

**Affirm and Opinion Filed August 3, 2020**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-18-01266-CV**

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**MARTIN BETTWIESER, Appellant**

**V.**

**SANDRA K. JEFFERY, F/N/A SANDRA K. DILL INDIVIDUALLY AND  
AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE  
ESTATE OF THOMAS KARL BETTWIESER, DECEASED; AND KEVIN  
JEFFERY, Appellees**

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**On Appeal from the County Court at Law  
Bastrop County, Texas  
Trial Court Cause No. 17-18735**

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**MEMORANDUM OPINION**

Before Justices Molberg, Reichek, and Evans  
Opinion by Justice Molberg

Appearing pro se, Martin Bettwieser appeals the county court at law's order dismissing his bill of review regarding the estate of his late brother, Thomas Bettwieser (Decedent), which closed in November 2002. We affirm the county court at law's order of dismissal.<sup>1</sup>

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<sup>1</sup> On October 19, 2018, the Supreme Court of Texas transferred this case from the Third District Court of Appeals to this Court. We therefore must apply that District's law. We discern no difference in application of the law in the Third Court of Appeals and the law as applied in this opinion.

## BACKGROUND

Decedent had no children and he died intestate on March 16, 2002. At the time of his death, he was married with two surviving parents. Appellee Sandra Jeffery claims she was married to Decedent from 1990 until his death. On July 10, 2002, Sandra filed an “Application for Letters of Independent Administration and Declaration Heirship” (Declaration of Heirship) in the county court at law in Bastrop County, Texas, naming herself and Decedent’s parents as Decedent’s heirs.<sup>2</sup> Decedent’s parents each executed separate “Waiver[s] of Citation or Notice and Consent by Distributee to Appointment of Independent Administrator,” which were notarized and filed in the original probate proceeding on August 8, 2002. Two disinterested witnesses each executed, before a notary public, an affidavit of “Proof for Declaration of Heirship,” testifying Decedent and Sandra were married from 1990 until the time of Decedent’s death.

After a hearing, the county court signed an “Order Declaring Heirship and Appointing Independent Administrator” on October 7, 2002 (Order Declaring Heirship). The Order Declaring Heirship stated Sandra and Decedent’s parents were Decedent’s only heirs. Under sections 201.001 and 201.002 of the Texas Probate Code, Sandra, as Decedent’s wife, received one-half of the estate and Decedent’s parents received the other half. TEX. PROB. CODE §§ 201.001(c), 201.002(c)(2), (3).

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<sup>2</sup> The 2002 Declaration of Heirship was amended on July 24, 2002, solely to correct Decedent’s age at the time of his death, and otherwise remained unchanged.

Decedent's probate estate closed on November 13, 2002. Sandra interred Decedent's remains in a private grave on their community property in Bastrop County.

Sandra married appellee Kevin Jeffery several years after Decedent's death. In May 2015, Sandra re-interred Decedent's remains at Dignity Memorial Cemetery in Bastrop. On November 13, 2017, appellant brought an action for a bill of review in county court at law in Bastrop County, Texas, seeking to vacate the 2002 Order Declaring Heirship and requesting an order to remove Decedent's remains from Dignity Memorial Cemetery for re-interment at the original private grave. The Honorable Benton Eskew presided over the original 2002 probate proceedings as well as the bill of review proceedings. Appellant's bill of review explained it was filed after the "four-year statute of limitations" had passed because Sandra perpetrated a fraud on the county court and on Decedent's parents by claiming to be Decedent's wife when, in fact, Decedent was legally married to Tracie Perkins Bettwieser at the time of his death. Appellant pleaded:

Upon information an belief, formed after reasonable inquiry, Sandra K. Jeffery knew at the time she filed her applications for letters of independent administration and declaration of heir[s]hip, that her alleged common-law marriage to [Decedent] was invalid because his prior marriage had never been resolved. (Exhibit 1, 2pgs [sic])[.] Sandra K. Jeffery committed extrinsic fraud upon [Decedent's father] and family by fraudulently inducing him to execute an affidavit of relinquishment . . . .

