WHEN IS A DECLARATORY JUDGMENT PROPER?

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I. INTRODUCTION.

Disappointed or would-be beneficiaries and errant fiduciaries fuel the bulk of fiduciary litigation in the probate courts. Such litigation often involves a: 1) will contest; 2) will or trust construction question; 3) breach of fiduciary duty claim; and/or 4) petition for judicial discharge. In addition, litigants strenuously attempt to pair causes of action related to breaches of fiduciary duty and other tort claims with declaratory judgment actions.

Why is this the trend? There are really two primary benefits to pursuing a declaratory judgment action. First, attorney's fees which the fact finder finds just and reasonable and the judge determines equitable and just may be awarded to the parties irrespective of who prevails so long as the party seeking fees acted in good faith. Second, when a declaratory judgment arrives on the scene, it raises the stakes in the litigation and threatens to eat away at the possible spoils, occasionally prompting parties to consider settlement.

Since litigants often avoid directly paying the freight for the prosecution of declaratory judgment actions, such actions provide an attractive mechanism by which to bring a dispute to the attention of the court. Sometimes, like a wolf in huntsman's clothing, claims for affirmative relief, like seeking the removal of a fiduciary, or sounding in tort, like breach of fiduciary duty, are improperly cloaked as declaratory judgment actions. This paper will explore common ways in which declaratory judgments are correctly used and examples of how declaratory judgments are sometimes misused.

II. PURPOSE OF TEXAS UNIFORM DECLARATORY JUDGMENTS ACT.

A. Remedial Not Coercive Relief.

The stated purpose of the Texas Uniform Declaratory Judgments Act ("TUDJA" or the "Act") is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." TEX. CIV. PRAC. & REM. CODE § 37.002(b) (Vernon 1986). The statute expressly provides that it is "remedial" and "is to be liberally construed." *Id.* The basic purpose of the remedy is to provide parties with an early adjudication of rights before they have suffered irreparable damage. *Harkins v. Crews*, 907 S.W.2d 51, 56 (Tex. App.—San Antonio 1995, writ denied). The TUDJA is intended as a speedy and effective remedy for settling disputes before substantial damages are incurred and was enacted to provide a remedy that is simpler and less harsh than coercive relief, if it appears that a declaration might terminate the potential controversy. *Town of Annetta South v. Seadrift Development*, L.P., 446 S.W.3d 823 (Tex. Civ. App.—Fort Worth 2014, pet. denied).

Declaratory judgment actions in the United States are defined by a statutory framework first developed by the National Conference of Commissioners on Uniform State Laws in 1922 and designed to expand the role and authority of courts in settling disputes.

> The Declaratory Judgment aims at abolishing the rule which limits the work of the courts to a decision which enforces a claim or assesses damage or determines punishment. The Declaratory Judgment allows parties who are uncertain as to their rights and duties, to ask for a final ruling from the court as to the legal effect of an act before they have progressed with it to the point where any one has been injured.

Uniform Declaratory Judgments Act, National Conference of Commissioners on Uniform State Laws, San Francisco, August 2-8, 1922.

B. Subject Matter of Relief under the TUDJA.

A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder. TEX. CIV. PRAC. & REM. CODE § 37.004(a) (Vernon 2008). The statute goes on to state that a "contract may be construed either before or after there has been a breach." *Id.*

C. Courts Have Broad Discretion.

A trial court has discretion to enter declaratory judgment so long as it will serve a useful purpose or will terminate a controversy between the parties. *Bonham State Bank v. Beadle*, 907 S.W.2d 465 (Tex.1995). *See also United Interests, Inc. v. Brewington, Inc*., 729 S.W.2d 897, 905 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.). Though trial courts have discretion with regard to entering declaratory judgments, courts are obligated to declare the rights of parties when such judgment will terminate the uncertainty or controversy giving rise to the lawsuit. *Public Util. Comm'n v. City of Austin*, 728 S.W.2d 907, 910 (Tex. App.—Austin 1987, writ ref'd n.r.e.). However, the TUDJA does not invite every party to seek construction of an instrument, rather, to be entitled to relief under such Act, a party must show that litigation is imminent unless the contractual obligations of the party can be judicially clarified. *Paulsen v. Texas Equal Access to Justice Found.*, 23 S.W.3d 42 (Tex. App.—Austin 1999, no pet.).

III. ATTORNEY'S FEES IN DECLARATORY JUDGMENTS.

A. Flexibility of Court in Awarding Fees.

It has long been recognized that Texas law does not allow recovery of attorney's fees unless authorized by statute or contract. Texas follows the "American Rule" whereby parties are ordinarily required to bear their own attorney's fees absent explicit statutory authority. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310-11 (Tex. 2006)(*citing Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Res*., 532 U.S. 598, 602, 121 S. Ct. 1835, 149 L.Ed.2d 855 (2001)).

Framing a controversy as a declaratory judgment action appears advantageous because trial courts may award reasonable and necessary attorney's fees which are equitable and just, irrespective of whether the party seeking attorney's fees prevailed in prosecuting their claim. "The trial court may award attorney's fees to the prevailing party, may decline to award attorney's fees to either party, or may award attorney's fees to the non-prevailing party, regardless of which party sought declaratory judgment." *Brookshire Katy Drainage Dist. v. Lily Gardens, LLC*, 333 S.W.3d 301, 313 (Tex. App.—Houston [1st Dist.] 2010, pet filed).

B. Award of Attorney's Fees Discretionary.

§37.009 of the TEX. CIV. PRAC. & REM. CODE provides as follows: "In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." The grant or denial of attorney's fees in a declaratory judgment action lies within the discretion of the trial court; a trial court's judgment on attorney's fees will not be reversed absent a clear showing that the trial court abused its discretion. *Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985).

C. Limitations of Discretion.

Though the courts enjoy broad discretion with regard to the award of attorney's fees in declaratory judgment actions, as the standard of review is abuse of discretion, there are four limitations to the court's discretion. Attorney's fees must be: 1) reasonable; 2) necessary; 3) equitable; and 4) just. Whether fees are reasonable and necessary raises a question of fact. Whether fees are equitable and just raises a question of law. *See Bocquet v. Herring,* 972 S.W.2d 19, 20 (Tex. 1998) (*citing Trevino v. American Nat'l Ins. Co.*, 140 Tex. 500, 168 S.W.2d 656,660 (1943); *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 961 (Tex. 1996); and *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 799 (Tex. 1974)). Further, a court abuses its discretion if it rules arbitrarily, unreasonably, or without regard to guiding legal principals. *Id.* (*citing Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997)).

1. Reasonableness.

Rule 1.04 of the Texas Rules of Professional Conduct provides that attorney's fees must be reasonable. In evaluating whether or not attorney's fees are reasonable, the following factors are considered:

- the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- the fee customarily charged in the locality for similar legal services;
- the amount involved and the results obtained;
- the time limitations imposed by the client or by the circumstances;
- the nature and length of the professional relationship with the client;
- the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- whether the fee is fixed or contingent on results obtained and whether there exists uncertainty regarding collection of the fee before the legal services have been rendered.

See Texas Disciplinary R. Prof'l Conduct 1.04 reprinted in TEX. GOV'T. CODE ANN., tit. 2, subtit. G app. A.

Reasonable fees are determined by multiplying the number of hours worked by the attorney's hourly rate. *See City of Houston v. Levingston*, 221 S.W.3d 204 (Tex. App.—Houston [1st Dist.] 2006, no pet). Both components of the calculation, the hours worked and the hourly rate charged, must be reasonable. *Guity v. C.C.I. Enter. Co*., 54 S.W.3d 526, 528 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

2. Necessity.

It seems unusual for an attorney to seek payment for unnecessary services and it is rare for courts to find fees unnecessary. Though not a declaratory judgment action, the *Goodyear* case represents an instance where the court of appeals found fees to be unnecessary. In *Goodyear Dunlop Tires N. Am., Ltd. v. Gamez*, defendant Goodyear appealed a portion of the trial court's judgment awarding $400,000 in fees to six guardians ad litem.

This products liability case arose when a high occupancy van rolled over in Arizona with sixteen migrant farm workers on board. Six of the passengers died as a result. Six guardians ad litem were appointed to represent a total of twenty-two minor plaintiffs, with five guardians ad litem being appointed within one month of trial. Shortly before trial, the minor plaintiffs arrived at a settlement, but Goodyear objected to the requested fee of the guardians ad litem on the grounds that such fees were excessive. Over the objections of

Goodyear, the trial court entered a final judgment approving the settlement, dismissing all claims against Goodyear, and awarding total fees of almost $400,000 to the guardians ad litem. *See Goodyear Dunlop Tires N. Am., Ltd. v. Gamez*, 151 .S.W.3d 574 (Tex. App.—San Antonio 2004, no pet.).

Generally, guardians ad litem must represent the best interests of their client while also serving as an officer of the court. "The ad litem is required to participate in the case to the extent necessary to adequately protect the interests of his ward." *Id.* at 580 (*quoting Am. Gen. Fire & Cas. Co. v. Vandewater*, 907 S.W.2d 491, 493 (Tex. 1995)). What is more, the role of the guardian ad litem ends when the conflict giving rise to such appointment ends; and work performed outside the scope of his duties or after the conflict has been resolved will not be compensated. *See Brownsville-Valley Regional Medical Center v. Gamez*, 894 S.W.2d 753, 755 (Tex. 1995). However, the trial court shall award the guardian ad litem a reasonable fee to be taxed as costs of court and the appropriateness of such fee is determined by factors set out in Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct, including among other considerations, the time and labor required and the novelty or difficulty of the legal questions involved. Additionally, the appellate court will not set aside an award of guardian ad litem fees without a showing of abuse of discretion. *Goodyear* at 580 (*quoting Boncquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998)).

