**SCAC MEETING AGENDA**
**Friday, August 18th & Saturday, August 19th, 2023**
***In Person at SBOT – Austin, TX***

# FRIDAY, August 18th and SATURDAY, August 19th, 2023:

## I. WELCOME FROM C. BABCOCK

## II. STATUS REPORT FROM JUSTICE BLAND

Justice Bland will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the June 16th, 2023 meeting.

## III. FIFTEENTH COURT OF APPEALS

***Business Court Sub-Committee:***
***Marcy Greer – Chair***
***Hon. R.H. Wallace – Vice Chair***
***Rusty Hardin***
***Hon. Peter Kelly***
***Hon. Emily Miskel***
***Chris Porter***
***Hon. Maria Salas Mendoza***
***Hon. Cathy Stryker***
***Hon. John Warren***
***Robert Levy***

A. June 3, 2023 Referral Letter
B. SB 1045

## IV. BUSINESS COURT

***Business Court Sub-Committee:***
***Marcy Greer – Chair***
***Hon. R.H. Wallace – Vice Chair***
***Rusty Hardin***
***Hon. Peter Kelly***
***Hon. Emily Miskel***
***Chris Porter***
***Hon. Maria Salas Mendoza***
***Hon. Cathy Stryker***
***Hon. John Warren***
***Robert Levy***

C. June 3, 2023 Referral Letter
D. HB 19

## V. CLERK'S RECORD

***Appellate Sub-Committee Members:***
***Pam Baron – Chair***
***Hon. Bill Boyce – Vice Chair***
***Prof. Elaine Carlson***
***Prof. Bill Dorsaneo***
***Connie Pfeiffer***
***Rich Phillips***
***Scott Stolley***
***Charles "Skip" Watson***

E. August 15, 2023 Appellate Rules Subcommittee Report
F. HB 3474 - Excerpt

## VI. PERMISSIVE APPEALS

***Appellate Sub-Committee Members:***
***Pam Baron – Chair***
***Hon. Bill Boyce – Vice Chair***
***Prof. Elaine Carlson***
***Prof. Bill Dorsaneo***
***Connie Pfeiffer***
***Rich Phillips***
***Scott Stolley***
***Charles "Skip" Watson***

G. August 15, 2023 Appellate Rules Subcommittee Report
    1. Emails from Chief Justices Adams, Christopher, and Worthen
    2. Misc. Dkt. No. 23-9047

## VII. TEXAS RULE OF CIVIL PROCEDURE 42

***15-165a Sub-Committee:***
***Richard Orsinger – Chair***
***Hon. Ana Estevez – Vice Chair***
***Prof. Alexandra Albright***
***Prof. Elaine Carlson***
***Nina Cortell***
***Prof. William Dorsaneo***
***John Kim***
***Hon. Emily Miskel***
***Pete Schenkkan***
***Hon. John Warren***

H. June 5, 2023 Memo re Fluid Recovery Awards
I. TRCP 42 – Preferences of Subcommittee Members
J. Kentucky Report of New Rule of Procedure
K. Kentucky Court Rules CR 23.05 Dismissal or Compromise of Class Actions
L. Highland Homes, Ltd v. State of Texas
M. Northrup v. Southwestern Bell Tel. Co.

## VIII. SMALL ESTATE AFFIDAVIT KIT

***Full Committee***

N. July 26, 2023 Referral Letter
O. June 27, 2023 Probate Forms Task Force Report
P. Small Estate Affidavit Kit
Q. SB 512 (84th Legislature)

## IX. TEXAS RULE OF EVIDENCE 509

***Evidence Sub-Committee:***
***Buddy Low – Chair***
***Hon. Harvey Brown – Vice Chair***
***Hon. Levi Benton***
***Prof. Elaine Carlson***
***Marcy Greer***
***Prof. Lonny Hoffman***
***Roger Hughes***
***Hon. Peter Kelly***

R. August 17, 2023 Subcommitte Memo
    1. December 5, 2022 AREC Memo
    2. March 21, 2023 Email from Prof. Steven Goode
    3. May 8, 2023 Memo from Roger Hughes
    4. August 17, 2023 Memo from Jonathan Stone

## X. TEXAS RULE OF EVIDENCE 510

***Evidence Sub-Committee:***
***Buddy Low – Chair***
***Hon. Harvey Brown – Vice Chair***
***Hon. Levi Benton***
***Prof. Elaine Carlson***
***Marcy Greer***
***Prof. Lonny Hoffman***
***Roger Hughes***
***Hon. Peter Kelly***

S. August 3, 2023 Evidence Subcommitte Memo

# Tab A

The Supreme Court of Texas

CHIEF JUSTICE
NATHAN L. HECHT

JUSTICES
DEBRA H. LEHRMANN
JEFFREY S. BOYD
JOHN P. DEVINE
JAMES D. BLACKLOCK
J. BRETT BUSBY
JANE N. BLAND
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CLERK
BLAKE A. HAWTHORNE

GENERAL COUNSEL
NINA HESS HSU

EXECUTIVE ASSISTANT
NADINE SCHNEIDER

DIRECTOR OF PUBLIC AFFAIRS
AMY STARNES

June 3, 2023

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

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters that arise from legislation passed by the 88th Legislature. Some require immediate attention, while others are longer-range initiatives.

The Committee should be prepared to discuss the following projects at its June 16-17, 2023 meeting and conclude its work on them by its August 18-19, 2023, meeting:

**Discovery in Family Law Cases.** HB 2850 adds Chapter 301 to the Family Code to move discovery procedures in family law cases from the Texas Rules of Civil Procedure to statute. The Committee should consider whether the discovery rules should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

**Suspension of Money Judgment Pending Appeal.** Civil Practice and Remedies Code § 52.006 and Texas Rule of Appellate Procedure 24.2(a)(1) govern the amount of a supersedeas bond when the judgment is for money. HB 4381, by adding Civil Procedure and Remedy Code § 52.007, requires a court to allow a judgment debtor worth less than $10 million to post "alternative security with value sufficient to secure the judgment" if the judgment debtor shows that the amount required by CPRC § 52.006 and TRAP 24.2(a)(1) would "require the judgment debtor to substantially liquidate the judgment debtor's interests in real or personal property necessary to normal course of the judgement debtor's business." The Committee should consider whether Texas Rule of Appellate Procedure 24.2 should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

**Conduct of Judicial Candidates.** HB 367 adds Government Code § 33.02105 to authorize the State Commission on Judicial Conduct to accept complaints, conduct investigations, and take disciplinary action against judicial candidates. The Committee should consider whether the Code of Judicial Conduct and the Procedural Rules for the Removal or Retirement of Judges should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

**Judicial Disclosures and Education.** HB 2384 imposes ballot application disclosure requirements on judicial candidates and education requirements on judges. Section 2 of the bill adds Government Code § 33.032 to make public any sanction the State Commission on Judicial Conduct issues against a judicial candidate for making false ballot application disclosures, along with related records. Section 3 adds Government Code §§ 39.003–.004 to provide for the suspension and removal of judges who do not comply with education requirements. The Committee should consider whether the Code of Judicial Conduct and the Procedural Rules for the Removal or Retirement of Judges should be changed or a comment added to reference or restate the statutes and draft any recommended amendments.

**Court Confidentiality.** Section 1 of SB 372 adds Government Code § 21.013 to make it a criminal offense for court staff to knowingly disclose judicial work product and to require court staff and judges to comply with Court rules governing judicial work product. Section 2 directs the Court to adopt any rules necessary to implement § 21.013. The Committee should draft any recommended rules.

**SVP Magistrate Referrals.** SB 1179 (Section 10) and SB 1180 (Section 1) add Civil Practice and Remedies Code Chapter 14A to govern actions brought by a sexually violent predator who has filed a Statement of Inability to Afford Payment of Court Costs. New § 14A.061 directs the Court to adopt rules that provides for referral of a Chapter 14A action to a magistrate for review and recommendation. The Committee should draft any recommended rules.

**Permissive Appeals.** On September 15, 2022, the Court asked the Committee to study permissive appeals, and the Committee discussed the issue at its February 17, 2023 meeting. The Court now asks that the Committee supplement its study and propose any recommended amendments in light of SB 1603. SB 1603 adds Civil Practice and Remedies Code § 51.014(g) and (h) to require a court of appeals that does not accept a permissive appeal to "state in its decision the specific reason for finding that the appeal is not warranted" and to expressly allow the Court to review de novo the decision not to accept a permissive appeal and direct the court of appeals to accept the appeal. The Committee should consider whether Texas Rule of Appellate Procedure 28.3 should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

The Committee should conclude its work on the following projects by its October 13, 2023, meeting:

**Clerk's Record.** Section 17.001 of HB 3474 adds Civil Practice and Remedies Code § 51.018 to permit appealing parties to file an appendix in lieu of the clerk's record and to prohibit a clerk from charging a fee for the appendix. The Committee should consider whether the Texas Rules of Appellate Procedure governing the clerk's record should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

**Business Court.** HB 19, by adding Government Code Chapter 25A, creates a business court and gives it jurisdiction over certain business matters. HB 19 includes several rulemaking directives. First, new § 25A.016 directs the Court to adopt rules "for the issuance of written opinions by the business court." Second, new § 25A.018 directs the Court to set fees for filings and actions in the business court. Finally, new § 25A.020 directs the Court to "adopt rules of civil procedure as the Court deems necessary," including rules "for the timely and efficient removal and remand of cases to and from the business court" and "the assignment of cases to judges of the business court." The Committee should draft recommended procedural and administrative rules.

**Fifteenth Court of Appeals.** SB 1045 creates a Fifteenth Court of Appeals. Section 1.05 adds Government Code § 22.220(d) to give the Fifteenth Court of Appeals exclusive intermediate appellate jurisdiction over certain civil matters, including certain matters brought by or against the State and matters involving the Office of Attorney General that challenge the constitutionality or validity of a state statute or rule. Section 1.08 directs the Court, by adding Government Code § 73.001(c), to adopt rules for (1) transferring an appeal incorrectly filed in the Fifteenth Court of Appeals to the appropriate court of appeals and (2) transferring appeals incorrectly filed in the other courts of appeals to Fifteenth Court of Appeals. The Committee should make recommendations and draft recommended procedural and administrative rules.

The Committee should conclude its work on the following project in fall 2024:

**Uniform Interstate Depositions and Discovery Act.** Section 1 of HB 3929 permits the Court to adopt by rule the Uniform Interstate Depositions and Discovery Act, which is a model statute adopted by 48 states to establish a uniform process for obtaining depositions and discovery in concert with other participating states. Section 2 repeals a conflicting statute—Civil Practice and Remedies Code § 20.002—upon the Court's adoption of rules. The Committee should consider whether the discovery rules should be changed and draft any recommended amendments.

The Committee should conclude its work on the following project as it is able:

**Court Interpreter Cost.** Both HB 3474 (Section 10.07) and SB 380 (Section 1) amend Government Code § 57.002(g) to clarify that a person who has filed a Statement of Inability to Afford Payment of Court Costs need not pay interpreter costs unless the statement is successfully challenged. The Committee should consider whether Texas Rule of Civil Procedure 183 should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

**SVP Statement of Inability to Afford Payment of Court Costs.** SB 1179 (Section 10) and SB 1180 (Section 1) add Civil Practice and Remedies Code Chapter 14A to govern actions brought by a sexually violent predator who has filed a Statement of Inability to Afford Payment of Court Costs. New § 14A.054 allows a court to order the sexually violent predator to pay court costs but allows payment by installment. The Committee should consider whether Texas Rule of Civil Procedure 145 should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

**Notice by Qualified Delivery Methods.** HB 785, SB 1373, SB 1457, and SB 2248 amend multiple sections of the Estates Code to allow service in guardianship and probate proceedings by certain qualified delivery methods, including private delivery services like UPS and FedEx. The Committee should consider whether the Texas Rules of Civil Procedure governing citation and

service should be changed or a comment added to reference or restate the statutes and draft any recommended amendments.

**Waiver of Citation in Probate Proceedings.** Sections 14 and 18 of SB 1373 amend Estates Code §§ 202.056 and 258.002 to allow for waiver of citation on minors in heirship and probate proceedings. The Committee should consider whether the citation rules should be changed or a comment added to reference or restate the statutes and draft any recommended amendments.

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

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

# Tab B

AN ACT

relating to the creation of the Fifteenth Court of Appeals with jurisdiction over certain civil cases, the compensation of the justices of that court, and the jurisdiction of the courts of appeals in this state.

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

ARTICLE 1. FIFTEENTH COURT OF APPEALS

SECTION 1.01. Section 22.201, Government Code, is amended by amending Subsection (a) and adding Subsection (p) to read as follows:

(a) The state is organized [~~divided~~] into 15 [~~14~~] courts of appeals districts with a court of appeals in each district.

(p) The Fifteenth Court of Appeals District is composed of all counties in this state.

SECTION 1.02. Subchapter C, Chapter 22, Government Code, is amended by adding Section 22.2151 to read as follows:

Sec. 22.2151. FIFTEENTH COURT OF APPEALS. (a) The Court of Appeals for the Fifteenth Court of Appeals District shall be held in the City of Austin.

(b) The Fifteenth Court of Appeals may transact its business in any county in the district as the court determines is necessary and convenient.

SECTION 1.03. Subchapter C, Chapter 22, Government Code, is amended by adding Section 22.2152 to read as follows:

Sec. 22.2152. REPORT ON FIFTEENTH COURT OF APPEALS. Not later than December 1 of each year, the Office of Court Administration of the Texas Judicial System shall submit to the legislature a report on the number and types of cases heard by the Court of Appeals for the Fifteenth Court of Appeals District in the preceding state fiscal year.

SECTION 1.04. Section 22.216, Government Code, is amended by adding Subsections (n-1) and (n-2) to read as follows:

(n-1) The Court of Appeals for the Fifteenth Court of Appeals District consists of a chief justice and of four justices holding places numbered consecutively beginning with Place 2.

(n-2) Notwithstanding Subsection (n-1), the Court of Appeals for the Fifteenth Court of Appeals District consists of a chief justice and of two justices holding places numbered consecutively beginning with Place 2 for the first three years following the court's creation. This subsection expires September 1, 2027.

SECTION 1.05. Section 22.220, Government Code, is amended by amending Subsection (a) and adding Subsection (d) to read as follows:

(a) Except as provided by Subsection (d), each [~~Each~~] court of appeals has appellate jurisdiction of all civil cases within its district of which the district courts or county courts have jurisdiction when the amount in controversy or the judgment rendered exceeds $250, exclusive of interest and costs.

(d) The Court of Appeals for the Fifteenth Court of Appeals District has exclusive intermediate appellate jurisdiction over

the following matters arising out of or related to a civil case:

(1) matters brought by or against the state or a board, commission, department, office, or other agency in the executive branch of the state government, including a university system or institution of higher education as defined by Section 61.003, Education Code, or by or against an officer or employee of the state or a board, commission, department, office, or other agency in the executive branch of the state government arising out of that officer's or employee's official conduct, other than:

(A) a proceeding brought under the Family Code and any related motion or proceeding;

(B) a proceeding brought under Chapter 7B or Article 17.292, Code of Criminal Procedure;

(C) a proceeding brought against a district attorney, a criminal district attorney, or a county attorney with criminal jurisdiction;

(D) a proceeding relating to a mental health commitment;

(E) a proceeding relating to civil asset forfeiture;

(F) a condemnation proceeding for the acquisition of land or a proceeding related to eminent domain;

(G) a proceeding brought under Chapter 101, Civil Practice and Remedies Code;

(H) a claim of personal injury or wrongful death;

(I) a proceeding brought under Chapter 125, Civil Practice and Remedies Code, to enjoin a common nuisance;

(J) a proceeding brought under Chapter 55, Code of Criminal Procedure;

(K) a proceeding under Chapter 22A, Government Code;

(L) a proceeding brought under Subchapter E-1, Chapter 411, Government Code;

(M) a proceeding brought under Chapter 21, Labor Code;

(N) a removal action under Chapter 87, Local Government Code; or

(O) a proceeding brought under Chapter 841, Health and Safety Code;

(2) matters in which a party to the proceeding files a petition, motion, or other pleading challenging the constitutionality or validity of a state statute or rule and the attorney general is a party to the case; and

(3) any other matter as provided by law.

SECTION 1.06. Section 22.221, Government Code, is amended by amending Subsection (b) and adding Subsections (c) and (c-1) to read as follows:

(b) Subject to Subsection (c-1), each [~~Each~~] court of appeals for a court of appeals district may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against [~~:~~

[~~(1)~~] a judge of a district, statutory county, statutory probate county, or county court in the court of appeals district[~~;~~

[~~(2) a judge of a district court who is acting as a magistrate at a court of inquiry under Chapter 52, Code of Criminal Procedure, in the court of appeals district; or~~

[~~(3) an associate judge of a district or county court appointed by a judge under Chapter 201, Family Code, in the court of appeals district for the judge who appointed the associate judge~~].

(c) Each court of appeals for a court of appeals district, other than the Court of Appeals for the Fifteenth Court of Appeals District, may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against:

(1) a judge of a district court who is acting as a magistrate at a court of inquiry under Chapter 52, Code of Criminal Procedure, in the court of appeals district; or

(2) an associate judge of a district or county court appointed by a judge under Chapter 201, Family Code, in the court of appeals district for the judge who appointed the associate judge.

(c-1) The original jurisdiction of the Court of Appeals for the Fifteenth Court of Appeals District to issue writs is limited to writs arising out of matters over which the court has exclusive intermediate appellate jurisdiction under Section 22.220(d).

SECTION 1.07. Section 22.229(a), Government Code, is amended to read as follows:

(a) An appellate judicial system fund is established for each court of appeals, other than the Court of Appeals of the Fifteenth Court of Appeals District, to:

(1) assist the court of appeals in the processing of appeals filed with the court of appeals from the county courts,

statutory county courts, statutory probate courts, and district courts in the counties the court of appeals serves; and

(2) defray costs and expenses incurred in the operation of the court of appeals.

SECTION 1.08. Section 73.001, Government Code, is amended to read as follows:

Sec. 73.001. AUTHORITY TO TRANSFER. (a) Except as provided by Subsection (b), the [~~The~~] supreme court may order cases transferred from one court of appeals to another at any time that, in the opinion of the supreme court, there is good cause for the transfer.

(b) The supreme court may not transfer any case or proceeding properly filed in the Court of Appeals for the Fifteenth Court of Appeals District to another court of appeals for the purpose of equalizing the dockets of the courts of appeals.

(c) The supreme court shall adopt rules for:

(1) transferring an appeal inappropriately filed in the Fifteenth Court of Appeals to a court of appeals with jurisdiction over the appeal; and

(2) transferring to the Fifteenth Court of Appeals from another court of appeals the appeals over which the Fifteenth Court of Appeals has exclusive intermediate appellate jurisdiction under Section 22.220(d).

SECTION 1.09. Section 659.012(a), Government Code, is amended to read as follows:

(a) Notwithstanding Section 659.011 and subject to Subsections (b) and (b-1):

(1) a judge of a district court is entitled to an annual base salary from the state as set by the General Appropriations Act in an amount equal to at least $140,000, except that the combined base salary of a district judge from all state and county sources, including compensation for any extrajudicial services performed on behalf of the county, may not exceed the amount that is $5,000 less than the maximum combined base salary from all state and county sources for a justice of a court of appeals other than a chief justice as determined under this subsection;

(2) except as provided by Subdivision (3), a justice of a court of appeals other than the chief justice is entitled to an annual base salary from the state in the amount equal to 110 percent of the state base salary of a district judge as set by the General Appropriations Act, except that the combined base salary of a justice of the court of appeals other than the chief justice from all state and county sources, including compensation for any extrajudicial services performed on behalf of the county, may not exceed the amount that is $5,000 less than the base salary for a justice of the supreme court as determined under this subsection;

(3) a justice of the Court of Appeals for the Fifteenth Court of Appeals District other than the chief justice is entitled to an annual base salary from the state in the amount equal to $5,000 less than 120 percent of the state base salary of a district judge as set by the General Appropriations Act;

(4) a justice of the supreme court other than the chief justice or a judge of the court of criminal appeals other than the

presiding judge is entitled to an annual base salary from the state in the amount equal to 120 percent of the state base salary of a district judge as set by the General Appropriations Act; and

(5) [~~(4)~~] the chief justice or presiding judge of an appellate court is entitled to an annual base salary from the state in the amount equal to $2,500 more than the state base salary provided for the other justices or judges of the court, except that the combined base salary of the chief justice of a court of appeals from all state and county sources may not exceed the amount equal to $2,500 less than the base salary for a justice of the supreme court as determined under this subsection.

SECTION 1.10. Section 2001.038(f), Government Code, is amended to read as follows:

(f) A Travis County district court in which an action is brought under this section, on its own motion or the motion of any party, may request transfer of the action to the Court of Appeals for the Fifteenth [~~Third~~] Court of Appeals District if the district court finds that the public interest requires a prompt, authoritative determination of the validity or applicability of the rule in question and the case would ordinarily be appealed. After filing of the district court's request with the court of appeals, transfer of the action may be granted by the court of appeals if it agrees with the findings of the district court concerning the application of the statutory standards to the action. On entry of an order by the court of appeals granting transfer, the action is transferred to the court of appeals for decision, and the validity or applicability of the rule in question is subject to judicial

review by the court of appeals. The administrative record and the district court record shall be filed by the district clerk with the clerk of the court of appeals. The court of appeals may direct the district court to conduct any necessary evidentiary hearings in connection with the action.

SECTION 1.11. Section 2001.176(c), Government Code, is amended to read as follows:

(c) A Travis County district court in which an action is brought under this section, on its own motion or on motion of any party, may request transfer of the action to the Court of Appeals for the Fifteenth [~~Third~~] Court of Appeals District if the district court finds that the public interest requires a prompt, authoritative determination of the legal issues in the case and the case would ordinarily be appealed. After filing of the district court's request with the court of appeals, transfer of the action may be granted by the court of appeals if it agrees with the findings of the district court concerning the application of the statutory standards to the action. On entry of an order by the court of appeals granting transfer, the action is transferred to the court of appeals for decision, and the agency decision in the contested case is subject to judicial review by the court of appeals. The administrative record and the district court record shall be filed by the district clerk with the clerk of the court of appeals. The court of appeals may direct the district court to conduct any necessary evidentiary hearings in connection with the action.

SECTION 1.12. Section 2301.751(a), Occupations Code, is

amended to read as follows:

(a) A party to a proceeding affected by a final order, rule, or decision or other final action of the board with respect to a matter arising under this chapter or Chapter 503, Transportation Code, may seek judicial review of the action under the substantial evidence rule in:

(1) a district court in Travis County; or

(2) the court of appeals for the Fifteenth [~~Third~~] Court of Appeals District.

SECTION 1.13. Section 39.001(e), Utilities Code, is amended to read as follows:

(e) Judicial review of competition rules adopted by the commission shall be conducted under Chapter 2001, Government Code, except as otherwise provided by this chapter. Judicial review of the validity of competition rules shall be commenced in the Court of Appeals for the Fifteenth [~~Third~~] Court of Appeals District and shall be limited to the commission's rulemaking record. The rulemaking record consists of:

(1) the notice of the proposed rule;

(2) the comments of all interested persons;

(3) all studies, reports, memoranda, or other materials on which the commission relied in adopting the rule; and

(4) the order adopting the rule.

SECTION 1.14. (a) Except as otherwise provided by this Act, the Court of Appeals for the Fifteenth Court of Appeals District is created September 1, 2024.

(b) If the Court of Appeals for the Fifteenth Court of

Appeals District is created, the initial vacancies in the offices of chief justice and justices of the court shall be filled by appointment.

SECTION 1.15. (a) The changes in law made by this Act apply to appeals perfected on or after September 1, 2024.

(b) On September 1, 2024, all cases pending in other courts of appeal that were filed on or after September 1, 2023, and of which the Court of Appeals for the Fifteenth Court of Appeals District has exclusive intermediate appellate jurisdiction are transferred to the Court of Appeals for the Fifteenth Court of Appeals District.

(c) When a case is transferred as provided by Subsection (b) of this section:

(1) all processes, writs, bonds, recognizances, or other obligations issued from the other courts of appeal are returnable to the Court of Appeals for the Fifteenth Court of Appeals District as if originally issued by that court; and

(2) the obligees on all bonds and recognizances taken in and for the other courts of appeal and all witnesses summoned to appear in another court of appeals are required to appear before the Court of Appeals for the Fifteenth Court of Appeals District as if originally required to appear before the Court of Appeals for the Fifteenth Court of Appeals District.

ARTICLE 2. CONFORMING AMENDMENTS

SECTION 2.01. Article 4.01, Code of Criminal Procedure, is amended to read as follows:

Art. 4.01. WHAT COURTS HAVE CRIMINAL JURISDICTION. The

following courts have jurisdiction in criminal actions:

1. The Court of Criminal Appeals;

2. Courts of appeals, other than the Court of Appeals for the Fifteenth Court of Appeals District;

3. The district courts;

4. The criminal district courts;

5. The magistrates appointed by the judges of the district courts of Bexar County, Dallas County, Tarrant County, or Travis County that give preference to criminal cases and the magistrates appointed by the judges of the criminal district courts of Dallas County or Tarrant County;

6. The county courts;

7. All county courts at law with criminal jurisdiction;

8. County criminal courts;

9. Justice courts;

10. Municipal courts;

11. The magistrates appointed by the judges of the district courts of Lubbock County;

12. The magistrates appointed by the El Paso Council of Judges;

13. The magistrates appointed by the Collin County Commissioners Court;

14. The magistrates appointed by the Brazoria County Commissioners Court or the local administrative judge for Brazoria County; and

15. The magistrates appointed by the judges of the

district courts of Tom Green County.

SECTION 2.02. Article 4.03, Code of Criminal Procedure, is amended to read as follows:

Art. 4.03. COURTS OF APPEALS. The Courts of Appeals, other than the Court of Appeals for the Fifteenth Court of Appeals District, shall have appellate jurisdiction coextensive with the limits of their respective districts in all criminal cases except those in which the death penalty has been assessed. This article [~~Article~~] shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court, the county criminal court, or county court at law, in which the fine imposed or affirmed by the county court, the county criminal court or county court at law does not exceed one hundred dollars, unless the sole issue is the constitutionality of the statute or ordinance on which the conviction is based.

SECTION 2.03. Article 44.25, Code of Criminal Procedure, is amended to read as follows:

Art. 44.25. CASES REMANDED. The courts of appeals, other than the Court of Appeals of the Fifteenth Court of Appeals District, or the Court of Criminal Appeals may reverse the judgment in a criminal action, as well upon the law as upon the facts.

SECTION 2.04. Section 31.001, Government Code, is amended to read as follows:

Sec. 31.001. AUTHORITY FOR COUNTY PAYMENT OF COMPENSATION. The commissioners courts in the counties of each of the 15 [~~14~~] courts of appeals districts may pay additional compensation in an amount that does not exceed the limitations of Section 659.012 to

each of the justices of the courts of appeals, other than a justice of the Court of Appeals of the Fifteenth Court of Appeals District, residing within the court of appeals district that includes those counties. The compensation is for all extrajudicial services performed by the justices.

ARTICLE 3. SPECIFIC APPROPRIATION REQUIRED; CONSTITUTIONAL CHALLENGE; EFFECTIVE DATE

SECTION 3.01. (a) Notwithstanding Section 22.201(a), Government Code, as amended by this Act, and Sections 22.201(p) and 22.2151, Government Code, as added by this Act, the Court of Appeals for the Fifteenth Court of Appeals District is not created unless the legislature makes a specific appropriation of money for that purpose. For purposes of this subsection, a specific appropriation is an appropriation identifying the Court of Appeals for the Fifteenth Court of Appeals District or an Act of the 88th Legislature, Regular Session, 2023, relating to the creation of the Court of Appeals for the Fifteenth Court of Appeals District.

(b) Notwithstanding Section 22.220(a), Government Code, as amended by this Act, a court of appeals has the same jurisdiction the court had on August 31, 2023, if the Court of Appeals for the Fifteenth Court of Appeals District is not created as a result of Subsection (a) of this section.

SECTION 3.02. The Texas Supreme Court has exclusive and original jurisdiction over a challenge to the constitutionality of this Act or any part of this Act and may issue injunctive or declaratory relief in connection with the challenge.

SECTION 3.03. This Act takes effect September 1, 2023.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 1045 passed the Senate on March 30, 2023, by the following vote: Yeas 19, Nays 12; and that the Senate concurred in House amendments on May 21, 2023, by the following vote: Yeas 19, Nays 12.

Secretary of the Senate

I hereby certify that S.B. No. 1045 passed the House, with amendments, on May 19, 2023, by the following vote: Yeas 91, Nays 47, two present not voting.

Chief Clerk of the House

Approved:

Date

Governor

# Tab C

The Supreme Court of Texas

CHIEF JUSTICE
NATHAN L. HECHT

JUSTICES
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June 3, 2023

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

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters that arise from legislation passed by the 88th Legislature. Some require immediate attention, while others are longer-range initiatives.

The Committee should be prepared to discuss the following projects at its June 16-17, 2023 meeting and conclude its work on them by its August 18-19, 2023, meeting:

**Discovery in Family Law Cases.** HB 2850 adds Chapter 301 to the Family Code to move discovery procedures in family law cases from the Texas Rules of Civil Procedure to statute. The Committee should consider whether the discovery rules should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

**Suspension of Money Judgment Pending Appeal.** Civil Practice and Remedies Code § 52.006 and Texas Rule of Appellate Procedure 24.2(a)(1) govern the amount of a supersedeas bond when the judgment is for money. HB 4381, by adding Civil Procedure and Remedy Code § 52.007, requires a court to allow a judgment debtor worth less than $10 million to post "alternative security with value sufficient to secure the judgment" if the judgment debtor shows that the amount required by CPRC § 52.006 and TRAP 24.2(a)(1) would "require the judgment debtor to substantially liquidate the judgment debtor's interests in real or personal property necessary to normal course of the judgement debtor's business." The Committee should consider whether Texas Rule of Appellate Procedure 24.2 should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

**Conduct of Judicial Candidates.** HB 367 adds Government Code § 33.02105 to authorize the State Commission on Judicial Conduct to accept complaints, conduct investigations, and take disciplinary action against judicial candidates. The Committee should consider whether the Code of Judicial Conduct and the Procedural Rules for the Removal or Retirement of Judges should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

**Judicial Disclosures and Education.** HB 2384 imposes ballot application disclosure requirements on judicial candidates and education requirements on judges. Section 2 of the bill adds Government Code § 33.032 to make public any sanction the State Commission on Judicial Conduct issues against a judicial candidate for making false ballot application disclosures, along with related records. Section 3 adds Government Code §§ 39.003–.004 to provide for the suspension and removal of judges who do not comply with education requirements. The Committee should consider whether the Code of Judicial Conduct and the Procedural Rules for the Removal or Retirement of Judges should be changed or a comment added to reference or restate the statutes and draft any recommended amendments.

**Court Confidentiality.** Section 1 of SB 372 adds Government Code § 21.013 to make it a criminal offense for court staff to knowingly disclose judicial work product and to require court staff and judges to comply with Court rules governing judicial work product. Section 2 directs the Court to adopt any rules necessary to implement § 21.013. The Committee should draft any recommended rules.

**SVP Magistrate Referrals.** SB 1179 (Section 10) and SB 1180 (Section 1) add Civil Practice and Remedies Code Chapter 14A to govern actions brought by a sexually violent predator who has filed a Statement of Inability to Afford Payment of Court Costs. New § 14A.061 directs the Court to adopt rules that provides for referral of a Chapter 14A action to a magistrate for review and recommendation. The Committee should draft any recommended rules.

**Permissive Appeals.** On September 15, 2022, the Court asked the Committee to study permissive appeals, and the Committee discussed the issue at its February 17, 2023 meeting. The Court now asks that the Committee supplement its study and propose any recommended amendments in light of SB 1603. SB 1603 adds Civil Practice and Remedies Code § 51.014(g) and (h) to require a court of appeals that does not accept a permissive appeal to "state in its decision the specific reason for finding that the appeal is not warranted" and to expressly allow the Court to review de novo the decision not to accept a permissive appeal and direct the court of appeals to accept the appeal. The Committee should consider whether Texas Rule of Appellate Procedure 28.3 should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

The Committee should conclude its work on the following projects by its October 13, 2023, meeting:

**Clerk's Record.** Section 17.001 of HB 3474 adds Civil Practice and Remedies Code § 51.018 to permit appealing parties to file an appendix in lieu of the clerk's record and to prohibit a clerk from charging a fee for the appendix. The Committee should consider whether the Texas Rules of Appellate Procedure governing the clerk's record should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

**Business Court.** HB 19, by adding Government Code Chapter 25A, creates a business court and gives it jurisdiction over certain business matters. HB 19 includes several rulemaking directives. First, new § 25A.016 directs the Court to adopt rules "for the issuance of written opinions by the business court." Second, new § 25A.018 directs the Court to set fees for filings and actions in the business court. Finally, new § 25A.020 directs the Court to "adopt rules of civil procedure as the Court deems necessary," including rules "for the timely and efficient removal and remand of cases to and from the business court" and "the assignment of cases to judges of the business court." The Committee should draft recommended procedural and administrative rules.

**Fifteenth Court of Appeals.** SB 1045 creates a Fifteenth Court of Appeals. Section 1.05 adds Government Code § 22.220(d) to give the Fifteenth Court of Appeals exclusive intermediate appellate jurisdiction over certain civil matters, including certain matters brought by or against the State and matters involving the Office of Attorney General that challenge the constitutionality or validity of a state statute or rule. Section 1.08 directs the Court, by adding Government Code § 73.001(c), to adopt rules for (1) transferring an appeal incorrectly filed in the Fifteenth Court of Appeals to the appropriate court of appeals and (2) transferring appeals incorrectly filed in the other courts of appeals to Fifteenth Court of Appeals. The Committee should make recommendations and draft recommended procedural and administrative rules.

The Committee should conclude its work on the following project in fall 2024:

**Uniform Interstate Depositions and Discovery Act.** Section 1 of HB 3929 permits the Court to adopt by rule the Uniform Interstate Depositions and Discovery Act, which is a model statute adopted by 48 states to establish a uniform process for obtaining depositions and discovery in concert with other participating states. Section 2 repeals a conflicting statute—Civil Practice and Remedies Code § 20.002—upon the Court's adoption of rules. The Committee should consider whether the discovery rules should be changed and draft any recommended amendments.

The Committee should conclude its work on the following project as it is able:

**Court Interpreter Cost.** Both HB 3474 (Section 10.07) and SB 380 (Section 1) amend Government Code § 57.002(g) to clarify that a person who has filed a Statement of Inability to Afford Payment of Court Costs need not pay interpreter costs unless the statement is successfully challenged. The Committee should consider whether Texas Rule of Civil Procedure 183 should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

**SVP Statement of Inability to Afford Payment of Court Costs.** SB 1179 (Section 10) and SB 1180 (Section 1) add Civil Practice and Remedies Code Chapter 14A to govern actions brought by a sexually violent predator who has filed a Statement of Inability to Afford Payment of Court Costs. New § 14A.054 allows a court to order the sexually violent predator to pay court costs but allows payment by installment. The Committee should consider whether Texas Rule of Civil Procedure 145 should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

**Notice by Qualified Delivery Methods.** HB 785, SB 1373, SB 1457, and SB 2248 amend multiple sections of the Estates Code to allow service in guardianship and probate proceedings by certain qualified delivery methods, including private delivery services like UPS and FedEx. The Committee should consider whether the Texas Rules of Civil Procedure governing citation and

service should be changed or a comment added to reference or restate the statutes and draft any recommended amendments.

**Waiver of Citation in Probate Proceedings.** Sections 14 and 18 of SB 1373 amend Estates Code §§ 202.056 and 258.002 to allow for waiver of citation on minors in heirship and probate proceedings. The Committee should consider whether the citation rules should be changed or a comment added to reference or restate the statutes and draft any recommended amendments.

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

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

# Tab D

AN ACT

relating to the creation of a specialty trial court to hear certain cases; authorizing fees.

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

SECTION 1. Subtitle A, Title 2, Government Code, is amended by adding Chapter 25A to read as follows:

CHAPTER 25A. BUSINESS COURT

Sec. 25A.001. DEFINITIONS. In this chapter:

(1) "Controlling person" means a person who directly or indirectly controls a governing person, officer, or organization.

(2) "Derivative proceeding" means a civil action brought in the right of a domestic or foreign corporation, a domestic or foreign limited liability company, or a domestic or foreign limited partnership, to the extent provided by the Business Organizations Code.

(3) "Governing documents" means the instruments, documents, or agreements adopted under an organization's governing law to govern the organization's formation and internal affairs. The term includes:

(A) a certificate of formation, articles of incorporation, and articles of organization;

(B) bylaws;

(C) a partnership agreement;

(D) a company agreement or operating agreement;

(E) a shareholder agreement;

(F) a voting agreement or voting trust agreement; and

(G) an agreement among owners restricting the transfer of ownership interests.

(4) "Governing law" means the law governing the formation and internal affairs of an organization.

