

Cause No. 495484

ESTATE OF § IN THE PROBATE COURT
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§
ERNEST L. HEIMLICH § NUMBER 1
§
§
DECEASED § HARRIS COUNTY, TEXAS

**OBJECTION TO WITHDRAWAL OF CANDICE SCHWAGER
WITH A REQUEST FOR A HEARING ON HER MOTION AND
HEARING ON SPECIFIC PERFORMANCE AS SCHEDULED**

NOW COMES EDMUND HEIMLICH (“Heimlich”) with his objection to the Motion of Candice Schwager to withdraw as his Attorney and objection to her Notice of withdrawal of her Motion to Vacate and/or Clarify. An additional request is for the Court to take Notice of and accept as filed the Amended Motion to Vacate and/or Clarify attached hereto as Exhibit A. The Law, codified in the Texas Estates Code section 351.352, does not provide this court with the discretionary authority to accept her withdrawal. Note the word “**shall**”.

Sec. 351.352. ENSURING COMPLIANCE WITH LAW. A county or probate court shall use reasonable diligence to see that personal representatives of estates administered under court orders and other

officers of the court perform the duty enjoined on them by law applicable to those estates.

Candice Schwager, (“Schwager”) a licensed lawyer, Texas Bar Card 24005603, is an ‘other officer of the court’. Of record February 22, 2022, this court ordered the sale of the Estate property at 806 Comstock Springs in Katy Texas to the First Reported Buyer. David S. Cook (“Cook”) serves by acceptance of appointment by this court as the personal representative of the Estate of Ernest L. Heimlich. The Law of Texas imposes a mandatory duty on this probate court to see that both the personal representative, Cook, and Schwager as an ‘other officer of the court’, comply with that court order.

COURT ORDER IS NOW A FINAL JUDGMENT

Exhibit C with the Amended Motion to Vacate and/or Clarify (Exhibit A) is the Order of this probate court of record in this Court on February 22, 2022. It is this trial court’s confirmation of the report of the sale of 806 Comstock Springs in Katy Texas to the First Reported Buyer, of record in this Court filed by Cook on December 3, 2021. **It is now a Final Judgment** that cannot be reversed by any means other than by a Bill of Review or an appeal to a higher court.

“The trial court’s confirmation or disapproval of a report shall have **the force and effect of a final judgment**. Id. Any person interested in the estate or in the sale shall have the right to have such orders reviewed as in other final judgments in probate proceedings. Id.” U.S. Bank v. Bentley, No. 14-19-00324-CV, at *5 (Tex. App. Apr. 8, 2021

LIMITED PURPOSE ELIMINATES ALL EXCEPTIONS

Schwager was retained for the limited purpose of securing the Specific Performance of the sale Ordered by this Court on February 22, 2022. The limited purpose eliminates all possible exceptions in the Texas Disciplinary Rules of Professional Conduct that could permit withdrawal. Withdrawal is now permissible only if Schwager can prove there would be no material adverse effect on the interest of her client Heimlich. *The attorney seeking to withdraw bears the burden of showing good cause for withdrawal. Harrison, 367 S.W.3d at 830.*

Of record in the ancillary case, 495484-402, filed date December 7, 2022, is the Motion for Specific Performance filed by Schwager as the attorney of record for Heimlich. The facts presented therein are uncontested and incontrovertible. **Exhibit A**, prepared by Schwager and submitted by her for filing on January 31, 2023, provides additional proof to her initial Motion to Vacate and/or Clarify, that the orders of April 14, 2022, entered two (2) months after the Order of February 22, 2022 do not negate the Contractual Right Heimlich has in the law of the contract nor negate the duty of this court to Order Specific Performance by the Estate by and through the personal representative of the Estate (Cook).

ADVERSE EFFECT ON THE INTEREST OF HER CLIENT

Heimlich has suffered the adverse effect of the loss of the \$79,500 assignment fee he was to receive at the closing of the sale ordered by the Court on February 22, 2022 (**See Exhibit A-1 & A-2 attached to Exhibit A**). The contract approved by this Court is the law that entitles Heimlich to specific performance as the means to recover part of his damages suffered from the anticipatory breach of the Estate by and through Cook as the personal representative.