Goodyear complained that, among other things, the guardians ad litem charged for activities outside the scope of their appointment when they prepared for, attended, and reviewed depositions not relevant to the minors to whom the guardians ad litem owed a duty. In addition, the guardians ad litem reviewed liability-related pleadings, discovery motions, and deposition notices.

The appeals court in Goodyear ultimately found that the guardians ad litem acted beyond the scope of appointment when they attended or reviewed every deposition, motion, and pleading without regard to its relevance to the minor child to whom they owed a duty. As a consequence, the court determined that the bulk of the fees requested were for unnecessary services. *See id*. at 584.

3. Equitable and Just.

Though a fact finder finds fees to be reasonable and necessary, the judge must take the analysis one step further and find a party's fees to be equitable and just in order for a party to be awarded attorney's fees. "Unreasonable fees cannot be awarded, even if the court believe[s] them just, but the court may conclude that it is not equitable or just to award even reasonable and necessary fees." *Bocquet* at 21.

In determining whether fees are equitable and just, the judge must consider equitable principles and fairness. "Whether it is equitable and just to award less than the fees found by a jury is not a fact question because the determination is not susceptible to direct proof but is rather a matter of fairness in light of all the circumstances." *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999). Though some courts have reversed awards for attorney's fees as not equitable and just when reversing a declaratory judgment upon which such fees are based, whether the party seeking attorney's fees prevailed in his claim is only one of several factors to consider when analyzing whether fees are equitable and just. *See Carpenter v. Carpenter*, No. 02–10–00243–CV, 2011 WL 5118802, at 8 (Tex. App.—Fort Worth 2011, pet. denied).

The court is tasked to use its discretion to determine whether an award of fees is equitable and just, based upon all the circumstances of the case, not just evidence presented by the party seeking the award. For example, the court may consider the history of the case, the value at stake in the litigation, and the merits of a party's position.

D. Segregation of Fees.

Often parties couple declaratory judgment actions with other actions like breach of fiduciary duty, fraud, or breach of contract. The general rule when pursuing claims for which attorney's fees are recoverable with claims for which such fees are not recoverable is that fees must be segregated. *See Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 73 (Tex. 1997).

The exception to the general rule requiring segregation of fees arises when such claims develop out of the same transaction and are so interrelated that the proof or denial of the claims involves essentially the same facts. *See Gullo Motors, supra* at 312 (*citing Flint & Assoc. v. Intercontinental Pipe & Steel, Inc.* 739 S.W.2d 622, 624-25 (Tex. App.—Dallas 1987, writ denied)). The duty to segregate attorney's fees activates when an attorney's efforts on a case do not also further the cause of the declaratory judgment action. "When the legal services provided advance both a claim for which attorney's fees are recoverable and a claim for which they are not recoverable, the claims are so intertwined they need not be segregated." *Cooper v. Cochran*, 288 S.W.3d 522, 537 (Tex. App.—Dallas 2009, no pet.).

Courts of appeal have been flooded with claims that recoverable and unrecoverable fees are inextricably intertwined and such courts have applied the exception obviating the need to segregate fees differently, as some focus on the "underlying facts, others on the elements that must be proved, and others on some combination of the two. Some do not require testimony that claims are intertwined, while others do." *See Gullo Motors*, *supra* at 312.

Whether or not a claimant is required to segregate fees is a mixed question of law and fact, as the analysis should turn on "how hard something was to discover and prove, how strongly it supported particular inferences or conclusions, how much difference it might make to the verdict, and a host of other details that include judgment and credibility questions about who had to do what and what it was worth." *Id.* at 313.

Though other claims may often be inextricably intertwined with declaratory judgment actions, some claims, such as counterclaims unrelated to the declaratory judgment action, clearly call for segregation of fees. Attorney's fees required segregation when a declaratory judgment action and a counterclaim were involved and defending or advancing the counterclaim did nothing to advance the declaratory judgment action. *See A&L Eng'g & Consulting, Inc. v. Shiloh Apollo Plaza, Inc*., 315 S.W.3d 928, 931 (Tex. App.—Dallas 2010, no pet.).

> Practice Tip: Given the varied ways in which different courts of appeal analyze whether fees related to the pursuit of a declaratory judgment are intertwined with related causes of action, consider segregating fees to the extent possible early on in the litigation.

E. Impact on Settlement.

Fiduciary litigation involving declaratory judgment actions raises the stakes as each party pursues their theory of the case. As cases progress, attorney's fees mount, thereby increasing each party's risk of loss and eroding the value sought to be obtained with victory. Yet, as the risk of loss increases and the value sought to be obtained through pursing the legal action declines, the possibility for settlement also seems to decrease. The possibility of settlement wanes as attorney's fees escalate, perhaps because the value available for division at the mediation table is diminished. In that way, the dogged pursuit of each party's position acts like a Chinese finger trap—the more aggressive the conflict, the more difficult it becomes to cooperatively resolve the dispute. Consequently, when the value sought to be obtained through a declaratory judgment action is fixed, a party is well advised to make good faith attempts at settlement early.

IV. COMMON USES OF DECLARATORY JUDGMENTS.

A. Will Contests.

When competing wills exist, framing a will contest as a declaratory judgment action expands the number of pockets from which to recover attorney's fees. In most will contests, the estate of the decedent foots the bill for the contest provided the parties pursued their actions in good faith and with just cause. *See* TEX. EST. CODE §352.052 As attorney's fees escalate, so does the probability of a pyrrhic victory, where the victor must pay the attorney's fees of the vanquished, significantly depleting the assets of the estate.

Consequently, if a will proponent believes they hold a competitive advantage or have the upper hand, seeking a determination as to the validity of the proponent's will and contesting the opponent's will might properly be brought as a declaratory judgment action, thereby enabling such will proponent to possibly recover reasonable attorney's fees from his adversaries, individually, if equitable and just.

1. Statutory Foundation and Court Interpretations.

The TUDJA provides that, "[a] person interested under a deed, will, written contract, or other writings constituting a contract . . . may have determined any question of construction or validity arising under the instrument . . ." TEX. CIV. PRAC. & REM. CODE §37.004(a) (Vernon 1986). The plain language of the statute seems to allow invoking the Act in a will contest since the validity of the testamentary instrument is in question.

However, if heirs at law wish to contest a will submitted for probate, and have no competing will to offer up for probate, framing the contest as a declaratory judgement action may be viewed as improper, as the contest may be a mere denial of the will proponent's claim and fail to seek affirmative relief. *See* discussions *infra* at IV(A)(1)(a) and IV(D). Further clouding interpretations of the Act with respect to will contests, the opinions discussed below contain excerpts, which when taken alone, suggest that will contests should not be pursued as declaratory judgment actions.

a. *Lipsey v. Lipsey*.

A frequently sited case, *Lipsey v. Lipsey*, stands for the proposition that the validity of an entire will may not be questioned through a declaratory judgment proceeding. *See Lipsey v. Lipsey*, 660 S.W.2d 149 (Tex. App.—Waco 1983, no writ.). In this case, a widow filed an application to probate her deceased husband's will and the decedent's son filed a will contest arguing that the decedent lacked capacity or was unduly influenced at the time the will was executed. The widow withdrew her application to probate the will and the court non-suited the application without prejudice.

The son appealed the non-suit, arguing that the widow did not have the right to discontinue the entire proceeding, as the son sought affirmative relief in the form of a declaration that the will was invalid. The appeals court disagreed and found that the son's will contest did not constitute a counterclaim for affirmative relief and that the widow was entitled to have the entire proceeding dismissed. *See id.* at 150.

In analyzing the *Lipsey* case, the court of appeals in *Harkins v. Crews*, 907 S.W.2d 51 (Tex. App.—San

Antonio 1995, writ denied) rightly points out that the body of the opinion in *Lipsey* does not address the use of a declaratory judgment action with respect to the validity of a will being offered for probate. Rather, the only mention of the declaratory judgment is within a footnote to the opinion. What is more, once the widow withdrew her application to probate her deceased husband's will, such will was no longer before the court; and, like the *Howard Hughes* case discussed below, any opinion offered by a court with respect to a will not before such court is an advisory opinion.

> Practice Tip: A contest of an application to probate a will might not seek sufficient affirmative relief to survive a nonsuit of the original application to probate.

b. *Howard Hughes Med. Inst. v. Lummis*.

Another argument used to avoid staging a will contest as a declaratory judgment action involves a claim that the Estates Code provides a statutory framework for proving up a will and allowing the "declaratory judgment mechanism to determine the validity of [a] claim that a valid will exists would impermissibly subvert the statutory scheme and time limitations established by the Probate Code." *Howard Hughes Med. Inst. v. Lummis*, 596 S.W.2d 171, 173 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

In the *Howard Hughes* case, fewer than ten days after the death of Hughes on April 5, 1976, the aunt of Howard Hughes, Annette Lummis, was appointed the temporary co-administrator of the estate of Hughes by Judge Gregory, the judge of Harris County Probate Court 2. Almost a year later, Howard Hughes Medical Institute ("HHMI") entered an appearance in the Harris County probate action and reported that they had filed for probate an alleged lost will of Howard Hughes in a Nevada district court. Lummis responded with a motion seeking a declaratory judgment that the alleged will claimed by HHMI was not the valid last will and testament of Howard Hughes. The motion was granted by way of summary judgment.