(5) "Governing person" means a person who is entitled, alone or as part of a group, to manage and direct an organization's affairs under the organization's governing documents and governing law. The term includes:

(A) a member of the board of directors of a corporation or other organization;

(B) a general partner of a general or limited partnership;

(C) a manager of a limited liability company that is managed by its managers;

(D) a member of a limited liability company that is managed by its members;

(E) a trust manager of a real estate investment trust; and

(F) a trustee of a business trust.

(6) "Governmental entity" means:

(A) this state; or

(B) a political subdivision of this state, including a municipality, a county, or any kind of district.

(7) "Internal affairs" means:

(A) the rights, powers, and duties of an organization's governing persons, officers, owners, and members; and

(B) matters relating to the organization's membership or ownership interests.

(8) "Managerial official" means a governing person or officer.

(9) "Officer" means a person elected, appointed, or designated as an officer of an organization by the organization's governing persons or governing documents.

(10) "Organization" means a foreign or domestic entity or association, regardless of whether the organization is for profit or nonprofit. The term includes:

(A) a corporation;

(B) a limited partnership;

(C) a general partnership;

(D) a limited liability partnership;

(E) a limited liability company;

(F) a business trust;

(G) a real estate investment trust;

(H) a joint venture;

(I) a joint stock company;

(J) a cooperative;

(K) a bank;

(L) a credit union;

(M) a savings and loan association;

(N) an insurance company; and

(O) a series of a limited liability company or of another entity.

(11) "Owner" means an owner of an organization. The term includes:

(A) a shareholder or stockholder of a corporation or other organization;

(B) a general or limited partner of a partnership or an assignee of a partnership interest in a partnership;

(C) a member of, or an assignee of a membership interest in, a limited liability company; and

(D) a member of a nonprofit organization.

(12) "Ownership interest" means an owner's interest in an organization, including an owner's economic, voting, and management rights.

(13) "Publicly traded company" means an entity whose voting equity securities are listed on a national securities exchange registered with the United States Securities and Exchange Commission under Section 6, Securities Exchange Act of 1934 (15 U.S.C. Section 78f) and any entity that is majority owned or controlled by such an entity.

(14) "Qualified transaction" means a transaction, other than a transaction involving a loan or an advance of money or credit by a bank, credit union, or savings and loan institution, under which a party:

(A) pays or receives, or is obligated to pay or is entitled to receive, consideration with an aggregate value of at

least $10 million; or

(B) lends, advances, borrows, receives, is obligated to lend or advance, or is entitled to borrow or receive money or credit with an aggregate value of at least $10 million.

Sec. 25A.002. CREATION. The business court is a statutory court created under Section 1, Article V, Texas Constitution.

Sec. 25A.003. BUSINESS COURT JUDICIAL DISTRICT; DIVISIONS. (a) The judicial district of the business court is composed of all counties in this state.

(b) The business court is composed of divisions as provided by this section.

(c) The First Business Court Division is composed of the counties composing the First Administrative Judicial Region under Section 74.042(b).

(d) The Second Business Court Division is composed of the counties composing the Second Administrative Judicial Region under Section 74.042(c), subject to funding through legislative appropriations. The division is abolished September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(e) The Third Business Court Division is composed of the counties composing the Third Administrative Judicial Region under Section 74.042(d).

(f) The Fourth Business Court Division is composed of the counties composing the Fourth Administrative Judicial Region under Section 74.042(e).

(g) The Fifth Business Court Division is composed of the

counties composing the Fifth Administrative Judicial Region under Section 74.042(f), subject to funding through legislative appropriations. The division is abolished on September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(h) The Sixth Business Court Division is composed of the counties composing the Sixth Administrative Judicial Region under Section 74.042(g), subject to funding through legislative appropriations. The division is abolished on September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(i) The Seventh Business Court Division is composed of the counties composing the Seventh Administrative Judicial Region under Section 74.042(h), subject to funding through legislative appropriations. The division is abolished on September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(j) The Eighth Business Court Division is composed of the counties composing the Eighth Administrative Judicial Region under Section 74.042(i).

(k) The Ninth Business Court Division is composed of the counties composing the Ninth Administrative Judicial Region under Section 74.042(j), subject to funding through legislative appropriations. The division is abolished on September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(l) The Tenth Business Court Division is composed of the

counties composing the Tenth Administrative Judicial Region under Section 74.042(k), subject to funding through legislative appropriations. The division is abolished on September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(m) The Eleventh Business Court Division is composed of the counties composing the Eleventh Administrative Judicial Region under Section 74.042(l).

(n) This subsection and Subsections (d), (g), (h), (i), (k), and (l) expire September 1, 2026.

Sec. 25A.004. JURISDICTION AND POWERS. (a) Subject to Subsections (b), (c), (d), (e), and (f), the business court has the powers provided to district courts by Chapter 24, including the power to:

(1) issue writs of injunction, mandamus, sequestration, attachment, garnishment, and supersedeas; and

(2) grant any relief that may be granted by a district court.

(b) Subject to Subsection (c), the business court has civil jurisdiction concurrent with district courts in the following actions in which the amount in controversy exceeds $5 million, excluding interest, statutory damages, exemplary damages, penalties, attorney's fees, and court costs:

(1) a derivative proceeding;

(2) an action regarding the governance, governing documents, or internal affairs of an organization;

(3) an action in which a claim under a state or federal

securities or trade regulation law is asserted against:

(A) an organization;

(B) a controlling person or managerial official of an organization for an act or omission by the organization or by the person in the person's capacity as a controlling person or managerial official;

(C) an underwriter of securities issued by the organization; or

(D) the auditor of an organization;

(4) an action by an organization, or an owner of an organization, if the action:

(A) is brought against an owner, controlling person, or managerial official of the organization; and

(B) alleges an act or omission by the person in the person's capacity as an owner, controlling person, or managerial official of the organization;

(5) an action alleging that an owner, controlling person, or managerial official breached a duty owed to an organization or an owner of an organization by reason of the person's status as an owner, controlling person, or managerial official, including the breach of a duty of loyalty or good faith;

(6) an action seeking to hold an owner or governing person of an organization liable for an obligation of the organization, other than on account of a written contract signed by the person to be held liable in a capacity other than as an owner or governing person; and

(7) an action arising out of the Business

Organizations Code.

(c) The business court has civil jurisdiction concurrent with district courts in an action described by Subsection (b) regardless of the amount in controversy if a party to the action is a publicly traded company.

(d) The business court has civil jurisdiction concurrent with district courts in the following actions in which the amount in controversy exceeds $10 million, excluding interest, statutory damages, exemplary damages, penalties, attorney's fees, and court costs:

(1) an action arising out of a qualified transaction;

(2) an action that arises out of a contract or commercial transaction in which the parties to the contract or transaction agreed in the contract or a subsequent agreement that the business court has jurisdiction of the action, except an action that arises out of an insurance contract; and

(3) subject to Subsection (g), an action that arises out of a violation of the Finance Code or Business & Commerce Code by an organization or an officer or governing person acting on behalf of an organization other than a bank, credit union, or savings and loan association.

(e) The business court has civil jurisdiction concurrent with district courts in an action seeking injunctive relief or a declaratory judgment under Chapter 37, Civil Practice and Remedies Code, involving a dispute based on a claim within the court's jurisdiction under Subsection (b), (c), or (d).

(f) Except as provided by Subsection (h), the business court

has supplemental jurisdiction over any other claim related to a case or controversy within the court's jurisdiction that forms part of the same case or controversy. A claim within the business court's supplemental jurisdiction may proceed in the business court only on the agreement of all parties to the claim and a judge of the division of the court before which the action is pending. If the parties involved in a claim within the business court's supplemental jurisdiction do not agree on the claim proceeding in the business court, the claim may proceed in a court of original jurisdiction concurrently with any related claims proceeding in the business court.

(g) Unless the claim falls within the business court's supplemental jurisdiction, the business court does not have jurisdiction of:

(1) a civil action:

(A) brought by or against a governmental entity; or

(B) to foreclose on a lien on real or personal property;

(2) a claim arising out of:

(A) Subchapter E, Chapter 15, and Chapter 17, Business & Commerce Code;

(B) the Estates Code;

(C) the Family Code;

(D) the Insurance Code; or

(E) Chapter 53 and Title 9, Property Code;

(3) a claim arising out of the production or sale of a

farm product, as that term is defined by Section 9.102, Business & Commerce Code;

(4) a claim related to a consumer transaction, as that term is defined by Section 601.001, Business & Commerce Code, to which a consumer in this state is a party, arising out of a violation of federal or state law; or

(5) a claim related to the duties and obligations under an insurance policy.

(h) The business court does not have jurisdiction of the following claims regardless of whether the claim is otherwise within the court's supplemental jurisdiction under Subsection (f):

(1) a claim arising under Chapter 74, Civil Practice and Remedies Code;

(2) a claim in which a party seeks recovery of monetary damages for bodily injury or death; or

(3) a claim of legal malpractice.

Sec. 25A.005. JUDICIAL AUTHORITY. A business court judge has all powers, duties, immunities, and privileges of a district judge.

Sec. 25A.006. INITIAL FILING; REMOVAL AND REMAND. (a) An action within the jurisdiction of the business court may be filed in the business court. The party filing the action must plead facts to establish venue in a county in a division of the business court, and the business court shall assign the action to that division. Venue may be established as provided by law or, if a written contract specifies a county as venue for the action, as provided by the contract.

(b) If the business court does not have jurisdiction of the action, the court shall, at the option of the party filing the action:

(1) transfer the action to a district court or county court at law in a county of proper venue; or

(2) dismiss the action without prejudice to the party's rights.

(c) If, after an action is assigned to a division of the business court, the court determines that the division's geographic territory does not include a county of proper venue for the action, the court shall:

(1) if an operating division of the court includes a county of proper venue, transfer the action to that division; or

(2) if there is not an operating division of the court that includes a county of proper venue, at the option of the party filing the action, transfer the action to a district court or county court at law in a county of proper venue.

(d) A party to an action filed in a district court or county court at law that is within the jurisdiction of the business court may remove the action to the business court. If the business court does not have jurisdiction of the action, the business court shall remand the action to the court in which the action was originally filed.

(e) A party to an action filed in a district court or county court at law in a county of proper venue that is not within an operating division of the business court or the judge of the court in which the action is filed may not remove or transfer the action

to the business court.

(f) A party may file an agreed notice of removal at any time during the pendency of the action. If all parties to the action have not agreed to remove the action, the notice of removal must be filed:

(1) not later than the 30th day after the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's jurisdiction over the action; or

(2) if an application for temporary injunction is pending on the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's jurisdiction over the action, not later than the 30th day after the date the application is granted, denied, or denied as a matter of law.

(g) The notice of removal must be filed with the business court and the court in which the action was originally filed. On receipt of the notice, the clerk of the court in which the action was originally filed shall immediately transfer the action to the business court in accordance with rules adopted by the supreme court, and the business court clerk shall assign the action to the appropriate division of the business court.

(h) The filing of an action or a notice of removal in the business court is subject to Section 10.001, Civil Practice and Remedies Code.

(i) Removal of a case to the business court is not subject to the statutes or rules governing the due order of pleading.

(j) Removal of a case does not waive a defect in venue or constitute an appearance to determine personal jurisdiction.

(k) The judge of a court in which an action is filed may request the presiding judge for the court's administrative region to transfer the action to the business court if the action is within the business court's jurisdiction. The judge shall notify all parties of the transfer request and request a hearing on the transfer request. After a hearing on the request, the presiding judge may transfer the action to the business court if the presiding judge finds the transfer will facilitate the fair and efficient administration of justice. The business court clerk shall assign an action transferred under this subsection to the appropriate division of the business court.

(l) The business court judge on establishment of jurisdiction and venue over an action shall by order declare the county in which any jury trial for the action will be held as determined under Section 25A.015.

Sec. 25A.007. APPEALS. (a) Notwithstanding any other law and except as provided by Subsection (b) and in instances when the supreme court has concurrent or exclusive jurisdiction, the Fifteenth Court of Appeals has exclusive jurisdiction over an appeal from an order or judgment of the business court or an original proceeding related to an action or order of the business court.

(b) If the Fifteenth Court of Appeals is not created, an appeal from an order or judgment of the business court or an original proceeding related to an action or order of the business

court shall be filed in the court of appeals with appellate jurisdiction of civil cases for the county declared in an order under Section 25A.006(l).

(c) The procedure governing an appeal or original proceeding from the business court is the same as the procedure for an appeal or original proceeding from a district court.

Sec. 25A.008. QUALIFICATIONS OF JUDGE. (a) A business court judge must:

(1) be at least 35 years of age;

(2) be a United States citizen;

(3) have been a resident of a county within the division of the business court to which the judge is appointed for at least five years before appointment; and

(4) be a licensed attorney in this state who has 10 or more years of experience in:

(A) practicing complex civil business litigation;

(B) practicing business transaction law;

(C) serving as a judge of a court in this state with civil jurisdiction; or

(D) any combination of experience described by Paragraphs (A)-(C).

(b) A business court judge may not have had the judge's license to practice law revoked, suspended, or subject to a probated suspension.

Sec. 25A.009. APPOINTMENT OF JUDGES; TERM; PRESIDING JUDGE; EXCHANGE OF BENCHES. (a) The governor, with the advice and consent

of the senate, shall appoint:

(1) two judges to each of the First, Third, Fourth, Eighth, and Eleventh Divisions of the business court; and

(2) one judge to each of the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Divisions of the business court.

(b) A business court judge shall serve for a term of two years, beginning on September 1 of every even-numbered year.

(c) A business court judge may be reappointed.

(d) Not later than the seventh day after the first day of a term, the business court judges by majority vote shall select a judge of the court to serve as administrative presiding judge for the duration of the term. If a vacancy occurs in the position of administrative presiding judge, the remaining business court judges shall select a judge of the court to serve as administrative presiding judge for the remainder of the unexpired term as soon as practicable.

(e) A business court judge shall take the constitutional oath of office required of appointed officers of this state and file the oath with the secretary of state.

(f) To promote the orderly and efficient administration of justice, the business court judges may exchange benches and sit and act for each other in any matter pending before the court.

Sec. 25A.010. VACANCY. If a vacancy occurs in an office of a business court judge, the governor, with the advice and consent of the senate, shall appoint, in the same manner as the original appointment, another person to serve for the remainder of the unexpired term.

Sec. 25A.011. JUDGE'S SALARY. The salary of a business court judge is the amount provided by Section 659.012 and shall be paid in equal monthly installments.

Sec. 25A.012. REMOVAL; DISQUALIFICATION AND RECUSAL. (a) A business court judge may be removed from office in the same manner and for the same reasons as a district judge.

(b) A business court judge is disqualified and subject to mandatory recusal for the same reasons a district judge is subject to disqualification or recusal in a pending case. Disqualification or recusal of a business court judge shall be governed by the same procedure as disqualification or recusal of a district judge.

Sec. 25A.013. PRIVATE PRACTICE OF LAW. A business court judge shall diligently discharge the duties of the office on a full-time basis and may not engage in the private practice of law.

Sec. 25A.014. VISITING JUDGE. (a) A retired or former judge or justice who has the qualifications prescribed by Section 25A.008 may be assigned as a visiting judge of a division of the business court by the chief justice of the supreme court. A visiting judge of a division of the business court is subject to objection, disqualification, or recusal in the same manner as a retired or former judge or justice is subject to objection, disqualification, or recusal if appointed as a visiting district judge.

(b) Before accepting an assignment as a visiting judge of a division of the business court, a retired or former judge or justice shall take the constitutional oath of office required of appointed officers of this state and file the oath with the secretary of

state.

Sec. 25A.015. JURY PRACTICE AND PROCEDURE; VENUE FOR JURY TRIAL. (a) A party in an action pending in the business court has the right to a trial by jury when required by the constitution.

(b) Subject to Subsection (d), a jury trial in a case filed initially in the business court shall be held in any county in which the case could have been filed under Section 15.002, Civil Practice and Remedies Code, as chosen by the plaintiff.

(c) Subject to Subsections (b) and (d), a jury trial in a case removed to the business court shall be held in the county in which the action was originally filed.

(d) A jury trial for a case in which a written contract specifies a county as venue for suits shall be held in that county.

(e) The parties and the business court judge may agree to hold the jury trial in any other county. A party may not be required to agree to hold the jury trial in a different county.

(f) The drawing of jury panels, selection of jurors, and other jury-related practice and procedure in the business court shall be the same as for the district court in the county in which the trial is held.

(g) Practice, procedure, rules of evidence, issuance of process and writs, and all other matters pertaining to the conduct of trials, hearings, and other business in the business court are governed by the laws and rules prescribed for district courts, unless otherwise provided by this chapter.

Sec. 25A.016. WRITTEN OPINIONS. The supreme court shall adopt rules for the issuance of written opinions by the business

court.

Sec. 25A.017. COURT LOCATION; STAFFING. (a) In this section, "remote proceeding" means a proceeding before the business court in which one or more of the participants, including a judge, party, attorney, witness, court reporter, or other individual attends the proceeding remotely through the use of technology.

(b) The administrative presiding judge of the business court shall manage administrative and personnel matters on behalf of the court. The administrative presiding judge of the business court shall appoint a clerk, whose office shall be located in Travis County in facilities provided by this state. The clerk shall:

(1) accept all filings in the business court; and

(2) fulfill the legal and administrative functions of a district clerk.

(c) Each business court judge shall maintain chambers in the county the judge selects within the geographic boundaries of the division to which the judge is appointed in facilities provided by this state. For purposes of this section, the Office of Court Administration of the Texas Judicial System may contract for the use of facilities with a county.

(d) Subject to Section 25A.015, a business court judge may hold court at any courtroom within the geographic boundaries of the division to which the judge is appointed as the court determines necessary or convenient for a particular civil action. To the extent practicable, a county using existing courtrooms and facilities shall accommodate the business court in the conduct of the court's hearings and other proceedings.

(e) The business court may conduct a proceeding other than a jury trial as a remote proceeding to facilitate the resolution of a matter before the court. The business court may not require a party or attorney to remotely attend a court proceeding in which oral testimony is heard, absent the agreement of the parties.

(f) The business court shall conduct a remote proceeding from a courtroom or the facilities provided to a business court judge by this state.

(g) The business court shall provide reasonable notice to the public that a proceeding will be conducted remotely and an opportunity for the public to observe the remote proceeding.

(h) In a county in which a division of the business court sits, the sheriff shall in person or by deputy attend the business court as required by the court. The sheriff or deputy is entitled to reimbursement from this state for the cost of attending the business court.

(i) The business court may appoint personnel necessary for the operation of the court, including:

(1) personnel to assist the clerk of the court;

(2) staff attorneys for the court;

(3) staff attorneys for each judge of the business court;

(4) court coordinators; and

(5) administrative assistants.

(j) Subject to Subsection (k), the court officials shall perform the duties and responsibilities of their offices and are entitled to the compensation, fees, and allowances prescribed by

law for the offices.

(k) All personnel, including the business court clerk, appointed under this section are employees of the Office of Court Administration of the Texas Judicial System and are state employees for all purposes, including accrual of leave time, insurance benefits, retirement benefits, and travel regulations.

Sec. 25A.0171. ADMINISTRATIVE ATTACHMENT TO OFFICE OF COURT ADMINISTRATION; REPORT. (a) The business court is administratively attached to the Office of Court Administration of the Texas Judicial System.

(b) The Office of Court Administration of the Texas Judicial System shall provide administrative support to the business court as necessary to enable the business court to carry out its duties under this chapter.

(c) The Office of Court Administration of the Texas Judicial System may employ personnel necessary to provide administrative support to the business court under this chapter.

(d) Only the business court may exercise the duties of the business court under this chapter. Except as otherwise provided by this chapter, the Office of Court Administration of the Texas Judicial System does not have any authority or responsibility related to the duties of the business court under this chapter.

(e) Not later than December 1 of each year, the Office of Court Administration of the Texas Judicial System shall submit to the legislature a report on the number and types of cases heard by the business court in the preceding year.

Sec. 25A.018. FEES. The supreme court shall set fees for

filings and actions in the business court in amounts sufficient to cover the costs of administering this chapter, taking into account fee waivers necessary for the interest of justice.

Sec. 25A.019. SEAL. The seal of the business court is the same as that provided by law for a district court except that the seal must contain the name "The Business Court of Texas."

Sec. 25A.020. RULES. (a) The supreme court shall adopt rules of civil procedure as the court determines necessary, including rules providing for:

(1) the timely and efficient removal and remand of cases to and from the business court; and

(2) the assignment of cases to judges of the business court.

(b) The business court may adopt rules of practice and procedure consistent with the Texas Rules of Civil Procedure and the Texas Rules of Evidence.

SECTION 2. Sections 659.012(a) and (e), Government Code, are amended to read as follows:

(a) Notwithstanding Section 659.011 and subject to Subsections (b) and (b-1):

(1) a judge of a district court or a division of the business court is entitled to an annual base salary from the state as set by the General Appropriations Act in an amount equal to at least $140,000, except that the combined base salary of a district judge or judge of a division of the business court from all state and county sources, including compensation for any extrajudicial services performed on behalf of the county, may not exceed the

amount that is $5,000 less than the maximum combined base salary from all state and county sources for a justice of a court of appeals other than a chief justice as determined under this subsection;

(2) a justice of a court of appeals other than the chief justice is entitled to an annual base salary from the state in the amount equal to 110 percent of the state base salary of a district judge as set by the General Appropriations Act, except that the combined base salary of a justice of the court of appeals other than the chief justice from all state and county sources, including compensation for any extrajudicial services performed on behalf of the county, may not exceed the amount that is $5,000 less than the base salary for a justice of the supreme court as determined under this subsection;

(3) a justice of the supreme court other than the chief justice or a judge of the court of criminal appeals other than the presiding judge is entitled to an annual base salary from the state in the amount equal to 120 percent of the state base salary of a district judge as set by the General Appropriations Act; and

(4) the chief justice or presiding judge of an appellate court is entitled to an annual base salary from the state in the amount equal to $2,500 more than the state base salary provided for the other justices or judges of the court, except that the combined base salary of the chief justice of a court of appeals from all state and county sources may not exceed the amount equal to $2,500 less than the base salary for a justice of the supreme court as determined under this subsection.

(e) For the purpose of salary payments by the state, the comptroller shall determine from sworn statements filed by the justices of the courts of appeals, [~~and~~] district judges, and business court judges that the required salary limitations provided by Subsection (a) are maintained. If the state base salary for a judge or justice prescribed by Subsection (a) combined with additional compensation from a county would exceed the limitations provided by Subsection (a), the comptroller shall reduce the salary payment made by the state by the amount of the excess.

SECTION 3. Section 837.001(a), Government Code, is amended to read as follows:

(a) Membership [~~Except as provided by Subsection (b), membership~~] in the retirement system is limited to persons who have never been eligible for membership in the Judicial Retirement System of Texas or the Judicial Retirement System of Texas Plan One and who at any time on or after the effective date of this Act are judges, justices, or commissioners of:

(1) the supreme court;

(2) the court of criminal appeals;

(3) a court of appeals;

(4) the business court;

(5) a district court; or

(6) [~~(5)~~] a commission to a court specified in this subsection.

SECTION 4. (a) The Texas Supreme Court has exclusive and original jurisdiction over a challenge to the constitutionality of this Act or any part of this Act and may issue injunctive or

declaratory relief in connection with the challenge.

(b) If the appointment of judges by the governor to the divisions of the business court under Section 25A.009, Government Code, as added by this Act, is held by the Texas Supreme Court as unconstitutional, the business court shall be staffed by retired or former judges or justices who are appointed to the court as provided by Section 25A.014, Government Code, as added by this Act.

SECTION 5. Except as otherwise provided by this Act, the business court is created September 1, 2024.

SECTION 6. (a) As soon as practicable after the effective date of this Act, the governor shall appoint judges to the First, Third, Fourth, Eighth, and Eleventh Business Court Divisions as required by Section 25A.009, Government Code, as added by this Act.

(b) On or before September 1, 2026, but not before July 1, 2026, the governor shall appoint judges to the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Business Court Divisions as required by Section 25A.009, Government Code, as added by this Act.

SECTION 7. (a) Notwithstanding Chapter 25A, Government Code, as added by this Act, the business court is not created unless the legislature makes a specific appropriation of money for that purpose. For purposes of this subsection, a specific appropriation is an appropriation identifying the business court or an Act of the 88th Legislature, Regular Session, 2023, relating to the creation of a specialty trial court to hear certain cases or of the business court.

(b) Notwithstanding Section 25A.007(a), Government Code, as added by this Act, a court of appeals retains the jurisdiction the

court had on August 31, 2024, if the business court is not created as a result of Subsection (a) of this section.

SECTION 8. The changes in law made by this Act apply to civil actions commenced on or after September 1, 2024.

SECTION 9. This Act takes effect September 1, 2023.

President of the Senate

Speaker of the House

I certify that H.B. No. 19 was passed by the House on May 2, 2023, by the following vote: Yeas 90, Nays 51, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 19 on May 25, 2023, by the following vote: Yeas 86, Nays 53, 1 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 19 was passed by the Senate, with amendments, on May 12, 2023, by the following vote: Yeas 24, Nays 6.

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

# Tab E

Memorandum

**To:** Supreme Court Advisory Committee

**From:** Appellate Rules Subcommittee

**Date:** August 15, 2023

**Re:** June 3, 2023 Referral Letter relating to HB 3474 and TRAP 34.5 clerk's record

## I. Matter referred to subcommittee

**Clerk's Record.** Section 17.001 of HB 3474 adds Civil Practice and Remedies Code § 51.018 to permit appealing parties to file an appendix in lieu of the clerk's record and to prohibit a clerk from charging a fee for the appendix. The Committee should consider whether the Texas Rules of Appellate Procedure governing the clerk's record should be changed or a comment added to reference or restate the statute and draft any recommended amendments.

## II. Relevant materials

HB 3474 provides that:

ARTICLE 17. APPELLATE RECORD

SECTION 17.001. (a) Subchapter B, Chapter 51, Civil Practice and Remedies Code, is amended by adding Section 51.018 to read as follows:

Sec. 51.018. APPENDIX IN LIEU OF CLERK'S RECORD. (a) Not later than the 10th day after the date that a party files a notice of appeal for a civil suit, the party may notify the trial court and the court of appeals that the party will file an appendix that replaces the clerk's record for the appeal.

(b) The party must file the appendix with the party's appellate brief. Except in an expedited proceeding or by order of the court, the brief and appendix must be filed not later than the 30th day after the later of:

(1) the date that the party provided notice under Subsection (a); or

(2) the date that a reporter's record, if any, is filed with the court of appeals.

(c) An appendix filed under this section must contain a file-stamped copy of each document required by Rule 34.5, Texas Rules of Appellate Procedure, for a civil suit and any other item the party intends to reference in the party's brief. The appendix may not contain a document that has not been filed with the trial court except by agreement of the parties to the appeal.

(d) An appendix filed in accordance with this section becomes part of the appellate record. A court clerk may not prepare or file a clerk's record or assess a fee for preparing a clerk's record if a party files an appendix in accordance with this section.

(b) Section 51.018, Civil Practice and Remedies Code, as added by this section, applies only to a party that files a notice of appeal on or after January 1, 2024. A party that files a notice of appeal before January 1, 2024, is governed by the law in effect on the date the notice was given, and the former law is continued in effect for that purpose.

## III. Subcommittee recommendation for new Rule 34.5A

The Subcommittee recommends adding a new Rule 34.5A and a comment, as follows. Chief Justice Christopher, Chief Justice Gray, Justice Kelly, and Justice Miskel participated in the subcommittee's discussions.

### 34.5A Appendix in Lieu of Clerk's Record in a Civil Case

(a) *Notice of Election.* Not later than the tenth day after the date that a party files a notice of appeal for a civil suit, the party may file a notice with the trial court and the court of appeals that the party will file an appendix that replaces the clerk's record for the appeal.

(b) *Time to File Original Appendix.* The party filing a notice under subsection (a) must file the appendix with the party's appellate brief. Except by order of the court under Rule 38.6(d), the brief and appendix must be filed not later than the 30th day—or the 20th day for an accelerated appeal—after the later of: (i) the date that the party filed the notice under subsection (a); or (ii) the date that a reporter's record, if any, is filed with the court of appeals.

(c) *Supplemental or Joint Appendices.* In an appeal in which an appellant has filed a notice under subsection (a), any other party may file a supplemental appendix with that party's brief. In accordance with an agreement made under Rule 6.6, the parties may file a joint appendix.

(d) *Court-Directed Supplement.* The court may direct the appellant to file a supplemental appendix containing items described by the court. If the appellant fails to supplement as requested, and the record fails to establish the court's jurisdiction, the court may dismiss the appeal. In cases where the court has jurisdiction, and the appellant fails to supplement as requested, the court may presume that the missing items support the judgment.

(e) *Contents of Original Appendix.* The appendix filed under subsection (b) must contain a file-stamped copy of (i) each document required by Rule 34.5(a) for a civil suit, and (ii) any other item referenced in the party's brief.

(f) *Contents of All Appendices.* An appendix filed in accordance with this rule must not contain a document that was not filed with the trial court, except by agreement of the parties filed in accordance with Rule 6.6. An appendix filed in accordance with this rule becomes part of the appellate record under Rule 34.1.

(g) *Filing Requirements.* An appendix filed in accordance with this rule must be filed separately from any other document, and the pages must be consecutively numbered. An appendix must meet applicable filing requirements of Rules 9.4, 9.8, and 9.9. A nonconforming appendix is subject to court action under Rule 9.4(k).

(h) *No Clerk's Record.* A court clerk may not prepare or file a clerk's record or assess a fee for preparing a clerk's record if a party files an appendix in accordance with this rule.

Comment to 2023 Change: This rule is added to comply with Texas Civil Practice and Remedies Code section 51.018, as added by HB 3474 in 2023. This new rule allows the parties in a civil case to file appendices in lieu of a clerk's record. This new rule applies only to an appeal in which a party files a notice of appeal on or after January 1, 2024. An appeal in which the notice of appeal was filed before January 1, 2024 is governed by the law in effect on the date the notice was filed, and the former law is continued in effect for that purpose.

## IV. Conforming amendments to Rules 35.3(a) and 38.6(a)

The subcommittee suggests the following conforming amendments to Rules 35.3(a) and 38.6(a):

### 35.3. Responsibility for Filing Record

(a) *Clerk's Record*. Except in an appeal governed by Rule 34.5A, ~~The~~ the trial court clerk is responsible for preparing, certifying, and timely filing the clerk's record if:

(1) a notice of appeal has been filed, and in criminal proceedings, the trial court has certified the defendant's right of appeal, as required by Rule 25.2(d); and

(2) the party responsible for paying for the preparation of the clerk's record has paid the clerk's fee, has made satisfactory arrangements with the clerk to pay the fee, or is entitled to appeal without paying the fee.

**38.6. Time to File Briefs**

(a) *Appellant's Filing Date*. Except in a habeas corpus or bail appeal, which is governed by Rule 31.1, or an appeal governed by Rule 34.5A, an appellant must file a brief within 30 days--20 days in an accelerated appeal--after the later of:

(1) the date the clerk's record was filed; or

(2) the date the reporter's record was filed.

## V. Discussion

1. The subcommittee believes that adding a new Rule 34.5A is the best way to implement HB 3474. The subcommittee believes that embedding the new provisions into existing Rule 34.5 is not optimal, since HB 3474 is intended to create a process that supplants, rather than supplements, the process for requesting and filing a clerk's record. This draft rule is largely taken verbatim from HB 3474.

2. HB 3474 contains no language allowing an appellee or any other party to file an appendix. Since it can be expected that the appellant's appendix will not always include everything that other parties may want to cite, the proposed rule supplements HB 3474 by adding subsection (c), which allows any other party to file a supplemental appendix with its brief. Subsection (c) also allows the parties to agree to a joint appendix.

3. The subcommittee also added subsection (d), which allows the court to direct the appellant to file a supplemental appendix. This might occur, for example, when the court has reason to question its jurisdiction, including finality of the judgment. If the appellant fails to file the requested supplement, the court may apply the presumption that the missing items support the judgment.

4. Another gap-filler to HB 3474 is to add subsection (g), which specifies filing requirements for appendices.

5. HB 3473 appears to provide that the appellant's election controls whether the appeal will be decided based on appendices rather than a clerk's record. HB 3474 does not address what happens when there are multiple appellants or multiple appellees. Nor does it address what happens when there is a cross-appeal. It is possible that the Legislature intended that the election made by the first-to-file appellant will control in all circumstances. Rather than attempting to address all possible permutations, the subcommittee decided to stick with the text of HB 3474. Presumably, courts will have the ability to make case-by-case determinations about how to handle the record in multi-party appeals and cross-appeals.

# Tab F

(10) an employee of a personal bond office, or an employee of a county, who is employed to obtain information required to be obtained under oath if the oath is required or authorized by Article 17.04 or by Article 26.04(n) or (o), Code of Criminal Procedure;

(11) the lieutenant governor or a former lieutenant governor;

(12) the speaker of the house of representatives or a former speaker of the house of representatives;

(13) the governor or a former governor;

(14) a legislator or retired legislator;

(14-a) the secretary of the senate or the chief clerk of the house of representatives;

(15) the attorney general or a former attorney general;

(16) the secretary or clerk of a municipality in a matter pertaining to the official business of the municipality;

(17) a peace officer described by Article 2.12, Code of Criminal Procedure, if:

(A) the oath is administered when the officer is engaged in the performance of the officer's duties; and

(B) the administration of the oath relates to the officer's duties; or

(18) a county treasurer.

ARTICLE 17. APPELLATE RECORD

SECTION 17.001. (a) Subchapter B, Chapter 51, Civil Practice and Remedies Code, is amended by adding Section 51.018 to

read as follows:

Sec. 51.018. APPENDIX IN LIEU OF CLERK'S RECORD. (a) Not later than the 10th day after the date that a party files a notice of appeal for a civil suit, the party may notify the trial court and the court of appeals that the party will file an appendix that replaces the clerk's record for the appeal.

(b) The party must file the appendix with the party's appellate brief. Except in an expedited proceeding or by order of the court, the brief and appendix must be filed not later than the 30th day after the later of:

(1) the date that the party provided notice under Subsection (a); or

(2) the date that a reporter's record, if any, is filed with the court of appeals.

(c) An appendix filed under this section must contain a file-stamped copy of each document required by Rule 34.5, Texas Rules of Appellate Procedure, for a civil suit and any other item the party intends to reference in the party's brief. The appendix may not contain a document that has not been filed with the trial court except by agreement of the parties to the appeal.

(d) An appendix filed in accordance with this section becomes part of the appellate record. A court clerk may not prepare or file a clerk's record or assess a fee for preparing a clerk's record if a party files an appendix in accordance with this section.

(b) Section 51.018, Civil Practice and Remedies Code, as added by this section, applies only to a party that files a notice of appeal on or after January 1, 2024. A party that files a notice

of appeal before January 1, 2024, is governed by the law in effect on the date the notice was given, and the former law is continued in effect for that purpose.

ARTICLE 18. DELIVERY OF DOCUMENTS

SECTION 18.001. The heading to Chapter 80, Government Code, is amended to read as follows:

CHAPTER 80. DELIVERY OF NOTICE, ORDERS, AND DOCUMENTS

SECTION 18.002. Section 80.001, Government Code, is amended to read as follows:

Sec. 80.001. DELIVERY OF NOTICE OR DOCUMENT. A court, justice, judge, magistrate, or clerk may send any notice or document by a method authorized by Section 80.002(a) [~~80.002~~].

SECTION 18.003. Section 80.002, Government Code, is amended to read as follows:

Sec. 80.002. [~~AUTHORIZED~~] DELIVERY OF NOTICE, ORDER, OR DOCUMENT. (a) A court, justice, judge, magistrate, or clerk may send any notice or document using mail or electronic mail. This subsection [~~section~~] applies to all civil and criminal statutes requiring delivery of a notice or document.

(b) In addition to any other delivery method required or authorized by law or supreme court rule, a statutory county court, district court, or appellate court shall deliver through the electronic filing system established under Section 72.031 to all parties in each case in which the use of the electronic filing system is required or authorized all court orders the court enters for the case.

ARTICLE 19. SERVICE OF PROCESS

SECTION 19.001. Chapter 30, Civil Practice and Remedies Code, is amended by adding Section 30.0035 to read as follows:

Sec. 30.0035. PERSONAL SERVICE OF PROCESS DURING LEGISLATIVE PROCEEDING PROHIBITED. A person may not serve citation or other civil process in person on a member, officer, or employee of the senate or house of representatives during any legislative proceeding. A court shall quash any service made in violation of this section. The supreme court shall revoke the certification of a process server who violates this section. This section is not subject to Section 22.004(c), Government Code.

ARTICLE 20. EFFECTIVE DATE

SECTION 20.001. (a) Except as otherwise provided by this Act and Subsection (b) of this section, this Act takes effect September 1, 2023.

(b) Article 15 of this Act takes effect immediately if this Act receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, Article 15 of this Act takes effect September 1, 2023.

