with deference. A dependent administration, on the contrary, usually happens when there is no will and an interested party needs to open an administration of the estate. In that case, the

administrator is more like a guardian, someone appointed and trusted by the court in the first instance to help the court manage the deceased's property.

Because a dependent administrator is a creature of the court, it makes more sense to let the court have a say in how the dependent administrator conducts business before the court. After all, if the court had known beforehand that a person it appointed to head a dependent administration was going to proceed *pro se*, it could have found her "unsuitable" and declined to appoint her. *See* Tex. Estates Code § 304.003(5).

In the end, the question of how to treat dependent administrators is not a highly consequential one compared with the treatment of independent executors. Nearly every Texas will drafted by an attorney or authored using common consumer software specifies an independent executor. It is now even possible to obtain an independent administration by agreement of all the heirs when there is no will. Tex. Estates Code §§ 401.002–003. Dependent administrations usually occur where there is no will, heirs cannot be found or are contentious, and where one heir or creditor needs to force an administration. In that case, it's unlikely that the person seeking the dependent administration will not be represented by counsel and that the dependent administrator ultimately appointed will be *pro se*. Moreover, probate courts can use their power to disqualify those they find "unsuitable," *id.*, to steer selection to a collaborator in administering the estate who will use an attorney.

We recommend against including dependent administrators in the rule primarily because, as Andrew states, "the question of how to treat dependent administrators is not a highly consequential one compared with the treatment of independent executors" since Texas wills generally specify an independent executor.

Exhibit A

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.

RULE 7. MAY APPEAR BY ATTORNEY

Any party to a suit may appear and prosecute or defend his or her rights therein, either in person or by an attorney of the court. An individual who is acting in a representative capacity may not appear in court to prosecute or defend his or her rights, but an individual who is not appearing in a representative capacity may appear pro se.

Comment: An independent executor of an estate represents himself or herself and not others and may appear pro se. Guardians -prosecuting or defending suits on behalf of their wards act in a representative capacity and may not appear pro se.

Alternative comment suggested by Andrew Ingram: A trustee or an independent executor of an estate represents himself or herself and not others and may appear pro se. Guardians prosecuting or defending suits on behalf of their wards act in a representative capacity and may not appear pro se.

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Exhibit B

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 Judge³ on the other⁴—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 property⁵—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 executors¹¹).

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, appraisal, 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

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 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

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 jurisdiction¹⁸): “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 owed, 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

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.

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 measures³⁷). 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

Exhibit C

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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¹See *infra* p. 8.

²See, 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.

³The 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 Texans⁷

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

made to probating the will.

⁷The 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).

⁸See 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.”)

⁹Of 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).

¹⁰State 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.*

¹²For 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).

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

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

¹⁵§ 88.

¹⁶§ 89.

¹⁷This 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.

²¹There 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 dismissed).

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 refused 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

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

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.

³³For 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; *see* TEX. GOV'T CODE ANN. §25.0003(d) (Vernon 2003); 17 WOODWARD, *supra* note 7, § 1.

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

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

³⁷For 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).

³⁸The 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 law⁴⁵ 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

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 than 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 property⁷⁶ 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

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 fundamental⁸⁵ 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 Lairy 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.

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

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

⁹⁰Restatement, *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. Slocumb, 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

⁹¹Kunstoplast 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).

⁹³TEX. 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

⁹⁵TEX. 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.”

⁹⁶See *supra* pp. 15-16.

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

Maine⁹⁸ 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 corporation. While 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

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.

⁹⁸The 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).

⁹⁹The 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(1).

¹⁰²For 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 Fidelity 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 unrepresented by an attorney, which would place an undue

¹¹⁶*Frazee v. Citizens Fidelity 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 Rule¹³²

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 zealotry 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 *Frazer v. Citizens Fidelity 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 zealotry 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 Fidelity 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

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

¹⁶⁷TEX. 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 Fidelity Bank & Trust Co.*, 393 S.W.2d 778, 784-785 (Ky. 1965).

¹⁷⁰TEX. 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.

¹⁷¹TEX. 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.

¹⁸⁸Steele, 927.