\* \* \*

[Decedent's father] never did learn of his son[']s undissolved marriage to Tracie Perkins Bettwieser and was given to believe by Sandra K. Jeffery that she was his legitimate daughter in law and his son[']s surviving spouse, for provisions in his estate as such  
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On January 4, 2018, appellant served appellees with a Notice of Lis Pendens, which he recorded in the Bastrop County public records. On January 8, 2018, appellees filed a motion to dismiss appellant's bill of review on the grounds the statute of limitations had expired and appellant had no standing or capacity to file the action for bill of review. Appellees filed a motion to expunge the lien on May 7, 2018, and gave appellant written notice of the hearing on their motion to dismiss and motion to expunge, to be held on June 25, 2018. Although appellant acknowledged receipt of the notice of hearing, he did not appear. By orders dated June 25, 2018, the county court granted appellees' motions to dismiss the bill of review and expunge the lien.

Although his complaints are not entirely clear, we interpret appellant's issues on appeal as contentions that the county court at law did not have jurisdiction over the bill of review proceeding, erred by denying appellant's motion to recuse or disqualify the judge, and erred by dismissing the bill of review of the Order Declaring Heirship.<sup>3</sup>

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<sup>3</sup> While appellant raises three enumerated issues in his brief on appeal, he appears to inject additional arguments with respect to the timeliness of the hearing on appellees' motion to dismiss, the necessity of discovery, and the expungement of the lien. Because we conclude the county court properly dismissed appellant's bill of review on other grounds, we need not address these additional arguments.

***The County Court Properly Dismissed the Bill of Review  
Because Appellant Lacks Standing***

We first address the question of whether appellant has standing to file a bill of review of the Order Declaring Heirship. A party must have both standing and capacity to file a lawsuit. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). A party has standing when he has a “justiciable interest” in the outcome of the suit, *id.*, that is to say he is personally aggrieved, regardless of whether he is acting with legal authority. *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996). To have standing to pursue a bill of review, a person generally either must have been a party to the prior judgment or have had a then-existing interest or right that was prejudiced by the prior judgment. *Frost Nat’l Bank v. Fernandez*, 315 S.W.3d 494, 502 (Tex. 2010). The existence of standing is a question of law. *Cleaver v. George Staton Co.*, 908 S.W.2d 468, 472 (Tex. App.—Tyler 1995, writ denied.). A party has capacity when he has the legal authority to act, regardless of whether he has a justiciable interest in the matter. *Id.*; *see also Lovato*, 171 S.W.3d at 848–49 (capacity is procedural issue regarding party’s personal right to litigate). Because the issue of standing is jurisdictional, it may be raised for the first time on appeal. *Lovato*, 171 S.W.3d at 849. Capacity, however, must be raised by a verified pleading in the trial court, or the issue is waived. *Id.*; *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 56 (Tex. 2003); TEX. R. CIV. P. 93.

Here, there is no dispute that Decedent had no children. At the time of Decedent's death, Sandra and Decedent's parents were his only possible heirs. *See* TEX. ESTATES CODE §§ 201.001(c), 201.002 (formerly TEX. PROB. CODE § 38). Because he was not an heir or a party to the prior judgment, appellant does not have standing to pursue a bill of review in this case, and the trial court properly dismissed the bill of review. *See Frost Nat'l Bank*, 315 S.W.3d at 502. Since we conclude appellant does not have standing, we need not address the issue of capacity. TEX. R. APP. P. 47.1.

Even if appellant had standing, however, the county court still did not err by dismissing appellant's bill of review.

***The County Court Judge Properly Presided Over This Matter***

In his first issue, appellant argues the county court judge presiding over the bill of review proceedings did not have jurisdiction over the case. We disagree.