# Tab G

**Memorandum**

**To:** Supreme Court Advisory Committee

**From:** Appellate Rules Subcommittee

**Date:** August 15, 2023

**Re:** July 23, 2023 Referral Letter relating to permissive appeals

## I. Matter referred to subcommittee

**Permissive Appeals.** In the attached emails, Chief Justices Christopher and Worthen suggest changes to the procedures for permissive appeals. The Committee should review and draft any recommended amendments.

## II. Relevant materials

Attached are copies of (1) the emails from Chief Justice Christopher, Chief Justice Worthen, and Chief Justice Adams (who sent his comment after the Court referred the issue to the subcommittee) and (2) Misc. Docket No. 23-9047 (the Court's order approving amendments to Rule 28.3).

## III. Subcommittee recommendation

The Subcommittee recommends that the Court adopt the following revision to TRAP 28.3(e)(2) to specify additional materials that must be submitted with the petition for permission to appeal:

(e) *Contents.* The petition must:

…

(2) attach ~~a copy of the order from which appeal is sought~~:

(A) a copy of the file-marked order from which appeal is sought;

(B) a copy of every file-marked document that is material to the order from which appeal is sought and that was filed in the trial court; and

(C) a properly authenticated transcript of any relevant testimony from the underlying proceeding, including any relevant exhibits offered in evidence relating to the order from which appeal is sought, or a statement that the transcript has been ordered and will be filed when it

is received, or a statement that no evidence was adduced in connection with such order.

The Subcommittee also recommends that the Court consider adopting the following new TRAP 28.3(m) to address procedures for notice and opportunity to cure before denying a petition for failure to comply with the procedural requirements of Rule 28.3:

> **(m)** ***Defective Petition.*** The court of appeals must not deny or dismiss the petition for formal defects or irregularities in procedure without providing notice of, and a reasonable time to correct or amend, the defects or irregularities.

## IV. Discussion

### A. The Court's Proposed TRAP 28.3(*l*)

After the last Committee meeting, the Court issued an order approving the addition of the following Rule 28.3(*l*):

> (l) ***When Petition Denied***. If the court of appeals denies the petition, the court must explain in its decision the specific reasons for its finding that an appeal is not warranted. On petition for review, the Supreme Court may review the court of appeals' denial de novo, and, if the Supreme Court concludes that the statutory prerequisites for a permissive appeal are met, the Supreme Court may direct the court of appeals to grant permission to appeal.

The Court's order invited public comment on the proposed amendment.

### B. Concerns from Courts of Appeals Justices

Chief Justice Christopher, Chief Justice Worthen, and Chief Justice Adams sent emails offering comments on the proposed amendments. Those emails are attached to this memo. Each email requests that the Court consider amending Rule 28.3 to require the parties to submit additional information with the petition for permission to appeal. They each suggest using Rule 52 (which specifies required attachments to a mandamus petition) as a model for the additional information and documents that should be required.

Chief Justice Christopher has also suggested that the rule should address whether the court must give notice and an opportunity to cure before denying a petition for permission to appeal for failure to comply with the procedural requirements of Rule 28.3.

### C. Proposed Additional Procedures

#### 1. Additional documents to be filed with the petition for permission to appeal

Chief Justice Christopher, Chief Justice Gray, Justice Kelly, and Justice Miskel met with the subcommittee to discuss the reasons for needing additional information with the petition for permission to appeal. The justices explained that many times even with the information currently required to be included in and filed with the petition for permission to appeal, it is difficult for the court to determine whether the statutory requirements are met and whether an immediate appeal is warranted. The additional requirements are based on materials required to be filed with a mandamus petition, with some modifications discussed below.

Rather than requiring "certified or sworn" copies, the subcommittee recommends requiring copies of the file-marked documents. With the move to electronic filing and the ease of obtaining copies of file-marked documents, the subcommittee believes there is no reason to require parties to go through the additional steps of obtaining certified copies or swearing under oath that the copies are "true and correct."

The subcommittee also discussed expressly requiring only the motion that resulted in the order from which appeal is sought, any responses or replies, and any exhibits, but decided that the more general language in proposed 28.3(e)(2)(B) will provide greater flexibility while still requiring at least those documents.

With regard to transcripts, the subcommittee recommends expressly allowing parties to state that the transcript has been ordered and will be filed at a later date because of the short-fuse deadline for filing a petition for permission to appeal. By statute, the petition must be filed no later than 15 days after the order granting permission to appeal is signed. It may be difficult to obtain the transcript in that time period. The proposed rule also allows parties to avoid filing the transcript if no evidence was adduced at the hearing.

### 2. Notice of defect and opportunity to cure

Chief Justice Christopher also noted the possibility for differing practices among the appellate courts about how to handle petitions for permission to appeal that do not comply with the procedural requirements. The subcommittee has drafted language requiring notice and an opportunity to cure for the full Committee's consideration.

The subcommittee recommends that the Court consider adopting new TRAP 28.3(m) to address this issue. The language in proposed Rule 28.3(m) is based on the proposed amendment to Rule 52.8 to address procedural defects in mandamus petitions, which the full Committee has already voted to recommend to the Court. The subcommittee recommends that if the Court opts to amend the rules to address procedural defects, the language in the two rules should be consistent.

# ATTACHMENT 1

**Subject:** Permissive appeals
**Date:** Thursday, June 15, 2023 at 3:06:27 PM Central Daylight Time
**From:** Tracy Christopher
**To:** Chip Babcock, Nathan Hecht, Jane Bland, Jaclyn Daumerie, Tracy Christopher

Dear Chief Justice Hecht, Justice Bland and Chip,
I think the procedures related to permissive appeals need to be changed, given the new statute. Right now we review a 15 page petition for permission to appeal. It's often agreed, so we never see the other side of the issue. Unlike at the Supreme Court, we are unable to call for briefing before we decide whether to grant the petition. I think that needs to be changed. At a minimum, all briefing below and the reporters record, if any, needs to be included
Given the de novo review by the Supreme Court, I would think the Court would also like full briefing at our level.
Many practitioners think their issue is a controlling one when it isn't. Many trial judges get confused as to whether there is a substantial ground for disagreement, when there isn't. If the trial judge made the correct legal call below, we have denied the petition.
If the legislature wanted us to grant all agreed permissive appeals, they could have written it that way. It has to be different from all the other interlocutory appeals.
Thank you for considering this.
Tracy Christopher
Chief Justice of the 14th Court of Appeals.

P.S. We need a current Justice of a COA on the appellate subcommittee.
P.P.S. Sorry to hear you are unavailable for the meeting, Chip.

Get Outlook for iOS

## Vernis McGill

**From:** Tracy Christopher
**Sent:** Tuesday, July 25, 2023 2:59 PM
**To:** Rulescomments
**Subject:** TRAP 28.3

To the members of the Supreme Court:
This comment is in response to the new law and changes to rule 28.3.
In order to properly determine whether or not to grant a permission to appeal, we need more than the order. We need all of the information currently required for original proceedings–including 52.7(a)

While you may believe that parties will automatically supply that information, we have received motions for permissive appeal with nothing but the order.

Thank you for considering this change.

Tracy Christopher
Chief Justice, 14th Court of Appeals
Houston, TX 77002
[redacted]

**From:** James Worthen
**To:** Rulescomments
**Cc:** Appellate Court Chiefs
**Subject:** Proposed Amendments to TRAP 28.3
**Date:** Tuesday, July 25, 2023 4:04:19 PM

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To: Chief Justice Hecht, Justices Lehrmann, Boyd, Devine, Blacklock, Busby, Bland, Huddle and Young,

I share Fourteenth COA Chief Justice Christopher's concerns regarding the changes to TRAP 28.3. My experience has been that more information, rather than less, is helpful in the administration of justice. I agree with her that the new TRAP 28.3 should require, at a minimum, the same information listed in TRAP 52.7 (a).

Thank you for your consideration.

Jim Worthen

| | |
|---|---|
| **From:** | Terry Adams |
| **To:** | Rulescomments |
| **Cc:** | Terry Adams |
| **Subject:** | TRAP 28.3 |
| **Date:** | Friday, July 28, 2023 1:53:34 PM |
| **Attachments:** | TRAP 28.3.pdf |

To Chief Justice Hecht and Justices on the Supreme Court of Texas:

This comment is in response to the new law and proposed amendment to Texas Rule of Appellate Procedure 28.3.

We receive petitions for permissive appeal that contain nothing more than the order from which a permissive appeal is sought.

We need more information than that to properly determine whether or not to grant a permission to appeal. And we certainly need more information than that in order to be able to fully comply with new Rule 28.3(l).

Specifically, we need the same type of additional information that is currently required for an original proceeding under Rule 52.3(k)(1)(A), (C) and Rule 52.7(a)(1) and (2).

Attached above is proposed additional language (in blue) to Rule 28.3(e) to require that this additional information also be included with a petition for permissive appeal.

Thank you for considering this change.

**Chief Justice Terry Adams**
First Court of Appeals
301 Fannin
Houston, Texas 77002
Office-(713) 274-2700
https://www.txcourts.gov/1stcoa/

## Rule 28. Accelerated, Agreed, and Permissive Appeals in Civil Cases

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### 28.3. Permissive Appeals in Civil Cases.

(a) *Petition Required.* When a trial court has permitted an appeal from an interlocutory order that would not otherwise be appealable, a party seeking to appeal must petition the court of appeals for permission to appeal.

(b) *Where Filed.* The petition must be filed with the clerk of the court of appeals having appellate jurisdiction over the action in which the order to be appealed is issued. The First and Fourteenth Courts of Appeals must determine in which of those two courts a petition will be filed.

(c) *When Filed.* The petition must be filed within 15 days after the order to be appealed is signed. If the order is amended by the trial court, either on its own or in response to a party's motion, to include the court's permission to appeal, the time to petition the court of appeals runs from the date the amended order is signed.

(d) *Extension of Time to File Petition.* The court of appeals may extend the time to file the petition if the party:

(1) files the petition within 5 days after the deadline, and

(2) files a motion complying with Rule 10.5(b).

(e) *Contents.* The petition must:

(1) contain the information required by Rule 25.1(d) to be included in a notice of appeal;

(2) attach a certified or sworn copy of the order from which appeal is sought; and

(A) unless voluminous or impracticable, the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based;

(B) a certified or sworn copy of every document that is material to the order from which appeal sought and that was filed in the underlying proceeding; and

(C) a properly authenticated transcript of any relevant testimony from the underlying proceeding, including any relevant exhibits offered in evidence relating to the order from which appeal is sought, or a statement that no testimony was adduced in connection with such order;

(3) contain a table of contents, index of authorities, issues presented, and a statement of facts; and

(4) argue clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal from the order may materially advance the ultimate termination of the litigation.

(f) *Response; Reply; Cross-Petition; Time for Filing.* If any party timely files a petition, any other party may file a response or a cross-petition within 10 days. A party may file a response to a cross-petition within 10 days of the date the cross-petition is filed. A petitioner or cross-petitioner may reply to any matter in a response within 7 days of the date the response is filed. The court of appeals may extend the time to file a response, reply, and cross-petition.

(g) *Length of Petition, Cross-Petition, Response, and Reply.* A petition, cross-petition, response, and reply must comply with the length limitations in Rule 9.4(i)(2)(D)-(E).

(h) *Service.* A petition, cross-petition, response, and reply must be served on all parties to the trial court proceeding.

(i) *Docketing Statement.* Upon filing the petition, the petitioner must file the docketing statement required by Rule 32.1.

(j) *Time for Determination.* Unless the court of appeals orders otherwise, a petition, and any cross-petition, response, and reply, will be determined without oral argument, no earlier than 10 days after the petition is filed.

(k) *When Petition Granted.* If the petition is granted, a notice of appeal is deemed to have been filed under Rule 26.1(b) on that date, and the appeal is governed by the rules for accelerated appeals. A separate notice of appeal need not be filed. A copy of the order granting the petition must be filed with the trial court clerk.

(l) *When Petition Denied.* If the court of appeals denies the petition, the court must explain in its decision the specific reasons for its finding that an appeal is not warranted. On petition for review, the Supreme Court may review the court of appeals' denial de novo, and, if the Supreme Court concludes that the statutory prerequisites for a permissive appeal are met, the Supreme Court may direct the court of appeals to grant permission to appeal.

Comment to 2023 change: Rule 28.2 is repealed. Rule 28.3 is amended to implement sections 51.014(g) and (h) of the Civil Practice and Remedies Code and governs the procedure for all permissive appeals filed after September 1, 2023.

# ATTACHMENT 2

# Supreme Court of Texas

Misc. Docket No. 23-9047

**Order Approving Repeal of Texas Rule of Appellate Procedure 28.2 and Amendments to Texas Rule of Appellate Procedure 28.3**

**ORDERED** that:

1. The Court invites public comments on the repeal of Texas Rule of Appellate Procedure 28.2 and on amendments to Texas Rules of Appellate Procedure 28.3.

2. To effectuate the Act of May 11, 2023, 88th Leg., R.S., ch. 209 (S.B. 1603, codified at TEX. CIV. PRAC. & REM. CODE § 51.014(g)-(h)), the repeal and amendments are effective September 1, 2023. But the repeal and amendments may later be changed in response to public comments. The Court requests public comments be submitted in writing to rulescomments@txcourts.gov by November 1, 2023.

3. The Clerk is directed to:

   a. file a copy of this Order with the Secretary of State;

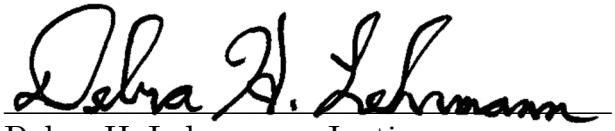
   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this Order to each elected member of the Legislature; and

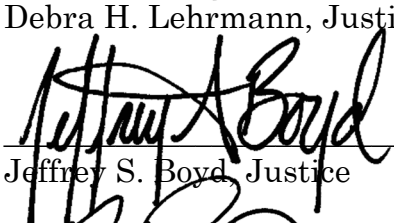
   d. submit a copy of this Order for publication in the *Texas Register*.

Dated: July 25, 2023.

Nathan L. Hecht, Chief Justice

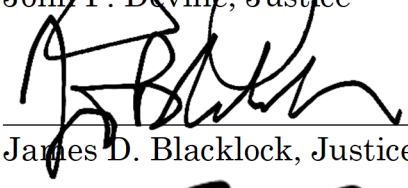


Debra H. Lehrmann, Justice

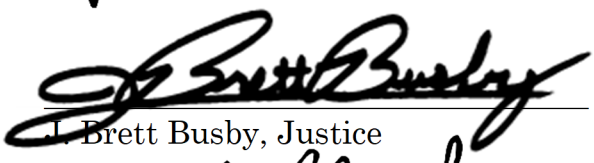


Jeffrey S. Boyd, Justice

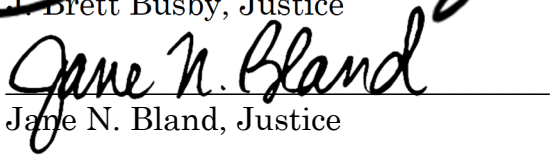
John P. Devine, Justice



James D. Blacklock, Justice

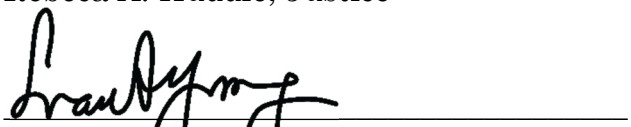


J. Brett Busby, Justice



Jane N. Bland, Justice

Rebeca A. Huddle, Justice



Evan A. Young, Justice

## TEXAS RULES OF APPELLATE PROCEDURE

### Rule 28. Accelerated, Agreed, and Permissive Appeals in Civil Cases

***

**28.3. Permissive Appeals in Civil Cases.**

(a) *Petition Required.* When a trial court has permitted an appeal from an interlocutory order that would not otherwise be appealable, a party seeking to appeal must petition the court of appeals for permission to appeal.

(b) *Where Filed.* The petition must be filed with the clerk of the court of appeals having appellate jurisdiction over the action in which the order to be appealed is issued. The First and Fourteenth Courts of Appeals must determine in which of those two courts a petition will be filed.

(c) *When Filed.* The petition must be filed within 15 days after the order to be appealed is signed. If the order is amended by the trial court, either on its own or in response to a party's motion, to include the court's permission to appeal, the time to petition the court of appeals runs from the date the amended order is signed.

(d) *Extension of Time to File Petition.* The court of appeals may extend the time to file the petition if the party:

(1) files the petition within 5 days after the deadline, and

(2) files a motion complying with Rule 10.5(b).

(e) *Contents.* The petition must:

(1) contain the information required by Rule 25.1(d) to be included in a notice of appeal;

(2) attach a copy of the order from which appeal is sought;

(3) contain a table of contents, index of authorities, issues presented, and a statement of facts; and

(4) argue clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal

from the order may materially advance the ultimate termination of the litigation.

(f) *Response; Reply; Cross-Petition; Time for Filing.* If any party timely files a petition, any other party may file a response or a cross-petition within 10 days. A party may file a response to a cross-petition within 10 days of the date the cross-petition is filed. A petitioner or cross-petitioner may reply to any matter in a response within 7 days of the date the response is filed. The court of appeals may extend the time to file a response, reply, and cross-petition.

(g) *Length of Petition, Cross-Petition, Response, and Reply.* A petition, cross-petition, response, and reply must comply with the length limitations in Rule 9.4(i)(2)(D)-(E).

(h) *Service.* A petition, cross-petition, response, and reply must be served on all parties to the trial court proceeding.

(i) *Docketing Statement.* Upon filing the petition, the petitioner must file the docketing statement required by Rule 32.1.

(j) *Time for Determination.* Unless the court of appeals orders otherwise, a petition, and any cross-petition, response, and reply, will be determined without oral argument, no earlier than 10 days after the petition is filed.

(k) *When Petition Granted.* If the petition is granted, a notice of appeal is deemed to have been filed under Rule 26.1(b) on that date, and the appeal is governed by the rules for accelerated appeals. A separate notice of appeal need not be filed. A copy of the order granting the petition must be filed with the trial court clerk.

(l) *When Petition Denied.* If the court of appeals denies the petition, the court must explain in its decision the specific reasons for its finding that an appeal is not warranted. On petition for review, the Supreme Court may review the court of appeals' denial de novo, and, if the Supreme Court concludes that the statutory prerequisites for a permissive appeal are met, the Supreme Court may direct the court of appeals to grant permission to appeal.

Comment to 2023 change: Rule 28.2 is repealed. Rule 28.3 is amended to implement sections 51.014(g) and (h) of the Civil Practice and Remedies Code and governs the procedure for all permissive appeals filed after September 1, 2023.

# Tab H

# Memo Regarding Cy Pres or "Fluid Recovery" Awards in Texas Class Action Lawsuits

June 5, 2023

1. On August 1, 2022, Chief Justice Hecht assigned to the Supreme Court Advisory Committee consideration of adopting a rule of procedure relating the cy pres awards of funds in class action lawsuits brought in Texas courts. The Chief Justice's letter read:

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

Committee Chair Chip Babcock referred the matter to the Subcommittee on Rules 16-165a.

2. The cy pres award, sometimes called a "fluid recovery" award, is a practice that is widely used in class action proceedings in courts around the United States, but which is subject to controversy.

3. The cy pre doctrine, said to arise out of the Code of Justinian and later English law, in Law French is called "cy pres comme possible," meaning "as near as possible." When the charitable purpose of an irrevocable charitable trust becomes impossible to fulfill, a court might be required to terminate the trust. Under the cy pres doctrine, instead of terminating the trust, a court can alter the purpose of the charitable trust to keep it in force, provided that that alternative use is as close as possible to the settlor's original intent. As stated by the Internal Revenue Service:

> The cy pres doctrine is a principle of law that courts use to save a charitable trust from failing when a charitable objective is originally or later becomes impossible or impracticable to fulfill. In such a case, the court may

substitute another charitable object which is believed to approach the original charitable purpose as closely as possible. (The term cy pres comes from French law and means "so near" or "as near (as possible".)) This legal doctrine is based on the theory that a court has the power to revise a charitable trust where the maker (also called the creator, settlor, or - in the case of a trust under a will - testator) had a charitable intent in order to meet unexpected emergencies or changes in conditions which threaten the trust's existence.[1]

4. Early American case law was restrictive on the courts' power to change the terms of a charitable trust, but over time the doctrine has been loosened to give judges more latitude to change beneficiaries or terms of distribution. In the United States, trust law is primarily state law, and the approach of courts in applying cy pres varies. A number of states have adopted cy pres statutes. The Texas statute reads:

> Sec. 5.043. REFORMATION OF INTERESTS VIOLATING RULE AGAINST PERPETUITIES.
>
> (a) Within the limits of the rule against perpetuities, a court shall reform or construe an interest in real or personal property that violates the rule to effect the ascertainable general intent of the creator of the interest. A court shall liberally construe and apply this provision to validate an interest to the fullest extent consistent with the creator's intent.
>
> (b) The court may reform or construe an interest under Subsection (a) of this section according to the doctrine of cy pres by giving effect to the general intent and specific directives of the creator within the limits of the rule against perpetuities.
>
> © If an instrument that violates the rule against perpetuities may be reformed or construed under this section, a court shall enforce the provisions of the instrument that do not violate the rule and shall reform or construe under this section a provision that violates or might violate the rule.

[1] <https://www.irs.gov/pub/irs-tege/eotopice81.pdf>, link to *the Cy Pres Doctrine: State Law and Dissolution of Charities* (1981).

> (d) This section applies to legal and equitable interests, including noncharitable gifts and trusts, conveyed by an inter vivos instrument or a will that takes effect on or after September 1, 1969, and this section applies to an appointment made on or after that date regardless of when the power was created.

The Texas statute tells the courts, in reforming or construing an interest in order to avoid the rule against perpetuities, to give effect to the "ascertainable general intent and specific directives of the creator ...."

5. According to one account, the idea of transporting cy pres to class actions law suits was first suggested in an article published by a Chicago law student.[2] The question was what to do with funds recovered from the defendant in a class-action suit that were not claimed by class members or could not feasibly be distributed to class members, due to inability to identify injured parties, or because the recovery was de minimis such that the cost of distribution would exceed the amount distributed. Something must be done with unclaimed funds. The choices are (I) return unclaimed funds to the defendant; (ii) let the funds escheat to the government; (iii) over-compensate known class members; or (iv) donate unclaimed funds to a third party, such as a charity or governmental or non-governmental entity. The doctrine of cy pres has been used to justify the fourth choice, turning over unclaimed funds to third parties. In practice recipients have varied from foundations or institutes who lobby or advocate or educate on the very issues embraced in the class action, to a local chapter of the American Board of Trial Advocates,[3] to law schools that were class counsel's alma maters, to charities in which the judge's spouse was a trustee,[4] to charitable foundations created as a result of the settlement of the class action in which the class-action defendant had a prominent management role, to the

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[2] Stewart R. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chicago Law Review 448 (1971), this student article is credited as being first to mention cy pres in class action suits. See James R. Copeland, *Update: Cy Pres*, p. 3 (Manhattan Institute 2019).

[3] *Williams v. Heritage Operating, LP.,* Case No. 05-7822-C1-11, in the 6th Judicial Circuit of Penallas County, Florida Feb. 27, 2018 ($100,000 awarded to the ABOTA Foundation "for the benefit of the Tampa Bay Chapter of ABOTA" to be distributed in the discretion of the local chapter).

[4] *Nachshin v. AOL, LLC*, 663 F.3d 1034 (2011) (Judge's husband was one of fifty volunteer attorneys who served on the board of directors of the Legal Aid Foundation of Los Angeles, a cy pres grantee).

office of a state attorney general who was about to personally engage in a campaign for higher office.

6. If you opt for the fourth choice, to distribute the unclaimed funds to third parties, the question becomes first, who decides what third parties will receive the plaintiffs' money (i.e., class counsel and defendant vs. independent panel of advisors vs. the court), second, how to describe the trial judge's duty to ensure that the settlement and choice of non-party cy pres beneficiaries is not influenced by improper factors (i.e., require a hearing with evidence of how and why cy pres beneficiaries were chosen, with assurances from the non-party entity on how funds will be used), and third, how to empower appellate courts, through the standard of review, to provide meaningful oversight to the entire process (i.e., de novo review rather than abuse of discretion review). The inescapable problem is that the choice of cy pres recipients is at best a subjective policy choice, and policy preferences will vary from judge to judge, and from justice to justice. This variability can be somewhat reduced by a statute or rule of procedure that sets out the standard (how close the nexus must be between the cy pres recipient the harm addressed by the class action), and even more by nudging the parties and trial judges to consider a particular governmental entity (that provides legal services to the indigent), or in the extreme it can take away discretion (by mandating that all or part of a cy pres award be paid to a government agency that provides legal services to the indigent).

7. The essence of a class action is to aggregate individual claims that are unlikely to be asserted individually into an assemblage large enough to warrant the cost of litigation, with the hope of affording recoveries to members of the class to compensate for their losses when they otherwise likely would never receive compensation. With the rise of opt-out classes (where normally a very small percentage of potential plaintiffs opt out and those who do not opt out are therefore bound by the class action outcome), defendants in class action suits have the prospect of settling nearly all claims that could be brought individually in one settlement, if they can just get the consent of class representatives and class counsel and the approval of the judge overseeing the case. Even more problematic are class-action cases that settle with an agreement to certify a class, especially where class representatives and class counsel agree to expand the scope of the class to include more potential claimants who will be paid trivial sums. And even more problematic are class action settlements that are "cy-pres only," meaning that no class members receive compensation so that the damages paid by the defendant go first the class representatives and class counsel and the rest goes to charities or foundations or entities chosen by the class representatives, class counsel, and the class-action defendant, subject to the approval of the judge. In the cy-pres only instances, no injured party is

compensated for harm. Concerns about potential conflicts of interest in cy pres settlements are stated in the Amicus Brief of the Attorneys General of Arizona, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Louisiana, Michigan, Mississippi, Missouri, North Dakota, Ohio, Oklahoma, South Carolina and Texas, *Perryman v. Romero*, No. 18-1074, in the Supreme Court of the United States[5] (where class members get to share $225,000 and some arguably worthless coupons, while $3 to $9 million goes to cy pres recipients and $8.7 million goes to class counsel).

8. Some (perhaps many--there is no way to know how many) cy pres class-action settlements give money to NGOs whose activities closely align with the interests of the injured class. Some would say that the *least likely* way to ensure a close link between the interests of class members who do not claim their share of damages and the cy pres recipients who receive their unclaimed money is to allow settling class representatives and class counsel and the defendant in the class action to pick who gets the unclaimed funds, followed what has often proven to be lax oversight by trial judges. A lenient abuse-of-discretion standard of appellate review will allow many arrangements to pass muster that benefit the negotiating parties but not the owners of the funds who are being given away.

9. Several states have adopted class-action Cy Pres statutes, to make the state's policy on this practice clear. An example is California Code of Civil Procedure, which reads:

> CHAPTER 5. Permissive Joinder, Section 384.
>
> (a) It is the policy of the State of California to ensure that the unpaid cash residue and unclaimed or abandoned funds in class action litigation are distributed, to the fullest extent possible, in a manner designed either to further the purposes of the underlying class action or causes of action, **or to promote justice for all Californians**. The Legislature finds that the use of funds for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes.
>
> (b) Except as provided in subdivision ©, before the entry of a judgment in a class action established pursuant to Section 382 that provides for the payment of money to members of the class, the court shall determine the total amount that will be payable to all class members if all class members

[5] <http://hlli.org/wp-content/uploads/2013/02/18-1074.state-AG-amicus.pdf>.

are paid the amount to which they are entitled pursuant to the judgment. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue or unclaimed or abandoned class member funds, plus any interest that has accrued thereon, to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, **or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent**. The court shall ensure that the distribution of any unpaid residue or unclaimed or abandoned class member funds derived from multistate or national cases brought under California law shall provide substantial or commensurate benefit to California consumers. For purposes of this subdivision, "judgment" includes a consent judgment, decree, or settlement agreement that has been approved by the court.

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

The bolded language of the statute reflects that the California legislature has broadened the cy pres doctrine for class actions to allow a wide range of recipients of unclaimed funds who have no correlation to the harm made the basis of the class action. Is this a tax? Is this a deprivation of property without due process of law? These questions have been asked.

Tennessee is more specific than California. Their Rule of Procedure 23 says:

RULE 23. CLASS ACTIONS

Any order entering a judgment or approving a proposed compromise of a class action certified under this rule may provide for the disbursement of residual funds. Residual funds are funds that remain after the payment of

all approved: class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement or order entering a judgment that does not create residual funds.

*It shall be within the discretion of the court to approve the timing and method of distribution of residual funds and to approve the recipient(s) of residual funds.* **A distribution of residual funds to a program or fund which serves the pro bono legal needs of Tennesseans including, but not limited to, the Tennessee Voluntary Fund for Indigent Civil Representation is permissible but not required.**

Upon motion of any party to a settlement or judgment of a class action certified under this rule or upon the court's own initiative, orders may be entered after an approved settlement or judgment to address the disposition and disbursement of residual funds in a manner consistent with this rule.

Tennessee has chosen to use the cy pres doctrine to encourage the funding of legal services to the poor, without regard to the nature of the harm that is the basis for the class action and the justification for the payment of damages.

Washington state, Civil Rule 23(f) moves past to a suggestion to a mandate:

(f) Disposition of Residual Funds.

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

(2) Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of residual funds. In matters where the claims process has been exhausted and residual funds remain, **not less than fifty percent**

> **(50%) of the residual funds shall be disbursed to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents of Washington State.** The court may disburse the balance of any residual funds beyond the minimum percentage to the Legal Foundation of Washington or to any other entity for purposes **that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class**.
>
> [Adopted effective July 1, 1967; Amended effective January 3, 2006; April 28, 2015; September 1, 2017.]

The residual part of this rule adheres to the traditional basis for cy pres, which is to benefit the designated beneficiaries "as close as possible," but only after taking a ½ bite out of the residual funds to use to provide legal services for low income residents of the state.

These policies in California, Tennessee, and Washington nakedly abandon the primacy in the cy pres doctrine of settlor's intent in favor of appropriating funds belonging to someone but defended by no one, to meet shortfalls in funding that result from the legislature's decision not to fund them.

10. Part of the problem with cy pres awards in class actions that some say can corrupt the judicial process is attributable to cases that should not qualify as class actions in the first place. This position was argued by the U.S. Chamber of Commerce in its amicus curiae brief filed in *Frank v. Gaus*, No. 17-961, in the Supreme Court of the United States. The Brief says:

> [T]he Chamber is submitting this brief in support of neither party to urge the Court that the first solution to the concerns raised by cy pres settlements is to police rigorously the requirements for class certification at the front end. More fundamentally, the Chamber seeks to highlight that the explosion of cy pres settlements in class-action litigation is symptomatic of a much deeper problem — the failure of lower courts to comply with this Court's precedents and rigorously police the requirements of Rule 23.

In this light, the issue of how to regulate cy pres awards can be partially addressed by courts not approving settlements in opt-out classes that create broad classes of claimants

who will recover little or nothing from the class action, while large sums of money go to class counsel for fees that are justified by large unclaimed funds that are doled out to groups and governmental or non-governmental entities that suffered no injury. Allowing such settlements amounts to court-approval of defendants buying a res judicata bar on claims of hundred or thousands of injured persons in exchange for rewarding class representatives with modest recoveries and class counsel with millions of dollars of fees for no benefit to nearly all of the persons who were actually harmed. If class actions that will not result in significant benefits to class members are certified only for injunctive relief to bar pernicious practices, and class counsel fees are scaled back in proportion to the actual recovery to class members, and not based on large cy pres award to third parties, the prophylactic effect of class actions against wrongdoers is preserved, and the opportunity for exploiting the class-action procedure would be lessened. If class action rules were changed to provide that class counsel fees must be measured based on the benefits recovered for class members, without regard to large set-asides to third parties under the cy pres doctrine, many of these problems would go away.

11. This issue is reminiscent of the litigation regarding the use of interest on IOLTA trust accounts to fund legal services for the poor. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), the U.S. Supreme Court held that "the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal," (i.e., the client). In *Brown v. The Legal Foundation of Washington*, 538 U.S. 216 (2003), the high court ruled that taking these funds to use to pay for legal services to the poor was not an "administrative taking" that required just compensation to the clients because the pecuniary loss to the clients was zero. This analysis would seem to suggest that a court directing that unclaimed funds belonging to class plaintiffs be paid to third parties is a taking, and the question is whether the pecuniary loss is zero.

12. Some have argued that a court order directing that unclaimed class action funds be given to organizations that take positions on political or social issue violates the First Amendment rights of class members. Reference is made to *Janus v. AFSCME*, 585 U.S. ___, 138 S.Ct. 2448 (2018), where the U.S. Supreme Court decided:

> Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bar gaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.

This issue was revisited when the U.S. Supreme Court ruled in *Keller v. State Bar of California*, 496 U.S. 1 (1990), that–

> Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.

And more recently, in *McDonald v. Longley*, 4 F. 4th 229 (5th Circuit 2021), the Fifth Circuit Court of Appeals ruled against the State Bar of Texas' collection of mandatory dues, saying: "In sum, the Bar is engaged in non-germane activities, so compelling the plaintiffs to join it violates their First Amendment rights."

When class representatives and class counsel and defendants and the court take money belonging to class members and award it to organizations who advocate political or policy issues, constitutional issues arise.

13. The choice is between (I) returning unclaimed funds to the defendant; (ii) letting the funds escheat to the government; (iii) over-compensating known class members; or (iv) donating unclaimed funds to a third party, such as a charity or of other NGO. Perhaps the best suggestion is (iv), but providing for an open and more neutral process for selecting third-party beneficiaries, such as an independent panel of advisors, with a proviso that there must be a nexus between the injury suffered by the class and the goals and established record of the third party's activities. In specifying by rule specific beneficiaries who may or must receive cy pres awards, we should be clear-eyed about the fact that we are untethering the courts from the self-imposed restriction they at one time felt necessary--that when substituting the court's judgment for the donor's intent the court must as close as possible to the donor's intent. On the other hand, letting class counsel and defendants select beneficiaries subject loose oversight by trial courts and even looser oversight by appellate courts applying an abuse of discretion standard, a uniform step moving everyone away from *cy pres comme possible* to an obviously legitimate cy pres recipient is probably more faithful to the doctrine of cy pres than allowing litigants and their lawyers select who gets the plaintiffs' money.

14. On September 12, 2002, the Texas Access to Justice Commission made a proposal to the Supreme Court Advisory Committee on a proposed change to Tex. R. Civ. P. 42:

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

14. The choices may be clear, but which choice is make is perhaps far from clear. Please send your comments, and preferences for what the subcommittee should recommend.

Thanks.

Richard R. Orsinger
Subcommittee Chair

# Tab I

TRCP 42 - Cy Pres Awards of Undistributable and Unclaimed Class Action Funds

Preferences of subcommittee members (8-17-2023)

Subcommittee members were asked to rank options from least desirable (1) to most desirable (5). Six members voted. Some members ranked several choices, while others ranked only a few. Each "x" represents one vote.

| | Least Desirable | | Neutral | | Most Desirable |
|---|---|---|---|---|---|
| CATEGORY | 1 | 2 | 3 | 4 | 5 |
| 1. Leave Rule 42 as is | x | x | x | | |
| 2. Return funds to Defendant | xxxx | | | | x |
| 3. Escheat funds to state for specific or general purposes | xxx | x | | | |
| 4. Lawyers & judge decide | xx | | | x | x |
| 5. To designated agency/foundation | | x | | xx | xxx |
| 6. To entity "as near as possible" | x | x | x | x | x |
| 7. Other suggestions: "Favor broad options to choose from at the time" | | | | | x |

Submitted by Richard Orsinger,
Subcommittee Chair

# Tab J

**SCOKY Amends CR 23 to Direct Some Residual Class Action Proceeds to Legal Aid for Low-Income Kentuckians**

David V. Kramer
dkramer@dbllaw.com

In Order 2013-14 (http://courts.ky.gov/courts/supreme/Rules_Procedures/201314.pdf) (eff. 1/1/2014), the Kentucky Supreme Court adopted a new section of Civil Rule 23 governing class actions providing that not less than 25% of any residual funds remaining after payment of claims to class members be paid to the Kentucky IOLTA Fund for distribution to legal aid programs for low-income Kentuckians. The rest of the residual proceeds may be used for a *cy pres* trust, subject to the trial court's discretion. The new Rule was patterned after similar rules adopted by a number of other jurisdictions that apportion excess or residual class action funds to legal aid programs. In so directing the disposition of a portion of excess class funds, some states in essence treat part of the excess funds in the same manner as abandoned or unclaimed property that is subject to escheat.

Residual funds from class action litigation have traditionally been used to establish *cy pres* trusts, which are intended to serve a charitable or beneficent purpose similar to the point of the underlying class action. The *cy pres* doctrine originated in the law of trusts and estates, where it has been applied to give comparable effect to the charitable intention of the grantor or testator (or to make "the next best use" of the property or funds) when the court determines it would be impossible or illegal to give literal effect to the donor's original intent.

