

## **Court Holds That Allegations Related To A Trustee’s Filing Of Suit Did Fall Under The Protection Of The Texas Citizens Participation Act, That A Trustee’s Actions To Modify Administrative Terms Did Not Trigger An In Terrorem Clause, But That Other Actions**

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In *Marshall v. Marshall*, a son, who was a trust beneficiary, sued his mother and brother alleging breaches of fiduciary duty and sought a declaratory judgment that they violated an in terrorem clause of the will. No. 14-18-00094-CV, No. 14-18-00095-CV, 2021 Tex. App. LEXIS 423 (Tex. App.—Houston [14th Dist.] January 21, 2021, no pet. history). The mother had created a similar Wyoming trust and then merged the original Texas trust into the Wyoming trust. The beneficiaries were essentially the same, but there were administrative differences, including who the trustees and successor trustees were and the wording of the in terrorem clauses. The mother also had a lawsuit filed in Wyoming to approve all of these changes, but did not serve the plaintiff. The defendants filed motions to dismiss under the Texas Citizens Participation Act (“TCPA”), the trial court denied them, and they appealed.

The mother filed her motion to dismiss solely on the basis that the son’s claim for declaratory relief due to the in terrorem clause violated the act. The court noted that “to be entitled to dismissal under the TCPA, the defendant has the initial burden to show by a preponderance of the evidence that the plaintiff’s claim “is based on, relates to, or is in response to” the defendant’s exercise of the right to petition, association, or speech.” The court found that the act facially applied to the claim because “the filing of a petition and an affidavit are communications in or pertaining to a judicial proceeding, and thus, implicate Elaine’s exercise of the right to petition.” *Id.* The court then looked at whether there was a prima facie case to support the application of the in terrorem clause. The court explained the son’s argument thusly:

Preston contends that the Company’s Wyoming “petition for instructions,” and Elaine’s consent to it, triggered the in terrorem clause because it was a “proceeding . . . to prevent any provisions [of the will] from being carried out in accordance with its terms.” Preston identifies three provisions of the will that the Wyoming proceeding undermined: (1) removing Preston as the designated successor trustee and authorizing Pierce to be the successor trustee; (2) changing the governing law from Texas to Wyoming; and (3) introducing a different in terrorem clause.

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*Id.* The court disagreed and held that the mother had solely sought to modify administrative terms, which did not violate the in terrorem clause:

[N]one of the changes that Elaine consented to in the Wyoming proceeding had a substantive effect on the distribution of E. Pierce Marshall's property. Elaine continued to be the income beneficiary, and the inter vivos trusts remained beneficiaries of the corpus. As Preston alleged in his petition, the Wyoming suit had the purpose of "ratifying" the actions Elaine took as trustee before filing the petition for instruction. By the time the Company filed the petition, the Company and Elaine already entered into a non-judicial settlement agreement to, among other things, merge the two trusts. The Wyoming Trust had been created, and that trust's declaration includes the terms that Preston complains of. The Wyoming proceeding sought a construction of the will and trusts to determine if Elaine's prior acts as trustee were lawful. Therefore, the proceeding was not one to contest the validity of the will or to prevent any provisions of it from being carried out. Considering the purpose of the Texas Trust and the nature of the Wyoming proceeding, we conclude that Preston has not established a prima facie case for his claims against Elaine based on the in terrorem clause.

*Id.* The court reversed the order denying the motion to dismiss on the in terrorem claims as against the mother.

The court then reviewed the denial of the son's claims against his brother. The court similarly reversed the order denying the motion to dismiss on the in terrorem claims. However, the court affirmed the denial of the motion to dismiss on the son's breach of fiduciary duty claims. "The vast majority of the allegations in Preston's petitions concern Elaine's conduct unrelated to the Wyoming lawsuit. Under these circumstances, we cannot conclude that Pierce has established by a preponderance of the evidence that Preston's allegations regarding the fiduciary duty claims relate to Pierce's right to petition." *Id.*

In *In re Grandchildren's Trust*, a separate case but related to the same parties, the son sued his mother, the trustee, concerning a trust and the trustee appealed the denial of her motion to dismiss under the TCPA. No. 14-18-01097-CV, 2020 Tex. App. LEXIS 9941 (Tex. App.—Houston [14th Dist.] December 17, 2020, no pet. history). The beneficiary alleged that a co-trustee should make all distributions decisions because he had filed other lawsuits against his mother. The mother filed the TCPA motion to dismiss because the beneficiary's petition "target's Mrs. Marshall's exercise of her right to petition by defending herself in court." *Id.* She argued that her "responses to Preston's lawsuits" were protected by the TCPA, and that "Preston's suit was based on, related to, or in response to Elaine's making or submitting of a statement or document in or pertaining to a judicial proceeding." *Id.* The trial court did not rule on the motion, so it was denied by operation of law, and the trustee appealed. The court of appeals affirmed the denial of the motion. The court noted that: "To be entitled to dismissal under the TCPA, Elaine has the initial burden to show by a preponderance of the evidence that Preston's claim "is based on, relates to, or is in response to" Elaine's exercise of the right to petition." *Id.* Further, an "exercise of the right to petition" means "a communication in or pertaining to . . . a judicial proceeding," and a "communication" is broadly defined as "the making or submitting of a statement or document in any form or medium." *Id.* The

court held that the beneficiary's claim did not arise out of the trustee's exercise of her right to petition:

Preston's petition does not assert a claim related to any particular statement that Elaine has made in any other lawsuit. Preston's petition refers generally to the fact that Preston "filed several suits" against Elaine and there is "ongoing litigation" between them. Elaine notes that she filed answers in those lawsuits. But, Preston's petition and the documents referenced by Elaine do not show by a preponderance of the evidence that Preston's request for a declaratory judgment regarding Article XV of the GTC #2 is related to Elaine's answers in those lawsuits. For the TCPA to apply, the plaintiff's claims must relate to the movant's right to petition, i.e., the movant's "communication." Preston's reference to the fact that he sued Elaine does not demonstrate that Preston's claims relate to any statement or document that Elaine made in or pertaining to any judicial proceedings. Accordingly, Elaine has not demonstrated by a preponderance of the evidence that Preston's claim is based on, relates to, or is in response to Elaine's exercise of the right to petition.

*Id.*

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National Law Review, Volumess XI, Number 27

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