

*In the
Fourteenth Court of Appeals*

FILED IN
14th COURT OF APPEALS
HOUSTON, TEXAS
11/23/2021 9:56:21 AM
CHRISTOPHER A. PRINE
Clerk

No. 14-21-00356-CV

**Mary Helen Gill, Appellant,
v.
Shawna Vordokas, Appellee,**

**On Appeal from the Probate Court Number Four of Harris County
Trial Court Cause No. 470396**

Lewis Chandler
SBN: 24036350
THE CHANDLER LAW FIRM
4141 Southwest Freeway; Suite 300
Houston, TX 77027
[Tel.] (713) 228-8508
lewis@chandlerlawllp.com

Seth Kretzer
SBN: 24043764
LAW OFFICES OF SETH KRETZER
9119 South Gessner; Suite 105
Houston, TX 77074
[Tel.] (713) 775-3050
seth@kretzerfirm.com

ATTORNEYS FOR APPELLANT, MARY HELEN GILL

ORAL ARGUMENT

Appellant requests oral argument.

IDENTITIES OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a), a complete list of the names of all interested parties is provided below:

Appellant

MARY HELEN GILL

Counsel

Seth Kretzer
9119 South Gessner; Suite 105
Houston, TX 77074

Lewis Chandler
4141 Southwest Freeway; Suite 300
Houston, TX 77027

Appellee

Shawna Vordokas

Counsel

John Elliott
952 Echo Lane; Suite 330
Houston, TX 77024

TABLE OF CONTENTS

ORAL ARGUMENT	i
IDENTITIES OF PARTIES AND COUNSEL	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
STATEMENT OF THE ISSUES	7
STATEMENT OF FACTS	7
SUMMARY OF ARGUMENT	10
ARGUMENT	10
I. The Probate Court Reversibly Erred in Denying Ms. Gill’s Statutory Bill of Review.....	10
A. Standards of Review	10
B. Form and Function Of A Statutory Bill of Review Under The Probate Code	11
C. Finality Of The March 2019 Judgment Is Edentulous Viz The Statutory Bill of Review	13
D. Ms. Gill Established Common Law Marriage to Johnson.....	13
II. No Res Judicata Bar	14
A. The Judgment Declaring Heirship Was Not a Final Judgment on the Merits.....	15
1. Ms. Gill was Not a Party or In Privity with a Party to the Heirship Determination.....	18

2.	Filing a Motion for New Trial is Not a Second Action that Would Satisfy the Third Element of Res Judicata	22
B.	Ms. Gill was not Required to Appeal the Judgment Declaring Heirship or Motion for New Trial	24
	CONCLUSION	25
	CERTIFICATE OF SERVICE	26
	CERTIFICATE OF COMPLIANCE	26

TABLE OF AUTHORITIES

Cases

<i>Amstadt v. United States Brass Corp.</i> , 919 S.W.2d 644 (Tex. 1996)	15
<i>Benson v. Wanda Petroleum</i> , 468 S.W.2d 361 (Tex. 1971)	19-20, 21
<i>Buster v. Metropolitan Transit Authority</i> , 835 S.W.2d 236 (Tex. App.—Houston [14 th Dist.] 1992, no pet)	15
<i>Caldwell v. Barnes</i> , 154 S.W.3d 93 (Tex. 2004)	12
<i>Dickey v. Club Corp.</i> , 12 S.W.3d 172 (Tex. App.—Dallas 2000, pet. denied)	11
<i>Eris v. Phares</i> , 39 S.W.3d 708 (Tex.App.-Houston [1st Dist.] 2001, pet. denied)	14
<i>In re Estate of Blevins</i> , 202 S.W.3d 326 (Tex. App.—Tyler 2006)	15
<i>In re Estate of Bruce Clayton Howard</i> , 543 S.W.3d 397 (Tex. App.—Houston [14 th Dist.] 2018, pet. denied)	16
<i>In re Jackson v. Honorable Gary H. Gatlin</i> , memorandum opinion, nos. 12-11-00341- CV and 12-11-00342-CV (Tex. App.—Tyler July 18, 2012, orig. proceeding)	22
<i>In re: Estate of Bruce Clayton Howard, Deceased</i> , 543 S.W.3d 397 (Tex App.—Houston [14 th Dist.] 2018, pet. denied)	18
<i>Kholaif v. Safi</i> , 14-20-00218-CV, 2021 WL 4999071, * 4 (October 28, 2021)	11, 13
<i>McDonald v. Carroll</i> , 783 S.W.2d 286 (Tex. App.—Dallas 1989)	14
<i>Mills v. Mest</i> , 94 S.W.3d 72 (Tex.App.-Houston [14th Dist.] 2002, pet. denied)	14

