

PUBLICATION UPDATE

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DORSANEO, TEXAS LITIGATION GUIDE

Publication 719

Release 157

June 2025

HIGHLIGHTS

- This release updates the Texas Litigation Guide with recent legislation as well as Texas Supreme Court and court of appeals decisions and federal cases. Many of the significant developments in this release are summarized below.

BUSINESS, EMPLOYMENT, AND COMMERCIAL LAW

LLC's Managing Member Has Fiduciary Duty to Nonmanaging Member. In *Davis v. Crawford*, 700 S.W.3d 438, 449 (Tex. App.—Eastland 2024, no pet. h.), the court of appeals held that the relationship between an LLC's managing member and a nonmanaging member is similar to that between a general partner and limited partner, and thereby creates a fiduciary obligation on the part

of the managing member. See Ch. 183, *Limited Liability Company*, § 183.01[5].

Age Discrimination. The Texas Supreme Court, in *Tex. Tech. Univ. Health Sciences Center v. Flores*, ___ S.W.3d ___, 2024 Tex. LEXIS 1176, *2 (Tex. Dec. 31, 2024), granted a public university's plea to the jurisdiction with respect to an employee's age discrimination claim when the employee did not establish a discriminatory pretext for not hiring her for a higher position. See Ch. 203A, *Employment Litigation*, § 203A.53[6][a].

Tortious Interference Claim Requires Valid Contract. In *Inwood Nat'l Bank v. Fagin*, ___ S.W.3d ___, 2025 Tex. LEXIS 56, *9 (Tex. Jan. 31, 2025), the Texas Supreme Court held that a beneficiary's tortious interference claim failed as a

matter of law because the trust agreement at issue did not create a contractual right to the shares in the beneficiary's favor with which the bank could interfere. See Ch. 205, *Tortious Interference With Business Relations*, § 205.02[2][a].

ESTATES

Order Probating Will. Tex. Estates Code § 257.151 expressly states that a court order admitting a will to probate as a muniment of title under this chapter does not preclude the subsequent appointment of a personal representative and opening of an administration for the testator's estate. Note, however, that Tex. Estates Code Ann. § 257.151, takes effect September 1, 2019 and is otherwise silent as to whether the statute is retrospective or prospective. At least one court has held that this enabling statute does not give retroactive effect to the amendment authorizing an opening of probate after a muniment of title order has been granted. *In re Est. of Shriver*, No. 04-22-00678-CV, 2024 Tex. App. LEXIS 2815 (Tex. App. Apr. 24, 2024). See Ch. 392, *Admitting Wills to Probate*, § 392.19[3].

Parties in Lawsuit to Void Property Transfer By Fiduciary. If a party instigates a lawsuit to void a transfer by a fiduciary such as an executor or trustee, the transferees are necessary parties to any declaratory action regarding the ownership of the transferred property [In re Trust of Bernard L., 651 S.W.3d 588, 590 (Tex. App. 2022) (setting aside the trial court's order voiding a trans-

fer because the trial court committed fundamental error and lacked subject matter jurisdiction to enter the order for failing to join transferees as necessary parties)]. However, notably, the probate court still has the jurisdiction to find that a fiduciary breached its duties to beneficiaries without notice to bona fide transferees. In re Trust A & Trust C, 67 Tex. Sup. Ct. J. 682, 690 S.W.3d 80, 86 (2024) (holding the probate court had jurisdiction to resolve the dispute between a beneficiary and a trustee even if relief was limited by failure to join necessary parties)]. See Ch. 392, *Admitting Wills to Probate*, § 392.19[3].

FAMILY LAW

Conservatorship. The El Paso Court of Appeals applied the Supreme Court's decision in *In re C.J.C.*, 603 S.W.3d 804, 812 (Tex. 2020), which held that a nonparent seeking conservatorship rights over a parent's objections must overcome the constitutional fit-parent presumption articulated by the United States Supreme Court in *Troxel v. Granville*. See Ch. 371, *Conservatorship*, § 371.04[2A].