¹⁸⁹Steele, 928.

¹⁹⁰Steele, 931.

¹⁹¹Steele, 928.

¹⁹²*Id.*

¹⁹³Steele, 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.

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 Ceterari*, 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.

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

²¹⁷Humane 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).

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

²¹⁹TEX. 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)).

²²⁰For 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 will²²¹ 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-proving 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).

Exhibit D

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 that 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

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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

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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

Page 931

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.

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

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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

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@traviscountytexas.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.

Exhibit E

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.

/s/ Stephen S. Gilstrap

Stephen S. Gilstrap

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.galvestoncountytexas.gov/ja/pb/Documents/Rules%20of%20the%20Court/adminorder02-2007.pdf
Harris County Probate Court No. 1	Pro se under limited circumstances	https://probate.harriscountytexas.gov/Documents/pro_se.pdf
Harris County Probate Court No. 2	Pro se under limited circumstances	https://probate.harriscountytexas.gov/Documents/pro_se.pdf
Harris County Probate Court No. 3	Pro se under limited circumstances	https://probate.harriscountytexas.gov/Documents/pro_se.pdf
Harris County Probate Court No. 4	Pro se under limited circumstances	https://probate.harriscountytexas.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.traviscountytexas.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.

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

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 have 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.

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-

capacity 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,

____/s/ *Renea Hicks*_____

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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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Exhibit F

TRAVIS COUNTY PROBATE COURT NO. 1

Travis County Courthouse, Room 217
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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.

Exhibit G

922 S.W.2d 920
Supreme Court of Texas.

Harvey K. HUIE, Jr., Individually, as Independent
Executor of the Estate of Adeline M. Huie,
Deceased, and as Trustee of the Melissa Huie
Chenault Trust, Relator

v.

The Honorable Nikki DeSHAZO, Judge,
Respondent.

No. 95-0873.

Argued Nov. 30, 1995.

Decided Feb. 9, 1996.

Rehearing Overruled June 28, 1996.

Synopsis

Trust beneficiary sought to compel discovery, from an attorney, of communications by a trustee to the attorney relating to trust administration, in a suit by beneficiary alleging that trustee breached his fiduciary duty. The trial court ordered the attorney to disclose communications made before suit was filed. The Court of Appeals denied relief and the trustee petitioned for writ of mandamus. The Supreme Court, Phillips, C.J., held that: (1) attorney-client privilege applied, notwithstanding trustee's fiduciary duties to fully disclose all material facts; (2) privilege did not affect trustee's duty to disclose and provide full trust accounting; (3) attorney-client relationship existed between trustee and attorney; (4) trust was not client; (5) crime-fraud exception to attorney-client privilege did not apply; (6) compensation of attorney with trust funds did not preclude attorney-work-product privilege; and (7) whether disputed documents were prepared in anticipation of litigation was to be considered on remand.

Writ conditionally granted.

*921 On petition for writ of mandamus.

Attorneys and Law Firms

G. David Ringer, Timothy D. Zeiger, Michael D. McKinley, Dallas, Douglas W. Alexander, Austin, Dwight M. Francis, Dallas, for Relator.

Donovan Campbell, Jr., T. Wesley Holmes, James J. Hartnett, Jr., James J. Hartnett, Sr., Jack M. Kinnebrew, Gary E. Clayton, and Kim Kelly Lewis, Dallas, for Respondent.

Jay J. Madrid, R. Gregory Brooks, Madrid, Corallo & Brooks, P.C., Dallas, for J. Peter Kline, Robert L. Miers, John A. Beckert, Richard N. Beckert, Edward J. Rohling, Jack Craycroft and Harvey Hotel Corp.

Opinion

Chief Justice PHILLIPS delivered the opinion of the Court, in which all Justices join.

The issue presented in this original mandamus proceeding is whether the attorney-client privilege protects communications between a trustee and his or her attorney relating to trust administration from discovery by a trust beneficiary. We hold that, notwithstanding the trustee's fiduciary duty to the beneficiary, only the trustee, not the trust beneficiary, is the client of the trustee's attorney. The beneficiary therefore may not discover communications between the trustee and attorney otherwise protected under Texas Rule of Civil Evidence 503. Because the trial court ruled otherwise, we conditionally grant writ of mandamus.