A bill of review is a direct attack on a judgment that is no longer subject to challenge by direct appeal or a motion for new trial. *Valdez v. Hollenbeck*, 465 S.W.3d 217, 226 (Tex. 2015); *Frost Nat'l Bank*, 315 S.W.3d at 504. Only the court that rendered the original judgment may exercise jurisdiction over the bill of review, and that is the court in which it must be filed.<sup>4</sup> *Id.* Because the government code has not established a statutory probate court in Bastrop County, *see* TEX. GOV'T

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<sup>4</sup> Once judgment attaches in the proper court, the case may be transferred to another court, which then has the authority to decide the merits of the bill of review. *Rodriguez ex rel. Rodriguez v. EMC Mortg. Corp.*, 94 S.W.3d 795, 797 (Tex. App.—San Antonio 2002, no pet.).

CODE § 25.0131 (“Bastrop County has one statutory county court, the County Court at Law of Bastrop County”), Chapter 25 of the government code grants the Bastrop County Court at Law jurisdiction over probate proceedings. *See* TEX. GOV’T CODE § 25.0003.

Here, Judge Eskew of the Bastrop County Court at Law presided over the original probate proceeding. Appellant filed the bill of review in the Bastrop County Court, where Judge Eskew still sits.<sup>5</sup> Judge Eskew also presided over the bill of review proceeding. We conclude the county court at law properly exercised jurisdiction over appellant’s bill of review proceeding. We resolve this issue against appellant.

***The Presiding Judge of the Second Administrative Judicial Region  
Of Texas Did Not Err By Denying Appellant’s Motion to Recuse and/or  
Disqualify Judge Eskew***

Appellant contends his motion to disqualify or recuse was improperly denied. We review the denial of a motion to recuse for an abuse of discretion. TEX. R. CIV. P. 18a(j)(1)(A); *In re C.J.O.*, 325 S.W.3d 261, 267 (Tex. App.—Eastland 2010, pet. denied); *Sommers v. Concepcion*, 20 S.W.3d 27, 41 (Tex. App.—Houston [14th

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<sup>5</sup> The caption on most of the filings in the clerk’s record on appeal for the bill of review proceeding reflect they were filed in the Bastrop County Court at Law. However, the clerk’s record on appeal includes several documents filed by the parties on which “In The District Court” and “335th Judicial District” appear in the caption. The caption on the order dismissing appellant’s bill of review, presumably drafted by a party and signed by Judge Eskew, also includes reference to the “335th Judicial District.” These references to the 335th Judicial District appear to be typographical errors. Judge Eskew is not and has not been a judge on the 335th District Court. He is the County Court at Law Judge for Bastrop County, and he presided over the bill of review proceeding. The Honorable Reva Towslee-Corbett is, and was at the time of the bill of review proceeding, the 335th Judicial District Court Judge.

Dist.] 2000, pet. denied). The movant bears the burden of proving recusal is warranted, and must show “bias or partiality to such an extent as to deprive him of a fair trial.” *In re C.J.O.*, 325 S.W.3d at 267. After reviewing the totality of the circumstances, we will reverse the denial of a motion to recuse only if it does not fall within the zone of reasonable disagreement. *Id.*

The method for seeking the disqualification or recusal of a judge in any trial court other than a statutory probate court or justice court is set out in Texas Rule of Civil Procedure 18a.<sup>6</sup> The permissible grounds for either disqualification or recusal of a judge are contained in Texas Rule of Civil Procedure 18b.<sup>7</sup>

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<sup>6</sup> A party in a case in any trial court other than a statutory probate court or justice court may seek to recuse or disqualify a judge who is sitting in the case by filing a motion with the clerk of the court in which the case is pending. The motion:

- (1) must be verified;
- (2) must assert one or more of the grounds listed in Rule 18b;
- (3) must not be based solely on the judge's rulings in the case; and
- (4) must state with detail and particularity facts that:

(A) are within the affiant's personal knowledge, except that facts may be stated on information and belief if the basis for that belief is specifically stated;

(B) would be admissible in evidence; and

(C) if proven, would be sufficient to justify recusal or disqualification.

