2024 TEXAS LEGAL REVIEW

18 Guardianship Related Cases

Decided by Texas Courts

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Note: This work was prepared as a guide to guardianship practitioners, and is intended as an informational guide, not as a complete listing of all case law. Before relying on any of the information presented in this summary, users are encouraged to consult with counsel familiar with guardianship law and related legal issues. Although this information is in the public domain, we ask that any references to this Legal Review contain proper attribution.

Pre-Adjudication Issues

1

In the Guardianship of Ratheal, No. 07-22-00346-CV, 2023 Tex. App. LEXIS 5628 (Tex. App.—Amarillo July 31, 2023, no pet. h.)

Summary by Dyann McCully

Daughter filed for temporary guardianship of mother in county court (in a county that does not have a statutory probate court.) Temporary was granted, and before it expired, daughter filed for permanent guardianship. The day prior to the scheduled hearing on the permanent, an attorney filed a notice of appearance on behalf of the mother along with a motion to transfer the matter to the county court at law under Estates Code 32.004. The motion stated "(t)his matter is contested as the Proposed Ward does not want a guardian appointed for her and does not believe that a permanent guardian is necessary."

The daughter's attorney then filed a motion for continuance and requested a hearing to determine whether the mother had capacity to enter a contract to obtain counsel. The county court granted the continuance and set the capacity determination hearing. The proposed ward's attorney objected, arguing that the county court lacked jurisdiction once the motion to transfer was filed. At the capacity hearing, the court allowed the proposed ward's attorney to participate minimally. After the testimony of proposed ward and her neurologist, the county court determined proposed ward lacked the capacity to contract and then "converted" the temporary guardianship to a permanent.

The appellate court analyzed whether the proposed ward's initial pleading was truly contested and decided it was because it reflected the parties had adversarial positions. The argument of the daughter's attorney that capacity must be determined before an attorney can appear on behalf of a proposed ward to contest a guardianship or file a motion to transfer failed. Also, once the motion to transfer is filed, it is immediately effective and the county court "shall" (no discretion) transfer the case per Estates Code 32.004.

2

Laurel Smith v. 2005 Tower LLC, 2024 WL 3616470 (Tex. App. – Beaumont 2024)

Summary by Steve Fields

This opinion involves two separate proceedings. A proceeding in the guardianship court and a proceeding in a district court. In September 2020, Gavin Clarkson filed to be appointed guardian of the person and estate of his 81 year-old mother, Martha Clarkson, in County Court at Law #2 in Montgomery County, TX (the guardianship court). Gavin filed a CME stating that Matha was partially incapacitated and had cognitive deficits preventing her from making complex financial decisions. In October 2020, the court appointed an attorney ad litem to represent Martha, and the ad litem filed an answer contesting Gavin's guardianship application. In February 2021, two more physicians filed CMEs stating that Martha was partially incapacitated and unable to make complex financial decisions due to cognitive deficits. In October 2021, the court discharged the first ad litem and appointed a successor attorney ad litem who moved to dismiss Gavin's application because one of the CME's suggested that Martha's POA appointing Gavin as her agent was a more appropriate and less restrictive alternative to guardianship. In January 2022, Gavin non-suited his guardianship application and the court signed an order approving Gavin's non-suit. At that time, no other guardianship applications for Martha were pending.

Nevertheless, in February 2022, a court-appointed investigator filed a Motion to Reinstate and Retain Case on Docket along with an application for Guardianship. Although the court never signed an order reinstating the case, over the next four months, the guardianship court behaved as if the case had been reinstated. Later in February 2022, the court signed an amended order appointing a GAL for Martha. In April 2022, the court discharged the first GAL and appointed Laurel Smith as successor GAL for Martha and ordered her to investigate whether a guardianship was necessary for Martha by reviewing her financial, medical, psychiatric, and personal records. During Smith's investigation, she discovered that Martha had executed a general warranty deed in March 2021 conveying a duplex she owned in Travis County to 2005 Tower, LLC, a company formed by Gavin. Therefore, Smith filed a Petition for Declaratory Judgment for the court to determine whether Martha had capacity to sign the general warranty deed. Smith also filed a Notice of Lis Pendens against the duplex and filed it in Travis County stating that ongoing disputes exist "as to whether Martha had capacity to transact business and manage her property." "A notice of lis pendens broadcasts to the world the existence of ongoing litigation regarding ownership of property."

However, the guardianship court never ruled on the GAL's petition for declaratory judgment. Sometime prior to July 2022, Gavin filed a Plea to the Jurisdiction and Motion to Dismiss. In July 2022, the guardianship court filed a Notice Regarding Plea to Jurisdiction in response to Gavin's motion. The court explained that after signing Gavin's non-suit order, it never signed an order granting the court-appointed investigator's motion to reinstate and retain case on the docket before the motion was overruled by law. Thus, the guardianship court found that it lacked jurisdiction to take any further action in "this closed and dismissed case." The court also found that it lacked jurisdiction to render orders related to the court-appointed investigator's application for guardianship including the order appointing Laurel Smith as successor GAL.

In May 2022, before Smith as GAL filed the Notice of Lis Pendens, Tower signed a residential sales contract to sell the condo in Travis County. Tower was set to close on the sales contract on or before July 25, 2022, but after GAL Smith filed the Lis Pendens on June 23, 2022, a title underwriter asked Tower to get the Lis Pendens released. Tower demanded that Smith release the Lis Pendens but made this demand prior to the guardianship's Notice Regarding Plea to the Jurisdiction, and so, Smith refused to release the Lis Pendens. When Tower failed to close the sales contract, Tower blamed Smith.

On July 22, 2022, Tower sued Smith in the District Court for filing a fraudulent lien, for tortiously interfering with the sales contract and to quiet title under the Uniform Declaratory Judgments Act. Smith filed a general denial and GAL immunity under the Estates Code and a motion to dismiss under the Texas Citizen's Participation Act (TCPA) asserting that each of Tower's claims involve her right to petition in the guardianship lawsuit by filing her notice of lis pendens. TCPA is intended to protect citizens from retaliatory lawsuits meant to intimidate them or silence them on matters of public concern. Smith argued that since Tower failed to establish a prima facie case for each of its claim, she was entitled to have Tower's claims dismissed. The district court held a hearing on Smith's motion to dismiss and denied it and awarded $4,575 to Tower in attorney's fees. Smith appealed.

