

CASE NO. 21-40365

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NICHOLAS FUGEDI, TRUSTEE OF THE CARB PURA VIDA TRUST
Plaintiff-Appellant,

v.

STEADFAST FUNDING, ET AL.
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION
CIVIL ACTION NO. 3:19-CV-00249

**AMICUS CURIAE'S BRIEF IN SUPPORT OF APPELLANT-PLAINTIFF
AND REVERSAL OF THE TRIAL COURT'S JUDGMENT**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that—in addition to the person and entities listed in the Appellant’s Certificate of Interested Persons—the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judge of this Court may evaluate possible disqualification or recusal.

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TABLE OF CONTENTS

	PAGE
Certificate of Interested Persons.....	ii
Table of Authorities.....	iv
Amicus Curiae’s Identity, Interest, and Source of Authority.....	1
FRAP 29(a)(4)(E) Statement.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	3
I. Voiding the Deed is Too Harsh a Result Where the Intent of the Parties Was Clear.....	3
II. The Case Law Does Not Support Voiding a Deed Conveying Title into a Trust.....	4
III. The Deed Could Be Corrected.....	6
a. A Non-Material Correction Instrument Under § 5.028 Was Sufficient to Correct the Deed.....	6
b. A Deed into a Trust Can Be Corrected Under § 5.029 with the Trustee Signing for the Original Grantee.....	7
IV. Even if a Material Correction is Not Effective, the Correction Instrument Constitutes a New Conveyance.....	8
V. In the Alternative, the Question of the Validity of a Deed into a Trust Should be Certified to the Texas Supreme Court.....	9
CONCLUSION.....	10

Certificate of Compliance.....12
Certificate of Service.....12

TABLE OF AUTHORITIES

CASES:

AIC Mgmt. Co. v. AT&T Mobility, LLC,
No. 01-16-00896-CV, 2018 WL 1189865, at *7 (Tex. App.—Houston [1st
Dist.] Mar. 8, 2018, pet. denied).....7

Broadway Nat’l Bank, Tr. of Mary Frances Evers Tr. v. Yates Energy Corp.,
64 Tex. Sup. Ct. J. 982, 2021 WL 1940042 (Tex.2021).....9

Concho Resources, Inc. v. Ellison,
627 S.W.3d 226 (Tex. 2021).....9

Hollis vs. Lynch,
827 F.3d 436 (5th Cir. 2016).....4, 5

Parham Family Limited Partnership v. Morgan,
434 S.W.3d 774, 787 (Tex. App.—Houston [14th Dist.] 2014, no pet.).....5

Ray Malooly Tr. v. Juhl,
186 S.W.3d 568, 570 (Tex. 2006).....3

STATUTES:

TEX. PROP. CODE §§ 5.027-5.031.....2, 5

TEX. PROP. CODE § 5.028.....6, 10

TEX. PROP. CODE § 5.029.....7, 8, 10

**AMICUS CURIAE'S IDENTITY, INTEREST, AND SOURCE OF
AUTHORITY**

Founded in 1908, the Texas Land Title Association (TLTA) is a statewide trade association representing the Texas title insurance industry and currently serving over 15,000 professionals involved in the safe and efficient transfer of real estate. In the course of their daily work, our membership serves over a million consumers each year. With active members in every Texas County, TLTA membership comprises approximately 90 percent of the title insurance agents and underwriters licensed to do business in Texas. From time to time, cases come before the Court that have significant impact on real estate commerce in Texas and which impact the ability of TLTA's members to safely insure title to real property. On those occasions, we will endeavor to share with the Court our support of those parties who advocate the sanctity of the Texas real property laws and doctrines.

FRAP 29(a)(4)(E) STATEMENT

No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund the preparing or submitting the brief. TLTA has received no compensation for the preparation of this Brief.