Termination of Parental Rights. The Texas Supreme Court has held that illegal drug use alone may not be sufficient to show endangerment, but a pattern of drug use accompanied by circumstances that indicate related dangers to the child can establish a substantial risk of harm. A reviewing court should not evaluate drug-use evidence in isolation; rather, it should consider additional evidence that a

factfinder could reasonably credit that demonstrates that illegal drug use presents a risk to the parent's "ability to parent" See Ch. 381, *Termination of Parent-Child Relationship*, §§ 381.02[3][b][iii], 381.02[4][b][iii].

Termination of Parental Rights.

While a trial court may allow a party to appear in a court proceeding by electronic means in some cases, trial courts in termination cases may be more inclined to require a parent's physical presence in the courtroom. A parent's physical presence at a final termination hearing promotes an accurate determination of whether that parent can provide a safe and stable home and environment for the child. See Ch. 381, *Termination of Parent-Child Relationship*, § 381.20[1].

Special Masters. Texas Rule of Civil Procedure 171 restricts the appointment of special masters to "exceptional cases" and for "good cause;" routine matters do not qualify. Texas courts generally do not consider divorce proceedings "exceptional," so as to require a master, even when the marital estate is substantial or disputed. See Ch. 360A, *Temporary Orders*, § 360A.11.

Support for Immigrant Spouse.

When a person sponsors a spouse's immigration under an Affidavit of Support (Form I-864), divorce does not end the sponsor's support obligation toward the beneficiary. The amount owed is calculated by subtracting the beneficiary's income

from the statutory threshold. Child support received by the beneficiary is not included in the beneficiary's income, and the beneficiary is not required to mitigate damages by, for example, getting a job. See Ch. 362, *Divorce*, § 362.23.

Modification of Child Support.

A court of appeals has held that a party seeking a decrease in child support has the burden to prove both (1) a material and substantial change in circumstances and (2) that the requested modification is in the child's best interest. See Ch. 373, *Modification of SAPCR Orders*, § 373.07[2A].

Termination of Parental Rights.

A court of appeals has held that the six-month time limit for attacking a termination order is jurisdictional and cannot be waived. See Ch. 381, *Termination of Parental Rights*, § 381.22[2].

INSURANCE LITIGATION

Liability Insurance; Excess Policy. An excess policy is applied according to its own terms, so there is no presumption that the excess policy provides coverage that is co-extensive with the underlying policy. *Ohio Cas. Ins. Co. v. Patterson-Uti Energy, Inc. Marsh USA, Inc.*, 68 Tex. Sup. Ct. J. 176, 2024 Tex. LEXIS 1123, at *6–*16 (Tex. 2024). See Ch. 341, *Liability Insurance*, § 341.13[1].

Life Insurance; Beneficiary of Policy. An insurer should give effect to a change of beneficiary that is permitted under the terms of a life insurance policy, even if it might be

prohibited by a divorce decree or other legal obligation of the insured. *Shumskie v. Finnell*, 688 S.W.3d 380, 392 (Tex. App.—Eastland 2024, pet. denied). See Ch. 344, *Life, Health, and Accident Insurance*, § 344.03[3].

PERSONAL INJURY LITIGATION

Tort Claims Act; Emergency Exception. The law or ordinance this is implicated under the emergency exception must specifically address emergency action; accordingly, when no law or ordinance specifically applies to the conduct at issue, the first prong of the emergency exception drops out of the equation, and the plaintiff must raise a fact issue on recklessness under the second prong. *City of Austin v. Powell*, 68 Tex. Sup. Ct. J. 213, 2024 Tex. LEXIS 1173, at *11–*18 (Tex. 2024). See Ch. 293, *Claims Against Governmental Entities*, § 293.12[4].

