No. 24-

IN THE

Supreme Court of the United States

IN RE: ESTATE OF
BEDA GARCIA BARNETT, DECEASED

UNKNOWN HEIRS AND KATHY ROUX,

Petitioners,

v.

HOWARD REINER, PERMANENT DEPENDENT ADMINISTRATOR FOR THE ESTATE OF BEDA GARCIA BARNETT, DECEASED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

KATHY ROUX
Counsel of Record
LAW OFFICE OF KATHY ROUX
P. O. Box 1701
Grapevine, TX 76099
(817) 874-8877
kathy@kathyrouxlaw.com

Counsel for Petitioners

130454

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Did the Texas Fifth District Court of Appeal's decision so grossly depart from the accepted and usual course of Texas law, or sanctioned such a departure by the probate court, that it requires the U.S. Supreme Court to exercise its supervisory power?

2. Is there a substantial conflict between Texas lower courts and federal court decisions in applying *Obergefell v. Hodges* such that certiorari is necessary to correct this error?

3. Does the Texas Fifth District Court of Appeal's decision affect an important federal question and create a substantial conflict with relevant decisions of the U.S. Supreme Court and Texas State courts' decisions such that certiorari is necessary to correct this error?

PARTIES TO THE PROCEEDINGS

The petitioners are Unknown Heirs and Kathy Roux.

The respondent is Howard Reiner, Permanent Dependent Administrator for the Estate of Beda Garcia Barnett, Deceased.

RELATED CASES

In re Estate of Beda Garcia Barnett, Deceased, Cause No. PR-19-02899-3, Probate Court Number 3, Dallas County, Texas.

In re Estate of Beda Garcia Barnett, Deceased, Cause No. 05-22-00538-CV, Fifth District Court of Appeals at Dallas, Texas.

In re Estate of Beda Garcia Barnett, Deceased, Cause No. 24-0355, Texas Supreme Court.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

CONSTITUTION

Page

STATUTES

Page

OTHER AUTHORITIES

OPINIONS BELOW

On March 28, 2022, the Dallas County Probate Court Number 3 entered (1) a signed order determining the heirship of decedent, Beda Garcia Barnett, and (2) an order to pay attorney *ad litem*. The probate court determined that Stacey Wray Barnett was decedent's spouse because she was married to decedent at the time of decedent's death on June 22, 2019, and that the attorney *ad litem* should be allowed a total fee of $400.00. Petitioners, Unknown Heirs and Kathy Roux, appealed the trial court's decisions by filing an appellate brief on October 11, 2022.

On January 24, 2024, the Fifth District Court of Appeals at Dallas, Texas issued a judgment and memorandum opinion affirming the trial court's judgment. The court of appeals judgment and opinion is not reported in S.W. Reporter, but may be found at 2024 WL 260483. On March 4, 2024, petitioners filed a motion for rehearing with the Fifth District Court of Appeals. On March 18, 2024, the Fifth District Court of Appeal denied petitioners' motion for rehearing.

On May 24, 2024, petitioners filed a petition for review with the Texas Supreme Court. On July 26, 2024, the Texas Supreme Court denied petitioners' petition for review.

Copies of the probate court's judgment and order dated March 28, 2022, the Fifth District Court of Appeals' judgment and memorandum opinion dated January 24, 2024, the Fifth District Court of Appeals' order denying rehearing dated March 18, 2024, and the Texas Supreme

Court's notice dated July 26, 2024 are attached to this petition as Appendices A, B, C, D and E.

JURISDICTION

The Texas probate court had jurisdiction under Sections 32.002(c) and 33.004 of the Texas Estates Code. The Fifth District Court of Appeals at Dallas, Texas had jurisdiction to review the probate court's judgment and order under Section 22.220 of the Texas Government Code. The Texas Supreme Court had jurisdiction to review the Fifth District Court of Appeals' decision under Section 22.001 of the Texas Government Code.

The jurisdiction of the United States Supreme Court is invoked under Article III, Sections 1 and 2, of the U.S. Constitution; and under 28 U.S.C. §§ 1254(1), 2101(c), and 2350(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 5th Amendment of the U.S. Constitution which states that " . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The 14th Amendment of the U.S. Constitution which states that " . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Nature of the Case

This case is about a same-sex couple that allegedly married in a helicopter over Niagra Falls in New York. One of the spouses subsequently died intestate, and the other spouse probated the decedent's estate as a determination of heirship. Although the probate proceeding lasted for almost 3 years, and was litigated, the award of attorney's fees to the *ad litem* was only $400.00, while the fee awards to the applicant's attorney, the temporary administrator, and the permanent administrator were over $5,000.00 each. The name of the judge who signed the order or judgment appealed from is The Honorable Margaret Jones Johnson. The trial court is Dallas County Probate Court No. 3, and the county in which it is located is Dallas County in the State of Texas.

Disposition of the Case by the Trial Court

On March 28, 2022, the probate court signed a judgment declaring heirship. The probate court determined (1) that decedent was in a same-sex marriage at the time of her death, (2) that decedent died intestate, (3) that the surviving spouse inherited all community property, all separate personal property, and one-half of separate real property; and (4) awarded the attorney *ad litem* a total fee of $400.00.

The federal questions sought to be reviewed regarding the marital status of decedent were raised by Barnett's application to determine heirship.

The federal questions sought to be reviewed regarding petitioner's attorney fees were raised in the trial court by petitioner's fee applications and testimony at the hearing on the application for determination of heirship.

Disposition of the Case by the Court of Appeals

The Fifth District Court of Appeals at Dallas, Texas affirmed the trial court's judgment, and denied petitioners' motion for rehearing.

The federal questions sought to be reviewed regarding the marital status of decedent were raised in petitioner's appellant's brief.

The federal questions sought to be reviewed regarding petitioner's attorney fees were raised in petitioner's appellant's brief.

Disposition of the Case by the Texas Supreme Court

The Texas Supreme Court denied petitioners' petition for review. There are no motions for rehearing or *en banc* reconsideration pending in the Texas Supreme Court at the time this petition for certiorari is filed.

The federal questions sought to be reviewed regarding the marital status of decedent were raised in petitioner's petition for review.

The federal questions sought to be reviewed regarding petitioner's attorney fees were raised in petitioner's petition for review.

REASONS FOR GRANTING THE PETITION

I. The Texas Fifth District Court of Appeal's decision has so grossly departed from the accepted and usual course of Texas law, or sanctioned such a departure by the probate court, that it requires the U.S. Supreme Court to exercise its supervisory power

Disputed Marriage

In her application to probate decedent's estate, Applicant Stacey Wray Barnett (hereinafter "Barnett") alleges that she is the surviving spouse of decedent, and they are a same-sex couple who were allegedly married in the State of New York on October 20, 2012. Barnett argues that: (1) her marriage to decedent was valid under New York law; and (2) the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015) made prior same-sex marriages valid by retroactivity, therefore, Barnett and decedent's marriage was made valid pursuant to *Obergefell*.

First, the facts of whether Barnett and decedent were married in New York is disputed by the testimony of one of Barnett's witnesses who testified that Barnett and decedent were married in a helicopter over Niagra Falls. Niagra Falls is in both New York and Canada so it is undeterminable whether Barnett and decedent were married in New York or in Canada during the alleged marriage ceremony since the marriage ceremony took place in the air. The facts of marriage are also disputed and put at issue by Petitioner through her testimony as *ad litem*, and her pleadings.

Second, at the time of Barnett's marriage to decedent in October, 2012, New York's statute provided that marriages are solemnized between a "husband and wife." New York Dom. Rel. § 12; see also 2011 Comment to New York Dom. Rel. § 12. Similarly, during this same time, Texas' Constitution provided that "marriage in this state shall consist only of the union of one man and one woman." Tex. Const. Art. 1, Sec. 32(a), Texas Family Code § 2.001. Both New York and Texas laws prohibited same-sex marriages in October, 2012.

Third, Barnett failed to introduce into evidence any documents showing her alleged marriage to decedent, e.g., license, marriage certificate, etc. to prove compliance with New York and Texas statutes governing marriage. She only emailed the documents to the court's clerk.

II. There is a substantial conflict between Texas lower courts and federal court decisions in applying *Obergefell v. Hodges* such that certiorari is necessary to correct this error

Barnett argues that the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015) made prior same-sex marriages valid by retroactivity. Yet, the question of whether *Obergefell* applies retroactively, and if so, to what extent, remains an open question in Texas. *In re LaFredo*, 2018 WL 4561215, at *1 (Tex. App.—Dallas Sept. 24, 2018, orig. proceeding) (mem. op.) ("The legal question of whether *Obergefell* is retroactive has not been determined by the Supreme Court of Texas or by the U.S. Supreme Court.").