TEX. R. CIV. P. 18a(a).

<sup>7</sup> (a) *Grounds for Disqualification.* A judge must disqualify in any proceeding in which:

(1) the judge has served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter;

(2) the judge knows that, individually or as a fiduciary, the judge has an interest in the subject matter in controversy; or

(3) either of the parties may be related to the judge by affinity or consanguinity within the third degree.

(b) *Grounds for Recusal.* A judge must recuse in any proceeding in which:

(1) the judge's impartiality might reasonably be questioned;

Appellant’s motion to disqualify or recuse was based on general allegations that Judge Eskew had “an interest and personal knowledge as to the extrinsic fraud that was committed in his court” and was “biased and or prejudiced against the pro-se Plaintiff [appellant] and the subject matter and ha[d] an interest in the subject matter.” On appeal, appellant argues Judge Eskew’s actions, rulings, and orders were not “fair, timely, proper and without error, without suspicion of bias[,] prejudice[,] and impartiality[,] and or warranted under the circumstances or necessitate remand or reversal.”

In compliance with Texas Rule of Civil Procedure 18a(f), Judge Eskew declined to voluntarily recuse himself and referred appellant’s recusal motion to the to the regional presiding judge. TEX. R. CIV. P. 18a(f). Implicitly finding Judge

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(2) the judge has a personal bias or prejudice concerning the subject matter or a party;

(3) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;

(4) the judge or a lawyer with whom the judge previously practiced law has been a material witness concerning the proceeding;

(5) the judge participated as counsel, adviser, or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;

(6) the judge knows that the judge, individually or as a fiduciary, or the judge’s spouse or minor child residing in the judge’s household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(7) the judge or the judge’s spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(A) is a party to the proceeding or an officer, director, or trustee of a party;

(B) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(C) is to the judge’s knowledge likely to be a material witness in the proceeding.

(8) the judge or the judge’s spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

TEX. R. CIV. P. 18b(a), (b).

Eskew’s conduct did not “indicat[e] a high degree of favoritism or antagonism that render[ed] fair judgment impossible,” the regional presiding judge denied the motion on the grounds it failed to allege any basis for disqualification or recusal under rules 18a or 18b; it was based mainly on the county court’s rulings; and it did not allege extra-judicial conduct.

We first note that both a motion to disqualify and a motion to recuse must (1) assert one or more of the grounds listed in Texas Rule of Civil Procedure 18b; (2) not be based solely on the judge’s rulings in the case; and (3) be supported by proof that would be admissible in evidence. TEX. R. CIV. P. 18a(a)(2)–(4). Here, appellant’s motion failed to adequately assert any of the grounds required by rule 18b. The regional presiding judge found that appellant’s motion failed to allege facts supporting his allegations and was based only on his dissatisfaction with the county court’s rulings. As such, appellant failed to meet his burden of proving that the county court’s actions indicated “a high degree of favoritism or antagonism that render[ed] fair judgment impossible.” *See Sommers*, 20 S.W.3d at 41. Under these circumstances, we conclude appellant did not present sufficient evidence to rebut the presumption of a neutral and detached trial court, *see In re C.J.O.*, 325 S.W.3d at 267, and the denial of appellant’s motion to disqualify or recuse was not an abuse of discretion. We resolve this issue against appellant.