The court of appeals reversed the trial court's finding that such lost will was invalid, explaining that "the declaratory judgment was an impermissible advisory opinion before joining of issue in a will contest, and before the expiration of the time allowed by law for the filing for probate of a valid last will and testament meeting all the requirements of the Probate Code." *Id.*

The opinion of the court of appeals in *Howard Hughes* has little applicability with respect to the run of the mill will contest for the following reasons. One, the purported lost will was not even before the probate court at the time the probate court deemed it invalid. Two, the declaration sought a determination before a will contest had been instituted; so the opinion of the trial court was necessarily advisory and impermissible. *See Harkins v. Crews*, 907 S.W.2d 51 (Tex. App.—San Antonio 1995, writ denied)(*supporting* the use of declaratory judgments in will contests as permissible and furthering the public policy of promoting judicial economy).

c. *Kausch v. First Wichita Nat'l Ba*nk.

Finally, some cite *Kausch v. First Wichita Nat'l Ba*nk, 470 F. 2d 1068 (5th Cir. 1972) and argue that the TUDJA enables a court to declare only particular provisions of a will to be invalid, but not the validity of the instrument itself. In *Kausch*, the Fifth Circuit Court of Appeals analyzed the plain language of the Uniform Declaratory Judgments Act and relevant parts are quoted below:

> The Uniform Declaratory Judgments Act states in pertinent part:
>
> Section 1. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed . . .
> Section 2. Any person interested under a . . . will . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder.

VERNON'S ANN. CIV. ST. TEX. ART. 2524-1 (1965).

In its analysis, the court focused on the phrase, "arising under the instrument," a phrase which has survived intact and remains in today's TUDJA. Such phrase indicated to the court that district courts may declare invalid only particular provisions of a will which has been admitted to probate, but district courts lack the power to "conduct an independent inquiry into the validity of the will as a testamentary instrument." *Kausch* at 1070. Once a will is properly admitted to probate by either a probate court or court properly sitting in probate, any attack on the validity of such testamentary instrument is considered an impermissible collateral attack. *See id.*

In short, the Fifth Circuit's opinion in *Kausch* protected the province of the probate court and other courts sitting in probate to determine the validity of a will, as the TUDJA enables district courts to invalidate only potions of a will, but not invalidate the instrument itself. So, in *Kausch*, the 5th Circuit made clear the limits of the district courts with respect to the power to invalidate wills, as such power remains the domain of probate courts and courts sitting in probate.

2. Contesting Will Via the TUDJA Generally Permitted.

The decisions rejecting the use of the TUDJA to invalidate a will in a will contest almost always lack relevance with respect to the typical contest involving competing wills. The cases which find the use of the TUDJA to be improper in a will contest can be distinguished for the following reasons: 1) as in *Lipsey* and *Hughes*, the declaratory judgment involved a will which was not before the court and any opinion regarding the will's validity would have been impermissible as an advisory opinion; 2) as in *Hughes*, no contest to the will had been initiated; and 3) as in *Kausch*, the case involved a district court's authority to invalidate a will properly admitted to probate.

Even if the proponent of a will fails to invoke the TUDJA in contesting another will, such proponent is entitled to seek reimbursement of attorney's fees expended in advocating for such will's probate irrespective of such proponent's success and so long as such proponent acted in good faith and with just cause. *See* TEX. EST. CODE §352.052. *See also Huff v. Huff*, 124 S.W.2d 327 (Tex. 1939).

However, if a contestant is not advocating for the probate of another will, but rather seeks to have a will declared invalid so that the decedent's estate passes by intestacy, in the event the contestant fails in such pursuit, the contestant is not entitled to attorney's fees. *Estate of Huff*, 15 S.W.3d 301 (Tex. App.—Texarkana 2000, no writ).

Query whether an award of attorney's fees out of the estate to heirs at law who unsuccessfully challenge the validity of a will pursuant to the TUDJA would stand. Would heirs at law even be allowed to contest an application to probate a will via the TUDJA without seeking any other affirmative relief? Maybe not.

> Practice Tip: If heirs at law have a strong case and wish to contest the probate of a will, avoid the argument that the contest is a mere denial of the will proponent's claim and consider seeking affirmative relief in the form of a declaratory judgment within the contest. For example, if a decedent lacked testamentary capacity yet signed a will and beneficiary designations at around the same time, include with the contest a request for declaratory relief with respect to the validity of the beneficiary designations. Adding grounds for affirmative relief in this way will shore up your decision to invoke the TUDJA with respect to the contest and perhaps enable your client to be reimbursed for reasonable and necessary attorney's fees.

B. Other Declarations Relating to a Trust or Estate.

The TUDJA offers a mechanism for persons interested in a trust or estate to have rights or legal relationships with respect to such trust or estate adjudicated.

> A person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, an infant, mentally incapacitated person, or insolvent may have a declaration of rights or legal relations in respect to the trust or estate:
>
> (1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;
> (2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity;
> (3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or
> (4) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.

TEX. CIV. PRAC. & REM. CODE §37.005 (Vernon 2000). Wills which fail to plan for every eventuality, ambiguous wills or trusts, and unclear relationships within the testator's family often raise many questions, the answers to which may be obtained via a declaratory judgment action.

1. Construction of Will or Trust.

a. Partial Intestacy.

Though a person dies testate, sometimes partial intestacy results when a testator fails to address an eventuality that comes to pass. The *Hunt* case involved a testatrix, Marguerite Hunt, who left her niece, Doris Delph, an interest in a trust and provided in her will as follows, "I give all of my property and estate . . . to Broadway National Bank . . . as Trustee for my niece, Doris Jean Delph . . . . If Doris Jean Delph is not living at the time of my death, I give my residuary estate to the Salvation Army . . ." Doris survived her aunt, Marguerite, but when Doris died, the Salvation Army laid claim to the remainder interest in Doris's trust. This troubled the intestate heirs of Marguerite who argued that since Doris actually survived Marguerite, the contingency through which the Salvation Army claimed

the trust's remainder interest did not come to pass. Caught in the middle, the trustee sought a declaration from the probate court as to the rightful owners of the remainder interest in Doris's trust.

The probate court erroneously believed the language of the Hunt will to be ambiguous and applied principles of construction to the instrument, ultimately finding that the Salvation Army's claim to the remainder interest prevailed. On appeal, the San Antonio Court of Appeals reversed the probate court's ruling, finding that the relevant provisions of the Hunt will were not ambiguous, just inadequate to prevent partial intestacy. *See In re Estate of Hunt*, 908 S.W.2d 483 (Tex. App.—San Antonio 1995, writ denied).

b. Construction of an Ambiguous Will or Trust.

One of the most common uses of the TUDJA in probate relates to construction of ambiguous wills or trusts. The court of appeals in *In re Estate of Melvin Lynn Wilson*, 7 S.W.3d 169 (Tex. App.—Eastland 1999, pet. denied) addressed a run of the mill will construction case involving: 1) an outdated will; 2) a blended family; and 3) a divorce.

Melvin Wilson had a daughter from his first marriage, Lisa Marie Wilson. He married JoAnn who had two children from a prior relationship, Robert Dean Parker, Jr. and Robin Rene Parker Tomita. Together, Melvin and JoAnn had no other children and they executed a joint, reciprocal will which left everything to each other and then to their children upon the surviving spouse's death. After eleven years of marriage, Melvin and JoAnn divorced and the agreement incident to divorce provided that they each waived the right to inherit any part of the estate of the other and that such agreement was binding upon their "respective legatees, devisees, heirs, executors, administrators, assigns, and successors in interest of the parties." *Wilson* at 170.

When Melvin Wilson died, his only child, Lisa submitted the joint will for probate and so did the children of JoAnn, being Robert and Robin. In addition to submitting the joint will for probate, Lisa sought from the court a declaratory judgment construing the will and the agreement incident to divorce. Lisa sought a declaratory judgment that she is Melvin's heir and that the will is void.

The trial court denied admitting the joint will to probate, declared that the will had been effectively revoked by the agreement incident to divorce, and determined that Melvin shall be deemed to have died intestate. In reversing the trial court's decision on such points, the court of appeals found that the agreement incident to divorce was not a writing executed with the formalities necessary to revoke a will pursuant to the provisions of TEX. PROB. CODE ANN. §63 (Vernon 1980). Consequently, the agreement incident to divorce did not revoke Melvin's will.

In construing the joint will's provisions in favor of Melvin's ex-spouse, JoAnn, and her children, which read, "[A]ll property, both real and personal owned by the one of us dying last shall at his or her death pass to our children, share and share alike, and if any of them be deceased at said time then said interest shall pass to their heirs," the court of appeals affirmed the trial court's finding that neither JoAnn nor her children take under such provision. They reasoned that because Melvin was not "the one dying last," as JoAnn clearly survived Melvin, the contingent bequest to the children failed. *See Wilson* at 171. As a result of such failed devise, Lisa took Melvin's estate via the laws of descent and distribution, as she was Melvin's sole heir at law.