In the context of class actions, situations in which courts have approved establishment of *cy pres* charitable trusts or other *cy pres* settlements have included the following: (1) when class members have received full compensation for their damages, and excess funds remain (such as when the defendant has been compelled to disgorge excessive profits as a deterrent, and the disgorged funds exceed the total amount of the damages, fees and costs of the class); (2) when proof of individual class members' claims would be overly burdensome or distribution of damages to individual class members would be too costly; or (3) when the class of persons who might otherwise qualify as class members is difficult to identify or evolves over time (a so-called "fluid class") such that measuring or awarding damages would be impracticable or impossible, and the court determines that providing indirect or prospective benefit serves the interests of justice.

The new Rule, in enhancing the availability of legal services to low-income residents, will promote improved access to the civil justice system that allowed the class action to achieve recovery.

Note: The foregoing post includes commentary reprinted from the the main volume and the forthcoming 2014 supplement to 6 Phillips & Kramer, *Rules of Civil Procedure Annotated*, 6th ed. (Kentucky Practice Series), by David V. Kramer, with permission of the author and publisher. Copyright (c) 2013 Thomson Reuters. For more information about this publication please visit http://store.westlaw.com/rules-of-civil-procedure-annotated-6th-vols-6-7-kentucky/130503/11774808/productdetail.

# Tab K

THOMSON REUTERS
WESTLAW **Kentucky Court Rules**

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Kentucky Rules of Civil Procedure (CR) Rule 23.05

## CR 23.05 Dismissal or compromise

Currentness

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

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

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

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

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

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

(6) Disposition of residual funds.

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

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

### Credits

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

Rules Civ. Proc., Rule 23.05, KY ST RCP Rule 23.05
Current with amendments received through December 1, 2022. Some sections may be more current, see credits for details.

**END OF DOCUMENT**

# Tab L

**448 S.W.3d 403 (2014)**

**HIGHLAND HOMES LTD., Petitioner,**

**v.**

**The STATE of Texas, Respondent.**

No. 12-0604.

**Supreme Court of Texas.**

Argued November 7, 2013.
Decided August 29, 2014.
Rehearing Denied December 19, 2014.

404 *404 Thomas S. Leatherbury, Vinson & Elkins LLP, Dallas, TX, for Amicus Curiae, Texas Access Justice Foundation.

David E. Sharp, Gunderson Sharp & Walke LLP, Houston, TX, for Amicus Curiae, Texas Appleseed.

Bruce P. Bower, Austin, TX, for Amicus Curiae, Texas Legal Services Center.

Douglas W. Alexander, Alexander Dubose Jefferson & Townsend LLP, Austin, TX, for Amicus Curiae, The Nature Conservancy.

405 Jamie Richards Whitney, John W. Weber Jr., Marcy Hogan Greer, Rosemarie *405 Kanusky, Fulbright & Jaworski LLP, San Antonio, TX, Zachary Spratt Smith, Alexander Dubose Jefferson & Townsend, Austin, TX, for Petitioner Highland Homes Ltd.

Daniel T. Hodge, First Asst. Attorney General, Greg W. Abbott, Attorney General of Texas, Jonathan F. Mitchell, Solicitor General, Joseph David `Jody' Hughes, Assistant Solicitor General, Lesli Gattis Ginn, Office of the Attorney General, Austin, TX, for Respondent The State of Texas.

Chief Justice HECHT delivered the opinion of the Court, in which Justice GREEN, Justice GUZMAN, Justice LEHRMANN, and Justice BROWN joined.

Rule 42(a) of the Texas Rules of Civil Procedure provides that when its requirements are met, "[o]ne or more members of a class may sue ... as representative parties on behalf of all".[1] It often happens that many class members do not personally appear in the action in any way,[2] and Rule 42 prescribes procedures to ensure that those whose claims are settled or adjudicated *in absentia* are afforded due process. Such procedures include court approval of class representatives and class counsel, notice to class members, and court approval of a proposed settlement after an opportunity to be heard.[3] When the rule is followed, class representatives may assert—and agree to disposition of—claims on behalf of the class, including claims on behalf of absent members.[4]

Under the Texas Unclaimed Property Act ("the Act"),[5] as we shall explain more fully, property that goes unclaimed for three years may be presumed abandoned and must then be delivered to the Comptroller to hold for the owner. The issue in this case is whether damages and settlement proceeds claimed by class representatives on behalf of absent members are nevertheless unclaimed property, presumed abandoned, and therefore subject to the Act. In other words,
406 does the Act *406 prohibit what Rule 42 permits—the disposition of absent class members' claims by their representatives with court approval? We hold that the Act, by its own terms, does not apply. Accordingly, we reverse the judgment of the court of appeals[6] and affirm the judgment of the trial court.

## I

Petitioner, Highland Homes, Ltd., a homebuilder in the Austin, Dallas-Fort Worth, Houston, and San Antonio areas, employs hundreds of subcontractors. In 2003, Highland Homes began docking subcontractors' pay if they did not furnish

proof of adequate general liability insurance coverage. Highland Homes contends that the deductions were to cover its own increased exposure from working with uninsured subcontractors. But in 2006, one subcontractor, Benny & Benny Construction Company, sued, alleging that Highland Homes had represented it would use the paycheck deductions to obtain liability insurance covering the subcontractor. Highland Homes denied Benny & Benny's claim but clarified its policy for the future.

In 2009, Benny & Benny amended its pleadings to add another subcontractor, Richard Polendo, and together they asserted claims on behalf of a class of more than 1,800 other subcontractors from whose pay Highland Homes had deducted amounts for insurance before clarifying its policy. The trial court certified the class under Rule 42(b)(3),[7] found Benny & Benny and Polendo to be adequate class representatives, appointed their lawyers as class counsel, and adopted a trial plan. Highland Homes appealed, but while the appeal was pending, the parties settled, subject to notice to the class and the trial court's review and approval.

The proposed terms were as follows. Highland Homes agreed to pay Benny & Benny $28,000 and to refund to the settlement class—members who did not opt out[8]—the total amounts withheld, plus each member's pro rata share of the difference between that total and $3,672,000 (less the amount for opt-outs). Highland Homes was to prepare from its records a list of class members with last known addresses and the amounts withheld from each. An administrator designated by the parties would then use computer software and other means to update the addresses. With the trial court's approval, formal notice would be sent to class members at the addresses thus determined, describing the claims being made on their behalf in the action, setting out the settlement terms, informing members of their rights, offering them the opportunity to opt out of the class, and setting a hearing for final approval of the settlement. If the settlement was finally approved, Highland Homes would issue refunds checks, sending them to existing subcontractors as it would their paychecks or by mailing checks to former subcontractors last known addresses.

The parties recognized that despite these efforts, some class members would not be located, and that others might refuse refunds. The class representatives agreed, on behalf of the settlement class members, that refund checks not negotiated within 90 days of issuance would be void, and that those and other undistributed refunds—referred to in the
407 settlement as "unclaimed funds"—would be given to The Nature Conservancy ("the *407 Conservancy") as a *cy pres* award.[9] The Conservancy is a well-known, nonprofit, charitable organization operating worldwide and in Texas, whose stated mission is "to conserve the lands and waters on which all life depends."[10] According to Highland Homes, the Conservancy was chosen because it "share[s] Highland Homes' vision of green building and commitment to the environment." The State points out another connection—that Highland Homes' president was on the Conservancy's Texas volunteer board of trustees. In any event, Highland Homes received no tax deduction or other benefit from the award,[11] and the appropriateness of the Conservancy as the beneficiary of the award is not at issue.

Class representatives—again, on behalf of settlement class members—acknowledged that Highland Homes denied all liability in the action and agreed to a global release of Highland Homes and its affiliates[12] from liability on all claims either brought or that could have been brought. The parties agreed to use their best efforts to obtain judicial approval of their agreement, and that if it was substantively altered, a party adversely affected could terminate the agreement.

In 2010, the parties presented their agreement to the trial court, which ordered that a detailed notice of the proposed settlement be mailed to class members at the addresses determined by the administrator. Of the 1,849 notices sent, 346 were returned as undeliverable, and 121 were re-mailed to different or forwarding addresses. After a final hearing, the trial court found that this notice was "the best ... practicable under the circumstances", was "reasonable ... fair,
408 adequate, and sufficient", and "fully complie[d]" with Rule 42. The court also *408 found that the settlement was "reasonable, fair, just, ... adequate, [and] in the best interest of the Settlement Class Members, and that it satisfie[d] [Rule 42] and other applicable law". Finally, the court determined "that Plaintiffs and Class Counsel... have adequately represented the interests of the Settlement Class".[13]

Only eight class members requested exclusion. One explained that it had "suffered no losses from Highland Homes", and another stated that it did not "wish to participate in this legal matter." The trial court approved the settlement and rendered final judgment accordingly, "binding on all parties to the Settlement Agreement and on all Settlement Class Members ... includ[ing] all ... who did not timely request exclusion from the Settlement Class".

Aware that the State had once challenged a *cy pres* award as violative of the Unclaimed Property Act,[14] the parties notified the Attorney General of their proposed award of undistributed refunds to the Conservancy. Shortly after judgment was rendered but before it became final, the State intervened to object to the award, arguing that the undistributed residue should be retained for three years and then paid to the Comptroller to hold for any owners who eventually surfaced. The trial court refused to modify the judgment, and the State appealed.

The court of appeals agreed with the State that Section 74.308 of the Act prohibits the imposition of a 90-day deadline for negotiating settlement checks, and that Section 74.309 prohibits the *cy pres* award.[15] The court reversed and remanded the case to the trial court with instructions to strike those provisions from the settlement, and to order the claims administrator to hold undistributed refunds—totaling $465,557, according to the State—for three years and then remit them to the Comptroller.[16]

We granted Highland Homes' petition for review.[17]

## II

The Unclaimed Property Act defines property that is presumed abandoned and prescribes a process for reporting and delivering it to the Comptroller to be held perpetually for the owner. Two provisions, Sections 74.308 and 74.309, are
409 aimed at preventing evasion of the Act. Under Section 74.308, a recovery of property *409 cannot be barred before the statutorily prescribed time passes for the property to be presumed abandoned—three years. The section states:

> § 74.308. Period of Limitation Not a Bar
>
> The expiration, on or after September 1, 1987, of any period specified by contract, statute, or court order, during which an action or proceeding may be initiated or enforced to obtain payment of a claim for money or recovery of property, does not prevent the money or property from being presumed abandoned property and does not affect any duty to file a report required by this chapter or to pay or deliver abandoned property to the comptroller.[18]

Section 74.309 broadly prohibits any method of circumventing the Act. It states:

> § 74.309. Private Escheat Agreements Prohibited
>
> An individual, corporation, business association, or other organization may not act through amendment of articles of incorporation, amendment of bylaws, private agreement, or any other means to take or divert funds or personal property into income, divide funds or personal property among locatable patrons or stockholders, or divert funds or personal property by any other method for the purpose of circumventing the unclaimed property process.[19]

The State argues that these provisions prohibit the *cy pres* award in this case. Specifically, under Section 74.308, the 90-day period for negotiating settlement checks does not preclude a presumption that amounts not paid to class members are abandoned, and Section 74.309 prohibits the diversion of settlement funds to the Conservancy.

But under the Act's express terms, neither provision applies in the circumstances before us. Chapter 74 of the Property Code, where the provisions are found, "applies to a holder of property that is presumed abandoned under Chapter 72, Chapter 73, or Chapter 75."[20] Under Chapter 72—of the three, the only one involved in this case[21]—a "holder" is a
410 person "in possession of property that belongs *410 to another" or "indebted to another"[22] and tangible or intangible personal property is presumed abandoned

if, for longer than three years:

> (1) the existence and location of the owner of the property is unknown to the holder of the property; and
>
> (2) according to the knowledge and records of the holder of the property, a claim to the property has not been asserted or an act of ownership of the property has not been exercised.[23]

Thus, Sections 74.308 and 74.309 apply only to a person who has property that the owner has not claimed or exercised ownership over for more than three years. In this case, the State asserts that the settlement administrator is holding payments owned by settlement class members.

The State's argument assumes that absent class members have neither asserted claims nor exercised acts of ownership in the litigation. But they have—through the class representatives. On behalf of all class members, including absent members, the class representatives asserted claims for refunds in the litigation, controlled the prosecution of those claims as owners, negotiated the terms for settling the claims, asserted claims for payments under the settlement agreement, and then released all claims. Class representatives' actions are those of class members, and are therefore binding on class members, including absent class members, so long as the requirements of due process are met. The United States Supreme Court has explained those requirements as follows:

> If [a] State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.[24]

The judgment approving the settlement agreement in this case met all these conditions, and the State does not contend otherwise. The judgment approving that settlement is binding on all settlement class members.

Section 74.308 provides that a limitation on the time for initiating or enforcing a claim does not prevent property from being presumed abandoned. But that provision is inconsequential here. The property—settlement payments on refund claims—cannot be presumed abandoned, not because of the 90-day limitation on negotiating settlement checks, but
411 because *411 the property was not unclaimed. To the contrary, this property was claimed by the owners—all settlement class members—through their representatives. For the same reason, Section 74.309 does not apply in these circumstances. Chapter 74 does not apply when a claim to property has been asserted or an act of ownership exercised. It is of no consequence that several owners have not *collected* their property within the time period to which they agreed through class representatives. An owner need not actually *collect* his property to rebut the presumption of abandonment and render the Act inapplicable; he need only *claim* it. Nor is the settlement's labeling of undistributed refunds as "unclaimed funds" determinative; the refunds were, in fact, claimed.

The following example illustrates the flaw in the State's argument. Suppose Benny & Benny had never asserted class claims, had settled its own claims on the same terms, and then had decided to tear up the $28,000 settlement check in hopes of getting more business from Highland Homes. Surely the State could not insist that Highland Homes was nevertheless obligated to pay the $28,000 to the Comptroller until Benny & Benny broke down and took it. Suppose Benny & Benny made the same decision for Polendo, acting as his attorney-in-fact. The Act would not apply in either instance because Benny & Benny and Polendo claimed the property, and thus it could not be presumed abandoned. The example is not far-fetched. One class member requested exclusion from the class because it had not been injured and another because it did not want to participate. Under Rule 42, the absent settlement class members participated in the litigation and settlement through their representatives as fully as the representatives did in person. The absent members agreed to the 90-day limitation on taking property they claimed, just as the class representatives individually did, and are as fully bound.

Furthermore, the settlement administrator no longer has property belonging to the settlement class members and is not indebted to them because they have agreed, through class representatives, to exercise their right to payment under the settlement agreement within 90 days. With court approval, class representatives were no less authorized to negotiate and agree to the terms of settlement than they were to agree to the amounts paid. Thus, the settlement administrator is no longer a "holder" to which Chapter 74 applies.

The State concedes that the Act would not apply to class settlement payments made only on application of class members, rather than mailed to last known addresses. "Because the unallocated funds are not owned by any identified individual," the State explains, "the Act would not apply...."[25] We agree with the State's conclusion but not its reason. As noted above, one requirement for property to be presumed abandoned under the Act is that "the existence and location of the owner of the property is unknown to the holder of the property".[26] Class members in the situation the State posits certainly meet this requirement and are thus those for whom the Act's protections are intended. They own property in the same sense as the class members in this case, and most importantly, they ordinarily agree, through class representatives, to release all claims against the settling parties. If anything, the opposite of the State's argument should be true: the better the identification of class members, the fewer instances in which the Act applies. But class
412 members who are hard to identify *412 are no less owners of claims that class representatives are authorized to prosecute, settle, and release than are those class members who are easy to identify. Whether settlement payments are mailed to class members or must be applied for, the Act is inapplicable for the same reason: absent class members have asserted claims and exercised ownership through their class representatives. In both situations, there is no holder of abandoned property.

In support of its position the State cites several cases involving other states' laws in which the courts rejected a holder's efforts to retain property, pending the owner's compliance with specified conditions, rather than deliver it to the state as unclaimed.[27] In each of these cases, a potential future holder of property attempted to limit the conditions under which a potential future claimant to that property would be able to obtain it, an attempt held to be in derogation of the jurisdiction's unclaimed property law. Here, the settlement agreement does not purport to govern future claims to as-yet unidentified property—rather, it itself establishes the class's claim to reimbursement. The State also relies on a prior decision of the court of appeals[28] and a recent decision of the Fifth Circuit,[29] both of which concluded that *cy pres* awards in class actions violate the Unclaimed Property Act. In neither case did the court appear to consider the arguments we find persuasive here. To the extent the two cases conflict with our decision today, they are disapproved.

The State's argument for the application of the Unclaimed Property Act in these circumstances cannot succeed unless class representatives' authority to act for class members under Rule 42 is disregarded. For that reason, the argument fails. The State warns that *cy pres* awards can be abused when they are nothing more than a judicial giveaway of private property, while Highland Homes and its *amici curiae* plead that *cy pres* awards benefit deserving, charitable causes. We need not take sides on this disagreement today. Though the State seems to consider the award to the Conservancy inappropriate, it does not make that challenge, assuming that it could. We agree with the State, however, that trial courts must be careful in class actions to protect class interests and scrutinize settlements. No one suggests that the trial court in this case failed in that responsibility.

*** * * * * ***

Accordingly, the judgment of the court of appeals is reversed and the judgment of the trial court is affirmed.

Justice DEVINE filed a dissenting opinion, in which Justice JOHNSON, Justice WILLETT, and Justice BOYD joined.

Justice DEVINE, joined by Justice JOHNSON, Justice WILLETT, and Justice BOYD, dissenting.

413 The Unclaimed Property Act (UPA) protects the property rights of identifiable *413 owners whose property cannot be delivered or returned because the owner cannot be found. *Melton v. State*, 993 S.W.2d 95, 97-98 (Tex.1999). Generally, when those circumstances persist for three years, the property in the possession of another is presumed abandoned by its owner and must be turned over to the State for safekeeping under the UPA. TEX. PROP.CODE § 72.101. The State then assumes responsibility for holding the property until the rightful owner can be located. *Id.* § 74.304.

Texas Rule of Civil Procedure 42, on the other hand, "is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment." *Sw. Refining Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex.2000). As a mere procedural device, the class-action rule is not intended "to enlarge or diminish any substantive rights or obligations of any parties to a civil action" but to facilitate the efficient adjudication of such rights and obligations. *Id.* Here, however, the Court uses our class-action rule to diminish the substantive property rights of the missing property owners and in so doing also marginalizes the UPA's public policy concerns. Because the Court's

application of Rule 42 conflicts with the UPA's explicit language, I respectfully dissent.

As the Court acknowledges, the UPA prohibits private limitation and escheat agreements that seek to evade the process for reporting and delivering abandoned property to the State. *See* 448 S.W.3d at 410 (quoting TEX. PROP.CODE §§ 74.308.309). Section 74.308 states that a contractual limitation period cannot be used to defeat the abandoned-property presumption and thus circumvent the UPA:

> The expiration [] of any period specified by contract, statute, or court order, during which an action or proceeding may be initiated or enforced to obtain payment of a claim for money or recovery of property, does not prevent the money or property from being presumed abandoned property and does not affect any duty to file a report required by this chapter or to pay or deliver abandoned property to the comptroller.

TEX. PROP.CODE § 74.308. Section 74.309 prohibits private escheat agreements that seek to divide funds among locatable interest holders, while disenfranchising owners who cannot be found, and generally prohibits the circumvention of the unclaimed property process through the diversion of funds by any method:

> An individual, corporation, business association, or other organization may not act through amendment of articles of incorporation, amendment of bylaws, private agreement, or any other means to take or divert funds or personal property into income, divide funds or personal property among locatable patrons or stockholders, or divert funds or personal property by any other method for the purpose of circumventing the unclaimed property process.

*Id.* § 74.309. Highland and the class representative negotiated a settlement of the class claims that included the following *cy pres* provision for the disposition of any class members unclaimed share of the settlement fund:

> The parties agree to a *cy pres* distribution of unclaimed funds owed to class members that cannot be located or who fail to negotiate the settlement check within ninety (90) days of its issuance. The amount of these unclaimed funds will not be paid to individual Class Members. Such *cy pres* distribution shall be made to the Nature Conservancy, a nonprofit, charitable organization operating in Texas.

414 *414 In my view, the above provision includes both a limitation period and private escheat agreement prohibited under the UPA.

The Court apparently agrees that the UPA would invalidate the settlement agreement's 90-day limitation period and private escheat provision, if it applied to the agreement. The Court concludes, however, that Highland is no longer a "holder" of any identified class member's property and that the settlement agreement does not concern abandoned property, and thus, the UPA does not apply. The Court reasons that unclaimed settlement funds have not been abandoned because the class representative has exercised ownership over the property on the class members' behalf by entering into the agreement with Highland. Such reasoning renders the statutory prohibitions against private escheat agreements and contractual time limits meaningless. Section 74.308 expressly prohibits prospectively setting contractual time limits on when property can be claimed, and section 74.309 expressly prohibits private agreements that divert prospective property interests to someone other than the true owner.

While I agree that the class representative exercised authority over the class claims and was authorized to settle, its authority did not extend to the subsequent disposition of the settlement checks, which are the individual class members' property rights created under the settlement agreement. Quite simply, the class representative lacked authority to claim, spend, or give away any other class member's settlement check. The Court mistakenly conflates the representative's authority over the class claims with the settlement proceeds it negotiated on behalf of the individual class members. Because the class representative could not assert any missing class member's ownership interest in the fund or cash their individual checks, in my view, it did not exercise ownership over such property. When the property went unclaimed, it was abandoned within the UPA's meaning, notwithstanding the *cy pres* provision. Remarkably, the Court's explanation is that the "`unclaimed funds'... were, in fact, claimed," 448 S.W.3d at 411, even though the class representative lacked authority to endorse the checks or otherwise claim the funds belonging to another class member.

The Property Code provides that property is presumed abandoned (and thus subject to the UPA) if "for longer than three

years," no claim has been asserted or act of ownership exercised. TEX. PROP. CODE § 72.101(a). Because the property interest here is represented by a check, the question is when does the three-year period begin to run on a check. For purposes of the UPA and the three-year period, at least, a check represents a property right that is distinct from the underlying obligation or transaction it represents. Property Code section 73.102 specifically addresses the commencement question, stating that the period begins running on the date (1) "the check was payable," (2) "the issuer or payor of the check last received documented communication from the payee," or (3) "the check was issued." At the earliest then, the three-year period commenced when the checks were issued.

Now the Court argues that Chapter 73 of the Property Code does not apply in this case because it applies only to "holders" that are "depositories," such as a bank, credit union or the like, *see* 448 S.W.3d at 409 n. 21, but Chapter 73 does not say that. Although parts of Chapter 73 specifically address depositories as holders, section 73.102 does not. It discusses checks—and the abandonment of checks—in terms of the conduct and knowledge of the "issuer" or "payor,"
415 rather *415 than the conduct or knowledge of the depository on which the checks are drawn. That only makes sense, of course, because for purposes of unclaimed property, the bank has no way of knowing whether a customer has written a check and if so, to whom, until the payee presents the check for payment. Section 73.102 can only apply to (and therefore define the three-year period for) scenarios in which the issuer/payor is the "holder," not the depository.

The Court ultimately concludes that the unclaimed checks are not abandoned property because the class representative has asserted a claim or exercised a right of ownership over the class members' claims by negotiating the class settlement. *See* 448 S.W.3d at 411 (noting that "the class representatives asserted claims for refunds in the litigation, controlled the prosecution of those claims as owners, negotiated the terms for settling the claims, asserted claims for payments under the settlement agreement, and then released all claims"). But that all occurred before the three-year period for determining abandonment of the checks even commenced. The assertion of a claim or the exercise of an act of ownership occurring *before* the three-year period begins is, I submit, meaningless. Because the class representative asserted a claim or exercised ownership, if at all, before the checks were issued, and because the class representative cannot assert a claim or exercise ownership over the checks *after* they were issued, the checks must be presumed abandoned under section 72.101(a), if not cashed within three years.

The UPA prevents individuals or entities that hold property belonging to others from prospectively contracting for the disposition of such property, if unclaimed by the rightful owner. Thus, for example, landlords, banks, utilities, and insurance companies cannot contract for the future disposition of unclaimed funds owed to their respective tenants, customers, or policyholders in circumvention of the UPA. The Court here, however, imbues the class representative in class-action litigation with special power to make such disposition. The UPA does not permit this exceptional treatment.

The Act clearly prohibits parties from making an agreement that prevents "money or property from being presumed abandoned." TEX. PROP.CODE § 74.308. But the Court reasons that this case does not concern abandoned property and thus does not implicate the UPA because the parties have previously agreed to the disposition of unclaimed property. The UPA's prohibitions against contractual time limits and private escheat agreements are meaningless, however, if they can be manipulated so easily. It makes no sense to hold that the UPA, which prohibits contractual limitations on unclaimed property and the presumption of abandonment, does not apply when the parties have agreed to the future disposition of unclaimed property. Contrary to the Court's analysis, such an agreement is not an exercise of ownership over the unclaimed property and does not prevent a presumption of abandonment.

No other court has taken such a fanciful approach to private escheat agreements. *See* Conn. Mut. Life Ins. Co. v. Moore, 333 U.S. 541, 546, 68 S.Ct. 682, 92 L.Ed. 863 (1948) (rejecting forfeiture of life insurance proceeds in favor of New York's unclaimed property law); People ex rel. Callahan v. Marshall, 83 Ill.App.3d 811, 38 Ill.Dec. 944, 404 N.E.2d 368, 373 (1980) (rejecting contractual time limitations on gift cards and credit memoranda in favor of Illinois' unclaimed property law); Div. of Unclaimed Prop. v. McKay Dee Credit Union, 958 P.2d 234, 240 (Utah 1998) (finding that Utah's
416 unclaimed property law takes *416 precedence over statute allowing businesses to purge debt records). For example, a California appellate court struck down a provision in a contract between a health insurer and its subscribers, requiring the subscribers to cash their claim checks within six months or forfeit their right to the funds. Blue Cross of N. Cal. v. Cory, 120 Cal.App.3d 723, 739-40, 174 Cal.Rptr. 901 (1981). The court reasoned that "[California's UPA], as a law established for a public reason, cannot be contravened by a private agreement." *Id.* at 740, 174 Cal.Rptr. 901. Similarly, the court reasoned that a union representative, acting on behalf of union members, could not agree to divert the value of individual members' royalty checks into an account for the union's general benefit, if the checks were not cashed within

a designated time. *Screen Actors Guild, Inc. v. Cory,* 91 Cal.App.3d 111, 115-16, 154 Cal. Rptr. 77 (Cal.Ct.App.1979). And despite the approval of a majority of shareholders, the New Jersey Supreme Court struck down an amendment to a corporation's charter that allowed the corporation to retain stock dividends if they went unclaimed for three years. *State by Furman v. Jefferson Lake Sulphur Co.,* 36 N.J. 577, 178 A.2d 329, 338-39 (1962), *cert. denied,* 370 U.S. 158, 82 S.Ct. 1253, 8 L.Ed.2d 402 (1962). The court reasoned that even with the assent of shareholders, the amendment violated New Jersey's UPA, because a corporation cannot alter its charter to give itself powers that are "obnoxious to any applicable general law or to public policy." *Id.* at 335-36.

The Court attempts to distinguish these cases by suggesting that the class members' property interests here were conditional and thus subject to forfeiture under the settlement agreement, unlike the shareholder's right to a dividend check, the union member's right to the royalty check, or the insured's right to a benefits check. 448 S.W.3d at 412 & n. 27. I fail to see how the class members' property interests here are any different or why they are entitled to any less protection under our UPA. Highland acknowledged in the settlement agreement that it "owed" the identified class members the funds represented by the checks and that, if a check were "not negotiated within ninety (90) days of its issuance, the funds owed to that class member [would] be considered `unclaimed funds.'" The agreement provided further for "a *cy pres* distribution of unclaimed funds owed to class members that cannot be located or who fail to negotiate within ninety (90) days of [the check's] issuance." The agreement thus acknowledges the members' property interests and seeks to redirect those interests under the *cy pres* provision. Although parties generally have the right to contract as they see fit, they do not have the right to make agreements that violate the law or public policy. *In re Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 129 & n. 11 (Tex.2004). This agreement violates the law because the parties have substantively agreed to the redisposition of future, unclaimed property—a private escheat agreement prohibited by the UPA.

Finally, the Court argues that the UPA should not apply because it intrudes on the class representative's authority to act for class members under Rule 42. 448 S.W.3d at 409. Again, I disagree. As already discussed, the class representative's authority extends to the settlement of the class claims but not to the disposition or forfeiture of the individual class member's vested property rights. The class action rule may authorize the representative to settle the class member's claim, but it does not authorize the representative to take away the member's share of that settlement once it has vested.

417 *417 I question whether the Court would be so favorably disposed to the class representative's power to redistribute unclaimed settlement proceeds if such proceeds were payable to the representative rather than a charity. I suspect that the Court's analysis is influenced more by where the unclaimed funds end up than by how they got there. Why should money escheat to the State, if a charity can benefit from unclaimed settlement proceeds? The problem, as I see it, is two fold. First, and foremost, under the terms of this settlement agreement, the money belongs to the missing class members, not to Highland or the class representative. The missing parties' property rights can only be preserved if the State is permitted to act as their custodian under the UPA. Second, even if this were an appropriate case for a *cy pres* distribution (and I do not believe it is), the *cy pres* distribution here is contrary to existing law on the subject.

As to this latter point, the Court acknowledges the State's warning that *cy pres* awards "can be ... nothing more than a judicial giveaway of private property" but suggests that the State either lacked standing to challenge the appropriateness of the award in this case or waived the complaint. 448 S.W.3d at 412. Again, I disagree. The State has standing to, and did in fact, challenge the *cy pres* distribution to The Nature Conservancy in both the court of appeals and this Court. *See In re Lease Oil Antitrust Litig.,* 570 F.3d 244, 250-51 (5th Cir. 2009) (determining that State of Texas had "direct, substantial, legally protectable interest" to challenge *cy pres* distribution in class action suit); *see also* Brief for Respondent at 40 ("The requisite nexus between the mission of the *cy pres* recipient and the purpose of the class action is absent here.").

*Cy pres* distributions in class actions are appropriate when there is money remaining in a settlement fund after identifiable class members have been compensated. *Klier v. Elf Atochem N. Am., Inc.,* 658 F.3d 468, 474-75 (5th Cir. 2011). Typically, this might occur when a defendant does not have sufficient information or resources to determine the precise size of the class or the identity of its members and thus relies on a claims-form process to qualify membership. In that situation, any unallocated surplus in the settlement fund might appropriately be disposed of under a cy pres provision. *See, e.g., Wilson v. Sw. Airlines, Inc.,* 880 F.2d 807, 813 (5th Cir. 1989) (allocating remainder of settlement fund where 500 potential class members were notified, but only 228 proved their right to the fund by filling out a claim

form and all 228 were fully compensated). In this case, however, all of the identifiable class members were not compensated.

Highland used its business records to precisely tailor the size of the settlement fund, reserving the right to reduce the fund by the amounts attributable to class members who opted-out. Highland then used these same records to issue checks to each settling class member, who under the settlement agreement were designated as the owners of their particular share of the fund and were issued checks representing that share. The *cy pres* provision then subsequently forfeited that property interest if the class member did not cash the issued check within 90 days. Highland did not require, nor need, the class members to prove their right to the fund as Highland possessed all the relevant information in its own business records. It therefore allocated the entire fund to identifiable class members by issuing each of them a check for the specific amount owed. There accordingly was no unclaimed surplus to which an appropriate *cy pres* distribution could attach.

418 *418 Even had there been a surplus, the *cy pres* provision in this agreement was clearly inappropriate for yet another reason. In class actions, the doctrine of *cy pres* is supposed to distribute funds "for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." *Klier,* 658 F.3d at 474. At the very least, the *cy pres* distribution should "reasonably approximate" the class members' interests. *In re Lupron Mktg. & Sales Practices Litig.,* 677 F.3d 21, 33 (1st Cir. 2012). Whether the *cy pres* distribution reasonably approximates the class members' interests is determined by analyzing a number of factors such as the purposes of the underlying statutes violated, the nature of the class members' injury, the class members' characteristics and interests, the geographical scope of the class, the reasons why the settlement funds have yet to be claimed, and the relationship of the *cy pres* recipient to the class. *Id.* at 33.

The Court acknowledges that The Nature Conservancy was chosen as the *cy pres* recipient because it "share[s] Highland Homes' vision of green building and commitment to the environment." 448 S.W.3d at 407 (alteration in original). But Highland's vision or preferences are irrelevant because the settlement fund does not belong to Highland. It belongs to the class members whose claims created the fund. *See Klier,* 658 F.3d at 474 ("The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members.") (citing *Principles of the Law of Aggregate Litigation,* 2010 A.L.I. § 3.07 cmt. b). As much as I respect and admire the mission of The Nature Conservancy, I fail to see its connection to the subcontractors' suit, which alleged that Highland misrepresented that liability insurance would be provided for uninsured subcontractors through payroll deductions.

The UPA provides that property is presumed abandoned if ownership is not exercised for a period of three years. It requires that such property be turned over to the State. The UPA further prohibits contracts that seek to limit the presumptive period or otherwise dispose of unclaimed property through private escheat agreements. In this regard, the Act prohibits agreements that "divert funds" or "divide funds ... among locatable" persons or use "any other method for the purpose of circumventing the unclaimed property process." TEX. PROP.CODE § 74.309. Highland and the class representative agreed "to a cy pres distribution of unclaimed funds owed to class members" who, although known, could not be found to cash their settlement checks within 90 days of issuance. I agree with the court of appeals that this *cy pres* provision is essentially a private escheat agreement prohibited by the UPA. 417 S.W.3d 478, 486-87 (Tex.App.-El Paso 2012). I accordingly would affirm the court of appeals' judgment. Because the Court does not, I respectfully dissent.

[1] TEX.R. CIV. P. 42(a). The rule is similar to Rule 23 of the Federal Rules of Civil Procedure.

[2] *See* Ethan D. Millar & John L. Coalson, Jr., *The Pot of Gold at the End of the Class Action Lawsuit: Can States Claim It as Unclaimed Property?,* 70 U. PITT. L.REV. 511, 514 (2009) ("It is not uncommon in class action settlements for a significant amount of the settlement checks to never be cashed.").

[3] TEX.R. CIV. P. 42(a)(4) (class representatives), 42(c)(2) (notice to certified class), 42(e) (approval of settlement, after the requisite notice, hearing, and findings), 42(e)(4)(A) (class members' right to object to settlement), 42(g) (appointment of class counsel).

[4] *Taylor v. Sturgell,* 553 U.S. 880, 894, 904, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008) (recognizing that "[r]epresentative suits with preclusive effect on nonparties include properly conducted class actions," but refusing to extend nonparty preclusion); *Martin v. Wilks,* 490 U.S. 755, 762 n. 2, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989) (noting a recognized, limited exception—to the general rule that a judgment "does not conclude the rights of strangers to [the] proceedings"—in "class" or "representative" suits, but refusing to extend nonparty preclusion to white firefighters challenging employment decisions made under a consent decree in a civil rights action),

*superseded by statute,* Civil Rights Act of 1991, Pub.L. No. 102-166, § 108, 105 Stat. 1074, 1076-1077, codified at 42 U.S.C. § 2000e-2(n); *Hansberry v. Lee,* 311 U.S. 32, 41-44, 61 S.Ct. 115, 85 L.Ed. 22 (1940) (noting a recognized, albeit imprecisely defined exception allowing judgments in "class" or "representative" suits to "bind members of the class or those represented who were not made parties" but refusing to extend nonparty preclusion to an injunctive decree enforcing a restrictive covenant agreement); *Citizens Ins. Co. of Am. v. Daccach,* 217 S.W.3d 430, 450 (Tex.2007) ("Basic principles of res judicata apply to class actions just as they do to any other form of litigation.") (citations omitted).

[5] TEX. PROP.CODE §§ 71.001-76.704.

[6] 417 S.W.3d 478 (Tex.App.-El Paso 2012).

[7] TEX.R. CIV. P. 42(b)(3).

[8] Also excluded were persons with whom Highland Homes had already settled, its employees, and class counsel.

[9] The phrase, *cy pres,* "derives from the Norman-French phrase, *cy pres comme possible,* meaning `as near as possible.'" Wilbur H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and* Cy Pres *Awards: Emerging Problems and Practical Solutions,* 21 VA. J. SOC. POL'Y & L. 267, 269 (2014). The Restatement (Third) of Trusts explains the *cy pres* doctrine as follows: "Unless the terms of the trust provide otherwise, where property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose, or to the extent it is or becomes wasteful to apply all of the property to the designated purpose, the charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose." RESTATEMENT (THIRD) OF TRUSTS § 67 (2003). In the class action context, *cy pres* refers to awards "to an entity that resembles, in either composition or purpose, the class members or their interests" when "direct distributions to class members are not feasible—either because class members cannot be reasonably identified or because distribution would involve such small amounts that, because of the administrative costs involved, such distribution would not be economically viable." PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07, cmt. b (2010). Despite the *Principles'* endorsement of such awards, *id.* § 3.07, issues regarding their legality and propriety have been raised. *See Marek v. Lane,* ___ U.S. ___, 134 S.Ct. 8, 9, 187 L.Ed.2d 392 (2013) (Roberts, C.J., statement respecting denial of certiorari). We have not had occasion to address such issues, and none is raised in this case.