***The County Court Properly Dismissed the Bill of Review  
Because It Was Not Timely Filed***

Even if appellant had standing, which he does not, the county court at law still properly dismissed the bill of review because the limitations period was not tolled. Appellant initiated bill of review proceedings in November 2017, almost fifteen years after the county court closed administration of Decedent’s estate in November 2002. Appellant does not contest that the four-year limitations period expired long before he filed his bill of review. In his third enumerated issue, appellant appears to argue the statute of limitations was tolled because Sandra perpetrated extrinsic fraud upon the county court and Decedent’s parents by claiming to be Decedent’s common law wife when she knew Decedent was legally married to another woman. Appellees respond that appellant “offers no proof of such allegation” and, moreover, he “is not a proper party to file a bill of review” because he is not an heir of Decedent.<sup>8</sup>

We review an order dismissing a bill of review for an abuse of discretion. *Britton v. J.P. Morgan Chase, N.A.*, No. 01-13-00928-CV, 2014 WL 3398504, at \*3 (Tex. App.—Houston [14th Dist.] July 10, 2014, no pet.) (mem. op.); *Carder v. Hollywood Marine, Inc.*, No. 01-00-00120-CV, 2001 WL 703908, at \*2 (Tex.

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<sup>8</sup> With respect to the limitations period, appellees’ motion to dismiss argued the four-year statute of limitations barred appellant’s action for bill of review. For the first time on appeal, they additionally contend the two-year statute of limitations prescribed by former section 31 of the Texas Probate Code—in effect at the time of the original probate proceeding—barred appellant’s action for bill of review. Consistent with the argument in their motion to dismiss, appellees’ brief on appeal argues appellant produced no evidence of extrinsic fraud. *See Valdez v. Hollenbeck*, 465 S.W.3d 217, 221 (Tex. 2015).

App.—Houston [1st Dist.] June 21, 2001, no pet.) (not designated for publication). In our review of the county court’s dismissal of appellant’s bill of review, we indulge every presumption in favor of the county court’s ruling, which we will not disturb unless there is an affirmative showing the trial court acted arbitrarily, capriciously, and without reference to any guiding rules or principles. *Britton*, 2014 WL 3398504, at \*3; *Carder*, 2001 WL 703908, at \*2.

To succeed by bill of review, a petitioner must prove he had a meritorious claim or defense, he was prevented from asserting the claim or defense by the fraud, accident, or wrongful act of the respondent or by official mistake, and his own fault or negligence did not prevent the assertion of the claim or defense. *Hernandez v. Koch Mach. Co.*, 16 S.W.3d 48, 57 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). An equitable bill of review ordinarily must be filed within four years of the date the judgement is signed unless extrinsic fraud is established or an express limitations period is prescribed by statute. TEX. CIV. PRAC. & REM. CODE § 16.051; *Valdez v. Hollenbeck*, 465 S.W.3d 217, 221 (Tex. 2015).

At the time of the events underlying this lawsuit, section 31 of the Texas Probate Code provided that “no bill of review shall be filed after two years have elapsed from the date of [the probate court’s] decision, order or judgment.” *See* TEX. ESTATES CODE § 55.251 (formerly TEX. PROB. CODE § 31).<sup>9</sup> The statute of

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<sup>9</sup> In 2014, the Texas Legislature re-codified section 31 as section 55.251, using substantially similar language.

limitations for appellant’s action for bill of review thus expired in 2004, unless “(1) the limitations period was tolled *and* (2) the heirs filed their petition for bill of review within two years from the date the injury was discoverable or the estoppel effect of tolling ceased.” *Valdez*, 465 S.W.3d at 229.

Only two doctrines may toll limitations: the discovery rule and fraudulent concealment. *Id.* Here, neither doctrine tolled the two-year limitations period. The discovery rule “defers the accrual of the cause of action until the injury was or could have been reasonably discovered.” *Id.* (quoting *Shell Oil Co. v. Ross*, 356 S.W.3d 924, 929–930 (Tex. 2011)). Fraudulent concealment “is a fact-specific equitable doctrine that tolls limitations until the fraud is discovered or could have been discovered with reasonable diligence. . . . When a defendant is under a duty to make a disclosure but conceals the existence of a cause of action from the party to whom it belongs, the defendant is estopped from relying on the defense of limitations until the party learns of the right of action or should reasonably have discovered it.” *Valdez*, 465 S.W.3d at 229–230. Here, appellant offers no evidence and makes no argument that he did not know about the original probate proceeding, and the statutory two-year limitations period was not tolled under either the discovery rule or the fraudulent concealment doctrine. *See id.* at 230 (estoppel effect of fraudulent concealment ends when party learns of circumstances which would have a reasonably prudent person to make inquiry which would lead to discovery of concealed cause of action).

