REPTL
REAL ESTATE, PROBATE & TRUST LAW
SECTION OF THE STATE BAR OF TEXAS

REPORTER

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REPORTER

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The REPTL Reporter is the official journal of the Real Estate, Probate and Trust Law Section of the State Bar of Texas (REPTL). It is published by REPTL to provide education and information for REPTL members in the areas of real estate, probate, trust, guardianship, tax and water law. A copy of each issue is furnished to the members of REPTL as part of their section dues.

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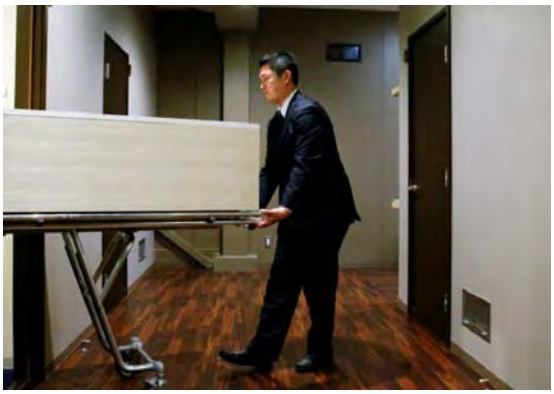
Cremains as Fish Bait

Ron Hopper wanted to go with his two buddies on a fishing trip but realized he might not make it because of his fatal medical condition. So, he told them to take some of his cremains and use them in a bait mixture. After he died, they did so and went fishing and caught a 180-pound carp with the cremains bait. It took them three hours to land the massive fish, which they later released. Ron's wife held back half of Ron's ashes, which she scattered on Grenada.

Fishermen Use Dead Friend's Ashes as Bait to Catch 180-pound carp, FOXNEWS.COM (Apr. 28, 2016).

The Corpse Hotel – "You Can Check out Anytime You Like, but You Can Never Leave"?



Too many corpses, too few crematoriums. This is the problem currently facing families in Japan. An entrepreneur has helped to alleviate the problem by building a corpse hotel to hold the "funeral refugees." Each corpse gets to occupy a private room costing about $80 per day until there is an opening at a local crematorium. The rooms are heavily air conditioned to prevent body decomposition. Some neighbors are displeased about having the bodies so near their apartments.

Japan's Corpse Hotels Upset Some of the Neighbors, AOL.COM (Apr. 29, 2016).

The All-Knowing Bed

If you decided to come home early from work, would you fear seeing four wiggling feet in your bed? There is now a new option. Instead of the traditional method of installing hidden surveillance cameras, you may purchase a tattletale mattress. The Durmet company installs a "Lover Detection System" in its Smarttress "composed of 24 intelligent sensors capable of capturing the 'suspicious' bed movement." The mattress then sends an alert to your cell phone, which will tell you when the mattress is being used. The app shows speed, intensity, impacts per minute, and pressure points.

Smarttress Official Video, YOUTUBE (Apr. 13, 2016).

INTESTACY, WILLS, ESTATE ADMINISTRATION, AND TRUSTS UPDATE

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Wills – Interpretation – "Common Disaster"

Stephens v. Beard, Nos. 14-0406 & 14-0407, 2016 WL 1069089 (Tex. Mar. 18, 2016).

Husband murdered wife, immediately shot himself, but did not die until a few hours later. Each will provided for legacies to nine named individuals if the spouses died in a common disaster or if their death order could not be determined. The trial court determined that the legacies were effective because the spouses died in a common disaster.

The appellate court affirmed in *Stephens v. Beard*, 428 S.W.3d 385 (Tex. App.—Tyler 2014). The court held that the murder-suicide was a common disaster because Husband fired both the murder and suicide gunshots in one episode. The court determined it was irrelevant to the classification of the event as a common disaster that Husband "did not successfully kill himself immediately" even though he lived almost two hours longer than Wife. *Id.* at 388.

On appeal to the Supreme Court of Texas, the court reversed without even giving the parties the opportunity to present oral arguments. The court focused on the well-recognized legal meaning of the term "common disaster" which means that the two parties "die at very nearly the same time, with no way of determining the order of their deaths." The court held that Husband and Wife did not die in a common disaster because although their deaths were temporally close, the order of their deaths is known with certainty.

Moral: A murder-suicide will not be considered as a common disaster if the death orders can be determined.

Wills – Will Contest

In re Estate of Parrimore, No. 14-14-00820-CV, 2016 WL 750293 (Tex. App.—Houston [14th Dist.] Feb. 25, 2016, no pet. h.) (mem. op.).

Testator and Wife worked together on Testator's will using a computer program which prepared his will according to his answers to questions generated by the software, which included an express provision that he was intentionally omitting his two children. Sometime thereafter, Testator suffered a stroke and was hospitalized for three days. Eleven days after being discharged, Testator had a will signing party at his home attended by family members and friends. After socializing with the guests and shooting pool, the will execution ceremony took place. One of the guests, a notary, testified that Testator asked his wife to sign the will for him and that three witnesses attested to the will in Testator's presence. During the months that followed, Testator continued his therapy, was able to drive, and even went back to work. About a year after the will execution ceremony, Testator died.

Wife filed the will for probate and Testator's children contested alleging that Testator lacked testamentary intent and testamentary capacity and was under Wife's undue influence. The trial court

heard the testimony of the people at the will party and admitted the will to probate. Testator's children appealed.

The appellate court affirmed. First, the court examined the document itself such as being labeled as a "Last Will and Testament," providing for the disposition of his property, and naming an executor. The court held this was sufficient to support the trial court's implied finding that Testator had testamentary intent.

Second, the court examined the evidence which supposedly demonstrated that Testator lacked testamentary capacity. The court recognized that Testator's stroke shortly before executing the will could put his capacity into question. However, there was ample testimony from individuals present at the will execution party who swore that Testator appeared to be of sound mind and that he knew he was executing a will.

Third, the court determined that there was insufficient evidence to set aside the will on the basis of undue influence. Although there was circumstantial evidence that Wife could have exerted undue influence, such as being named as the sole beneficiary to the exclusion of his children and participating in the preparation and execution of the will, there was insufficient evidence that she actually exerted any undue influence. Merely having the opportunity to exert such influence does not prove that Wife took advantage of that opportunity.

Moral: Anytime a testator has a medical condition which could give rise to a contest based on lack of capacity or undue influence, the attorney should take steps to preserve evidence that demonstrates capacity and lack of undue influence. In addition, a testator should consult with an attorney when executing a will rather than using a computer program and then throwing a will execution party.

Wills – Tortious Interference with Inheritance Rights – Austin District

Anderson v. Archer, No. 03-13-00790-CV, 2016 WL 859017 (Tex. App.—Austin Mar. 2, 2016, no pet. h.).

The jury determined that Defendant tortiously interfered with Plaintiffs' rights to inherit from their uncle and the trial court awarded over $2.5 million in damages. Defendant appealed.

The appellate court reversed holding that Texas does not recognize a cause of action for tortious interference with inheritance. The court conducted a detailed review of the numerous Texas cases discussing tortious interference and determined that although they may have discussed the tort, they never actually recognized it. The court also refused to interpret Estates Code § 54.001 as a legislative admission that the tort exists merely because this provision provides that filing or contesting a will is not tortious interference. The court then explained that express legislative action or a decision of the Texas Supreme Court is needed to recognize the tort.

The court also noted that Plaintiffs had already received the property with which they alleged Defendant tortiously interfered. The main component of their damages was not the recovery of the uncle's property but rather attorneys' fees incurred to receive their inheritance. Thus, Plaintiffs were actually using the tort as a fee-shifting mechanism to recover fees otherwise unrecoverable due to Texas following the American Rule that the winning party cannot recover attorneys' fees unless authorized by statute.

Moral: Whether Texas courts may award damages for tortious interference with inheritance rights is in a state of flux as intermediate appellate courts have differing opinions. Hopefully, the Texas Supreme Court will grant petition to one of these cases and decide the issue.

Estate Administration – Sale of Estate Property

In re Estate of Stone, 475 S.W.3d 370 (Tex. App.—Waco 2014, pet. denied).

Dependent Administratrix found two potential purchasers for estate property. The court confirmed the second offer, which was financially a better deal for the estate. The person who made the first offer two years earlier claimed the trial court's approval of the second offer was improper and appealed.

The appellate court affirmed. The court reviewed the procedure Administratrix and the trial court followed and found that the procedure was in full compliance with the applicable statutory provisions. The court then examined the court's decision to confirm the second offer and held that the trial court's action was not an abuse of discretion. In fact, the second offer was a considerably better contract for the estate—the purchaser offered a higher price for just the surface rights than the first potential purchaser offered for both the surface and mineral rights.

The court rejected the argument that the first purchaser should prevail because had Administratrix timely filed a request within thirty days for the court to confirm the sale as required by the statute, the court would have done so because the offered price was fair at that time. The court explained that it is unknown whether an expert would have been hired to determine that the offered price for both the surface and mineral interests was not actually fair to the estate. After examining additional evidence, the court determined that there was no showing that the first purchaser was injured or disadvantaged by Administratrix's failure to file the report of sale within thirty days.

The first purchaser also claimed that Administratrix was not following the terms of the will in disposing of estate property. The court disposed of this argument in short order by explaining the first purchaser lacked standing to complain about the Administratrix's conduct.

Moral: A potential purchaser of estate property from a dependent personal representative needs to avoid relying on the sale as a fait accompli until the court actually confirms the sale.

Trusts – Revocation

Gordon v. Gordon, No. 11-14-00086-CV, 2016 WL 1274076 (Tex. App.—Eastland Mar. 31, 2016, no pet. h.) (mem. op.).

Husband and Wife created a revocable trust which required a revocation to be in a signed, acknowledged writing delivered to the trustee. Thereafter, they executed a joint will which provided that the will overrides "any prior allocations described in trust documents." After Husband's death, a dispute arose as to whether the property they had transferred to the trust would be governed by the terms of the trust or the will. Wife claimed that the trust controlled and Executor of Husband's will contended that the will controlled. The trial court held that the will provision did not act to revoke the trust and thus, the trust assets passed under the terms of the trust. Executor appealed.

The appellate court affirmed. The court explained that the language of the will addressing the disposition of property was testamentary in nature, that is, it would take effect after death even though the language of the will revoking previous wills was effective immediately. The will did not contain a provision revoking the trust which complied with the requirements for revocation set forth in the trust.

Moral: An *inter vivos* trust is a nonprobate asset and the property transferred to the trust is governed by the terms of the trust, not a subsequent will, unless the will can serve as a presently effective trust revocation following the terms of the trust.

GUARDIANSHIP LAW CASE NOTES

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Subject Matter Jurisdiction; Divorce Related to Guardianship Proceeding

In re Mares, No. 13-15-00549-CV, 2016 WL 362783 (Tex. App.—Corpus Christi Jan. 28, 2016, no pet.) (mem. op.).

In this case, the appellate court considered whether the probate court had subject matter jurisdiction in a divorce proceeding involving the ward. Ward's wife filed an application in the county court at law requesting the appointment of ward's daughter as guardian. The court appointed ward's daughter as guardian of the person and estate.

Wife then filed for divorce from ward in the district court. Subsequently, the county court at law transferred the guardianship to the statutory probate court pursuant to Texas Estates Code § 1023.003. The guardian requested the divorce proceeding be transferred to the probate court and the probate court entered an order transferring the pending divorce proceeding pursuant to Texas Estates Code § 1022.007, thereby consolidating the proceedings.

The district court ignored the probate court's order and instead issued an order setting the divorce for trial. Guardian filed a plea to the jurisdiction on the grounds that the probate court had assumed subject matter jurisdiction or in the alternative sought a continuance. The district court then rendered a final decree of divorce.

Guardian filed for mandamus arguing the following: (1) the district court abused its discretion by proceeding to trial after the probate court ordered transfer of the proceeding; and (2) the order granting the divorce is void. The wife filed a response arguing that the Texas Estates Code provides that a probate court "may" transfer a divorce proceeding, but is not required to and therefore, the district court had jurisdiction.

The appellate court cited to *In re Graham*, 971 S.W.2d 56, 60 (Tex. 1998), in which the Texas Supreme Court held under the then analogous provisions of the Texas Probate Code that a statutory probate court has the authority to transfer to itself, from the district court, a divorce proceeding when one party to the divorce is a ward of the probate court. In *Graham*, the court held that the "outcome of this divorce proceeding . . . necessarily appertain[ed] to [the husband's] estate because it directly impacts the assimilation, distribution and settlement of [the husband's] estate."

Relying on *Graham*, the appellate court concluded the same result applies under the current Texas Estates Code and that a divorce proceeding involving the ward is a matter related to a guardianship proceeding. Accordingly, the appellate court held that the probate court had the authority to transfer the divorce proceedings to itself and the district court abused its discretion in granting the divorce.

The appellate court granted the writ of mandamus and directed the district court to vacate the divorce decree and transfer the case to the probate court.

ELDER LAW UPDATE

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Agency Authority in Skilled Nursing Facilities' Arbitration Agreements

Gross v. GGNSC Southaven, L.L.C., No. 15-60124, 2016 WL 1019200 (5th Cir. Mar. 14, 2016).

Son moved Mom into a Mississippi Skilled Nursing Facility and was presented with a stack of administrative paperwork, which Son signed on Mom's behalf. Among the admission papers was an arbitration agreement. Prior to moving into the Skilled Nursing Facility, Mom orally authorized Son to handle her affairs but never signed a durable or medical power of attorney. Mom passed away and Son sued Skilled Nursing Facility, in his capacity as Administrator of Mom's Estate, for negligence, medical malpractice, and wrongful death. Skilled Nursing Facility moved to compel arbitration based on the signed arbitration agreement in the admission paperwork.

The Mississippi District Court held that a power of attorney, or other "formal legal device," is necessary to confer actual authority to sign a nursing home arbitration agreement on behalf of another. Thus, Son did not have actual authority to agree to arbitration on Mom's behalf.

