COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

IN THE ESTATE OF;	§	No. 08-21-00184-CV
RICKEY RAY ALLEN,	§	Appeal from the
DECEASED.	§	County Court of Law
	§	of Hill County, Texas
	§	(TC# PR14881)

O P I N I O N

This is an appeal from the trial court's order granting an independent administrator's application to resign and to make an immediate appointment of the decedent's son to serve as the successor independent administrator for the estate of his father, Rickey Ray Allen (Rickey). [1] Rickey's surviving spouse, Appellant Lisa Allen (Lisa), contends that the trial court improperly granted the application by failing to: (1) provide notice and citation to all interested parties and the failure to hold a hearing before granting the application; (2) make findings of the necessity to immediately grant the application without notice and a hearing; and (3) obtain her consent before granting the application. In a fourth issue, Lisa contends that the trial court abused its discretion in

[1] This case was transferred from our sister court in Waco, and we decide it in accordance with the precedent of that court to the extent required by TEX.R.APP.P. 41.3.

appointing the decedent's son as the successor independent executor, contending that she had priority for the appointment under the Estates Code. Because we find that the trial court lacked the authority under the Estates Code to make the appointment in the manner that it did, we reverse the trial court's judgment and remand to the trial court for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Rickey's Will is Admitted to Probate

Rickey, who passed away in July 2019, had two children, Robert Corey Allen (Corey) and Beckey Allen (Beckey), by his first wife, Ruth Allen (Ruth). Ruth passed away in 1999, and Rickey married Lisa in 2004. Before Ruth's death, Rickey executed a will leaving all of his property to Ruth and his two children. The will named Ruth as the independent executor of his estate, a third person as the first alternative executor, and Ruth's brother, Kenneth Lindsey (Kenneth) as the second alternative executor. At the time of Rickey's death, both Ruth and the third person had passed away, and Beckey, who passed away shortly after her father's death, disclaimed all interest in her father's estate. That left Corey as the sole beneficiary of the will.

Kenneth and Corey applied to admit Rickey's will to probate in the County Court of Law in Hill County, Texas. The application sought an order naming Kenneth as the independent executor of the estate. Lisa contested the validity of the will on several grounds, but the trial court found that the will was valid, admitted it to probate, and granted letters testamentary to Kenneth as the independent executor of the estate in March 2020. Lisa unsuccessfully challenged the order in an appeal to our sister court in Edinburg. *See Estate of Allen*, No. 13-20-00289-CV, 2021 WL 2006528, at *8 (Tex.App.--Corpus Christi–Edinburg May 20, 2021, no pet.)(mem. op.). The validity of Rickey's will is therefore no longer at issue.

B. Kenneth resigns as executor and Corey is appointed as his successor

Beginning in June 2020 through May 2021, Kenneth filed eight requests for extensions of time to file the estate's inventory, appraisement, and list of claims, all of which the trial court granted. On June 25, 2021, Kenneth and Corey filed a joint application seeking to allow Kenneth to resign as the independent executor without filing a final accounting, and asking that Corey be immediately appointed as his successor (the Application). As explained below, Chapter 361 of the Texas Estates Code generally requires a personal representative of an estate to file a final accounting before resigning, and further requires the trial court to provide notice and a hearing to all interested persons before granting the resignation and before appointing a successor representative.[2] But in the Application, Kenneth cited an exception to this requirement, found in section 361.002 of the Code, which allows a "personal representative" to resign without filing a final accounting and which also allows a trial court to make an "immediate" appointment of a successor representative upon determining that a "necessity exists."[3]

In support of the need to resign without filing an accounting, Kenneth pointed to his "advanced age" and the fact that his residence was "distant" from Hill County where the estate was pending. Kenneth also sought the immediate appointment of Corey as the successor independent executor of the estate, pointing out that Corey was Rickey's sole surviving beneficiary under the will, and was qualified to serve under the Estates Code. Kenneth also agreed that if allowed to resign, he would not be discharged from his obligations under the bond he had posted as required by section 361.002 (b) of the Code.[4]

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[2] TEX.ESTATES CODE ANN. § 361.003 (a)(b); id . § 361.004(a)(b).

[3] *See* TEX.ESTATES CODE ANN. § 361.002(a)("If the necessity exists, the court may immediately accept the resignation of a personal representative and appoint a successor representative.").