Note that to arrive at this conclusion, the court of appeals had to find that such provision was not a "provision in favor of the testator's former spouse," otherwise, the court would have applied §69 of the Texas Probate Code and read such provision as if JoAnn had predeceased Melvin and such provision would have been given effect, so that Lisa, Robert, and Robin would have all taken under such provision.

Interestingly, §69 of the Texas Probate Code was amended in 2007 to instruct courts to read the entire will of a divorced decedent, as opposed to just the provisions in favor of the former spouse, as if the ex-spouse had predeceased the decedent. Additionally, such amendment expanded the class of persons considered to have predeceased the decedent for purposes of reading a divorced decedent's will to include the relatives of the ex-spouse who are not also relatives of the decedent. TEX. PROB. CODE ANN. §69 (West 2007). So, if the *Wilson* case were subject to review after the 2007 changes to §69, the devise to the children would not fail, as JoAnn would be deemed to have predeceased Melvin, but the provision would be read as if JoAnn's relatives also predeceased Melvin and Lisa would be the sole devisee.

c. Construction of Non-Probated Will.

A will need not be admitted to probate to be ripe for construction pursuant to the TUDJA. Consider the decision in *Estate of Rhoades*, 502 S.W.3d 406 (Tex. App.—Fort Worth 2016, pet. filed). In *Rhoades*, the decedent Glenda Rhoades, left a purported will that made the following bequests:

- the residential homestead passed to her father, Glen Rhoades;
- all of her personal property also passed to her father;
- "all of the rest of [her] estate," to her father, but if he predeceased her, to Elise Kinler, but if Kinler should predecease her, to Kinler's son, Michael Kinler; and

- "any other property that has not been disposed of under any other provision of this will" to her heirs at law. *Id.* at 416.

The decedent's father, Glen Rhoades, predeceased his daughter, the decedent. As a consequence, Elise Kinler filed a petition for declaratory relief seeking a determination that under the unambiguous terms of the purported will, Glenda Rhoades's entire estate passed to Elise Kinler per the residuary clause, as the specific devises to Glenda's father failed and the assets described in such specific devises fell into the residue of the estate. The heirs at law of Glenda also filed for declaratory relief claiming that the specific devises to the decedent's father of the homestead and personal property had lapsed and such property was properly distributed pursuant to the clause benefiting the heirs at law of the decedent.

The purported devisee under the will, Elise Kinler, along with the heirs at law of the decedent, sought withdrawal of the purported will from probate pursuant to an agreed motion which was granted. The trial court granted Elise Kinler's motion for summary judgment and the heirs at law appealed arguing, among other things, that the court lacked jurisdiction to construe the will since it had been withdrawn from probate.

Appellants asserted that, because at the time the trial court granted such motion for summary judgment the order admitting the will to probate had been set aside, any decision with regard to the will's meaning was not ripe for consideration, and the trial court's summary judgment was merely an advisory opinion. *Id.* at 410. In making such argument, the appellant relied on the opinion in *Cowan v. Cowan*, 254 S.W.2d 862 (Tex. Civ. App.—Amarillo 1952, no writ), a decision congruent with the decisions in *Lipsey* and *Hughes*, discussed *supra*, and which reasoned that in the case of a "will not having been presented to the court for probate, the probate court has no jurisdiction over it, even under the [TUDJA], and neither the probate court nor the district court, since a justiciable issue does not exist, is empowered to determine the validity of the instrument." *Cowan* at 865.

The appeals court in *Rhoades* questioned appellant's reliance on the opinion in *Cowan* since it involved a will, the drafter of which was still alive and, as a consequence, could not possibly be presented to the court for probate. In contrast to the *Cowan* case, the *Rhoades* case involved a deceased testator and the will was properly before the court, as it had been presented for probate and later withdrawn. *See Rhoades* at 413-414.

In further distinguishing the decisions in *Cowan* and *Rhoades*, the court of appeals pointed out the obvious, or that the *Cowan* case involved a will which *was not* "presented to the court for probate" and in the instant case, such will *was* presented for probate, then admitted to probate, and finally withdrawn from probate. With regard to the question of whether a will withdrawn from probate may properly be the subject of a declaratory judgment action, the court of appeals ruled that, "the temporary removal of the will from probate did not render the trial court's decision advisory or moot." *Rhoades* at 415.

d. Construction in Independent Administration.

The Texas Estates Code limits the authority of trial courts over matters incident to estates under independent administration. *See* TEXAS EST. CODE §402.001 (*providing* that in an independent administration, once the inventory has been filed by the independent executor and approved by the court, or after an affidavit in lieu of an inventory has been filed, and so 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."). Such limitation expressed in the Estates Code codified longstanding common law aimed at freeing independent executors from court supervision to minimize the cost and delay associated with the administration of estates. *See Burke v. Satterfield*, 525 S.W.2d 950, 955 (Tex. 1975).

However, the limitations on the jurisdiction of the probate court in independent administrations do not bar declaratory judgment actions brought by interested persons. *See Estate of Bean*, 120 S.W.3d 914 (Tex. App.—Texarkana 2003, writ denied). The *Bean* case involved a will and codicil which were admitted to probate and an independent executor who was appointed by the court. Three of the devisees under the will and codicil filed a declaratory judgment action seeking a declaration that a devise of real property failed for lack of specificity. Though the independent executor argued that the court lacked jurisdiction to make such a declaration, as the independent executor's inventory had been filed and approved by the court, the court of appeals concluded that, "an action for declaratory judgment construing a provision of a will is permissible, despite the limitation in the Probate Code of the types of actions a court can take with respect to an estate for which an independent executor may be appointed." *Bean* at 918.

2. Resolve Questions Arising During Administration.

No discussion about declaratory judgments by a probate judge in Houston would be complete without reviewing *In Re O'Quinn*, 355 S.W.3d 857 (Tex. App.—Houston [1st Dist] 2011, orig. proceeding). The *O'Quinn* case involves the use of a declaratory judgment action on the part of a putative spouse, who among other things, claims she was informally married to the decedent and she has a community property interest in some of the assets of the estate.

a. Facts in *O'Quinn*.

In July of 2008, John O'Quinn executed a will which named as the principal devisee of his estate a foundation he formed as a charitable organization. No bequests were made to Darla Lexington Quinn, John O'Quinn's supposed spouse; and the will recited that at the time, John O'Quinn was unmarried. In October of 2009, John O'Quinn died in a car accident and his will was admitted to probate in Harris County Probate Court No. 2 by Judge Wood. Five months later, the foundation sought a declaratory judgment declaring, among other things, that John O'Quinn was unmarried at the time of his death. Then, in July of 2010, the executor filed its own declaratory judgment seeking a declaration that John never married Darla and that John never made gifts of art or cars to Darla except for the items for which the executor had already paid the requisite gift taxes.

Darla fired back, suing the executor for the return of property belonging to her as her community property and seeking return of gifts made to her by John, claiming that she and John had been informally married since 2003. In addition, she asserted that the foundation lacked the ability to intervene, as only the executor had the right to seek a declaratory judgment regarding the alleged marriage and gifts made to Darla. Further, she argued that the foundation lacked standing to seek such declaratory judgment, as it did not have a justiciable interest in the outcome of the litigation. To support this contention, Darla referred to the opinion in *Wilder v. Mossler*, 583 S.W.2d 664 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) which found that lawsuits to establish decedent's liability on a claim are properly brought by the personal representative of the estate and heirs and devisees are not necessary or proper parties to such claims.

b. Did the Foundation Have Standing to Challenge Darla's Claim?

In analyzing the question of whether the foundation possessed standing to challenge Darla's claims as a putative spouse, the court of appeals reviewed the case law appearing to bolster Darla's claims and they also looked to the plain language of the TUDJA.

i. Analysis of Case Law.

The court of appeals quickly pointed out that the case in *Wilder* involved an heir who sought a jury trial to oppose the settlement of a claim against the estate but she sought no affirmative relief on her own behalf. Further, the court dismissed any belief on Darla's part that *Wilder* was analogous to the present case, as *Wilder* involved a routine suit to establish claims against an estate. In contrast to the situation presented in *Wilder*, the court deemed Darla's claims an attack on the will of John O'Quinn.

In its breakdown of Darla's arguments, the court of appeals looked to the guidance found in the opinion of the court in *Lieber v. Mercantile National Bank at Dallas*, 331 S.W.2d 463 (Tex. Civ. App.—Dallas 1960, writ ref'd n.r.e.) which more aptly matched the facts in *O'Quinn*. In the *Lieber* case, the decedent's widow sought a declaratory judgment to establish an ante-nuptial agreement to financially provide for the widow for the remainder of her life. The executor sought a declaration that no such agreement existed and he named the principal devisees of the estate, or the decedent's sisters, as necessary parties. The decedent's widow asked the trial court to dismiss the sisters as necessary parties and the court of appeals affirmed the trial court's denial of the widow's motion to dismiss for two reasons.