On appeal, the Skilled Nursing Facility argued that the district court incorrectly adopted a formal legal device requirement for a party to prove actual authority to sign a nursing home arbitration agreement. The Fifth Circuit agreed with the Skilled Nursing Facility and rejected the formal legal device requirement, holding that a power of attorney is not the only way to establish agency authority to sign an arbitration agreement. When evaluating whether there is a valid agreement to arbitrate between parties, courts looks to state law principles that govern formation of contracts, which require mutual assent between parties with legal capacity to contract. Under Mississippi law, an agent's authority can be expressed or implied and can be granted in either written or oral terms. Thus, the Fifth Circuit found that Son's sworn deposition testimony alone could be used as evidence to determine the existence and scope of an agency relationship with Mom. The case was remanded to determine whether Son had express authority to act on Mom's behalf and whether executing the arbitration agreement was within the scope of that authority.

Transfer on Death Deed v. Lady Bird Deed

In 2015, the Texas Legislature passed the Texas Real Property Transfer on Death Act by adding a new Chapter 114 to the Texas Estates Code. Effective September 1, 2015, an individual can transfer his or her interest in real property to one or more beneficiaries upon the transferor's death. During the transferor's life, the transferor retains all rights to the property, including homestead rights, property tax exemptions, and the right to convey or encumber the property. TEX. EST. CODE § 114.101(1). Similar to a payable on death account for personal property, a Transfer on Death Deed transfers real property outside of the probate estate. A Transfer on Death Deed must be signed by a transferor, notarized, and recorded in the office of the recorder of deeds in the county where the property is located during the transferor's lifetime. It cannot be created through use of a power of attorney. TEX. EST. CODE § 114.054(b). Because the transfer of the owner's interest will not occur until the owner dies, a Transfer

on Death Deed is revocable by a subsequent inconsistent Transfer on Death Deed or by an express revocation.

In comparison, an Enhanced Life Estate Deed, commonly known as a Lady Bird Deed, allows a transferor to transfer property to his or her heirs while simultaneously retaining a life estate and the right to sell, convey, or mortgage the property without beneficiary consent. Similar to a Transfer on Death Deed, a Lady Bird Deed transfers real property outside of the probate estate and a transferor can take away a remainder owner's interest during the transferor's lifetime.

At first glance, the Transfer on Death Deed and the Lady Bird Deed appear to be the same thing. When deciding which deed to use, however, the following features and applications of each deed should be considered:

- Effect on Medicaid Eligibility: For both the Transfer on Death Deed and the Lady Bird Deed, if the property being transferred is exempt from inclusion in a calculation of available resources, there is no transfer penalty for purposes of Medicaid qualification. In addition, property transferred under both deeds passes outside the probate estate and is therefore, not subject to the Medicaid Estate Recovery Program. Although the Health and Human Services Commission has stated that the Transfer on Death Deed will be treated the same as a Lady Bird Deed, the Lady Bird Deed has the current advantage of being more familiar to Medicaid program personnel and to title companies. Moreover, a Lady Bird Deed can be executed by an agent acting under a durable power of attorney.
- Title Insurance: The Transfer on Death Deed statute expressly provides that it transfers real property without covenant of warranty of title even if the deed contains a contrary provision. TEX. EST. CODE § 114.103(d). Because different title policies contain different provisions as to what claims are covered, it may be unclear whether the beneficiary of a Transfer on Death Deed is within the definition of "insured" under the policy or otherwise entitled to the policy's protection. Although this seems favorable in limiting liability to the estate of the transferor, it precludes protection for which the transferor paid and may want for the beneficiary. In contrast, the Lady Bird Deed allows for the creation of a general warranty of title for the protection of a beneficiary. Therefore, if title insurance is involved, a Lady Bird Deed drafted as a General Warranty Deed would be preferable.
- Acceptance: A key difference between a Transfer on Death Deed and a Lady Bird Deed is the origin of each deed. A Transfer on Dead Deed is clearly defined by statute and derived from uniform laws adopted by several states. By contrast, references to Lady Bird Deeds or Enhanced Life Estate Deeds are found in case law, leaving the need for further development.

REAL ESTATE & OIL AND GAS TAX DEVELOPMENTS

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Section 2063 Applied because Taxpayer Retained Possession or Enjoyment of Assets Placed into Partnership

Strangi v. Comm'r, 2015-2 USTC ¶60,506 (5th Cir. 2016).

Although not technically a real estate issue, everyone who does tax planning should be aware of Albert Strangi. Most of us first heard of him in *Estate of Strangi v. Commissioner*, 115 T.C. 478 (2000). The facts were undisputed. Mr. Strangi was aged and in ill health. His son-in-law, a lawyer, had attended a seminar where he learned of the "Fortress Plan," basically creating a limited partnership with a corporation as the general partner. Mr. Strangi would place approximately 98% of his assets in the partnership in exchange for a 99% limited partnership interest and a minority interest in the general partner. His children (beneficiaries of his estate) would acquire a majority of the shares of the corporate general partner in exchange for a cash contribution. Documents showed that Mr. Strangi's contribution of real estate partnerships, investment accounts, and real property (including the house Mr. Strangi lived in) had a value of $9,932,967 and his four children contributed $55,650 for the majority of the stock of the general partner.

In the first Tax Court case, the Service asserted that the partnership should be disregarded as it lacked economic substance and a business purpose. It also contended that the estate's interest in the assets was worth $10,947,343 rather than the $6,560,730 which had been reported. The lower value for the partnership interests related to discounts for lack of marketability and control. Prior to trial, the Service attempted to amend its answer and assert that under § 2036, Strangi's taxable estate should include the full value of the assets transferred to the partnership rather than a discounted value. The Tax Court denied the motion to amend and after trial, held for the Estate. The Service appealed and the case was remanded to Tax Court for a determination of why the motion to amend the pleading was denied or for a reversal of the denial of the motion.

The Tax Court opted to permit the amendment to the pleadings and in 2003, held that the initially assessed estate tax deficiency was correct and that Mr. Strangi had retained the possession or enjoyment of his assets and thus, they were includable in his estate under § 2036(a). The Estate appealed.

The Estate argued that Mr. Strangi had valid nontax reasons for the formation of the partnership. First, he was worried about a lawsuit from his second wife's children, whom he had excluded from his estate. Second, he feared a lawsuit from his caregiver who had been injured while working for him. He was also concerned about the potential outrageous executor's fees that would be charged by the bank. He also wanted to create a joint investment vehicle for the partners and permit centralized management of the assets. Thus, acting under a power of attorney, Mr. Strangi's son-in-law transferred the bulk of Mr. Stangi's assets to the partnership. Mr. Strangi did retain two small bank accounts ($762.00) and various brokerage accounts having a value of $187,000.

The Fifth Circuit noted that the partnership did make distributions to Mr. Strangi to meet his needs. It also paid $40,000 for his funeral expenses and $65,000 for a specific bequest. It also distributed

$3,187,800 to pay federal and state inheritance taxes. The court cited *United States v. Byrum*, 408 U.S. 125 (1972), which stated that a transferor retains "possession or enjoyment" of property within the meaning of § 2036(a)(1) if the transferor retains a substantial present economic benefit from the property. The IRS regulations further require that there be an "express or implied" agreement at the time of the transfer that the transferor will retain possession or enjoyment of the property.

In this case, the Commissioner did not suggest that an express agreement existed but asserted that there was an implied agreement that the Strangi children would allow their father to have access to the transferred assets.

In the administration of the partnership, formalities were observed. When distributions were made to Mr. Strangi, proportional distributions were made to the general partner. Rent was accrued on the house Mr. Strangi occupied even though the rent was not paid until after his death. Mr. Strangi did receive pension and social security benefits, which totaled approximately $3,000 per month. Thus, combined with his brokerage account, there was at least an indication that Mr. Strangi had retained sufficient assets to provide for his own support. However, in the two months from the creation of the partnership until Mr. Strangi's death, his monthly expenditures averaged nearly $17,000. Because of the substantial support Mr. Strangi received from the partnership, the Fifth Circuit sustained the Tax Court's determination that § 2036(a) applied.

The Estate then argued that even if § 2036(a) applied, the transfer to the partnership was within the "bona fide sale for an adequate and full consideration" exception. The court noted that *Kimbell v. United States*, 371 F.3d 257, 262 (5th Cir. 2004), stated that when assets are transferred to a partnership in exchange for a proportional interest therein, the adequate and full consideration requirement will generally be satisfied, so long as the formalities of the partnership are respected. The Commissioner conceded that this was the case here and thus, the only question that remained was whether a "bona fide sale" occurred.

The Estate argued that since the transfer was for adequate and full consideration, a bona fide sale had occurred. This argument was rejected as § 2036 discusses a bona fide sale for adequate and full consideration. If only one term was needed, why are they both included?

The court focused on "non tax" motives for the creation of the partnership. It sought to equate "bona fide" with "economic substance." The court discarded the nontax factors advanced by the Estate, one by one. First it noted that the children of his ex-wife's claim was stale when the partnership was formed and their claims never materialized. Kind of affirmation by hindsight. Second, there was never any valid basis for a claim by the injured caregiver as she and Mr. Strangi were very close and he had paid all her medical expenses. Also, there was little reason that the transfer to the partnership would have mitigated such a claim. Third, was the fear of high administrative costs ever valid? Why not amend the will and make the children executors rather than the bank? Last, the Strangi assets transferred to the partnership really did not need much active management. Also, the prospect of a joint investment vehicle when one partner's contribution is *de minimis* was obviously ignored when determining the bona fides. Thus, the fourth episode of the Strangi estate saga ends with a victory for the Commissioner and a formidable concern about § 2036 and family partnership planning.

We should note that a simple definition of a partnership is a relationship of two or more persons joining together to carry on a trade or business. Each person contributes money, property, labor or skill and expects to share in the profits and losses of the business. The touchstone of the definition is carrying on a trade or business. Too many practitioners have determined that one can magically place

assets in a juridical entity called a partnership and ignore the aspects of the definition that define its existence.

Fair Market Valuation Standard Deemed Appropriate Standard for Contribution of Properties

Green v. U.S., No. CIV-13-1237-D (W. D. Okla. Nov. 4, 2015).

In this case, the court was attempting to determine whether trust accounting limited a charitable contribution deduction. The trust instrument allowed the trustee to make charitable contributions in such amounts from the gross income of the trust as the trustee deems appropriate. In 2002, 2003, and 2004, the Trust was a partner in a partnership that owned or operated many but not all of the Hobby Lobby stores. Its annual share of gross income for those years ranged from $60 million to $72 million.

The Trust purchased various tracts of real estate and in 2004, it claimed a charitable contribution deduction for $20,526,383 donated to various religious charities. These donations were of real estate purchased by the Trust. In 2008, the Trust amended its 2004 tax return and claimed a deduction of $29,654,233 for the donated real estate (its fair market value) rather than the basis in such real estate. The IRS disallowed the increased charitable contribution and stated that the deduction was limited to the basis of the property contributed.

The IRS argued that § 642(c)(1) limits a charitable contribution to the amount of gross income of the trust and unrealized appreciation in real property does not constitute gross income. Section 642(c)(1) does state in part "there shall be allowed as a deduction in computing its taxable income (in lieu of the deduction allowed by section 170(a), relating to deduction for charitable, etc., contributions and gifts) . . . any amount of the gross income, without limitation, . . . paid for a purpose specified in section 170(c)."

The Service argued that for donated properties to qualify as charitable contributions under § 642, they must be sourced from and traceable to the trust's gross income. There was little argument that the real estate was purchased with the trust's gross income. However, the Service contended that any appreciation in the donated properties could not be considered as it constituted unrealized gains.

The court noted that reading the statute with the Service's interpretation would cause problems with contributions procured in one year (out of gross income) and donated in another. In short, the court stated that the Service was attempting to impose a charitable contribution limitation in a statute where none existed. Therefore, the charitable contribution was allowed equal to the fair market value of the property on the date of its donation.

Taxpayers' Saddlebred Horse Activities Not a Single Undertaking with their Real Estate Business and was Not Conducted for a Profit

Judah v. Comm'r, 101 T.C.M. 592 (2015).

The Taxpayer was contesting the disallowance of his losses on saddlebred horse showing activities. Taxpayer and his wife were both engaged in profitable real estate businesses. In an effort to offset the impact of § 183, the Taxpayers argued that their saddlebred business was a singular undertaking with their real estate businesses.

Taxpayers had no substantial connection with the horse industry until their daughter began riding and showing saddlebred horses. Their daughter evidently became known in the horse industry as an excellent show woman. Because of this activity, Taxpayers began looking for a saddlebred horse to

purchase and in 1998, they acquired their first horse. Beginning with this horse purchase, Taxpayers began deducting as business expenses their horse-related activities.

Taxpayers evidently did well with their 1998 horse purchases. Their first horse was purchased for $44,000 and sold in 2000 for $100,000. Their second purchase in 1998 was for $40,000 and that horse sold in 2006 for $150,000. In 1999, Taxpayers formed Judah Saddlebreds, LLC and conducted their horse activities through this entity. Taxpayers' plan was to purchase horses at a low cost and train and show them to exponentially increase their value, which could be realized through a sale. Taxpayers' expenses mainly consisted of boarding, training, and showing the horses. Taxpayers did not own any property that could accommodate the horses. Showing the horses was expensive because of the extra time the trainers had to spend getting ready for, attending, and traveling to the shows. Taxpayers also incurred the cost of VIP box seats, entry fees, and horse stall fees. During the period from 1998 through 2014, Taxpayers generated nearly $1.5 million in losses.

Taxpayers contended that their saddlebred activities and their real estate activities were a singular undertaking for the purposes of § 183. Taxpayers operated both a real estate brokerage business and a construction business. Multiple undertakings of a taxpayer may be treated as one activity if the undertakings are sufficiently interconnected. The most important factors in making the determination are the degrees of organizational and economic interrelationships of the undertakings, the business purpose served, and the similarity of the undertakings.

The court analyzed the nine factors under the § 183 regulations and determined that there was little interconnection between the activities. Although the Taxpayers advertised in the horse show programs, they could not show a link between their successful real estate business and their horse business. The court then analyzed the nine factors under § 183 to determine whether the activity was engaged in with an actual and honest objective of making a profit.