I

Harvey K. Huie, the relator, is the executor of the estate of his deceased wife, who died in 1980. Huie is also the trustee of *922 three separate testamentary trusts created under his wife's will for the primary benefit of the Huies' three daughters. One of the daughters, Melissa Huie Chenault, filed the underlying suit against Huie in February 1993 for breach of fiduciary duties relating to her trust.¹ Chenault claims that Huie mismanaged the trust, engaged in self-dealing, diverted business opportunities from the trust, and commingled and converted trust property. Huie's other two daughters have not joined in the lawsuit.

Chenault noticed the deposition of Huie's lawyer, David Ringer, who has represented Huie in his capacity as executor and trustee since Mrs. Huie's death. Ringer has



also represented Huie in many other matters unrelated to the trusts and estate during that period. Before Chenault filed suit, Ringer was compensated from trust and estate funds for his fiduciary representation. Since the suit, however, Huie has personally compensated Ringer for all work.

Although Ringer appeared for deposition, he refused to answer questions about the management and business dealings of the trust, claiming the attorney-client and attorney-work-product privileges. Chenault subsequently moved to compel responses, and Huie moved for a protective order. After an evidentiary hearing, the trial court held that the attorney-client privilege did not prevent beneficiaries of the trust from discovering pre-lawsuit communications between Huie and Ringer relating to the trust. The court's order, signed July 19, 1995, does not cite to any of the exceptions under Texas Rule of Civil Evidence 503 or otherwise disclose the court's rationale.² The court held that the attorney-client privilege protected only communications made under the following circumstances: 1) a litigious dispute existed between Chenault and Huie; 2) Huie obtained legal advice to protect himself against charges of misconduct; and 3) Huie paid for the legal counsel without reimbursement from the estate or trust. The court accordingly ordered Ringer to answer questions relating to events before February 1993, when suit was filed and Huie began personally compensating Ringer. The court also held that the attorney-work-product privilege did not apply to communications made before Chenault filed suit, again without stating its reasoning.


The court of appeals, after granting Huie's motion for leave to file petition for writ of mandamus, subsequently vacated that order as improvidently granted, denying relief. After Huie sought mandamus relief from this Court, we stayed Ringer's deposition pending our consideration of the merits.

II

The attorney-client privilege protects from disclosure confidential communications between a client and his or her attorney "made for the purpose of facilitating the rendition of professional legal services to the client...." TEX.R.CIV.EVID. 503(b). This privilege allows "unrestrained communication and contact between an attorney and client in all matters in which the attorney's professional advice or services are sought, without fear


that these confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding."  *West v. Solito*, 563 S.W.2d 240, 245 (Tex.1978). The privilege thus "promote[s] effective legal services," which "in turn promotes the broader societal interest of the effective administration of justice."  *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex.1993).

The Texas Trust Code provides that "[a] trustee may employ attorneys ... reasonably necessary in the administration of the trust estate." TEX.PROP.CODE § 113.018. Chenault *923 does not dispute that Huie employed Ringer to assist Huie in the administration of the Chenault trust. Indeed, Chenault does not seriously dispute that an attorney-client relationship existed between Huie and Ringer about trust matters.³ Further, Rule 503 contains no exception to the privilege for fiduciaries and their counsel. Chenault nonetheless contends that communications between Huie and Ringer regarding trust matters cannot be privileged as to Chenault, a trust beneficiary, even if the elements of Rule 503 are otherwise met. Chenault's primary argument is that Huie's fiduciary duty of disclosure overrides any attorney-client privilege that might otherwise apply.

Trustees and executors owe beneficiaries "a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiaries'] rights."  *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex.1984). See also TEX.PROP.CODE § 113.151(a) (requiring trustee to account to beneficiaries for all trust transactions). This duty exists independently of the rules of discovery, applying even if no litigious dispute exists between the trustee and beneficiaries.