The appellate court agreed with Smith that each of Tower's claims were based on her exercise of the right to petition and to file her notice of lis pendens. Once Smith made this initial showing, the burden shifted to Tower to establish by clear and convincing evidence a prima facie case for each of its claims. The appellate court found that Tower failed to establish a prima facie case for its fraudulent lien claim because the court record did not contain any evidence that Smith was acting outside her authority by filing the Notice of Lis Pendens. The Estates Code provides that a GAL is an officer of the

court who is obligated to protect the incapacitated person in a manner that will enable the court to determine the action that will be in that person's best interests. Tower alleged that Smith perpetrated fraud in filing the lis pendens by failing to disclose that the guardianship court lacked jurisdiction. The appellate court stated that Gavin's statement in his Plea to Jurisdiction that Smith knew the guardianship court lacked jurisdiction was conclusory and was not clear and convincing evidence that Smith knew the court lacked jurisdiction. The appellate court also found that Tower couldn't establish a prima facie case for tortious interference with the contract either but could present a prima facie case to quiet title and for declaratory judgment. The appellate court thus reversed the trial court's judgment on the motion to dismiss on the first two grounds and reversed its attorney fee judgment against Smith and remanded the case to the trial court to award attorney's fees to Smith on her TCPA motion to dismiss.

3

In re Guardianship of Jansky, No. 13-23-00104-CV, 2023 Tex. App. LEXIS 4401 (Tex. App.—Corpus Christi June 22, 2023, no pet. h.); *In re Jansky*, No. 13-23-00157-CV, 2023 Tex. App. LEXIS 3700 (Tex. App.—Corpus Christi May 31, 2023, no pet. h.)

Summary by Dyann McCully

In this memorandum opinion by the Corpus Christi-Edinburg Court of Appeals. On its own motion, county court transferred contested guardianship matter to District Court. Proposed ward was not personally served in accordance with Texas Estates Code 1051.103(a)(1); therefore, the District Court's guardianship order and subsequent related orders void and must be vacated. Didn't reach issue of adult children not receiving notice because no personal jurisdiction due to lack of personal service on proposed ward.

Guardians' Actions

4

In re Guardianship of Lugo, 2022 Tex. App. LEXIS 9341(Tex. App. Houston [14th Dist.] December 22, 2022, no pet.) (mem. op.)

Summary by Terry Hammond

In this memorandum opinion the 14th District Court of Appeals in Houston withdraws a prior opinion and considers again an appeal that resulted from a dispute between a corporate trustee and a guardian of the person and estate of an adult incapacitated person.

In this proceeding, Tish was appointed as guardian of the person and estate of her sister, Samantha. Regions Bank was separately appointed as a trustee for assets for Samantha under Chapter 142 of the Texas Property Code. The corporate assets resulted from settlement of a medical malpractice claim that resulted in incapacitating injuries at Samantha's birth.

The bank filed an application to remove Tish as guardian of the person and to terminate the guardianship of the estate, alleging multiple financial improprieties by Tish. The court appointed a guardian ad litem for Tish. Tish made counter-allegations against the bank and began the process of trying to move Samantha and the guardianship to Puerto Rico, which the guardian ad litem and bank all opposed. The bank sought to resign as trustee if the guardianship and Tish were moved to Puerto Rico. At a hearing on the possible removal of Tish there were attempts at beginning the hearing and then breaks followed by resumption of the hearing. Counsel for Tish announced that Tish "unconditionally resigns" as guardian of the person and estate. Counsel for the Bank responded "We accept that." The probate judge responded "All right. Very good." There was no testimony from any witness on the removal of Tish as guardian of the person or termination of the guardianship of the estate.

Tish filed her "Resignation of Guardian of the Person and Estate." On the same day the probate judge signed an "Order Removing Personal Representative and Appointing Temporary Guardian of the Person and Estate Pending Contest" which indicated that the removal was "on its own motion" and found that Tish was "no longer suitable to serve as guardian."

Tish filed a bill of review seeking withdrawal of the probate court's removal order, arguing that it was entered in error because she had resigned, and no evidence was heard to support the trial court's finding on removal along with other justifications for the bill of review. The bank opposed the bill of review, arguing that the probate court was not obligated to accept Tish's resignation and the record contained sufficient evidence to support removal. The probate court denied the bill of review without a hearing.

The court of appeals cites prior precedent that a trial court "cannot abuse its discretion if it reaches the right result, even for the wrong reasons." The court of appeals reviews Texas Estates Code §1203.051 which addresses removal without notice, and §1203.052 which addresses removal with notice. The court of appeals finds that the

probate court's sua sponte motion to remove Tish without notice did not fall within §1203.051 of the Estates Code and further found that the probate judge did, in fact, accept Tish's resignation as guardian of the person and estate at the hearing by stating "All right. Very good." The court of appeals reversed the probate court's order denying Tish's bill of review and rendered judgment granting the bill of review and ordered the probate court to correct the removal order by accepting Tish's resignation as guardian of the person and estate and approving her discharge as guardian.

5

In the Matter of the Guardianship of Robert Lewis Hindman, 2024 WL 2197220 (Tex. App. – Corpus 2024)

Summary by Steve Fields

On May 5, 2022, Virginia Hindman applied to be appointed guardian of the person and estate of her husband, Robert Lewis Hindman. She filed a letter from a physician Dr. Diaz that stated that Robert was totally without capacity to care for himself or manage his property. She also filed a neuropsychological evaluation from Dr. Rexer, a clinical neuropsychologist that stated that Robert had severe memory impairment consistent with mild to moderate dementia. At the hearing, Virginia testified that Robert was diagnosed with mild cognitive impairment and placed in hospice care on March 9, 2022. Virginia also testified that Robert had overdrawn some bank accounts and named a distant relative, a "grandnephew" he barely knew as the beneficiary of his IRA which was the main asset of his estate. Virginia requested the court to give her the power to create and change rights of survivorship and beneficiary designations on Robert's IRA and the power to move it to a different financial institution in order to remove the "grandnephew's" access to the IRA.

On May 26, 2022, the court appointed Virginia as the guardian of the person and estate of Robert with the power to change the beneficiary designation on Robert's IRA. On July 5, 2022, Virginia filed an Inventory that included three bank accounts listed as cash assets, but did not list the IRA as a probate asset. The opinion did not clarify this point, but it was implied that Virginia had not just removed the "grandnephew" as the IRA beneficiary, which would have made the IRA payable to Robert's estate and thus includible on the Inventory, but that Virginia had actually named someone else as the IRA beneficiary (most likely herself).