Because of the method with which Taxpayers approached their saddlebred activity, the court determined the Taxpayers did not have an honest objective toward making a profit. Some of the court's rationale was a little strained. Much emphasis was placed on the lack of a written business plan even though Mr. Judah was the sole member and sole manager of the LLC. The court noted that Taxpayers did not ask their accountants at what price the horses should be sold or what lines of business could improve profitability and reduce expenses. Accountants are generally smart, but who knew they were experts in horse activities and business consulting.

Taxpayers also conducted this activity without any land or stabling facilities. They merely talked with trainers and attended horse shows and did not engage in any of the less pleasant aspects of raising horses, such as mucking out stalls, feeding, and grooming. Their activities consisted mainly of a social outlet with friends. Not all was lost because Taxpayers did avoid the accuracy-related penalty because their returns were prepared by an accountant and the accountant did not tell them that their horse-related expenses were subject to disallowance by § 183. They also claimed losses from 1998 through 2007 without any question by the IRS.

PROPERTY TAX LAW UPDATE

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The Legislature Granted Complete Exemption for Properties Owned by Authorities Under the Higher Education Authority Act. Provisions in the Act Requiring Exclusive Use of the Property for Educational Purposes Did Not Pertain to the Property Tax Exemption.

Tex. Student Housing Auth. v. Brazos Cnty. Appraisal Dist., 460 S.W.3d 137 (Tex. 2015).

A governmental entity formed under the provisions of the Higher Education Authority Act provided residential housing to students at Texas A&M University and Blinn College. During the summer, it rented rooms to participants in summer programs at Texas A&M University who were not college students at either college. The appraisal district claimed these actions violated the exclusive governmental use requirements contained in the Texas Tax Code. The Texas Supreme Court disagreed. It found that the grant of exemption to the authority in § 53.46 of the act contained no such restrictions. That section provides, "Because the property owned by authority will be held for educational purposes only and will be devoted exclusively to the use and benefit of the students, faculty and staff members of an accredited institution of higher education, it is exempt from taxation of every character." The court contrasted this provision to those in the Tax Code that state that these other exemptions can only be granted "if" a property is used for an exempt purpose. The court explained that a person who believes that an authority has acted outside its statutory mandate can sue it challenging the ultra vires conduct. The appraisal district had not filed such an action. The court concluded that whether a property tax exemption should be removed for these types of violations of chartering authority are determinations that are left to the legislature's discretion.

Chief Appraisers Have the Authority to Determine "Degree of Intensity" Standards for Open Space Land; They Are Not Limited to Data Obtained From Within Their Own Counties; a Taxpayer May Not Sue a Chief Appraiser Personally Merely Because He Disagrees with the Chief Appraiser's Determinations.

Moers v. Harris Cnty. Appraisal Dist., 469 S.W.3d 655 (Tex. App.—Houston [1st Dist.] 2015, pet. denied).

Taxpayer was involved in organic sheep raising in Harris County. He sought open space land valuation for his property. The appraisal district denied his application, and the taxpayer sued both the district and the chief appraiser. The district court granted a motion for summary judgment to the appraisal district on the grounds that the taxpayer could not prove that it had a sufficient number of sheep on its farm to establish that the farm met the "degree of intensity" standard established by the chief appraiser. On appeal, the taxpayer claimed that the district did not have the authority to establish those standards, and that if it did, that it had illegally utilized data for counties surrounding Harris County in determining the standards. He further alleged that the chief appraiser had exceeded his authority in establishing those standards. The court of appeals disagreed. It ruled that the legislature had granted the Comptroller the right to establish standards pertaining to determination of open space land values, and that due to the localized nature of the statutory "degree of intensity" test, the Comptroller required local chief appraisers to set those standards. Accordingly, the chief appraiser had

the legal right to set the standards that he did. The court further ruled that neither the Tax Code nor the Comptroller's Agricultural Manual required a chief appraiser to restrict his "degree of intensity" determination to information obtained solely from the county in which the agricultural property is located. Finally, the court ruled that the taxpayer failed to adduce any evidence that the chief appraiser had acted outside the authority granted to him by the legislature. A disagreement with a chief appraiser's determination is not sufficient grounds as to sue a chief appraiser personally.

Not Including All Tax Accounts Comprising a Property is Not a Jurisdictional Defect in a Property Tax Equalization Suit As Long As the Taxpayer Pleads That the Entire Value of the Property is Being Treated Unequally; Nor is the Failure to Amend a Property Tax Lawsuit to State That a Taxpayer is Intending to Pay Its Taxes in Full; on the Question of Comparability of Properties in an Equality Suit, the Court of Appeals Will Significantly Defer to the Discretion of the Trial Court; Failure to be Able to Explain in an Equity Case Why Not All Portions of the Property Have Been Valued Does Not Present a Trial Court with Sufficient Evidence to Determine Comparability.

Galveston Cent. Appraisal Dist. v. Valero Refining-Tex. L.P., 463 S.W.3d 177 (Tex. App.—Houston [14th Dist.] 2015, pet. filed).

Refinery sued appraisal district claiming it was being treated unequally in comparison with the two other refineries located in the county. A jury trial was held, and the jury ordered a large reduction in the appraised value of the property. The appraisal district appealed, raising four points of error: (1) the trial court lacked jurisdiction over the suit because the refinery had failed to include all of the refinery's tax accounts in its suit; (2) the court lacked jurisdiction because the refinery failed to amend its lawsuit to inform the appraisal district that it was intending to pay its taxes in full; (3) that no evidence existed to support the jury's verdict because one of the other two refineries in the county was not a true comparable; and (4) that no evidence existed to support the verdict because the refinery without explanation deleted certain tax accounts that constituted parts of the property. The court of appeals rejected three of the four claims. It ruled that the refinery's failure to include all portions of the refinery in its suit was not a jurisdictional defect because the refinery had alleged, and was required to prove that the refinery as a whole had been unequally appraised. It ruled that the refinery's failure to amend its petition as required by § 42.08(d) of the Tax Code to state that it was paying its taxes in full was also not a jurisdictional defect because that statute only applies to taxpayers who choose not to pay their taxes in full. It ruled that the question of whether one of the other refineries was a true comparable was a complex one and that the trial court's holding had "particular force in this context because a very demanding threshold standard of comparability could prevent owners of complex industrial properties from bringing an equal-and-uniform challenge at all—at odds with the broad construction we are to give section 42.26 as a remedial statute." However, the court found that the inability of the refinery's expert witnesses to explain why certain portions of the overall refinery property had been removed from the lawsuit other than the refinery "told them to" do so rendered the jury's verdict as not being "supported by legally sufficient evidence." The elimination of those portions of the refinery from the suit had caused a substantial difference in value between the two calculations made by the experts.

A Community Housing Developing Organization That Acquires a Qualifying Low Income Housing Project from a Purchaser at a Foreclosure Sale Within Thirty Days of the Sale is Entitled to Continue the Property Tax Exemption.

HDSA Westfield Lake, LLC. v. Harris Cnty. Appraisal Dist., No. 14-15-00180-CV (Tex. App.—Houston [14th Dist.] Feb. 11, 2016, no pet. h.).

An apartment project that qualified for a Community Housing Development Organization (CHDO) exemption defaulted on its bond obligations and was sold at a foreclosure sale to a nonqualifying party. Within thirty days, the property was transferred to a qualified CHDO, and the CHDO applied to the appraisal district to continue the exemption. The appraisal district denied the application. Section 11.182 of the Texas Tax Code authorizes the continuation of an exemption "if the property is sold at a foreclosure sale and [within 30 days], the owner of the property submits to the chief appraiser evidence that the property is owned by [a qualifying CHDO]." Citing legislative history, the appraisal district claimed that the provision required the owner submitting proof to have been the purchaser at the foreclosure sale. The court disagreed finding that the plain language of the statute did not include such a restriction.

Taxpayers Have the Burden of Proof in District Court Suits Involving Claims of Unequal Tax Treatment.

Estate of Smith v. Ector Cnty. Appraisal Dist., No. 11-13-00337-CV (Tex. App.—Eastland, Nov. 12, 2015, pet. filed).

Taxpayer filed suit appealing an appraisal review board order contending that its property was not being equally appraised. After a year had passed, the appraisal district filed a no evidence summary judgment motion with the court stating that the taxpayer had no evidence of unequal treatment. Without responding to the appraisal district's motion, the taxpayer filed its own no evidence motion for summary judgment alleging that the appraisal district had the burden of proof on the matter and that the district had no evidence that the property was appraised equally. The district court ruled in the appraisal district's favor on both motions. On appeal, the taxpayer cited § 41.41(a)(3) of the Texas Tax Code as the basis for its claim that the burden of proof was on the appraisal district. That section states that in a challenge involving unequal appraisal, "the appraisal district has the burden of establishing the value of the property by clear and convincing evidence." In denying the taxpayer's appeal, the court of appeals ruled that that provision only applies in hearings before the appraisal review board and not in trials before the district court. Accordingly, the burden of proof in court in cases before the district court is upon the taxpayer.

Natural Gas Stored in Texas, at the Behest of a Texas Company, at a Location Connected to an Intrastate Pipeline, Was Not Entitled to an Exemption from Taxation under the Federal Commerce Clause.

ETC Marketing, Ltd. v. Harris Cnty. Appraisal Dist., No. 01-12-00264-CV (Tex. App.—Houston [1st Dist.] May 5, 2015, pet. filed).

A company with multiple business locations in Texas purchased natural gas at a storage facility in Harris County and stored it there until such time as it could sell the gas at a profit. Its intent was to sell the gas in other states, but nothing prevented it from reselling the gas in Texas. The appraisal district denied the company's exemption claim and the determination was upheld by the court of appeals. Without ruling on whether the gas was located in the stream of interstate commerce, the court found that the gas did not meet any of the exceptions from taxation specified by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In doing so, it totally distinguishes the most recent Texas cases on point. The court found that the gas had a "substantial nexus" to Texas because the company had multiple offices and employees in the state and because the gas spent a considerable time in Texas. It found that the tax was "fairly apportioned" because there was no evidence that the company stored gas in any other state and because the taxpayer conceded that the

only gas being taxed was that which was located in Harris County. It held that there was no evidence of discrimination against interstate commerce since the same tax was equally levied against products located solely within the state. And finally, it ruled that the tax was "fairly related" to services provided to it by the government such as police and fire protection. It rejected the argument that the millions of dollars in property taxes paid by the pipeline company were sufficient to recompense the government for its services potentially related to the gas itself.

THE CASE OF THE MISSING TRUST AGREEMENT: WHAT TO DO WHEN A WRITTEN TRUST AGREEMENT IS LOST OR CANNOT BE LOCATED

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It was dark and stormy outside, and you knew this would turn out to be anything but a normal day. The door to your office bursts open, and a prospective client walks in with a particularly mysterious dilemma: (gulp) she needs a copy of a written trust agreement…but it is nowhere to be found (cue ominous music). Perhaps this client is a trustee, and the written trust agreement is vital to the administration of the trust and the fulfillment of her fiduciary duties. Perhaps the client is a beneficiary, and the written trust agreement is necessary to determine the extent of her beneficial interest. Or worse, perhaps the client is the pesky town creditor, and the trust agreement is necessary to determine the name of the successor trustee because the original trustee who signed an instrument is now deceased. Regardless, this client looks at you and notices the blank stare on your face. After a few moments of awkward silence, you collect your thoughts and calmly state that (for an equitable and just fee, of course) you would be happy to solve this thrilling legal mystery.

As a threshold matter, a trust may be created by: (1) a property owner's declaration that the owner holds the property as trustee for another person; (2) a property owner's *inter vivos* transfer of the property to another person as trustee for the transferor or a third person; (3) a property owner's testamentary transfer to another person as trustee for a third person; (4) an appointment under a power of appointment to another person as trustee for the donee of the power or for a third person; or (5) a promise to another person whose rights under the promise are to be held in trust for a third person. TEX. PROP. CODE § 112.001. Although no particular words are required for the creation of a trust, "[a] declaration of trust must be reasonably certain in its material terms. This includes identification of the property covered by the trust, the beneficiaries or persons in whose behalf the trust is created and the manner in which the trust is to be performed. If any of these elements are vague, general or equivocal, the trust will fail for want of certainty." *City of Wichita Falls v. Kemp Pub. Library Bd. of Trustees,* 593 S.W.2d 834, 836 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

Furthermore, although a trust may be orally created, a trust holding real property is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent. TEX. PROP. CODE § 112.004. Written evidence of the trust's terms may be found in a formal written trust agreement, a testator's will creating a testamentary trust, or any other written document containing the manifestation of a settlor's intention to create a trust and the material terms of the trust.

So what happens when the written trust instrument is missing or cannot be located?

Gathering Clues

Before you consider the trust agreement officially lost or destroyed, pull out your magnifying glass and be prepared to do some digging. A settlor or trustee may have provided a copy of the trust

agreement or a certification of the trust, *see* Texas Property Code § 114.086, to various people or entities, including the settlor's heirs, financial institutions where the trustee may have had a trust account or transacted business on behalf of the trust, or a county appraisal district in case a homestead exemption for a qualified trust was requested. Additionally, consider contacting the lawyer who drafted the instrument to see if he or she has a copy in the client file. Finally, check county real property records for a copy of the recorded trust instrument or certification of trust. This search may at first seem overwhelming, but clearing those cobwebs will be worth the effort.

When All Else Fails

While there is no direct statutory mechanism available when a trust instrument is truly lost, a declaratory judgment can resolve the uncertainty surrounding the rights, duties, and obligations of individuals and institutions involved. In fact, the Civil Practice and Remedies Code specifically provides for declaratory judgments relating to a trust or an estate:

> A person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, an infant, mentally incapacitated person, or insolvent may have a declaration of rights or legal relations in respect to the trust or estate: . . .
>
> (3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; . . . .

TEX. CIV. PRAC. & REM. CODE § 37.005.