Tort Claims Act; Official Immunity; Scope. When the employee is not liable for the conduct at issue due to official immunity, the employing government unit is likewise shielded from liability by governmental immunity; however, the unit bears the burden to plead and prove its employee’s official immunity. *City of Hous. v. Rodriguez*, 68 Tex. Sup. Ct. J. ___, 2024 Tex. LEXIS 1178, at *7–*8 (Tex. 2024). See Ch. 293, *Claims Against Governmental Entities*, § 293.13[1], [2].

Tort Claims Act; Official Immunity; Good Faith. Because it was undisputed that the officer used the vehicle’s emergency lights and siren

as he approached the intersection, and that the officer considered the need/risk factors throughout his pursuit of the fleeing suspect, his good faith was established as a matter of law. *City of Hous. v. Salazar*, 682 S.W.3d 911, 917–919 (Tex. App.—Houston [14th Dist.] 2024, no pet.). See Ch. 293, *Claims Against Governmental Entities*, § 293.13[2].

Malicious Prosecution; Causation. The exception for providing false information to the police or other authorities does not apply if the defendant believes the information to be true, even if that belief was unreasonable under the circumstances; instead, actual knowledge that the information provided is false is required. *Keenan v. Robin*, 68 Tex. Sup. Ct. J. 361, 2024 Tex. LEXIS 1181, at *16–*17 (Tex. 2024) (per curiam). See Ch. 332, *Malicious Prosecution and Abuse of Process*, § 332.05.

Medical Malpractice; Expert Report; Claimant. A county is not a “person” at common law and therefore cannot be a “claimant” required to file an expert report under Tex. Civ. Prac. & Rem. Code § 74.001(a)(2). *Albertson Cos. v. Cnty. of Dall.*, 691 S.W.3d 697, 699–703 (Tex. App.—Houston [14th Dist.] 2024, pet. filed). See Ch. 321, *Medical Malpractice*, § 321.02[8].

Medical Malpractice; Expert Report; Objection. Because the representative of the decedent’s estate filed an answer to a petition that technically misnamed the defendant, the 21-day period to object to the

adequacy of an expert report began to run immediately rather than on the later date that the second answer was filed after correction of the misnomer by an amended petition. *In re Est. of Agüero*, 692 S.W.3d 622, 627–628 (Tex. App.—Corpus Christi 2023, pet. denied). See Ch. 321, *Medical Malpractice*, § 321.15[5].

Citizens Participation Act; Ruling on Motion. Because any ruling on a TCPA motion is a merits decision, the trial court must first determine that it has subject matter jurisdiction over the action before it may either grant or deny the motion. *Tex. Right to Life v. Van Stean*, 68 Tex. Sup. Ct. J. 97, 2024 Tex. LEXIS 1038, at *4 (Tex. 2024) (per curiam). See Ch. 333, *Libel and Slander*, § 333.42[1].

Citizens Participation Act; Applicability. When a party moves for court enforcement of a subpoena directed to a nonparty and seeks sanctions for noncompliance, the motion is a “legal action” under the TCPA because it adds a claim for relief against a new party not named in the original pleadings. *Pate v. Haven at Thorpe Lane, LLC*, 681 S.W.3d 476, 483–486 (Tex. App.—Austin 2023, no pet.). See Ch. 333, *Libel and Slander*, § 333.42[3][a].

Citizens Participation Act; Time to File Motion. The defendant’s original timely TCPA motion did not raise an affirmative defense, so its later assertion outside of the 60-day window for filing the motion waived the defense for the purposes of deciding the motion. *Edry-TX-II, GP v.*

CCND-Main ST Shopping Ctr., LP, 683 S.W.3d 450, 458–459 (Tex. App.—Houston [14th Dist.] 2023, pet. denied). See Ch. 333, *Libel and Slander*, § 333.42[4][a].