In September 2022, an attorney representing Joel Barham, a relative of Robert, filed a Motion to Set Aside Void Provisions of Order, and in the Alternative, Original Petition for Bill of Review. Barham alleged that he was actually a first cousin once removed of Robert (not a "grandnephew") and that he had a long-term relationship with Robert and that he was a beneficiary of Robert's IRA. Virginia's attorney objected to Barham's standing to file the Bill of Review, and argued that Robert had previously been financially exploited by Barham making Barham an adverse party to the proceeding. Barham's counsel argued that there was no evidence that Barham financially exploited Robert and that he was not adverse to Robert and was not objecting to the guardianship but was merely objecting to the court granting Virginia the power to change a beneficiary designation on the IRA which Barham's counsel argued was not allowed by the Estate Code. Virginia then revealed to the court that Robert had passed away on June 11, 2022. The trial court continued the hearing and asked for briefing by the parties, and then on November 28, 2022, entered an order denying Barham's Bill of Review. Barham appealed.

The appellate court found that Barham had standing as an "interested party" to file the Bill of Review because he was named as a beneficiary of the IRA before Virginia was given the power to change it. The appellate court also found that a ward's estate does not cease to exist upon the ward's death and that the trial court had not yet settled and closed the guardianship of Robert's estate prior to the time that Barham filed his Bill of Review. The appellate court then reviewed EC 1056.101 and found that Barham met all elements of a statutory Bill of Review because there was a substantial error in the guardianship appointment order because neither EC 1151.101 nor EC 1151.103 authorizes a court to grant a guardian the power to change a ward's beneficiary designation on a financial account. The appellate court reversed the trial court's order denying Barham's Bill of Review and remanded the case to the trial court for further proceeding consistent with this opinion.

6

In re the Guardianship of Ryan Reed Albers, 2023 WL 6632797 (Tex. App.- Dallas 2023)

Summary by Steve Fields

JoAnn Ryan and William Albers were married but divorced in 1997. They had a son, Ryan Albers, who suffered a traumatic brain injury in 2005 from a skiing accident at age 17 that left him incapacitated. In 2007 when Ryan was 18 years old, the probate

judge signed an order finding Ryan fully incapacitated and appointing JoAnn and William as co-guardians of the person of Ryan. Ryan lived in a detached, garage apartment located on William's property, and the rent for his apartment was paid to William from Ryan's trust. Ryan is cared for by hired caregivers at his apartment. JoAnn would visit Ryan at his apartment by entering the garage from the alley. At some point, issues between JoAnn and William affected their ability to cooperatively serve as co-guardians.

In 2021, JoAnn filed an emergency motion to enforce the 2007 order, and she also sought clarification of the 2007 order if the court thought it was necessary. William filed a response to JoAnn's motion complaining of her conduct as a co-guardian and requested a possession schedule. Neither JoAnn nor William served citation on Ryan and the court did not appoint an attorney ad litem or guardian ad litem to investigate the co-guardians' competing complaints. After a hearing, the probate judge signed a possession order that set out specific times for JoAnn's possession of Ryan. The order also included a provision that if William and his wife travelled outside of the geographical area for more than 24 hours, or in the event of an emergency to Ryan's health, that JoAnn shall have access to Ryan at William's residence, but she may not have any guests with her.

JoAnn appealed claiming that the probate judge erred when it granted William's request to modify her powers as co-guardian because William did not satisfy the requirement of seeking modification of the guardianship under EC 1202.051. William did not contest that he failed to meet the requirements for a modification but contends that those requirements do not apply because the probate court's possession order was a clarification of the rights and duties granted in its 2007 order. The appellate court agreed with William and stated that the court's appointment of co-guardians necessarily implied limitations on the co-guardians' rights to have physical possession of Ryan because they were divorced and were not residing together at the time of their appointment. The appellate court stated that the possession order did not substantially change or alter the substance of the 2007 order's provisions appointing them as co-guardians but clarified that order by construing how the co-guardians' implied limited physical possession of Ryan would work.

JoAnn also argued that the probate court erred when it impliedly gave superior rights to William's wife, a non-guardian, because it prohibits JoAnn from exercising her periods of possession at the house and lot owned by William except when there is a medical emergency or when William and his wife are travelling. The appellate court disagreed with JoAnn conclusion that if William is travelling but his wife is not, then JoAnn may not have access to the Ward at William's domicile. The appellate court

stated that William's wife has no rights to Ryan at all and does not have the right to prevent JoAnn from exercising her possession rights. Her presence or absence may affect the places where JoAnn may exercise her possession rights, but her decisions cannot deny JoAnn her right of possession outright. The appellate court therefore affirmed the probate court's possession order.

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Griselda Ramos v. Rodrigo Hernandez and Freight Pro Transport LLC, 2023 WL 5115319 (Tex. App. – Fort Worth 2023)

Summary by Steve Fields

Griselda Ramos was appointed guardian of her adult son Cristino on October 3, 2019, in some county other than Tarrant County and was probably appointed as guardian of the person only. Three week later, on October 24, 2019, she and Cristino were in a car accident with Rodrigo Hernandez who was driving a truck for Freight Pro Transport LLC. Ramos filed suit in the 96th District Court in Tarrant County in her capacity as "next friend" of Cristino and that lawsuit was a "friendly suit" because the parties had reached a settlement requiring court approval due to Cristino's incapacity. The final judgment in this case states "Final Judgment Disposing of All Claims of Cristino Ramos, Jr." and reflects that the court approved the settlement of all clams "of the Plaintiff against the Defendant." The judgment identified Cristino as the Plaintiff and dismissed "any and all claims and causes of action of Plaintiff against Freight Pro and its agents, employees and assigns as more fully defined in the settlement agreement approved by the court.

The problem was that the settlement agreement defined "Plaintiff" much more broadly to include "Griselda Ramos, Cristino Ramos, Jr., individually along with their spouses, children, heirs, executors, administrator, assigns and estates. The settlement agreement listed $18,000 in exchange for a broad release in that Plaintiff released Defendant from "any claims of causes of action of any kind whatsoever which allegedly caused Plaintiff to sustain damages" and provided a laundry list of types of damages. The settlement also stated that Plaintiff accepts the payment as full and complete compromise of all matters involving disputed issues as to Defendant as a result of the accident regardless of whether too little or too much may have been given or accepted. Ramos signed the settlement agreement on March 23, 2021 "individually" and as "next friend of Cristino and her counsel signed as "attorney of record for Griselda Ramos, individually, and as next friend of Cristino.