In *Ford v. Freemen*, 2020 WL 4784635, at *1 (N.D. Tex. Aug. 18, 2020) the U.S. District Court stated that the *Obergefell* holding applies retroactively citing *Ranolls v. Dewling*, 223 F. Supp. 3d 613, 624 (E.D. Tex. 2016)). However, the *Ford* court did not make a factual determination of whether decedent and plaintiff were married, only that it would be too time-consuming and expensive for the plaintiff to prove its marital status, and determined that decedent's will and beneficiary designation do not create fact questions concerning Plaintiff 's status as the decedent's common-law spouse. *Ford*, 2020 WL 4784635, at *1.

Ranolls held that *Obergefell* " . . . applied retroactively to [the decedent's] partner's wrongful death and survival claims and that she had standing to sue as a surviving spouse, but genuine issues of material fact [existed] as to whether [decedent] and her partner were informally married under Texas law [which] precluded summary judgment on partner's claims." *Ranolls*, 223 F.Supp.3d at 622. However, the *Ranolls*' holding of retroactivity was limited to that case and its facts. *Ranolls*, 223 F.Supp.3d at 625 (the court finds that the Supreme Court's decision in *Obergefell* applies retroactively to this case). Such a holding is contradictory and inconsistent in and of itself, and only leads to further confusion for other Texas lower courts regarding the proper applicability of *Obergefell* .

Even assuming without deciding that *Obergefell* applies retroactively and, as a result, relieved Barnett of establishing that she and decedent obtained a valid marriage license in 2012, Barnett must still prove that she and decedent met the remaining requirements under Texas law to establish a valid, formal marriage—that the ceremony was performed by a person authorized to

perform a marriage ceremony under section 2.202(a) of the Texas Family Code. *See*, *e.g.*, *Obergefell*, 576 U.S. at 675–676, (state laws are "invalid to the extent they exclude same-sex couples from civil marriage *on the same terms and conditions as opposite-sex couples*") (emphasis added); *see also Ranolls*, 223 F. Supp. 3d at 625 (applying *Obergefell* retroactively and denying summary judgment because genuine issues of material fact with respect to parties' marital status). Barnett provided no evidence to fulfill the statutory requirement of Texas Family Code § 2.202(a).

And if Barnett and decedent were not formally married in New York, then Barnett carries the burden of proof that she was informally married to decedent under Texas Family Code § 2.401. Petitioner disputed at the trial court and in her appellate brief that Barnett carried her burden of proof in showing that she was married, either formally or informally, to decedent at the time of decedent's death.

The issue of whether or not Texas now recognizes same-sex marriages formed prior to the *Obergefell* decision is a matter of law and should not be decided by the factfinder. *In re LaFredo*, 2018 WL 4561215, at *1 (Tex. App.—Dallas 2018, orig. proceeding). Moreover, the existence of an informal or common law marriage is a question of fact to be resolved by the fact finder. *In re LaFredo*, 2018 WL 4561215, *1 (Tex.App.-Dallas 2018) *citing Joplin v. Borusheski*, 244 S.W.3d 607, 610–11 (Tex. App.—Dallas 2008, no pet.); *Small v. McMaster*, 352 S.W.3d 280, 282–83 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). The facts are disputed surrounding the parties' intentions, agreements, and representations concerning their marital status.

***Obergefell's* Effect on the Constitutionality of Texas Law**

Obergefell has raised important constitutional issues for Texas courts. The U.S. Fifth Circuit in *De Leon* states that *Obergefell* is the " . . . law of the land, and consequently the law of this circuit . . . " and affirmed the district court's injunction prohibiting the enforcement of " . . . Art. 1, Sec. 32 of the Texas Constitution, any related provisions in the Texas Family Code, and any other laws or regulations prohibiting person from marrying another person of the same sex or recognizing same-sex marriage," although it did not by its express language hold any Texas law unconstitutional. *See DeLeon v. Abbott*, 791 F.3d 619, 625 (5th Cir. 2015).

However, in *Pidgeon v. Turner*, 538 S.W.3d 73 (Tex.2017), the Texas Supreme Court disagreed with *De Leon*'s opinion regarding the extent of *Obergefell* in stating that *Obergefell*, unlike the court in *DeLeon*, does not hold that Texas DOMA statutes are unconstitutional. *Pidgeon*, 538 S.W.3d at 87, 88 n.21 (Neither *Obergefell* nor *DeLeon* have struck down any Texas law, and while such laws remain in place, litigants may still bring claims).

In *Pidgeon*, the Texas Supreme Court stated that "[w]e agree with *Pidgeon* that the court of appeals should not have ordered the trial court to proceed on remand "consistent with" *DeLeon*, and that " . . . the trial court could read the court of appeals' opinion to hold merely that the trial court should consider *DeLeon* as a persuasive authority when addressing *Pidgeon*'s arguments." *Pidgeon*, 538 S.W.3d at 81-82 citing *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (holding that while "Texas courts may certainly draw upon the

precedents of the Fifth Circuit, or any other federal or state court, . . . they are obligated to follow only higher Texas courts and the United States Supreme Court").

Yet in *Karets v. Estate of Gumbs*, 2023 WL 2436691, *1, *6, n.5 (Tex.App.-Austin 2023), the appellate court's dissenting opinion stated that in light of *Obergefell*, " . . . that part of the Texas Family Code § 2.401 limiting informal marriage to "the marriage of a man and woman" has been declared unconstitutional," citing *Pidgeon v. Turner*, 538 S.W.3d at 88 n.21 (Tex. 2017).

The trial court failed to correctly analyze or apply the law and reached an arbitrary and unreasonable decision when it determined that Barnett established as a matter of Texas law that a legal marriage existed between her and decedent, either formally or informally, that decedent owned community property at her death, and that Barnett inherited all of decedent's community property, and part of decedent's personal property.

A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner, or if it acts without reference to guiding rules or principles. *Wal-Mart Stores Texas LLC v. Bishop*, 553 S.W.3d 648, 673 (Tex.App.-Dallas 2018) (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)).

Given the defects in Barnett's witnesses' testimony and lack of evidence to prove that Barnett met the requirements under Texas law to establish a valid, formal or informal marriage, Petitioner contends that Barnett is not decedent's surviving spouse. Because Barnett is not decedent's surviving spouse, there was no

community property at the time of decedent's death, and Barnett should not receive any of the property decedent owned on the date of her death. For the probate court to award Barnett decedent's property arguably amounts to decedent's heirs being deprived of property without due process of law.

Under Article III of the Constitution, federal courts can hear "all cases, in law and equity, arising under the U.S. Constitution [and] the laws of the United States..." U.S. Const., Art III, Sec. 2. The U.S. Supreme Court has interpreted this clause broadly, finding that it allows federal courts to hear any case in which there is a federal ingredient. *Osborn v. Bank of the United States*, 22 US 738 (1824).

Barnett relies wholly on the retroactivity of *Obergefell* as the basis of her lawful same-sex marriage to decedent. Barnett's reliance on the retroactivity of *Obergefell* may be found in the facts pleaded in her application (1 C.R. 18-21), and in her counsel's statement at the hearing on the application to determine heirship, which was agreed to by the court. (Breed R.R. 19).

III. The Texas Fifth District Court of Appeal's decision affects an important federal question and creates a substantial conflict with relevant decisions of the U.S. Supreme Court and Texas State courts' decisions such that certiorari is necessary to correct this error

First, both the trial court and the appellate court failed to apply the proper legal analyses to determine the award of attorney's fees for the attorney *ad litem*. Texas jurisprudence requires courts to apply the lodestar

method to determine the reasonableness of attorney's fees. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 488-489 (Tex.2019); *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 819 (Tex.1997); *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex.2012).

Second, Texas jurisprudence requires courts to analyze the reasonableness of attorney's fees using the factors set forth in *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 819 (Tex.1997). The failure of the lower courts to follow this legal procedure is an abuse of discretion, and renders the award of attorney's fees arbitrary and capricious. *Wal-Mart*, 533 S.W.3d at 673.