[4] *See* TEX.ESTATES CODE ANN. § 361.002(b)(the court "may not discharge a person whose resignation is accepted under Subsection (a), or release the person or the sureties on the person's bond, until a final order has been issued or judgment has been rendered on the final account required under Section 361.001.").

Although the Application did not include a proposed order, it appears that Kenneth's attorney or his legal staff hand-delivered a proposed order granting the Application to the trial court judge, which the judge signed approximately fourteen minutes after the Application was filed (the Appointment Order).

C. Lisa moves to vacate the Appointment Order

Lisa promptly moved to vacate and set aside the trial court's Appointment Order.[5] In her motion, Lisa argued that the trial court erred in granting the Application, contending that the record did not support a finding that there was any "necessity" for allowing Kenneth to resign without filing a final accounting, or for making an immediate appointment of Corey as his successor. She therefore contends that the trial court needed to provide her with notice and a hearing prior to granting the Application under section 361.002 of the Estates Code. Casey opposed the motion, arguing that the exception in section 361.002 to the notice and hearing requirements applied due to Kenneth's advanced age and his inability to perform his duties adequately. The trial court denied Lisa's motion without holding a hearing and without further explanation.

Lisa now appeals from the trial court's Appointment Order.[6]

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[5] Lisa also responded by filing a motion to recuse the trial court judge, alleging that an improper ex parte communication with Kenneth's attorney led to the signing of the Appointment Order, and that the judge had generally evidenced a bias in favor of Kenneth and Corey. The recusal motion was assigned to another judge who held a hearing on the motion, and ultimately denied it.

[6] A probate court order determining who may serve as an independent executor is appealable because it finally adjudicates a substantial right of the parties in an estate proceeding. *See Brashear v. Dorai*, No. 14-19-00194-CV, 2020 WL 5792304, at *2 (Tex.App.--Houston [14th Dist.] Sept. 29, 2020, no pet.)(mem. op.), *citing Eastland v. Eastland*, 273 S.W.3d 815, 819 (Tex.App.--Houston [14th Dist.] 2008, no pet.).

II. ISSUES ON APPEAL

In her first two issues on appeal, Lisa renews her argument that the trial court lacked the authority under the Estates Code to issue the Appointment Order without providing her with notice and a hearing. Her third issue raises a different statutory twist, as she claims the trial court lacked the statutory authority to appoint Corey as an independent administrator because section 404.005(a) of the Estates Code requires that "all" of the estate's "distributees" must agree on a replacement independent administrator, and she was never consulted or consented. In her fourth issue, Lisa contends that she had statutory priority over Corey to be appointed as the successor executor given her status as Rickey's surviving spouse, and that the trial court therefore should have appointed her as the successor independent administrator of Rickey's estate, rather than Corey.

III. THE TRIAL COURT LACKED AUTHORITY TO APPOINT COREY AS THE SUCCESSOR INDEPENDENT EXECUTOR

At the heart of Lisa's first two issues is the question of whether the trial court could issue its Appointment Order under Chapter 361 of the Texas Estates Code, without first providing her with notice and a hearing. As explained below, however, we conclude that the provisions of Chapter 361—which govern the resignation and appointment of "personal representatives"—are not the only relevant provisions when, as here, a testator has opted for an independent administration of his estate. In that situation, section 404.005(a) of the Code is the controlling provision in the Estates Code that gives a trial court the authority to appoint a successor independent administrator who is not named in the will.[7] And because we find that the trial court

[7] For purposes of our analysis, we use the terms independent executor and independent administrator interchangeably. *See* TEX.ESTATES CODE ANN. § 22.017 ('Independent executor' means the personal representative of an estate under

did not follow the requirements of this provision, we conclude that the trial court abused its discretion in issuing the Appointment Order.