Six months later, Griselda sued Rodrigo Hernandez and Freight Pro for her individual personal injuries in the accident that occurred on October 24, 2019. Rodrigo and Freight Pro moved for summary judgment asserting an affirmative defense of release based on the court approved settlement agreement, and the trial court dismissed Griselda's suit on summary judgment. Griselda appealed arguing that the trial court erred in granting the Defendant's motion because a genuine issue of material fact exists as to a latent ambiguity and no meeting of the minds. Griselda pointed out that the district court's judgment shows that she was never individually named party in that suit and that she acted in that suit solely in her capacity as Cristino's legal guardian (actually "next friend"). Griselda also argued that her personal claims were never discussed in settlement negotiations in Cristino's case as shown by an email chain from March 2020 where Freight Pro offered $10,000 "to resolve your client's bodily injury claim" to which she replied "my client has rejected your offer. I have been instructed to counter demand at $65,000." Griselda also argued that the "footer" on the settlement agreement states "Confidential Settlement Agreement and Release – Cristino Ramos, Jr." and the check issued on March 11, 2021 that lists a single claimant "Ramos Jr., Cristino."

The appellate court agreed with Griselda and found that the district court judgment didn't address Griselda's individual claims even though the settlement agreement attempted to dispose of "all claims." The appellate court agreement that the fact that the settlement check was made out to Cristino contradicts the disposal of both Cristino's and Griselda's claims. Also, Griselda began medical treatment in July 2020 indicating that she had a claim for individual injuries in addition to her derivative claims as to Cristino. Therefore, the appellate court held that Griselda met her burden to raise a genuine issue of material fact regarding ambiguity and meeting of the minds and reversed the trial court's summary judgment ruling and remanded the case back to the trial court for further proceedings.

Fees

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In re Guardianship of Semrad, No. 01-21-00491-CV, 2023 Tex. App. LEXIS 6693, at *1 (Tex. App.—Houston [1st Dist.] Aug. 29, 2023, no pet. h.)

Summary by Dyann McCully

This case was heard by the First District Court of Appeals in Houston on appeal from County Court at Law No. 4 of Fort Bend County. The applicant, *pro se* on appeal, was the daughter of Judy Semrad and challenged the final judgment closing the guardianship of her late mother. The appellate court reversed/remanded the trial court.

Judy's husband was originally appointed permanent guardian of the person and permanent community administrator of the estate by Probate Court No. 1 in Bexar County. Four years later, the couple moved to Fort Bend County to be closer to family and the case was transferred there. Two years later, Judy's husband died and daughter Staci applied to be successor guardian of the person and community administrator. Staci's sister then filed to be successor guardian, resulting in a contested matter.

The two sisters executed a Rule 11 agreement providing Staci would be successor guardian of the person and her sister would be guardian of the estate and that they would seek an appointment of an attorney ad litem for their mother. The court appointed attorney ad litem in turn requested the appointment of a guardian ad litem, and the court appointed a guardian ad litem and requested a written report be filed as to Judy's best interests. In the following weeks, concerns arose regarding appropriate care of Judy and after hearing the court discharged the court appointed guardian ad litem and appointed her to serve as temporary guardian of the person. The guardian ad litem's order for payment of fees was approved and she was paid for her services by the county.

By the end of the month, Judy died. The attorney ad litem applied for payment of fees and the court ordered these fees to be paid from Judy's estate. The sister who had filed the contest nonsuited her guardianship application. She and the court appointed temporary guardian also filed a joint final report and requested the court close the guardianship and community administration. The following day, the court signed an order closing the guardianship (although the order was not filed until 19 days later.) Between the time the court signed the order and the order was filed with the clerk, *pro se* applicant filed application for reimbursement largely consisting of costs for travel and lodging expenses incurred while caring for her mother during the guardianship contest. and an application for payment of attorney's fees she had incurred while represented during the contested guardianship proceeding. The filings were supported by affidavits, itemizations, and receipts.

The sister who had contested the guardianship argued that Judy's death rendered all guardianship-related matters moot and deprived the court of jurisdiction, aside from addressing the fees of the court-appointed attorneys. The sister who filed the original application for successor guardianship countered that upon her sister's nonsuit of the contest, she became a nonparty without standing. She also argued that she did not

have an opportunity to object to the closing of the case or approval of the temporary guardian's report.

The court subsequently awarded the court appointed temporary guardian payment for her legal services as temporary guardian.

The appellate court clarified that although a guardianship matter ends when a ward dies, the trial court does not immediately lose subject matter jurisdiction regarding the underlying proceeding. In this case, the expenses the applicant requested were incurred while she was acting under the terms of the Rule 11 agreement and may be entitled to reimbursement of expenditures which were made in good faith.

9

Goode v. McGuire, 2023 Tex. App. LEXIS 6178 (Tex. App. – Houston [1st Dist.] August 15, 2023, no pet.) (mem. op.)

Summary by Terry Hammond

A reading of this memorandum opinion demonstrates that this proceeding went up and down the appellate ladder multiple times. This segment of the perpetual litigation focuses on the effect of a non-suit by a contestant on subsequent decisions made by a probate court in an ongoing guardianship proceeding. Bob Goode had been in a contested battle over guardianship of his wife, Lockie, with Stephanie McGuire, who had initiated the guardianship proceeding for the protection of Lockie. Ultimately Bob non-suited his application for guardianship but became involved again when Stephanie filed for approval of $163,443.25 in attorney fees and expenses after the appointment of a third-party guardian by the probate court. Stephanie sought payment out of Lockie's guardianship estate that was managed by Bob and/or the Robert Harding Goode, Jr. and Lockie Linnea Goode Irrevocable Trust of which Bob was a beneficiary and trustee. Bob did not challenge the amount of the fees and expenses or whether Samantha had

acted in good faith – he just challenged payment from the trust via a plea in abatement and objection to payment from the trust.