Third, the lower courts rely on the premise that the attorney *ad litem* acted outside the scope of her appointment to reduce her fee applications totaling $20,075.22 to a fee award of $400.00. However, a review of the order appointing the attorney *ad litem* shows that it does not discuss, limit, or reference the scope of her appointment. Similarly, there are no limits by the Texas Estates Code on the scope of the appointment of an attorney *ad litem* in an heirship proceeding. Texas Estates Code §§ 53.104(a), 202.009.

The only guidelines that exist regarding the scope of an attorney *ad litem*'s appointment are found in two sources: (1) Texas case law: *Estate of Tartt v. Harpold*, 531 S.W.2d 696, 698 (Tex. App.-Houston [14th Dist.] 1975, writ ref'd n.r.e.) (quoting *Madero v. Calzado*, 281 S.W. 328 (Tex. Civ. App.-San Antonio 1926, writ dism'd)); *Estate of Stanton*, 2005 Tex. App. LEXIS 10901 (Tex. App. Tyler 2005, pet. denied), and (2) *The Ad Litem Manual for 2017 for Guardianships & Heirship Proceedings in Texas*

Probate Courts, The Honorable Steve M. King, Tarrant County Probate Court Number One, Fort Worth, Texas, pp. 48-53.

The attorney *ad litem*'s legal actions in this case are very much within both Texas case law and *The Ad Litem Manual for 2017* because it is her duty to " . . . [c] larify whether there is a surviving spouse's interest and community property. *The Ad Litem Manual for 2017*, pp. 48-53.

Fourth, the trial court failed to follow its own Dallas County Probate Court *Guidelines for Court Approval of Attorney Fee Petition* regarding awarding attorney's fees to an *ad litem* when there are assets of the estate. In the probate case, decedent's estate was shown to be valued at $284,773.77 on the Temporary Administrator's final accounting. Furthermore, while the probate court approved attorney's fees to the applicant's attorney, the temporary administrator, and the permanent administrator in amounts greater than $5,000.00 each, the probate court reduced petitioner Kathy Roux's attorney's fees to $400.00 for 3 years of legal services in litigating decedent's estate.

The failure of the probate court to properly apply the lodestar method to determine the reasonableness of petitioner's attorney's fees as required by Texas law and jurisprudence constitutes an abuse of discretion. A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner, or if it acts without reference to guiding rules or principles. *Wal-Mart Stores Texas LLC v. Bishop*, 553 S.W.3d 648, 673 (Tex.App.-Dallas 2018) (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)).

"Property interests protected by the procedural due process clause include, at the very least, ownership of ... money." *Stotter v. University of Tex. At San Antonio*, 508 F.3d 812, 822 (5th Cir. 2007); *Fontenot v. City of Houston*, No. 4:12-CV-03503, 2013 WL 5274449, at *9, 2013 U.S. Dist. LEXIS 133600, at *26-27 (S.D. Tex. 2013). The probate court's actions *vis-à-vis* petitioner's fee award violates the U.S. Constitution's Fifth Amendment (1) by depriving petitioner of property without due process of law, and (2) is a taking of legal services for public use without just compensation. There is no adequate post-deprivation remedy available to petitioner in this case because the probate court judge is immune from suit. Tex. Govt. Code § 25.0026; *James v. Underwood*, 438 S.W.3d 704, 710-713 (Tex.App.-Houston [1st Dist.] 2014). The probate court's actions *vis-à-vis* petitioner's fee award violates the U.S. Constitution's Fourteenth Amendment (1) by depriving petitioner of property without due process of law, and (2) discriminating against petitioner based upon the disparity in attorney fees awarded to the other attorneys on this case and the inequitable application of the court's own guidelines regarding attorney fee awards.

Petitioner's only remedy is to appeal to a higher court, and the U.S. Supreme Court is her last resort. Without consideration by the U.S. Supreme Court of her claims for (1) deprivation of property, (2) violation of her due process rights, (3) disparate treatment, and (4) violation of her equal protection rights, then petitioner has no recourse for her injury.

CONCLUSION

In conclusion, there are several important reasons that the U.S. Supreme Court should grant review of the Fifth District Court of Appeals' decision affirming the probate court's judgments. There is a conflict between the Texas courts of appeals, Texas appellate decisions, and federal jurisprudence on the issue of same-sex marriage in Texas in light of the U.S. Supreme Court's *Obergefell* decision.

This case involves the construction or validity of New York and Texas statutes governing same-sex marriages prior to the *Obergefell* decision.

The trial court abused its discretion in deciding (1) that Barnett was decedent's surviving spouse and inherited part of decedent's estate, and (2) the amount of attorney's fees awarded attorney *ad litem*. Furthermore, the trial court failed to apply the proper legal analysis to the foregoing issues, and failed to follow relevant and controlling statutes and cases, thereby abusing its discretion.

The Texas appellate courts have erroneously upheld the trial court's decisions, thereby committing an error of law of such importance to Texas' jurisprudence that it should be corrected in the interests of uniformity, consistency, equity, justice, and fairness.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Date: October 24, 2024

Respectfully submitted,

KATHY ROUX
Counsel of Record
LAW OFFICE OF KATHY ROUX
P. O. Box 1701
Grapevine, TX 76099
(817) 874-8877
kathy@kathyrouxlaw.com

Counsel for Petitioners

APPENDIX

TABLE OF APPENDICES

APPENDIX A — DENIAL OF REVIEW OF THE SUPREME COURT OF TEXAS, DATED JULY 26, 2024

SUPREME COURT OF TEXAS

RE: Case No. 24-0355

COA #: 05-22-00538-CV

TC#: PR-19-02899-3

STYLE: IN RE THE ESTATE OF BARNETT

DATE: 7/26/2024

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MS. THUY FRAZIER
1255 W 15TH ST STE 1060
PLANO, TX 75075-4220
* DELIVERED VIA E-MAIL *

APPENDIX B — ORDER OF THE COURT OF APPEALS, FIFTH DISTRICT OF TEXAS AT DALLAS, FILED MARCH 18, 2024

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-22-00538-CV

IN RE: THE MATTER OF THE ESTATE OF
BEDA GARCIA BARNETT, DECEASED

On Appeal from the Probate Court No. 3
Dallas County, Texas
Trial Court Cause No. PR-19-02899-3

Order entered March 18, 2024

ORDER

Before Justices Molberg, Pedersen, and Miskel

Before the Court is appellant Kathy Roux's March 4, 2024 motion for rehearing. We **DENY** the motion.

/s/
KEN MOLBERG
JUSTICE

APPENDIX C — MEMORANDUM OPINION AND JUDGMENT OF THE COURT OF APPEALS FIFTH DISTRICT OF TEXAS AT DALLAS, FILED JANUARY 24, 2024

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-22-00538-CV

IN RE: THE MATTER OF THE ESTATE OF
BEDA GARCIA BARNETT, DECEASED

Affirmed and Opinion Filed January 24, 2024

On Appeal from the Probate Court No. 3
Dallas County, Texas
Trial Court Cause No. PR-19-02899-3

MEMORANDUM OPINION

Before Justices Molberg, Pedersen, III, and Miskel

Opinion by Justice Molberg

Appellant Kathy Roux, attorney ad litem for unknown heirs of decedent Beda Garcia Barnett, appeals the trial court's judgment declaring heirship and its order awarding attorney's fees. Roux argues the trial court abused its discretion in determining that (1) the decedent had a surviving spouse, (2) Roux was entitled to just $400 in attorney's fees, and (3) Roux acted outside the scope of her appointment and discharging her. For the reasons explained below, we affirm in this memorandum opinion.

Appendix C

I. Background

Stacey Wray Barnett filed applications to determine heirship, for court-created independent administration, and for issuance of letters of independent administration in which she stated that decedent died on June 22, 2019, without a will and that a necessity existed for the administration of her estate. The application listed decedent's heirs as spouse Stacey Barnett, father Mariano Garcia[1], and mother Enedina Nunez. Stacey was also listed as decedent's surviving spouse on the death certificate filed with the trial court. The applications further explained that decedent was married once—to Stacey—they married on or about October 20, 2012, and they never divorced; there were no children born to or adopted by decedent.

On November 6, 2019, Roux was appointed attorney ad litem for unknown heirs of decedent's estate. Stacey filed an application for temporary administration on March 3, 2021. A few days later, Roux filed an answer to the application for determination of heirship and an objection to the application for temporary administration. Among other things, Roux challenged Stacey's standing to bring her applications to determine heirship and for temporary administration, arguing that Stacey was not the spouse of decedent. Roux contended that Stacey provided her "with a certificate of marriage registration, but not a marriage license." Nowhere in her answer did Roux state

1. The application noted Garcia died on August 1, 2019, and listed his estate as heir.

she identified any unknown heirs of decedent. Roux later submitted a nine-page memorandum in support of her answer in which she argued that under "both New York and Texas law . . . [Stacey] is not the surviving spouse of decedent because she was never married to decedent."

