



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

Nos. 04-15-00717-CV  
04-15-00787-CV

In re Estate of Maria L. **RAYNES**, Deceased

From the Probate Court No. 1, Bexar County, Texas  
Trial Court No. 2013-PC-0369  
The Honorable Kelly Cross, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice  
Patricia O. Alvarez, Justice  
Jason Pulliam, Justice

Delivered and Filed: August 10, 2016

**REVERSED AND REMANDED IN PART; AFFIRMED IN PART**

In these consolidated appeals, the independent executor of the estate of Maria L. Raynes challenges a judgment ordering the sale of a house and a subsequent order appointing a receiver to carry out the sale. Additionally, the independent executor challenges a portion of the judgment refusing to evict the occupants of the house. We reverse and remand in part, and affirm in part.

**FACTUAL AND PROCEDURAL BACKGROUND**

Maria L. Raynes died and left a will in which she appointed one of her sons, Arthur Raynes, as the independent executor of her estate. The will provides that Maria's estate be divided among her five children "share and share alike." The primary asset of the estate is a house located at 6307 Handsome Lake Dr., Leon Valley, Texas. Maria's daughter, Leah Raynes, lives in the house and

has done so since before her mother's death. Leah's adult sons, Samuel Barta and Todd Barta, also live in the house.

Three months after Maria's death, Arthur, as independent executor, asked Leah to vacate the house so he could list it for sale and divide the proceeds of the sale among the devisees. Leah refused to vacate the house. Arthur and Leah engaged in discussions about the possible sale of the house to Leah. Arthur and Leah dispute whether an agreement for the sale of the house to Leah was ever reached.

Approximately one year after Maria's death, Arthur sent written notices to Leah, Samuel, and Todd directing them to vacate the house so he could prepare it for sale on the open market. Leah, Samuel, and Todd did not vacate the house. Thereafter, Arthur petitioned the probate court to evict Leah, Samuel, and Todd from the house and to grant related injunctive relief. Arthur's petition also included claims against Leah, Samuel, and Todd for tortious interference with the estate, fraud, and trespass to try title. Leah, Samuel, and Todd filed answers to Arthur's petition and demanded a jury trial. The jury fee was paid. Leah also filed an application asking the probate court to order Arthur to sell the house to her.

The probate court held a hearing on Arthur's eviction and injunction requests. The application for sale of the house was not set for hearing. Nevertheless, evidence was presented on whether Arthur and Leah reached an agreement to sell the house to Leah.

After the hearing, the probate court signed a judgment ordering the sale of the house to Leah for the sum of \$121,000.00, on or before October 2, 2015. The probate court further ordered that if the sale of the house did not close by October 2, 2015, a hearing would be held for the appointment of a receiver "to liquidate" the house. The judgment denied all other relief. Arthur appealed. This appeal was assigned appeal number 04-15-00717-CV.

The sale of the house to Leah did not occur. After the closing deadline, Leah filed an amended application for sale of the house and for the appointment of a receiver and requested a hearing on the matter. After the hearing, the probate court signed an order appointing a receiver to sell the house to Leah. Once again, Arthur appealed. This appeal was assigned appeal number 04-15-00787-CV.

Leah moved to consolidate the two appeals. We granted the motion and consolidated the appeals; however, our consolidation order required the parties to file separate briefs in each appeal.

#### **APPEAL OF THE JUDGMENT**

In appeal number 04-15-00717-CV, Arthur complains the probate court erred: (1) by denying him his constitutional right to a jury trial on material issues of fact; (2) by limiting the subject of the hearing to the requests for injunction and eviction and then rendering a final judgment on all requests for relief; (3) by finding that a letter written by his attorney was an enforceable contract when the offer was not accepted; (4) by rendering a judgment forcing him to sell the house to one of the five devisees for an amount below fair market value based on a nonexistent contract; (5) by rendering a final judgment ordering the sale of the house and the appointment of receiver without support in the pleadings or the evidence; and (6) by denying his requests for the eviction of Leah, Samuel and Todd and for related injunctive relief.

In response, Leah argues that, although she believes the evidence supports a judgment in her favor, she does not object to a remand for a jury trial on the question of whether she and Arthur reached an enforceable agreement regarding the sale of the house. Leah further argues this court need not consider Arthur's complaints about the appointment of a receiver in this appeal because the judgment the subject of appeal number 04-15-00717-CV does not appoint a receiver. Finally, Leah argues this court should affirm the portion of the probate court's judgment denying Arthur's

eviction request because Leah is a cotenant, who enjoys the same right to possess and use the property as the other cotenants.

### ***Right to Jury Trial***

In his first issue, Arthur argues the trial court's judgment ordering the sale of the house to Leah denied him his constitutional right to a jury trial in this case. Arthur further argues the trial court's April 17, 2015 judgment extinguishes his right to a jury trial on material issues of fact arising from his claims for tortious interference, fraud, sanctions, and attorney's fees.