At the hearing on payment of Samantha's fees and expenses, Bob made the following arguments which are followed by the probate court's and appellate court's rulings:

1) Bob had demanded a jury trial and alleges he should have had one – the probate court awarded a total of $145,696.64 to be paid from the assets of Lockie Goode held by Bob. The probate court did not order payment from the trust. Bob's non-suit did away with his jury demand.
2) Bob alleges the appointment of the third-party guardian was void due to lack of subject matter jurisdiction, personal jurisdiction, lack of service, failure to post, lack of compliance with eight separate statutory notice provisions, and a lack of written waiver of hearing - The court of appeals rules that this issue was waived due to not timely filing a notice of appeal. The court of appeals cites case law holding that a probate court order is final for the purposes for appeal when there is an express statute declaring the phase of the probate proceedings to be final and appealable. Bob did not file his notice of appeal until 148 days after the appointment of the third-party guardian of the estate.
3) Bob alleges that the evidence did not support a finding that he was unsuitable to serve as guardian of Lockie's estate, he lacked priority, he waived his right to jury, and that he waived his right to notice of hearing - The court of appeals rules that this issue was waived due to not timely filing a notice of appeal. The court of appeals cites case law holding that a probate court order is final for the purposes for appeal when there is an express statute declaring the phase of the probate proceedings to be final and appealable. Bob did not file his notice of appeal until 148 days after the appointment of the third-party guardian of the estate at which time he was found to be unsuitable.
4) Bob complains that the trial court erred in awarding attorney's fees to Samantha's attorney – The court of appeals rules that this appeal was filed timely. Bob raised the following points of appeal related to the granting of attorney's fees:
    a. The probate court lacked subject matter jurisdiction. The court of appeals rules that the filing of the application for the appointment of a guardian of the estate, or person, or both confers subject matter jurisdiction on the probate court.
    b. The probate court lacked personal jurisdiction because Bob was not personally served with citation. The court of appeals rules that Lockie was personally served with citation, and Bob's due process rights were not violated due to lack of service of process on him because he had appeared generally in the proceeding by objecting to Samantha's guardianship

application and by contesting her application, as well as by seeking application himself prior to his non-suit. A party waives any challenge to personal jurisdiction by making a general appearance or by failing to timely object to the court's jurisdiction.

c. Bob did not receive proper notice of the trial on Samantha's application for a guardian of Lockie's estate. This issue is waived because Bob had counsel present on the date the court indicated it would two days later considered Samantha's application for guardianship. Additionally, Bob had filed a non-suit and his counsel did not object to the hearing on Samantha's application.
d. There was never a citation by posting. The court of appeals rules that the probate court did not sign the guardianship order until after the return of the citation by posting had been received.
e. Failure to notify siblings. The court of appeals rules that the failure to serve an adult sibling of a proposed ward is not a jurisdictional defect, plus this complaint is a collateral attack.
f. A sworn affidavit regarding compliance with statutory requirements under Texas Estates Code §1051.104(b) was never filed. Bob's appeal was inadequately briefed with lack of appropriate citations to the record so this issue cannot be considered.

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In re Guardianship of Mascorro, No. 05-21-00940-CV, 2023 Tex. App. LEXIS 6495 (Tex. App.—Dallas Aug. 23, 2023, no pet. h.)

Summary by Dyann McCully

This case is out of Dallas County Probate Court 2 and the opinion was issued by the Dallas Court of Appeals, which upheld the probate court's order denying a substantial amount of fees and expenses sought by an attorney ad litem. Prior to his appointment as Mr. Mascorro's attorney ad litem, attorney Hemphill entered an engagement letter with Mascorro to assist him in securing his release from a nursing home and possibly probating his wife's will. The following month, Mr. Mascorro's son filed application for temporary and permanent guardianship. The court appointed an attorney ad litem, who filed an answer. The following day, attorney Hemphill filed an answer on behalf of proposed ward Mr. Mascorro. The court then removed the attorney ad litem and

appointed her as guardian ad litem and appointed attorney Hemphill as attorney ad litem. The court's order specified these appointments were with the agreement of the parties.

Now attorney ad litem Hemphill prepared a revised engagement letter which added to the scope of his representation of Mr. Mascorro opposition to the guardianship and filing an application for probate of his wife's will. The engagement letter specified $500 filing fee for the will application and $4,000.00 for other legal fees and expenses were due immediately and that remaining legal services would be charged at $300.00 per hour.

Four months later, attorney ad litem Hemphill applied with the court for payment of over $21,000.00 in legal fees and $1,000 in expenses for a two month period. The payment application stated that because there was no judicial finding of incapacity, Mr. Mascorro may be able to pay without court order, but court authorization was being requested for payment of the fees "to avoid any doubt." The guardian ad litem objected, pointing out that attorney Hemphill's request for direct payment should be denied because an attorney ad litem cannot be paid or reimbursed without a court order because the estates code provides an attorney ad litem is entitled to "reasonable" compensation for services in the amount "set by the court" and such payments are to be taxed as costs. She also argued that the legal issues of partial incapacity had been raised via pleadings and other filings in the case.

Hemphill moved for withdrawal as attorney ad litem and the court granted this request in January. The following May, Hemphill asked for $52,000.00 in fees and $2,200 in expenses as attorney ad litem. His application was verified, and he segregated fees and expenses according to subject matter and date incurred, admitting that some fees had been paid directly pursuant to the engagement letters. Guardian ad litem argued that in addition to direct payments being inappropriate, the attorney ad litem went beyond the scope of his duties, including filing frivolous pleadings. The court denied approximately $34,000.00 in fees and $2,100 in expenses but awarded the remaining amounts. The trial court noted that the fees which had been paid directly to attorney Hemphill during the pendency of the guardianship proceeding should be disgorged. Hemphill countered that the court failed to make a finding of breach of fiduciary duty necessary for disgorgement of fees.

The appellate court held that the trial court's order did contain sufficient findings to support the offset of fees and expenses paid to attorney Hemphill directly during the ongoing guardianship matter. Texas Estates Code Section 1054.007(b) requires judicial action for payment of fees to an attorney ad litem.

11

Henry v. Sullivan, 659 S.W.3d 442 (Tex. 2022)

Summary by Terry Hammond

In this Texas Supreme Court opinion the Texas Supreme Court determines that a county commissioners court has authority to determine the supplemental salary for a statutory probate judge. The Supreme Court holds that Texas Government Code §25.0023(a) grants the commissioners the authority and discretion to decide whether to pay a judge a supplemental salary for services as a local administrative statutory probate judge. After a considerable detailed analysis, the Supreme Court reverses the court of appeals' judgment and renders judgment dismissing the judge's claims against the county commissioners.