On March 23, 2022, Roux filed a report in which she, among other things, reiterated her opinion that the listing of the heirs of decedent in the application to declare heirship was not correct because Stacey was not an heir and that the entire estate should go to decedent's parents.

The trial court held a hearing on the determination of heirship on March 28, 2022. Louis Rowlett, a friend of decedent, testified that decedent and Stacey married on October 20, 2012, in the state of New York and never divorced. He said decedent never gave birth to or adopted any children, and that she was survived by her parents. He did not know of any other people who could be decedent's heirs. Roux did not cross-examine Rowlett. Decedent's mother-in-law, Karen Barnett, testified that decedent was married once, to Stacey. She stated she was present at their wedding in New York on October 20, 2012. Karen Barnett said decedent did not have any children and was never divorced from Stacey.

After this testimony, Roux gave her report to the court in which she reiterated her legal arguments that at the time of the marriage in question, "the statute in New York that authorized marriage . . . did not authorize same-sex marriage on constitutional grounds[,]" and that, "[i]n addition to that, in 2012, Texas law did not recognize

same-sex marriages, whether they were—whether they occurred either in Texas or in any other jurisdiction[.]" Counsel for Stacey responded, in part, by noting that,

> the case law in Texas which has, Your Honor, established the retroactivity of marriages in this state after that, and that she misstates what is the current law of the land, Your Honor, and so I would like the Court to focus on what the current law of the land is. I'm happy to brief it, but I'm sure the Court knows exactly what it is, and also, in addition to a lawful marriage that occurred in New York, where [same-sex] marriage was legal in 2012, Texas also has common-law marriage, Your Honor.

The trial court stated it was "looking at a death certificate where this is an official record that is holding them out as being—her spouse as being Stacey Wray Barnett." Counsel for Stacey also pointed out the marriage license form, certificate of marriage, registration of marriage, and identifying documents all showed decedent and Stacey were married. Counsel for decedent's mother and father agreed with the list of heirs proposed—Stacey and decedent's parents—in Stacey's applications.

The trial court ordered a division of property as follows: all community property, all separate personal property, and one-half of separate real property to Stacey; one-fourth share of separate real property to decedent's father's estate; and one-fourth share of separate real property to decedent's mother. The court found "no other

unknown heirs or known heirs whose whereabouts are unknown." The trial court entered findings of fact and conclusions of law, finding, inter alia, that Roux did not locate any unknown heirs.

Regarding ad litem attorney's fees, the court stated it would take into consideration "submission of the fees by affidavits of the ad litem," as well as affidavits from other attorneys. The trial court gave Roux two days to submit affidavits and otherwise discharged her as attorney ad litem for unknown heirs. The trial court instructed Roux as follows:

> The Court appointed you to represent the interest of unknown heirs or disabled heirs or known heirs whose whereabouts are unknown. The Court did not appoint you to brief anything about the law in New York, just to locate unknown heirs or known heirs whose whereabouts are unknown, so I'm instructing you not to submit anything for payment that is not relative to those issues because I'm not going to allow it.

Over the course of the proceedings, Roux filed multiple applications for attorney's fees. In her applications, she sought $1,531.75 for expenses and 5.3 hours of work; $8,235.06 for expenses and 25.9 hours of work; $774.14 for expenses and 2.6 hours of work; and $9,534.27 for 32.9 hours of work and expenses. She sought $20,081.22 in total. On April 1, 2022, Roux filed an affidavit as to legal services and fees, stating, among other things, that the fees and costs in her applications were reasonable. She

also filed an affidavit from R. Kevin Spencer, who stated he devoted a minimum of fifty percent of his practice to estate planning and probate and/or guardianship and that it was his opinion that the fees sought by Roux were reasonable and not excessive. The trial court ordered Roux to be paid $400 in attorney's fees.

II. Discussion

Roux first argues the trial court abused its discretion in finding that Stacey is the surviving spouse of decedent. Appellee Howard Reiner, administrator of decedent's estate, responds by arguing the trial court did not abuse its discretion. We agree with appellee.

Roux was appointed attorney ad litem for any unknown heirs of the estate. Each "unknown heir" of the decedent who is the subject of the proceeding must be made a party to a proceeding to declare heirship. *See* TEX. ESTATES CODE § 202.008. The trial court shall appoint an attorney ad litem in a proceeding to declare heirship to represent the interests of heirs whose names or locations are unknown. *Id.* § 202.009(a). The court may appoint an attorney ad litem in any probate proceeding to represent the interests of any person, including unknown heirs. *Id.* § 53.104. Thus, Roux's appointment was to determine whether there were any unknown heirs to the estate and represent their interests. *See Estate of Howells*, No. 05-20-00720- CV, 2022 WL 1222826, at *5 (Tex. App.—Dallas Apr. 26, 2022, no pet.) (mem. op.) (attorney ad litem for unknown heirs' appointment was "to investigate unknown heirs").

Appendix C

Roux reported to the trial court that she investigated whether any unknown heirs existed and did not find any. Moreover, she does not contend on appeal that there are any unknown heirs to the estate. In the trial court, Roux's complaint against the application to declare heirship was not that it would have deprived unknown heirs but decedent's parents, who were represented by counsel and did not agree with Roux's argument.

Roux cites cases holding that the attorney ad litem should exhaust all remedies available to her client and should represent her client on appeal when it is in the interest of her client to do so, *see Executors of Tarttjs Estate v. Harpold*, 531 S.W.2d 696, 698 (Tex. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.), and that an attorney ad litem for unknown heirs has authority to oppose the appointment of a temporary administrator and to apply for the appointment of an independent third-party administrator, *see In re Estate of Stanton*, 202 S.W.3d 205, 208 (Tex. App.—Tyler 2005, pet. denied).

Estate of Stanton in particular helps illuminate the incoherence of Roux's position. In that case, the decedent died intestate, unmarried, and childless, and his heirs were therefore the descendants of his parents' siblings. 202 S.W.3d at 207. Evidence showed a substantial investigation by an heir tracing service was required "to trace the heirship of the decedent and to locate the heirs" and that "there was a large number of potential heirs." *Id.* at 210. Appeal was perfected, not from a determination of heirship, but from various preliminary orders. *Id.*

Here, by contrast, Roux appeals—purportedly on behalf of the unknown heirs—from a judgment declaring heirship without challenging the trial court's finding that there were no unknown heirs. Furthermore, no evidence presented to the trial court indicated other potential heirs.

Even supposing Roux as attorney ad litem had authority to bring this claim, we conclude sufficient evidence supported the court's heirship determination. We apply the following standard of review in determining whether legally and factually sufficient evidence supports a finding:

> We review a trial court's findings of fact under the same legal and factual sufficiency of the evidence standards used when determining if sufficient evidence exists to support an answer to a jury question. When an appellant challenges the legal sufficiency of an adverse finding on which he did not have the burden of proof at trial, he must demonstrate there is no evidence to support the adverse finding. When reviewing the record, we determine whether any evidence supports the challenged finding. If more than a scintilla of evidence exists to support the finding, the legal sufficiency challenge fails. When an appellant challenges the factual sufficiency of the evidence on an issue, we consider all the evidence supporting and contradicting the finding. We set aside the finding for factual insufficiency only if the finding is so contrary to the evidence as to

> be clearly wrong and manifestly unjust. The trial court, as factfinder, is the sole judge of the credibility of the witnesses. As long as the evidence falls "within the zone of reasonable disagreement," we will not substitute our judgment for that of the fact-finder.

Wyde v. Francesconi, 566 S.W.3d 890, 894 (Tex. App.—Dallas 2018, no pet.) (internal citations omitted).

As stated above, Louis Rowlett and Karen Barnett testified Stacey and decedent were married in New York on October 20, 2012, and they never divorced. No other testimonial evidence contradicted their testimony. The trial court also had before it in the clerk's record decedent's death certificate, which listed Stacey as decedent's surviving spouse; a certificate of marriage registration from the New York State Department of Health that stated decedent and Stacey were married on

October 20, 2012 in New York "as shown by the duly registered license and certificate of marriage on file in this office"; a certificate of marriage reflecting the same; and a New York marriage license obtained October 19, 2012. The trial court in its findings of fact indicated it reviewed these documents, and no objection was levied against their consideration.