However, even if appellant's bill of review was equitable and not statutory, the statute of limitations still expired. In *Alexander v. Hagedorn*, the Texas Supreme Court underscored the fundamental importance of according some finality to judgments and, therefore, the grounds for attacking a judgment by bill of review are narrow. 226 S.W.2d 996, 998 (Tex. 1950). Noting that endless litigation, in which nothing ever is finally determined, would be worse than occasional miscarriages of justice, the court concluded "the rules are not to be relaxed merely because it may appear in some particular case that an injustice has been done." *Id.* To this end, only "extrinsic fraud" will support an equitable bill of review; "intrinsic fraud" will not. *Id.* at 1001.

Extrinsic fraud is conduct that denied a litigant the opportunity to litigate rights or defenses that could have been asserted at trial because he was "misled by his adversary by fraud or deception, or was denied knowledge of the suit." *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 275 (Tex. 2012). Extrinsic fraud "prevents a real trial upon the issues involved." *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). "Extrinsic fraud is 'collateral' fraud in the sense that it must be collateral to the matter actually tried and not something which was actually or potentially in issue in the trial." *Id.* at 312.

In contrast, intrinsic fraud "is inherent in the matter considered and determined in the trial 'where the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting the fraud were, or could have been

litigated therein.” *Id.* (quoting *Mills v. Baird*, 147 S.W.2d 312, 316 (Tex. Civ. App.—Austin 1941, writ ref’d)). In other words, intrinsic fraud relates to issues which were presented to and considered by the trial court in rendering the judgment challenged by the bill of review.

Included in intrinsic fraud are fraudulent instruments, perjured testimony, or any matter which was actually presented to and considered by the trial court in rendering the judgment assailed. It is particularly well-established that the alleged perjury of a witness on a contested issue, which the opposing party had the opportunity to refute, is intrinsic fraud.

*Montgomery*, 669 S.W.2d at 313 (internal citations omitted).

Here, whether Sandra was the legal common law wife of Decedent is precisely the type of issue that falls in the intrinsic fraud category—it was an issue presented to, considered, and determined by the county court at law in 2002, with witness testimony in the form of notarized affidavits. Even if false,<sup>10</sup> Sandra’s representation that she was Decedent’s common law wife did not deny appellant the opportunity to litigate that issue. *See PNS Stores, Inc.*, 379 S.W.3d at 275. The question of Sandra’s marital status with Decedent was considered and determined in the original probate proceeding; it was not collateral to any matter that was decided by the county court.

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<sup>10</sup> We note there is nothing in the record on appeal showing that Decedent was legally married to anyone but Sandra at the time of his death.

We conclude the county court at law properly dismissed appellant's bill of review as untimely filed. We resolve this issue against appellant.

We affirm the trial court's order dismissing appellant's bill of review.

*/Ken Molberg//*

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**KEN MOLBERG**  
**JUSTICE**

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**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

MARTIN BETTWIESER, Appellant

No. 05-18-01266-CV      V.

SANDRA K. JEFFERY, F/N/A  
SANDRA K. DILL  
INDIVIDUALLY AND AS  
ADMINISTRATOR AND  
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OF THE ESTATE OF THOMAS  
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On Appeal from the County Court at  
Law, Bastrop County, Texas  
Trial Court Cause No. 17-18735.  
Opinion delivered by Justice  
Molberg. Justices Reichek and Evans  
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 3<sup>rd</sup> day of August, 2020.