Legal Malpractice; Assignment of Claim. A bankruptcy reorganization plan that gave a creditor a significant interest in the debtor’s potential malpractice recovery was not a prohibited assignment of the claim; however, the distortion of the parties’ positions created by the plan must be fully disclosed to the jury. *Henry S. Miller Commer. Co. v. Newsom, Terry & Newsom, LLP*, 68 Tex. Sup. Ct. J. 258, 2024 Tex. LEXIS 1177, at *15–*26 (Tex. 2024). See Ch. 322, *Professional Malpractice*, § 322.02[1][g].

Professional Malpractice; Certificate of Merit. When the trial court dismisses the *petition* without prejudice rather than the entire action due to the failure to file a certificate of merit, the plaintiff can file an amended petition that is accompanied by a certificate need not file a new action to pursue the claim. *Studio E. Architecture & Interiors, Inc. v. Lehmberg*, 690 S.W.3d 725, 728–729 (Tex. App.—San Antonio 2024, pet. filed). See Ch. 322, *Professional Malpractice*, § 322.04[2][d].

PRETRIAL, TRIAL, AND APPELLATE PRACTICE

Legal Specialization. The Texas Supreme Court has amended the Texas Plan for Recognition and Regulation of Specialization in the Law to include several new specialties, including Judicial Administra-

tion. See Ch. 3, *Professional Responsibility*, § 3.03[2][c].

Process Servers. The authority to certify process servers has been transferred from the Supreme Court to the Judicial Branch Certification Commission; this change has been noted in Ch. 31, *Service on Residents*, and in other chapters.

Electronic Filing. The Texas Supreme Court has approved version 9.0 of the Technology Standards that apply to documents filed electronically. See Ch. 30, *Commencement of Actions*, § 30.02[3][k].

Appellate Documents. The Texas Supreme Court amended Appellate Rules 9, 38, 52, 53, and 55, to indicate that electronic bookmarking must be included in appellate briefs and other documents filed in the Supreme Court and Courts of Appeals. See Ch. 150, *Appellate Proceedings in Court of Appeals*, Ch. 151, *Appellate Proceedings in Supreme Court*, and other chapters.

Privileges. In *In re Peters*, 699 S.W.3d 307 (Tex. 2024), the Texas Supreme Court discussed the privilege against self-incrimination. See Ch. 90, *Discovery: Scope and Limitations*, § 90.06[3][b].

Amended Pleadings. In *In re Est. of Phillips*, 700 S.W.3d 428, 429–431 (Tex. 2024), the Texas Supreme Court concluded that omitting claims from an amended pleading does not waive those claims when the claims were omitted to comply with a court order striking those claims. See Ch. 111, *Amended and Supplemental*

Pleadings, § 111.02[10].

Summary Judgment. In *Verhalen v. Adriana Akhtar*, 699 S.W.3d 303, 305 (Tex. 2024), the Texas Supreme Court ruled that the trial court erred in denying leave to file a late summary judgment response when the response was one day late because of a simple calendaring error, and no prejudice resulted to the opposing party. See Ch. 101, *Summary Judgment*, §§ 101.02[2][b], 101.05[1][b][2].

REAL PROPERTY LITIGATION

Oil and Gas Leases; Royalty Interest. Because an NPRI is a non-possessory interest in production, not a share of the lessor’s royalty, ratification of the lease does not subject the interest to the lease’s royalty provision; however, a stipulation between the parties was an enforceable conveyance that converted the NPRI from a fixed fractional interest to a floating interest, subject to the royalty stated in the lease. *ConocoPhillips Co. v. Hahn*, 68 Tex. Sup. Ct. J. 286, 2024 Tex. LEXIS 1180, at *14–*21 (Tex. 2024). See Ch. 283, *Oil and Gas Leases*, § 283.01[2].

Oil and Gas Leases; Shut-In Royalty. A lease permitting a \$50 shut-in royalty payment to extend the lease term “per well per year” was unambiguous, so when the lessee made two \$50 payments in consecutive months, the lease was extended for two years, not one year from the date of the second payment. *Scout Energy Mgmt., LLC v. Taylor Props.*, 68 Tex. Sup. Ct. J. 367, 2024 Tex.