SUMMARY OF ARGUMENT

TLTA presents this Amicus Curiae Brief to express its deep concern regarding the District Court's opinion that a deed conveying title to Texas real property to a trust, as opposed to the trustee of the trust, is void, can never be corrected, and any attempted correction of such a deed is invalid. Texas title insurance companies and agents encounter deeds conveying title to a trust with no mention of the trustee on a daily basis. Such deeds are problematic, as the District Court recognized, because Texas case law currently holds that (1) a trust is a fiduciary relationship and not a legal entity and (2) a deed into a grantee that does not exist is ineffective. However, no Texas court has specifically held that a conveyance of real property to an existing trust is void. Therefore, in order to remedy any possible vesting error, title companies routinely require such deeds be corrected pursuant to the Texas correction statutes in [Texas Property Code §§ 5.027 – 5.031](#) to reflect the trustee as the record title holder, with the trustee holding legal title for the trust as grantee.

But if the District Court opinion is upheld, the result would cause significant harm to the status of real property title in Texas. For example, invalidating a deed to a trust or the correction thereof could create gaps in the chain of title going back in some cases decades, involving what we believe to be thousands, if not more, of Texas properties, which in turn can prevent current owners from selling or borrowing against those properties. Even if a replacement deed is obtained, there

may still be a loss of priority for the current owner and/or lender, creating exposure to involuntary liens against the grantor in the defective deed to the trust. Accordingly, TLTA respectfully requests that this Court reverse the District Court's opinion and allow the established and unchallenged practice of correcting these inadvertent vesting errors via the Texas correction statutes to continue. In the alternative, TLTA invites the Court to certify to the Texas Supreme Court the question of whether a deed conveying title to Texas real property to a trust is invalid and, if so, whether such a deed can be corrected.

ARGUMENT

I. Voiding the Deed is Too Harsh a Result Where the Intent of the Parties Was Clear.

If allowed to stand, the District Court's opinion will invalidate every Texas deed that mistakenly conveyed title to a trust instead of naming the trustee of the trust, wreaking havoc on the state of real property title in Texas. This result is wholly unwarranted where the trust relationship exists, the intent of the parties based on the four corners of the deed is clear, and there is no contradictory evidence of that intent. As noted in Fugedi's briefing to this Court, Texas case law requires courts to construe deeds to effectuate the intent of the parties. In the 2019 deed to the Carb Pura Vida Trust (the "Deed"), the grantor plainly intended to put title into the trust, which legally means the fiduciary relationship between trustee as record title holder for the benefit of the beneficiaries, the equitable title holders. *Ray Malooly Trust v.*

Juhl, 186 S.W.3d 568, 570 (Tex. 2006). The only apparent mistake that could have been made is one of law where the parties assumed that a trust is an entity, rather than the description of a relationship between a trustee and the beneficiaries. Such inartful drafting of a deed – which is a frequent occurrence in Texas instruments and affects thousands, if not more, of properties in the state – does not deserve the harsh result of invalidation where the trust exists and the grant was intended.

II. The Case Law Does Not Support Voiding a Deed Conveying Title into a Trust.

The cases relied upon by the District Court to support its holding are plainly distinguishable from the present facts and do not merit a finding that all deeds naming only a trust as grantee are void. The District Court cites *Hollis v. Lynch* to find that a trust is not a valid grantee because “[a] trust cannot possess anything as it is not an entity under Texas law.” But this quote is taken out of context and oversimplifies the opinion, in which this Court found that:

In Texas, a “trustee is vested with legal title and right of possession of the trust property but holds it for the benefit of the beneficiaries, who are vested with equitable title to the trust property ... ***Thus, Hollis, a person, would in fact possess the machinegun even if he is a trustee.*** A trust cannot possess anything as it is not an entity under Texas law.”

827 F.3d 436, 443 (5th Cir. 2016) (emphasis added). Hollis made application to manufacture a firearm as the trustee, and Hollis, as trustee, was in title to the machinegun. Relying on these facts, the Court correctly determined that the trustee would be in possession of the firearm, holding that “***Hollis*** is subject to Section

922(o)'s ban on possessing a machinegun.” *Id.* (emphasis added). Thus, the purpose and effect of title in the name of the trust is to vest title in the name of the trustee. Nothing in *Hollis* stands for the idea that a conveyance into the name of a trust is a meaningless instrument and of no effect. Mere inartful drafting of a deed or ignorance of Texas trust law does not empower a court to ignore the clear intent of a deed to a trust and the existence of the fiduciary relationship between trustee and beneficiary for the purpose of vesting title.