At least one Texas appeals court has dealt with a missing trust agreement. In *In re Estate of Berger*, a daughter of the decedent had seen a copy of the agreement creating the Berger Trust mere days before the death of Mildred Jacquelyn Berger. *In re Estate of Berger*, 174 S.W.3d 845 (Tex. App.—Waco 2005, no pet.). Properties owned by Mildred were titled in the name of "The Berger Trust." However, Mildred's husband claimed that he could not locate either the trust agreement or his wife's will. Accordingly, Mr. Berger claimed Mildred died intestate and filed a no-evidence motion for summary judgment arguing that there was no evidence the trust agreement was ever signed. However, the court found that sufficient evidence existed to deny summary judgment.

Mildred's daughter successfully argued that Texas Rules of Evidence rule 1004(a) permits the admission of other evidence to establish the contents of a writing if the original writing has been lost or destroyed. She maintained that she had provided the court with sufficient "other evidence" under rule 1004(a) to defeat the summary judgment.

Under this rule, a party must prove (a) a search for the original writing, recording, or photograph was conducted, (b) that there remains the inability to obtain the trust instrument, and (c) the contents of the trust instrument. The court relied on *Travis County Water Control & Improvement District v. McMillen* to apply the requirements of Evidence rule 1004(a). *Travis Cnty. Water Control & Improvement Dist. v. McMillen*, 414 S.W.2d 450, 452 (Tex. 1966). In *McMillen*, a property owner challenged an ad valorem tax suit on the basis that there was no documentation proving that the property was within a particular water district. The water district produced two affidavits with testimony that the property was indeed within the district, but the trial court granted the property owner summary judgment, excluding the water district's affidavits under the best evidence rule. The Texas Supreme Court reversed the

judgment and remanded the matter to the trial court on grounds that such secondary evidence is admissible and thus, creates a fact issue when nonproduction of the original document is accounted for.

Mildred's husband also argued the statute of frauds required "written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent," and that Mildred's daughter's evidence was thus insufficient. The court, however, concluded that while the statute of frauds is a strong affirmative defense, it is still subject to Evidence rule 1004(a).

The court's reasoning in *In Re Estate of Berger* was later followed by the United States District Court for the Southern District of Texas in *United States v. Washington*, No. H-09-3996, 2011 U.S. Dist. LEXIS 65019 (S.D. Tex. June 20, 2011). There, the Internal Revenue Service claimed that Washington owed delinquent income taxes and sought to collect the tax debt through foreclosure of real property it claimed was held in a revocable trust created by Washington. Washington, an attorney, claimed that the properties were held by him as trustee of irrevocable trusts for the benefit of his children, but that the trust instruments were destroyed in a flood. Washington produced photographs of the flood damage that occurred on three storage units which contained the original trust documents and an affidavit of his secretary which provided that she remembered drafting the trusts to be irrevocable after she and Washington had received advice to do so from an estate planning attorney. While the IRS argued that the trusts should be deemed or presumed revocable because Washington could not provide a writing to the contrary, the court found Washington's evidence sufficient to demonstrate that the trusts were created and that the trust instruments were lost or destroyed. As a result, the court refused to assume that the trusts were revocable simply because he could not provide the trust instruments.

Other jurisdictions have had similar difficulty determining what to do in the event a trust instrument is lost or destroyed. No other jurisdiction has enacted a specific statute addressing the handling of a lost or destroyed trust agreement outside of a general rule of evidence. Likewise, the Uniform Trust Code—adopted by at least thirty states—does not address the handling of a lost or destroyed trust instrument directly. But the Restatement (Second) of Trusts § 49 provides that "[t]he loss or destruction of a memorandum does not deprive it of its effect as a satisfaction of the requirements of the Statute of Frauds, and oral evidence of its contents is admissible unless excluded by some rule of the law of evidence."

Additional Options

There are a few more options available, including judicial modification or termination of the trust, judicial appointment of a successor trustee, or amending and restating the terms of the trust.

Requesting a judicial modification or termination of the trust can pave a new path. Pursuant to § 112.054 of the Texas Property Code, a trustee or a beneficiary of a trust may petition the court for modification or termination for several reasons: (1) when the purpose of the trust has become impossible to fulfill, (2) when circumstances have changed, (3) modification of administrative terms of the trust is necessary to prevent waste, or (4) continuance of the trust is not necessary to achieve the material purpose of the trust. However, it is important to note that the discontinuance of the trust will require all beneficiaries to consent to the order. TEX. PROP. CODE § 112.054.

Seeking the judicial appointment of a successor trustee can be an attractive option if the dispositive terms and intent of the trust are undisputed, but the trustee is unknown, or the trustee cannot fulfill his or her duties pursuant to the terms of the trust, including death, resignation, incapacity, removal, or a vacancy has occurred. TEX. PROP. CODE § 113.083.

Of course, if the missing trust instrument is for a revocable trust and your client is the settlor, the client can (1) execute a restatement of the trust, and/or (2) revoke the trust and distribute the property outright and free of the trust.

Conclusion

The next time a client poses you with the mysterious disappearance of a written trust instrument, there is comfort knowing that the mystery can be solved—at least indirectly by utilizing the same remedies available in situations when a trust agreement is not lost or destroyed.

"WHO'S THE BOSS?": WHY A HOLE IN THE LAW GOVERNING THE STATUS OF INDEPENDENT EXECUTORS ON APPEAL NEEDS FILLING

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When a corporation spends months transitioning through a friendly buyout, there is little doubt about who the boss was, is, and will be. When an executor managing a $32 million estate is removed and her replacements appointed virtually overnight, "Who's the boss?" is much less certain while an appeal is pending.

When a monetary judgment is appealed, a supersedeas bond stays the judgment and preserves the status quo. What about when a judgment removing an executor is filed? Is the new boss the same as the old boss after an appeal is perfected? Or do the new executors remain in charge? Can estate property be distributed? Can the contestants at least receive the attorneys' fees awarded to pay for the appeal?

These are the questions that troubled the successful contestants in a now fully resolved contest over the disposition of an estate worth in excess of $32 million. With the judgment not yet entered, and an offer from the defendant not to appeal in exchange for certain concessions in an agreed judgment, the answer was critical. At first glance, that answer did not look good for the contestants.

Recent Decisions

In at least two cases over the past twelve years, the parties and the appellate courts did not seemingly dispute that an appeal suspended the judgment of the trial court and instead argued over whether the independent executor was required to file a bond or not pursuant to what was then Tex. Prob. Code. Ann. § 29 (recodified as Tex. Estate Code § 351.002, and hereafter referred to as "§ 29"), which provides as follows: "(a) Except as provided by Subsection (b), an appeal bond is not required if an appeal is taken by an executor or administrator. (b) An executor or administrator must give an appeal bond if the appeal personally concerns the executor or administrator." "Appeal bond" is not defined, but has been assumed, perhaps incorrectly, to refer to a supersedeas bond.

In a 2003 decision, the Sixth Court of Appeals deferred to the parties' interpretation of § 29,[1] noting that the parties agreed both that § 29 was the controlling statute and that "the effect of the lack of a supersedeas bond on the appeal in this context is controlled by the statute." Where the parties disagreed was which part of the statute controlled, i.e., whether the executor needed to file a bond to suspend the order during his appeal. The opinion never suggests that the judgment would not be suspended by an appeal, even though § 29 says nothing to the effect that the filing of an "appeal bond" would suspend the trial court's order.

Similarly, in a 2009 decision, the Twelfth Court of Appeals resolved a dispute over whether the executor needed to file a bond pursuant to § 29 to suspend the trial court's order compelling an

[1] *In re* Shore, 106 S.W. 3d 817, 818 (Tex. App.—Texarkana 2003).

accounting, finding that the subject of the order did not personally concern her, and therefore, the judgment was suspended merely by filing a notice of appeal pursuant to § 29.[2] In dicta, the appellate court also explained that even if the outcome of the appeal had personally concerned the executor, she could have suspended the judgment by filing the amount and type of security set by the trial court pursuant to Tex. R. App. P. 24.2(3) and 25.1(g)(1). It does not appear from the opinion that an argument was ever offered that the filing of an appeal does not suspend a judgment in a probate matter.

Texas Practice Series and the Texas Supreme Court

Commentary in the Texas Practice Series suggests the Texarkana and Tyler appellate courts were correct in their assumption that an appeal by an ousted executor suspends the trial court's removal order and that the status quo is maintained while the appeal is pending.[3] According to the practice guide, if there is no direct appeal to an order appointing an executor after a will is probated, but the will is challenged pursuant to Tex. Prob. Code § 93 (Tex. Estate Code § 256.204), when an appeal is filed following a successful contest, "the appeal suspends the judgment, and the independent executor is entitled to continue to serve as such until there is a final disposition of the appeal."

The practice guide cites to the Texas Supreme Court's decision in *Corpus Christi Bank and Trust v. Alice National Bank* in support of the proposition that an appeal will suspend an order invalidating a spurious will and removing an independent executor.[4] In *Alice*, the Texas Supreme Court held that a bank appointed as the independent executor was entitled to continue to serve as such while an appeal was pending. However, that case was decided in 1969, before the Texas Constitution was amended to grant district courts original jurisdiction over probate matters, and before significant changes were made to the Texas Rules of Civil Procedure. The Texas Supreme Court based its decision in *Alice* on Tex. R. Civ. P. 335, which provided that "a probate court judgment or order be suspended pending an appeal to the district court." At the time *Alice* was decided, an appeal of a probate court's order in a will contest could be appealed to the district court, which heard the case de novo. After the 1973 constitutional amendment and changes to the probate code and rules of procedure in 1975, that is no longer the case. As the Texas Supreme Court noted in its Comments on the 1975 Amendments, Tex. R. Civ. P. 335 and related rules were repealed because the constitutional amendment "render[ed] these rules unnecessary."[5]

The judges of constitutional county courts are not required to have law degrees, and prior to the constitutional amendment that vested district courts (where the judges are licensed attorneys) with the authority to hear probate cases, Tex. R. Civ. P. 335 provided some assurance that in the event a county judge committed an error, the status quo would be maintained while an appeal to the district court was pending. The Texas Supreme Court more than likely found Tex. R. Civ. P. 335 "unnecessary" because the parties involved in probate litigation may request that the case be transferred to a district court, where a judge with formal legal training can hear the case. The repeal of Tex. R. Civ. P. 335 strongly suggests that the filing of an appeal is not sufficient to suspend orders regarding the validity of a will or removal of an independent executor.

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[2] *In re* Bailey, 296 S.W. 3d 859, 863 (Tex. App.—Tyler 2009).

[3] 17 TEX. PRAC., Prob. & Decedent's Estate § 115, "Suspending orders appointing personal representatives."

[4] Corpus Christi Bank & Trust v. Alice Nat'l Bank, 444 S.W. 2d 632 (Tex. 1969).

[5] *Texas Rules of Civil Procedure Comments on the 1975 Amendments*, TEX. BAR J, March 1976, at 220.

Appeal Bond

Texas Rule of Appellate Procedure §§ 24.1 and 24.2 govern the circumstances under which a "judgment debtor" may suspend a trial court's judgment through the filing of a bond. No such requirements are described in § 29, the statute that courts and litigants have cited in support of their conclusion that the filing of an appeal after a will contest suspends the trial court's judgment. At least one court has recognized the § 29 "appeal bond" as a "cost bond" rather than as a supersedeas bond, i.e., a bond intended to cover court costs in the event of an unsuccessful appeal.[6] This is more than likely the correct interpretation of § 29.

Conclusion

At a time when a county judge with no formal legal education could decide the fate of a potentially sizable estate, it made sense that the filing of an appeal would suspend the judgment while the parties prepared for a de novo review by a licensed attorney sitting as a district court judge. When district courts were granted jurisdiction over probate litigation, the need to suspend the constitutional court's judgment became "unnecessary," and as a result Tex. R. Civ. P. 335 was repealed. Although an "appeal bond" is provided for in the Texas Estates Code (and formerly the Probate Code), the applicable statute contains no language to indicate that filing an appeal would suspend the trial court's judgment, and it is likely the Fifth Court of Appeals correctly identified the "appeal bond" as a cost bond, rather than a supersedeas bond.

To avoid any uncertainty on this subject, it would be beneficial for the legislature to amend the Estates Code to clarify the purpose and effect of the "appeal bond" so that there is no doubt about who is in charge of an estate after the jury has concluded that the challenged will is invalid and that the appointed executor should be replaced.

[6] Maxfield v. Terry, 870 S.W. 2d 614, 615 (Tex. App.—Dallas 1993).

PROPER INVESTIGATION OF THE FOXES CHOSEN TO GUARD THE HENHOUSE: REQUIRING CRIMINAL BACKGROUND CHECKS FOR ALL PROPOSED GUARDIANS

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STUDENT WRITING CONTEST

First Place – 2015

I. Introduction

The Texas Estates Code specifically states that courts are not authorized to appoint guardians who have certain criminal convictions or are unsuitable.[1] However, until recently, courts lacked the statutory authority to investigate family members to comply with this mandate. To ensure compliance with the law, the Texas Legislature passed House Bill 1438 in 2015 giving Texas probate courts the statutory authority to review the criminal history of family members who are proposed as guardians.

In Texas, the guardianship program is designed to protect the elderly and disabled. The stated purpose of the guardianship program in Texas is to "promote and protect the well-being of the incapacitated person."[2] Interested parties may initiate a four step application process that, if successful and in the best interest of the ward, ends with an individual being appointed guardian.[3] Texas law prohibits the court from appointing guardians who have certain criminal convictions.[4] But until this past September, courts were not authorized to access criminal background history of family members proposed to be guardians. As a result, an unknown number of bad actors were guarding the estate of an elderly or disabled family member.

While guardianship is designed to protect the elderly and disabled, abuse by guardians is prevalent. Elder abuse, in particular, is a growing issue as our population ages. The guardianship process has

[1] TEX. ESTATES CODE ANN. § 1104.353 (West).

[2] TEX. ESTATES CODE ANN. § 1001.001 (West); Valdes-Fuerte v. State, 892 S.W.2d 103, 107 (Tex. App.—San Antonio 1994, no writ) ("Guardianship proceedings are designed to protect a person who is, for any reason, mentally incapable of taking care of himself or his property.").

[3] *Infra* Part III(A).