Roux argues this was not enough; she cites only provisions of the family code relating to applying for a marriage license, the marriage ceremony, and return of the license. *See* Tex. Fam. Code §§ 2.001, 2.008, 2.201,

2.202, 2.206. But none of these statutes address the evidence required to prove a marriage in a probate proceeding. Given the above, we conclude evidence supports the trial court's finding and that no evidence contradicted the finding. Roux's legal argument about the invalidity of the marriage has not been presented to this Court with citations to pertinent authorities and is thus inadequately briefed. *See* TEX. R. APP. P. 38.1(i). Accordingly, we conclude legally and factually sufficient evidence supports the trial court's finding. Roux's first issue is overruled.

In her second issue, Roux contends the trial court abused its discretion in determining her attorney's fees because her evidence proved far more than the $400 she was awarded. An attorney ad litem appointed under § 53.104 is entitled to reasonable compensation for services provided in the amount set by the court. TEX. ESTATES CODE § 53.104(b). We review the amount of attorney's fees awarded to an attorney ad litem for an abuse of discretion. *Estate of Howells*, 2022 WL 1222826, at *4. The lodestar method is the starting point for determining reasonable and necessary attorney's fees. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 501 (Tex. 2019). Under this method, the factfinder determines a base lodestar figure, which is calculated by the reasonable hours worked multiplied by a reasonable hourly rate. *Id.*

Further, the parties agree that the Guidelines for Court Approval of Attorney Fee Petitions, formulated and approved by the probate courts of Dallas County, governed Roux's appointment, though we observe that by

their own terms these guidelines "are not absolute rules." The county guidelines in the record before us state that if a "petition seeks attorney fees in excess of $2,500, it must contain supporting affidavits from two other attorneys who have Probate, Guardianship, and Estate Planning experience and who have examined the request for attorney fees." The guidelines further reflect that when,

> an ad litem can be compensated from a solvent estate, the Court's award of reasonable attorney's fees usually begins with the Court determining if the representation provided by, and reasonably required of, the ad litem, is "typical" or "normal." In a "typical" or "normal" case, the Court ordinarily awards total fees of between $300–$600 to an attorney ad litem. In determining whether representation is "typical" or "normal," the Court considers matters such as the type of case, the complexity or potential complexity of the case in terms of the number of parties and issues involved, and any unusual circumstances. These factors determine the extent to which the fee allowed should be more than, equal to, or less than the typical or normal fee.

Given that Roux failed to support her fee applications with affidavits from two other attorneys with probate experience who examined the fee request, we conclude the trial court did not abuse its discretion in ordering Roux be paid within the range specified for typical cases. Furthermore, independent of any affidavit requirement

in the guidelines, the evidence Roux provided does not demonstrate the reasonableness of her fee request. Roux was appointed to represent the interests of any unknown heirs, and she acknowledges there is no evidence of any unknown heirs. The extra time she spent on this case falls outside the scope of that appointment. As we stated in another case where she was ad litem, Roux "ignores the fact that the trial court repeatedly questioned her as to why she should be compensated for any time she spent that was unrelated to her appointment as an attorney ad litem for unknown heirs." *Estate of Howells*, 2022 WL 1222826, at *5.

Roux refers to an attorney ad litem practice manual to justify her work in this case, yet that manual distinguishes between "plain Jane" cases and "mystery" cases. In event of the former, the manual advises the ad litem as follows: "If it is simple to start with, it should end up that way. . . . It is not your job to duplicate all efforts made by the attorney for the applicant. . . . You do not do the spadework unless there truly are unknown heirs." Steve M. King, *The Ad Litem Manual for 2017 for Guardianship & Heirship Proceedings in Texas Probate Courts*, 48 (rev. date July 2017). The manual indicates a $400 fee is proper for such cases. *Id.* at 46. We conclude the trial court did not abuse its discretion in ordering $400 in attorney's fees and overrule Roux's second issue.

The same reasons justifying the trial court's attorney's fees order support the court's finding that Roux acted outside the scope of her appointment and its discharge of her. *Cf. Coleson v. Bethan*, 931 S.W.2d 706, 714 (Tex.

App.—Fort Worth 1996, no writ) (reviewing removal of attorney ad litem under abuse of discretion standard). We conclude the trial court did not abuse its discretion, and we overrule Roux's final issue.

III. Conclusion

Having overruled Roux's three issues, we affirm the trial court's judgment.

/s/_____
KEN MOLBERG
JUSTICE

Appendix C

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-22-00538-CV

IN RE: THE MATTER OF THE ESTATE OF
BEDA GARCIA BARNETT, DECEASED

Filed January 24, 2024

On Appeal from the Probate Court No. 3
Dallas County, Texas
Trial Court Cause No. PR-19-02899-3

JUDGMENT

Opinion delivered by Justice Molberg

Justices Pedersen, III and Miskel participating

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee recover his costs of this appeal from appellant.

Judgment entered this 24th day of January, 2024.

APPENDIX D — JUDGMENT DECLARING HEIRSHIP IN THE PROBATE COURT NUMBER THREE OF DALLAS COUNTY, TEXAS, SIGNED MARCH 28, 2022

IN THE PROBATE COURT
NUMBER THREE OF DALLAS COUNTY, TEXAS

NO. PR-19-02899-3

ESTATE OF BEDA GARCIA BARNETT,
DECEASED

March 28, 2022

JUDGMENT DECLARING HEIRSHIP

On this date came on to be heard via ZOOM Video the sworn First Amended Application to Determine Heirship filed herein by **STACEY WRAY BARNETT**, Applicant herein, for the Estate of **BEDA GARCIA BARNETT** ("Decedent"), wherein Decedent's unknown heirs and heirs whose whereabouts are unknown are Defendants, and upon hearing and considering the Application, it appears to the Court and the Court so finds that all parties interested in this Determination of Heirship proceeding have been made parties hereto as required by law, that the Court appointed **KATHY ROUX**, as Attorney Ad Litem to appear and answer and to represent Defendants and such Attorney Ad Litem did so appear and file an Answer herein, that this Court has jurisdiction of the subject matter and all persons and parties; that the evidence presented and admitted fully and satisfactorily proves each and every issue presented to the Court; that **BEDA GARCIA BARNETT** died intestate and that the heirship of **BEDA GARCIA BARNETT** has been fully

and satisfactorily proved and the interest and shares of all heirs therein.

[Handwritten: The Attorney Ad Litem is discharged of her service effective 3:08 pm on March 28, 2022.]

The Court finds and it is ORDERED by the Court that the names and places of residence of the heirs of Decedent and their respective shares and interests in the real and personal property of Decedent are as follows:

Name and Residence	Relationship	Decedent's Interest, (Separate and Community)
STACEY WRAY BARNETT 610 Hinton Street Grand Prairie, Texas 75050	Spouse Adult	All Community Property All Separate Personal Property ½ Separate Real Property
Estate of MARIANO GARCIA, Dec'd. Died: August 1, 2019	Father Adult	¼ Separate Real Property
ENEDINA NUNEZ 532 S. Phillips Avenue Salina, Kansas 67401	Mother Adult	¼ Separate Real Property

SIGNED this 28th day of March, 2022.

/s/_____
HON. MARGARET JONES JOHNSON
JUDGE PRESIDING

APPENDIX E — ORDER TO PAY ATTORNEY AD LITEM IN PROBATE COURT NUMBER THREE OF DALLAS COUNTY, TEXAS, SIGNED MARCH 28, 2022

IN PROBATE COURT
NUMBER THREE OF DALLAS COUNTY, TEXAS

NO. PR-19-02899-3

THE ESTATE OF BEDA GARCIA BARNETT, DECEASED

March 28, 2022

ORDER TO PAY ATTORNEY AD LITEM

On this day, the Court heard the sworn Application to Determine Heirship of Beda Garcia Barnett, Deceased.

The Court found and ordered Kathy Roux, Attorney Ad Litem appointed to represent the interest of the unknown heirs should be allowed a total fee of $400.00.

It is ORDERED that Kathy Roux, the Attorney Ad Litem shall be paid $400.00 on deposit with the Dallas County Clerk with the remainder of such fee to be paid from the assets of the Decedent's Estate and is hereby discharged of her services.

SIGNED this 28th day of March, 2022.