The District Court also relied on *Parham Family Limited Partnership v. Morgan* to conclude that “a deed is void if the grantee is not in existence at the time the deed is executed.” [434 S.W.3d 774, 787](#) (Tex. App.—Houston [14th Dist.] 2014, no pet.). But *Parham* involved a fraudulent transfer where the grantee never existed or came into existence, and the court of appeals explicitly found that the deed was void as a fraudulent transfer. *Id.* at 788. Here, the District Court did not find that the trust relationship was not in existence, but that the trust was not a legal entity. Thus, *Parham* is distinguishable as the trust relationship existed¹ and the parties clearly intended to correctly vest title in the trustee, as shown by the multiple correction instruments.

Simply put, stringing together the holdings in *Hollis* and *Parham* to conclude

¹ If this Court finds that the trust relationship did not exist at the time of the deed, then TLTA respectfully requests the Court make that clear.

that a deed naming only a trust as grantee is void is a “form over substance” result that should be rejected. Any benefit from a judicial extension of a quick summarization and over simplistic reading of these cases is grossly outweighed by the substantial uncertainty and confusion the District Court’s ruling will create in Texas real property titles.

III. The Deed Could Be Corrected.

The District Court recognized that the Deed could be corrected under the Texas correction statutes in Texas Property Code §§ 5.027 – 5.031, but held that a material correction was impossible because the trust was not a “legally recognizable entity” and therefore could not sign the correction instrument. This is circular reasoning and an untenable result. If a drafting error in a deed is admittedly correctable, then there must be a valid means to correct the error and provide a resolution to current owners and lenders. Moreover, avoidance of the court system when all parties to the deed are in agreement to correct the error is a fundamental basis of the Texas correction statutes.

a. A Non-Material Correction Instrument Under § 5.028 Was Sufficient to Correct the Deed.

The District Court erred in finding that naming of a trustee as grantee is not a non-material correction under Texas Property Code § 5.028, as clarification of an existing grantee falls squarely within the non-material correction language of the statute. Subsection (a)(2)(A) provides that a correction instrument may be used for

“an addition, correction, or clarification of a party’s name, including the spelling of a name, a first or middle name or initial, a suffix, an alternate name by which a party is known, or a description of an entity as a corporation, company, or other type of organization . . .” (emphasis added). Under the laws of statutory construction, the listing of potential non-material revisions is merely an example of specific corrections under § 5.028, not an exhaustive list of all possible clarifications. Correcting the record title grantee to be the trustee is nothing more than a clarification of the original party’s name, as the original parties intended the property to be a part of the trust and the trust relationship plainly existed. Legally, the trustee holds record title to the trust property as a fiduciary of the trust beneficiaries, and the correction of the drafting error simply effectuates the intent of the caselaw. Moreover, reliance on *AIC Mgmt. Co. v. AT&T Mobility, LLC* to support a conclusion that a “substitution of parties” constitutes a material correction under § 5.029 is misplaced as the parties stipulated at trial that a material correction was required and the court never ruled that clarifying the grantee as the trustee of the trust rather than the trust required a material correction. No. 01-16-00896-CV, 2018 WL 1189865, at *8 (Tex. App.—Houston [1st Dist.] Mar. 8, 2018, pet. denied).

b. A Deed into a Trust Can Be Corrected Under § 5.029 with the Trustee Signing for the Original Grantee.

The District Court’s holding that the Deed could not be corrected under § 5.029 because the trust was not a “legally recognizable entity” and therefore could

not sign the correction instrument is simply incorrect. There was no finding that the trust was not in existence at the time the Deed and the correction instruments were executed, and the trustee is legally entitled to act on behalf of the trust. While technically speaking, a trust may not hold record title to real property, there is no reason why the trustee acting on behalf of the trust cannot sign a correction instrument under § 5.029. That is the essence of the trustee's role – to act on behalf of the trust and its beneficiaries.