Misconduct

12

Guardianship of Workman, 670 S.W.3d 414 (Tex. App.—Eastland 2023, pet. denied)

Summary by Dyann McCully

Really interesting analysis of Texas Anti-SLAPP legislation, but the intersection with guardianship is also interesting. Mrs. Workman was "mentally and physically disabled." Acting under a durable power of attorney, her husband signed a contract to sell her interest in property she owned at Possum Kingdom Lake which was an undivided interest in with her two sisters. Mr. and Mrs. Workman's daughter contacted a real estate agent, concerned that the buyer had taken advantage of the Workmans. The real estate agent reviewed the sales documents and paid an attorney a retainer to represent the Workmans. He also wrote a letter to Mrs. Workman's sisters stating the sales

contract their brother-in-law signed was likely invalid and may have been fraudulently induced. He concluded the letter by asking the sisters for a meeting to discuss their options.

The sisters then filed a guardianship application alleging their brother-in-law was not appropriately caring for his wife, attaching the letter from the real estate agent as proof. The court granted a temporary restraining order prohibiting the husband from taking any actions to transfer or dispose of his wife's property. The buyer intervened in the guardianship and also filed a third-party action against the real estate agent, the daughter, and her boyfriend for tortious interference with a contract and civil conspiracy.

The Eastland Court of Appeals held that the real estate's letter to the sisters was protected under Texas Anti-SLAPP legislation because a portion of the communication could logically be construed as encouraging the sisters to pursue their rights in court. However, the appellate court held that the letter to the sisters made a prima facie case of suggesting tortious interference with the sale, and remanded the case for further determination on this issue. The civil conspiracy allegation failed.

13

Altice v. Hernandez, 688 S.W.3d 399 (Tex. App. – Houston [1st District], no. pet.)

Summary by Terry Hammond

Although not a guardianship case, this appeal of a will contest includes an excellent discussion of undue influence and the "Rothermel" factors established by the Texas Supreme Court in 1963. *See* Rothermel v. Duncan, 369 S.W.2d 917 (Tex. 1963). In brief, to show undue influence, a contestant must prove 1) the existence and exertion of an influence, 2) that subverted or overpowered the testator's mind when she executed the will, 3) such that she executed a will that she would not have otherwise executed but for the influence. *Id*. at 922. The court considers ten non-exhaustive factors established by Rothermel (the first five factors were applied to determine whether undue influence occurred).

In this case, the contestant challenged the validity of a twenty year old holographic will and alleged that the proponent of the will had exercised undue influence over the testator. The court of appeals affirmed the decision by the jury and by the trial court that the proponent of the holographic will had not exercised undue influence over the testator.

14

Longoria v. State, 2023 Tex. App. LEXIS 2703 - (Tex. App. - Beaumont 2022, no pet.) (mem. op.)

Summary by Terry Hammond

The defendant in a criminal prosecution who was alleged to have sexually assaulted an incapacitated person who was under guardianship did not suffer "egregious harm" due to an omission of an instruction or definition of all eleven enumerated sections described in Texas Penal Code §22.011(b). The court of appeals held that there was overwhelming evidence that supported conviction of aggravated sexual assault of the disabled person under Tex. Penal Code §22.021(a)(2)(c) based on the victim's testimony, along with the victim's mother's testimony, that established the elements of the alleged sexual assault, and that the victim was a disabled individual who did not consent to the sexual contact.

The court of appeals considered the defendant's complaint that "the abstract portion of the jury charge did not specifically enumerate" the circumstances "in which a sexual assault is committed without the consent of another person." The court of appeals relied on Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1985) in finding that if there is error in the court's charge and states that "the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial." The trial court's omission of some of the eleven of the enumerated circumstances contained in Penal Code §22.011 was not error where the defendant did not point to any evidence in the record that pertained to the omitted examples in the statute and did not explain how he was harmed by the omissions. The defendant was the victim's mother's boyfriend, and the victim provided compelling testimony about the aggravated sexual assault against her.

15

In re Guardianship of Delp, 2023 Tex. App. LEXIS 3617 (Tex. App. – Fort Worth 2023, no pet.) (mem. op.)

Summary by Terry Hammond

This case emanates out of Probate Court No. 2 in Tarrant County, Texas and involves a guardianship proceeding that evidently ended in a resolution short of guardianship

where an agent under durable power of attorney was removed for breaching her fiduciary duty. The court of appeals framed the issue to be decided as one that "pits brother and sister against each other" in a dispute over Trudy, their elderly mother. Trudy had progressive mental deterioration due to a dementia diagnosis. Trudy initially at age 84 executed a statutory durable power of attorney designating her oldest daughter, Linda, as agent and her son Billy as successor agent. Trudy appointed another daughter, Dianna, as healthcare agent and another daughter, Donna, as alternate healthcare agent. Dianna had been living rent-free on one of Trudy's homes and then moved in to live with Trudy in her personal residence.

Dianna subsequently arranged for Trudy to execute a quitclaim deed transferring the Trudy's property in which Dianna had previously lived to Dianna (which Adult Protective Services later found to have involved financial exploitation), and then took Trudy to an attorney to sign a new statutory durable power of attorney where Trudy designated Dianna as agent, replacing Linda. The opinion reflects that later the same month Dianna took control of some of Trudy's bank accounts, social security payments and credit cards.

A fifth child, Kyle, applied to be appointed Trudy's guardian and for temporary relief to restrict Dianna from taking further action to take over Trudy's assets. The probate court denied the requested injunctive relief and Kyle amended his ancillary proceeding to seek a declaration that Trudy lacked capacity to sign the new power of attorney that designated Dianna as financial agent, alleging breach of fiduciary duty and the need to restore the earlier power of attorney that designated Linda as agent. Kyle further sought to remove Dianna as health care agent under the first healthcare power of attorney.

The probate court conducted a two-day bench trial and ruled that Dianna had breached her fiduciary duty to Trudy and removed Dianna as agent under all powers of attorney and ordered Dianna to file an accounting of her actions taken under the durable power of attorney.