Chenault argues that the trustee's duty of disclosure extends to any communications between the trustee and the trustee's attorney. The fiduciary's affairs are the beneficiaries' affairs, according to Chenault, and thus the beneficiaries are entitled to know every aspect of Huie's conduct as trustee, including his communications with Ringer. We disagree.





The trustee's duty of full disclosure extends to all *material facts* affecting the beneficiaries' rights. Applying the attorney-client privilege does not limit this duty. In Texas, the attorney-client privilege protects confidential communications between a client and attorney made for the purpose of facilitating the rendition of professional legal services to the client. See TEX.R.CIV.EVID. 503(b). While the privilege extends to the entire communication, including facts contained therein, see *GAF Corp. v. Caldwell*, 839 S.W.2d 149, 151




(Tex.App.—Houston [14th Dist.] 1992, orig. proceeding); 1 STEVEN GOODE ET. AL, TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL, § 503.5 n. 15 (1993), a person cannot cloak a material fact with the privilege merely by communicating it to an attorney. See, e.g.,  *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 199 (Tex.1993).

This distinction may be illustrated by the following hypothetical example: Assume that a trustee who has misappropriated money from a trust confidentially reveals this fact to his or her attorney for the purpose of obtaining legal advice. The trustee, when asked at trial whether he or she misappropriated money, cannot claim the attorney-client privilege. The act of misappropriation is a material fact of which the trustee has knowledge independently of the communication. The trustee must therefore disclose the fact (assuming no other privilege applies), even though the trustee confidentially conveyed the fact to the attorney. However, because the attorney's only knowledge of the misappropriation is through the confidential communication, the attorney cannot be called on to reveal this information.

Our holding, therefore, in no way affects Huie's duty to disclose all material facts and to provide a full trust accounting to Chenault, even as to information conveyed to Ringer. In the underlying litigation, Chenault may depose Huie and question him fully regarding his handling of trust property and other factual matters involving the trust. Moreover, the attorney-client privilege does not bar Ringer from testifying about factual matters involving the trust, as long as he is not called on to reveal confidential attorney-client communications.

The *communications* between Ringer and Huie made confidentially and for the purpose *924 of facilitating legal services are protected. The attorney-client privilege serves the same important purpose in the trustee-attorney relationship as it does in other attorney-client relationships. A trustee must be able to consult freely with his or her attorney to obtain the best possible legal guidance. Without the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second-guessing the trustee's actions. Alternatively, trustees might feel compelled to blindly follow counsel's advice, ignoring their own judgment and experience. See  *In re Prudence-Bonds Corp.*, 76 F.Supp. 643, 647 (E.D.N.Y.1948) (concluding that, without the privilege, "the experience in management and best judgment by [the trustee] is put aside ... which, in the end may result in harm to the [beneficiaries]").

Chenault relies on  *Burton v. Cravey*, 759 S.W.2d 160 (Tex.App.—Houston [1st Dist.] 1988, no writ), for the proposition that the attorney-client privilege does not apply where a party has a right to information independently of the rules of discovery. In  *Burton*, condominium owners filed a trial court mandamus action against the condominium association to enforce their statutory right to inspect the association's books and records. See TEX.PROP.CODE § 81.209;  TEX.REV.CIV.STAT.ANN. art. 1396–2.23. The trial court allowed inspection of the records, including those in the possession of the association's attorney, finding as a factual matter that the attorney's records constituted part of the association's records. The court of appeals affirmed, holding that the attorney-client privilege did not apply in light of the owners' unqualified right of inspection.  759 S.W.2d at 162.

It is unclear whether the records at issue in  *Burton* were merely records of the association in the possession of the attorney, or whether they contained separate confidential attorney-client communications. To the extent that they consisted of the former, we agree that they were not protected. See  *Brotherton*, 851 S.W.2d at 199. However, to the extent that the court held that the owners' statutory right of inspection somehow trumped the privilege for confidential attorney-client communications, we disapprove of its holding, for the reasons previously discussed. We also disapprove of the court's dicta that the trial court could, in its discretion, decline to apply the attorney-client privilege even if all the elements of Rule 503 were met. See  759 S.W.2d at 162.