/s/_____
HON. MARGARET JONES JOHNSON
JUDGE PRESIDING

Mail Check to: Kathy Roux

APPENDIX F — GUIDELINES FOR COURT APPROVAL OF ATTORNEY FEE PETITIONS, REVISED AND MODIFIED JANUARY 20, 2015

GUIDELINES FOR COURT APPROVAL OF ATTORNEY FEE PETITIONS

Revised and Modified January 20, 2015

The Probate Courts of Dallas County have formulated the following standards to assist attorneys with drafting fee petitions in probate and guardianship cases. By understanding how the Court evaluates fee petitions, attorneys will be better able to comply with Court standards, reducing the need for consultations between attorneys and Court personnel regarding problems with specific petitions. These standards are not absolute rules: the Courts will make exceptions in particular circumstances as fairness and justice demand. In formulating and revising these standards, the Courts have considered not only the Texas Probate Coda, the Texas Rules of Disciplinary Procedure, and applicable case law, but also comments from the Dallas County Bar Association's Probate and Estate Planning Section

I. Attorney's Fees

It is the Court's duty to ensure that estates of decedents and wards pay only for "reasonable and necessary" attorney's fees and expenses. See Probate Code § 242 (decedents estates) and § 665C (guardianship estates), the factors to be considered in determining the reasonableness of attorney's fees are set forth in Rule 1.04 of the Texas

Rules of Professional Conduct. These include the time and labor involved in the case, the difficulty or novelty of the work performed, the customary hourly rate of the attorney requesting the approval of fees, and the customary hourly rates of attorneys with similar education and skills performing similar services.

A. Court-Approved Fees for a Fiduciary; Attorney

Below is a table setting forth what the Courts believe are appropriate rates for court-appointed fiduciaries' attorney's fees. Attorneys should be aware, however, that a Court may depart from these rates in certain circumstances. For example, a particularly difficult probate or guardianship matter may require special expertise that should be compensated at a rate higher than the attorney's standard rate under these guidelines. Similarly, a Court will adjust an attorney's rate in situations in which the estate is so small that the requested fee would consume most of the estate. Moreover, a Court will reduce an attorney's fee when the time expended by the attorney on a particular matter far exceeds the amount normally expended by attorneys on similar matters or, in those rare instances, when it comes to the Court's attention that a lawyer is not performing up to the standards of those licensed for an equivalent length of time. Be advised that it is a particular lawyer's experience in probate and guardianship law that determines his or her rate, not the number of years that the lawyer has been licensed.

Appendix F

To assist the Court ln determining a particular lawyer's rate, each attorney who is new to the practice of probate or guardianship law in a particular Court should submit his or her resume with the first fee application. Similarly, an attorney who believes that his or her experience before the Court qualifies for a rate increase should submit a letter to the Court detailing the reasons that such an increase is appropriate.

Years Practicing Probate and Guardianship Law	**Court-Approved Rate**
0-2 years	up to $150/hour
3-5 years	$150-$200/hour
6-10 years	$200-$250/hour
11-20 years	up to $360/hour
20 years +	up to $400/hour

In determining how lawyers will be paid within the practice categories above, the Court will consider the extent of the lawyer's experience in Probate and Guardianship Law involved as well as Board Certification in Probate and Estate Planning. In the 11-20 and 20+ categories, the Court will pay the highest rate to those few lawyers whose experience and mastery of probate, estate planning, and guardianship law qualify them as experts in these areas. These attorneys in the 11-20 and 20+ categories in order to qualify for the highest rate must be board certified in Estate Planning and Probate or devote a minimum of fifty percent (50%) of their practice to Estate Planning and Probate and/or Guardianship.

Appendix F

The Court has the flexibility to compensate an attorney serving as a fiduciary at a higher rate than set forth herein if the fiduciary is performing services that he/she would otherwise hire and compensate an expert at a higher rate than those set forth in these guidelines.

Attorney fee petitions must be accompanied by an affidavit signed by the attorney seeking attorney fees. If the petition seeks attorney fees in excess of $1,000.00 but less than $2,000.00, the petition must also contain a supporting affidavit from another attorney who has Probate, Guardianship and Estate Planning experience, and who has examined the request for attorney fees. If the petition seeks attorney fees in excess of $2,500.00, it must contain supporting affidavits from two other attorneys who have Probate. Guardianship and Estate Planning experience and who have examined the request for attorney fees. Supporting affidavits cannot be signed by members of the petitioning attorney's law firm or of counsel to such firm.

For those attorneys seeking the maximum rate allowed by these guidelines, any supporting affidavits must be signed by attorneys who are board certified in Estate Planning and Probate or devote a minimum of fifty percent (50%) of their practice lo Estate Planning and Probate and/or Guardianship.

Appendix F

B. Attorney Ad Litem and Guardian Ad Litem Fees

Formulating standards for the compensation of reasonable attorney's fees for an attorney ad litem or guardian ad litem is challenging, not only because of the variety of factors set forth in Rule 1.04 of the Texas Rules or Professional Conduct. but also because of certain factors over which the Court has limited control.

In the case of court-appointed counsel for indigent parties, for example, the Court must heed Dallas County budgetary considerations. Since an estate is unavailable or unable to pay fees, the Court approves fees under a budget approved and overseen by the Commissioners Court. Thus, attorneys who accept Court appointments in probate and guardianship cases with an indigent party should not expect to be reimbursed at their regular hourly rates. Ordinarily, the Courts compensate attorneys ad litem involved in County-pay cases at an hourly rate of $100–$150 depending on the experience of the ad litem and the complexity of the case. The hourly rate for guardians ad litem in indigent cases is similar to that paid to attorneys ad litem, although it is common for the total fees to be higher for guardians ad litem, especially when the guardian ad litem initiates the Court proceedings.

When an ad litem can be compensated from a solvent estate, the Court's award of reasonable attorney's

fees usually begins with the Court determining if the representation provided by, and reasonably required or, the ad litem is "typical" or "normal." In a "typical" or "normal" case, the Courts ordinarily awards total fees of between $300–$500 to an attorney ad litem, in determining whether representation is "typical" or "normal," the Court considers matters such as the type of case, the complexity or potential complexity of the case in terms of the number of parties and issues involved, and any unusual circumstances. These factors determine the extent to which the fee allowed should be more than, equal to, or less than the typical or normal fee. In general attorneys ad litem and guardians ad litem should expect to receive a fee that is less than the fee of the applicant's attorney unless special factors are present.

C. Fees when an Attorney is also the Fiduciary

In rare situations the Courts may appoint an attorney to serve as a fiduciary in a guardianship or administration. Such appointment may be made because there are no other persons willing or capable or serving as such in that case. In those situations in which the Courts appoint an attorney as a fiduciary in a guardianship or administration there are non-legal fiduciary tasks that will be performed by the attorney. The Courts recognize and acknowledge that attorneys appointed as fiduciaries are not appointed primarily for performance of non-legal tasks, but for their willingness and ability to serve as responsible fiduciaries in conjunction with their

service as attorneys. The Courts recognize there is no prohibition against the attorney seeking to be paid dual compensation as both attorney and guardian or administrator, and the Courts may approve dual compensation. Nonetheless, in order to avoid the appearance of any impropriety the attorney seeking dual compensation should adhere lo the following guidelines insofar as possible:

1. There should be disclosure of the attorney-fiduciary's intention to request dual compensation as soon as reasonably practicable after the time of appointment. If disclosure is not made near the time of appointment then it should be made upon motion and hearing, with notice to all parties who have appeared in the case.

2. The attorney-fiduciary should keep accurate time and expense records, segregating legal and non-legal time and expenses.

3. Under Texas law, an attorney-fiduciary may seek attorney's fees only for legal services. The Courts recognize that the "practice of law" embraces, in general, all advice to clients and all actions taken for them in matters connected with the law. The Courts rely upon those attorneys who accept appointments to serve as both attorney and guardian or administrator to fairly and accurately characterize their time and expenses as legal or non-legal, but the Courts are the final arbiters.

4. Should the attorney-fiduciary think that the statutory compensation formula as appeal to a particular estate or guardianship would be unreasonably low (*see* T.P.C. §§ 241 and 665) considering the fiduciary services rendered, then the attorney-fiduciary may submit time records (normally submitted with an annual or final account) for those fiduciary services and request additional hourly compensation. The Courts will determine if additional compensation is warranted and may allow additional amounts as reasonable compensation for those fiduciary services. If additional reasonable compensation is allowed, attorneys may expect that the total hourly rate for non-legal fiduciary services will be from $150 lo $200 per hour depending upon factors including the actual nature of the non-legal tasks performed, the experience level of the attorney and the overall fiduciary responsibility accepted by the attorney.

