

No. _____

**In The
Supreme Court of the United States**

—————◆—————
MARKUTTER McINTOSH,

Petitioner,

vs.

IN RE: THE ESTATE OF
MAGGIE WILLIAMS TURNER, DECEASED,

Respondent.

—————◆—————
**On Petition For A Writ Of Certiorari
To The Texas Court Of Appeals**

—————◆—————
PETITION FOR WRIT OF CERTIORARI

—————◆—————
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QUESTIONS PRESENTED

The case at hand involves the application of Texas Property Statutes that were designed to abrogate the Common Law Rule that an “estate in remainder expectant on the death of the grantor, could not be created.” TEX.REV.CIV.STAT.ANN. Art. 1296 and the current *Texas Property Code Sec. 5.041* were enacted to abrogate the referenced Common Law Rule:

Article 1296, Revised Civil Statutes 1925, stated: An estate or freehold or inheritance may be made to commence in futuro, by deed or conveyance, in like manner as by will

Texas Property Code Sec. 5.041 states: A person may make an inter vivos conveyance of an estate of freehold or inheritance that commences in the future, in the same manner as by a will.

Petitioner was the Grantee in a Warranty Deed supported by Consideration in real property transaction involving in excess of 600 acres with mineral and royalty rights, the transaction was governed by *Texas Property Code Sec. 5.041*. The Texas Appellate Court permitted the divesting of the real property with mineral and royalty rights from Petitioner/Grantee back to Respondent/Grantor in a multi-deed conveyance transaction by the Grantor based on a void clause in the original Warranty Deed between Petitioner/Grantee and the Respondent/Grantor said clause being that Respondent/Grantor possessed a unilateral power to sell the entire fee hold without Petitioner/Grantee permission. (*See App. 23*)

The question presented is whether the State Appellate Court’s expansion of the legal parameters of

QUESTION PRESENTED – Continued

Texas Property Code Sec. 5.041 deprived Petitioner/Grantee of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

The question presented is whether the State Appellate Court's expansion of the legal parameters of *Texas Property Code Sec. 5.041* deprived Petitioner/Grantee of equal protection of the laws, in violation of the Fourteenth Amendment of the United States Constitution.

LIST OF PARTIES

All Parties listed in the caption

CORPORATE DISCLOSURE STATEMENT

None of the stated parties are Corporate entities.

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The Texas Sixth Court of Appeals, Texarkana, Texas on December 8, 2012 entered the opinion in this matter which was unpublished. (*See App. 1-9*)

Petitioner's Petition for Discretionary Review to the Texas Supreme Court was denied on March 16, 2018. (*See App. 12*)



STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment of the United States Constitution

Sec. 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.



STATEMENT OF THE CASE

Petitioner, on November 13, 2009, entered a Warranty Deed with Consideration for the purchase of in excess of 600 acres of property with mineral and royalty rights; the Respondent was the Grantor/owner of the referenced Warranty Deed. (*See App. 13-24*) The referenced Deed contained multiple expectancy estates associated with land and mineral rights. The expectancy estates were in the form of a “Life Estate” with Respondent as the “Life Estate Holder” and Petitioner as the “Remainder Holder”. The Deed also contained a clause that permitted Respondent to sell the entire estate land and mineral interest unilaterally without the consent of Petitioner. (*See App. 23*) The latter right being a right that placed a restraint of alienation against Petitioner’s expectancy interest in addition to expanding the Respondent’s ability to sell the land and mineral estate in the expectancy estate owned by the Petitioner beyond the Life Estate interest of Respondent acquired following the execution of the Warranty Deed dated November 13, 2009. Respondent exercised her alleged right to sell the real property and mineral rights by executing two deeds as follows:

1. Deed 1 dated April 2, 2013 executed by Respondent in which Respondent conveyed all real property and mineral rights to an entity known as Maggie Turner LLC. (*See App. 28-30*)
2. Deed 2 dated April 2, 2013 executed by the entity Maggie Turner LLC which

conveyed all real property and mineral rights to Maggie L. Turner the Respondent/ Grantor in the original Warranty Deed to Petitioner/ Grantee dated November 13, 2009. (*See App. 25-27*)

On May 17, 2017 a Texas State District Judge signed a Partial Summary Judgment Order stating “Plaintiff Markutter McIntosh, has no interest in the real property described in the Warranty Deed filed at Volume 792, Page 389 of the official Public Records of Marion County, Texas” (*See App. 10*) The order entered by the Texas State District Court validated the clause that permitted Respondent to sell the entire estate land and mineral interest unilaterally without the consent Petitioner. On appeal by Petitioner to the Texas Sixth Court of Appeals, Texarkana, Texas, the appellate court on December 8, 2012 entered an unpublished opinion which also validated Respondent’s sale of the entire estate land and mineral interest unilaterally without the consent of Petitioner. (*See App. 1-9*)

Petitioner’s Petition for Discretionary Review to the Texas Supreme Court was denied on March 16, 2018. (*See App. 12*)



REASON FOR ALLOWANCE OF THE WRIT

The Texas State Appellate Court following statutory law designed to abrogate the Common Law Rule that an estate in remainder, expectant on the death of the grantor, could not be created; has conflated this statutory effort with the standing Common Law

prohibition on “Restrain of Alienation in real property transaction”.