Chenault also relies on a study by the Section of Real Property, Probate and Trust Law of the American Bar Association, entitled *Report of the Special Study Committee on Professional Responsibility—Counselling the Fiduciary*. See 28 REAL PROP., PROB. & TR.J. 823 (1994). This study concludes that, while counsel retained by a fiduciary ordinarily represents only the fiduciary, the counsel should be allowed to disclose confidential communications relating to trust administration to the beneficiaries. *Id.* at 849–850. The study reasoned as follows:

The fiduciary's duty is to administer the estate or trust for the benefit of the beneficiaries. A lawyer whose assignment is to

provide assistance to the fiduciary during administration is also working, in tandem with the fiduciary, for the benefit of the beneficiaries, and the lawyer has the discretion to reveal such information to the beneficiaries, if necessary to protect the trust estate. The interests of the beneficiaries should not be compromised by a barrier of confidentiality.

Id. Several English common-law cases, and treatises citing those cases, also support this view. *See, e.g., In re Mason*, 22 Ch.D. 609 (1883); *Talbot v. Marshfield*, 2 Dr. & Sm. 549 (1865); *Wynne v. Humbertson*, 27 Beav. 421 (1858). *See also* BOGART, *THE LAW OF TRUSTS AND TRUSTEES*, § 961 (2nd. ed. 1983); SCOTT, *THE LAW OF TRUSTS*, § 173 (3rd ed. 1967).

We decline to adopt this approach. We find the countervailing arguments supporting application of the privilege, discussed previously, more persuasive. Moreover, Rule 503 contains no exception applicable to fiduciaries *925 and their attorneys. If the special role of a fiduciary does justify such an exception, it should be instituted as an amendment to Rule 503 through the rulemaking process. Ringer testified that he had the “fullest expectation” that his communications with Huie would be privileged. This expectation was justified considering the express language of Rule 503 protecting confidential attorney-client communications. We should not thwart such legitimate expectations by retroactively amending the rule through judicial decision.

We thus hold that, while a trustee must fully disclose material facts regarding the administration of the trust, the attorney-client privilege protects confidential communications between the trustee and his or her attorney under Rule 503.⁴

III

A

We also reject the notion that the attorney-client privilege does not apply because there was no true attorney-client relationship between Huie and Ringer. This argument finds support in some other jurisdictions, where courts have held that an attorney advising a trustee in connection with the trustee’s fiduciary duties in fact represents the trust beneficiaries. Accordingly, the trustee has no privilege to withhold confidential communications from the beneficiaries. *See, e.g., Wildbur v. ARCO Chemical Co.*, 974 F.2d 631 (5th Cir.1992); *United States v. Evans*, 796 F.2d 264 (9th Cir.1986); *In the Matter of Torian*, 263 Ark. 304, 564 S.W.2d 521 (1978); *Riggs Nat’l Bank of Washington v. Zimmer*, 355 A.2d 709 (Del.Ch.1976); *In re Hoehl’s Estate*, 181 Wis. 190, 193 N.W. 514 (1923). The court in *Riggs* reasoned as follows:



As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served. And, the beneficiaries are not simply incidental beneficiaries who *chance* to gain from the professional services rendered. The very intention of the communication is to aid the beneficiaries.... In effect, the beneficiaries were the clients of [the trustees’ attorney] as much as the trustees were, and perhaps more so.

355 A.2d at 713–14.

We conclude that, under Texas law at least, the trustee who retains an attorney to advise him or her in administering the trust is the real client, not the trust beneficiaries. *See Thompson v. Vinson & Elkins*, 859 S.W.2d 617 (Tex.App.—Houston [1st Dist.] 1993, writ denied) (beneficiary lacked standing to sue trustee’s attorney for malpractice, as no attorney-client relationship existed between them). “Client” is defined under Rule 503 as

a person, public officer, or corporation, association, or other

organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

TEX.R.CIV.EVID. 503(a)(1). It is the trustee who is empowered to hire and consult with the attorney and to act on the attorney's advice. While Huie owes fiduciary duties to Chenault as her trustee, he did not retain Ringer to represent Chenault, but to represent himself in carrying out his fiduciary duties. Ringer testified, for example, that he has "never given any legal advice to Mrs. Chenault," and in fact had only seen her on a few isolated occasions. It would strain reality to hold that a trust beneficiary, who has no direct professional relationship with the trustee's attorney, is the real client. See  *In re Prudence-Bonds Corp.*, 76 F.Supp. 643 (E.D.N.Y.1948);  *926 *Shannon v. Superior Court*, 217 Cal.App.3d 986, 266 Cal.Rptr. 242, 246 (1990). We thus hold that Huie, rather than Chenault, was Ringer's client for purposes of the attorney-client privilege.