[10] *About Us: Vision and Mission,* THE NATURE CONSERVANCY, http://www.nature.org/about-us/ vision-mission/-index.htm (last visited August 22, 2014).

[11] Highland Homes was authorized to deduct from the award any administration expenses that exceeded $30,000. It has made no such claim.

[12] Those affiliates were Horizon Homes, Ltd., Sanders Custom Builder, Ltd., Highland Homes-Houston, Ltd., Sanders Custom Builder-Houston, Ltd., Highland Homes-San Antonio, Ltd., and Highland Homes-Austin, Ltd.

[13] Highland Homes paid class counsel's fee, set by the trial court at $1.8 million, over and above the $3,672,000 it paid the settlement class.

[14] *State v. Snell,* 950 S.W.2d 108 (Tex.App.-El Paso 1997, no writ).

[15] 417 S.W.3d 478, 488 (Tex.App.-El Paso 2012).

[16] *Id.* at 488.

[17] 56 Tex. Sup.Ct. J. 864, ___ S.W.3d ___ (Aug. 23, 2013). The plaintiffs did not participate in the proceedings in the court of appeals. The State argues that because Highland Homes has now disclaimed any interest in settlement funds, it lacks standing to complain of the court of appeals' modification of the settlement and the judgment predicated on it. But "[a] final judgment which is founded upon a settlement agreement reached by the parties must be in strict or literal compliance with that agreement". *Vickrey v. Am. Youth Camps, Inc.,* 532 S.W.2d 292, 292 (Tex. 1976) (per curiam) (citations omitted). It should go without saying that when a party agrees to one judgment and a materially different one is rendered, the party is personally aggrieved and has standing to complain. *See DaimlerChrysler Corp. v. Inman,* 252 S.W.3d 299, 304 (Tex. 2008) ("For standing, a plaintiff must be personally aggrieved...."). The *cy pres* award was a significant part of the settlement, and we cannot assume that Highland Homes would have reached the same agreement without it.

[18] TEX. PROP.CODE § 74.308.

[19] *Id.* § 74.309.

[20] *Id.* § 74.001(a); *accord id.* § 72.001(d) ("A holder of property presumed abandoned under this chapter is subject to the procedures of Chapter 74.").

[21] Chapter 75 "applies to mineral proceeds". *Id.* § 75.001(b). No mineral proceeds or depositories are involved in this case. Chapter 73 applies to "property held by financial institutions", the title of the chapter, and defines a "holder" as "a depository", *id.* § 73.001(a)(4)—that is, "a bank, savings and loan association, credit union, or other banking organization", *id.* § 73.002. The dissent argues that Section 73.102 in the chapter, defining when a check is presumed to be abandoned, nevertheless applies to all holders of checks. *Id.* § 73.102 ("A check is presumed to be abandoned on the latest of: (1) the third anniversary of the date the check was payable; (2) the third anniversary of the date the issuer or payor of the check last received documented communication from the payee of the check; or (3) the third anniversary of the date the check was issued if, according to the knowledge and records of the issuer or payor of the check, during that period, a claim to the check has not been asserted or an act of ownership by the payee has not been exercised."). We think the application of that section is limited along with the rest of the chapter. *See* TEX. GOV'T CODE § 311.023 ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the ... title (caption)...."). Moreover, even if Section 73.102 applied, it would not nullify the class representative's authority. Having the authority on behalf of the class to arrange for payments of claims by check in the first place, the class representative also had the authority to prescribe the terms under which the checks would be paid.

[22] TEX. PROP.CODE § 72.001(e)(1), (3).

[23] *Id.* § 72.101(a). In *Melton v. State,* 993 S.W.2d 95, 98 (Tex.1999), we stated that "`unknown,' as used in section 72.101(a) of the Property Code, does not mean completely unidentified."

[24] *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811-812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (footnote and citations omitted).

[25] State of Texas Brief on the Merits at 45.

[26] TEX. PROP.CODE § 72.101(a)(1).

[27] *See Connecticut Mut. Life Ins. Co. v. Moore,* 333 U.S. 541, 546, 68 S.Ct. 682, 92 L.Ed. 863 (1948) (insurer sought to retain life insurance benefits until proof of entitlement made); *State by Furman v. Jefferson Lake Sulphur Co.,* 36 N.J. 577, 178 A.2d 329, 333-339 (1962) (corporation sought to retain dividends until claimed); *Screen Actors Guild, Inc. v. Cory,* 91 Cal.App.3d 111, 154 Cal.Rptr. 77, 79-80 (1979) (union sought to retain unclaimed royalty checks); *People ex rel. Callahan v. Marshall Field & Co.,* 83 Ill.App.3d 811, 38 Ill. Dec. 944, 404 N.E.2d 368, 371-374 (1980) (merchant sought to retain gift cards).

[28] *State v. Snell,* 950 S.W.2d 108, 113 (Tex. App.-El Paso 1997, no writ).

[29] *All Plaintiffs v. All Defendants,* 645 F.3d 329, 331-332 (5th Cir. 2011).

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# Tab M

**72 S.W.3d 16 (2002)**

**Michael NORTHRUP and Homer Max Wiesen, Appellants,**

**v.**

**SOUTHWESTERN BELL TELEPHONE COMPANY, et al., Appellees.**

No. 13-00-377-CV.

**Court of Appeals of Texas, Corpus Christi.**

February 21, 2002.
Rehearings Overruled April 11, 2002.

18 *18 Homer Max Wiesen, Denton, Michael Northrup, Dallas, for appellants.

Bobby M. Rubarts, David J. Schenck, Kevin J. Franta, Robert E. Davis, Hughes & Luce, Jeffrey M. Tillotson, Lynn Tillotson & Pinker, John T. Cox, III, Russell J. DePalma, Dallas, David F. Brown, Austin, Jorge C. Rangel, Rangel Law Firm, Corpus Christi, Michael R. Cowen, Brownsville, for appellees.

Before Justices DORSEY, YAÑEZ, and CASTILLO.

# OPINION

DORSEY, Justice.

This case involves the settlement of a class action lawsuit brought against Southwestern Bell Telephone Company (SWBT) seeking recovery of allegedly improper charges contained on its customers' bills. The class plaintiffs and Southwestern Bell reached a tentative settlement prior to the trial court's certification of the class. The trial court then conditionally certified the class, and notice was sent to all class members of both the pendency of a potential class action and of its proposed settlement. Later, the trial court certified the class when it approved the settlement. Michael Northrup and Homer Max Wiesen, appellants, contend they are class members who did not opt out of the class, but rather, filed objections to the settlement prior to its approval by the trial court.

We first address Mr. Wiesen's claims. Southwestern Bell and the class representatives dispute that he is a class member as the class is defined. We agree. Although given the opportunity to support his contention that he is a member of the class by our opinion dated June 14, 2001, Mr. Wiesen has failed to show that he is a member of the class.[1] He
19 has failed to offer any explanation to support his bare *19 contention. Accordingly, we hold that he is not a class member according to the definition of this class, and is therefore without standing to prosecute this appeal.

We now address Mr. Northrup's appellate issues. First, Mr. Northrup contends, by several issues, that the notice was defective. Two rules govern this issue. Rule 42(c)(2) states:

> After the court has determined that a class action may be maintained it shall order the party claiming the class action to direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort.

See Tex.R. Civ. P. 42(c)(2). Rule 42(c)(3), (e) states, "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Tex.R. Civ. P. 42(c)(3), (e).

Northrup presented his objections, in writing, to the trial court, as he was required to do in order to preserve the issue for review. *See* Tex.R.App. P. 33.1 (requiring specific, timely objections made to the trial court as a prerequisite to review by the appellate court). While his arguments on appeal related to notice are phrased somewhat differently than his objections at trial, in both, he challenges two basic components of the notice: its form and its content. By form, we refer to the method by which notice was provided to the class members.

The trial court approved the form of the notices in its order granting preliminary approval of the class action settlement. The order stated that the defendant "shall send and publish the notices substantially in the form required by the Settlement Agreement." Further, the court found that the mailing and publishing of the notices in that manner "meets the requirements of Rule 42 of the Texas Rules of Civil Procedure and due process and constitutes the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons or entities entitled thereto."

Notice was sent to the class as outlined in the settlement agreement. Two different forms were provided to the class members: direct mail and publication in several Texas newspapers on both January 27 and January 30, 2000.[2] The direct mail notice was sent to current SWBT customers as an insert in their regular monthly telephone bills beginning on January 21, 2000, and continuing through February 19, 2000. Both forms of notice had been pre-approved by the court.

We do not find this form to be defective. The trial court found that it was the "best notice practicable" for advising the unnamed class members of the pendency of the class action. We see no abuse of discretion in that finding, nor do we believe that the form of notice violates principles of due process. Although there is no Texas case considering this method, the procedure of providing class members with notice by an insert in their regular monthly bill or regular correspondence has been used and accepted by courts across the country. *See, e.g., Mountain States Tel. & Tel. Co. v.*
20 *District Court,* 778 P.2d 667, 674 (Colo.1989) (affirming a trial court's order requiring the phone company to put *20 inserts providing notice of a class action into its phone bills); *County of Suffolk v. Long Island Lighting Co.,* 710 F.Supp. 1477, 1484 (E.D.N.Y.1989) (allowing notice to be sent to customers in monthly bill); *Bogosian v. Gulf Oil Corp.,* 561 F.2d 434, 456 (3d Cir.1977), *cert. denied,* 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978) (holding that notice sent out to current customers in regular monthly correspondence was fair, efficient, and fulfilled the purposes of the federal rule, however, holding that "former" customers must also receive individual notice if they were to be included in the class).[3]

Moreover, Northrup has done no more than assert that the notice provided in this case was not the best notice practicable. He has pointed to no evidence in the record that supports this contention. He does not dispute that he, personally, received actual notice. He did not appear at the hearing on the final settlement to complain about the form of notice. Without some evidence in the record to support his objections regarding the form of the notice, we cannot say the trial court abused its discretion in finding that mailing notice to all existing customers in combination with providing publication notice was not "the best notice practicable under the circumstances." We overrule Northrup's issue complaining the form of notice was insufficient. *See also Peters v. Blockbuster, Inc.,* 65 S.W.3d 295 (Tex.App.-Beaumont Dec. 4, 2001, no pet. h.) (analyzing the issue of whether a class action notice was sufficient, ultimately deciding that it was).

Northrup's complaints regarding the contents of the notice are similarly unsubstantiated. Both parties provided this Court with the actual notice that was provided to SWBT's customers and the notice that was published in the newspapers. We hold that it complies with Rule 42. It clearly advises each member of the class the nature of the suit; that the court will exclude any member from the class if so requested by a specified date; that the judgment, whether favorable or not, will include and bind all members who do not request exclusion by the specified date; and that any member who does not request exclusion may if he desires, enter an appearance through counsel. *See* Tex.R. Civ. P. 42(c)(2). That is all that is required. We overrule Northrup's issues related to the content of the notice.

Finally, Northrup has also challenged the notice's description of how attorneys' fees would be calculated. The Texas Supreme Court has held that "class action settlement notices must contain the maximum amount of attorney's fees sought by class counsel and specify the proposed method of calculating the award." *General Motors Corp. v. Bloyed,* 916 S.W.2d 949, 957 (Tex.1996). The notice in this case stated:

> Class Counsel intends to petition the Court for an award of fees and expenses of twenty percent (20%) of the total benefit provided to the Class. This amount equals two million dollars. In no event shall the award of fees and expenses be greater than this number. The Court will make the final determination with respect to attorney's fees and may award less than this request, but in no event shall the award of fees be greater than this number. SWBT has agreed that it will not oppose the fee request. Class Counsel will
> 21 be filing prior to the Settlement Hearing a detailed *21 legal briefing supporting its fee request.

We hold that this language satisfies *Bloyed.*

The notice at issue in *Bloyed* did not state any amount of attorneys' fees, but only stated that fees would be paid solely by the defendant and "would not reduce, directly or indirectly, any of the ... benefits to class members." *Id.* at 957. The Court held this to be insufficient, reasoning that:

> `[a]ttorneys' fees, even though they may not be technically deducted from the amount paid to the litigants, represent an integral part of the overall amount that the settling party is willing to pay, and as such, they have a direct effect on the net amount that will ultimately be paid to the litigants.'

*Id.* at 958 (citing to the *Bloyed* court of appeals' decision).

The notice in this case advised the class members of the maximum amount of attorneys' fees and advised them of how that number was calculated. We hold that it sufficiently complies with *Bloyed*'s requirements. *Id.* at 957-58. Accordingly, we overrule all Northrup's issues related to the sufficiency of the notice. The trial court did not abuse its discretion in applying Rule 42, nor did the notice at issue— either with regard to its form or its content—run afoul of due process dictates.

We now turn to Northrup's issues related to the fairness of the settlement. Rule 42(e) charges the trial court with the responsibility of determining that a settlement is fair, adequate, and reasonable. *Id.* at 955. "Approval of a class action settlement is within the sound discretion of the trial court and should not be reversed absent an abuse of that discretion." *Id.* In making this determination, the court should consider the following factors:

> (1) whether the settlement was negotiated at arms' length or was a product of fraud or collusion;
>
> (2) the complexity, expense, and likely duration of the litigation;
>
> (3) the stage of the proceedings, including the status of discovery;
>
> (4) the factual and legal obstacles that could prevent the plaintiffs from prevailing on the merits;
>
> (5) the possible range of recovery and the certainty of damages;
>
> (6) the respective opinions of the participants, including class counsel, class representatives, and the absent class members.

*Id.* The trial court must examine both procedural and substantive aspects of the settlement, including whether the terms of the settlement are fair, adequate and reasonable, and whether the settlement was the product of honest negotiations. *Id.*

The record from the fairness hearing conducted in this case indicates that the trial court based its approval of the settlement on consideration of the appropriate factors. Evidence was introduced showing that because of the way SWBT's records were kept, determining the exact amount of damages for each individual plaintiff would be time-consuming and excessively difficult. Moreover, the amount that would likely be owed to each plaintiff would have been very small—*i.e.,* around one dollar. Dean Sherman, from Tulane University School of Law, appeared at the hearing and offered his expert opinion testimony that the settlement was fair. Dean Sherman also offered testimony that the named representatives were adequate representatives of the class and that counsel was competent to perform its function. He
22 testified that the requirements of commonality, typicality and inadequacy of other *22 remedies besides class action were present in this case, supporting the trial court's certification decision. *See* Tex.R. Civ. P. 42(a), 42(b)(4). Dean Sherman also testified that the case contained issues of substantive law that would create significant hurdles for the class to overcome, therefore making settlement a more attractive option for the class.

Finally, Dean Sherman testified that the *cy pres* settlement used in this case was an appropriate method for disbursing settlement proceeds. The *cy pres* doctrine has been used to disburse proceeds of a class action lawsuit when the amounts owing to each individual plaintiff are exceedingly small and/or identification of the amount due each individual would be excessively difficult. *See generally* Susan Beth Farmer, *More Lessons Learned from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General,* 68 Ford. L.Rev. 361, 393 (1999). It allows a trial court to fashion an equitable remedy to distribute settlement funds in a class action when the costs of distribution outweigh the individual share to which each class member is entitled. *Id.* Distributing litigation proceeds

through *cy pres* satisfies class action goals by deterring similar conduct and disgorging the defendant of profits wrongfully obtained, and using those funds in a way that at least indirectly benefits the class members. *Id.* at 394. While we have not located a Texas case addressing the efficacy of *cy pres* distribution of a class action settlement, these types of settlement arrangement have been found to be fair by other courts around the country. *See, e.g., In re Motorsports Merch. Antitrust Lit.*, 160 F.Supp.2d 1392, 1394 (N.D.Ga.2001) (distributing unclaimed remainder funds to charitable purposes according to *cy pres* doctrine); *Jones v. National Distillers,* 56 F.Supp.2d 355, 358 (S.D.N.Y.1999) (authorizing that unclaimed funds in securities litigation case be paid to legal aid charity); *New York v. Reebok Int'l Ltd.*, 903 F.Supp. 532, 536-37 (S.D.N.Y.1995) (holding settlement fair that distributed to charitable purposes eight million dollar recovery for overcharging of athletic shoes, where each individual claims ranged from $1-$4 and cost of administering individual recovery would be around $2.50 per claimant); *Superior Beverage Co. v. Owens-Illinois, Inc.*, 827 F.Supp. 477, 478-79 (N.D.Ill. 1993) (settlement in anti-trust case distributed unclaimed remainder funds according to *cy pres* doctrine to several different charities); *Pray v. Lockheed Aircraft Corp.*, 644 F.Supp. 1289, 1303 (D.D.C.1986) (allowing punitive damage portion of settlement fund case be given to charitable cause in case involving recovery for claims stemming from 1975 airplane crash in Saigon). Because there is no authority disallowing such settlements, we cannot say the trial court abused its discretion in holding that the *cy pres* distribution was fair. We overrule Northrup's points related to the fairness of the settlement.

Accordingly, having overruled each of Northrup's issues, we affirm the trial court's order approving the class action settlement.[4]

[1] *See Northrup v. Southwestern Bell Telephone Co.*, 72 S.W.3d 1, 15 n. 22 (Tex.App.-Corpus Christi 2001, no pet.). That opinion was limited to the question of whether Northrup and Wiesen lacked standing to proceed as appellants because they failed to file formal interventions in the class action prior to the trial court's approval of the settlement. *Id.* at 14-15. We held that their failure to file formal interventions did not preclude their ability to appeal. *Id.*

We note, though, that one of the critical rationales for our holding that Wiesen and Northrup have standing to appeal the class settlement without having formally intervened was the fact that, as the law existed at the time we handed down our opinion, putative class members in settlement class cases had no ability to appeal the certification except after final judgment. *Id.* at 10-15 (citing *McAllen Medical Center, Inc. v. Cortez*, 17 S.W.3d 305, 310 (Tex.App.-Corpus Christi 2000)) *reversed by* 44 Tex. Sup.Ct. J. 1094, 2001 WL 987350, at *5 (Aug. 30, 2001). Recently, the Texas Supreme Court spoke to this issue and held that class members in settlement class cases may appeal the *preliminary* certification of the class. *See Cortez,* 44 Tex. Sup.Ct. J. 1094, 66 S.W.3d at 234.

[2] Notice was published in the Dallas Morning News, the Houston Chronicle, the Austin American-Statesman, the Lubbock Avalanche Journal, the El Paso Times, the Corpus Christi Caller Times, the Brownsville Herald, and the San Antonio Express News, one time per week for two consecutive weeks.

[3] Federal decisions and authorities interpreting current federal class action requirements are persuasive authority in Texas. *Southwestern Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 433 (Tex.2000).

[4] We note that although Northrup has raised issues related to the trial court's certification of the class in his briefing, he did not make any objection regarding the certification to the trial court prior to making such arguments to this Court. Accordingly, he has waived appellate review of issues regarding certification. *See* Tex.R.App. P. 33.1.

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# Tab N

The Supreme Court of Texas

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DIRECTOR OF PUBLIC AFFAIRS
AMY STARNES

July 26, 2023

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

Re: Referral of Rules Issues

Dear Chip:

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

**Small Estate Affidavit Kit and Muniment of Title Kit.** In response to SB 512, passed by the 84th Legislature, the Court established the Probate Forms Task Force to draft forms for use by individuals representing themselves in certain probate matters. On July 6, 2023, the Task Force submitted a report and a proposed kit of forms for (1) a small estate affidavit proceeding and (2) the probate of a will as a muniment of title. The report and kits are attached to this letter. The Committee should review and make recommendations.

**Permissive Appeals.** In the attached emails, Chief Justices Christopher and Worthen suggest changes to the procedures for permissive appeals. The Committee should review and draft any recommended amendments.

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

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

# Tab O

**Supreme Court of Texas Probate Forms Task Force**
P.O. Box 12487 ● Austin, TX 78711-2487 ● Tel: 512-427-1855 ● Fax: 512-427-4160

*Chair*
Hon. Polly Jackson Spencer

*Members*
Mr. Carlos Aguiñaga

Ms. Barbara Anderson

Ms. Julie Balovich

Mr. Craig Hopper

Ms. Cathy Horvath

Mr. Jerry Jones

Hon. Steve M. King

Ms. Trish McAllister

Ms. Christy Nisbett

Ms. Arielle Prangner

*Supreme Court of Texas Liaison*
Hon. Eva M. Guzman

*Supreme Court of Texas Staff Representative*
Osler McCarthy

June 27, 2023

Justice Brett Busby
The Supreme Court of Texas
Supreme Court Building
201 West 14th Street, Room 104
Austin, Texas 78701

RE: **Report to the Supreme Court of Texas, Misc. Docket No. 16-9003**

Dear Justice Busby and Justices of the Supreme Court of Texas:

The members of this task force appointed by the Supreme Court on January 21, 2016, are Judge Polly Jackson Spencer as chair, Carlos Aguinaga, Barbara McComas Anderson, Julie Balovich, Craig Hopper, Cathy Horvath, Jerry Frank Jones, Judge Steve M. King, Trish McAllister, Christy Nisbett, and Arielle M. Prangner. Of our original group, Christy Nisbett retired. Julie Balovich and Cathy Horvath both took different jobs but remained actively involved in the second phase of our assignment, the preparation of Muniment of Title Forms and Small Estate Affidavit Forms. We have continued to meet almost monthly either in person or by Zoom to work on this project, although the pandemic did interfere with our work as it did with basically everyone else's work. We also experienced quite a bit of turnover in the support people who have worked with us with a resulting loss of some of our work.

The process continues to be interesting, challenging, and educational but also much more difficult and time-consuming than any of us anticipated. Our committee consists of very detail-oriented people from different backgrounds – estate planning attorneys, Legal Aid attorneys, judges, and clerks – all of whom see problems relating to the use of these forms from different perspectives. We have tried to accommodate the concerns raised by each of us in drafting this second set of forms while keeping in mind our mandate to write forms in "plain language" for people to complete without the assistance of an attorney.

Preparation of the Muniment of Title Forms was perhaps the easiest of our assignments. We developed an application which we believe meets the statutory requirements and several affidavits that might be required at the time of a hearing with instructions regarding when those affidavits would be used. In the Instructions, we tried to explain and guide people to places where they could make determinations about the types of wills they might be trying to have probated, such as handwritten, witnessed, and/or self-proved wills. We also tried

to point people to some pitfalls they might encounter in doing this without an attorney, such as some other need for administration (a reason that probate as a muniment might not be appropriate), the fact that a MERP claim might exist and constitute a debt of the estate, and certain local rules which might have different requirements from those of other courts.

The Small Estate Affidavit forms were quite a bit more challenging. Trying to explain to lay people the differences between separate and community property as well as the nuances of Texas intestacy laws regarding the disposition of such property when there are children from more than one relationship, children who have been adopted by another, children for whom parental rights have been terminated, inheritance rights for half-siblings as opposed to full blood siblings and the potential overlay of homestead rights along with exempt property and associated rights is very difficult. Rather early into the development of these forms, we simply decided that the adopted child and half-sibling issues along with the concept of dividing property into paternal and maternal moieties was beyond anything that should be addressed by *pro se* people and referred them to an attorney. We initially developed some demonstrative charts as visuals for division of intestate property, but the charts became so complicated that even we could not understand them. They were discarded and simpler ones were developed by two members of the committee – Julie Balovich and Cathy Horvath. In our Instructions, we tried to include examples of how to complete the forms in a variety of family situations with different types of property, both separate and community and exempt and non-exempt.

We are pleased to present these forms to the Court as a product into which much time, thought and effort has gone. We recognize that the forms will be reviewed and likely revised by the Court. We also recognize that no form will be perfect and that they will probably be revised from time to time as the public uses them and provides information about their ease of use and general value. I speak for all of us when I say we would like to discuss any revisions the Court makes. I know I speak for all of us when I say that it has been an honor for us to be asked to be a part of this important work and this task force. We are now working on the final part of our assignment – development of TODD forms - and hope to provide those to the Court within the next few months.

Very truly yours,

Hon. Polly Jackson Spencer
*Chair*

# Tab P

# INSTRUCTIONS FOR
# SMALL ESTATE AFFIDAVIT

Included with these Instructions are the following:

1. Frequently Asked Questions (FAQs) for Small Estate Affidavit
2. Small Estate Affidavit
3. Order Approving Small Estate Affidavit
4. Asset Distribution Charts – Married
5. Asset Distribution Charts – Not Married

**Read these instructions carefully.**

***THESE INSTRUCTIONS DO NOT GIVE LEGAL ADVICE AND ARE NOT A SUBSTITUTE FOR THE ADVICE OF A LAWYER.***

WHEN TO USE THE SMALL ESTATE AFFIDAVIT:

The Small Estate Affidavit can be used if ALL these statements are true:

- ☐ The deceased person (Decedent) died **without a Will**. If there is a Will, this Small Estate Affidavit ("the Affidavit") **cannot** be used.
- ☐ Decedent died at least thirty (30) days ago.
- ☐ At least one of the following survived Decedent (meaning they lived more than 120 hours after Decedent died):
  - A spouse (see "Married" definition in "Helpful Words to Know")
  - A child or children, or other descendants (grandchildren, great-grandchildren, etc.)
  - A parent or parents
  - A sibling or siblings, or their descendants (nieces, nephews)
- ☐ The total value of Decedent's assets (excluding homestead and exempt personal property) is not more than $75,000.00.
  - Exempt personal property is listed in § 42.002 of the Texas Property Code. It only remains exempt if Decedent had a surviving spouse, minor children, unmarried adult children living with Decedent's family, or incapacitated adult children.
  - Homestead retains its status as a Homestead only if Decedent had a surviving spouse or minor children.
  - For more information see Texas Estates Code § 353.051 and Texas Property Code Chapters 41 and 42.
- ☐ The total value of Decedent's assets is more than the debts.

- The values of an exempt homestead and exempt personal property are not included in the total value of assets; and
- The amount of a mortgage on an exempt homestead and any debt secured by exempt property are not included in the total value of debts.

☐ No application for the appointment of a personal representative is pending with a court nor has one been granted by a court. (If you are not sure, you can research court records online or go to the County Clerk's office in the county where Decedent resided or where Decedent's principal estate was located. Such applications may be titled "Application for Letters of Administration" or "Application for Probate of Will and Issuance of Letters Testamentary.")

<u>These instructions DO NOT explain what to do if:</u>

- One or more of Decedent's children were born after Decedent died.
- One or more of Decedent's heirs survived Decedent but have since died.
- Decedent had no spouse or children but had half-siblings.
- Decedent lost parental rights of a child or gave up a child for adoption.
- Decedent had no surviving spouse, children or their descendants, parents, or siblings or their descendants.

If any of these are true, contact an attorney.

**Helpful Words to Know**

| | |
|---|---|
| Assets | Money and property that belonged to Decedent at the time of death, even if there are still outstanding debts against the property. |
| Children | Any person born to or adopted by Decedent, including any child of Decedent adopted by another person. |
| Community Property | Community property includes all real and personal property acquired during the marriage, except for separate property, which is defined below. Community Property is owned one-half by Decedent's estate and one-half by Decedent's surviving spouse. All property of a married decedent is considered to be community property unless you can show that it is separate property. Even if property is only in one spouse's name, it may still be community property. See Texas Family Code § 3.002 |
| Descendant | For purposes of this Affidavit, the descendants of a person are their children, their grandchildren, their great-grandchildren, and so on. |

| | |
|---|---|
| Disinterested Witness | A person who is familiar with Decedent's family history, marital status at death, children and grandchildren (including those not born of any marriage), and other family members, and who does not inherit property from Decedent.<br><br>Each disinterested witness who signs the Affidavit is liable under Texas Estates Code § 205.007(c) for any damage or loss to any person that arises from a payment, delivery, transfer, or issuance made in reliance on the Affidavit. |
| Estate Assets | For purposes of this Affidavit, the term "Estate Assets" does not include any asset that passes directly to a named person or persons who survived Decedent by, for example:<br>• an account, vehicle, or deed that has a right of survivorship or transfer on death provision<br>• a payable on death account<br>• a life insurance policy<br>• an annuity or retirement account<br><br>If a person named to receive any of these types of property did NOT survive Decedent, and there is no other person named as alternate beneficiary who survived Decedent, then the affected property may need to be included in the list of estate assets in Section 8 of the Small Estate Affidavit form. |
| Exempt Property | Exempt property includes the homestead, clothing, household goods and furnishings, a car for each family member with a driver's license, two guns, jewelry, sporting equipment, farming or ranching equipment and tools used in a trade or profession, certain farm animals and their food, and household pets.<br><br>Exempt personal property is listed in § 42.002 of the Texas Property Code. It only remains exempt if Decedent had a surviving spouse, minor children, unmarried adult children living with Decedent's family, or incapacitated adult children.<br><br>Homestead retains its status as a Homestead only if Decedent had a surviving spouse or minor children.<br><br>For more information see Texas Estates Code §353.051 and Texas Property Code Chapters 41 and 42. |
| Half-sibling | A sister or brother of Decedent who has only one parent in common with Decedent. |

| | |
|---|---|
| Heir | For purposes of the Affidavit, an heir is a person entitled to a share of Decedent's estate. Depending on who survives Decedent, the heirs may be Decedent's spouse, children, grandchildren, great-grandchildren (and so on), parents, siblings, nieces and nephews, and great-nieces and great-nephews (and so on).<br><br>A person who died before Decedent or less than 120 hours after Decedent is NOT an heir. *See definition of "SURVIVE," and the Asset Distribution Charts.* |
| Homestead | For a home to qualify as a homestead under the Affidavit:<br>• Decedent must have owned and used the home as Decedent's main residence AND<br>• Decedent must have a surviving spouse or minor child. (The spouse or child did not have to live in the home for it to be a homestead.) |
| Legally authorized representative | The natural guardian (parents) or next of kin of any minor heir or the guardian of any other incapacitated heir. |
| Married | Decedent was married if Decedent and Decedent's spouse had a valid marriage license or declaration of informal marriage from Texas, another state, or another country and were not divorced from each other or their marriage otherwise dissolved at the time of Decedent's death.<br><br>Decedent was married even if Decedent and Decedent's spouse were separated at the time of Decedent's death.<br><br>Decedent may also have been married under common law if, at the time the marriage was created, Decedent and Decedent's spouse:<br>• were not already married, informally or formally, to anyone else<br>• were at least 18 years of age<br>• agreed to be married<br>• lived in Texas as a married couple after agreeing to be married **AND**<br>• represented to others that they were married<br><br>If there is a question about whether Decedent's marriage was valid, consult an attorney. |
| Notary Public | A notary public ("notary") is a person authorized by law to swear that the people signing the Affidavit are who they say they are. A notary will sign and seal the Affidavit. |

| | |
|---|---|
| Personal Property | Personal property includes, but is not limited to, cash and bank accounts, stocks and bonds, clothing, household furnishings, vehicles, and jewelry. |
| Real property | Real property includes land and improvements, such as a house or mobile home designated as real property. It also includes oil, gas, and other mineral rights. |
| Secured and Unsecured Debts | A debt is "secured" when the creditor may take specific property to pay the debt. Examples of secured debts are a mortgage on a house or loan on a car. The mortgage is secured by the house; the car loan is secured by the car. The creditor may foreclose on the house or repossess the car to recover the debts if they are not paid. That is what makes them "secured" debts.<br><br>Unsecured debts are all other debts for which no collateral or security was provided. Examples of unsecured debts are credit card balances or unpaid utility or medical bills. |
| Separate Property | Separate property includes personal or real property owned by Decedent before a marriage or received during marriage by gift or inheritance. It also includes certain types of damages awarded during marriage from a personal injury lawsuit. All property of a married decedent is considered to be community property unless you can show that it is separate property. See Texas Family Code § 3.001. |
| Share | The part of the estate an heir has a right to receive. |
| Sibling | A sibling is a sister or brother of Decedent who has BOTH parents in common with Decedent. |
| Survive | For purposes of the Small Estate Affidavit form, to "survive" Decedent a person must live for at least 120 hours after Decedent died. **A person must survive Decedent in order to be an heir to the estate.** |
| Unmarried | If Decedent was single, widowed, or divorced at death, Decedent was unmarried.<br><br>If at death Decedent did not have a valid marriage license or declaration of informal marriage or did not meet the requirements for a common law marriage, Decedent was unmarried. |

**Instructions for Filling Out the Small Estate Affidavit**:

Some of the sections of the Affidavit will not need information added.

Top Part of the Form/Heading:

- *Case Number* – Leave this blank. The County Clerk's office will fill in the Case Number when you file this form.
- *Estate of* – Write Decedent's full name
- *In* _____ *Court* – Check the box next to the court type. If you are not sure, ask the County Clerk.
- _____ *County, Texas* – Write in the name of the county where you are filing the Affidavit.

Completing the Sections of the Affidavit:

1. Fill in the blanks with the information needed.
2. The Affidavit cannot be sworn to and signed until at least 30 days have passed since Decedent's death. You do not need to add any information here, but this must be a true statement when the Affidavit is signed by all the heirs and disinterested witnesses.
3. Write the names of the county and state where Decedent was a resident at the time of Decedent's death. If Decedent resided outside of Texas, check the box and explain why you are filing in this county.

   If Decedent LIVED in Texas:

   File the Affidavit with the County Clerk of the county where Decedent lived. This is the county where Decedent had a home, even if they were living elsewhere at death, like in a nursing home or with a child.

   If Decedent DID NOT LIVE in Texas, the county where the Affidavit should be filed is based on where Decedent died:

   - If Decedent died in Texas, file the Affidavit with the County Clerk of:
     - the County where Decedent's principal estate was located; or
     - the County where Decedent died.
   - If Decedent died outside of Texas, file the Affidavit with the County Clerk of:
     - the County where Decedent's next of kin live; or
     - if there is no next of kin in Texas, the County where Decedent's principal estate is located.
4. You cannot file the Affidavit if an application for appointment of a personal representative is pending or has been granted by the court. If you are not sure, you can search the court records online or go to the County Clerk's office in the county where Decedent resided or where Decedent's principal estate was located. Such applications may be titled "Application for Letters of Administration" or "Application for Probate of Will and Issuance of Letters Testamentary."

5. You do not need to add any information here, but this must be a true statement when the Affidavit is signed by all the heirs and disinterested witnesses. In Section 8 of the Affidavit form, you will list ALL of Decedent's assets, and indicate whether an asset is exempt property. Decedent's assets (not including the homestead and other exempt property) must be worth $75,000 or less to use the Affidavit. You will need to follow Section 8 of these instructions to find the total value of the non-exempt assets. If the total is more than $75,000, you cannot use the Affidavit.

6. You do not need to add any information here, but this must be a true statement when the Affidavit is signed by all the heirs and disinterested witnesses. In section 9 of the Affidavit form, you will list ALL of Decedent's debts and indicate whether a debt is secured by exempt property. Decedent MUST have more non-exempt assets than debts not secured by exempt property to use the Affidavit. You will need to follow Section 9 of these instructions to find the total amount of debts not secured by exempt property. If total non-exempt debts are more than the total non-exempt assets, you cannot use the Affidavit.

7. Medicaid Estate Recovery Program ("MERP"):

   Check the applicable box in section 7 of the form.

   Claims for Medicaid recovery in Texas are debts of the estate. If Decedent applied for and received Medicaid benefits (or similar needs-based government benefits subject to repayment) on or after March 1, 2005, then the Medicaid Estate Recovery Program ("MERP") may have a claim against the estate. **NOTE: This does not refer to *Medicare* benefits.**

   If such benefits were received, a court may require a certification from the Health and Human Services Commission that administers the Medicaid program in Texas. For more information and to obtain the certification, visit the website of the Texas Health and Human Services Commission: https://www.hhs.texas.gov and search for "MERP Certification Form."

   Find out if the court requires you to attach certification that Decedent's estate is not subject to a MERP Claim. You may be able to learn this by asking the court staff.

8. Estate Assets

   This is the section of the Affidavit form where you will list all of Decedent's assets at the time of death. There are two tables in this section – one for Separate Property Assets (four columns) and one for Community Property Assets (five columns).

   If Decedent was NOT married at death, there will be no community property; list all assets in the "Separate Property Assets" table and mark through or write "N/A" across the Community Property Assets table.

   A married Decedent can have community property *AND* separate property. If Decedent WAS married at death, generally each asset will be listed in the "Community Property Assets" table OR the "Separate Property Assets" table, but not both.

***Separate Property Assets***

Separate Property assets include all personal and real property owned by Decedent before a marriage or received during marriage by gift or inheritance. It also includes certain types of damages awarded during marriage from a personal injury lawsuit. All property of a married Decedent is considered community property unless you can show that it is separate property. See Texas Family Code § 3.001.

***Community Property Assets***

Community Property assets of a married Decedent include all real and personal property acquired during the marriage, except for separate property. Community property assets are owned one-half by Decedent's estate and one-half by Decedent's surviving spouse. All property of a married Decedent is considered community property unless you can show that it is separate property. Even if property is only in one spouse's name, it may still be community property. See Texas Family Code § 3.002.