First, the court of appeals viewed the widow's claim that an ante-nuptial agreement existed as "really an attack on the will" of the decedent, because "the effect of sustaining her claim would be to defeat and prevent the full effect and operation of other parts of the will." *Id.* at 471-472. Second, resolution of the widow's claim necessarily impacted the sisters' interest in the estate. As a consequence, the sisters were proper parties to the suit. *Id.*

Likening the facts of *O'Quinn* to those in *Lieber*, the court of appeals in *O'Quinn* found that by claiming an informal marriage to John O'Quinn, Darla effectively attacked John's will, as his will states that he is unmarried and he leaves all of his personal effects and remaining property to the foundation. *See O'Quinn* at 864. What is more, since the foundation, as principal devisee, is vested with title to the assets of the estate subject to administration, Darla's contention that she was the common law spouse of the decedent, entitling her to a community interest in some of the assets of the decedent's estate, along with her claim that John made gifts to her and made promises to her, threatened to reduce the share of the estate to which the foundation was entitled.

The court of appeals thus concluded "that a 'real and substantial controversy involving a genuine conflict of tangible interests' exists between the foundation and Darla and that this dispute is not merely theoretical, hypothetical, or contingent." *O'Quinn* at 865 (*citing Di Portanova v. Monroe*, 229 S.W.3d 324 (Tex. App.—

Houston [1st Dist.] 2006, pet. denied)). The court ruled that the foundation has standing to pursue declaratory relief to determine questions relating to the administration of the estate, or more particularly, whether John and Darla were married, whether he made gifts to her, and whether he made financial promises to her.

ii. Analysis of §37.005 of the Civil Practice and Remedies Code.

After finding that a real and substantial controversy exists between Darla and the foundation, the court of appeals looked at Chapter 37 of the Civil Practice and Remedies Code to determine if the controversy could properly be framed as a declaratory judgment action. The language of §37.005 seems clear in that a person interested in an estate "may have a declaration of rights or legal relations in respect to the trust or estate: to ascertain any class of . . . heirs, next of kin, or others." TEX. CIV. PRAC. & REM. CODE §37.005. Under §37.005, devisees are "among the classes of person who are given the power to seek a declaration of rights with respect to the estate to, among other things, determine any question arising in the administration of the estate." *O'Quinn* at 865 (*citing In re Estate of Bean*, 120 S.W.3d 914, 918 (Tex. App.—Texarkana 2003, pet. denied), a will construction case where the devisees were ruled to have the authority to seek a declaration concerning the construction of a will)).

c. Ruling in *O'Quinn*.

Despite the plain language of §37.005 which clearly enables those interested in an estate to seek a declaration regarding rights or legal relations in respect to a trust or estate, Darla points to several cases for the proposition that, with few exceptions, the personal representative has the exclusive right to sue and defend on behalf of the estate. *See O'Quinn* at 865 (*citing, inter alia, Chandler v. Welborn*, 156 Tex. 312, 294 S.W.2d 801, 806 (1956) and *Burns v. Burns*, 2 S.W.3d 339, 342 (Tex. App.—San Antonio 1999, no pet.)). Darla's reliance on this line of decisions seems misplaced, as such cases involved situations where the heirs and devisees of an estate were suing to recover or collect property of the estate.

The heirs and devisees in *Chandler* and *Burns* were attempting to pursue claims on behalf of an estate to enlarge the value of the estate, while Darla's claims sought to diminish estate assets by: 1) carving out supposed community property; 2) delivering property purportedly gifted to Darla but in the possession of the estate; and 3) funding supposed promises for future maintenance. Ultimately, the court of appeals ruled that the foundation, as the devisee under John O'Quinn's will, may seek declaratory relief to determine "any question arising in the administration" of the O'Quinn estate, including whether John was married to Darla and whether he made financial promises and gifts to Darla. *See O'Quinn* at 866.

3. Judicial Discharge.

In 1999, the Texas Legislature added provisions to the Probate Code, which invoke the use of the TUDJA, to enable an independent executor or administrator to seek a judicial discharge from the court. Once an estate has been fully administered, taxes have been paid, and the distributees of the estate are in receipt of estate assets (the personal representative is allowed a reasonable holdback for future costs of administration), a personal representative serving independently may seek a judicial discharge via a declaratory judgment and pay from estate assets legal fees, expenses, and other costs incurred in relation to such declaratory judgment.

> After an estate has been administered and if there is no further need for an independent administration of the estate, the independent executor of the estate may file an action for declaratory judgment under Chapter 37, Civil Practice and Remedies Code, seeking to discharge the independent executor from any liability involving matters relating to the past administration of the estate that have been fully and fairly disclosed.

TEX. ESTATES CODE §405.003(a).

Often, before granting judicial discharge, the courts require that personal representatives serving independently file an accounting of the estate so as to insure full disclosure of matters relating to the administration of the estate, pursuant to §405.003(c) of the Texas Estates Code. Even if the court does not require the filing of an accounting, it is best practice, so as to insure that the administration of the estate has been fully and fairly disclosed. This, of course, requires that a complete initial inventory of the estate be made available to the court as a starting place for the court's review. The court may audit, settle, and approve the final account. TEX. ESTATES CODE §405.003(c).

Surprisingly, few petitions for judicial discharge are filed by personal representatives in Harris County Probate Court 4. Perhaps personal representatives feel comfortable closing the door on an administration without a judicial discharge for the following reasons: 1) they obtain receipts and releases from all devisees or heirs; 2) all claims have been properly settled; 3) they have strong relationships with those taking under the will or pursuant to an heirship; or 4) they find it advisable to leave the administration open for the future. Perhaps this procedure is seldom utilized because some courts are not comfortable with, or have a policy against, discharging personal representatives in estates the

administration of which has not been supervised by the court.

The personal representative would do well to plan with an eye toward discharge, beginning from the date of qualification, to ensure that adequate records are kept to make full disclosure and provide all information the court considers necessary to adjudicate the request for a discharge of liability.

When a person who is not a devisee or heir of the estate serves as an independent personal representative, special consideration should be given to filing for judicial discharge. Consider the *Estate of Whittington*, 409 S.W.3d 666 (Tex. App.—Eastland 2013, no writ). In 2005, James Bailey Whittington executed a will and he died on October 3, 2008. The will named Lonnie Jones to serve as Independent Executor and the sole devisee of the will was Nora Ann Carpenter. The will was admitted to probate and Lonnie Jones qualified on November 7, 2008. In March of 2010, having completed the administration of the estate, Lonnie Jones filed a petition for judicial discharge. In May of 2010, the court granted the petition and discharged Lonnie Jones from any liability involving matters relating to the past administration of the estate that had been fully and fairly disclosed.

After the administration was completed, along comes Paul Whittington, the only child of James Bailey Whittington. On November 8, 2010, Paul files a contest to the 2005 will of his father, James Bailey Whittington. November 7th was a Sunday so Paul filed his contest in the nick of time and avoided the two year statute of limitations applicable to the contest of wills.

In his contest, Paul reported that his father lacked testamentary capacity and that Nora Ann Carpenter, the sole devisee under the will and his father's caregiver, procured the will through undue influence. The contest named Lonnie Jones, in his capacity as the Independent Executor, as a defendant.

Lonnie Jones then filed a motion to dismiss asserting that he, as Independent Executor, was not a proper party to the contest, as the administration was closed and he had received a judicial discharge. Paul responded claiming that a judicial discharge only absolves the executor of liability to the beneficiaries named in the challenged will.

In analyzing Paul's interpretation of the language of what is now §405.003 of the Estates Code, the court of appeals found that Paul's "interpretation would lead to an absurd result, especially in this case. [Lonnie Jones] has distributed the estate to the beneficiary, Carpenter, yet he would be forced as a fiduciary to defend the will and to pay an attorney from his own pocket. As noted in the bill analysis, [Texas Probate Code] Sections 149D–G were designed to provide a procedure for independent executors to distribute the estate assets to beneficiaries and not have to 'defend any subsequent lawsuits with executor's own money.' The analysis noted that, if the beneficiaries had spent all of the estate's funds, the executor would have no remedy." *Estate of Whittington* at 670-671.

> Practice Tip: Even in situations where receipts and releases can easily be obtained, certain cases might justify the filing of a petition for judicial discharge so that any disputes arising in the future with respect to the validity of the will proceed without the participation of the personal representative.

C. Construction and Validity of Contracts.

The plain language of the TUDJA creates the statutory framework necessary for interested persons seeking a declaration regarding the construction or validity of contracts. In the context of fiduciary litigation, questions commonly arise regarding the validity or construction of contracts related to life insurance, annuities, brokerage accounts, retirement benefits, bank accounts, and settlement agreements. Interestingly, like David Allan Coe, the Austin Court of Appeals may have written the perfect country and western opinion, as it answers questions related to each of the above-described contracts.

The *Spiegel* case involved a husband and wife whose final decree of divorce would have been entered but for the wife's death one day before the date of the final hearing. Robert and Martha married in 1970 and in 2000, Robert filed for divorce. In March of 2002, they attended a mediation which resulted in a mediated settlement agreement. Under the agreement, Martha took the Dripping Springs home and Robert took the home in New Braunfels. Thereafter, Robert claimed the New Braunfels home as his homestead for tax purposes. Sadly, Martha never changed her will and the will she signed in 1999 left "our homestead" to Robert. *See Spiegel v. KLRU Endowment Fund*, 228 S.W.3d 237 (Tex. App.—Austin 2007, pet. denied).