II. Paralegal/ Legal Assistant Charges

The Courts recognize that many attorneys rely on paralegals and legal assistants for gathering information and reviewing and preparing documents. A Court will reimburse an attorney for paralegal/ legal assistant work at a rate between $55 and $125 depending upon the following factors:

certification as a paralegal by the NALA, or recognition as a PACE-Registered Paralegal, or successful completion of a legal assistant program, or possession of a post-secondary degree (B.A. degree or higher);

number of years of experience in the probate, estate planning, and guardianship field;

certification in Estate Planning and Probate Law from the Texas Board of Legal Specialization; and

number of continuing legal education courses in probate, guardianship, and estate planning attended in the past three years.

In order to evaluate these factors in determining the appropriate rate for each paralegal/ legal assistant, the Courts suggest that attorneys submit to the Court the resumes of each paralegal/legal assistant for whose work they will seek reimbursement from the Court and a short statement of any relevant qualifications that do not appear on the resume. If an attorney believes that the billing rate for a paralegal or legal assistant should increase because of newly acquired credentials, the attorney should submit a letter to the Court detailing the reasons that such an increase is appropriate.

Attorneys should understand that the Courts do not pay for secretarial services at the paralegal rate even if such services are performed by paralegals. It is the Courts position that secretarial services are included in the attorney's overhead, for which an attorney is reimbursed at his or her hourly rate.

Attorneys seeking the highest rate for paralegal services should include the paralegals qualifications as set forth above in the attorney's affidavit in support of his petition for attorney fees.

III. Billing

The Court understands that the cash-flow situations at law firms differ, leading some firms to bill more frequently than others. The Courts do not want to direct the timing of fee applications other than to suggest a preference that bills be submitted at least once a year. To facilitate the review of fee applications, the Courts do request that attorneys itemize each service billed by identifying the time spent on each service and the corresponding charge for each service.

IV. Guidelines for Specific Types of Charges

A. Travel

In determining how to reimburse attorneys for travel time, the Courts follow two general rules. First, travel time from an attorney's office to the courthouse to attend hearings is normally reimbursed at the attorney's approved rate. If, however, the attorney resides or has an office outside of Dallas County, the attorney's travel time to the courthouse from his home or office will be reimbursed at half of the attorney's approved rate. That attorney will also be entitled to mileage reimbursement at the I.R.S. rate.

Second, the Courts expect that most clients will ordinarily visit their attorney's offices for consultations and document execution. Therefore, the Courts will reimburse attorney travel-time to visit clients only (1) if that client is a ward and the attorney is the

Court-appointed guardian, guardian ad litem, or attorney ad litem or (2) if some emergency or other special circumstance requires the attorney to visit the client at home. Such special circumstances should be described in the fee petition to be reviewed by the Court. If the Court approves the visit, the Court will reimburse attorneys at their full, approved rate or at the appropriate County-pay rate in indigence cases.

B. Legal Research

The Courts expect attorneys who practice in these Courts to be familiar with general probate and guardianship matters; therefore, the Courts will not reimburse attorneys for basic legal research in these areas. Thus, for example, an attorney will not be reimbursed for research into the application requirements for the probate of a will as muniment of title, an independent or dependent administration, a determination of heirship, or a guardianship. However, the Courts will reimburse attorneys for costs associated with necessary and reasonable legal research conducted to address novel legal questions or to respond to legal issues posed by the Court or opposing counsel.

The Courts consider the contract costs of computerized legal research (such as Westlaw and Lexis) to be part of an attorney's overhead, as are the costs of a hard-copy library. Consequently, the Courts do not reimburse for those costs.

C. Preparation of Fee Petitions

It is the general practice of attorneys to include in their overhead the cost of generating and reviewing billing invoices and of drafting and mailing the cover letters that accompany the invoices. Even though the Courts are cognizant that Court authority must be obtained for the approval of fee petitions in certain circumstances, the Courts believe that the estate of a decedent or ward should not be taxed with the attorney's billing costs. Therefore, the Courts, like the majority of statutory probate courts in the state, will not reimburse attorneys for the costs of preparing invoices and the fairly standardized fee applications and orders that accompany them.

D. Conversations with Court and Clerk Staff

Court staff is a vital source of information and assistance to the legal community. The Courts are proud of its accessibility to the lawyers and the public that have questions about uncontested matters—procedural and substantive—in probate and guardianship law. The Courts and staff attempt to answer these questions and to provide guidance where appropriate. Bearing in mind that the Courts require all personal representatives to have counsel, the Courts do not believe it appropriate for the Court to have discussions with personal representatives outside the presence of their counsel. Please do not suggest to a client that it is appropriate to call the Court for a consultation or an explanation of what is going on hi the estate being administered by that client. Again,

the Courts and its staff have no problem discussing these matters with an attorney.

However, we do not think it is appropriate to charge an estate for the time the Court spent providing the personal representative's attorney with assistance. Nor will the Courts reimburse attorneys for time spent in discussions with the Court Auditor aimed at correcting deficiencies in the client's accountings. Of course, if a member of the Court staff requests an attorney to provide information not ordinarily contained in properly drafted pleadings, the Court will reimburse the attorney for the time spent responding to that request. Or, if the petition reveals special circumstances requiring the attorney to seek guidance from the Court, the Court will award attorney's fees. For example, the Court will reimburse attorneys for communications with the Court regarding the need for corrective action when a guardian, administrator, or an attorney dies during an ongoing estate.

It continues to be the long-standing practice of the Courts not to reimburse attorneys from probate and guardianship estates for calls to the Clerk's office. The Courts urge adherence to the common practice of attaching to all applications a copy of the proposed order and a self-addressed, stamped envelope. This step, coupled with payment of the correct filing and posting fee, if required, will help ensure that attorneys receive conformed copies of all proposed orders and will reduce the necessity for calls to the Clerk's office to check on the status of a particular order.

Appendix F

E. Copies and Faxes

From experience reviewing fee petitions and from consultation with commercial copying companies, the Courts recognize that attorneys pass through different costs to their clients and that significant variation exists in the price charged for copies, ranging from attorneys who include copies as overhead reimbursed as part of their hourly rate to those charging $.30 per page. Cognizant of the need for uniformity in reimbursements for copy costs and mindful of the rates for commercial copying in Dallas County, the Courts have determined that they will reimburse attorneys up to $.20 per page. Copies made by the Clerk's office will be reimbursed at the rate charged by the Clerk if the fee petition indicates this fact. In no case, however, will the Courts pay any copying costs not accompanied by a statement of the charge per page and the number of copies.

Fax charges have presented a unique problem for the Courts. Some attorneys charge for faxes, others do not. Of those that do charge, some attorneys charge a set fee based on the fact that a fax was sent, others charge on a per-page basis for faxes sent. Some attorneys charge a set fee based on the fact that a fax was received, others charge on a per-page basis for faxes received. Some attorneys charge only for long distance faxes, others charge for both long distance and local faxes. Commercial entities that fax documents set their fees based on external market factors and a profit motive not usually associated with the recovery of expenses

in the practice of law. Faced with these myriad and frustrating variations in pricing, the Courts have determined that the best practice is to consider faxes as a part of attorney overhead and to include it as part of an attorney's hourly rate. Therefore, the Courts will not pay for facsimile transmissions. It will, however, pay the long-distance charges associated with long-distance faxes in the same manner it reimburses long-distance phone calls.

V. Costs Necessitated by Misfeasance or Malfeasance

The Courts do not believe that guardianship or probate estates should be charged with any attorney time or mileage for resolving problems or attending hearings necessitated by the misfeasance or the malfeasance of the client or attorney. For instance, if a personal representative sells property without Court approval and there are attendant costs associated with rectifying the situation, the Courts believe the personal representative should be personally responsible for any added, expense. Likewise, show-cause hearings fall within this exception, and the attorney or the client will be responsible for all costs associated with attendance at the hearing, including service and filing fees assessed by the Clerk.

VI. Court Action on Fee Applications

Fee requests should be filed as applications for payment of fees or for reimbursement of fees (if paid already by the representative) and not as claims against the estate. The Courts have found that a representative is likely to rubber

stamp his or her attorney's fee request without exercising independent judgment, resulting in an inherent unfairness to the estate. If the representative chooses to disregard the Courts' policy and file the fee application as a claim, the Courts will—in every case—require a hearing under Probate Code § 312(c) and § 799(c).