A. Standard of Review

Our determination of whether the trial court erred in issuing the Appointment Order allowing Kenneth to resign and appointing Casey in his place, turns on how we interpret the meaning of various provisions in the Estates Code. In general, we review questions of statutory construction de novo, with our primary objective being to give effect to the Legislature's intent. *Ferrell v. Univ. of Tex. Sys.*, 583 S.W.3d 805, 808–09 (Tex.App.--El Paso 2019, no pet.), *citing Taylor v. Firemen's & Policemen's Civ. Serv. Comm'n of City of Lubbock,* 616 S.W.2d 187, 189 (Tex. 1981); *see also Eastland*, 273 S.W.3d at 820 (Tex.App.--Houston [14th Dist.] 2008, no pet.)(treating question of statutory construction of former Probate Code as presenting legal issues that appellate court reviews de novo.). In ascertaining the Legislature's intent, we give statutory terms their plain and common meaning unless such a construction would lead to an absurd result. *See City of Rockwall v. Hughes,* 246 S.W.3d 621, 625–26 (Tex. 2008); *see also Ferrell*, 583 S.W.3d at 808–09 (same).

Once we determine the Legislature's intent in enacting a provision, we apply an abuse of discretion standard to determine whether the trial court acted correctly in applying those provisions. *See In re Estate of Denton*, No. 11-10-00341-CV, 2012 WL 3063845, at *4 (Tex.App.--Eastland July 26, 2012, no pet.)(mem. op.)(recognizing that Texas courts have applied an abuse of discretion standard to review a trial court's actions under various sections of the former provisions of the Probate Code), *citing Eastland,* 273 S.W.3d at 820 (applying an abuse of

independent administration as provided by Chapter 401 and Section 402.001. The term includes an independent administrator.").

discretion standard in reviewing a probate court's findings on unsuitability of party to serve as independent executor and its determination of necessity for administration); *In re Estate of Stanton*, 202 S.W.3d 205, 209 (Tex.App.--Tyler 2005, pet. denied)(applying abuse of discretion standard in reviewing trial court's appointment of a dependent administrator of an estate); *In re Estate of Clark*, 198 S.W.3d 273, 275 (Tex.App.--Dallas 2006, pet. denied)(appellate court reviews a trial court's order removing an administrator under an abuse of discretion standard). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law, or if it clearly fails to analyze or apply the law correctly. *See In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005), *citing Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992)(orig. proceeding); *In re Lewis*, 185 S.W.3d 615, 617 (Tex.App. - -Waco 2006, no pet.)(same). Stated otherwise, the question of whether a trial court abused its discretion is whether it acted "without reference to any guiding rules and principles." *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). "The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred." *Id.* at 242.

B. The statutory scheme: Chapter 361 or Chapter 404?

Significant to our analysis is the interplay between the provisions of Chapter 361 of the Estates Code, which govern the resignation of "personal representatives" and the appointment of their successors, and Chapter 404 of the Code, which specifically provides for the method of appointing a successor independent administrator. In order to understand why Chapter 404 must play a role here, we find it helpful to first explain the distinction between independent administrations and dependent (also known as general) administrations.

1. Dependent v. independent administrations

The primary distinction between dependent and independent administrations is the level of judicial supervision over the exercise of the executor's power. *Eastland*, 273 S.W.3d at 821–22 (discussing the former Probate Code provisions). In a dependent administration, an executor or other personal representative can perform only a few transactions without seeking a court's permission. *Id.* In contrast, in an independent administration, the executor is "free from . . . the expense and control of judicial supervision except where the . . . Code specifically and explicitly provides otherwise." *Id*. at 821, *citing Corpus Christi Bank & Trust v. Alice Nat'l Bank,* 444 S.W.2d 632, 634–35 (Tex. 1969) and *Bunting v. Pearson*, 430 S.W.2d 470, 471, 473 (Tex. 1968); *see also* TEX. ESTATES CODE ANN. § 402.001 ("When an independent administration has been created . . . as long as the estate is represented by an independent executor, further action of any nature may not be had in the probate court except where this title specifically and explicitly provides for some action in the court."); *Id*. § 402.002 ("Unless this title specifically provides otherwise, any action that a personal representative subject to court supervision may take with or without a court order may be taken by an independent executor without a court order.").

As our sister court in Waco has recognized, the "independent administration of estates and the testator's right to select an independent executor of his or her choice are foundations of Texas law." *In re Roy*, 249 S.W.3d 592, 596 (Tex.App.--Waco 2008, pet. denied). So if an independent executor named in a will is willing to serve, the court has no discretionary power to refuse to issue letters to the named executor unless he is a minor, an incompetent, or otherwise disqualified under the Code. *See In re Estate of Gaines*, 262 S.W.3d 50, 55–56 (Tex.App.--Houston [14th Dist.] 2008, no pet.).