[4] *Infra* Part III(D).

statutory safeguards, including in-depth screening for professional certified guardians and court oversight and supervision after a guardianship is established. However, research shows that the majority of abuse, specifically elder abuse, goes unreported.[5] While historically the focus has been on punishment, HB 1438 reflects a move toward focusing on prevention. Since family members are the most likely perpetrators of elderly abuse,[6] effective screening of their background is of the utmost importance when appointing them guardian.

Ex ante safeguards, such as the more in-depth criminal background investigation in HB 1438, have been shown to be more effective than *ex post* punishments, sanctions, or remedies. Nationally, the trend is to require more background information from proposed guardians, including family members appointed to the position.[7] The reporting and investigation processes in Texas, while necessary, are not preventing the thousands of cases of abuse that go unreported.[8] Moreover neither the threat of investigation by Adult Protective Services (APS) nor criminal punishment has a significant enough deterrent effect to prevent abuse. Additionally, proposed guardians' privacy interest is already safeguarded by current regulations regarding the confidentiality of background information obtained by county clerks. Finally, while requiring a criminal background investigation increases the cost of establishing a guardianship, it is outweighed by the security interest of the proposed ward.

Guardianship is designed to protect some of the most vulnerable Texans. The simple change in HB 1438, requiring a criminal background check for all family members, will prevent thousands of cases of abuse every year.

II. Background on Elder and Disabled Abuse

As our population ages, elder abuse is becoming more and more prevalent. While awareness of the warning signs is also on the rise, which may account for increased reporting, the reality is that abuse is extremely widespread. The elderly and disabled constitute an extremely vulnerable segment of society. While many programs, guardianship included, are designed to protect this vulnerable population, abuse statistics show that elder abuse is growing both in the United States and here in Texas. In Texas, Adult Protective Services (hereafter APS), an agency within the Department of Family and Protective Services (hereafter DFPS), investigates and reports on allegations of abuse of the adult disabled and the elderly.[9] APS statistics show that abuse of the disabled and elderly in Texas is on the rise. In addition to the trend of increasing cases of abuse, statistics confirm that family members perpetrate the vast majority of abuse both nationally, and in Texas.

A. Elder Abuse is a Growing Problem in the United States.

Elder abuse in the United States is a growing problem. The U.S. Census Bureau projects the population of adults sixty-five and older will increase from 47 million in 2015 to 74 million in 2030.[10]

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[5] *Infra* Part II.

[6] *Infra* Part II(B).

[7] *Infra* Part V(A)(2).

[8] *Infra* Part V(B)(1).

[9] *Texas Adult Protective Services (APS)*, DFPS https://www.dfps.state.tx.us/adult_protection/ (last visited May 6, 2015).

[10] *Table 3. Projections of the Population by Sex and Selected Age Groups for the United States: 2015 to 2060*, UNITED STATES CENSUS BUREAU (last visited Apr. 15, 2015).

Simply put, our population is aging. As our population ages, elder abuse, unless checked, will only grow as a problem. In fact, it is estimated that one in four elderly will suffer elder abuse, either financially or physically.[11]

Elder abuse has been on the national radar for some time. In 1998, at the request of Congress, a study was published by the National Center for Elder Abuse at the American Public Human Services Association.[12] The study concluded 551,000 elders in the United States suffered from elder abuse in 1996.[13] The study also found that female elders are more frequently abused than their male counterparts[14] and elders over the age of eighty are two to three more times likely to suffer from elder abuse.[15] The study also found that in almost 90% of cases involving a known perpetrator, the perpetrator is a family member, and in 47% it was the elderly's adult child.[16]

More importantly, the study suggested that the number of reported cases of elder abuse pales in comparison to the number of incidents that go unreported.[17] Its data suggested that of the 551,011 cases of elder abuse in 1996, only 21% were reported to APS agencies.[18] The study suggested that the isolation of elders, many of whom live alone and have little social interaction with the outside world, was a contributing factor.[19]

B. Abuse of the Elderly and Adults with Disabilities is Likewise on the Rise in Texas

APS is the agency within the DFPS that is responsible for investigating allegations of abuse, neglect, and exploitation for Texans over sixty-five or between eighteen and sixty-five with a disability. In 2014, APS investigated 81,681 allegations of abuse, neglect, or exploitation involving adults living at home.[20] Of these allegations, 54,731 were validated.[21] And APS has evidence that elder abuse is on the rise in Texas; its statistics show that the number of in-home case investigations has risen by 35% in the last decade.[22] In 2014, APS reported that "48,392 Texans who lived at home were confirmed victims of abuse, neglect, or exploitation last year . . . . [i]n most cases, a member of the victim's family was responsible."[23] APS reported in 2014 that 36.8% of perpetrators were adult children of the victim.[24] In total, according to APS statistics, 89.9% of perpetrators were relatives of the victim.[25]

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[11] Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203 (2000).

[12] *See generally* THE NATIONAL CENTER ON ELDER ABUSE AT THE AMERICAN PUBLIC HUMAN SERVICES ASSOCIATION, *The National Elder Abuse Incidence Study* (1998).

[13] *Id.* at 1.

[14] *Id.* at 4-16.

[15] *Id.* at 4-34.

[16] *Id.* at 4-28.

[17] *Id.* at 5-1.

[18] *Id.*

[19] *Id.* at 5-3.

[20] THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, ANNUAL REPORT & DATA BOOK 2014 7 (2014) [hereinafter ANNUAL REPORT].

[21] *Id.*

[22] *Id.*

[23] Press Release, Dep't of Family and Protective Servs., If it's Not Your Money - It's a Crime! (Oct. 1, 2014).

[24] ANNUAL REPORT, *supra* note 20, at 18 (2014).

[25] *Id.*

III. Guardianship in Texas

Many states have instituted guardianship programs to protect their vulnerable elderly and disabled.[26] In Texas, guardianship is one of many programs aimed at protecting vulnerable Texans in need of care. Often a conflict of interest can arise between caregivers and their ward. Even the most compassionate caregivers may break down and act in accordance with their own self-interest at times. Recognizing this, many states have implemented extensive screening protocols, professional certification processes, and court oversight to prevent abuse.[27]

A. The Guardianship Process

In Texas, a guardianship is a legal relationship between a ward and a guardian established by a court of law and conducted under court supervision.[28] A guardian may be appointed either over the person or the estate, or both. Texas law authorizes the probate courts to appoint a guardian over incapacitated persons.[29] The stated purpose of this program is to "promote and protect the well-being of the incapacitated person."[30] Establishing a guardianship consists of four steps.

First, an application must be filed to initiate guardianship proceedings. Guardianship proceedings may be initiated by application by either an outside individual[31] or the court.[32] Second, after an application is filed, notice is required to alert interested parties to comply with constitutional due process requirements.[33]

Third, a hearing is held where an individual must be deemed incapacitated by clear and convincing evidence.[34] At the hearing, the court must inquire about the proposed ward's ability to "feed, clothe, and shelter himself or herself; . . . care for his or her own physical health; . . . and manage his or her property or financial affairs."[35] To appoint a guardian, the court must find by clear and convincing evidence that the proposed ward is incapacitated, it is in the best interest of the proposed ward to have a guardian appointed, and that the rights and property of the proposed ward will be protected by the appointment of a guardian.[36] In addition, the court must find by a preponderance of the evidence that the court has proper venue, the proposed guardian is eligible to serve as guardian, that the guardianship is not being created to establish residency for school purposes if the proposed ward is a minor, and that the proposed ward "(i)s totally without capacity as provided by this [statute] to care for himself or

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[26] *See infra* Section V(A)(2).

[27] *See id.*

[28] TEXAS DEPARTMENT OF AGING AND DISABILITY SERVICES, A TEXAS GUIDE TO ADULT GUARDIANSHIP 3 (2014) [hereinafter TEXAS GUIDE].

[29] TEX. ESTATES CODE ANN. § 1001.001 (2014).

[30] *Id.*

[31] *Id*. at § 1101.001.

[32] *Id*. at § 1102.001; *See also* 42 Tex. Jur. 3d Guardianship and Conservatorship § 106 (stating a court may initiate proceedings on behalf of an interested person's complaint to the court).

[33] TEX. ESTATES CODE ANN. § 1051.102.

[34] *Id*. at § 1055.051; *see also* TEXAS GUIDE, *supra* note 28, at 29.

[35] *Id.* at § 1101.051.

[36] *Id.* at § 1101.101. Proving incapacity by clear and convincing evidence requires "recurring acts or occurrences in the preceding six months and not [only] isolated instances of negligence or bad judgment. *Id.* at § 1101.102.

herself and to manage his or her property; or (ii) lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property."[37] The burden of proving each requirement is on the applicant.[38]

Fourth and finally, the court issues a guardianship. The court must choose a guardian who is in the best interest of the ward and "design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person."[39] Since guardianship is a legal relationship with court supervision, the process is never truly complete, as the courts provide continual oversight.

B. Who is Appointed Guardian?

Once the court is authorized to appoint a guardian for the incapacitated person,[40] the appointed individual must be chosen in light of the "circumstances and considering the incapacitated person's best interests."[41] The Estates Code sets forth an order of preference, that prefers the nearest of kin being appointed guardian, in the event there are two or more persons eligible to serve as guardian.[42] A person may also appoint whom he or she would prefer to serve as guardian before that person becomes incapacitated.[43]

Texas also has a professional guardianship program that requires certification in the event no eligible volunteer is available.[44] Professional guardians' certification requires an in-depth background investigation, and courts are already authorized to access their criminal background history. Family members and friends are not required to be certified as professional guardians under Subchapter C of Chapter 155 of the Government Code or any other law to serve as the ward's guardian.[45] The extensive screening required to become a professional guardian is not discussed at length in this paper.

C. Unsuitable Individuals Cannot be Appointed Guardians

As stated previously, Texas requires the applicant prove by a preponderance of the evidence that a proposed guardian is eligible to serve.[46] The Estates Code lists several disqualifications.[47] A person is

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[37] *Id.*

[38] *Id.* at § 1001.001. *See also id*. at § 101.101(b) ("The court may not grant an application to create a guardianship unless the applicant proves each element required by this title."). Moreover, the applicant must submit a letter or certificate by a physician who has examined the proposed ward. *Id.* at § 1101.103. The letter must describe the nature, severity, and degree of the proposed ward's incapacity, including the ability to make decisions and handle daily life activities. *Id.* Moreover, age cannot be the sole factor upon which incapacity is found. *Id.* at § 1101.105.

[39] *Id.*

[40] *Id.* at § 1104.101.

[41] *Id.*; *see also* Carney v. Aicklen, 587 S.W.2d 507, 511 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (stating that "the best interest of the ward is served by the appointment of a fit and proper person as guardian.").

[42] TEX. ESTATES CODE ANN. § 1104.102 (West). This usually arises when an individual proposed to be guardian in the application faces competition from another family member in contested guardianship proceedings.

[43] *Id.* at § 1104.103.

[44] *Id.* at § 1104.251.

[45] *Id.* at § 1104.253.

[46] *See infra* footnote 37 and surrounding text.

[47] TEX. ESTATES CODE ANN. §§ 1104.351–.358 (West).

disqualified from serving as a guardian if the court finds the person is a minor,[48] incapacitated or inexperienced,[49] unsuitable,[50] has notoriously bad conduct,[51] has a conflict of interest,[52] lacks the necessary professional certification,[53] is a nonresident without a resident agent,[54] or has a protective order for family violence.[55] In contested guardianship proceedings, the burden of proving disqualification rests with the party contesting the appointment.[56]

D. Certain Criminal Convictions Disqualify an Individual Proposed to Serve as a Guardian

Individuals are disqualified by his or her previous notoriously bad conduct by § 1104.353 of the Estates Code.[57] A proposed guardian can be disqualified under § 1104.353 in two ways. First, he or she may be disqualified by the previous notoriously bad conduct.[58] Second, it is presumed to be not in the best interest of the ward if the person has been convicted of certain offenses listed by statute.[59] These offenses include sexual offenses, aggravated assault, injury to a child, elderly, or disabled individual, abandoning or endangering a child, making a terroristic threat, or continuous violence against the family of the ward or an incapacitated person.[60] While the presumption only applies to the listed offenses, should the court determine that the convictions of the proposed guardian are notoriously bad, it has the authority to disqualify the applicant.[61]

Previously, to comply with § 1104.353, court clerks were authorized to access criminal background checks from the Department of Public Safety and the Federal Bureau of Investigation for private professional guardians, those assisting professional guardians, temporary guardians, and proposed successor guardians, other than the ward's family member or attorney.[62] In essence, clerks could obtain criminal background checks only for proposed guardians who are not family members or attorneys, thus, relegating the presumption against the best interest of the ward moot in cases where the proposed guardian is a family member.

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[48] *Id.* at § 1104.351.

[49] *Id.*

[50] *Id.* at § 1104.352.

[51] *Id.* at § 1104.353.

[52] *Id.* at § 1104.354 (Including being the opposing party in a lawsuit against the proposed ward, asserting a claim against the proposed ward's property, and being indebted to the proposed ward); Carney v. Aicklen, 587 S.W.2d 507, 509 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e); Dobrowolski v. Wyman, 397 S.W.2d 930, 932 (Tex. Civ. App.—San Antonio 1965, no writ).

[53] TEX. ESTATES CODE ANN. § 1104.356 (West).

[54] *Id.* at § 1104.357.

[55] *Id.* at § 1104.358.

[56] *See, e.g.*, Ramirez v. Garcia de Bretado, 547 S.W.2d 717 (Tex. Civ. App.—El Paso 1977, no writ); Chapa v. Hernandez, 587 S.W.2d 778 (Tex. Civ. App.—Corpus Christi 1979, no writ).

[57] TEX. ESTATES CODE ANN. § 1104.353 (West).

[58] *Id.* at § 1104.353(a); *see also* Legler v. Legler, 37 S.W.2d 284, 285 (Tex. Civ. App.—Austin 1931, writ denied) (holding that bad conduct, even if not notorious, toward the ward is sufficient regardless of the use of "notoriously bad" in the statute).

[59] TEX. ESTATES CODE ANN. § 1104.353(b) (West).