The executor of Martha's estate brought a declaratory judgment action to: 1) enforce the mediated settlement agreement; 2) determine that the specific devise of "our homestead" to Robert failed, as such devise adeemed; and 3) clarify whether the settlement agreement revoked beneficiary designations in favor of Robert which were signed before such agreement was entered into. *See id.* In opposition to the executor's position, Robert argued that the mediated settlement agreement is unenforceable, as it was never incorporated into a final decree of divorce. In addition, with respect to the specific devise to him of "our homestead" in Martha's will, Robert claimed that such reference was made to the Dripping Springs home where they lived together in 1999. Finally, on the issue of whether the settlement agreement revoked Martha's beneficiary designations, Robert urged the court to find

that the settlement agreement only applies to ownership interests, not beneficial interests. *See id.*

On the first point, the court of appeals reviewed the language of the settlement agreement, the plain language of the statute which governs mediated settlements in the context of pending divorce, or Section 6.602 of the Texas Family Code, and the public policy supporting such statute. In the end, the court of appeals affirmed the trial court's decision that the mediated settlement agreement was immediately binding upon the parties when it was signed, irrespective of whether such agreement was incorporated into a final decree of divorce. *See id.* at 242.

With regard to point two, in analyzing whether the specific devise in Martha's will of "our homestead" to Robert adeemed, the court of appeals focused on the intent of the testator which must be ascertained from the language within the four corners of the will. *See id.* at 243 (*citing San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 639 (Tex. 2000)). Though Robert argued that the doctrine of ademption cannot apply to the specific devise, as the home in Dripping Springs and located on Plum Creek was still owned by Martha at her death and still physically exists, the appeals court drew their attention to the careful language used by Martha in her will. The court of appeals conceded that the doctrine of ademption would not apply if Martha had described the devise to Robert in terms of the "Plum Creek residence."

However, Martha described the asset subject to the devise as "our homestead." Since Robert took up residence in New Braunfels and claimed such residence as his homestead, no property bearing the description "our homestead" existed at Martha's death. Consequently, the appeals court affirmed the trial court's ruling that the devise to Robert of "our homestead" adeemed.

Finally, in considering point three relating to whether Martha's beneficiary designations in favor of Robert on non-probate assets including, among other things a 401(k) plan, were revoked by the mediated settlement agreement, the appeals court noted the divided authority with respect to what is required to revoke a beneficiary designation. "The Dallas court has held that the allocation of an insurance policy to one spouse as her separate property is sufficient to revoke a beneficiary designation for that policy in favor of the other spouse." *Spiegel* at 244 (*citing McDonald v. McDonald*, 632 S.W.2d 636,639 (Tex. App.—Dallas 1982, writ ref'd n.r.e.)). Other courts have held that language specifically referring to beneficial interests is required. *Spiegel* at 245 (*citing Pitts v. Ashcraft*, 586 S.W.2d 685,696 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.)). The appeals court sided with the approach used by the Texas Court of Appeals in Dallas, as such approach "incorporates the presumption that people who are divorcing intend to revoke beneficiary designations in favor of their soon-to-be ex-spouses in the absence of explicit language to the contrary."

D. Counterclaim Seeking Affirmative Relief.

Declaratory Judgments filed as counterclaims are proper only when the counterclaim has greater ramifications beyond the original suit. For example, if the counterclaim includes a claim for affirmative relief, use of the TUDJA is appropriate. *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 841 (Tex. 1990). In *BHP Petroleum*, a natural gas producer, BHP Petroleum, sued for breach of the "take or pay" obligations under its contract with a purchaser. The purchaser counterclaimed seeking a declaratory judgment and stated in its pleading that, "an actual controversy exists between [purchaser] and BHP regarding: (a) the interpretation of certain provisions of the contract; (b) the respective rights and obligations resulting therefrom; and (c) the claims BHP has asserted or may assert against [purchaser] related to the contract." *Id.* at 840.

BHP filed a motion for nonsuit and the judge granted the nonsuit but realigned the parties with the purchaser as plaintiff and BHP as defendant. BHP argued that the purchaser's counterclaim failed to plead a claim for affirmative relief and that the counterclaim was nothing more than a response to its original petition. The purchaser responded asserting that its counterclaim is a "pending claim for affirmative relief" which may not be dismissed and the appeals court agreed.

In its analysis, the court of appeals focused on the scope of the purchaser's claims for relief, stating "[to] qualify as a claim for affirmative relief, a defensive pleading must allege that the defendant has a cause of action, independent of the plaintiff's claim, on which he could recover benefits, compensation, or relief, even though the plaintiff may abandon his cause of action or fail to establish it." *Id.* at 841 (*quoting General Land Office v. Oxy U.S.A., Inc*., 789 S.W.2d 569, 570 (Tex. 1990)). The court went on to reason that in certain instances a defensive declaratory judgment may present issues beyond those raised by the plaintiff. *Id.*

In the instant case, the purchaser went beyond seeking a declaratory judgment regarding the "take or pay" obligation under the contract (as set out in BHP's original petition). The purchaser sought the court's declaration that "events have occurred which constitute *force majeure*, as the parties agreed to define the term, or other causes not reasonably within the control of [purchaser] and its customers, which have affected and will continue for the foreseeable future to affect [purchaser's] takes of natural gas under the contract." *Id.* The court determined that the purchaser's declaratory judgment was "more than a mere denial of BHP's causes of action," as the purchaser's declaratory judgment action pursued claims which had "greater ramifications" than BHP's original suit. *Id.* at 842.

E. Rival Claims to Same Property.

Though matters akin to trespass to try title suits may be brought as declaratory judgment actions, the courts must analyze the issues in the same manner as a trespass to try title suit. *See Coker v. Geisendorff*, 370 S.W.3d 8, 12-13 (Tex. App.—Texarkana 2012, no pet.). In 2007, the Texas Legislature added an exception to the rule that a trespass to try title claim is the exclusive method for adjudicating disputed claims to the title of real property. *Id.* at 14. "Notwithstanding [the trespass to try title statute], a person [interested under a deed, will, written contract, or other writings constituting a contract] may obtain a determination under this chapter when the sole issue concerning title to real property is the determination of the proper boundary line." TEX. CIV. PRAC. & REM. CODE §37.004(c). Historically, suits concerning rival claims to the same property have not been treated as a boundary dispute unless that dispute was between adjoining landowners and the question could be resolved by defining a boundary line. *See Corker* at 12.

By way of contrast, if a dispute over land involves claims to property wholly inside the boundaries of a rival's parcel, such dispute must be resolved using traditional claims of trespass to try title. *Id.* Further, when the substantive rights of the parties over ownership of real property is at stake, the dispute is governed by trespass to try title. *See Kennesaw Life & Accident Inc. Co.,* 694 S.W.2d 115, 117-18 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

F. Claims Relating to Easement.

The court in *Roberson v. City of Austin*, 157 S.W.3d 130 (Tex. App.—Austin 2005, pet. denied) instructs that actions involving easements are properly brought as declaratory judgment actions. In *Roberson*, Roberson, a landowner, sued the City of Austin and Jester Development Corporation ("JDC") after Roberson noticed problems with his deck supports and cracks in concrete flatwork caused by the settling of a sewer line not revealed to him when he originally purchased his home in 1983. In 1979, JDC began developing in what would become Roberson's subdivision. The sewer easement was not included in the original plat approved by the City of Austin, but the city was later granted an easement for the placement of sewer lines. Sadly, the city never recorded the easement in the county records. When Roberson purchased his home in the subdivision from the builder, the purchase documents failed to reveal the presence of the sewer easement.

Roberson filed suit against the city in 1998 under the TUDJA seeking, among other things, a declaration that the easement was invalid and an injunction preventing the city from holding up the removal of the sewer line. After a jury trial, the jury determined that Roberson was entitled to $31,000 in damages and reasonable attorney's fees totaling $111,227. The court awarded only the damages and reasoned that the claim should have been brought as a trespass to try title action. As a consequence, Roberson was not entitled to attorney's fees.

On appeal, Roberson argued that the trial court abused its discretion by holding that the TUDJA was an inappropriate vehicle by which to bring his claim and by failing to award attorney's fees. The appeals court sided with Roberson holding that Roberson could properly bring his claims regarding the easement under the TUDJA and to "do otherwise would render the TUDJA's language concerning its use in determining the validity of deeds meaningless." *Id.* at 137. In arriving at this conclusion, the court of appeals made three related arguments.

First, the court pointed to the Texas Supreme Court's decision in *Martin v. Amerman*, 133 S.W.3d 262 (Tex. 2004) wherein the court explained that trespass to try title suits are typically used to clear problems in chains of title or to recover possession of land unlawfully withheld and for boundary disputes which inherently involve title to and possession of property. In contrast, easements are nonpossessory in nature and simply authorize the holder of such easement use of the property for a particular purpose.

Second, though some courts have allowed easement disputes to advance as trespass to try title actions, the remedy of trespass to try title has not generally been applied to nonpossessory property interests such as easements. *See Roberson* at 136 (*citing T-Vestco Litt-Vada v. Lu-Cal One Oil Co*., 651 S.W.2d 284 (Tex. App.—Austin 1983, writ ref'd n.r.e.) which held that a royalty interest is a nonpossessory interest insufficient to support possessory remedies such as trespass to try title).