***Completing the Estate Assets Tables***

**Column 1: Description of Assets (Both Separate & Community Property Tables)**

Write a description of each asset in Decedent's estate. Provide enough detail to identify each asset and the percentage owned by Decedent. Example: bank name, account type & last three digits of the account number; description of the car (make & model) plus the vehicle identification number (VIN); life insurance company name, address, policy number; and legal description of real property (may be found on property deed or property tax statement).

Do not list any asset that passes directly to a named person or persons who survived Decedent, for example:

- an account, vehicle, or deed that has a right of survivorship or transfer on death provision
- a payable on death account
- a life insurance policy
- an annuity or retirement account

If a person named to receive any of these types of property did NOT survive Decedent, and there is no other person named as alternate beneficiary who survived Decedent, then that property may need to be included here.

You must include any asset that passes directly to the estate, for example: if the estate is named as a beneficiary, if there are no named beneficiaries, or if none of the named beneficiaries is alive.

If Decedent was married at death and any assets are listed as "Separate Property," explain why the asset is Separate Property, for example "inherited from parent," "owned before marriage," etc. See Texas Family Code § 3.001-3.003.

**Column 2: Acc't #**

Write the last three digits of the account number for the asset, if applicable.

**Column 3: Exempt (yes/no)**

Write "Yes" if the asset is exempt property; write "No" if it is not.

Exempt property includes the homestead, clothing, household goods and furnishings, a car for each family member with a driver's license, two guns, jewelry, sporting equipment, farming or ranching equipment and tools used in a trade or profession, certain farm animals and their food, and household pets. See Texas Property Code Chapters 41 and 42.

**Column 4: Value (100%)**

Write the entire value of the asset on the date of the Affidavit.

The Affidavit cannot be approved with an asset of "unknown" value.

**Column 5: Value (50%)** (Community Property Assets Table ONLY)

Write 50% (half) of the entire value of the asset on the date of the Affidavit. The amount entered in this column is the estate's share of the asset; this is the value that should be included in the total and when calculating the exempt property total.

The Affidavit cannot be approved with an asset of "unknown" value.

*EXAMPLES OF HOW TO COMPLETE THE ESTATE ASSETS TABLES:*

**SEPARATE PROPERTY ASSETS**

| **Description of Separate Property Assets** ***For married Decedent, explain why it is Separate Property*** | **Acc't # (last 3 digits)** | **Exempt (yes/no)** | **Value (100%)** |
|---|---|---|---|
| *1964 Ford Fairlane, VIN 9999999 (Inherited from father)* | *N/A* | *No* | *$1,200.00* |
| *1984 Fender Stratocaster electric guitar (purchased before marriage)* | *N/A* | *No* | *$850.00* |

**TOTAL VALUE: $ *2,050.00***

In the example above, none of the assets listed are exempt (*"No"*), so the total *non-exempt* SEPARATE property is $2,050.00.

**COMMUNITY PROPERTY ASSETS**

| Description of Community Property Assets | Acc't # (last 3 digits) | Exempt (yes/no) | Full Value (100%) | Estate Value (50%) |
|---|---|---|---|---|
| *Wells Fargo Savings Account* | *123* | *No* | *$4,000.00* | *$2,000.00* |
| *2014 Chevy Tahoe, VIN 8888888888888* | *N/A* | *Yes* | *$12,000.00* | *$6,000.00* |
| *Personal and household goods, clothing, tools, furnishings* | *N/A* | *Yes* | *$2,000.00* | *$1,000.00* |
| *Homestead: 123 County Road 10, Smithville, Texas; Legal: Jones Survey, Unit #5, Block 3, Lot 9, Smith County, Texas* | *N/A* | *Yes* | *$125,000.00* | *$62,500.00* |

**TOTAL NON-EXEMPT ESTATE VALUE: $ *2,000.00***

In the example above, there are three exempt assets ("*Yes*") totaling $69,500.00 listed in the Community Property Assets table and one non-exempt asset (*"No"*) totaling $2,000.00, so the total *non-exempt* COMMUNITY property is $2,000.00.

Add together the total non-exempt Separate Property and the total non-exempt Community Property to reach the total Estate Value of non-exempt assets:

**TOTAL NON-EXEMPT SEPARATE PROPERTY:** **$2,050.00**

**TOTAL NON-EXEMPT COMMUNITY PROPERTY:** **+ 2,000.00**

**TOTAL NON-EXEMPT ASSETS:** **$4,050.00**

If the total estate value of non-exempt assets is more than $75,000, you will not be able to use the Small Estate Affidavit (see Section 5).

9. Debts

If none, write "none."

If funeral expenses are to be paid or reimbursed from estate assets, include them in this table.

**Column 1: Description of Debts**

List each debt on which money is still owed by Decedent's estate on the date of the Affidavit. Provide enough detail to identify each debt.

**Column 2: Acc't #**

Write the last three numbers of the account number associated with the debt, if any.

**Column 3: Is the debt secured by exempt property? (yes/no)**

Write "Yes" if the debt is secured by exempt property; write "No" if it is not.

A debt is "secured" when the creditor may take specific property to pay the debt; examples include, but are not limited to, a mortgage on a house or loan on a car. The mortgage is secured by the house; the car loan is secured by the car. The creditor may foreclose or repossess those assets to recover the debts if they are not paid – that is what makes them "secured" debts.

Unsecured debts are all other debts for which no collateral or security was provided; examples include, but are not limited to, credit card balances or unpaid utility or medical bills.

Exempt property includes the homestead, clothing, household goods and furnishings, a car for each family member with a driver's license, two guns, jewelry, sporting equipment, farming or ranching equipment and tools used in a trade or profession, certain farm animals and their food, and household pets. See "Helpful Words to Know" (above) and Texas Property Code §§ 41 and 42.

**Column 4: Balance Due**

Write how much is still owed on the debt on the date of the Affidavit.

After completing the table in "Section 9: Debts" and entering the total at the bottom, subtract the value of any debt that is secured by exempt property – the result will be the total amount of debts not secured by exempt property. If the total is more than the total value of non-exempt assets listed in Section 8, you will not be able to use the Small Estate Affidavit (see Section 6).

*EXAMPLE OF HOW TO COMPLETE THE DEBTS TABLE:*

**DEBTS**

| Description of Debts | Acc't # (last 3 digits) | Is the debt secured by exempt property? (yes/no) | Balance Due |
|---|---|---|---|
| *Capital One Credit Card* | *431* | *No* | *$300.00* |
| *Wells Fargo Bank, auto loan, 2014 Chevy Tahoe, VIN 8888888888888* | *987* | *Yes* | *$1,200.00* |
| *First Capital Mortgage, mortgage balance on 123 County Road 10, Smithville, Texas* | *654* | *Yes* | *$58,200.00* |

TOTAL $ *59,700.00*

In the example table above, there are two debts totaling $59,400.00 that are secured by exempt property (*"Yes"*), and one debt in the amount of $300.00 that is NOT secured by exempt property (*"No"*). THE TOTAL AMOUNT OF DEBTS NOT SECURED BY EXEMPT PROPERTY is $300.00, as shown above. This amount must be LESS THAN the total value of NON-EXEMPT ASSETS - $4,050.00 in the example shown in Section 8, "Estate Assets," above.

**TOTAL DEBTS NOT SECURED BY EXEMPT PROPERTY: $300.00**

NON-EXEMPT ASSETS ($4,050.00) are greater than DEBTS NOT SECURED BY EXEMPT PROPERTY ($300.00), so the Small Estate Affidavit may be used based in this example.

| | |
|---|---|
| **TOTAL NON-EXEMPT ASSETS:** | **$4,050.00** |
| **TOTAL DEBTS NOT SECURED BY EXEMPT PROPERTY:** | **- $300.00** |
| **TOTAL ESTATE VALUE (MUST BE $75,000.00 OR LESS):** | **$3,750.00** |

10. Family History

This section has 5 parts. You MUST completely answer sections A ("Marriage") and B ("Children").

If Decedent has a surviving spouse **and/or** children, you do not need to complete Sections C ("Parents") and D ("Siblings"), and you can skip to Section 11 ("Asset Distribution Table").

If Decedent has a surviving spouse but no children or other descendants, you WILL have to complete Section C ("Parents") and you may have to complete Section D ("Siblings").

You will list the names of Decedent's heirs and indicate whether they are under 18 years old. Provide the name of the other parent of each of Decedent's children.

If any of Decedent's heirs died **after** Decedent died, contact an attorney.

A. Marriage

If Decedent was not married when they died, check the first box and proceed to Section B: Children. If Decedent was married, check the second box and write the name of Decedent's spouse and the date they were married.

B. Children

If Decedent DID NOT have or adopt any children, mark the first checkbox, and go to Section C ("Parents").

If Decedent DID have or adopt any children, mark the second checkbox. You will need to know the names of all of Decedent's children, the name of their other parent, whether they are under 18, the date of death of any child who did not survive Decedent, and the names and ages of the children or grandchildren of any deceased child.

In the first boxed section, list ALL of Decedent's children, whether living or deceased, and the name of each child's other parent. If the child is under 18 on the date of the Affidavit, check the "under 18" box next to their name. If Decedent had children who were given up for adoption or for whom Decedent's parental rights were terminated, contact an attorney.

In the second boxed section, mark the first checkbox if all Decedent's children were alive when Decedent died. Mark the second checkbox if any of Decedent's children died before Decedent. If so, list the deceased child's name, date of death, and the names of any children of that child (Decedent's grandchildren), whether living or deceased.

*Example*: Decedent had three children (Child A, Child B, and Child C). List their names in the first boxed section. Child A died two years before Decedent and had one child (Grandchild X). In the second boxed section, write Child A's name, the date Child A died, and Grandchild X's name.

If Grandchild X did not survive Decedent, you would need to use a separate sheet of paper to list Grandchild X's children.

If any of Decedent's children, grandchildren, or great-grandchildren survived Decedent, skip Section C: Parents and Section D: Siblings, and go to "Section 11. Asset Distribution".

C. Parents

List the names of Decedent's parents. You will need to indicate if one or both of Decedent's parents are living or deceased, and, if deceased, their date(s) of death, if known. Mark the checkbox next to the statement that is true and fill in the blanks.

If both of Decedent's parents survived Decedent, skip Section D (Siblings) and go to Section 11 ("Asset Distribution").

D. Siblings

If Decedent DID NOT have any siblings, write "none" across the first boxed section and proceed to Section 11 ("Asset Distribution").

If Decedent DID have siblings, list ALL of Decedent's siblings, whether living or deceased in the first boxed section. If any sibling is under 18 on the date of the Affidavit, check the "under 18" box next to their name. Write the names of the parents of each sibling on the lines provided.

If any of Decedent's siblings did **not** survive Decedent, write the deceased sibling's name, date of death, and the names of their children (Decedent's nephews and/or nieces), if any, in the second boxed section.

E. Other:

If Decedent did not have a surviving spouse, child or other descendant, parent, sibling, niece, nephew, or any other descendant of a sibling, you need to contact an attorney. The Small Estate Affidavit may not be appropriate to use in this situation.

11. Asset Distribution Table

In this section, you will list each heir's name and current address. You will write how they are related to Decedent (for example: spouse, child, parent, etc.). Use the attached "Asset Distribution Charts" to determine each heir's share of Decedent's estate. *See "*Helpful Words to Know" for definitions of any words you do not understand.

If Decedent DID have a surviving spouse, indicate in the appropriate boxes the heirs' shares of Separate and Community Property using the chart included as Item #4 in the Instructions package, "**Asset Distribution Chart – Married**" to complete this section of the Affidavit.

If Decedent DID NOT have a surviving spouse, indicate in the appropriate boxes the heirs' shares of Separate Property using the chart included as Item #5 in the Instructions package, "**Asset Distribution Chart – NOT Married**" to complete this section of the Affidavit. DO NOT enter anything in the boxes under column labeled "Share of Married Decedent's Community Property".

*Below are examples provided for instructional purposes only; you will need to use the attached Asset Distribution Charts to find the correct distribution for the Affidavit you are completing. The fractional shares shown in the example charts are based on the example given; shares are determined by the number of heirs who have an interest in that property. See the Asset Distribution Charts for more detailed explanation.*

*(This section intentionally left blank.)*

## EXAMPLES OF HOW TO COMPLETE THE ASSET DISTRIBUTION TABLE:

***EXAMPLE 1*** *(See "Asset Distribution Chart - MARRIED", Chart I.a.)**:***

- Decedent has surviving spouse
- Decedent has 2 surviving children whose other parent is the surviving spouse

For each Heir, list:

| Name & Address | Relationship to Decedent | Share of Married Decedent's Community Property | Share of Separate Personal Property | Share of Separate Real Property |
|---|---|---|---|---|
| JANE DOE, 123 County Road 10, Smithville, Texas 77777 | Surviving Spouse | 100% | 1/3 | 1/3 life estate |
| MARK DOE, 987 County Road 10, Smithville, Texas 77777 | Son | None | 1/3 | 1/2 subject to 1/3 life estate |
| SUSAN DOE, 345 Park Lane Avenue, Dallas, Texas 70000 | Daughter | None | 1/3 | 1/2 subject to 1/3 life estate |

***EXAMPLE 2*** *(See "Asset Distribution Charts – NOT MARRIED", Chart I.a.):*

- Decedent not married at death
- Decedent had 2 children
    - One child died before Decedent leaving 2 surviving children who are both Decedent's grandchildren

For each Heir, list:

| Name & Address | Relationship to Decedent | Share of Married Decedent's Community Property | Share of Separate <u>Personal</u> Property | Share of Separate <u>Real</u> Property |
|---|---|---|---|---|
| VIET THANH NGUYEN, 987 County Road 10, Smithville, Texas 77777 | Son | N/A | 1/2 | 1/2 |
| LAN DUONG, 1212 Fair Avenue, Dallas, Texas 70000 | Granddaughter | N/A | 1/4 | 1/4 |
| LINH DINH, 111 Sunflower Drive, Austin, Texas 75555 | Grandson | N/A | 1/4 | 1/4 |

***EXAMPLE 3*** *(See "Asset Distribution Charts - MARRIED", Chart I.b.):*

- Decedent has a surviving spouse
- Decedent had 3 children
    - One child is from a previous marriage (other parent is not Decedent's surviving spouse)
    - One child died before Decedent leaving 2 children who are both Decedent's grandchildren

For each Heir, list:

| Name & Address | Relationship to Decedent | Share of Married Decedent's Community Property | Share of Separate <u>Personal</u> Property | Share of Separate <u>Real</u> Property |
|---|---|---|---|---|
| ELVERA SANCHEZ, 123 County Road 10, Smithville, Texas 77777 | Surviving Spouse | None | 1/3 | 1/3 life estate |
| MARK SANCHEZ, 123 County Road 10, Smithville, Texas 77777 | Son | 1/3 | 2/9 | 1/3 subject to 1/3 life estate |
| JEFF SANCHEZ, 987 County Road 10, Smithville, Texas 77777 | Son | 1/3 | 2/9 | 1/3 subject to 1/3 life estate |
| TRACEY DAVIS, 1212 Fair Avenue, Dallas, Texas 70000 | Granddaughter | 1/6 | 1/9 | 1/6 subject to 1/3 life estate |
| WILLIAM SANCHEZ, 111 Sunflower Drive, Austin, Texas 75555 | Grandson | 1/6 | 1/9 | 1/6 subject to 1/3 life estate |

***EXAMPLE 4*** *(See "Asset Distribution Charts - MARRIED", Chart II.b.)**:***

- Decedent has a surviving spouse
- Decedent has 1 surviving parent
- Decedent has 2 surviving siblings
- Decedent had no children

For each Heir, list:

| Name & Address | Relationship to Decedent | Share of Married Decedent's Community Property | Share of Separate <u>Personal</u> Property | Share of Separate <u>Real</u> Property |
|---|---|---|---|---|
| MONROE SUNDANCER, 44 Lance Road, Nocona, Texas 76255 | Surviving Spouse | All | All | 1/2 |
| MARY TEN BEARS, 20135 White Wolf Road, Spanish Fort, Texas 77777 | Mother | None | None | 1/4 |
| MARCUS TEN BEARS, 987 Brush Arbor, Benjamin, Texas 79505 | Brother | None | None | 1/8 |
| JULIA TEN BEARS HORSEBACK, 345 Parfleche Circle, Dublin, Texas 76446 | Sister | None | None | 1/8 |

***EXAMPLE 5*** *(See "Asset Distribution Charts – NOT MARRIED", Chart II.c.):*

- Decedent NOT married at death
- Decedent had no children
- Decedent has one surviving parent
- Decedent has 2 siblings
    - One sibling survived Decedent
    - One sibling died before Decedent
        - 2 surviving children of sibling

For each Heir, list:

| Name & Address | Relationship to Decedent | Share of Married Decedent's Community Property | Share of Separate <u>Personal</u> Property | Share of Separate <u>Real</u> Property |
|---|---|---|---|---|
| DEPAK PADNYA, 135 County Road 10, Smithville, Texas 77777 | Father | N/A | 1/2 | 1/2 |
| SUNITTA WILLIAMS, 345 Park Lane Avenue, Dallas, Texas 70000 | Sister | N/A | 1/4 | 1/4 |
| JAY ANNADJ, 999 Poplar Street, Austin, Texas 75555 | Nephew | N/A | 1/8 | 1/8 |
| DINA ANNADJ, 555 Elm Street, Victoria, Texas 77902 | Niece | N/A | 1/8 | 1/8 |

## Instructions for signing the Small Estate Affidavit form:

When the Small Estate Affidavit form is completely filled out, all of the heirs and two disinterested witnesses must sign it before a notary public. Original signatures (not photocopied) are required on the form filed with the court, unless the Small Estate Affidavit will be electronically filed through the state authorized e-filing portal. To register as a user, visit https://efile.txcourts.gov/ofsweb and click "Register." If e-filing with the court, you should retain the original signed and notarized Small Estate Affidavit and provide it to the court if and when required to do so.

Heir Sworn Statement:

All heirs 18 years of age or older MUST sign the Small Estate Affidavit. By signing the Affidavit, you are swearing or affirming that you know the information in the Affidavit is true. You are also stating that you have legal capacity. This means you are 18 years of age or older and have not been legally declared incapacitated.

If there are any heirs who do not have legal capacity because they are a minor or have a disability that prevents them from understanding the contents and purpose of the Small Estate Affidavit, their legally authorized representative can sign for them. *If the legally authorized representative who is signing for a minor heir is also an heir of Decedent, that person will need to sign two separate execution pages (sworn statement with notarized signature) – one as the legally authorized representative of the minor heir, and another as an heir in their own right.*

**Any heir or witness who signs the Affidavit may be held responsible for any loss or damage caused to someone from the use of the Affidavit.**

DO NOT SIGN UNTIL YOU ARE WITH A NOTARY. Write your name on the line provided and sign in front of a notary public. There may be a fee for the notary's services.

Disinterested Witness Statement

Two disinterested witnesses MUST sign the Affidavit. A disinterested witness cannot receive anything from Decedent's estate. By signing the Affidavit, you are swearing or affirming that you know the information in the Affidavit is true. You are also stating that you have legal capacity. This means you are 18 years of age or older and have not been legally declared incapacitated.

**Any heir or witness who signs the Affidavit may be held responsible for any loss or damage caused to someone from the use of the Affidavit.**

DO NOT SIGN UNTIL YOU ARE WITH A NOTARY. Write your name on the line provided and sign in front of a notary public. There may be a fee for the notary's services.

# FREQUENTLY ASKED QUESTIONS (FAQs) FOR SMALL ESTATE AFFIDAVIT

## Frequently Asked Questions

Some important words are explained below, but if there are other words that you do not know, check the list of words and definitions called "Helpful Words to Know" beginning on page 3 of INSTRUCTIONS FOR SMALL ESTATE AFFIDAVIT.

**1.** ***Who is Decedent?***

Decedent is the person who died. When you see "Decedent's property" or "Decedent's homestead," we are talking about the property or homestead that belonged to the person who died.

**2.** ***Who is an heir?***

An heir is a person who has a right to get some or all of Decedent's property after they die. If the Decedent was married when they died, their surviving spouse is an heir. If the Decedent had children, the children, or their descendants such as grandchildren or great-grandchildren (and so on) are heirs. A person's parents, siblings, nieces and nephews, great-nieces and great-nephews (and so on) may also be heirs. However, a person who dies fewer than 120 hours after the Decedent died is NOT an heir even if the person is the Decedent's spouse or child.

**3.** ***What is a homestead?***

A homestead is a home the Decedent owned and used as the main place they lived. In order for the property to be a homestead for transfer under the Small Estate Affidavit, Decedent must have a surviving spouse or minor child. (The spouse or child did not have to live in the home for it to be a homestead.)

**4.** ***What can I do with a Small Estate Affidavit?***

You can use the Small Estate Affidavit to transfer Decedent's money and property to the heirs if Decedent left no Will and the value of all of the property is less than a certain amount. You can also use the Small Estate Affidavit to transfer title to Decedent's homestead to the heirs. You CANNOT use the Small Estate Affidavit to transfer title to any real property that is not a homestead, such as rental property or an undeveloped lot.

**5.** ***What qualifies as a small estate?***

The value of the estate is $75,000 or less. You do not have to count certain property called "exempt property" or property that passes directly to a specific, named person (such as life insurance) when you add up the value of all of the property.

The value of the estate assets must also be more than the amount of debts owed by Decedent. You do not have to count debts secured by homestead or exempt property, such as a mortgage or car loan.

For more information about what type of property and debts you do not have to count, look under "Estate assets," "Exempt property," and "Secured and Unsecured Debts," in "Helpful Words to Know" in the Instructions.

**6. *Who can use a Small Estate Affidavit?***

Any heir or legally authorized representative of an heir can use the Small Estate Affidavit. A "legally authorized representative" is a natural guardian (such as the parents or next of kin) of an heir who is under 18 years old, or the court-appointed guardian of any other incapacitated heir. An incapacitated heir is someone who is unable to manage their affairs due to disability, age, injury, illness, or other reasons.

**7. *What do I need to fill out a Small Estate Affidavit*?**

- ☐ All heirs must sign the Affidavit. You CANNOT leave out any heir. The natural guardian must sign for any heir who is under 18 years old, and a court-appointed guardian must sign for an incapacitated adult.
- ☐ Two disinterested witnesses must also sign the Affidavit. A "disinterested witness" is a person who is familiar with Decedent's family history, marital status at death, children and grandchildren, and other family members, and who will not inherit property from Decedent. Decedent's close friend is an example of someone who could be a disinterested witness. Decedent's sibling or cousin might also be an example of a disinterested witness, as long as that person would not inherit any property. The disinterested witnesses must swear that the information in the Affidavit is true.
- ☐ Notary Public. Each heir and disinterested witness must go to a notary public and swear that the information in the Affidavit is true, subject to penalties of perjury. A notary public may charge a fee for this service. Your bank may have a notary. You can also find a list of notaries by going to the Texas Secretary of State's website (https://sos.state.tx.us) and clicking on "Notary, Apostilles & Authentications" in the top ribbon.
- ☐ Information about Decedent's assets. You will need to list **ALL** of Decedent's assets, with the last three digits of account numbers (if known) and how much the asset is worth. Additionally, if the Decedent was married at death you must state if an asset is separate or community property. See "Community Property" and "Separate Property" in "Helpful Words to Know" and Section 8 ("Estate Assets") in the Instructions for more information on separate and community property.

☐ Information about Decedent's debts. You will need to list **ALL** of Decedent's debts, with the last three digits of account numbers (if known) and the amount of outstanding debt. See "Secured and Unsecured Debts" in "Helpful Words to Know" and Section 9 ("Debts") in the Instructions for more information on debts.

☐ Information about Decedent's heirs. You will need to list the names and addresses of **ALL** of Decedent's heirs. If you do not know the names and addresses of all of Decedent's heirs, you will NOT be able to use the Small Estate Affidavit.

**8.** ***What does it mean if I sign the Small Estate Affidavit*?**

If you sign the Affidavit, it means that you have:

- personal knowledge of Decedent's family, including Decedent's marriages,
- personal knowledge of Decedent's assets, AND
- personal knowledge of Decedent's debts

AND you understand and acknowledge that:

- **By signing the Affidavit, you may be liable under Texas Estate Code § 205.007(c) for any damage or loss to any person arising from a payment, delivery, transfer, or issuance made in reliance on the Affidavit.**

**9.** ***Where do I file the Small Estate Affidavit?***

If Decedent LIVED in Texas:

File the Affidavit with the County Clerk of the county where Decedent lived. This is the county where Decedent had a home, even if they were living elsewhere at death, like in a nursing home or with a child.

If Decedent DID NOT LIVE in Texas, the county where the Affidavit should be filed is based on where Decedent died:

- If Decedent died in Texas, file the Affidavit with the County Clerk of:
  - the County where Decedent's principal estate was located; or
  - the County where Decedent died.
- If Decedent died outside of Texas, file the Affidavit with the County Clerk of:
  - the County where Decedent's next of kin live; or
  - if there is no next of kin in Texas, the County where Decedent's principal estate is located.

**10.** ***How much does it cost to file a Small Estate Affidavit?***

Look on the County Clerk 's website in the county where you will file the Affidavit or call the County Clerk's office for filing fee information.

**11.** ***What if I cannot afford the filing fee?***

If you cannot afford the filing fee, you can ask the court to waive (eliminate) your filing fees and court costs by filling out and filing a Statement of Inability to Afford Payment of Court Costs. You can get a Statement of Inability to Afford Payment of Court Costs form by asking the County Clerk for a copy of the form. The clerk is required to provide you the form at no cost. You can also find the form at https://www.txcourts.gov. See Texas Rule of Civil Procedure 145.

**12.** ***How do I use the Small Estate Affidavit after it has been approved by the court?***

Once approved by the court, you can use a certified copy of the Small Estate Affidavit and the Order Approving Small Estate Affidavit to collect and transfer the money and property of Decedent's estate.

- After the judge signs the Order Approving Small Estate Affidavit, purchase certified copies of the Affidavit and the Order from the County Clerk's office. You may need more than one certified copy to collect all the money and property.
- Take a certified copy to each person, business, or other organization holding Decedent's assets to:
  - Collect Decedent's money or other property from people, businesses, or organizations who have it;
  - Access Decedent's bank accounts;
  - Transfer title to the homestead by recording the Affidavit and Order in the County Clerk's office of the county where the homestead is located.

**13.** ***What if Decedent had children who were given up for adoption or for whom Decedent's parental rights were terminated?***

Contact an attorney.

**14.** ***What if Decedent had half-siblings*****?**

Contact an attorney.

**15.** ***What if Decedent has a child who was born after Decedent died?***

Contact an attorney.

**CASE NUMBER _____**

| | | | |
|---|---|---|---|
| **ESTATE OF** | **§** | **IN** | ❑ **PROBATE COURT** |
| | | | ❑ **COUNTY COURT** |
| **_____,** | **§** | | ❑ **COUNTY COURT AT LAW NO._____** |
| **DECEASED** | **§** | | **_____ COUNTY, TEXAS** |

**SMALL ESTATE AFFIDAVIT**
**PURSUANT TO TEXAS ESTATES CODE CHAPTER 205**

The information in this Affidavit is true according to the heirs and witnesses who swore to or affirmed its truth.

1. The person who died ("Decedent"), _____, died on
*First, Middle, and Last Name*

_____ in _____, _____ County, _____.
*MM/DD/YYYY* *City* *County* *State*

Decedent did not leave a Will. The last three digits of Decedent's driver's license number are _____ and the last three digits of Decedent's Social Security number are_____.

If you do not know this information, explain why:_____

*Be prepared to provide a copy of the death certificate.*

2. Decedent died at least thirty (30) days ago.
3. Decedent was a resident of _____ County, _____ , at the time of death.
*County* *State*

*Check if applicable:*

☐ Decedent was not a resident of this county at the time of death, and I am filing in this county because:_____ .

4. No other probate proceeding has been filed.
5. On the date of this Affidavit, the total value of Decedent's estate assets is not more than $75,000. This value does not include the value of the homestead or other exempt property. *For a home to qualify as a homestead under this Affidavit, Decedent must have owned the house (even if still paying for it) and used it as his/her main residence, AND Decedent must have a surviving spouse or minor child. (The spouse or child did not have to live in the house for it to be a homestead.) See instructions for a definition of exempt property.*
6. On the date of this Affidavit, the total value of Decedent's estate assets (not including the homestead and other exempt property) is more than the total of Decedent's known debts (not including debts secured by the homestead or other exempt property).

7. Medicaid Estate Recovery Program *(See Instructions)*:

   *Check one:*

   ☐ Decedent did not apply for, nor receive, Medicaid benefits (or similar needs-based government benefits subject to repayment) on or after March 1, 2005.

   ☐ Decedent received Medicaid benefits (or similar needs-based government benefits subject to repayment) on or after March 1, 2005, but a MERP certification which states that Decedent's estate owes no money to the State of Texas as a result of the payment of those benefits has been attached if required by this court.

   ☐ Decedent did apply for and receive Medicaid benefits (or similar needs-based government benefits subject to repayment) on or after March 1, 2005, and the Medicaid Estate Recovery Program claim is listed as a debt in section 9.

8. Estate Assets Tables:
   All assets of Decedent's estate, including homestead and other exempt property, are listed in these tables.

**SEPARATE PROPERTY ASSETS**

| Description of Separate Property Assets<br>Explain Why it is Separate Property | Acc't #<br>(last 3 digits) | Exempt<br>(yes/no) | Value<br>(100%) |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

TOTAL $_____

**COMMUNITY PROPERTY ASSETS**

| Description of Community Property Assets | Acc't #<br>(last 3 digits) | Exempt<br>(yes/no) | Value<br>(100%) | Estate Value<br>(50%) |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

TOTAL $_____

9. Debts:

All remaining debts of Decedent's estate are listed here. The Balance Due is the amount owed on the date of this Affidavit.

**DEBTS**

| Description of Debts | Acc't # (last 3 digits) | Is the debt secured by exempt property? (yes/no) | Balance Due |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
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| | | | |

TOTAL $_____

10. Family history: *Put check marks in the small boxes by the statements that apply and provide the information as indicated.*

A. Marriage:

☐ Decedent was NOT married when Decedent died.

***OR***

☐ Decedent was married to and survived by _____. They were married on _____ (date). *Someone survived Decedent if they lived more than 120 hours after Decedent died.*

B. Children:

☐ Decedent did NOT have or adopt any children, whether now living or deceased.
*If you check this box, go to C. "Parents".*

☐ All children born to or adopted by Decedent, whether now living or deceased, are listed below.

These are all of Decedent's children (*Use additional pages as necessary)*:

| Name of Child | Check if under 18 | Name of Child's Other Parent |
|---|---|---|
| _____ | ☐ | _____ |
| _____ | ☐ | _____ |
| _____ | ☐ | _____ |
| _____ | ☐ | _____ |
| _____ | ☐ | _____ |
| _____ | ☐ | _____ |
| _____ | ☐ | _____ |
| _____ | ☐ | _____ |

☐ All of Decedent's children survived Decedent. *Someone "survived" Decedent if they lived more than 120 hours after Decedent died.*

***OR***

☐ These are Decedent's children who DID NOT survive Decedent.

| Deceased Child's Name<br>*Write deceased child's name* | Date child died<br>*MM/DD/YYYY* | If this child had children, name them. If not, write None or N/A.:<br>*If any of these grandchildren also died before Decedent, use a separate page to give date of death and names of all of that person's children.* |
|---|---|---|
| _____ | _____ | _____ |
| _____ | _____ | _____ |
| _____ | _____ | _____ |

*If ANY of Decedent's children, grandchildren, or great-grandchildren survived Decedent, skip to "Section 11. Asset Distribution."*

C. Parents:

Decedent's parents are _____ and _____.
*Parent 1 Name* *Parent 2 Name*

*Check ONE:*

☐ Both of Decedent's parents survived Decedent.
☐ One of Decedent's parents DID NOT survive Decedent. This parent,

_____, died on _____, if known.
*Name* *Date*

☐ Neither of Decedent's parents survived Decedent.

_____, died on _____, if known.
*Parent 1 Name* *Date*

_____, died on _____, if known.
*Parent 2 Name* *Date*

*If both of Decedent's parents survived Decedent, skip to "11. Asset Distribution Table".*

D. Siblings (*Use additional pages as necessary)*:

These are all of Decedent's siblings (including half-siblings). *If there are half-siblings, contact an attorney.* ***If none, write "none."***

| Sibling Name | Check if Under 18 | Sibling's Parents' Names |
|---|---|---|
| | ☐ | |
| | ☐ | |
| | ☐ | |
| | ☐ | |
| | ☐ | |

☐ All of Decedent's siblings (including half-siblings) survived Decedent. *Someone "survived" Decedent if they lived more than 120 hours after Decedent died.*

***OR***

☐ These are Decedent's siblings (including half-siblings) who DID NOT survive Decedent.

| Deceased Sibling's Name<br>*Write deceased sibling's name* | Date of Death<br>*MM/DD/YYYY* | Names of surviving children of Deceased Sibling<br>*If none, write None or N/A*:<br>*If any of these nephews/nieces also died before Decedent, use a separate page to give date of death and names of all of that person's children.* |
|---|---|---|
| | | |
| | | |
| | | |

E. Other

If no one listed in sections A-D above survived Decedent but there are other relatives that did survive Decedent, you should contact an attorney.

11. Asset Distribution Table:

Based on the family history given in this Affidavit, the following table lists all of Decedent's heirs at law, together with their fractional interests in Decedent's estate.

*List each person getting a share of Decedent's estate. List each person's share of each type of property in the estate. If Decedent was not married, do not enter anything in the column labeled "Share of Married Decedent's Community Property".*

***THE FOLLOWING TABLE MUST BE FILLED OUT: DO NOT fill out this table without reading and following the Asset Distribution Charts included with the Instructions for Small Estate Affidavit.***

**ASSET DISTRIBUTION TABLE**

*For each Heir, list the following:*

| Name & Address | Relationship to Decedent | Share of Married Decedent's Community Property | Share of Separate Personal Property | Share of Separate Real Property |
|---|---|---|---|---|
| | | | | |
| | | | | |
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| | | | | |
| | | | | |

| Name & Address | Relationship to Decedent | Share of Married Decedent's Community Property | Share of Separate Personal Property | Share of Separate Real Property |
|---|---|---|---|---|
| | | | | |
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| | | | | |
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**Signatures and Sworn Statements of <u>Every Person</u> Who Gets a Share of Decedent's Estate:**
*Include other signature pages for each person as needed.*

STATE OF _____
COUNTY OF _____

I am: *(Check one)*

- ☐ an heir of the Decedent, or
- ☐ the legally authorized representative of _____, who is an heir of the Decedent, authorized by §205.002(a)(1)(C), Texas Estates Code to sign this Affidavit.

I swear or affirm that:

a. I have personal knowledge of the facts stated in this Affidavit, and these facts are true and complete;

b. I have legal capacity;

c. **By signing this Affidavit, I understand that I am liable under Texas Estate Code § 205.007(c) for any damage or loss to any person arising from a payment, delivery, transfer, or issuance made in reliance on the Affidavit.** *See FAQ #8 for what this means.*

_____ _____
Printed Name of Heir or Legally Authorized Representative Signature of Heir or Legally Authorized Representative

SWORN TO AND SUBSCRIBED before me by_____, an heir or legally authorized representative on _____(Date).

(Seal)

_____
Notary Public, State of _____
Identification Number: _____

**Signatures and Sworn Statements of <u>Every Person</u> Who Gets a Share of Decedent's Estate:**
*Include other signature pages for each person as needed.*

STATE OF _____
COUNTY OF _____

I am:

- ☐ an heir of the Decedent, or
- ☐ the legally authorized representative of _____, who is an heir of the Decedent, authorized by §205.002(a)(1)(C), Texas Estates Code to sign this Affidavit.

I swear or affirm that:

a. I have personal knowledge of the facts stated in this Affidavit, and these facts are true and complete;

b. I have legal capacity;

c. **By signing this Affidavit, I understand that I am liable under Texas Estate Code § 205.007(c) for any damage or loss to any person arising from a payment, delivery, transfer, or issuance made in reliance on the Affidavit.** *See FAQ #8 for what this means.*

_____ _____
Printed Name of Heir or Legally Authorized Representative Signature of Heir or Legally Authorized Representative

SWORN TO AND SUBSCRIBED before me by_____, an heir or legally authorized representative on _____(Date).

(Seal)

_____
Notary Public, State of _____
Identification Number: _____

**Signatures and Sworn Statements of <u>Every Person</u> Who Gets a Share of Decedent's Estate:**
*Include other signature pages for each person as needed.*

STATE OF _____
COUNTY OF _____

I am:

- ☐ an heir of the Decedent, or
- ☐ the legally authorized representative of _____, who is an heir of the Decedent, authorized by §205.002(a)(1)(C), Texas Estates Code to sign this Affidavit.

I swear or affirm that:

a. I have personal knowledge of the facts stated in this Affidavit, and these facts are true and complete;

b. I have legal capacity;

c. **By signing this Affidavit, I understand that I am liable under Texas Estate Code § 205.007(c) for any damage or loss to any person arising from a payment, delivery, transfer, or issuance made in reliance on the Affidavit.** *See FAQ #8 for what this means.*

_____ _____
Printed Name of Heir or Legally Authorized Representative Signature of Heir or Legally Authorized Representative

SWORN TO AND SUBSCRIBED before me by_____, an heir or legally authorized representative on _____(Date).