[60] *Id.*

[61] *Id.*

[62] *Id.*

In uncontested guardianship proceedings, family members proposed as guardians can avoid disclosing their prior convictions. Allowing family members to hide their prior bad conduct is especially problematic since family members are preferred to serve as guardians, and are the most likely to be appointed. This loophole, closed by HB 1438, only served to put proposed wards in jeopardy and expose them to abuse and neglect.

IV. House Bill 1438 Requires Criminal Background Checks for All Family Members Proposed to be Guardians

Family members are the first priority to serve as guardians in Texas.[63] As such, family members are also the most common perpetrators of abuse.[64] However, prior to September 1,Texas law allowed for family members to avoid a criminal history record check when they are proposed as guardian.[65] This exception rendered § 1104.353 ("Notoriously Bad Conduct; Presumption Concerning Best Interest") moot. Without statutory authorization, county clerks were unable to run the necessary background checks to see if family members have been convicted of the crimes listed and therefore, are unable to serve as guardians. Thus, courts were unable to comply with the law as it was written.

A. Legislative History of Criminal Background Checks in Guardianship Proceedings

The Estates Code § 104.402 ("Court Clerk's Duty to Obtain Criminal History Record Information; Authority to Charge Fee") was formerly Probate Code § 698 subsections (a) and (e).[66] This statute was added by HB 2685 in 1993 by the 73rd Legislature as part of a larger guardianship bill by Representative Naishtat.[67] The original statute only authorized clerks to access criminal background checks for private professional guardians.[68] That same bill added both the presumption against the best interest of the ward (presumption against people convicted of certain crimes discussed in subpart III(D)) and the criteria that make a guardian ineligible were added.[69]

Subsequent amendments slowly expanded the groups subject to a criminal background check. First, HB 3630 in 1999 expanded the requirement to individuals employed by a private professional guardian who will have significant contact with the ward or responsibility for guardianship duties.[70] In 2005, Senate Bill 6 added DADS employees and volunteers providing guardianship programs.[71] In 2007, SB 291 greatly expanded the categories of proposed guardians for whom the court must obtain a background check.[72] SB 291 was authored by Senator Nelson and sponsored by Representative Naishtat in the

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[63] *Supra* footnotes 42–43 and surrounding text.

[64] *Supra* Part II.

[65] Tex. Estates Code Ann. § 1104.402 (West).

[66] Act of May 31, 1993, 73d Leg., R.S., ch. 957, § 698, 1993 Tex. Gen. Laws 4106–07 (amended by Act of May 28, 1999, 76th Leg., R.S., ch. 1116, § 3, 1999 Tex. Gen. Laws 3987).

[67] *Id.* Impressively, HB 2685, 196 pages long, passed through the local and consent calendar.

[68] *Id.*

[69] *Id.*

[70] Act of May 28, 1999, 76th Leg., R.S., ch. 1116, § 3, 1999 Tex. Gen. Laws 3987 (amended by Act of May 31, 2005, 79th Leg., R.S., ch. 268, § 3.15, 2005 Tex. Gen. Laws 704).

[71] Act of May 31, 2005, 79th Leg., R.S., ch. 268, § 3.15, 2005 Tex. Gen. Laws 704 (amended by Act of May 17, 2007, 80th Leg., R.S., ch. 361, §3, 2007 Tex. Gen. Laws 661).

[72] Act of May 17, 2007, 80th Leg., R.S., ch. 361, §3, 2007 Tex. Gen. Laws 661 (amended by Act of May 29, 2009, 81d Leg., R.S., ch. 511, § 1, 2009 Tex. Gen. Laws 1196).

House. Representative Hartnett offered a floor amendment that explicitly added the familial exception.[73] Representative Hartnett's amendment expanded the Senate's version of the bill, which only required criminal history from private professional guardians and DADS guardians. [74] Finally, in 2009, SB 1057 clarified that the county clerk is not required to acquire a criminal history check for certified professional guardians but may request a copy from the Guardianship Certification Board.[75] The result is the statute on the books today. In 2011, the statute was moved from the Probate Code to the Estates Code.[76]

B. HB 1438 Updates the Estate Code to Authorize Clerks to Run Background Checks on Family Members Proposed as Guardians.

HB 1438 included the original language of HB 1921, filed by Representative Elliott Naishtat. HB 1921, as filed, authorized the court clerk to acquire and use the criminal background checks of family members in guardianship proceedings, as is the current practice for nonfamily applications. HB 1921 reflected Representative Naishtat's commitment to protecting the most vulnerable populations in Texas.[77]

First, the bill removed the familial exemption for the background check requirement in § 1104.402 ("Court Clerk's Duty to Obtain Criminal History Record Information; Authority to Charge Fee") of the Estates Code. Removing the exemption requires the county clerk to obtain criminal history record information from the DPS and the FBI for anyone proposed to be a guardian or a temporary guardian, including family members. The exemption for background checks is maintained for attorneys proposed as guardians under the assumption that attorneys with the specific disqualifying offenses would already have been disbarred.

Second, the bill amended § 1104.409 ("Use of Information by Court") to reflect that background information may be used to determine whether to appoint any individual, including family members, who is proposed to serve as a guardian or temporary guardian.

Finally, the bill updated the cross-references and reflects the change from the Texas Probate Code to the Estates Code.

HB 1921 was filed February 25, 2015, by Representative Elliott Naishtat of Austin. In early April HB 1921 was rolled into a guardianship omnibus package in the form of HB 1438 by Senfronia Thompson ("Relating to guardianships and other matters related to incapacitated persons."). HB 1438 was heard in the Judiciary and Civil Jurisprudence Committee on April 14, 2015. A committee substitute for HB 1438 was introduced in committee and heard on May 7, 2015. The bill was subsequently unanimously voted out of committee that same day and sent to the Local and Consent Calendar. HB 1438 was placed on the local and consent calendar on May 15, 2015. HB 1438 was signed by the governor on June 19, 2015, and went into effect September 1, 2015.

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[73] *Id.*

[74] *Id.*

[75] Act of May 29, 2009, 81d Leg., R.S., ch. 511, § 1, 2009 Tex. Gen. Laws 1196, *repealed by* Act of May 21, 2011, 82d Leg., R.S., ch. 823, §1.02, 2011 Tex. Gen. Laws 1964.

[76] Act of May 21, 2011, 82d Leg., R.S., ch. 823, §1.02, 2011 Tex. Gen. Laws 1964.

[77] *It Came From New York,* THE N.Y. TIMES, Jan. 26, 1997, *available at* http://www.nytimes.com/1997/01/26/magazine/it-came-from-new-york.html.

V. Arguments and Counterarguments for Criminal Background Checks for Family Members

HB 1438 recognizes that the key to reducing the likelihood of abuse for the elderly and disabled in Texas is prevention. *Ex ante* safeguards, including criminal background checks, have been shown to effectively screen out bad actors. Accordingly, many states have enacted statutes similar to the criminal background check in HB 1438. The national trend toward more in-depth screening for all proposed guardians reflects an understanding that one instance of abuse can destroy an individual emotionally, physically, and financially.

Ex post punishments for perpetrators and remedies for victims cannot adequately prevent abuse nor honestly restore victims. These punishments and remedies are already in place and statistics show that elder abuse reporting specifically is on the rise. Therefore, there is clearly a need for more effective screening.

While reporting suspected abuse is mandatory in Texas and individuals face criminal penalties for failure to report, the majority of cases go unreported. Many times abuse is not readily observable, ostensibly because of the relative isolation of many elderly and disabled individuals. Moreover, privacy and confidentiality laws conflict with these reporting requirements creating confusion.

Finally, the Estates Code sets forth sufficient safeguards to keep background information for the confidential use of the court. It is true that requiring a criminal background check from proposed guardians who are family members will increase the cost of a guardianship proceeding by ten dollars. However guardianship is already an expensive process, and the ability to charge a fee is at the court's discretion. While any price increase is unfortunate, when balanced with the preventative effect of the screening, the balance must tip in favor of protecting a vulnerable individual from abuse.

A. Ex Ante Safeguards are Effective and Better Protect the Elderly from Abuse Than *Ex Post* Remedies

Ex ante screening mechanisms are effective and protect wards from the emotional detriment that accompanies abuse. While remedies exist to restore the wards back to their original state, the processes are costly and time-consuming and can never truly restore the emotional wellbeing of a ward that has suffered abuse at the hands of a family member.

1. Criminal Background Checks are an Effective Tool to Screen Out Bad Actors

Research has shown that *ex ante* checks screen out bad actors. In 2010, the U.S. Government Accountability Office (hereafter GAO) reported that in six of twenty case studies, the court's inadequate review of criminal and financial backgrounds of prospective guardians led to the appointment of a guardian "whose past should have raised questions about their suitability to care for vulnerable seniors."[78] In 30% of the GAO case studies, a review of the background of a prospective guardian would have revealed a history of bad acts, and abuse could have been avoided.

Texas has already shown a desire to screen out these bad actors by requiring criminal background checks for nonfamily proposed guardians. Additionally, background check screening is already mandatory for guardians of other vulnerable populations. For example, all fifty states require criminal background checks of prospective foster and adoptive parents and all adults residing in their households.[79] The incapacitated elderly, like minors, are an equally vulnerable population. Their

[78] GAO, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS 8 (2010).

[79] CHILD WELFARE INFORMATION GATEWAY, CRIMINAL BACKGROUND CHECKS FOR PROSPECTIVE FOSTER AND ADOPTIVE PARENTS 1

vulnerability and need for outside protection is the very reason guardianship was created. As with an adoptive parent, a guardian assumes a huge amount of power over their ward. Prescreening to ensure bad actors are not able to take advantage of the system to gain power over a vulnerable individual is of the utmost importance.

2. Increasingly, States are Enacting Criminal and Financial Background Checks for Prospective Guardians

The current trend across the United States is to require more background information from prospective guardians. For example, in 2012, three states passed bills relating to criminal background checks for all prospective guardians[80] and in 2013, four states passed bills relating to criminal background checks.[81] In 2014, two states passed bills relating to criminal background checks.[82] Several states now also require proposed guardians to submit their financial history or undergo a credit check.

Increasingly, more and more states are requiring guardians to submit a background check.[83] As of 2015, fifteen states either require or allow the court to obtain a background check for any proposed guardian, both professional and relatives of the ward.[84] And at least fourteen states have automatic or discretionary disqualification for felons or those convicted of a crime.[85]

Further evidence of this national trend is the pending federal legislation, the Court-Appointed Guardian Accountability and Senior Protection Act, introduced by Senator Klobuchar of Minnesota and sponsored by Texas Senator John Cornyn, among others.[86] The bill would amend the Elder Justice Act of 2009 to allow Secretary of Health and Human Services to award grants to state courts to assess their current guardianship programs and make necessary changes, including requiring background checks from potential guardians.[87]

(a) States that Require Courts to Obtain Background Checks for All Proposed Guardians

Currently, twelve states require background checks for all proposed guardians.[88] This reflects the growing understanding that the enormous responsibility placed upon guardians necessitates a stronger screening before appointment. States require criminal background checks in a variety of ways, from requiring fingerprints to authorizing the county clerks to obtain a record check to requiring applicants to

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(2011).

[80] *Id.* at 10 (Tennessee, New York, and New Mexico).

[81] Commission on Law and Aging American Bar Association, *State Adult Guardianship Legislation: Directions Of Reform – 2012* 8–9 (2013) (Illinois, Idaho, Minnesota, and Nevada).

[82] Commission on Law and Aging American Bar Association, *State Adult Guardianship Legislation: Directions Of Reform – 2012* 8–9 (2012) (Florida and Arizona).

[83] COMMISSION ON LAW AND AGING AMERICAN BAR ASSOCIATION, *State Adult Guardianship Legislation: Directions Of Reform – 2012* 10 (2012).

[84] Sally Balch Hurme, *Guardian Felony Disqualification and Background Requirements* 1–11 (2013) (collecting statutes).

[85] *Id.*

[86] Court-Appointed Guardian Accountability and Senior Protection Act, S. 1614, 113th Cong. (2015).

[87] *Id.*

[88] Hurme, *supra* note 84, at 1–11.

attach a name-based criminal history check.[89]

In 2014, Florida passed and adopted a bill that requires background checks for all guardians.[90] The bill amended the previous Florida statute that left background checks to the discretion of the court.[91] The bill makes financial background investigations and what Florida calls Level 2 background checks mandatory for all nonprofessional guardians.[92] The Level 2 background check includes fingerprinting for a statewide criminal history check and national criminal history checks through the FBI.[93] The bill allows for a nonprofessional guardian to petition the court for reimbursement.[94]

In 2013, Minnesota strengthened its background check requirement for proposed guardians. Minnesota now requires a background check before a guardian is appointed, unless one has been done within the last two years, and every two years thereafter.[95] The background check must include criminal history from the Bureau of Criminal Apprehension, the National Criminal Records Repository if the proposed guardian has not resided in Minnesota for the previous ten years, and a state licensing agency search if the individual ever held a professional license.[96] The only familial exception is made for parents of a proposed ward.[97]

(b) States That Allow Courts to Obtain Background Checks for Proposed Guardians

There are also states that allow courts to obtain criminal background checks from proposed guardians, but do not require the court to do so. New York's statute is reflective of several states that authorize courts to obtain a background checks at their discretion. In 2012, New York clarified its guardianship law relating to background investigations. The law, as it stands now, authorizes the court to obtain and consider certain background information and to use it to determine whether or not a proposed guardian is fit.[98] Should the court so choose, it may obtain fingerprints and a background check, relevant reports from the sex offender registry and the statewide central register of child abuse and maltreatment, and the statewide registry of protective orders.[99]

(c) States That Do Not Authorize Courts to Obtain Background Checks on Nonprofessional Guardians

Several states do not allow courts to access any background checks for proposed nonprofessional guardians. For example, Nevada only requires private professional guardians to undergo both an FBI and Nevada criminal background check and pay the court costs.[100] Nonprofessional guardians, however, are

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[89] *Compare* MINN. STAT. ANN. § 524.5-118(a) (West) (requiring record check) *and* FLA. STAT. ANN. § 744.3135 (West) (requires fingerprinting) *with* COLO. REV. STAT. ANN. § 15-14-110 (West) (requiring an attached criminal history check and credit report).