Third, many other easement cases have been decided as claims pursuant to the TUDJA. *See id.* (*citing Holmstrom v. Lee*, 26 S.W.3d 526 (Tex. App.—Austin 2000, no pet.) which affirmed a trial court's declaratory judgment that plaintiffs had easement appurtenant to use water and septic lines). Further, the appeals court added, the TUDJA is to be liberally construed and the plain language of the statute makes it clear that it is to be used to determine the validity of deeds. *See id.*

G. Determination Regarding Insurer's obligations to Insured.

Insurers who have denied the claim of an insured may properly bring a declaratory judgment action to settle whether it owes coverage to an insured, as the insured might likely sue as a result of the denial of such insured's claim. *Transportation Ins. Co. v. WH Cleaners, Inc.*, 372 S.W.3d 223, 230-232 (Tex. App.—Dallas 2012, no pet.).

V. WHEN USE OF THE TUDJA IS INAPPROPRIATE.

A. Case Does Not Involve Actual Controversy.

Declaratory judgment actions are appropriate only if a justiciable controversy exists as to rights and status of parties and the controversy will be resolved by the declaration sought. *Bonham State Bank v. Beadle*, 907 S.W.2d 465 (Tex.1995). A declaratory judgment is not appropriate where a plaintiff has a mature and enforceable right that results in a judgment or decree such that the declaration would add nothing to the judgment. *Tucker v. Graham*, 878 S.W.2d 681, 683 (Tex. App.—Eastland 1994, no writ). However, a cause of action does not need to be fully ripe to constitute a justiciable controversy. Rather, the action must be ripe enough for judicial review and consideration must be given as to the hardship suffered by a party in the event a court declines to rule on the matter. *Juliff Gardens v. TCEQ*, 131 S.W.3d 271 (Tex. App.—Austin 2004, no pet.). Further, a request for declaratory judgment is moot if the claim presents no live controversy. *See Tex. A & M Univ.-Kingsville v. Yarbrough*, 347 S.W.3d 289, 290 (Tex. 2011).

Though the Supreme Court of Texas ruled that a request for declaratory judgment is moot when the claim fails to present a live controversy, the court of appeals tested the limits of what represents a live controversy in their analysis of *In re Estate of Gibbons*, 451 S.W.3d 115 (Tex. App.—Houston [14th Dist.], pet. denied). In *Gibbons*, before the decedent's death, she signed three wills and at least two sets of beneficiary designations on life insurance policies. Around the time the decedent entered a hospital for a surgical procedure to remove a brain tumor, the decedent called a friend who was also an attorney and the decedent executed estate planning documents prepared by such attorney naming the attorney as a beneficiary on two life insurance policies and as independent executor under her will. Shortly before her death, the decedent retained another attorney, signed a new will, and changed the beneficiary designations on the life insurance policies, naming her estate as the beneficiary.

After the decedent's death, decedent's former attorney and friend filed the will signed around the time of the decedent's surgery for probate. The decedent's surviving spouse then sought the admission of the most recent will to probate along with a declaration from the court that the most recent beneficiary designations on the life insurance policies were valid and that the decedent's estate was the beneficiary of such policies, as opposed to the decedent's former attorney and friend. The surviving spouse also sought reasonable and necessary attorney's fees pursuant to the TUDJA. A will contest ensued. Ultimately, the decedent's friend and former attorney non-suited all claims. However, the case proceeded to trial and the surviving spouse obtained a judgment from the trial court which, among other things, granted the declaratory relief related to the beneficiary designations on the life insurance policies in favor of the surviving spouse and awarded attorney's fees to be paid by the decedent's friend and former attorney.

On appeal, the decedent's friend and former attorney argued that the trial court should not have granted declaratory relief or awarded attorney's fees to be paid by her to the surviving spouse since she non-suited her entire cause of action. As a consequence, the friend and former attorney of the decedent continued, no live controversy existed regarding who was entitled to the life insurance proceeds. The court of appeals disagreed stating that the contestant's nonsuit of any claims asserted by her does not prejudice the surviving spouse's right to pursue his pending claims for declaratory relief and award of attorney's fees against such contestant. *See Gibbons* at 120 (*citing City of Dallas v. Albert*, 354 S.W.3d 368 (Tex. 2011) and TEX. R. CIV. P. 162).

> Practice Tip: Before nonsuiting claims where a declaratory judgment action is involved, try to obtain an agreement from the opposing party that they will not seek their attorney's fees against your client.

B. Case to Alter Rights or Remedies.

A declaratory judgment cannot be used as an affirmative ground of recovery to revise or alter rights or legal remedies. *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 164 (Tex. 1993)(*citing Emmco Insurance company v. Burrows*, 419 S.W.2d 665, 670 (Tex. Civ. App.—Tyler 1967, no writ)). Nor can it be used as a mechanism to confer additional substantive rights upon parties. *Lane v. Baxter Healthcare Corp.*, 905 S.W.2d 39, 41 (Tex. App.—Houston [1st Dist.] 1995, no writ).

In *Emmco*, the plaintiff purchased a truck financed through Associates Discount Corporation. Plaintiff insured the truck with Emmco. A couple years after purchasing the truck, the truck was involved in an accident, resulting in damages equal to $12,300. Plaintiff filed suit against the insurance company, Emmco, to recuperate his damages; and he also filed a declaratory judgment action against the finance company contending that the monthly installment payments due on the note should be suspended until the matter with Emmco is sorted out. Plaintiff asserted that Emmco and the finance company were acting "in consort" in handling his claim. The trial court awarded the declaratory relief sought by the plaintiff and the defendants appealed.

On appeal, the defendants argued that declaratory relief was not available to rewrite a contract between the parties and the appeals court agreed, recognizing that declaratory relief is available to declare existing rights, status, or other legal relations. As applied to contracts,

in a declaratory judgment action, the court may only interpret a contract, not modify its terms.

What is more, declaratory relief is not appropriate when the only issue is one of fact. Here, the contract was not in dispute, as both the plaintiff and the finance company recognized payments were due pursuant to the terms of the contract. At issue was whether the finance company acted in consort with Emmco, so as to warrant the suspension of monthly payments due by the plaintiff. *See Emmco* at 671 (*citing Lincoln v. Harvey*, 191 S.W.2d 764 (Tex. Civ. App.—Dallas 1945, n.w.h.)).

C. Case to Determine Tort Liability.

Though seeking judicial discharge of an independent executor represents an appropriate use of a declaratory judgment action pursuant to TEX. EST. CODE §405.003(a), no perfectly parallel statute exists by which trustees may seek a judicial discharge. However, §115.001(a)(4) of the Texas Trust Code enables the court to "determine the powers, responsibilities, duties, and *liability* of a trustee." In addition, §114.064 of the Texas Trust Code enables the court to make an award of costs and reasonable and necessary attorney's fees as may seem equitable and just.

Though independent executors and trustees may seek a judicial discharge pursuant to the Texas Estates Code and Texas Trust Code, a likely defendant cannot use the TUDJA to determine potential tort liability. *Averitt v. PriceWaterhouseCoopers*, 89 S.W.3d 330 (Tex. App.—Fort Worth 2002, no pet.).

In the *Averitt* case, the plaintiff, Ms. Averitt, had worked with the defendant, PriceWaterhouseCoopers ("PWC"), for many years, as PWC provided tax consultations, offered representation before the IRS, and prepared federal income tax returns on behalf of Ms. Averitt. PWC advised Ms. Averitt to create a trust to enable future generations of the Averitt family to enjoy the benefits associated with maximizing the use of the generation-skipping transfer tax exemption. Such planning required the filing of a 709 gift tax return upon funding of the trust, a task for which PWC was charged yet did not complete. Ms. Averitt filed suit against PWC in Midland federal district court claiming malpractice, breach of contract, breach of fiduciary duty, and fraud; but, shortly thereafter she nonsuited her claims, as she had not named the proper party. In April of 1999, Ms. Averitt filed suit again. This time, she named the proper party.

Two days before the filing of Ms. Averitt's second claim, PWC filed a declaratory judgment action against her in Tarrant County seeking a judicial determination as to PWC's liability on Ms. Averitt's malpractice and negligent misrepresentation claims, citing §37.004(a) which provides that "an interested person under a deed, will, written contract, or other writings constituting a contract may have determined any question of construction or validity arising under the instrument and obtain a declaration of the rights, status, or other legal relations thereunder." TEX. CIV. PRAC. & REM CODE ANN. §37.004(a) (Vernon 1997).

In its analysis of whether PWC's declaratory judgment action was proper, the court of appeals considered the conclusions reached in *Abor v. Black, infra,* that: 1) a potential defendant may not use a declaratory judgment action to determine potential tort liability; and 2) the [TUDJA] was not intended to deprive a potential tort plaintiff of the right to decide whether, when, and where to sue. *See Abor v. Black*, 695 S.W.2d 564, 566-67 (Tex. 1985).

Though PWC asserts that the declaratory judgment action was proper due to its contractual relationship with Ms. Averitt, the court of appeals recognized that whether a contract exists between a professional and his client matters not when the cause of action sounds in tort rather than breach of contract. *Id.* So, the court in *Abor* concluded that the trial court should have dismissed PWC's declaratory judgment action, as declaratory judgment actions cannot be used to determine potential tort liability thereby depriving a plaintiff of its traditional right to choose the time and place of suit. *Id.*

Consider whether an independent executor or trustee, facing down disgruntled beneficiaries who likely have an impending cause of action, could file for judicial discharge thereby preemptively choosing the time of suit (and place in the case of the trustee) of suit.