2. The appointment of successor independent administrators

The fundamental question here is which provisions in the Estates Code apply when the named independent executor in a decedent's will, or his named successors, are unable or unwilling to serve?

In the trial court, Kenneth and Corey relied on Chapter 361 of the Estates Code in their Application seeking to allow Kenneth to step down and to name Corey as the successor independent executor. And Corey continues to rely on this Chapter in asserting that the trial court acted correctly in granting the Application. We conclude, however, that Chapter 361 does not govern the appointment of a successor *independent* executor or administrator not named in a will.

Under section 361.002 of the Code, a court may accept the resignation of a "personal representative" of an estate, and may immediately appoint a successor representative when "necessity exists" without notice or a hearing. *See* TEX.ESTATES CODE ANN 361.002. To be sure, section 22.031(a) of the Code defines a "personal representative" to include an "independent executor" or "independent administrator" of an estate. TEX.ESTATES CODE ANN. § 22.031 (a). But section 22.031(b) provides a significant exception to the general rule that an independent executor is to be treated like a "personal representative," stating that "[t]he inclusion of an independent executor in Subsection (a) may not be construed to subject an independent executor to the control of the courts in probate matters with respect to settlement of estates, except as expressly provided by law." TEX.ESTATES CODE ANN. § 22.031 (b). And in turn, a trial court exerts "control" over an independent executor when the court either removes him, or when it appoints a successor who has not been named in the testator's will. *Eastland*, 273 S.W.3d at 823 (if the "***removal*** of an independent executor is control with respect to settlement of an estate, it follows that ***appointment*** of a successor independent executor also is control with respect to settlement of an estate (emphasis

in the original), *citing Bell v. Still,* 389 S.W.2d 605, 606–07 (Tex.App.-Waco 1965), *aff'd,* 403 S.W.2d 353 (Tex. 1966)(recognizing that the "the power to remove is the power to control," and to allow a trial court to remove an independent executor without express statutory authority would contradict the meaning given to the phrase "settlement of estates" by the Texas Supreme Court in earlier opinions); *see also Baker v. Hammett,* 789 S.W.2d 682, 683–85 (Tex.App.--Texarkana 1990, no writ)(recognizing that although a personal representative is defined as including an independent executor, the trial court did not have the authority under the former Probate Code to remove an independent executor—as it would other types of personal representatives—as such a removal would constitute control over the settlement of the estate). Thus, a trial court may neither remove an independent executor or appoint his successor absent express statutory authority allowing it to do so. *Eastland*, 273 S.W.3d at 823.

As Lisa points out, section 404.005 of the Code, which is found in Subtitle I of the Code governs "Independent Administration," and provides one specific instance in which a trial court may appoint a successor independent administrator not named in a will. Section 404.005(a) provides that if the will of a person names an independent executor who for any reason is unwilling or unable to serve, and if each successor executor named in the will is also either unable or unwilling to serve, "all of the distributees of the decedent" may file an "application for an order continuing [the] independent administration [and] may apply to the probate court for the appointment of a qualified person, firm, or corporation to serve as successor independent administrator." *See* TEX.ESTATES CODE ANN. § 404.005(a). And if the probate court finds that the "continued administration of the estate is necessary," this provision allows the court to "enter an order continuing independent administration and appointing the person, firm, or corporation

designated in the application as successor independent administrator, unless the probate court finds that it would not be in the best interest of the estate to do so." *Id.*

Given the language used in this provision—requiring "all distributees" to join in the application—we conclude that the Legislature intended to only give a probate court the limited authority to appoint a successor independent executor not named in a will when "all" of the distributees agreed; in other words, it did not intend to allow a single distributee to unilaterally apply for the continuation of an independent administration or to appoint a successor administrator. *See Estate of Nunu*, No. 14-17-00495-CV, 2018 WL 3151231, at *3 (Tex.App.--Houston [14th Dist.] June 28, 2018, no pet.)(mem. op.)(recognizing that the Estates Code requires an agreement by all of the estate's distributees to the appointment of a successor independent administrator), *citing Boone v. LeGalley*, 29 S.W.3d 614, 616 (Tex.App.--Waco 2000, no pet.)(recognizing that under the similarly worded provisions in the former Probate Code, when the named independent executors in a will are unable or unwilling to serve, the trial court is "powerless" to appoint a successor independent administrator without agreement by all of the distributees); *see also* 17 Tex. Prac., Prob. & Decedents' Estates § 522 (recognizing that section 404.005 of the Estates Code appears to require "unanimous agreement on both the desirability of an independent administration and the person to be appointed" before a trial court may appoint a successor independent administrator).