If the District Court's opinion is allowed to stand, the gap in title caused by a deficient deed becomes a permanent part of that property's chain of title that can never be remedied. This is an unsupportable result where the original parties plainly intended to vest title in the existing trust. If vesting directly into the trust was incorrect, the parties must have an opportunity to correct what is at best an error of form over substance.

IV. Even if a Material Correction is Not Effective, the Correction Instrument Constitutes a New Conveyance.

According to the District Court, “[t]he original conveyance is invalid. No amount of correction instruments filed with the recording office will change that.”

Id. However, the District Court never explains why a correction instrument signed by all parties that somehow fails to meet the technical requirements of § 5.029 cannot serve as a new conveyance. A material correction instrument by necessity must contain all the elements of a valid conveyance, including a grantor, a grantee, a

description of real property, and conveyance language. In practice and pursuant to the Texas State Bar Form, a material correction deed is identical to a standard warranty deed, but with an additional paragraph explaining what was corrected and the notarized signatures of the original parties to the warranty deed. Thus, a correction deed is still a deed and should vest title in the properly-named trustee grantee. Although recognizing the material correction instrument as a deed would not relate back in priority to the original filing, it would at least cure gaps in title arising from deeds into the name of the trust under the legal principle of after-acquired title. At an absolute minimum, such a remedy must be available to prevent the harsh result of the District Court's opinion.

V. In the Alternative, the Question of the Validity of a Deed into a Trust Should be Certified to the Texas Supreme Court.

In the alternative, TLTA respectfully requests this Court certify the issues in this case regarding trusts and use of the Texas Property Code correction statutes. Pursuant to Texas Rule of Appellate Procedure 58, the Texas Supreme Court is empowered to answer any questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent. As noted above, there is no Texas state or federal court case holding that a deed conveying title to a trust, as opposed to a trustee, is void. Certification would utilize the special expertise the Texas Supreme Court has recently developed analyzing correction instruments in

Broadway National Bank v. Yates Energy Corporation, [631 S.W.3d 16](#) (Tex. 2021), *Concho Resources, Inc. v. Ellison*, [627 S.W.3d 226](#) (Tex. 2021), and other similar cases. Additionally, because of the importance to the legal profession and general public dealing with real estate, it is probable the correction statutes will receive state legislative attention in the next regular session in 2023. An opinion by the Texas Supreme Court providing guidance would be immensely beneficial. This case presents unsettled issues critical to the State of Texas recording and correction statutes and the validity of innumerable chains of title. Certifying the issues will avoid potential inconsistency leading to forum shopping, and promote judicial economy and efficiency.

CONCLUSION

While a technical reading of the relevant case law precludes conveying title to Texas real property directly to a trust, the District Court's opinion goes too far in finding such a deed void. The lower court's holding is a draconian reaction to ignorance of the law or poor drafting that defeats the intent of the parties and will inject unnecessary confusion and uncertainty into untold numbers of existing property titles in Texas. To effectuate the plain intent of the parties to the deed and protect unwitting subsequent purchasers and creditors, TLTA respectfully requests that this Court clearly and explicitly permit a deed conveying title to a trust to be corrected pursuant to the non-material correction statute in Property Code § 5.028,

or at a minimum the material correction statute in § 5.029 with the trustee signing on behalf of the original trust grantee. If the Court finds that the correction statutes are not available in this instance, TLTA would ask that the Court recognize that a deed that is ineffective as a correction is still a valid deed that may at least cure gaps in the chain of title via the after-acquired title doctrine. In the alternative, TLTA suggests that the Court may certify this to the Texas Supreme Court as one that directly impacts the status of real property in the State of Texas and its unique statutory and common law history surrounding land titles.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because this brief contains 2,732 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2002 Version 16.012527.21214 (32 bit) in Times New Roman 14-point font.

Dated: December 13, 2021

/s/ Daryl W. Bailey
Daryl W. Bailey

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Amicus Curiae's Brief with the Clerk of the Fifth Circuit Court of Appeals through the Appellate CM/ECF system of the Court. I further certify that all participants in the case registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

Dated: December 13, 2021

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