B


Chenault also advances an argument on post-submission brief to this Court that the *trust* itself was Ringer's real client. This approach, however, is inconsistent with the law of trusts. Mrs. Huie created the testamentary trusts by devising property to Huie as trustee. See TEX.PROP.CODE § 112.001(3). It is Huie that holds the trust property for the benefit of Chenault, and it is Huie that is authorized to hire counsel. See TEX.PROP.CODE § 113.018. 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. See TEX.PROP.CODE § 111.004. Ringer thus represented Huie in his capacity as trustee, not the "trust" as an entity.

IV

Chenault also argues that communications between Ringer and Huie should be disclosed under the crime-fraud exception to the attorney-client privilege. See TEX.R.CIV.EVID. 503(d)(1). Chenault does not argue that the alleged breaches of trust for which she is suing are crimes or fraud within this exception; rather, she contends that the failure to disclose communications in and of itself is fraud. Because we have held that the trustee's invocation of the attorney-client privilege does not violate his or her duty of full disclosure, we find Chenault's crime-fraud argument to be without merit.

V

A

The party resisting discovery bears the burden of proving any applicable privilege. See  *State v. Lowry*, 802 S.W.2d 669, 671 (Tex.1991). Chenault argues that even if the attorney-client privilege is otherwise available, Huie failed to carry his evidentiary burden to establish its applicability in this case.

Ringer, who was allowed to give testimony in narrative form, testified in part as follows:

The questions that were propounded to me during my deposition by [Chenault's counsel] I believe were argumentative, and they sought to go at the very core of things I understood, things that I knew, or even questions that related to whether something occurred or not, would go to the essence of the advice and communication. I have always handled my work with Mr. Huie with the fullest expectation that my correspondence with him and my communications with him and his correspondence with me and his communication with me would be privileged.... I also have Mr. Huie's instruction and expectation that his

communications be confidential....

Ringer did not specifically address any of the numerous certified questions before the court, and thus there is no testimony about whether or why each particular question calls for the disclosure of confidential communications. Chenault thus contends that Huie did not prove “what particular deposition testimony would entrench upon the alleged attorney-client privilege....” Huie responds that many of the questions on their face call for privileged communications, but at the same time concedes that other questions “arguably present a close question as to whether confidential attorney-client communications ... would be compromised.”

The trial court’s ruling is based on its conclusion that the attorney-client privilege does not apply to any pre-litigation communications between a trustee and the trustee’s attorney, a contention we have rejected. In light of this holding, we believe the trial court should have an opportunity to consider, in the first instance, whether Huie has carried his evidentiary burden as to each of the certified questions for which Ringer claimed, on Huie’s behalf, the attorney-client privilege. The court may, in its discretion, receive further evidence from the parties.

B

Chenault further argues that many of the certified questions relate to federal tax returns *927 filed by the estate. Relying on cases interpreting the federal attorney-client privilege, she contends that the privilege does not apply when an attorney is employed to prepare tax returns, as the attorney is primarily performing accounting, rather than legal, services. *See, e.g., In re Grand Jury Investigation*, 842 F.2d 1223, 1225 (11th Cir.1987); *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir.1981); *Canaday v. United States*, 354 F.2d 849, 857 (8th Cir.1966). *But see Colton v. United States*, 306 F.2d 633, 637 (2d Cir.1962), *cert. denied*, 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499 (1963).

The attorney-client privilege embodied in Rule 503 requires that the communication be “made for the purpose of facilitating the rendition of professional legal services to the client....” The trial court, in considering whether Huie has met his evidentiary burden, should in the first

instance determine whether this element is satisfied as to each of the certified questions.