The conflation in the case at hand allowed a blatant “Restrain of Alienation Clause” in the pending matter to become a functional part of a Deed, that led to the validation of a “unilateral sell” by a Life Estate Holder of the entire Estate without consent of the Petitioner/Grantee. The acts and actions constituted a violation of Petitioner/Grantee’s Fourteenth Amendment rights that deprive the Petitioner/Grantee of property, without due process of law; and denied Petitioner/Grantee equal protection of the laws.

A. Violation of Petitioner/Grantee’s Fourteenth Amendment rights that deprives the Petitioner/Grantee of property, without due process:

In *Woodworth v. Cortez*, 660 S.W. 2d 561, Court of Appeals of Texas, San Antonio (1983) the court citing *Davis v. Zeanon*, 111 S.W.2d 772, (Tex.Civ.App.Waco 1937, writ ref’d) noted that “At common law, an estate in remainder, expectant on the death of the grantor, could not be created, but in this state, by virtue of a special statutory provision, an estate in land may be created by deed to commence in futuro.”. (*Woodworth at 564*) The court in *Woodworth* further noted also citing *Davis v. Zeanon* stated that “When the instrument conforms to the requirements of our statutes and purports to be an executed conveyance w-19 of land, *the delivery of such instrument has effect, as between the parties, to vest title in the grantee in all respects the*

same when there is no consideration for the conveyance as when there is one." (*Woodworth at 564*) The *Woodworth* Court also reference the statute in *Davis v. Zeanon* as *Tex. Rev. Civ. Ann. Art. 1296*. (*Woodworth at 564*) The successor of *Tex. Rev. Civ. Ann. Art. 1296* is *Texas Property Code §5.041* titled Future Estates which states: "A person may make an inter vivos conveyance of an estate freehold or inheritance that commences in the future, in the same manner as by a will." In the case at hand the Warranty Deed between Petitioner/Grantee and Respondent/Grantor notes the expectancy estate in the following locations:

Grantor is reserving life estates for the life of Grantor and Markutter McIntosh for all mineral interests in and under the tracts in W.K. Allen, B.B.B. & C.R.R., Survey, being Tracts Nos. One, Two and Three above, which minerals and mineral interests shall revert to the owner of the surface estate upon the death of the survivor of Grantor and Markutter McIntosh. Grantor and Markutter McIntosh shall have the full use and enjoyment of the mineral taken from said land during their lifetime as well as the rents, issues and profits there. (*See App. 22-23*)

The Deed in question as to the life estates aspect clearly is on point with the Expectancy Estate governed by *Texas Property Code §5.041*, the Warranty Deed dated November 13, 2009 opens by stating:

That I, Maggie Turner of Jefferson, Marion County, Texas, for in consideration of Ten Dollar and other valuable consideration, the

receipt of which is hereby acknowledged, have Granted, Sold and Conveyed, and by these presents do Grant, Sell and convey unto Markutter McIntosh, 3518 Nexus Court Woodbridge, Virginia 22192 of the County of Prince William, Virginia, subject to the reservation below: [Omitted description of 13 Tract of land]. (*See App. 13*)

It is the intent of the Grantor to deed to Grantee all real property interests she has in Marion County, Texas, including but not limited to all tracts in the W.K. Allen, B.B.B. & C.R.R., Johns Humphreys, and Stephen Smith Surveys of Marion County, Texas. (*See App. 22*)

The Warranty Deed however closes by stating:

TO HAVE AND TO HOLD the above described premises, together with all and singular, the rights. . . . EXCEPT however . . . grantor herein reserves, and hereby agreed, that she shall have, for Maggie Turner the full possession, benefit and use of the above-described premises, as well as rent . . . **and the unilateral power of sale of any or all of the above properties with or without the consent of Grantee, for and during the natural life of Maggie Turner** (emphasis added)

(*See App. 23*)

In connection with the latter referenced “unilateral power of sale provision” Petitioner tendered to the court that her rights have been violated by State

Appellate Court's expansion of the legal parameters of *Texas Property Code Sec. 5.041* which deprived Petitioner/Grantee of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. In particular on this issue the Texas Appellate Courts conflated the "Expectancy Interest" under *Texas Property Code Sec. 5.041* with the Common Law Property Concept of Restraint of Alienation.