The constitutions of the United States and Texas guarantee the right to trial by jury. *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996). Rule 216 of the Texas Rules of Civil Procedure requires parties asserting their right to a jury trial to make a jury request and pay a jury fee in a timely manner. *Rhyne*, 925 S.W.2d at 666; TEX. R. CIV. P. 216. We review the trial court's denial of a jury demand for an abuse of discretion. *Rhyne*, 925 S.W.2d at 666. A trial court abuses its discretion only when its decision is arbitrary, unreasonable, or without reference to guiding principles. *Id.*

Here, Leah, Samuel, and Todd filed a jury demand and paid the jury fee in a timely manner. The probate court subsequently set the case for a jury trial.<sup>1</sup> The trial court then held a hearing on Arthur's requests for eviction and related injunctive relief. During this hearing, the probate judge and counsel repeatedly stated that the only issues before the court were the eviction and the injunction, and that the other issues raised in the parties' pleadings would be decided later at a trial on the merits. Thus, the reporter's record confirms that the only matters before the probate court at the hearing were the eviction and the injunction.

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<sup>1</sup>The probate court's April 16, 2015 docket control order set the cause for trial on October 12, 2015, and ordered counsel to serve proposed jury charges no later than one week before trial.

In her brief, Leah recognizes that jury demands were on file and that Arthur was entitled to rely on those jury demands. *See id.* (recognizing that when a party requests a jury and pays the jury fee, an opposing party may rely on those actions). Leah further states that she does not object to a remand for a jury trial on the question of whether she and Arthur reached an enforceable agreement regarding the sale of the house to her. However, Arthur points out in his reply brief that Leah incorrectly limits the jury issues in this case to whether an enforceable agreement to sell the house existed. Arthur also cites to the various other claims contained in his pleadings. We agree with Arthur that, given the claims raised in his pleadings, the potential jury issues in this case are not limited to whether Leah and Arthur reached an enforceable agreement regarding the sale of the house.

We conclude the probate court abused its discretion by denying Arthur his constitutional right to a jury trial. *See id.* (holding the trial court's disregard of its own order setting the case for a jury trial was an abuse of discretion). When a case contains material fact issues, the wrongful denial of the right to a jury trial is harmful. *Id.* at 667. Because this case contains material fact issues, the error in denying the right to a jury trial was harmful. Arthur's first issue is sustained.

Because we sustain Arthur's first issue, we need not address his second, third, and fourth issues, which also challenge the probate court's judgment ordering the sale of the house to Leah. *See* TEX. R. APP. P. 47.1 (requiring opinions to be as brief as practicable while addressing every issue raised and necessary to disposition of the appeal).

### ***Appointment of Receiver***

In his fifth issue, Arthur argues the probate court abused its discretion by appointing a receiver to sell the house to Leah. However, the judgment that is the subject of this appeal did not appoint a receiver to sell the house. Arthur's fifth issue is overruled.

***Refusal to Evict***

In his sixth issue, Arthur argues the probate court erred by denying his requests to evict Leah, Samuel, and Todd from the house and for related injunctive relief. The crux of Arthur's argument is that the probate court was required to grant the eviction because the will authorizes him, as independent executor, to sell estate property.

Leah counters that none of the authority cited in Arthur's opening brief shows the probate court was required to grant the eviction and injunctive relief. Leah argues, as she argued below, that she is entitled to occupy the house because she is a devisee under Maria's will and a cotenant. *See Byrom v. Pendley*, 717 S.W.2d 602, 605 (Tex. 1986) (“[E]ach cotenant has a right to enter upon the common estate and a corollary right to possession.”); *Smith v. Hodges*, 294 S.W.3d 774, 777 (Tex. App.—Eastland 2009, no pet.) (providing that property devised under a duly probated will is deemed to vest title in the devisee at the moment of the testator's death). Leah also points out that Arthur has never attempted to formally partition the house.

The only authorities cited by Arthur in his opening brief are *In the Estate of Casida*, 13 S.W.3d 519, 523 (Tex. App.—Beaumont 2000, no pet.), and section 402.052 of the Texas Estates Code. In *Casida*, the issue was whether a decedent's surviving son, who was unmarried and lived with the decedent prior to his death, was entitled to have the decedent's property declared an exempt homestead of the decedent rather than a general asset of the estate. *Id.* at 522. The son also sought a declaration that he had the right to continue to occupy the homestead. *Id.* at 521. The appellate court concluded that the trial court erred in failing to recognize the homestead character of the house, but it did not err in concluding the son had no right to occupy the homestead. *Id.* at 523-24. *Casida* does not establish that the probate court erred in the present case. Unlike *Casida*, the present case does not involve a trial court's failure to recognize the homestead character of the house; instead, it involves a cotenant's right to occupy the house.

Section 402.052 provides that an independent executor has the power of sale for the same purposes as a personal representative in a supervised administration, except without the requirement of court approval. TEX. ESTATES CODE ANN. § 402.052 (West 2014). Arthur argues the probate court was required to evict Leah from the house based on section 402.052. We disagree. Section 402.052 addresses, in general terms, an independent executor's authority to sell estate property; it does not address an independent executor's authority to obtain the eviction of a cotenant.