VI


The trial court also overruled Huie’s attorney-work-product objections as to communications made before the date Chenault filed suit. Huie contends that the work-product privilege protects communications made after 1988, the time when he contends that he anticipated litigation.



An attorney’s “work product” refers to “specific documents, reports, communications, memoranda, mental impressions, conclusions, opinions, or legal theories, prepared and assembled in actual anticipation of litigation or for trial.” *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 200 (Tex.1993). The trial court did not rule on Huie’s claims of work-product privilege independently of his claims of attorney-client privilege; rather, the court summarily overruled both of these claims as to all pre-litigation communications. It thus appears that the trial court concluded, as it did for the attorney-client privilege, that the work-product privilege simply does not apply in the fiduciary-attorney relationship prior to the time suit is actually filed.

We disagree with this conclusion. The policy reasons supporting the attorney-client privilege in the context of the fiduciary-attorney relationship support even more strongly the work-product privilege, as the latter protects the confidentiality of work prepared in anticipation of litigation. There can be little dispute that a fiduciary must be allowed some measure of confidentiality in defending against an anticipated suit for breach of fiduciary duty. Further, we do not believe it is determinative that Ringer was compensated from trust funds, rather than by Huie personally, before Chenault filed suit. The determinative factor for the work-product privilege is instead whether litigation was anticipated. While we express no opinion on whether it was *proper* for Ringer to be compensated from trust funds for any work that may have been done in anticipation of litigation, we hold that any such impropriety would not abrogate the work-product privilege. *See Lasky, Haas, Cohler & Munter v. Superior Court*, 172 Cal.App.3d 264, 218 Cal.Rptr. 205 (1985) (public policy underlying full disclosure by trustee does not overcome work-product privilege, even where attorney is compensated from trust corpus).

Because the trial court concluded that the work-product privilege did not apply to materials or communications generated prior to the time suit was filed and Huie began personally compensating Ringer, it appears that the court never reached the issue of when Huie anticipated litigation. The court should therefore reconsider Huie's work-product objections in accordance with this opinion.

VII

Chenault argues that because the legal question confronting the trial court was an issue of first impression in Texas, the court could not have "abused its discretion" in resolving the issue, and thus mandamus relief is inappropriate. We disagree. "A trial court has no 'discretion' in determining what the law is or applying the law to the facts."  *Walker v. Packer*, 827 S.W.2d 833,

840 (Tex.1992). Consequently, the trial court's erroneous legal conclusion, even in an *928 unsettled area of law, is an abuse of discretion. See  *Lunsford v. Morris*, 746 S.W.2d 471 (Tex.1988). Moreover, because the trial court's order compels the disclosure of potentially privileged information, Huie lacks an adequate remedy by appeal. See  *Walker*, 827 S.W.2d at 843.

We therefore conditionally grant the writ of mandamus and direct the trial court to vacate its July 19, 1995, discovery order. The trial court shall reconsider Huie's claims of attorney-client and attorney-work-product privilege in accordance with this opinion. The court may in its discretion receive additional evidence from the parties.

All Citations

922 S.W.2d 920, 64 USLW 2540, 39 Tex. Sup. Ct. J. 288

Footnotes

- ¹ Chenault sued individually, as next friend of her minor daughter, and as next friend of her minor niece, who is under Chenault's conservatorship. Chenault also named several business associates of Huie as additional defendants.
- ² The trial court initially relied on Texas Rule of Civil Evidence 503(d)(5), which creates an exception to the attorney-client privilege as between joint clients of an attorney regarding matters of common interest to the clients. The court, however, later amended its order to delete this reference.
- ³ Chenault argues for the first time in a post-submission brief that Ringer represented the trust itself as an entity, rather than Huie as trustee. This argument is addressed in section III-B below.
- ⁴ Chenault also argues that Huie, by accepting the appointment as trustee with knowledge of his duty of disclosure, impliedly waived the protection of the attorney-client privilege. Because we conclude that a trustee does not violate the duty of full disclosure by invoking the attorney-client privilege, we reject this waiver argument.