In the case of *Reagan Nat. Advertising v. Capital Outdoors*, 96 SW 3d 490 – Tex: Court of Appeals, 3rd Dist. 2002 the court stated the following in reference to the concept of Restraint of Alienation in Texas:

The rule prohibiting unreasonable restraints on alienation of real property is well established in Texas. *See, e.g., Sonny Arnold, Inc. v. Sentry Sav. Ass'n*, 633 S.W.2d 811, 813 (Tex.1982); *Crestview, Ltd. v. Foremost Ins. Co.*, 621 S.W.2d 816, 823 (Tex.Civ.App.-Austin 1981, writ ref'd n.r.e.). Texas courts often look to the Restatement of Property for guidance in deciding whether a restraint on alienation exists. *See, e.g., Sonny Arnold*, 633 S.W.2d at 813 . . .

A restraint on alienation, as that phrase is used in this Restatement, is an attempt by an otherwise effective conveyance or contract to cause a later conveyance . . .

(b) to impose contractual liability on the one who makes the later conveyance when such

liability results from a breach of an agreement not to convey; or

(c) to terminate or subject to termination all or part of the property interest conveyed.

Restatement (First) of Prop. §404 (1944). (*Reagan* at 94)

Utilization of *Reagan* in the pending matter yields an absolute Restraint on Alienation for Petitioner/Grantee as reflected by the following case law.

Equity recognized in Texas the right to convey expectancies. An expectancy is the mere possibility that a person may acquire by inheritance or otherwise. 22 Tex. Jur.2d Estates §14.

The court in *Barre v. Daggett*, 105 Tex. 572, 153 S.W. 120 (1913) was presented the question, “Is an expectancy in the estate of a parent a present right and the subject of sale?” In answering the issue, the court held:

... The facts bring the case within the letter and spirit of *Hale v. Hollon*, 90 Tex. 427, 39 S.W. 287, 36 L.R.A. 75, 59 Am.St.Rep. 819, in which this **court held that the expectancy of a brother in the estate of a non compos sister under guardianship was a present existing right which was a proper subject of sale** (emphasis added).

In the case at hand there would be no question that if Petitioner/Grantee sought to sale her right of expectancies, the presence of Respondent/Grantor “unilateral power of sale provision” would be an absolute

bar to Petitioner/Grantee's ability to convey her Expectancy Interest to wit what buyer would purchase Petitioner/Grantee's interest knowing that Respondent/Grantor has a "unilateral power of sale provision" as to the entire Expectancy Interest, in an argument by analogy the concept of the "Right of First Refusal" a common target for the application of "Restraint on Alienation" is clearly less restrictive than the "unilateral power of sale provision" in the case at hand. Additionally, the "unilateral right to sell" is directly on point with item (b) of the Restatement (First) of Prop. §404 (1944) cited in *Reagan* to wit the unilateral right to sell clause "terminate or subject to termination all or part of the property interest conveyed."

In closing this section Petitioner/Grantee would note that the State of Texas implemented the "Texas Real Property Transfer on death Act." (*See Tex. Est. Code Ann. §114 West 2015*) The statute permits the ability for an individual to revoke, or sale property covered by the conveyance; the law only applies to transfers on death deeds executed and acknowledged on or after September 1, 2015. (*See Tex. Est. Code Ann. §114.003 West 2015*) The statute would not be applicable in the case at hand and it appears to be a statutory remedy to abrogate the Common Law "Restraint of Alienation in Expectancy Interest property transaction."

B. Violation of Petitioner/Grantee's Fourteenth Amendment rights under the United States Constitution, that deprives the Petitioner/Grantee of Equal protection of the laws:

Petitioner/Grantee incorporate verbatim by reference all arguments under **Item A** in this section and tenders to this Honorable Supreme Court that the State Appellate Court's expansion of the legal parameters of *Texas Property Code Sec. 5.041* deprived Petitioner/Grantee **of equal protection of the law**, in violation of the Fourteenth Amendment of the United States Constitution.



CONCLUSION

For all the foregoing reason, to wit: the State Appellate Court's expansion of the legal parameters of *Texas Property Code Sec. 5.041* which resulted in the violation of Petitioners Fourteenth Amendment Rights that derived Petitioner of property, without due process and derived Petitioner of equal protection of the

law, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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