D. Choice of Law Provisions Prevent Use of TUDJA.

Valid choice of law provisions within a contract govern the contract's interpretation and award of attorney's fees. *Exxon Corp. v. Burglin*, 4 F.3d 1294 (5th Cir. 1993). In *Exxon*, Exxon served as the general partner of a partnership that owned interests in oil and gas leases. Exxon offered to purchase the interests of the limited partners and as part of such offer, the limited partners were given the option to "select a mutually acceptable consultant to make an independent assessment of Exxon's offer" and the cost associated with such consultant would be shared among the limited partners and Exxon. The limited partners agreed to sell their interests to Exxon and declined to exercise the option to obtain an independent assessment of Exxon's offer.

When the oil and gas interests proved much more valuable than the limited partners had anticipated, they sued Exxon in Alaska alleging: misrepresentation, fraud, and breach of fiduciary duty. In response, Exxon brought a declaratory judgment action in Texas to determine its duties under the partnership agreement. The case was removed to federal court. Ultimately, the district court granted Exxon's motion for summary judgment holding that Exxon had no duty to disclose information it considered confidential. The court also awarded attorney's fees to Exxon.

In reviewing the district court's decision in *Exxon*, the Fifth Circuit Court of Appeals affirmed the finding that Exxon had no duty to disclose information it considered confidential; but, the court vacated the award of attorney's fees. The court found that the choice of law agreed upon in the partnership should control not only the interpretation of the contract but also the award of attorney's fees and bringing a suit under the TUDJA did not change such result, as the TUDJA "is merely a procedural device and does not confer any substantive benefits." *Id.* at 1301 (*citing Housing Auth. v. Valdez*, 841 S.W.2d 860, 864 (Tex. App.—Corpus Christi 1992, writ denied).

E. In Administrative Proceedings When Agency Acting Within Statutory Powers.

Provided that an agency is acting within its statutory powers, intervention in an administrative proceeding using the TUDJA is not permitted. *Beacon Nat'l Inc. Co. v. Montemayor*, 86 S.W.3d 260 (Tex. App.—Austin 2002, no pet.). Since the Department of Insurance had the exclusive authority to enforce rules relating to a preferred provider organization (PPO), aggrieved physicians who were terminated from such PPO were not entitled to construction of contract rights pursuant to the TUDJA. *Texas Medical Ass'n v. Aetna Life Ins. Co*., 80 F.3d 153 (5th Cir. 1996).

F. Counterclaim is Mere Denial of Plaintiff's Claim.

Generally speaking, declaratory judgment actions should not be used to settle disputes already pending before a court. When a declaratory judgment is sought, either as a counterclaim or in a separate suit, if the declaratory judgment would have "greater ramifications" as compared to the original suit, it may be allowed, otherwise, it will not be allowed. *See Howell v. Mauzy*, 899 S.W.2d 690 (Tex. App.—Austin 1994, writ denied).

The case of *Howell v. Mauzy* involved two candidates for the Texas Supreme Court. In 1986, after contested primaries, both Howell and Mauzy won the nominations of their respective parties. Shortly before the general election, Howell filed suit against Mauzy and his wife contending that they violated campaign contribution and expenditure reporting requirements. In response, Mauzy counterclaimed seeking a declaratory judgment that his campaign finance reports complied with relevant provisions of the Election Code.

Howell argued that Mauzy was not entitled to a declaratory judgment because he requested no relief beyond what could be obtained through resolution of Howell's pending action. In addition, Howell suggested that Mauzy's counterclaim was merely a contrivance to obtain attorney's fees and inhibit non-suit. Over Howell's objections, the trial court rendered a declaratory judgment finding that Mauzy's campaign finance reports were in compliance.

The court of appeals agreed with Howell and held that declaratory judgment actions are not available to settle disputes pending before the court. *Id.* at 706 (*citing BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 841 (Tex. 1990)). In addition, the court reasoned that a counterclaim including only affirmative defenses to the plaintiff's claims and which "exists solely to pave the way to an award of attorney's fees" is improper. *Id.* (*citing Hitchcock Properties v. Levering*, 776 S.W.2d at 236, 239 (Tex. App.—Houston [1st Dist.] 1989, writ denied). Though use of declaratory judgments is improper in such cases, the use of the TUDJA is proper if the counterclaim seeks affirmative relief and alleges a cause of action independent of plaintiff's claim so that the defendant could enjoy a recovery of "benefits, compensation, or relief, even if the plaintiff were to abandon or fail to establish his cause of action." *Id.* To conclude, the court of appeals disagreed with the trial court's granting of declaratory judgment and reversed such judgment.

> Practice Tip: Before filing a declaratory judgment action as a defensive pleading, consider whether the claims advanced by such action could survive a non-suit by the plaintiff; and if the claims advanced by the defensive declaratory judgment action fail to stand alone, it is likely an improper use of the TUDJA.

G. To Interpret Judgments.

The TUDJA may not be used to seek interpretation of a court's judgment. *Cohen v. Cohen*, 632 S.W.2d 172-173 (Tex. App.—Waco 1982, no writ). The *Cohen* case involved a declaratory judgment action instituted for the purpose of rendering a provision in a divorce decree void. The Cohens divorced in 1975. The plaintiff did not appeal the judgment of divorce. Six years later, Mr. Cohen filed his declaratory judgment action asking the court to find a provision requiring him to pay 10% interest annually on amounts due Ms. Cohen per the decree of divorce void because at the time the judgment was entered, Texas law provided that all judgments would bear interest at 6%. He argued that such award was a deprivation of property without due course of law under the Texas and the United States Constitutions.

Thereafter Mrs. Cohen filed a plea in abatement and the trial court sustained such plea and dismissed the declaratory judgment claims. The court of appeals affirmed the trial court's judgment, finding that the "utilization of a declaratory judgment action is a collateral attack on the prior judgment and cannot be used for the purpose of asking a trial court to interpret a

prior judgment entered by that or any other court." *Id.* at 173.

H. Some Actions Unique to Real Estate.

1. *Lis Pendens.*

Declaratory relief and accompanying attorney's fees are not available for *lis pendens* actions, as a *lis pendens* is not a deed, will, or writing constituting a contract. *Jordan v. Hagler*, 179 S.W. 3d 217 (Tex. App.—Fort Worth 2005, no pet.). The case of *Jordan v. Hagler* involved a contractor, Jordan, who became disgruntled with his homeowner clients, the Haglers. Jordan supplied materials and performed services for the Haglers' homestead including mold remediation and reconstruction work.

Jordan's business relationship with the Haglers soured and he filed liens on the homestead property. The liens were ultimately found to be invalid and so Jordan filed a *lis pendens* against the property. The Haglers moved to cancel the *lis pendens* via a declaratory judgment action and sought sanctions and attorney's fees. The trial court invalided the *lis pendens* and awarded attorney's fees to the Haglers. Jordan appealed.

On review, the court of appeals struck down the trial court's award of attorney's fees to the Haglers, finding that a *lis pendens* is not a "deed, will, written contract, or other writing constituting a contract" and such writings designated by Section 37.004 of the Civil Practice and Remedies Code are the only instruments for which declaratory relief is available. *See id.* at 222. In the end, the judgment was affirmed by the court of appeals, except as to the portion of the judgment related to attorney's fees awarded pursuant to the TUDJA. Such portion of the judgment was reversed and rendered such that the Haglers took nothing in attorney's fees.

2. Possessory Rights to Real Estate.

Property Code § 22.001, not the TUDJA, governs disputes regarding title or possessory rights to real property. *Ramsey v. Grizzle*, 313 S.W.3d 498 (Tex. App.—Texarkana 2010, no pet.). *See* Sections IV(E)-(F), *supra*, for more discussion regarding when use of the TUDJA versus a suit to try title is appropriate in settling disputes involving real property.

VI. CONCLUSION.

In preparing this paper, an interview with James W. Carter, an attorney in San Antonio, Texas, led me to his summary and analysis of appellate level cases involving declaratory judgments on questions related to: 1) construction of language in wills; 2) duties of fiduciaries; 3) validity of *in terrorem* clauses; and 4) judicial discharge. In his extensive research of appellate cases in Texas involving declaratory judgments in the context of fiduciary litigation, he notes that, "there seems to be a growth trend toward the award [of attorney's fees] based on the published opinions." He goes on to clarify that such trend may or may not apply to trial court opinions not scrutinized by the appellate courts.

When asked whether he believes there is a rise in the number of declaratory judgment actions being filed in Texas each year, Mr. Carter responded, "I don't know, but there should be. I say that because a [declaratory judgment] question is ultimately framed by the plaintiff. It seems counterintuitive to ask a question to which the answer may be adverse. If the lawyer has framed the question with careful thought to the client's goals, victory and attorney's fee awards should be trending toward the plaintiff."

The first trial over which I presided was in 2011 and involved two competing declaratory judgment actions. Since that time, more and more controversies seem to be framed in the context of declaratory judgment actions and litigants invest time, energy, and money attempting to resolve whether invoking the TUDJA is proper. Thank you for giving me the opportunity to weigh in on the subject and hopefully this paper will benefit you and your service to your client.