[90] FLA. STAT. ANN. § 744.3135 (West).

[91] *Id.*

[92] *Id.*

[93] FLA. STAT. ANN. § 435.04 (West).

[94] *Id.* at § 744.3135.

[95] MINN. STAT. ANN. § 524.5-118(a) (West).

[96] *Id.* at § 524.5-118(b).

[97] *Id.* at § 524.5-118(f)(2).

[98] N.Y. Mental Hyg. Law § 81.19(g) (McKinney).

[99] *Id.*

[100] NEV. REV. STAT. ANN. § 159.0595 (West).

not required to submit to a background check of any sort, nor is the court authorized to obtain one.[101] Nevada, like Texas and many other states, has a law that disqualifies individuals with felony convictions; however, it does not authorize courts to access criminal background checks.[102] Moreover, at least three states, including Tennessee, require disclosure of any felony or misdemeanor convictions by the proposed guardian in the guardianship application.[103]

B. Ex post Punishments for Perpetrators and Remedies for Victims Do Not Adequately Prevent Abuse Nor Honestly Restore Victims

To date, in Texas, much of the focus on preventing elder abuse has been on punishment of offenders rather than prevention. The two main avenues in Texas for punishment are investigations by APS that can end in criminal prosecution and independent criminal charges. While admirable, investigation and punishment alone cannot prevent elder abuse from occurring. Studies show that the majority of elder abuses cases go unreported.[104] Moreover, these punishments may keep an elder safe from future abuse; however, they alone cannot remedy the combination of emotional, physical, and financial damage that accompanies abuse. While victims have civil recourse against their perpetrators, this cannot honestly restore the victim. Therefore, the focus for any policy moving forward that seeks to address the elder abuse epidemic must be prevention.

1. Investigation By APS is an Insufficient Safeguard As Many Cases Are Never Reported to APS.

APS is charged with investigating allegations of elder abuse. While the investigative and protective services it offers is admirable, it does not prevent elder abuse from taking place because many cases of elder abuse go unreported.

APS investigates allegations that the "alleged victim is in a state of or at risk of harm due to abuse, neglect, or financial exploitation."[105] An APS specialist will assess the alleged maltreatment, the alleged perpetrator, and whether the individual is currently being abused or in danger of abuse.[106] APS must initiate its investigation within twenty-four hours of the report of abuse.[107] APS then refers cases to the appropriate authorities, including law enforcement when appropriate. APS investigated 81,681 allegations of abuse in 2014.[108]

While APS investigations are necessary, the threat of an allegation or investigation does not prevent elder abuse. Moreover, APS is constrained by funding and capacity. Its ability to respond to allegations and care for the elderly that are abused would be increased if effective elder abuse prevention measures were in place. More thorough screening of proposed guardians has been shown to catch known bad actors and would both reduce the number of elderly who undergo the harrowing

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[101] *Id.*

[102] *See, e.g.*, *id.* at § 159.059.

[103] TENN. CODE ANN. § 34-3-104 (West).

[104] *Supra* footnotes 17–19 and surrounding text.

[105] 40 TEX. ADMIN. CODE § 705.1001.

[106] DFPS, *1340 Allegations That APS Investigates*, TEX. DEP'T OF FAMILY & PROTECTIVE SERVS. (May 13, 2015), http://www.dfps.state.tx.us/handbooks/APS/Files/APS_pg_1340.asp - APS_1340.

[107] TEX. HUM. RES. CODE ANN. § 48.151 (West).

[108] *Supra* footnote 20.

experience of being abused and lighten APS's load and allow it to more effectively serve the elderly population of Texas.

2. Criminal Penalties for Elder Abuse Are Insufficient Deterrents

The Texas Penal Code makes it a crime to cause bodily injury to either an elderly individual or a person who "by reason of age or physical or mental disease, defect, or injury is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self."[109] These two categories encompass anyone deemed incapacitated and therefore, all individuals in guardianship. A crime is committed even by an individual's failure to act if the individual has assumed care for an elderly or disabled individual.[110] The punishment depends on the requisite intent, from a first degree to a state jail felony.[111]

In addition, the general theft statute can be used against former guardians who financially exploit their wards. Section 31 of the Texas Penal Code makes it a crime when someone "unlawfully appropriates property with intent to deprive the owner of property."[112] Unlawful appropriation occurs if the individual does not have effective consent of the owner.[113] The punishment for the offense depends on the value of the property stolen; however, if the victim is an elderly individual the punishment is increased to the next level.[114]

It is also a crime to "intentionally, knowingly, or recklessly cause[] the exploitation of a child, elderly individual, or disabled individual."[115] Exploitation is defined as the "illegal or improper use of a child, elderly individual, or disabled individual or of the resources of a child, elderly individual, or disabled individual for monetary or personal benefit, profit, or gain."[116] This offense is classified as a third degree felony.[117]

While criminal statutes are designed to both punish offenders and deter potential offenders, many scholars argue that they are often ineffective means of deterrence.[118] First, deterrence is reduced when the likelihood of being caught is low. Studies show that certainty of apprehension has a much higher deterrent effect than increased severity in punishment.[119] In the case of elder abuse, more than half of the suspected cases go unreported and therefore, the perpetrator is never caught.[120] This low likelihood of apprehension likely contributes to the low deterrent effect of the criminal punishments for elder abuse. Second, deterrent effect is further hindered by the public's general lack of knowledge of

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[109] TEX. PENAL CODE ANN. § 22.04 (West).

[110] *Id.* at § 22.04(b).

[111] *Id.* at § 22.04.

[112] *Id.* at § 31.03(a).

[113] *Id.* at § 31.03(b).

[114] *Id.* at § 31.03(f)(3).

[115] *Id.* at § 32.53.

[116] *Id.* at § 32.53.

[117] *Id.*

[118] *See, e.g.*, Isaac Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 THE JOURNAL OF LEGAL STUDIES 259, 260 2 (1972).

[119] Daniel Nagin and Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865, 865 (2001).

[120] *Supra* footnote 20–22.

sentencing guidelines.[121] The heightened sentence for stealing from an elderly individual is likely not common knowledge.

Even if the heightened punishment for theft from the elderly has a marginal deterrent effect, it cannot restore the victim's loss or sense of security. Preventative measures, including screening out bad actors, would prevent potential victims from having to endure the pain of abuse and the stress of a criminal prosecution of their former guardian.

3. The Bond Process is Expensive, Time-Consuming, and Wasteful of the Court's Resources

Texas guardians are required by the court to give a bond to protect the ward and his creditors.[122] This is arguably a sufficient safeguard; however, the bond process, while necessary, cannot be sufficient in cases where the loss could have been avoided. Moreover, the reality of trying to make the incapacitated person whole for a financial loss by recovering against the surety on a guardian's bond is expensive, time-consuming, and wasteful of the court's scarce resources.

C. Reporting Requirements and Conflicting Privacy Laws Confuse Individuals Who Are Required to Report Abuse

Many argue that reporting requirements already safeguard wards from abuse. However, this confidence in reporting is unfounded, as studies have found that the majority of abuse is not reported.

The Human Resources Code requires reporting to the appropriate department if a person has cause to believe that an elderly or disabled person is "in a state of abuse, neglect, or exploitation."[123] The requirement applies without exception, even to those individuals whose "professional communications are generally confidential."[124] The Human Resource Code also sets forth a Class A Misdemeanor for anyone who fails to report, arguably to incentivize reporting.[125] The law also provides judicial immunity for people who report suspected abuse.[126]

While these requirements and penalties are commendable, they are not enough to adequately protect the incapacitated. Many times abuse is not observable, and even when it is, people may not be aware of their duty to report or the immunity the law grants them should they report suspected abuse. For instance, attorneys, doctors, bankers, and many other professionals have conflicting confidentiality and privacy requirements for clients. While the Human Resources Code requires reporting, these professionals are likely to be better acquainted with their profession's privacy requirements.

For example, financial abuse is sometimes observable from banking statements. However, studies show that bank employees are hesitant to report suspected cases of financial elder abuse in fear of violating confidentiality requirements.[127] Banks face civil and criminal penalties, as well as potential damages from civil suits brought by bank customers, for violations.[128] A general lack of knowledge of

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[121] VALERIE WRIGHT, JUSTICE EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 3 (2010).

[122] TEX. ESTATES CODE ANN. § 1105.101(a) (West).

[123] TEX. HUM. RES. CODE ANN. § 48.051(a) (West).

[124] *Id.* at § 48.051(c).

[125] *Id.* at § 48.052.

[126] *Id.* at § 48.054.

[127] Reid Johnson, Comment, *Eradicating Elderly Exploitation: How Simple Solutions Can Protect the Elderly Population of Texas from Financial Abuse,* 15 TEX. TECH ADMIN. L.J. 209, 214 (2013).

[128] *Id.*

reporting requirements and apparently conflicting privacy laws, in addition to the lack of detail regarding what professions are required to report may be to blame.[129]

D. Sufficient Safeguards Are Already in Place to Prevent Background Check Information from Becoming Public Knowledge

The argument that the background check is an invasion of privacy with insurmountable risk of becoming public knowledge is equally unpersuasive. There are existing rules regarding the clerk's duties relating to the privacy of the background checks for professional guardians. The criminal history obtained by the clerk is privileged and confidential information and may only be used by the court to determine the suitability of a proposed guardian.[130] Should the criminal history record be disclosed without consent of the person being investigated or a court order, the punishment is a Class A misdemeanor.[131] Moreover, the Estates Code allows for the information to be destroyed after use to safeguard guardian's privacy.[132]

Criminal background history is sensitive, private information. However, the safeguards in place are sufficient to protect the privacy of proposed guardians. Clerks face a Class A misdemeanor if they improperly reveal the criminal background information. A Class A misdemeanor is punishable by a fine of up to $4,000, a jail sentence of up to one year, or both.[133] Class A is the highest class of misdemeanors in the state of Texas. This is one of only three punishable, criminal offenses in the Estates Code.[134] For comparison, the unauthorized release of genetic material of an individual collected for purposes of genetic testing in heirship proceedings is also a Class A misdemeanor.[135] The severe punishment for a Class A misdemeanor reflects the importance that Texas places on protecting the privacy of individuals.

Moreover, individuals are on constructive notice that should they be proposed as guardians, a criminal background check will be necessary. Undergoing the guardianship appointment process is entirely voluntary, and proposed guardians may elect to decline a guardianship at any time. Should an individual have something in that individual's criminal background that the individual would prefer to remain private, even to the court, that person may choose to not pursue the guardianship. While maintaining the privacy of guardians is a valid concern, ensuring that a vulnerable individual is not placed with a known bad actor outweighs the privacy concerns of proposed guardians.

E. Additional Cost to Family Members

Finally, it is a valid argument that the ten dollar fee that the clerk is authorized to collect would deter family members from serving as guardians.[136] However this fee is discretionary and the clerk may choose to require payment. The guardianship procedure itself is time consuming and expensive, making it out of the realm of possibility for many Texans. While making access to protective measures like

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[129] *Id.* at 227–28.

[130] TEX. ESTATES CODE ANN. § 1104.405 (West).

[131] *Id.* at § 1104.411.

[132] *Id.* at § 1104.405.

[133] TEX. PENAL CODE ANN. § 12.21 (West).

[134] TEX. ESTATES CODE ANN. §§ 204.056, § 505.006, § 1104.411 (West).

[135] *Id.* at § 204.056.

[136] *See* TEX. ESTATES CODE ANN. § 1104.402(b) (West).

guardianship more affordable is necessary and laudable, a ten-dollar fee pales in comparison to the potential harm that could be avoided.

VI. Conclusion

HB 1438 rectified the hole in the Estates Code that kept courts from fulfilling their mandate to investigate family members and disqualify certain known bad actors. The elderly and disabled constitute an extremely vulnerable population, deserving of the full protection of the court system. However, our probate courts are now better able to protect them.

Research shows that elder abuse is on the rise, and will only continue to increase as our population ages. Since the majority of abuse goes unreported and the most likely perpetrators of elderly abuse are family members, the focus must be on preventing likely abusers from being appointed guardian. *Ex ante* safeguards, like the criminal background investigation included in HB 1438, are more effective than *ex post* punishments, sanctions, or remedies. Moreover, *ex post* solutions, including the threat of investigation by APS and/or criminal punishment, are not sufficient deterrents.

By passing HB 1438, Texas joins a group of states that are committed to protecting the elderly and disabled within the guardianship program. Guardianship is designed to protect some of the most vulnerable Texans, and the simple change in HB 1438, requiring a criminal background check for all family members, will prevent thousands of cases of abuse every year and keep Texans safe.

TEXAS RICE LAND PARTNERS, LTD. V. DENBURY GREEN PIPELINE-TEXAS, LLC: TEXAS EMINENT DOMAIN LAW AND THE NOT-SO-COMMON COMMON CARRIER STATUS

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STUDENT WRITING CONTEST

Honorable Mention – Real Estate 2015

I. Introduction[1]

Pipeline companies that use and benefit from eminent domain law are a source of major contention between property owners and the energy industry, especially in Texas. While both the United States Constitution and the Texas State Constitution allow for the taking of private land for public use,[2] landowners have consistently challenged the constitutionality of such taking; specifically, that pipeline companies do not meet the requirement of qualifying as a common carrier to exercise eminent domain authority.[3] According to the Texas Natural Resource Code, a common carrier is one who "owns, operates, or manages . . . pipelines for the transportation of carbon dioxide or hydrogen in whatever form to or for the public."[4] Once an entity meets the common carrier requirement, it has the right to enter and condemn the land for the use of a common carrier pipeline.[5]

A significant change in Texas eminent domain law came after the Texas Supreme Court decided the case *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC* (*Denbury I*) in 2012.[6] In that case, the court determined that the constitutional requirement that land be taken for public use is paramount and that to qualify as a common carrier, a company must prove that there is a *reasonable*

[1] First published by the *South Texas Law Review*, http://www.stcl.edu/southtexaslawreview/index.html.