In his reply brief, Arthur asserts he was not required to seek partition of the property because of the "unlimited powers" the will conferred on him regarding the sale of real property. In support of this argument, Arthur cites additional cases for the proposition that "[a] will may provide broad authority for the independent executor to sell property of the estate, and that power is valid as against a specific devisee of the property sold." *Hodges*, 294 S.W.3d at 778; *see Harper v. Swoveland*, 591 S.W.2d 629, 630-31 (Tex. Civ. App.—Dallas 1979, no writ). But neither of these cases involved the eviction of a cotenant and neither shows that the probate court was required to grant Arthur's eviction request.<sup>2</sup>

We conclude the probate court did not err by denying Arthur's requests for eviction and related injunctive relief. Arthur's sixth issue is overruled.

#### **APPEAL OF ORDER APPOINTING RECEIVER**

In appeal number 04-15-00787-CV, Arthur complains the probate court erred: (1) by appointing a receiver to sell the house because the judgment was suspended when he, as independent executor, filed a notice of appeal; (2) by appointing a receiver to sell the house in the

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<sup>2</sup>Arthur also presents new arguments supported by new authority in his reply brief. We decline to address these arguments. *See Lopez v. Montemayor*, 131 S.W.3d 54, 61 (Tex. App.—San Antonio 2003, pet. denied) ("A reply brief is not intended to allow an appellant to raise new issues.").

absence of proper notice; (3) by failing to comply with Rule 695a of the Texas Rules of Civil Procedure which requires the probate court to set an applicant bond and require the posting of an applicant bond before a receiver is appointed; and (4) by appointing a receiver for the purpose of selling the house when there was no contract or statutory basis for the sale.

***No Contract or Statutory Basis for the Sale***

In his fourth issue, Arthur argues the probate court erred by appointing a receiver for the purpose of selling the house when there was no contract or statutory basis for the sale. Among other things, Arthur argues the sole purpose of the appointment of a receiver was to sell the house on the terms and conditions provided for in the judgment rendered in appeal number 04-15-00717-CV.

We review an order appointing a receiver for an abuse of discretion. *Elliott v. Weatherman*, 396 S.W.3d 224, 228 (Tex. App.—Austin 2013, no pet.); *In re Estate of Trevino*, 195 S.W.3d 223, 231 (Tex. App.—San Antonio 2006, no pet.). Under this standard, we may not substitute our judgment on factual matters for that of the trial court unless it is clear from the record that the trial court could reach only one decision. *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992). A trial court has no discretion in determining what the law is or in applying the law to the facts. *Id.* at 840. A clear failure by a trial court to analyze or apply the law properly amounts to an abuse of discretion. *Id.* A trial court abuses its discretion when it rules arbitrarily, unreasonably, without regard to guiding legal principles, or without supporting evidence. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998); *Elliott*, 396 S.W.3d at 228.

The appointment of a receiver may be authorized by statute or by equity. *Estate of Benson*, No. 04-15-00087-CV, 2015 WL 5258702, at \*5 (Tex. App.—San Antonio 2015, pet. dismissed); *Elliott*, 396 S.W.3d at 228. Whether authorized by statute or by equity, the appointment of a receiver is considered a harsh, drastic, and extraordinary remedy that must be used cautiously.

*Benson*, 2015 WL 5258702, at \*5; *Elliott*, 396 S.W.3d at 228-29. The party seeking the appointment of a receiver bears the burden of proof to show the existence of circumstances justifying the appointment of a receiver. *Benson*, 2015 WL 5258702, at \*5; *Elliott*, 396 S.W.3d at 230.

Here, the probate court found that Arthur and Leah had entered into an agreement to sell the house to Leah. Both the probate court's judgment challenged in appeal number 04-15-00717-CV and its order appointing a receiver challenged in appeal number 04-15-00787-CV are premised on this finding. We have concluded that Arthur was denied his constitutional right to a jury trial and that the judgment, except to the extent it denies the eviction and related injunctive relief, must be reversed and this case remanded for a jury trial. Because the issue regarding the sale of the house to Leah must still be tried before a jury, circumstances do not exist justifying the appointment of a receiver to sell the house to Leah. We, therefore, conclude the trial court's order appointing a receiver to sell the house to Leah constitutes an abuse of discretion. Arthur's fourth issue is sustained.

Because we sustain Arthur's fourth issue, we need not address his first, second, and third issues, which also challenge the order appointing a receiver. *See* TEX. R. APP. P. 47.1 (requiring opinions to be as brief as practicable while addressing every issue raised and necessary to disposition of the appeal).

#### CONCLUSION

The portion of the probate court's judgment denying the eviction and the injunction is affirmed, but the remainder of the judgment is reversed. The probate court's order appointing a receiver is reversed. This case is remanded to the probate court for proceedings consistent with this opinion.

Karen Angelini, Justice