And in turn, if the distrubutees do not all agree on the continuation of the independent administration or the appointment of a successor independent administrator, the estate will then be converted to a dependent administration, which will be subject to judicial control, and any successor appointed by the court will be treated as a dependent executor. *See Boone*, 29 S.W.3d at 616 (if all distributees do not agree on the appointment of a successor independent executor, the

trial court "may appoint an administrator only under the general law," who would then be subject to judicial control), *citing Loewenstein v. Watts,* 119 S.W.2d 176, 184 (Tex.App.--El Paso 1938)(op. on reh'g), *aff'd,* 137 S.W.2d 2 (1940)(recognizing that under former Probate Code—which had no provision for the appointment of a successor independent executor not named in the will—the probate court could not appoint an administrator with the powers of an independent executor if the named person failed or refused to service, and could appoint an administrator "only under the general law.") and *In re Grant's Estate,* 53 S.W. 372, 373-74 (Tex. 1899)(because the former Probate Code did not give a court any authority to appoint a successor independent administrator, if the named executor was unable or unwilling to serve, the court must "treat the provision for an independent administration as having failed for the want of an executor, and must proceed under the general law, and resume entire control of the administration.");*see also In re Estate of Gober*, 350 S.W.3d 597, 599, n. 1 (Tex.App.--Texarkana 2011, no pet.)(unless a person is named in the will, or all of the distributees agree to the person's appointment, if the independent executor designated by the will is unwilling to serve, the probate court is powerless to appoint an independent executor and in that circumstance, the court "may appoint an administrator only under the general law.").

We therefore conclude that Lisa is correct that all "distributees of the decedent" needed to agree on Corey's appointment as the successor independent administrator to allow the independent administration to continue.

C. Was Lisa a "distributee" of the estate?

Lisa's argument leads to the next question: was she a "distributee" under section 404.005(d) of the Code, whose agreement was required before the court could appoint Corey as the successor independent administrator? Or as Corey contends, was he the sole "distributee" who

had the right to file an application to be appointed successor administrator? We side with Lisa on this issue.

1. Reconciling dueling definitions

In arguing that Lisa cannot be considered a distributee, Corey relies on section 22.010 of the Estates Code, which defines a "distributee" as a "person who is entitled to a part of the estate of a decedent under a lawful will or the statutes of descent and distribution." TEX.ESTATES CODE ANN. § 22.010. Corey contends that neither situation applies to Lisa. First, Lisa did not receive any part of the estate through the "statutes of descent and distribution" because those provisions address a decedent who dies intestate—which Rickey did not. *See* TEX.ESTATES CODE ANN. § § 201.001-201.152. And second, Corey points out that Lisa was not named as a beneficiary under Rickey's will, and was thus not entitled to any part of Rickey's estate under his will.

Lisa responds that she is a distributee based on her life estate in the family homestead. As Rickey's wife at the date of his death, Lisa was entitled to a life estate in the couple's family homestead under Texas law, specifically Article 16, section 52 of the Texas Constitution Texas Constitution and section 102.003 of the Estate Code.[8] Corey downplays this fact, contending that a surviving spouse's homestead right does not pass under a decedent's will or through the intestacy statutes—the predicates for a distribute under section 22.010.[9] Corey therefore asserts that Lisa

[8] Article 16, section 52 of the Texas Constitution provides that: "On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same." TEX.CONST.ART. XVI, § 52. Similarly, section 102.003 of the Estates Code provides that: "The homestead of a decedent who dies leaving a surviving spouse descends and vests on the decedent's death in the same manner as other real property of the decedent and is governed by the same laws of descent and distribution." TEX.ESTATES CODE ANN. § 102.003.

[9] *See generally Wassmer v. Hopper*, 463 S.W.3d 513, 526 (Tex.App.--El Paso 2014, no pet.)(recognizing that the homestead exemption passes to the surviving spouse through the Probate Code and the Texas Constitution, and that the surviving spouse's interest in the homestead was not subject to estate administration); *French v. French*, 188

cannot be considered a "distributee" under section 22.010 of the Code, and that, in turn, her agreement was not needed to grant his application to be appointed the successor independent administrator of the estate section 404.005 of the Code.