[2] U.S. CONST. amend V; TEX. CONST. art. I, § 17.

[3] *See, e.g.*, Coastal States Gas Producing Co. v. Pate, 309 S.W.2d 828, 831 (Tex. 1958); Crawford Family Farm P'ship v. TransCanada Keystone Pipeline, L.P., 409 S.W.3d 908 (Tex. App.—Texarkana 2013, pet. denied).

[4] TEX. NAT. RES. CODE ANN. § 111.002(6) (West 2011).

[5] *Id.* at § 111.019(a).

[6] Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline–Tex., LLC (*Denbury I*), 363 SW.3d 192 (Tex. 2012).

probability that the pipeline will at some point serve the public and not just the company or its affiliates.[7] On remand, the appellate court concluded that reasonable minds could differ whether Denbury's pipeline was created for public use and thus, reversed the trial court's granting of summary judgment in *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline–Texas, LLC* (*Denbury II*).[8] A petition for review has been filed in the Supreme Court of Texas, and if granted, the court must determine whether Denbury has established a reasonable probability that the pipeline will be used for the public and subsequently qualify as a common carrier.[9]

This Note will address why Denbury should not qualify as a common carrier and therefore, cannot condemn the private land through eminent domain authority. Part II will discuss the history and evolvement of eminent domain law and common carrier status and walk through the appellate court's decision in *Denbury II*. Part III will analyze the validity of the court's determination, and then Part IV will conclude with why the Texas Supreme Court should rule against Denbury using the court's own test established in 2012.

II. Background

A. The Progression of Eminent Domain Law in Texas

The Fifth Amendment of the Constitution declares that "private property [shall not] be taken for public use without just compensation."[10] Similarly, the Texas Constitution states that no person's property shall be taken for public use without adequate compensation and only if "the taking, damage, or destruction is for: (1) the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by: (A) the State, a political subdivision of the State, or the public at large; or (B) an entity granted the power of eminent domain under law."[11] Given this constitutional authority, the legislature often gives private entities the power of eminent domain if they qualify as common carriers, public utilities, or gas corporations.[12] A pipeline can become a common carrier through a T-4 permit application as long as the transportation of carbon dioxide is to or for the public; however, this entire process only necessitates checking a box on the application and a subsequent letter agreeing to be subjected to obligations of Chapter 111 of the Texas Natural Resource Code to be granted eminent domain authority.[13]

In 2005, the United States Supreme Court decided *Kelo v. New City of London*, further reducing the

[7] *Id.* at 202.

[8] Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline–Tex., LLC (*Denbury II*), 457 S.W.3d 115, 122 (Tex. App.—Beaumont 2015, pet. filed).

[9] Petition for Review, Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., No. 15-0225 (Tex. June 3, 2015), 2015 WL 5101747.

[10] U.S. CONST. amend. V.

[11] TEX. CONST. art. I, § 17.

[12] *See* TEX. NAT. RES. CODE. ANN. § 111.019 (West 2011) (common carrier status); TEX. UTIL. CODE ANN. § 121.001 (West 2007) (gas utility); TEX. UTIL. CODE ANN. § 181.004 (West 2007) (gas corporation).

[13] Megan James, Comment, *Checking the Box is Not Enough: The Impact of* Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC *and Texas's Eminent Domain Reforms on the Common Carrier Application Process*, 45 TEX. TECH L. REV. 959, 974 (2013).

minimal protections landowners had against improper eminent domain power.[14] In that case, the Court concluded that the common test of public use being "use by the general public" was no longer adequate and expanded the definition of public use into anything with a "public purpose."[15] However, the Court also stated, "[N]othing in [their] opinion precludes any State from placing further restrictions on its exercise of the takings power."[16] Texas took that statement and ran. In 2009, the Texas Legislature amended the Texas Constitution to its current form, addressing the *Kelo* decision by prohibiting public use from including the taking of land for the "purpose of economic development or [enhancing] . . . tax revenues."[17] This amendment was created to help ensure that when private landowner's property is taken, that it is actually taken for a public use, and not a private use camouflaged as a public use. Since the amendment, there has been a myriad of cases challenging a private entity's eminent domain authority under the common carrier status.

B. Challenging Common Carrier Status and Public Use

In *Occidental Chemical Corp. v. ETC NGL Transportation, LLC*, the appellate court decided that ETC presented evidence by which the district court could conclude it was acting as a common carrier.[18] ETC, a subsidiary of a natural gas corporation, requested that Occidental allow it to enter onto Occidental's pipeline corridor to assess the area for the construction of a liquid natural gas pipeline.[19] Occidental denied the request on the grounds that it had its own plans for the corridor.[20] ETC was granted a T-4 permit by the Texas Railroad Commission; however, Occidental still denied access, and the district court later granted ETC's temporary injunction.[21] The appellate court held that the evidence presented by ETC as proof of common carrier status was sufficient and upheld the injunction.[22] In its reasoning, the court noted that the pipeline was to transport product for others, not just for ETC's own private use, and that ETC already had multiple contracts with corporations to use its pipeline, as further proof that the pipeline was for public use.[23]

In 2012, the Texas Supreme Court tackled this issue when it heard *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC* (*Denbury I*).[24] When the landowners in this case refused to allow Denbury access to their land despite their statutory authority to do so, Denbury filed suit, seeking an injunction to access the land.[25] Both the trial court and appellate court held for Denbury as a common

[14] Kelo v. City of New London, 545 U.S. 469, 489 (2005).

[15] *Id.* at 480.

[16] *Id.* at 489.

[17] TEX. CONST. art. I, § 17(b).

[18] Occidental Chem. Corp. v. ETC NGL Transp., LLC, 425 S.W.3d 354, 366 (Tex. App.—Houston [1st Dist.] 2011, pet. dism'd).

[19] *Id.* at 358.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 366.

[23] *Id.* at 365–66.

[24] Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (*Denbury I*), 363 SW.3d 192 (Tex. 2012).

[25] *Id.* at 196.

carrier pursuant to the Texas Natural Resources Code.[26] However the supreme court disagreed and subjected common carrier status to a higher level of scrutiny.[27] The court noted the importance that the legislative grant of eminent domain be strictly construed, and that "the statute granting such power is strictly construed in favor of the landowner and against . . . corporations . . . ."[28] Because the court concluded that filling out a form declaring public use was not sufficient, as many corporations still condemned land for private use, it imposed a new standard: for a person *intending* to build a carbon dioxide pipeline to qualify as a common carrier, "a reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier."[29] Based on this standard and the burden of the corporation to prove its intended public use, the Texas Supreme Court reversed and remanded the case.[30]

Once the *Denbury* standard was established, many cases followed with landowners challenging the public use requirement of corporations claiming common carrier status. One notable case is *Crosstex NGL Pipeline, L.P. v. Reins Rd. Farms-1, Ltd*.[31] A corporation that was granted a permit to operate a pipeline on the landowner's property was denied a temporary injunction because it did not prove to the court that the pipeline would be used for public use.[32] Because a party may dispute whether a pipeline has a public use (despite the T-4 permit the corporation possesses), the court applied the *Denbury I* holding.[33] Crosstex did not meet its burden of proving public use because it was unsuccessful in solidifying bids from third parties to use the pipeline; additionally, the landowners brought evidence that Crosstex intended to transport its own products and that of its affiliates between its pipelines for over ninety percent of the pipeline's capacity.[34] Based on this evidence, the court determined that there was not a reasonable probability that the pipeline would serve those other than the corporation or its affiliates, so the injunction was denied.[35]

C. *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*

Once the Texas Supreme Court reversed and remanded *Denbury I*, the trial court still declared that Denbury was a common carrier under the new test, and it did not take long for Texas Rice to appeal back to the Ninth Court of Appeals.[36] With the new test in place, Denbury argued that Denbury Green

[26] *Id.* at 196.

[27] *Id.* at 197.

[28] *Id.* at 198 (quoting Coastal States Gas Producing Co. v. Pate, 309 S.W.2d 828, 831 (Tex. 1958)) (internal quotation marks omitted).

[29] *Id.* at 202.

[30] *Id.* at 204.

[31] Crosstex NGL Pipeline, L.P. v. Reins Rd. Farms–1, Ltd., 404 S.W.3d 754 (Tex. App.—Beaumont 2013, no pet.).

[32] *Id.* at 756.

[33] *Id.* at 760; *see Denbury I*, 363 S.W.3d at 198.

[34] *Crosstex NGL Pipeline*, 404 S.W.3d at 760.

[35] *Id.*

[36] Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 457 S.W.3d 115, 117 (Tex. App.—Beaumont 2015, pet. filed).

was formed for the distinct purpose of owning a pipeline, and it is regulated by the Texas Railroad Commission as a common carrier and does not "buy, sell, explore for, or produce carbon dioxide."[37] Denbury further asserted that the pipeline would not just be used to transport carbon dioxide to and from a network of units that it and its affiliates own, and it brought evidence that it had reserved space for others to use the pipeline and that it already had contracts with third parties to use the pipeline in an attempt to satisfy the new test.[38]

The appellate court took this evidence and applied the *Denbury* test, focusing on the intent of Denbury at the time of the plan to build the pipeline, to determine if the corporation qualified as a common carrier.[39] In looking back at 2008 when the pipeline was first contemplated, the court found that the third party contract it entered into did not even come into play until after the pipeline was completed.[40] Therefore, there were no other parties that were going to use the pipeline besides Denbury and its affiliates when the pipeline construction began. The court also rejected Denbury's next contention: that the placement of the pipeline by oilfields created a reasonable probability that others would use the pipeline for their transportation needs.[41] The court concluded that a subjective belief of public use does not satisfy the test and does not prove that the purpose was to serve the public; in fact, the court stressed that "property is taken for public use only when there results to the public some *definite* right or use . . . ."[42] The last argument Denbury used to try to convince the court that it was a common carrier was that it did not own all of the units and products that the carbon dioxide would be transported to and from.[43] The court rejected this final argument because evidence showed that Denbury did own a controlling interest in the units and the third-party interest owners did not actually take title to or possess the carbon dioxide, thereby making a majority of the operations and product still under the control of Denbury.[44] Given these findings, the appellate court determined that reasonable minds could differ as to whether there was a reasonable probability that the pipeline was created to serve the public and not just the private interests of Denbury.[45]

III. Analysis of *Texas Rice*

The appellate court's decision is in line with not only the test established in *Denbury I*, but also with prior case law interpreting the relatively new test. The test requiring a reasonable probability that the pipeline was created to serve the public is proper due to the protection it grants private landowners and the burden it puts on the large corporations. The *Denbury I* court was correct to create this test, because, while the statute specifically grants the ability of private entities to have eminent domain power as common carriers, it is up to the courts to scrutinize such cases. The power of condemnation

[37] *Id.*

[38] *Id.* at 118.

[39] *Id.* at 120.

[40] *Id.*

[41] *Id.*

[42] *Id.* (quoting Coastal States Gas Producing Co. v. Pate, 309 S.W.2d 828, 833 (Tex. 1958)) (internal quotation marks omitted).

[43] *Id.* at 121.

[44] *Id.*

[45] *Id.*

might be "essential to the success of the energy industry," but the rights of landowners cannot be overshadowed.[46] Applying the test to *Denbury II*, it was appropriate for the court to conclude that Denbury had not met its burden in proving that, more likely than not, the pipeline was created for and would be used by the public.

Similar to *Crosstex*, Denbury did not have any unrelated parties contracted to use the pipeline either prior to construction or after completion.[47] Additionally, the private landowners in both *Crosstex* and *Denbury* were able to prove that the pipelines were to be used by mainly the corporations and their affiliates.[48] If Denbury were to succeed on the merits, it would need to bring evidence similar to that in *Occidental*, in which ETC brought evidence that the pipeline was created for more than the corporation's personal use and built the pipeline with multiple contracts for unrelated third parties to use the pipeline.[49]

Based on the conclusions in *Crosstex* and *Occidental*, the court correctly interpreted the requirement of public use for a corporation to be a common carrier. A pipeline created for private use only—with a chance that third parties might want to use it—does not rise to the level of statutory eminent domain authority. It is the court's duty to protect landowners and their land from being overtaken by large corporations who, until recently, have been able to condemn land just by checking off a box on a T-4 form. Now that corporations have to prove a reasonable probability of public use at the time a pipeline was intended to be built, landowners are better protected from those who want to take private land for private economic gain only, which is expressly prohibited by the Texas Constitution.[50] The Texas courts have made it clear that after *Denbury II*, a corporation needs to show a reasonable probability of public use to qualify as a common carrier, and that public use requires unrelated third party contracts and intent to keep the pipeline open.[51] If a corporation cannot meet its relatively low burden of showing a reasonable probability that the pipeline will be used for the public, then it does not qualify as a common carrier and should not be granted eminent domain power.

IV. Conclusion

Though eminent domain law in Texas remains an ever-developing area of law, the Supreme Court of Texas has made the requirements clear for a corporation to be a common carrier. Requiring a reasonable probability is not a heavy burden for a corporation to prove and serves the greater purpose of protecting private landowners in a time of energy industry domination. The burden allows for broad eminent domain authority while still giving landowners the protections they need when compared to public benefit. With multiple appellate courts using the *Denbury* test to rule on eminent domain

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[46] James, *supra* note 13, at 961.

[47] *See* Crosstex NGL Pipeline, L.P. v. Reins Rd. Farms-1, Ltd., 404 S.W.3d 754, 761 (Tex. App.—Beaumont 2013, no pet.).

[48] *See id.* at 760; Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (Denbury I), 363 SW.3d 192 (Tex. 2012).

[49] Occidental Chem. Corp. v. ETC NGL Transp., LLC, 425 S.W.3d 354, 366 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).

[50] *See* TEX. CONST. art. I, § 17(b).

[51] *See* Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline–Tex., LLC (*Denbury II*), 457 S.W.3d 115, 121 (Tex. App.—Beaumont 2015, pet. filed).

authority and *Denbury II* going back to the same supreme court that created the test, the court will most likely determine that Denbury Green has not met its burden of proving by a reasonable probability that the pipeline was created for use by the public and will serve the public, thereby upholding the appellate court's decision.


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