(Seal)

_____
Notary Public, State of _____
Identification Number: _____

**Signatures and Sworn Statements of TWO DISINTERESTED WITNESSES:**

STATE OF _____
COUNTY OF _____

I, as a Disinterested Witness to this Affidavit, as indicated by my signature below, do solemnly swear or affirm:

a. I have legal capacity;
b. I am not getting anything from the Decedent's estate;
c. I have personal knowledge of the facts stated in this Affidavit, and these facts are true and complete; and
d. **I understand that I am liable under Texas Estate Code § 205.007(c) for any damage or loss to any person arising from a payment, delivery, transfer, or issuance made in reliance on this Affidavit.** *See FAQ #8 for what this means.*

_____ _____
Printed Name of Disinterested Witness Signature of Disinterested Witness

SWORN TO AND SUBSCRIBED before me by_____, a disinterested witness, on _____(Date).

_____
(Seal) Notary Public, State of _____
Identification Number: _____

STATE OF _____
COUNTY OF _____

I, as a Disinterested Witness to this Affidavit, as indicated by my signature below, do solemnly swear or affirm:

a. I have legal capacity;
b. I am not getting anything from the Decedent's estate;
c. I have personal knowledge of the facts stated in this Affidavit, and these facts are true and complete; and
d. **I understand that I am liable under Texas Estate Code § 205.007(c) for any damage or loss to any person arising from a payment, delivery, transfer, or issuance made in reliance on this Affidavit.** *See FAQ #8 for what this means.*

_____ _____
Printed Name of Disinterested Witness Signature of Disinterested Witness

SWORN TO AND SUBSCRIBED before me by_____, a disinterested witness, on _____ (Date).

_____
(Seal) Notary Public, State of _____
Identification Number: _____

**CASE NUMBER _____**

| | | |
|---|---|---|
| **ESTATE OF** | **§** | **IN** ❑ **PROBATE COURT** |
| | | ❑ **COUNTY COURT** |
| **_____,** | **§** | ❑ **COUNTY COURT AT LAW NO._____** |
| **DECEASED** | **§** | **_____ COUNTY, TEXAS** |

**ORDER APPROVING SMALL ESTATE AFFIDAVIT**

On this day, the Court considered the above Small Estate Affidavit and the Court finds that:

1. This court has jurisdiction and venue;
2. The Affidavit conforms to the terms and provisions of Texas Estates Code Chapter 205; and
3. The Affidavit should be approved.

It is therefore ORDERED that the foregoing Affidavit is APPROVED.

A person making a payment, delivery, transfer, or issuance under the foregoing Affidavit is released to the same extent as if made to a personal representative of Decedent.

SIGNED _____

_____
JUDGE PRESIDING

# Asset Distribution Charts (Who gets what?)

## If Decedent Was MARRIED at Time of Death and there is No Will

**When and why do you use these charts?**

The purpose of these charts is to help you complete the "Asset Distribution Table" section of the Small Estate Affidavit form. In the form, you will need to write in the share that each surviving heir will inherit. These charts will help you figure out what share each person gets.

The charts below apply only if:

- Decedent was married when they died;
- Surviving spouse lived more than 120 hours after Decedent's death;
- Decedent did not leave a Will; and
- Decedent died on or after September 1, 1993.

These charts do not apply if Decedent died before September 1, 1993 – in that situation, you should contact an attorney.

For each heir, you need to determine these things:

- what fraction of the community property assets they get,
- what fraction of the separate real property they get, and
- what fraction of the separate personal property they get.

**What is the difference between community and separate property?**

A married Decedent will likely have "community property" and may have "separate property." You need to know if property was "community" or "separate" when filling out the Small Estate Affidavit.

**Community property** is all real and personal property acquired during the marriage, except for separate property. Community Property is owned one-half by Decedent's estate and one-half by Decedent's surviving spouse. All property of a married Decedent is considered to be community property unless you can show that it is separate property. Even if property is only in one spouse's name, it may still be community property. See Texas Family Code § 3.002.

**Separate property** is personal or real property owned before a marriage or received during marriage by gift or inheritance. It also includes some damages awarded during marriage from a personal injury lawsuit. Any asset listed as Separate Property in the Small Estate Affidavit form must include an explanation of why it is considered Separate Property. All property of a married Decedent is considered to be community property unless you can show that it is separate property. See Texas Family Code § 3.001.

**What is the difference between personal and real property?**

Any separate property will also need to be listed as "personal property" or "real property." This difference does not matter for community property.

**Personal property** includes, but is not limited to, cash and bank accounts, clothing, household furnishings, vehicles, and jewelry.

**Real property** is land and improvements, such as a house or mobile home designated as real property, and also includes oil, gas, and other mineral rights.

**What is the difference between a life estate and a homestead right?**

A **life estate** gives the surviving spouse certain rights and obligations during their lifetime. The life estate ends when the surviving spouse dies. You must list the life estate in the asset distribution table.

A **homestead** right is a right to exclusive use and occupancy of the property during a lifetime. The surviving spouse may have homestead rights. Decedent's minor children may also have homestead rights. **An attorney can explain what those rights are**. For purpose of the asset distribution table, you do not list the homestead right. However, knowing if there are homestead rights is important to understand who can live in the property.

**What if a person who would be an heir dies before Decedent?**

It depends.

If a person who would have been an heir dies before Decedent, usually their children get that deceased parent's share equally. If the person had no children or other descendants, you do not include them in figuring out the number of shares.

However, if **all** of the people who are related to Decedent in the same way (for example, all of the children or all of the siblings of Decedent) die before Decedent, usually those people's children will all share that portion of Decedent's estate equally.

If one or more of the children of the predeceased heir also died before Decedent, consult an attorney.

**Who gets what?**

This is an explanation of the charts below, and the number of each item listed below will be shown in the related chart.

**I. IF DECEDENT WAS MARRIED WITH CHILDREN:**

a. If all of the children are the children of the surviving spouse (CHART I.a.):

1. **Community property:** all of it goes to the surviving spouse.
2. **Separate personal property:**
   a. The surviving spouse gets a 1/3 interest in Decedent's separate personal property.
   b. The children share the remaining 2/3 interest in Decedent's separate personal property.

3. **Separate real property:**
    a. The surviving spouse gets a 1/3 life estate interest and may have homestead rights to the property during their lifetime.
    b. The children inherit in equal parts all of the property, but it is subject to the surviving spouse's 1/3 life estate and homestead rights, if any.

b. If any of the children are <u>not</u> the children of the surviving spouse (CHART I.b.):
    1. **Community property:**
        a. The surviving spouse keeps their own 1/2 share of the community property.
        b. The children share equally in Decedent's 1/2 interest subject to the surviving spouse's homestead rights, if any.
    2. **Separate personal property:**
        a. The surviving spouse gets a 1/3 interest in Decedent's separate personal property.
        b. The children share the remaining 2/3 interest in Decedent's separate personal property.
    3. **Separate real property**
        a. The surviving spouse gets a 1/3 life estate interest and may have homestead rights to the property during their lifetime.
        b. The children inherit in equal parts all of the property, but it is subject to the surviving spouse's 1/3 life estate and homestead rights, if any.

## II. IF THE DECEDENT WAS MARRIED AND DID NOT HAVE CHILDREN:

a. If Decedent was survived by both parents (CHART II.a.):
    1. **Community property:** all of it goes to the surviving spouse.
    2. **Separate personal property:** all of it goes to the surviving spouse.
    3. **Separate real property:**
        a. The surviving spouse gets 1/2 of the separate real property and may have homestead rights to all of the property during their lifetime.
        b. The parents each get 1/4 of the separate real property subject to the surviving spouse's homestead rights, if any.

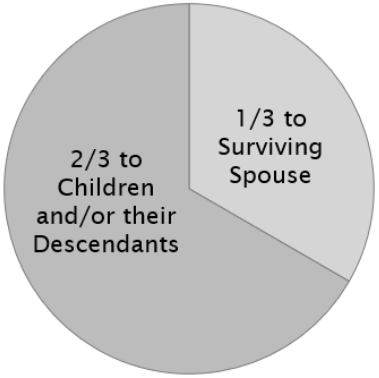
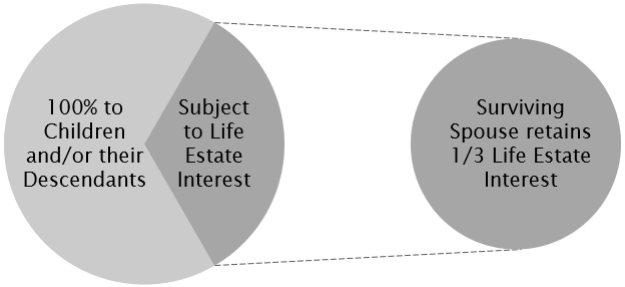
b. If Decedent had one surviving parent and had surviving siblings (or their descendants) (CHART II.b.):
    1. **Community property:** all of it goes to the surviving spouse.
    2. **Separate personal property:** all of it goes to the surviving spouse.
    3. **Separate real property:**
        a. The surviving spouse gets 1/2 of the separate real property and may have homestead rights to the property during their lifetime.
        b. The parent gets 1/4 of the separate real property, but it is subject to the surviving spouse's homestead rights, if any.

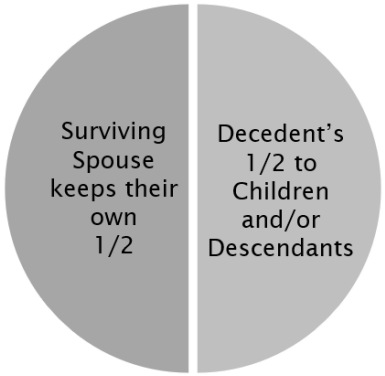
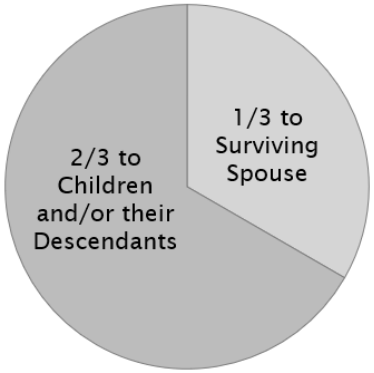
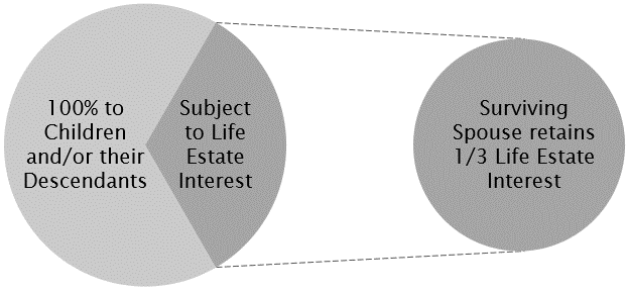
c. The siblings share in equal parts the other 1/4 of the separate real property, but it is subject to the surviving spouse's homestead rights, if any.

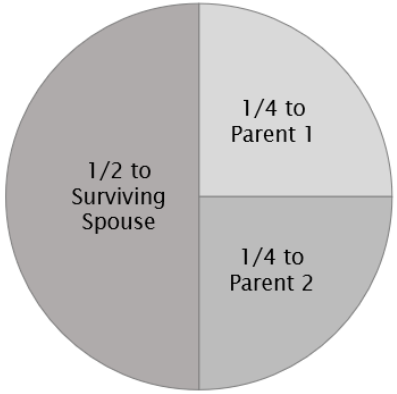
c. If Decedent had one surviving parent and no surviving siblings (or their descendants) (CHART II.c.):
    1. **Community property:** all of it goes to the surviving spouse.
    2. **Separate personal property:** all of it goes to the surviving spouse.
    3. **Separate real property:**
        a. The surviving spouse gets 1/2 of the separate real property and may have homestead rights to the property during their lifetime.
        b. The surviving parent gets 1/2 of the separate real property, but it is subject to the surviving spouse's homestead rights, if any.

d. If Decedent had no surviving parents but did have surviving siblings (or their descendants who take their deceased parent's share) (CHART II.d.):
    1. **Community property:** all of it goes to the surviving spouse.
    2. **Separate personal property:** all of it goes to the surviving spouse.
    3. **Separate real property:**
        a. The surviving spouse gets 1/2 of the separate real property and may have homestead rights to the property during their lifetime.
        b. The siblings (or their descendants) get the other 1/2 of the separate real property subject to the surviving spouse's homestead rights to the property during their lifetime, if any.

e. If Decedent had no surviving parents and no surviving siblings (or their descendants) (CHART II.e.):
    1. **Community property:** all of it goes to the surviving spouse.
    2. **Separate personal property:** all of it goes to the surviving spouse.
    3. **Separate real property:** all of it goes to the surviving spouse.

| CHART I.a. – Married Person with children, all from current marriage | | |
|---|---|---|
| COMMUNITY PROPERTY | SEPARATE PERSONAL PROPERTY | SEPARATE REAL PROPERTY |
| Texas Estates Code §201.003(b)(2) | Texas Estates Code §201.002(b) | Texas Estates Code §201.002(b)(3) |
|  I.a.1. |  I.a.2. |  I.a.3. |

| CHART I.b. – Married Person with children from outside current marriage | | |
|---|---|---|
| COMMUNITY PROPERTY | SEPARATE PERSONAL PROPERTY | SEPARATE REAL PROPERTY |
| Texas Estates Code §201.003(c) | Texas Estates Code §201.002(b) | Texas Estates Code §201.002(b)(3) |
|  I.b.1. |  I.b.2. |  I.b.3 |

| CHART II.a. – Married Person with no children – survived by both parents | | |
|---|---|---|
| COMMUNITY PROPERTY | SEPARATE PERSONAL PROPERTY | SEPARATE REAL PROPERTY |
| Texas Estates Code §201.003(b)(1) | Texas Estates Code §201.002(c) | Texas Estates Code §201.002(c) |
|  II.a.1. |  II.a.2 |  II.a.3 |

| CHART II.b. – Married Person with no children – survived by one parent and siblings or their descendants | | |
|---|---|---|
| COMMUNITY PROPERTY | SEPARATE PERSONAL PROPERTY | SEPARATE REAL PROPERTY |
| Texas Estates Code §201.003(b)(1) | Texas Estates Code §201.002(c) | Texas Estates Code §201.002(c) |
|  II.b.1 |  II.b.2 |  II.b.3 |

| CHART II.c. – Married Person with no children – survived by one parent, and no surviving siblings or their descendants | | |
|---|---|---|
| **COMMUNITY PROPERTY** | **SEPARATE PERSONAL PROPERTY** | **SEPARATE REAL PROPERTY** |
| Texas Estates Code §201.003(b)(1) | Texas Estates Code §201.002(c) | Texas Estates Code §201.002(c) |
|  II.c.1 |  II.c.2 |  II.c.3 |

| CHART II.d. – Married Person with no children – no surviving parents, but there are surviving siblings and/or their descendants | | |
|---|---|---|
| COMMUNITY PROPERTY | SEPARATE PERSONAL PROPERTY | SEPARATE REAL PROPERTY |
| Texas Estates Code §201.003(b)(1) | Texas Estates Code §201.002(c) | Texas Estates Code §201.002(c) |
|  II.d.1 |  II.d.2 |  II.d.3 |

| CHART II.e. – Married Person with no children – no surviving parents, siblings, or siblings' descendants | | |
|---|---|---|
| COMMUNITY PROPERTY | SEPARATE PERSONAL PROPERTY | SEPARATE REAL PROPERTY |
| Texas Estates Code §201.003(b)(1) | Texas Estates Code §201.002(c) | Texas Estates Code §201.002(d) |
|  II.e.1 |  II.e.2 |  II.e.3 |

# Asset Distribution Charts (Who gets what?)

## If Decedent Was NOT MARRIED at Time of Death and there is No Will

**When and why do you use these charts?**

The purpose of these charts is to help you complete the "Asset Distribution Table" section of the Small Estate Affidavit form. In the form, you will need to write in the share that each surviving heir will inherit. These charts will help you figure out what share each person gets.

The charts below apply only if:

- Decedent was unmarried when they died;
- At least one child, grandchild, parent, sibling, or sibling's descendant(s) lived more than 120 hours after Decedent's death; and
- Decedent did not leave a Will.

For each heir, you need to determine what fraction of the property they get. When a person is not married, all of their property is separate property at their death. Real and personal property are treated the same for the heirs of unmarried persons.

**What if a person who would be an heir dies before Decedent?**

It depends.

If a person who would have been an heir dies before Decedent, usually their children get that deceased parent's share equally. If the person had no children or other descendants, you do not include them in figuring out the number of shares.

However, if **all** of the people who are related to Decedent in the same way (for example, all of the children or all of the siblings of Decedent) die before Decedent, usually those people's children will all share that portion of Decedent's estate equally.

If one or more of the children of the predeceased heir also died before Decedent, consult an attorney.

**Who gets what?**

This is an explanation of the charts below, and the number of each item listed below will be shown in the related chart.

**I. IF DECEDENT WAS UNMARRIED WITH CHILDREN:**

a. All of the children share the property in equal shares.

**II. IF DECEDENT WAS UNMARRIED WITH NO CHILDREN:**

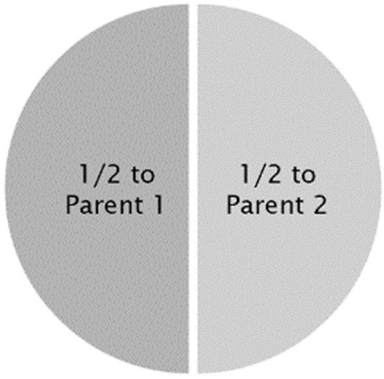
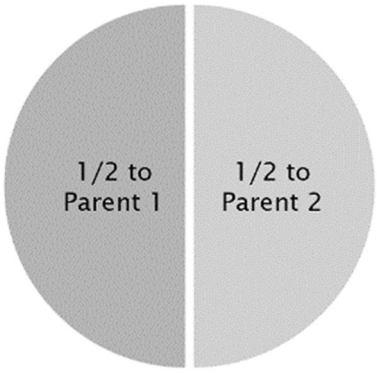
a. If both parents survive, each will inherit 1/2 of the estate.

b. If one parent survives and there are no siblings, the surviving parent inherits the entire estate.

c. If one parent survives and there are siblings, the surviving parent inherits 1/2 of the estate and the siblings would share in the other 1/2 of the estate.

d. If there are no surviving parents, the siblings will share in the entire estate in equal parts.

| CHART I.a. – Unmarried Person with Children | |
|---|---|
| SEPARATE PERSONAL PROPERTY | SEPARATE REAL PROPERTY |
| Texas Estates Code §201.001(b) | Texas Estates Code §201.001(b) |
|  I.a. |  I.a. |

| CHART II.a. – Unmarried Person with No Children – Both Parents Survived | |
|---|---|
| SEPARATE PERSONAL PROPERTY | SEPARATE REAL PROPERTY |
| Texas Estates Code §201.001(c) | Texas Estates Code §201.001(c) |
|  II.a. |  II.a. |

| CHART II.b. – Unmarried Person with No Children – One Parent Survived; No Siblings or Siblings' Descendants Survived | |
|---|---|
| SEPARATE PERSONAL PROPERTY | SEPARATE REAL PROPERTY |
| Texas Estates Code §201.001(d)(2) | Texas Estates Code §201.001(d)(2) |
|  II.b. |  II.b. |

| CHART II.c. – Unmarried Person with No Children – One Parent Survived; Siblings and/or Siblings' Descendants Survived | |
|---|---|
| SEPARATE PERSONAL PROPERTY | SEPARATE REAL PROPERTY |
| Texas Estates Code §201.001(d)(1) | Texas Estates Code §201.001(d)(1) |
|  II.c. |  II.c. |

| CHART II.d. – Unmarried Person with No Children – No Parent Survived; Siblings and/or Siblings' Descendants Survived | |
|---|---|
| SEPARATE PERSONAL PROPERTY | SEPARATE REAL PROPERTY |
| Texas Estates Code §201.001(e) | Texas Estates Code §201.001(e) |
|  II.d. |  II.d. |

# Tab Q

AN ACT

relating to the promulgation of certain forms for use in probate matters.

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

SECTION 1. Subchapter A, Chapter 22, Government Code, is amended by adding Section 22.020 to read as follows:

Sec. 22.020. PROMULGATION OF CERTAIN PROBATE FORMS. (a) In this section:

(1) "Probate court" has the meaning assigned by Section 22.007, Estates Code.

(2) "Probate matter" has the meaning assigned by Section 22.029, Estates Code.

(b) The supreme court shall, as the court considers appropriate, promulgate:

(1) forms for use by individuals representing themselves in certain probate matters, including forms for use in:

(A) a small estate affidavit proceeding under Chapter 205, Estates Code; and

(B) the probate of a will as a muniment of title under Chapter 257, Estates Code;

(2) a simple will form for:

(A) a married individual with an adult child;

(B) a married individual with a minor child;

(C) a married individual with no children;

(D) an unmarried individual with an adult child;

(E) an unmarried individual with a minor child; and

(F) an unmarried individual with no children; and

(3) instructions for the proper use of each form or set of forms.

(c) The forms and instructions:

(1) must be written in plain language that is easy to understand by the general public;

(2) shall be made readily available to the general public in the manner prescribed by the supreme court; and

(3) must be translated into the Spanish language as provided by Subsection (d).

(d) The Spanish language translation of a form must:

(1) state:

(A) that the Spanish language translated form is to be used solely for the purpose of assisting in understanding the form and may not be submitted to the probate court; and

(B) that the English language version of the form must be submitted to the probate court; or

(2) be incorporated into the English language version of the form in a manner that is understandable to both the probate court and members of the general public.

(e) Each form and its instructions must clearly and conspicuously state that the form is not a substitute for the advice of an attorney.

(f) The clerk of a probate court shall inform members of the

general public of the availability of a form promulgated by the supreme court under this section as appropriate and make the form available free of charge.

(g) A probate court shall accept a form promulgated by the supreme court under this section unless the form has been completed in a manner that causes a substantive defect that cannot be cured.

SECTION 2. This Act takes effect September 1, 2015.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 512 passed the Senate on March 24, 2015, by the following vote: Yeas 30, Nays 1.

Secretary of the Senate

I hereby certify that S.B. No. 512 passed the House on May 22, 2015, by the following vote: Yeas 138, Nays 2, two present not voting.

Chief Clerk of the House

Approved:

Date

Governor

# Tab R

**Texas Supreme Court Advisory Committee**

# Memo

To: Texas Supreme Court Advisory Committee (SCAC)

From: TRE Subcommittee

CC: Chip Babcock, Jacqueline Daumerie, Shiva Zamen

Date: August 17, 2023

Re: TRE 509

---

The SCAC Evidence Subcommittee has reviewed AREC's recommendations for Rules 509 and 510 (Exhibit A). In addition, we have conferred with three members of AREC and have separately conferred with Professor Steven Goode. A copy of Professor Goode's response to AREC's proposal is attached as Exhibit B. Roger Hughes wrote a memo for our committee on the impact of the changes on administrative proceedings (Exhibit C).

After the last SCAC meeting, we reviewed SCAC's comments during the June 16, 2023 meeting and had further discussions with AREC. AREC has subsequently changed its recommendation and now suggests deleting both (e)(2) and (f) in their entirety. (Ex. D) We agree with these suggestions.

Our original proposal is set forth on pages 5-6 of this memo. Our new proposal is on pages 6-7.

As a point of clarification, the proposals do not address the scope of the litigation exception in TRE 509(e)(4). That procedure is set forth in *R.K. v. Ramirez*, 887 S.W.2d 836, 843 (Tex. 1994):

> To summarize, the exceptions to the medical and mental health privileges apply when (1) the records sought to be discovered are relevant to the condition at issue, and (2) the condition is relied upon as a part of a party's claim or defense, meaning that the condition itself is a fact that carries some legal significance. Both parts of the test must be met before the exception will apply. Even then, when requested, the trial court must perform an *in camera* inspection of the documents produced to assure that the proper balancing of interests, which we have described, occurs before production is ordered.

Merely pleading confidential and privileged records *may* be relevant is not sufficient to trigger the litigation exception. *Id*. at 843. *E.g.*, *In re Morgan*, 507 S.W.3d 400, 404 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding).

Some questions were raised at the last meeting regarding the relationship between HIPAA's national standards and the Texas Medical Records Privacy Act. "With limited exceptions, HIPAA's privacy rules preempt any contrary requirement of state law unless the state law is more stringent than the federal rules. 45 C.F.R. §160.103. A requirement is 'contrary' if it would be impossible for a covered entity to comply with both the state law requirement and the HIPAA privacy rules, or if the requirement would undermine HIPAA's purposes. *Id*. §160.202." *In re Collins*, 286 S.W.3d 911, 917 (Tex. 2009).

**509(e)(1), 509(e)(2), and 509(e)(5)**

We agree with AREC that 509(e)(1)(b) and 509(e)(5) should be removed. These changes are not substantive; they are intended to clarify that the Rules do not apply to administrative proceedings. See TRE101(b), (c). Professor Goode agreed and could not recall why the administrative proceedings were included in the current text of the rule.

Richard Orsinger raised the issue of whether administrative proceedings might as a matter of statute, practice, or policy utilize the Rules of Evidence. For example, Tex. Gov't Code § 2001.081 states:

> The rules of evidence as applied in a nonjury civil case in a district court of this state shall apply to a contested case except that evidence inadmissible under those rules may be admitted

if three criteria are satisfied. Tex. Gov't Code § 2001.083 states, "In a contested case, a state agency shall give effect to the rules of privilege recognized by law," while Tex. Gov't Code Ann. § 2001.091 excludes from discovery in state agency cases materials that are "not privileged." These rules are referenced in the comment to the 2015 restyling.

We have drafted, if the SCAC thinks it is desirable, the following comment: "The deletion of Subsection 5 and 6 is not intended to change administrative proceedings that choose to follow the Texas Rules of Evidence. Instead, these deletions reflect that the rules are legally binding only in civil cases absent some other statute or administrative practice, procedure or policy." But we do not recommend this comment.

Professor Goode raised the question of whether 509(e)(5)'s provision regarding disciplinary investigations of or proceedings against nurses should be left in place but did not make any recommendation. AREC responded that nurses practice under a hospital's or physician's supervision so this provision should likewise be deleted.

We believe this is another example of a statute that elects to utilize parts of the Texas Rules of Evidence. Because those rules are not binding absent a statute or administrative policy or practice, it seems the reference should be deleted from the evidence rules. The regulation of nurses is governed by chapter 301 of the Texas Occupations Code. Tex. Occ. Code § 301.460provides that the board must provide upon request the license holder (i.e. the nurse) access to all known exculpatory information in the board's possession and information in the board's possession that it intends to offer into evidence at the contested hearing, but it is not required to produce materials covered by a privilege as recognized by the Texas Rules of Civil Procedure or the Texas Rules of Evidence. Tex. Occ. Code Ann. § 301.463 permits the board to

enter into an agreed disposition which is treated as "a settlement agreement under Rule 408, Texas Rules of Evidence."

**509(f)**

AREC originally recommended deleting the entirety of 509(f) and addressing the issue of consent in subpart (e)(2) under the title authorization instead of consent. Based on the last SCAC meeting, it appears that many committee members think subparagraph f should be a stand-alone provision for clarity.

We agreed that the word "authorization" is more precise than "consent" because the authorization is governed by HIPPA and state law. Referencing the applicable federal and state statutes also allows the form and content of authorizations to be revised based on statutory changes without revising the Rules of Evidence. For example, 45 C.F.R. § 164.502 contains general rules on disclosure including authorization for minors while 45 C.F.R. § 164.508 governs the "uses and disclosures for which an authorization is required."

We also agreed with deleting subparts 1 and 2 from subsection f. We previously informed AREC that we believed there are some practical benefits to retaining—with some tweaks—subsections (3) and (4) but moving them up into the body of this section. The three AREC members that we spoke with agreed with this change. They originally agreed that many practitioners would benefit from providing the statutory references.

Thus, we originally recommended that 509(f) include three slight revisions from AREC's recommendation. First, we suggested that it should cover "health care information" rather than "medical information because it is broader;" that change is reflected in the orange font below. Second, we suggested that it would be helpful to identify the two laws that most commonly apply to the question; this change is highlighted in green. Third, we suggested retaining former subparts (f)(3) and (f)(4), with the additional revision of the word consent to authorization; that change is highlighted in yellow. We believe it would be helpful to advise practitioners that an authorization may be revoked.

Since our last SCAC meeting, we have had additional discussions with AREC and it has now recommended deleting subpart f. The reasons are explained in AREC's memo and we agree with it. Professor Goode earlier suggested that Section (e)(2) and (f) should be deleted in their entirety.

**509(e)(6)**

We agree, and so does Professor Goode, that 509(e)(6) should be revised to include a provision regarding civil commitment of sexually violent predators as follows:

> Involuntary Civil Commitment or Similar Proceeding. In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:
>
> (A) chapter 462 (Treatment of Persons with Chemical Dependencies);
> (B) title 7, subtitle C (Texas Mental Health Code);
> (C) title 7, subtitle D (Persons With an Intellectual Disability Act); or

(D) title 11, chapter 841 (Civil Commitment of Sexually Violent Predators).

Conclusion

Here is how the Rule would read under our *original proposal*.

**(e ) Exceptions in a Civil Case.** This privilege does not apply

(1) Proceeding Against Physician. If the communication or record is relevant to a claim or defense in a proceeding the patient brings against a physician~~;~~

~~**(B)** a license revocation proceeding in which the patient is a complaining witness.~~

~~***Consent*.** If the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f).~~

**(2)** ***Action to Collect*.** In an action to collect a claim for medical services rendered to the patient.

**(3)** ***Party Relies on Patient's Condition*.** If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

**(5)** ~~***Disciplinary Investigation or Proceeding*.** In a disciplinary investigation of or proceeding against a physician under the Medical Practice Act, Tex. Occ. Code § 164.001 et seq., or a registered nurse under Tex. Occ. Code § 301.451 et seq. But the board conducting the investigation or proceeding must protect the identity of any patient whose medical records are examined unless:~~

~~**(A)** the patient's records would be subject to disclosure under paragraph (e)(1); or~~

~~**(B)** the patient has consented in writing to the release of medical records, as provided in subdivision (f).~~

**(4~~6~~)** ***Involuntary Civil Commitment or Similar Proceeding.*** In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:

**(A)** chapter 462 (Treatment of Persons With Chemical Dependencies);

**(B)** title 7, subtitle C (Texas Mental Health Code); or

**(C)** title 7, subtitle D (Persons With an Intellectual Disability Act).

(D) title 11, chapter 841 (Civil Commitment of Sexually Violent Predators).

**(5~~7~~)** ***Abuse or Neglect of "Institution" Resident*.** In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code § 242.002.

**(f)** ~~**Consent For Release of Privileged Information.**~~

~~(1) Consent for the release of privileged information must be in writing and signed by:~~

~~(A) the patient;~~

~~(B) a parent or legal guardian if the patient is a minor;~~

~~(C) a legal guardian if the patient has been adjudicated incompetent to manage personal affairs;~~

~~(D) an attorney appointed for the patient under Tex. Health & Safety Code title 7, subtitles C and D;~~

~~(E) an attorney ad litem appointed for the patient under Tex. Estates Code title 3, subtitle C;~~

~~(F) an attorney ad litem or guardian ad litem appointed for a minor under Tex. Fam. Code chapter 107, subchapter B; or~~

~~(G) a personal representative if the patient is deceased.~~

~~(2) The consent must specify:~~

~~(A) the information or medical records covered by the release;~~

~~(B) the reasons or purposes for the release; and~~

~~(C) the person to whom the information is to be released.~~

~~(3) The patient, or other person authorized to consent, may withdraw consent to the release of any information. But a withdrawal of consent does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal.~~

~~(4) Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the consent.~~

**(f)** *Authorization*. If a written authorization is executed that complies with applicable state or federal law governing the release or disclosure of otherwise privileged health care information ~~the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f)~~, such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 C.F. R. § 164.500, et seq., or the Texas Medical Records Privacy Act, Tex. Health & Safety Code § 181.001, et seq., a health care provide may release a copy of privileged records. ~~(3)~~ The patient, or other person authorized to sign an *authorization* ~~consent~~, may withdraw ~~consent~~ *the authorization* to the release of any information. But a withdrawal of *an authorization* ~~consent~~ does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal. ~~(4)~~ Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the ~~consent~~ *authorization*.

Without the highlighting, strikethroughs, and different fonts, our original proposal was as follows:

**(e ) Exceptions in a Civil Case.** This privilege does not apply

**(1) Proceeding Against Physician**. If the communication or record is relevant to a claim or defense in a proceeding the patient brings against a physician~~;~~

**(2)** ***Action to Collect.*** In an action to collect a claim for medical services rendered to the patient.

**(3) *Party Relies on Patient's Condition*.** If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

**(4) *Involuntary Civil Commitment or Similar Proceeding.*** In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:

**(A)** chapter 462 (Treatment of Persons With Chemical Dependencies);

**(B)** title 7, subtitle C (Texas Mental Health Code);

**(C)** title 7, subtitle D (Persons With an Intellectual Disability Act); or

(D) title 11, chapter 841 (Civil Commitment of Sexually Violent Predators).

**(5) *Abuse or Neglect of "Institution" Resident*.** In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code § 242.002.

**(f) Authorization**. If a written authorization is executed that complies with applicable law governing the release or disclosure of otherwise privileged health care information, such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 C.F. R. § 164.500, et seq., or the Texas Medical Records Privacy Act, Tex. Health & Safety Code § 181.001, et seq., a health care provide may release a copy of privileged records. The patient, or other person authorized to sign an authorization, may withdraw the authorization to the release of any information. But a withdrawal of an authorization does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal. Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the authorization.

**New Recommendation**

**(e) Exceptions in a Civil Case.** This privilege does not apply

**(1) Proceeding Against Physician**. If the communication or record is relevant to a claim or defense in a proceeding the patient brings against a physician~~;~~

**(2) *Action to Collect*.** In an action to collect a claim for medical services rendered to the patient.

**(3) *Party Relies on Patient's Condition*.** If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

**(4) *Involuntary Civil Commitment or Similar Proceeding.*** In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:

**(A)** chapter 462 (Treatment of Persons With Chemical Dependencies);

**(B)** title 7, subtitle C (Texas Mental Health Code);

**(C)** title 7, subtitle D (Persons With an Intellectual Disability Act); or

(D) title 11, chapter 841 (Civil Commitment of Sexually Violent Predators).

**(5)** ***Abuse or Neglect of "Institution" Resident.*** In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code § 242.002.

# Tab R1

EXHIBIT
A

# MEMORANDUM

To: Texas State Bar Board of Directors

From: Angie Olalde, Chair of State Bar of Texas Administration of Rules of Evidence Committee (AREC)

Re: AREC's recommendation to amend TRE 509

Date: December 5, 2022

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## Summary

At its final meeting for the 2020-2021 bar year, AREC voted to recommend 3 changes to TRE 509:

1. to remove references to administrative proceedings in 509(e)(1)(b) and 509(e)(5),
2. to remove (f)'s consent requirements, and
3. to add the sexually violent predator statutory exception to 509(e)(6)).

AREC decided not to recommend adding any redaction requirement to records under TRE 509, or to add a privilege exception if the patient's condition is relevant to the execution of a will.

## Background and AREC's Work

AREC continues its years-long review of TRE 509 and 510 to update them and make them consistent with current statutory provisions regarding the confidentiality of personal health and mental health information.

Rules 509 and 510 are peculiar among the Texas Rules of Evidence because their roots lie largely in statutory privileges afforded to patients and their doctors, nurses, physicians' assistants, dentists, podiatrists, pharmacists, and several other types of healthcare providers. There is even a statute protecting communications between a veterinarian and a pet owner. These statutes and protections are tied to the provision of health care.

AREC has been tasked with reviewing current statutes to ensure that the Rules of Evidence do not conflict with, and accurately reflect the current scope of the law concerning, a patient's medical and mental health privileges.

As part of that work, preliminary review shows that three changes should be recommended without additional delay:

## I. Removing references to administrative proceedings in 509(e)(1)(b) and 509(e)(5)

In 2015's restyling, the committee noted that the former rule's reference to administrative proceedings was deleted because the Texas Rules of Evidence only govern proceedings in Texas courts.

The TRE apply only to proceedings in Texas courts, unless a statute or constitutional provision requires otherwise. Tex. R. Evid. 101(b), (d). The TRE does not apply to certain criminal proceedings set out in Rule 101(e).

To the extent the rules apply in administrative proceedings, it is because the Administrative Procedure Act mandates their applicability. Tex. Gov't Code § 2001.083 provides that "[i]n a contested case, a state agency shall give effect to the rules of privilege recognized by law." Section 2001.091 excludes privileged material from discovery in contested administrative cases."

Based on this note, and the fact that a physician's duty to keep medical information confidential outside the courtroom derives from statutory and professional obligations, AREC has voted to remove language in Rule 509 that applies specifically to administrative proceedings.