We need not, however, decide whether Lisa fits within section 22.010's general definition of "distributee," because Lisa is a "distributee" under the more specific definition of that term found in section 404.005(d) of the Code. Subsection (d) provides:

> "If a life estate is created either in the decedent's will or by law, and if a life tenant is living at the time of the filing of the application for an order continuing independent administration, then the life tenant or life tenants, determined as if the life estate were to commence on the date of the filing of the application for an order continuing independent administration, shall, for the purposes of this section, be considered to be the distributee or distributees on behalf of the entire estate created, and are authorized to apply for an order continuing independent administration on behalf of the estate without the consent or approval of any remainderman."

TEX.ESTATES CODE ANN. § 404.005(d).

In determining that this definition of "distributee" trumps the more general definition of that same term found in section 22.001, we apply the well-known principle of statutory construction that holds that when there are seemingly conflicting provisions in a statute, the more specific or "special" statutory provision prevails over the more generally applicable statute "unless the general provision is the later enactment and the manifest intent is that the general provision prevail." *Ferrell v. Univ. of Tex. Sys.*, 583 S.W.3d 805, 809 (Tex.App.--El Paso 2019, no pet.), *citing* TEX.GOV'T CODE ANN. § 311.026(b)(providing that, when construing code provisions that

S.W.2d 586, 589 (Tex.Civ.App.--Amarillo 1945, writ ref'd w.o.m.), (the homestead right is not inherited by the surviving spouse but is acquired through the Texas Constitution and statutes), *citing Roots v. Robertson*, 93 Tex. 365, 371, 55 S.W. 308, 309 (1900)(recognizing that the "homestead exemption does not descend to heirs, but they take the property, under the statute and the constitution . . . ").

are irreconcilable, "the special or local provision prevails as an exception to the general provision"); *see also Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000)(recognizing the "traditional statutory construction principle that the more specific statute controls over the more general."). Here, the Legislature included the specific definition of a "distributee" as including a person receiving a life estate created by law, in the very same Code provision in which it stated that all "distributees" must agree to the appointment of a successor independent administrator. TEX.ESTATES CODE ANN. § 404.005 (a)(d). We therefore conclude that the Legislature's manifest intent was to apply this more specific definition—as opposed to the more general one found in section 22.001—in determining who is a "distributee" under this provision. *See generally Interest of Z.N.*, 602 S.W.3d 541, 547 (Tex. 2020)("We presume the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind.'), *quoting Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010).

That leaves the final question of whether Lisa's life estate—resulting from the homestead status of the property—was created "by law" under section 404.005(d). We conclude that it was.

2. Lisa held a life estate created by law in the family's homestead

The Legislature first adopted the section 404.005 in 1977. The prior version, and later versions, have consistently defined a "distributee" as a person holding a "life estate . . . created either in a decedent's will or by law" in applying for the continuation of an independent administration.[10] Lisa points out that when this provision was adopted, the Texas Supreme Court

[10] This provision was first enacted by the Texas Legislature during its 65th regular session in 1977, in what was then Chapter 390 of the Probate Code. *See* Acts 1977, 65th Leg., p. 1066, ch. 390, § 8, eff. Sept. 1, 1977. It has survived various iterations of the Probate Code since that time, and as set forth above, it is currently found in section 405.005 of the Estates Code. TEX.ESTATES CODE ANN. § 404.005(d).

had issued several opinions in which it treated homestead rights as the equivalent of a life estate created by law. While the court has recognized that a homestead may differ in some respects from other forms of life estates, it still has consistently recognized that "the homestead right of the survivor to continue to occupy the family homestead is in the nature of a life estate created by law." *Thompson v. Thompson*, 236 S.W.2d 779, 786 (Tex. 1951), *citing Sargeant v. Sargeant*, 15 S.W.2d 589, 593 (Comm'n App. 1929); *see also Laster v. First Huntsville Properties Co.*, 826 S.W.2d 125, 129 (Tex. 1991)(recognizing that in Texas, "the homestead right constitutes an estate in land."), *citing Woods v. Alvarado State Bank*, 19 S.W.2d 35, 37–38 (Tex. 1929)(holding that upon the death of her husband, the family's homestead became the wife's "life estate as certain and absolute as such an estate could become."). The court has further opined that this estate is "analogous to a life tenancy, with the holder of the homestead right possessing the rights similar to those of a life tenant for so long as the property retains its homestead character." *Laster,* 826 S.W.2d at 129; *see also Dominguez v. Castaneda*, 163 S.W.3d 318, 329–30 (Tex.App.--El Paso 2005, pet. denied)(same).