Dianna challenged the legal sufficiency of the evidence supporting the probate court's numerous findings of financial impropriety. The court of appeals does not address the evidence supporting the probate court's findings, and instead focused on the *unchallenged* finding by the probate court that "Dianna continued to reside in Trudy's home rent free and without paying any of the expenses for upkeep and maintenance of the home." Because unchallenged fact-findings are entitled to the same weight as a jury's verdict and bind an appellate court unless either the contrary is established as a matter of law or no evidence supports the finding, and because there was "some"

evidence to support the finding, the court appeals denies the appeal as Dianna, the fiduciary, at no point brought forth evidence of fairness to Trudy, her principal.

16

Joanie Martinez Cosper v. State of Texas, 685 SW3d 196 (Tex. App. – Corpus 2024)

Summary by Steve Fields

Myrl Cosper, age 84, hired Senior Helpers to provide caretaking and housekeeping services for his wife, Norma Jean Cosper who was incapacitated and needed feeding and ambulation assistance. Senior Helpers hired Joanie Martinez to provide these services for Norma. Nineteen days later, Joanie ended her employment with Senior Helpers citing a family emergency. Myrl actually hired Joanie privately to continue providing caretaking services to Norma outside of Senior Helper's employment. Norma's daughter Carol and her husband Paul visited Norma often and became aware of Mryl's arrangement with Joanie and found it problematic but also knew that Mryl didn't get along with many people and were at least happy that Myrl found somebody to care for Norma.

Carol then noticed unusual withdrawals from Myrl's bank account and Myrl then opened a bank account only in his name when previously it was held with both Norma and Carol. Myrl also made several large transfers from his Edward Jones investment account. In August 2020, Carol filed an application for guardianship of Myrl and attached a letter from Dr. Grant diagnosing Myrl with severe dementia. Myrl then hired an attorney to draft financial and medical POAs naming daughter Leslie as initial agent and Joanie as successor agent, and a new will that no longer named Norma as sole beneficiary but named Leslie as sole beneficiary and Joanie as successor beneficiary. Myrl also hired another doctor who diagnosed him as merely having early dementia. Carol then dismissed her guardianship application.

On October 21, 2020, Norma Jean died. **Sixteen days later Myrl and Joannie were married!** In the next two months, over $50,000 was withdrawn from Myrl's bank account to which Joanie was added. Myrl also made Joanie the initial agent on his financial POA, and signed a gift deed giving Joannie a one-half interest in Myrl's residence in Inez, TX, valued at $330,000. Myrl also took Joanie to his Edward Jones financial advisor and asked to add her to the investment account. The advisor alerted his supervisor and contacted APS and the account was frozen. Joanie came to the Edward Jones office the next day with the POA and attempted to liquidate the $300,000

in the account but was unable to do so since it was frozen. Two of the $10,000 withdrawals in November triggered suspicious activity reports that led to an investigation and Joanie's eventual arrest. In December 2020, Carol again filed an application for guardianship of Myrl and got a TRO against Joanie. After her arrest, Joannie deeded back her interest in the Inez, TX, property to Myrl.

At trial, the State produced evidence that Myrl made a $28,000 cash withdrawal in June 2020, and shortly thereafter, Joanie bought a Toyota RAV4 for $26,000. The Edward Jones advisor testified that Myrl separately transferred $25,000 and $78,000 from his account in June 2020 for a "new vehicle." The jury found Joanie guilty on one count of misapplication of fiduciary property between $150,000 and $300,000 and sentenced her to 40 years in prison on that count. The jury also found Joanie guilty of one count of exploitation of an elderly individual and sentenced her to 20 years on that count and both sentences were to be served concurrently. Joanie appealed on lack of evidence to support either conviction. The court of appeals reversed the conviction for misapplication of fiduciary property (40-year sentence), due to insufficient evidence. However, the appellate court upheld the conviction on exploitation of an elderly individual (20-year sentence) finding that the gift money to purchase a vehicle which occurred prior to Myrl and Joanie's marriage could have served as the basis for that conviction.

Post Adjudication Issues

17

Ridge v. Ridge, 658 S.W.3d 427 (Tex. App – Houston [14th District], no pet.)

Summary by Terry Hammond

The 14th District Court of Appeals frames the issues in this proceeding as "what appears to be an issue of first impression for this court." The Court of Appeals holds that the dismissal of a contest to an application for appointment as a guardian can, but does not always, end a discrete phase of the proceedings and therefore constitute a final guardianship order.

In this case the mother, Katrina, became the guardian of the person and later guardian of the estate for an incapacitated daughter, Angela. The mother's other daughter, Amanda, sought removal of her mother as guardian of the person and estate and appointment as successor guardian of the person and estate. The probate court appointed a guardian ad litem and attorney ad litem who raised concerns about Katrina engaging in "egregious financial abuse" of trust funds that had been set aside for Angela. Amanda sought removal of her mother without notice, and the probate court removed Katrina after finding that she had misapplied Angela's property entrusted to her care. The probate court appointed Amanda as temporary guardian of the person and estate pending her mother's contest of Amanda's permanent guardianship application.

The probate court granted the attorney ad litem's motion for costs and ordered Katrina to deposit $25,000.00 in security within 15 days. Katrina did not deposit the funds, nor did she file a statement of inability to pay court costs and the court dismissed Katrina's contests with prejudice. The court appointed Amanda as successor guardian of Angela's person. Katrina then filed a new contest of Amanda's application for appointment as guardian of the estate. The court dismissed the second contest regarding the guardianship of the estate due to the failure to have posted the deposit as security for costs and later appointed Amanda as successor guardian of the estate.

Katrina appealed the order on security of costs, the first order dismissing contest, and the second order dismissing contest.

The court of appeals began its analysis by stating that probate courts may render multiple appealable judgments on discrete issues, or phases of the proceeding, before the entire proceeding is concluded. The court of appeals stressed that a determination of a final order for purpose of appeal requires giving controlling effect to an "express statute" declaring a phase of the proceeding to be final and appealable, and notes that "if no express statute controls, a probate order is final and appealable only if it 'disposes of all parties or issues in a particular phase of the proceedings.'" [When a trial court renders a final judgment, "the court's interlocutory orders merge into the judgment and may be challenged by appealing that judgment."