The Courts always receive the right to require hearings on fee applications. These guidelines shall apply to all billing incurred on or after February 1, 2015,

Signed this 20th day of January, 2015.

/s/_____
Honorable Brenda Hull Thompson
Judge Probate Court

/s/_____
Honorable Ingrid M. Warren
Judge Probate Court No. 2

/s/_____
Honorable Margaret Jones-Johnson
Judge Probate Court No. 3

APPENDIX G — CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S.C.A. CONST. AMEND. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

****

Appendix G

Vernon's Ann. Texas Const. Art. 1, § 32

Effective: November 23, 2005

§ 32. Marriage

(a) Marriage in this state shall consist only of the union of one man and one woman.

(b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.

Appendix G

V.T.C.A., Estates Code § 53.104

Effective: January 1, 2014

Formerly cited as TX PROBATE § 34A.

§ 53.104. Appointment of Attorneys ad Litem

(a) Except as provided by Section 202.009(b), the judge of a probate court may appoint an attorney ad litem in any probate proceeding to represent the interests of any person, including:

(1) a person who has a legal disability under state or federal law;

(2) a nonresident;

(3) an unborn or unascertained person;

(4) an unknown heir;

(5) a missing heir; or

(6) an unknown or missing person for whom cash is deposited into the court's registry under Section 362.011.

(b) An attorney ad litem appointed under this section is entitled to reasonable compensation for services provided in the amount set by the court. The court shall:

(1) tax the compensation as costs in the probate proceeding and order the compensation to be paid out of the estate or by any party at any time during the proceeding; or

(2) for an attorney ad litem appointed under Subsection (a)(6), order that the compensation be paid from the cash on deposit in the court's registry as provided by Section 362.011.

Appendix G

V.T.C.A., Family Code § 6.204

Effective: September 1, 2003

§ 6.204. Recognition of Same-Sex Marriage or Civil Union

(a) In this section, "civil union" means any relationship status other than marriage that:

(1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and

(2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.

(b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.

(c) The state or an agency or political subdivision of the state may not give effect to a:

(1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or

(2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

Appendix G

V.T.C.A., Family Code § 2.001

§ 2.001. Marriage License

(a) A man and a woman desiring to enter into a ceremonial marriage must obtain a marriage license from the county clerk of any county of this state.

(b) A license may not be issued for the marriage of persons of the same sex.

Appendix G

V.T.C.A., Family Code § 2.008

§ 2.008. Execution of Application by Clerk

(a) The county clerk shall:

(1) determine that all necessary information, other than the date of the marriage ceremony, the county in which the ceremony is conducted, and the name of the person who performs the ceremony, is recorded on the application and that all necessary documents are submitted;

(2) administer the oath to each applicant appearing before the clerk;

(3) have each applicant appearing before the clerk sign the application in the clerk's presence; and

(4) execute the clerk's certificate on the application.

(b) A person appearing before the clerk on behalf of an absent applicant is not required to take the oath on behalf of the absent applicant.

Appendix G

V.T.C.A., Family Code § 2.401

Effective: September 1, 2005

§ 2.401. Proof of Informal Marriage

(a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:

(1) a declaration of their marriage has been signed as provided by this subchapter; or

(2) the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.

(b) If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.

(c) A person under 18 years of age may not:

(1) be a party to an informal marriage; or

(2) execute a declaration of informal marriage under Section 2.402.

(d) A person may not be a party to an informal marriage or execute a declaration of an informal marriage if the person is presently married to a person who is not the other party to the informal marriage or declaration of an informal marriage, as applicable.

Appendix G

V.T.C.A., Family Code § 2.402

Effective: September 1, 2005

§ 2.402. Declaration and Registration of Informal Marriage

(a) A declaration of informal marriage must be signed on a form prescribed by the bureau of vital statistics and provided by the county clerk. Each party to the declaration shall provide the information required in the form.

(b) The declaration form must contain:

(1) a heading entitled "Declaration and Registration of Informal Marriage, _____ County, Texas";

(2) spaces for each party's full name, including the woman's maiden surname, address, date of birth, place of birth, including city, county, and state, and social security number, if any;

(3) a space for indicating the type of document tendered by each party as proof of age and identity;

(4) printed boxes for each party to check "true" or "false" in response to the following statement: "The other party is not related to me as:

(A) an ancestor or descendant, by blood or adoption;

(B) a brother or sister, of the whole or half blood or by adoption;

(C) a parent's brother or sister, of the whole or half blood or by adoption;

(D) a son or daughter of a brother or sister, of the whole or half blood or by adoption;

(E) a current or former stepchild or stepparent; or

(F) a son or daughter of a parent's brother or sister, of the whole or half blood or by adoption.";

(5) a printed declaration and oath reading: "I SOLEMNLY SWEAR (OR AFFIRM) THAT WE, THE UNDERSIGNED, ARE MARRIED TO EACH OTHER BY VIRTUE OF THE FOLLOWING FACTS: ON OR ABOUT (DATE) WE AGREED TO BE MARRIED, AND AFTER THAT DATE WE LIVED TOGETHER AS HUSBAND AND WIFE AND IN THIS STATE WE REPRESENTED TO OTHERS THAT WE WERE MARRIED. SINCE THE DATE OF MARRIAGE TO THE OTHER PARTY I HAVE NOT BEEN MARRIED TO ANY OTHER PERSON. THIS DECLARATION IS TRUE AND THE INFORMATION IN IT WHICH I HAVE GIVEN IS CORRECT.";

(6) spaces immediately below the printed declaration and oath for the parties' signatures; and

(7) a certificate of the county clerk that the parties made the declaration and oath and the place and date it was made.

(c) Repealed by Acts 1997, 75th Leg., ch. 1362, § 4, eff. Sept. 1, 1997.

Appendix G

Sec. 2.404. RECORDING OF CERTIFICATE OR DECLARATION OF INFORMAL MARRIAGE.

(a) The county clerk shall:

(1) determine that all necessary information is recorded on the declaration of informal marriage form and that all necessary documents are submitted to the clerk;

(2) administer the oath to each party to the declaration;

(3) have each party sign the declaration in the clerk's presence; and

(4) execute the clerk's certificate to the declaration.

(a-1) On the proper execution of the declaration, the clerk may:

(1) prepare a certificate of informal marriage;

(2) enter on the certificate the names of the persons declaring their informal marriage and the date the certificate or declaration is issued; and

(3) record the time at which the certificate or declaration is issued.

(b) The county clerk may not certify the declaration or issue or record the certificate of informal marriage or declaration if:

(1) either party fails to supply any information or provide any document required by this subchapter;

(2) either party is under 18 years of age; or

(3) either party checks "false" in response to the statement of relationship to the other party.

(c) On execution of the declaration, the county clerk shall record the declaration or certificate of informal marriage, deliver the original of the declaration to the parties, deliver the original of the certificate of informal marriage to the parties, if a certificate was prepared, and send a copy of the declaration of informal marriage to the bureau of vital statistics.

(d) An executed declaration or a certificate of informal marriage recorded as provided in this section is prima facie evidence of the marriage of the parties.

(e) At the time the parties sign the declaration, the clerk shall distribute to each party printed materials about acquired immune deficiency syndrome (AIDS) and human immunodeficiency virus (HIV). The clerk shall note on the declaration that the distribution was made. The materials shall be prepared and provided to the clerk by the Texas Department of Health and shall be designed to inform the parties about:

(1) the incidence and mode of transmission of AIDS and HIV;

(2) the local availability of medical procedures, including voluntary testing, designed to show or help show whether a person has AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS; and

(3) available and appropriate counseling services regarding AIDS and HIV infection.

Appendix G

McKinney's DRL § 12

Effective: March 28, 2023

§ 12. Marriage, how solemnized

No particular form or ceremony is required when a marriage is solemnized as herein provided by a clergyman or magistrate, or oneday marriage officiant as designated by a town or city clerk pursuant to section eleven-d of this article, but the parties must solemnly declare in the presence of a clergyman, magistrate, or such one-day marriage officiant and the attending witness or witnesses that they take each other as spouses. In every case, at least one witness beside the clergyman, magistrate, or such one-day marriage officiant must be present at the ceremony.

The preceding provisions of this chapter, so far as they relate to the manner of solemnizing marriages, shall not affect marriages among the people called friends or quakers; nor marriages among the people of any other denominations having as such any particular mode of solemnizing marriages; but such marriages must be solemnized in the manner heretofore used and practiced in their respective societies or denominations, and marriages so solemnized shall be as valid as if this article had not been enacted.