Against this backdrop, the Legislature enacted section 404.005. In construing the meaning of a statute, courts must presume that the Legislature is "aware of relevant case law when it enacts or modifies statutes." *Phillips v. Bramlett*, 407 S.W.3d 229, 241 (Tex. 2013); *Acker v. Tex. Water Comm'n,* 790 S.W.2d 299, 301 (Tex. 1990)("A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it."); *see also Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 106-07 (Tex. 2021)("we presume that the Legislature uses statutory language with complete knowledge of the existing law and with reference to it"). Thus, although statutory language should be construed according to common usage, phrases used in a statute "that have acquired a particular meaning—whether by definition

or otherwise—should be construed accordingly." *Amazon.com, Inc.*, 625 S.W.3d at 106, *citing* TEX. GOV'T CODE § 311.011 ("Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.") and *KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175, 183 (Tex. 2019)(in construing a statement appellate court uses any definitions the legislature has prescribed and must "take into account any technical or particular meaning the words have acquired"). Accordingly, we presume that the Legislature was aware of the Texas Supreme Court's previous holdings in which they interpreted a surviving spouse's homestead rights as being a life estate created by law—as well as the court's treatment of the surviving spouse as a life tenant—when it defined a "distributee" using these same phrases in section 404.005(d) of the Estates Code.

We therefore conclude that Lisa was in fact a "distributee" under section 404.005(d) through her homestead rights, and that, consequently, her agreement was required under section 404.005(a) of the Code before the trial court could appoint Corey as the successor independent administrator of Rickey's estate. Accordingly, the trial court erred by accepting Kenneth's resignation and appointing Corey as his successor without obtaining Lisa's agreement.

We sustain Lisa's Issue Three, as we find that the trial court erred in failing to follow the applicable provisions of section 404.005 of the Code in issuing its Appointment Order, and we must therefore reverse that order and remand for further proceedings. Because we remand on Issue Three, we find it unnecessary to rule on Issues One and Two.

IV. THE ISSUE OF STATUTORY PRIORITY

Finally, Lisa argues in Issue Four that the trial court erred in appointing Corey as the successor independent administrator, as she had statutory priority over Corey to be named as Kenneth's successor under TEX.ESTATES CODE ANN. § 304.001 given her status as Rickey's

surviving spouse. As set forth above, however, section 404.005(d) of the Code provides the method for appointing a successor independent executor, and only allows for an appointment by agreement of the distributees, regardless of any statutory priorities. Thus, section 304.001, which comes under the general Code provisions relating to the appointment of "personal representatives," was not relevant to the trial court's decision.

We could agree that the issue of statutory priority may become relevant if on remand, the trial court permits Kenneth to resign as the independent administrator, and Corey and Lisa cannot agree on a successor independent administrator. At that point, the trial court will then have to appoint a successor personal representative under the general provisions of the Code—a dependent executor who will be subject to judicial control. *See Boone,* 29 S.W.3d at 616. Today, however, it would be premature for us to address the issue of statutory priority, as doing so would constitute an impermissible advisory opinion on an issue not before us. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993)(courts are prohibited from issuing advisory opinions that "decides an abstract question of law without binding the parties."); *see also Isbell v. Rednick*, 193 S.W.2d 736, 737 (Tex.App.--Waco 1946, no writ)(it is a "fundamental principle that courts are created, not for the purpose of deciding abstract questions of law or rendering advisory opinions, but for the judicial determination of presently existing disputes between parties in relation to facts out of which controverted questions arise"). Thus, we decline to address the issue of statutory priority today.

Lisa's Issue Four is overruled it requests an advisory opinion on questions of statutory priority that are not before us today.

CONCLUSION

For the reasons set forth above, we conclude that the trial court erred in entering the Appointment Order allowing Kenneth's resignation and appointing Corey as the successor independent administrator. We therefore reverse the Appointment Order, and remand to the trial court for further proceedings consistent with our opinion.

Jeff Alley, Justice

December 2, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.