LEXIS 1169, at *7–*12 (Tex. 2024) (per curiam). See Ch. 283, *Oil and Gas Leases*, § 283.03[8].

Adjoining Landowners; Trespass. Allowing cattle to enter and graze on the property of another is an actionable trespass; moreover, the presence of manure on the property was sufficient to preclude summary judgment, even though the owner never personally observed cattle present on the property. *Keenan v. Robin*, 68 Tex. Sup. Ct. J. 361, 2024 Tex. LEXIS 1181, at *7–*9 (Tex. 2024) (per curiam). See Ch. 280, *Adjoining Landowners*, § 280.02[1].

Easements; Express Grant. A contract providing that a particular property had the right to park cars on an adjacent property created an easement appurtenant, even though the contract never used the word “easement.” *425 Soledad, Ltd. v. CRVI Riverwalk Hosp., LLC*, 68 Tex. Sup. Ct. J. 325, 2024 Tex. LEXIS 1174, at *10–*11 (Tex. 2024). See Ch. 281, *Easements*, § 281.03[2].

Easements; Dedication. The recording of a subdivision’s plat approved by the county resulted in the creation of dedicated public streets, so a lot owner in the subdivision was entitled to a declaratory judgment that the defendant did not have any right to erect fences, gates, or any other obstruction of those streets. *Keenan v. Robin*, 68 Tex. Sup. Ct. J. 361, 2024 Tex. LEXIS 1181, at *12–*15 (Tex. 2024) (per curiam). See Ch. 281, *Easements*, § 281.05[1].

Real Property Taxes; Delinquent Taxes. Allegations that an irrigation

district refused to cancel more than 20 year-old delinquent taxes as required by Tex. Tax Code § 33.05(c) were sufficient to state an ultra vires claim for purposes of the district’s plea to jurisdiction; whether amounts allegedly due were actually assessments separately authorized by the Water Code that had no corresponding limitations period was a merits issue that did not affect the trial court’s jurisdiction. *Herrera v. Mata*, 68 Tex. Sup. Ct. J. 121, 2024 Tex. LEXIS 1079, at *6–*11 (Tex. 2024) (per curiam). See Ch. 260, *Real Property Tax Suits*, § 260.02[3].

Deeds; Bona Fide Purchaser Status. Though a parking easement was unrecorded, the original purchaser had actual notice and an affiliate that later bought the property had attributed inquiry notice of the potential adverse interest that was reflected in the sales documents, so neither were bona fide purchasers and both took title subject to the preexisting easement. *425 Soledad, Ltd. v. CRVI Riverwalk Hosp., LLC*, 68 Tex. Sup. Ct. J. 325, 2024 Tex. LEXIS 1174, at *12–*16 (Tex. 2024). See Ch. 254, *Deeds and Conveyances*, § 254.07[2].

Mechanic’s Liens; Validity. Because an improvement contract was void under the Insurance Code, no valid contract was executed or filed, so the trial court properly removed a mechanic’s lien on a homestead property under Tex. Prop. Code § 53.160. *Wolfe’s Carpet, Tile & Remodeling, LLC v. Bourelle*, 693 S.W.3d 424, 433–434 (Tex. App.—

Houston [14th Dist.] 2023, no pet.). See Ch. 271, *Mechanic's and Materialmen's Liens*, § 271.111.

Condemnation; Owner's Right to Repurchase. Property Code Section 21.101 waives the condemning authority's sovereign or governmental immunity in a former owner's suit to enforce the repurchase rights created by the statute; moreover, the

right is available regardless of whether the action went to a formal judgment of condemnation, or whether it was settled by the parties before judgment. *JRJ Pusok Holdings, LLC v. State*, 693 S.W.3d 679, 683–685 (Tex. App.—Houston [14th Dist.] 2023, pet. filed). See Ch. 261, *Condemnation*, § 261.15[1].

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