TRE 509(e)(1)(B), (5) both exclusively relate to occupational licensing investigations and proceedings brought by the Texas Medical Board (TMB) against physicians. These are administrative proceedings that take place before TMB and at the State Office of Administrative Hearings (SOAH). There are a separate set of laws and rules relating to these proceedings, including the physician-patient privilege contained in the Texas Occupation Code Chapter 159, so removing references to administrative proceedings in the TRE will have no actual impact.

The current version of Rule 509 includes an exception for disciplinary investigations or proceedings against a physician or nurse under the Medical Practice Act. These are administrative proceedings that should be governed according to administrative rules and the applicable statutory privileges and confidentiality provisions, not the Texas Rules of Evidence.

AREC therefore voted to recommend the following change to Rule 509, to remove subsection 509(e)(1)(b) and 509(e)(5):

(e) Exceptions in a Civil Case. This privilege does not apply:
(1) Proceeding Against Physician. If the communication or record is relevant to a claim or defense in:
~~(A)~~ a proceeding the patient brings against a physician~~; or~~.
~~(B) a license revocation proceeding in which the patient is a complaining witness.~~

…

~~**(5) Disciplinary Investigation or Proceeding.** In a disciplinary investigation of or proceeding against a physician under the Medical Practice Act, Tex. Occ. Code § 164.001 et seq., or a registered nurse under Tex. Occ. Code § 301.451 et seq. But the board~~

~~conducting the investigation or proceeding must protect the identity of any patient whose medical records are examined unless:~~
~~**(A)** the patient's records would be subject to disclosure under paragraph (e)(1); or~~
~~**(B)** the patient has consented in writing to the release of medical records, as provided in subdivision (f).~~

These recommended changes are not meant to in any way limit any statutory or existing privileges, but to clarify that administrative proceedings are governed by statutory confidentiality and privilege protections. Nothing in this recommended change would prohibit an administrative proceeding from choosing to abide by TRE provisions.

## II. Removing subsection (f)'s consent requirements and changing "consent" to "authorization."

Extensive federal and state laws govern the release of protected health information. The TRE, on the other hand, relate to the admission of certain evidence during proceedings before Texas courts, and do not govern whether a third-party health provider should, or can, release information to a third party. Because regulations such as the Health Insurance Portability and Accountability Act, or HIPAA, govern whether and when protected health information can be *released* to someone who is not the patient, there is no need for the Texas Rules of Evidence to duplicate, or possibly conflict with, such requirements.

For example, an "authorization" has a specific meaning in the HIPAA Privacy Rule., which is the document that must be signed by the patient or their representative. Authorizations must comply with the certain requirements before the release of protected health information to a third party can occur. The TMRPA,[1] the TMRPA, Texas Civil Practice & Remedies Code,[2] and Office of the Attorney General model[3] authorization forms use the term "authorization" in reference to the release of protected health information. The TRE, however, uses the term "consent," while substantively referring to what federal and Texas law deem an "authorization."

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[1] Tex. Health & Safety Code § 181.154(d) (Texas Medical Records Privacy Act or TMRPA, adopting HIPAA's requirements for an authorization to release medical information); *see also* Tex. Health & Safety Code § 181.154(b) (a separate authorization is required for each disclosure and that "[a]n authorization for disclosure under this subsection may be made in written or electronic form or in oral form if it is documented in writing by the covered entity.")

[2] For medical liability claims brought against health care providers, a patient-litigant in Texas must provide complete a statutory "Authorization Form for Release of Protected Health Information." Tex. Civ. Prac. Rem. Code § 74.052(b).

[3] The OAG model authorization form states that:

> As indicated on the form, specific authorization is required for the release of information about certain sensitive conditions, including:
>
> - Mental health records (excluding "psychotherapy notes" as defined in HIPAA at 45 CFR 164.501).
> - Drug, alcohol, or substance abuse records.
> - Records or tests relating to HIV/AIDS.
> - Genetic (inherited) diseases or tests (except as may be prohibited by 45 C.F.R. § 164.502).

Therefore, to eliminate any duplication of, or conflict with, state and federal statutory protections regarding the release of protected health information, AREC has voted to amend TRE 509(f) as follows:

**(e) Exceptions in a Civil Case.** This privilege does not apply:

**…**

**(2)** ~~**Consent**~~**Authorization.** If a written authorization is executed that complies with Texas or federal law governing the disclosure of medical information ~~the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f)~~.

…

~~**(f) Consent For Release of Privileged Information.**~~

~~**(1)** Consent for the release of privileged information must be in writing and signed by:~~

~~**(A)** the patient;~~

~~**(B)** a parent or legal guardian if the patient is a minor;~~

~~**(C)** a legal guardian if the patient has been adjudicated incompetent to manage personal affairs;~~

~~**(D)** an attorney appointed for the patient under Tex. Health & Safety Code title 7, subtitles C and D;~~

~~**(E)** an attorney ad litem appointed for the patient under Tex. Estates Code title 3, subtitle C;~~

~~**(F)** an attorney ad litem or guardian ad litem appointed for a minor under Tex. Fam. Code chapter 107, subchapter B; or~~

~~**(G)** a personal representative if the patient is deceased.~~

~~**(2)** The consent must specify:~~

~~**(A)** the information or medical records covered by the release;~~

~~**(B)** the reasons or purposes for the release; and~~

~~**(C)** the person to whom the information is to be released.~~

~~**(3)** The patient, or other person authorized to consent, may withdraw consent to the release of any information. But a withdrawal of consent does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal.~~

~~**(4)** Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the consent.~~

## III. Adding the sexually violent predator statutory exception to TRE 509(e)(6)

The program for the civil commitment of sexually violent predators not exist when TRE 509(e)(6) was originally written. As a subsequently created program that meets the criteria listed in this rule, AREC has voted that TRE 509 should be amended to include this program.

Accordingly, AREC recommends the following change to TRE 509(e)(6):

***Involuntary Civil Commitment or Similar Proceeding.*** In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:
**(A)** chapter 462 (Treatment of Persons With Chemical Dependencies);

**(B)** title 7, subtitle C (Texas Mental Health Code); ~~or~~
**(C)** title 7, subtitle D (Persons With an Intellectual Disability Act); or
**(D)** title 11, chapter 841 (Civil Commitment of Sexually Violent Predators).

# Tab R2

EXHIBIT

B

## Misty N. Croshaw

**From:** Goode, Steven <SGoode@law.utexas.edu>
**Sent:** Tuesday, March 21, 2023 5:46 PM
**To:** Misty N. Croshaw
**Subject:** RE: SCAC - Referral of Rules Issues

[EXTERNAL SENDER]

Buddy,

It was good to chat with you today. You are a goldmine of information.

Here's my quick take on the AREC proposals.

Rule 509:

1. I absolutely agree with the AREC's premise that the TRE are not the place for rules regarding the applicability of privilege to administrative proceedings. As the AREC report aptly states, the TRE apply to court proceedings. The extent to which administrative agencies should apply them is a matter of administrative law, not the rules of evidence. And with perhaps one exception, I agree that deleting the exceptions currently listed in Rule 509(e)(1)(B) and (e) would have no effect on the law because the Texas Occ. Code sec. 159.003(a)(1)(B) and (5) respectively provide statutory exceptions for license revocation proceedings and disciplinary investigations of physicians. The one possible exception – where the AREC proposal might change the status quo – concerns disciplinary investigations or proceedings against a nurse. The cited Occ. Code provisions refer only to physicians; they don't cover nurses. I'm not aware of any other statutory exception regarding nurses, although there may be one of which I'm simply not aware. In any event, this is something that should be dealt with statutorily. The TRE should not be setting rules for administrative proceedings.
2. Rather than substitute for the Rule 509(e)(2) and (f) consent provisions the AREC proposed "authorization" language, my inclination would be to simply delete Rule 509(e)(2) and (f). Rules of privilege are designed to allow the privilege holder to resist being compelled to disclose and to prevent others from disclosing privileged information. A privilege holder, however, may voluntarily choose to disclose privileged information. As I understand it, the written authorization language in HIPAA and the Texas statutes cited in the AREC memo set forth for health providers the conditions under which they may release a patient's health information. That has nothing to do with privilege. To the contrary, as I understand it (and I may be wrong) HIPAA provides in 45 CFR 164.512(a) and (e)(1) that a health provider may disclose a patient's health information (without the patient's written authorization) in response to a court order or subpoena.

   In other words, if a patient asserts the physician-patient privilege and the court finds that the privilege doesn't apply – either because an exception applies or the patient has waived the privilege – the court may compel production. And a court can find under Rule 511 that a patient has waived the privilege in the absence of any written authorization of the type contemplated in the AREC proposed language. So, to my thinking, there's simply no need – and, in fact, no place – in Rule 509 for either the current Rule 509(e)(2) and (f) or the language proposed as a substitute for the current provision.

3. I agree with the addition of the sexually violent predator exception to Rule 509(e)(6).

Rule 510

I'm afraid I just don't understand the landscape of the peer assistance programs well enough to have much of an opinion about this. I'm not sure exactly what putting this in TRE 510 accomplishes beyond what's already in the statute. The statute provides for confidentiality and seems by its terms to apply to court proceedings as well as other situations. I suppose one could argue it would privilege confidential communications made between the patient and profession, which arguably are not covered by the statutory language. But I'm not sure that such communications are not covered implicitly by the statutory provision. The only other observation I have concerns the proposed comment to the AREC proposal. It states:

> Such programs [peer assistance programs under Chapter 467] include, but are not limited to, programs assisting lawyers
> (the Texas Lawyers' Assistance Program or TLAP), and professions listed in the Texas Occupations Code such as nurses, doctors, veterinarians, and chemical dependency counselors.

But Health & S. Code section 467.002 says, "This chapter does not apply to a peer assistance program for licensed physicians or pharmacists or for any other profession that is authorized under other law to establish a peer assistance program." That seems at variance with the reference to doctors in the AREC comment. But again, I really am not familiar with the world of peer assistance programs and their statutory bases.

I hope this is helpful.

Regards,
Steve

**From:** Misty N. Croshaw <mcroshaw@obt.com>
**Sent:** Tuesday, March 21, 2023 2:34 PM
**To:** Goode, Steven <SGoode@law.utexas.edu>
**Subject:** SCAC - Referral of Rules Issues

Steve,

Thank you for talking to me about this and agreeing to review this and giving me your comments. Your opinion means so very much to me and I appreciate your help.

Thank you very much,
Buddy Low

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ord of the in camera proceeding. The record of the in camera proceeding must not otherwise be revealed without the public entity's consent.

Eff. March 1, 1998. Amended by orders of Supreme Court March 10, 2015 and Court of Criminal Appeals March 12, 2015, eff. April 1, 2015.

**Source:** Proposed FRE 510 (1972) and Unif. R. Evid. 509 (1974).

See also **O'Connor's Texas Rules**, "Asserting privileges," ch. 6-A, §18.2; **O'Connor's Texas Rules**, "Scope of Discovery," ch. 6-B, §1 et seq.; Brown & Rondon, **Texas Rules of Evidence Handbook**, Rule 508.

## ANNOTATIONS

**In re Bates**, 555 S.W.2d 420, 430 (Tex.1977). When the "role of the informer was very minor and occurred quite early in the [bribery] investigation; and absent other evidence concerning the relevance of the identity of the informer; the disclosure [of the informer's identity] is not required."

**Warford v. Childers**, 642 S.W.2d 63, 66-67 (Tex.App.—Amarillo 1982, no writ). The rule-blocking disclosure "is a recognition of the fact that most informants relay rumor, gossip and street talk of no evidentiary value and the exceptions [to the rule] are designed for the rare case where the informant can give eyewitness testimony about the alleged crime or arrest."

### TRE 509. PHYSICIAN-PATIENT PRIVILEGE

**(a) Definitions.** In this rule:

(1) A "patient" is a person who consults or is seen by a physician for medical care.

(2) A "physician" is a person licensed, or who the patient reasonably believes is licensed, to practice medicine in any state or nation.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those:

(A) present to further the patient's interest in the consultation, examination, or interview;

(B) reasonably necessary to transmit the communication; or

(C) participating in the diagnosis and treatment under the physician's direction, including members of the patient's family.

**(b) Limited Privilege in a Criminal Case.** There is no physician-patient privilege in a criminal case. But a confidential communication is not admissible in a criminal case if made:

(1) to a person involved in the treatment of or examination for alcohol or drug abuse; and

(2) by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse.

**(c) General Rule in a Civil Case.** In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:

(1) a confidential communication between a physician and the patient that relates to or was made in connection with any professional services the physician rendered the patient; and

(2) a record of the patient's identity, diagnosis, evaluation, or treatment created or maintained by a physician.

**(d) Who May Claim in a Civil Case.** The privilege may be claimed by:

(1) the patient; or

(2) the patient's representative on the patient's behalf.

The physician may claim the privilege on the patient's behalf—and is presumed to have authority to do so.

**(e) Exceptions in a Civil Case.** This privilege does not apply:

(1) ***Proceeding Against Physician.*** If the communication or record is relevant to a claim or defense in:

(A) a proceeding the patient brings against a physician; or

(B) a license revocation proceeding in which the patient is a complaining witness.

(2) ***Consent.*** If the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f).

(3) ***Action to Collect.*** In an action to collect a claim for medical services rendered to the patient.

(4) ***Party Relies on Patient's Condition.*** If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

(5) ***Disciplinary Investigation or Proceeding.*** In a disciplinary investigation of or proceeding against a physician under the Medical Practice Act, Tex. Occ. Code §164.001 et seq., or a registered nurse under Tex. Occ. Code §301.451 et seq. But the board conducting the investigation or proceeding must protect the identity of any patient whose medical records are examined unless:

(A) the patient's records would be subject to disclosure under paragraph (e)(1); or

(B) the patient has consented in writing to the release of medical records, as provided in subdivision (f).

(6) ***Involuntary Civil Commitment or Similar Proceeding.*** In a proceeding for involuntary civil commit-

ment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:

(A) chapter 462 (Treatment of Persons With Chemical Dependencies);

(B) title 7, subtitle C (Texas Mental Health Code); or

(C) title 7, subtitle D (Persons With an Intellectual Disability Act).

(7) ***Abuse or Neglect of "Institution" Resident.*** In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code §242.002.

**(f) Consent for Release of Privileged Information.**

(1) Consent for the release of privileged information must be in writing and signed by:

(A) the patient;

(B) a parent or legal guardian if the patient is a minor;

(C) a legal guardian if the patient has been adjudicated incompetent to manage personal affairs;

(D) an attorney appointed for the patient under Tex. Health & Safety Code title 7, subtitles C and D;

(E) an attorney ad litem appointed for the patient under Tex. Estates Code title 3, subtitle C;

(F) an attorney ad litem or guardian ad litem appointed for a minor under Tex. Fam. Code chapter 107, subchapter B; or

(G) a personal representative if the patient is deceased.

(2) The consent must specify:

(A) the information or medical records covered by the release;

(B) the reasons or purposes for the release; and

(C) the person to whom the information is to be released.

(3) The patient, or other person authorized to consent, may withdraw consent to the release of any information. But a withdrawal of consent does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal.

(4) Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the consent.

Eff. March 1, 1998. Amended by orders of Supreme Court March 10, 2015 and Court of Criminal Appeals March 12, 2015, eff. April 1, 2015. Amended by order of Supreme Court June 14, 2016, eff. June 14, 2016.

**Comment to 1998 change:** This comment is intended to inform the construction and application of this rule. Prior Criminal Rules of Evidence 509 and 510 are now in subparagraph (b) of this Rule. This rule governs disclosures of patient-physician communications only in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by Tex.Rev.Civ.Stat.Ann. art. 4495b, §5.08. Former subparagraph (d)(5) of the Civil Evidence Rules, regarding disclosures in a suit affecting the parent-child relationship, is omitted, not because there should be no exception to the privilege in suits affecting the parent-child relationship, but because the exception in such suits is properly considered under subparagraph (c)(4) of the new rule (formerly subparagraph (d)(4)), as construed in **R.K. v. Ramirez**, 887 S.W.2d 836 (Tex. 1994). In determining the proper application of an exception in such suits, the trial court must ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege. Subparagraph (c) of the new rule does not except from the privilege information relating to a nonparty patient who is or may be a consulting or testifying expert in the suit.

**Comment to 2015 Restyling:** The physician-patient privilege in a civil case was first enacted in Texas in 1981 as part of the Medical Practice Act, formerly codified in Tex. Rev. Civ. Stat. art. 4495b. That statute provided that the privilege applied even if a patient had received a physician's services before the statute's enactment. Because more than thirty years have now passed, it is no longer necessary to burden the text of the rule with a statement regarding the privilege's retroactive application. But deleting this statement from the rule's text is not intended as a substantive change in the law.

The former rule's reference to "confidentiality or" and "administrative proceedings" in subdivision (c) [Exceptions in a Civil Case] has been deleted. First, this rule is a privilege rule only. Tex. Occ. Code §159.004 sets forth exceptions to a physician's duty to maintain confidentiality of patient information outside court and administrative proceedings. Second, by their own terms the rules of evidence govern only proceedings in Texas courts. See Rule 101(b). To the extent the rules apply in administrative proceedings, it is because the Administrative Procedure Act mandates their applicability. Tex. Gov't Code §2001.083 provides that "[i]n a contested case, a state agency shall give effect to the rules of privilege recognized by law." Section 2001.091 excludes privileged material from discovery in contested administrative cases.

Statutory references in the former rule that are no longer up-to-date have been revised. Finally, reconciling the provisions of Rule 509 with the parts of Tex. Occ. Code ch. 159 that address a physician-patient privilege applicable to court proceedings is beyond the scope of the restyling project.

See also **O'Connor's Texas Rules**, "Asserting privileges," ch. 6-A, §18.2; **O'Connor's Texas Rules**, "Scope of Discovery," ch. 6-B, §1 et seq.; **O'Connor's Texas Rules**, "Medical Records," ch. 6-J, §1 et seq.; Brown & Rondon, **Texas Rules of Evidence Handbook**, Rule 509; **O'Connor's Texas Forms**, FORM 5E:1.

## ANNOTATIONS

**R.K. v. Ramirez**, 887 S.W.2d 836, 842 (Tex.1994). "[T]he patient-litigant exception to [TRE 509 and 510] privileges applies when a party's condition relates in a significant way to a party's claim or defense. *At 843 n.7:* Whether a condition is a part of a claim or defense should be determined on the face of the pleadings, without reference to the evidence that is allegedly privileged. *At 843:* [T]he exceptions to the medical and mental health privileges apply when (1) the records sought to be discovered are relevant to the condition at issue, and (2) the condition is relied upon as a part of a party's claim or defense, meaning that the condition itself is a fact that carries some legal significance."



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**Groves v. Gabriel**, 874 S.W.2d 660, 661 (Tex.1994). "[A] trial court's order compelling release of medical records should be restrictively drawn so as to maintain the privilege with respect to records or communications not relevant to the underlying suit. The global release in this case does not meet the **Mutter** standard." *See also* **In re Collins**, 286 S.W.3d 911, 916 (Tex.2009).

**Mutter v. Wood**, 744 S.W.2d 600, 600 (Tex.1988). "There are ... eight exceptions to the [physician-patient] privilege. *At 601:* In this case, the privilege was waived completely as to the defendant doctors and partially as to the treating doctors. To the extent, however, that the treating doctors had records or communications which were not relevant to the underlying suit, they remained privileged...."

**In re Toyota Motor Corp.**, 191 S.W.3d 498, 502 (Tex.App.—Waco 2006, orig. proceeding). "A claim for mental anguish or emotional distress will not, standing alone, make a plaintiff's mental or emotional condition a part of the plaintiff's claim. [T]he allegation in [P's] petition that he suffered 'emotional shock' is not a sufficient basis to make his mental or emotional condition an issue on which the jury will be required to make a factual determination. [¶] Therefore, [P's] communications ... are protected by the physician-patient privilege."

**In re Arriola**, 159 S.W.3d 670, 675-76 (Tex.App.—Corpus Christi 2004, orig. proceeding). "[Ds] contend the abuse-and-neglect exceptions [to TRE 509 and 510] apply only to proceedings brought by appropriate law enforcement agencies. [¶] However, the abuse-and-neglect exceptions ... contain no such limitation. [R]ules 509 and 510 state that the exceptions apply in administrative proceedings and civil proceedings in court. [¶] [Ds] contend numerous state statutes and administrative rules protect the records and medical information from disclosure.... [¶] However, each of the confidentiality and privilege provisions [Ds cite] contains an exception to nondisclosure where release of the information is required by law or ordered by the court. *At 677:* Here, the rules of evidence are the 'law' that requires release of the information."

**In re Whiteley**, 79 S.W.3d 729, 732-34 (Tex.App.—Corpus Christi 2002, orig. proceeding). D-doctor in medical-malpractice case triggered the TRE 509(e)(4) exception to physician-patient privilege when he testified in deposition that he successfully performed the same surgical procedure on nonparty patients; thus, nonparty patients' medical records became discoverable by P.

**James v. Kloos**, 75 S.W.3d 153, 160 (Tex.App.—Fort Worth 2002, no pet.). "[A] party can be prejudiced when his doctor meets with opposing counsel, but ... such prejudice may not be severe enough to disallow the doctor's testimony. [P]rejudice due to an improper meeting does not necessarily mean prejudice at trial, and, therefore, does not mean that an improper verdict necessarily results when a doctor is allowed to testify after such a meeting. [T]here must be a showing that the ruling probably caused the rendition of an improper judgment." *See also* **Durst v. Hill Country Mem'l Hosp.**, 70 S.W.3d 233, 237 (Tex.App.—San Antonio 2001, no pet.).

## TRE 510. MENTAL HEALTH INFORMATION PRIVILEGE IN CIVIL CASES

**(a) Definitions.** In this rule:

(1) A "professional" is a person:

(A) authorized to practice medicine in any state or nation;

(B) licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional disorder;

(C) involved in the treatment or examination of drug abusers; or

(D) who the patient reasonably believes to be a professional under this rule.

(2) A "patient" is a person who:

(A) consults or is interviewed by a professional for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and drug addiction; or

(B) is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.

(3) A "patient's representative" is:

(A) any person who has the patient's written consent;

(B) the parent of a minor patient;

(C) the guardian of a patient who has been adjudicated incompetent to manage personal affairs; or

(D) the personal representative of a deceased patient.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those:

(A) present to further the patient's interest in the diagnosis, examination, evaluation, or treatment;

(B) reasonably necessary to transmit the communication; or

(C) participating in the diagnosis, examination, evaluation, or treatment under the professional's direction, including members of the patient's family.

**(b) General Rule; Disclosure.**

(1) In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:

(A) a confidential communication between the patient and a professional; and

(B) a record of the patient's identity, diagnosis, evaluation, or treatment that is created or maintained by a professional.

(2) In a civil case, any person—other than a patient's representative acting on the patient's behalf—who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes for which it was obtained.

(c) **Who May Claim.** The privilege may be claimed by:

(1) the patient; or

(2) the patient's representative on the patient's behalf.

The professional may claim the privilege on the patient's behalf—and is presumed to have authority to do so.

(d) **Exceptions.** This privilege does not apply:

(1) ***Proceeding Against Professional.*** If the communication or record is relevant to a claim or defense in:

(A) a proceeding the patient brings against a professional; or

(B) a license revocation proceeding in which the patient is a complaining witness.

(2) ***Written Waiver.*** If the patient or a person authorized to act on the patient's behalf waives the privilege in writing.

(3) ***Action to Collect.*** In an action to collect a claim for mental or emotional health services rendered to the patient.

(4) ***Communication Made in Court-Ordered Examination.*** To a communication the patient made to a professional during a court-ordered examination relating to the patient's mental or emotional condition or disorder if:

(A) the patient made the communication after being informed that it would not be privileged;

(B) the communication is offered to prove an issue involving the patient's mental or emotional health; and

(C) the court imposes appropriate safeguards against unauthorized disclosure.

(5) ***Party Relies on Patient's Condition.*** If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

(6) ***Abuse or Neglect of "Institution" Resident.*** In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code §242.002.

Eff. March 1, 1998. Amended by orders of Supreme Court March 10, 2015 and Court of Criminal Appeals March 12, 2015, eff. April 1, 2015. Amended by Supreme Court order of June 14, 2016, eff. June 14, 2016.

**Comment to 1998 change:** This comment is intended to inform the construction and application of this rule. This rule governs disclosures of patient-professional communications only in judicial or administrative proceedings. Whether a professional may or must disclose such communications in other circumstances is governed by Tex.Health & Safety Code Ann. §§611.001 to 611.008. Former subparagraph (d)(6) of the Civil Evidence Rules, regarding disclosures in a suit affecting the parent-child relationship, is omitted, not because there should be no exception to the privilege in suits affecting the parent-child relationship, but because the exception in such suits is properly considered under subparagraph (d)(5), as construed in R.K. v. Ramirez, 887 S.W.2d 836 (Tex. 1994). In determining the proper application of an exception in such suits, the trial court must ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege. Subparagraph (d) does not except from the privilege information relating to a nonparty patient who is or may be a consulting or testifying expert in the suit.

**Comment to 2015 Restyling:** The mental-health-information privilege in civil cases was enacted in Texas in 1979. Tex. Rev. Civ. Stat. art. 5561h (later codified at Tex. Health & Safety Code §611.001 et seq.) provided that the privilege applied even if the patient had received the professional's services before the statute's enactment. Because more than thirty years have now passed, it is no longer necessary to burden the text of the rule with a statement regarding the privilege's retroactive application. But deleting this statement from the rule's text is not intended as a substantive change in the law.

Tex. Health & Safety Code ch. 611 addresses confidentiality rules for communications between a patient and a mental-health professional and for the professional's treatment records. Many of these provisions apply in contexts other than court proceedings. Reconciling the provisions of Rule 510 with the parts of chapter 611 that address a mental-health-information privilege applicable to court proceedings is beyond the scope of the restyling project.

See also **O'Connor's Texas Rules**, "Asserting privileges," ch. 6-A, §18.2; **O'Connor's Texas Rules**, "Scope of Discovery," ch. 6-B, §1 et seq.; **O'Connor's Texas Rules**, "Medical Records," ch. 6-J, §1 et seq.; Brown & Rondon, **Texas Rules of Evidence Handbook**, Rule 510; **O'Connor's Texas Forms**, FORM 5E:1.

## ANNOTATIONS

**R.K. v. Ramirez**, 887 S.W.2d 836, 843 (Tex.1994). "As a general rule, a mental condition will be a 'part' of a claim or defense if the pleadings indicate that the jury must make a factual determination concerning the condition itself."

**Groves v. Gabriel**, 874 S.W.2d 660, 661 (Tex.1994). "Because [P] alleges severe emotional damages, including 'post-traumatic stress disorder,' [she] waived the privilege as to any medical records relevant to her claim for emotional damages." *See also* **Ginsberg v. Fifth Ct. of Appeals**, 686 S.W.2d 105, 107 (Tex.1985).

**In re Arriola**, 159 S.W.3d 670, 675-76 (Tex.App.—Corpus Christi 2004, orig. proceeding). See annotation under TRE 509.

### TRE 511. WAIVER BY VOLUNTARY DISCLOSURE

(a) **General Rule.**

A person upon whom these rules confer a privilege against disclosure waives the privilege if:

(1) the person or a predecessor of the person while



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# Tab R3

EXHIBIT

C

To: SCAC Evidence Subcommittee
Fm: Roger W. Hughes
Date: May 8, 2023
Re: Effect of Proposed Changes to TRE 509 on Administrative Disciplinary Proceedings against Physicians and Nurse

1. I think the exceptions currently listed in Rule 509(e)(1)(B) and Rule 509(e)(5) are unnecessary and the proposed changes will have no adverse effect on current practices in administrative proceedings. First, they are probably holdover from the attempt to adopt former art. 4495(b) as a rule of evidence.

Second, the licensing proceedings are treated as "contested cases" under the Administrative Procedure Act (APA) held before an administrative law judge (ALJ) assigned by the State Office of Administrative Hearings (SOAH). For contested cases, the APA adopts the rules of evidence from district court and other privileges recognized by law. Appeals for the disciplinary proceedings go to the Travis County District Court which applies the "substantive evidence" rule of decision.

In short, Rule 509 and the statutory patient-physician communication privilege already apply in the administrative disciplinary proceedings. The proposed changes will not affect evidentiary practice before the licensing agency in contested case hearings or appeals into the district court.

2. TEX. R. EVID. 509(e)(1)(B) provides the privilege does not apply in a license revocation hearing against a physician in which the patient is the complaining witness. TEX. R. EVID. 509(e)(5) provides the privilege does not apply to a disciplinary proceeding against (i) a doctor under TEX. OCC. CODE §164.001, or (ii) a registered nurse under TEX. OCC. CODE §301.451. Note: this applies only to proceedings against medical doctors and registered nurses. There are a number of licensed healthcare providers (e.g., LPNs, physicians' assistants, medical technicians, chiropractors, etc.) that are not within the exception. I think the existing exceptions 509(e)(1)(B) and 509(e)(5) are vestiges of an earlier time.

3. TEX. GOV'T CODE §2001.081 provides the rules of evidence in district court apply to "contested cases" held under the APA, unless the evidence (a) is necessary to determine facts not "reasonably susceptible of proof" under the rules of evidence, and (b) not precluded by statute. Section 2001.083, states in contested cases, the agency will give effect to the rules of privilege "recognized by law." Section 2001.091 states that in contested cases the agency, subject to the "limitations of the kind provided for discovery under the Texas Rules of Civil Procedure," may order a party to produce relevant material that "is not privileged." TEX. OCC. CODE §159.002 provides a privilege for physician-

patient privileges. However, Section 159.003 provides exceptions for an administrative proceeding (1) in which the patient is the complaining witness for a license revocation and the disclosure is relevant, or (2) for discipline and the Medical Board protects the patient's identity.

Arguably the proposed changes will clarify that under section 2001.081 TRE 509 will apply to contested cases. The current TRE 509(e) says it does not apply to disciplinary proceedings against physicians/nurses, but section 2001.081 says the rules of evidence apply. This will reduce confusion about whether TRE 509 applies to disciplinary proceedings or not.

4. TEX. OCC. CODE §164.001 allows the Medical Board to refuse to issue/renew a medical license, revoke/suspend a license, or reprimand a license holder. Proceedings are treated as contested cases and held before an administrative law judge, who makes findings of fact and conclusions of law; however, sanctions are decided by the Board. TEX. OCC. CODE §164.007. Both sides may appeal to a Travis County District court. TEX. OCC. CODE §§164.0072, -.009. The appeal is decided under the 'substantive evidence' standard.

Similarly, a licensed nurse is entitled to "contested case" hearing by an ALJ before the Board of Nursing can refuse to issue or renew a license, or can revoke or suspend a license. TEX. OCC. CODE §301.454. The Board's decision is appealed to the Travis County district court and decided under the substantive evidence standard. TEX. GOV'T CODE §2001.176.

# Tab R4

EXHIBIT
D

# MEMORANDUM

To: Buddy Low, Chair
Supreme Court Advisory Committee

From: Johnathan Stone, Rule 509 Subcommittee Chair
State Bar of Texas Administration of Rules of Evidence Committee (AREC)

Re: AREC's Updated Recommendation Regarding TRE 509

Date: August 17, 2023

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## Update

AREC originally recommended deleting the entirety of 509(f) and addressing the issue of consent in subpart e(2) under the title authorization instead of consent.

On April 28, 2023, AREC met and discussed the feedback from SCAC and Professor Goode in response to the original recommendation.

Upon further consideration, AREC voted to recommend deleting both (e)(2) and (f) in their entirety.

The purpose of Rule 509(e)(2) and (f) is seemingly to allow a patient to provide written consent allowing a party to obtain and use in evidence a patient's confidential physician-patient communications and records. The ability of the recipient to *obtain* privileged information using the written consent is particularly important in the context of Rule 509 because a patient who produces medical records in discovery or otherwise voluntarily discloses the information is already subject to the general privilege waiver contained in Rule 511.

Rule 509, as written, fails to accomplish this goal. The "consent" in Rule 509(f) is modeled after the "consent" in Tex. Occ. Code § 159.005, which in turn appears to be modeled after the "authorization" in HIPAA. But the elements of a "consent" contained in Rule 509(f) and Tex. Occ. Code § 159.005(b), do not have contain all the necessary elements of an "authorization" for the release of privileged information contained in HIPAA and elsewhere in state law. *Compare* Tex. Occ. Code § 159.005(b) (listing the elements of a consent), *with* HIPAA, 45 C.F.R. § 164.508(c) (listing the necessary elements of an authorization, including the accompanying required statements); *see also* Tex. Health & Safety Code § 181.154; Tex. Civ. Prac. Rem. Code § 74.052; OAG Model Authorization to Disclose Protected Health Information, www.texasattorneygeneral.gov/sites/default/files/files/divisions/consumer-protection/hb300-Authorization-Disclose-Health-Info.pdf.

AREC's members, including its members who practice in health law, agreed that an attorney relying on a Tex. R. Evid. 509(f) and Tex. Occ. Code § 159.005(b) "consent" would likely be unable to obtain medical records from a healthcare provider because of the missing "authorization"

requirements. *See In re Collins*, 286 S.W.3d 911, 920 (Tex. 2009) (HIPAA preempts state law if it would be impossible for a covered entity to comply with both the state and federal requirements).

The same problems extends to subsection (e) and the corresponding state law it was modeled after, Tex. Occ. Code § 159.003(a)(2).

AREC's original proposed change picked "authorization" over "consent" as the correct terminology and elements to obtain privileged health information. But this ignores the "consent" waiver of the physician-patient privilege contained in Tex. Occ. Code §§ 159.003(a)(2), .005.

AREC does not believe that the rules of evidence are the proper venue for resolving conflicts among state and federal laws and, even if it were, it would be inadvisable to adopt a list of the necessary elements of either a "consent" or an "authorization" when both are subject to future legislative change.

Moreover, the focus of this section is on *obtaining* medical records, which is arguable not within the purview of the rules governing the admissibility of evidence. Rule 511(a)(1) already exists providing a privilege waiver when the privilege holder consents.

AREC recommends deleting both subsections (e)(2) and (f), as unnecessary. "Consents" and "authorizations" exist elsewhere in the law and will continue to govern the method by which a patient authorizes a recipient to obtain and use the patient's confidential physician-patient communications and records.

The Supreme Court's rulemaking authority contained in Tex. Gov't Code § 22.004(c) might permit it to repeal Tex. Occ. Code §§ 159.003(a)(2), .005, to the extent the "consents" requirements do not contain all of the "authorization" requirements contained elsewhere in state and federal law.

# Tab S

To: SCAC Evidence Subcommittee
Fm: Roger W. Hughes
Date: August 3, 2023
Re: Amendment of TRE 510(a)(1) to cover "peer assistance programs"

1. The original AREC proposal was to amend TRE 510(a)(1) that defines who is a "professional" to include a person:

> "(D) acting as an employee, member, or agent of an approved peer assistance program under Chapter 467 of the Texas Health and Safety Code;"

AREC's proposal is limited to programs under Chapter 467; it would not extend to programs under the many other statutes listed in Ms. Angie Olalde's Memo, dated Dec. 5, 2020; Tab Z1, p. 347, of June 16-17, 2023 SCAC materials.

2. The SCAC voted in favor of recognizing a peer assistance privilege and asked the Subcommittee discuss and propose further revision. This memo summarizes the issues discussed at the June 2023 meeting.

   a. Levy – public policy to promote a risk-free dialogue for those seeking help. However, how would this apply to a suicide hot-line? Should we reach out to Board of Medical Examiners on this? Hoffman responded this already covered by statute.
   b. Kelly – no one has ever subpoenaed TLAP records so we are just offering institutional support for TLAP.
   c. Schaeffer – has there been research on peer assistance privileges in other states? Hoffman addressed that.
   d. Miskel – "peer assistance" could be overbroad. Do we want it to extend to any peer assistance?
   e. Bland – how will this apply in civil commitment proceedings?

3. My personal recommendation is an amended to cover approved programs authorized by statute. This is my suggestion for TRE 510(a)(1)(D):

> "(D) acting as an employee, member, or agent of an approved peer assistance program authorized by law."

This limits it to employees, etc., of peer assistance programs that are (1) authorized under a state statute, and (2) approved by the body responsible to

supervise or create the program. This will not extend the privilege to informal communications to peers or to *ad hoc* groups.

4. Involuntary Civil Commitment. My understanding is civil commitment for persons with mental health issues is handled by Probate Court. TRE 510 already applies the privilege in such cases. TRE 510(d)(5) provides the privilege does not apply if (1) the patient's physical, mental, or emotional health is part of a party's claim or defense, and (2) the communication is relevant to that condition. My opinion is that a "peer assistance program" privilege will not present for mental health commitments.

However, TRE 509(e)(6) provides that it does not apply to involuntary civil commitment and court-ordered treatment under H&S Code chap. 462 (chemical dependence, mental health, intellectual disability); AREC recommended amending Rule 509(e)(6) to exclude proceedings involving commitment of SVPs (sexually violent predator's) under H&S chap. 841. We may wish to consider a similar exclusion to Rule 510(d) to avoid questions over why Rule 509(e) expressly excludes involuntary commitment, but Rule 510(d) has no similar exclusion.