The court of appeals analyzes the facts of the case and makes the following rulings:

1) The order on security for costs was not final as no controlling statute declares an order requiring security for costs as final and appealable as it did not end any phase of the proceeding and did not address any of Angela's substantive rights, nor was it logically separate from the rest of the proceedings.
2) The first order of dismissal of Katrina's initial contests to Amanda's application was not a final, appealable order. When the order dismissing the initial contests was signed, there was not yet a permanent successor guardian of the person (Amanda was only temporary guardian of the person and was not appointed successor permanent guardian of the person until several weeks after the contests were dismissed. There was no controlling statute that declares this type of order final and appealable. It seems that the critical factor was that there was not yet a permanent guardian of the person appointed.
3) The order appointing permanent guardian of the person was made appealable by statute. Texas Estates Code §1152.001 states that a party may "appeal from an order or judgment appointing a guardian." Once Amanda was appointed as permanent successor guardian of the person, that particular stage of the proceedings addressing the guardianship of the person was concluded. That order did not "set the stage" for any further ruling or further proceedings. The order on successor guardian of the person was a "final, appealable order into which the order on security of costs and the first order dismissing contest merged."

The court of appeals held that it lacked subject-matter jurisdiction to consider whether the trial court erred by ordering Katrina to provide security for costs for her prior actions, by ordering Katrina to provide security for costs for anticipated future actions, and by dismissing Katrina's contest with prejudice when she did not provide security for costs.

In considering the appeal of the second order dismissing Katrina's second contest, the court of appeals recited the following facts. On February 10, 2021, the probate court removed Katrina as guardian and appointed Amanda as temporary guardian of the person and estate pending Katrina's contest of Amanda's application. It was evidently at this time that the probate court ordered Katrina to deposit the $25,000.00 as security for costs within fifteen days. By March of 2021 Katrina had not made the deposit and had not filed an affidavit of inability to pay court costs. On March 15, 2021, the probate court signed the order dismissing Katrina's contests with prejudice (first order dismissing contest). On April 5, 2021, the probate court appointed Amanda as Angela's successor guardian of the person. In June, 2021, Katrina filed a new contest of Amanda's application for appointment as guardian of the estate. Katrina moved to dismiss the second contest due to Katrina's failure to

comply with the order on security for costs. The probate court granted this motion and struck and dismissed Katrina's second contest on July 8, 2021. Katrina filed her appeal to this order on August 5, 2021. Katrina argued that the probate court had erred by striking her contest to Amanda's application for appointment as guardian of the estate (second order dismissing contest).

The court of appeals holds that "because the order on successor guardian of the person disposes of all parties and issues relating to [Amanda's] application for appointment as guardian of the person, we hold the order on successor guardian of the person was a final, appealable order into which the order on security for costs and the first order dismissing contest merged." Katrina had not filed her second notice of appeal until August 5, 2021, which was well after the deadline for filing a notice of appeal of a final order signed April 5, 2021.

Regarding the portion of the appeal that survived, the court of appeals reviews what constitutes a "guardianship proceeding" and notes that a guardianship proceeding begins with "the filing of the application for guardianship of the person or estate, or both" (Estates Code §1022.002(d) and ends when "the guardianship is settled and closed." *Id*. However, a single guardianship proceeding is composed of various phases of the proceedings with each phase resulting in a "final order." The separate applications for guardianship of the person and the estate were separate phases of the guardianship proceeding. The probate court made no reversible error in issuing its second order dismissing contest.

18

In the Matter of the Marriage of Carlos Y. Benavides, Jr., and Leticia R. Benavides, 2023 WL 1806844 (Tex. App. – San Antonio 2023)

Summary by Steve Fields

This is the fourth and hopefully final appeal involving the estate of cattle rancher, lawyer and county judge Carlos Benavides, Jr. Carlos had three children, Carlos III, Guillermo and Alexander, from a previous marriage. Carlos and his children serve as principals of the Rancho Viejo Cattle Co. and Benavides Management LLC. In 2001, Carlos purchased a home on O'Meara Circle. In 2004, Carlos married his fourth wife Leticia and they signed a premarital agreement that the O'Meara Circle property would remain Carlos's sole and separate property. A few days after the wedding, they opened a joint account with right of survivorship. In the fall of 2005, a San Antonio doctor diagnosed Carlos with dementia but neither Carlos nor Leticia told the three children about the diagnosis. In 2006, Carlos added Leticia's name to some of the premarital bank accounts and designated the bank accounts as joint accounts with right of survivorship. They also refinanced the mortgage on the O'Meara property but the warranty deed remained in Carlos's name only. Between 2008 and 2012, Leticia wrote herself checks from the joint accounts totaling $958,000 which she deposited in her separate, pre-marriage bank account.

In September 2011, Carlos's children filed an application to appoint a guardian of his person and estate because they could not operate their family businesses without Carlos's participation. The children asked Leticia to serve as guardian but she refused because she believed the children sought guardianship because Carlos refused to sign off on a loan they wanted to obtain for a project of which he disapproved. In October 2011, the court appointed Shirley Mathis as temporary guardian of Carlos's person and estate. Carlos objected to the guardianship and hired two attorneys to contest it. Leticia paid the attorneys with checks totaling $73,500 from the joint bank accounts. In March 2013, the court appointed Mathis as guardian of the estate and Alexander as guardian of the person. Alexander moved Carlos out of the O'Meara property but let Leticia continue to live there. In October 2016, the court appointed Alexander as both guardian of the person and estate of Carlos. On March 30, 2018, three years after removing Carlos from the marital home, Alexander filed a petition for divorce on Carlos's behalf. Linda then filed six motions for summary judgment in August 2020 asking the court to declare Leticia and Carlos were divorce based in living apart for more than three years, and that the premarital and post-marital agreements were enforceable and that certain assets were Carlos's separate property. Leticia filed a response but the court granted all six summary judgments in Alexander's favor and signed the final decree of divorce on September 9, 2020.

Leticia filed her notice of appeal on December 8, 2020, and Carlos died on December 23, 2020. Carlos's estate was estimated to be $32 million. Leticia argued that the trial

court erred by declaring in the divorce decree that there was no community property because the court did not address the parties' ownership in ancillary bank accounts, retirement benefits, and guns and jewelry. Alexander countered by saying that the court did address these items by finding that the marital agreements to be valid and enforceable (thus there was no community property) and by awarding each spouse his or her own separate property by those agreements. The appellate court dismissed as moot Leticia's appeal from the summary judgment granting the divorce, and concluded that Leticia did not raise a genuine issue of material fact sufficient to defeat Alexander's entitlement to summary judgment on the marital agreements and the property component of the divorce. Therefore, the appellate court affirmed the final decree of divorce and hopefully ruled on the final appeal in this matter.