Cook, the personal representative, has asked the court to use his motion to declare Heimlich a vexatious litigant, and the subsequent order on that declaration entered April 14, 2022, as a means to deprive Heimlich of his contractual right and as a cover for the court to refuse to perform the duty the law of Texas imposes pursuant to section 351.352 of the Estate Codes. The vexatious litigant statute applies only to persons who are not represented by an attorney.

Therefore; Cook has threatened Schwager with a bar grievance and threatened her with \$25,000 in sanctions Cook believes this Court will impose upon her at his request to intimate Schwager into filing a Motion to Withdraw. Cook has made clear his belief this court will then deny Heimlich's Motion for Specific Performance (for compliance pursuant to 351.352) under the false excuse it cannot be accepted pursuant to the vexatious litigant statute now that the attorney that submitted it has withdrawn.

The legal burden is on Schwager to prove that Heimlich will not suffer this adverse effect on his interest in the contract for his purchase of the Estate property the court ordered be sold to him, and/or his assigns, in the order of February 22, 2022. Attached as **Exhibit B** to this Objection to her withdrawal is an email from Schwager to court personnel, Chris Machicek, in which Schwalger states “after receiving documents and information from Mr. Cook that I didn’t have before, I have filed a motion to withdraw”.

Schwager has not produced any documents or information that would change the well-established facts, and law, that entitled Heimlich to specific performance and the law that imposes upon this Court the duty to ensure compliance with the order of February 22, 2022 to sell the property to the First Reported Buyer, ***Edmund Heimlich and/or assigns***. There are NO documents and NO information relevant and material to Heimlich’s contractual right and the duty of this court imposed by section 351.352 of the Estates Code.

DIGITAL SIGNATURE ON AMENDED MOTION

Proof of submission of **Exhibit A, Amended Motion to Vacate and/or Clarify**, is the notice of the submission attached as **Exhibit C** as proof that Candice Schwager intended to file her AMENDED MOTION TO VACATE AND CLARIFY. The electronic filing system proves no one other than Schwager submitted the Motion to the filing Clerk and, therefore, it stands as a digital signature. The request of the clerk

for her signature on the signature line therein is merely a formality.

Heimlich also asks this Court to accept the attached **Exhibit A, Amended Motion to Vacate and/or Clarify**, as if filed under his name, as a pro se party. The **Amended Motion to Vacate and/or Clarify** drafted by Schwager presents the facts and the law applicable to those facts as additional proof the Orders of April 14, 2022, do not legally apply to the Order of the same Court two (2) months prior, February 22, 2022, ordering the personal representative to sell to the First Reported Buyer pursuant to the terms of the contract the personal representative submitted into the record of the court with request for approval on December 3, 20231.

DEFECT IN PLEADING NO EXCUSE TO INVALIDATE

Probate courts exist as, essentially, administrative courts. Cases are initiated by an Applicant seeking an Administration for the benefit of a third party, a disabled person or the beneficiaries of a deceased person. There is no Plaintiff and there is no Defendant. They are, therefore, not intended to be adversarial. No party to a probate case is required to be represented by an attorney and, on the knowledge that most with an interest in a probate proceeding will not be represented, the Texas Legislature, in the Texas Estates Code, has ruled that a probate court may not invalidate a pro se pleading in probate on the basis of a defect in form or substance. See:

Sec. 54.002. DEFECT IN PLEADING. A court may not invalidate a pleading in probate, or an order based on the pleading, on the basis of a defect of form or substance in the pleading unless a timely objection has been made against the defect and the defect has been called to the attention of the court in which the proceeding was or is pending.

As licensed practitioners (Attorneys) neither can Schwager nor Cook can avail themselves to the protection of the law of Texas codified in the Estates Code as Section 54.002. The intent of that law is to protect Heimlich, and others like him, who enter pro se into the public institution known as a probate court. Heimlich has the right to correct any defect of form or substance in this pleading, or any past pleading, after it has been called to the attention of the court. None have.

CONCLUSION AND PRAYER

WHEREFORE, premises considered, Heimlich moves that the Motion for Withdrawal of Candice Schwager as Heimlich's attorney, and her Notice of Withdrawal of her Motion to Vacate and/or Clarify, be denied and that her Amended Motion to Vacate and/or Clarify be accepted as digitally signed by her or as a pro se pleading of Heimlich and heard as scheduled in the hearing set for the 16th of February, 2023. Respectfully submitted on the 3rd Day of February 2023.

By: /s/ Ed Heimlich
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