<i>Nadolney v. Taub</i> , 116 S.W.3d 273 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)	12
<i>Nguyen v. Intertex, Inc.</i> , 93 S.W.3d 288 (Tex. App.—Houston [14th Dist.] 2002, no pet.).....	10
<i>State Farm Lloyds vs. Borum</i> , 53 S.W.3d 877 (Tex. App.—Dallas 2001, Pet. denied)	16
<i>Valdez v. Hollenbeck</i> , 465 S.W.3d 217 (Tex. 2015)	12
<i>Weaver v. State</i> , 855 S.W.2d 116 (Tex.App.-Houston [14th Dist.] 1993, no pet.)	14
<i>Winfield v. Renfro</i> , 821 S.W.2d 640 (Tex.App.-Houston [1st Dist.] 1991, writ denied).....	14
<i>Woods v. Kenner</i> , 501 S.W.3d 185 (Tex. App.—Houston [1st Dist.] 2016, no pet.)	11, 13

Statutes

Restatement (Second) of Judgments §34(2).....	20
Restatement (Second) of Judgments §34(3).....	21
Tex. Est. Code § 55.002.....	21
Tex. Est. Code § 55.251	10, 13
Tex. Est. Code § 55.251(a)	7, 12
Tex. Fam. Code § 2.401(a)(2).....	13

STATEMENT OF THE CASE

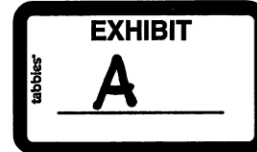
Bobby Joe Johnson died July 15, 2018. On September 21, 2018, four applicants filed an Application to Determine Heirship. CR.8. The document was signed by Shawna Vorkas and attorney Robert Petersen. CR.10.

Paragraph 8 read as follows, CR.9:

8. At the time of his death, Decedent was not married. Decedent was married to Eunice Pearl Johnson from December 23, 1955 until their divorce April 12, 1983. Decedent was thereafter married to Bernice Rose Johnson until their divorce on March 15, 1993. Thereafter Decedent did not re-marry but had a companion, Mary Helen Gill, whose address is 404 Tyler St, Tomball, Texas 77375.

This statement was untrue. Mary Helen Gill and the late Mr. Johnson had held themselves out as married for the past quarter century. Nor was Ms. Gill residing at 404 Tyler Street in Tomball. For at least the past 23 years, Ms. Gill had resided at 28535 Calvert Road with Mr. Johnson. CR.223 (Ms. Gill Affidavit). Vordokas necessarily knew where Ms. Gill really lived, as evidenced by the fact that she and her sister repeatedly tried to evict Ms. Gill from the Calvert Road address throughout the summer of 2018:

NOTICE TO VACATE



STATE OF TEXAS
COUNTY OF HARRIS

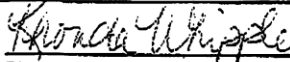
TO: Mary Gill

ADDRESS: 28535 Calvert Road, Tomball, TX 77375

As outlined in Article 24.005, Texas Property Code, you are hereby notified that 3 days after delivery of this notice, I demand possession of said property listed above, now occupied by you, which you illegally detain from me. Unless you vacate at once, I shall proceed to repossess said property which you now owe \$ 10,000.00 for rent thru the 4th day of August, 2018 and / or for the reason(s) listed herein: Non-payment of rent

I HEREBY DEMAND that you pay all past due rent and vacate the property at once or I shall proceed against you as the law directs.

SIGNED this 1 day of August 2018


Rhonda Whipple
10814 Elgar Lane,
Tomball, TX 77375
832-732-2059
Executor, Representing the Heirs and Estate of
BOBBY JOE JOHNSON

.....
This notice was executed at the above address on the 1 day of August 2018, at 1:35 o'clock p.m. by:

- delivering a true copy of this notice to Defendant in person.
- leaving a true copy of this notice with _____ a person over the age of 16 years, at the address listed above.
- posting a true copy of this notice to the premises according to the law. ✓

SIGNED this 13th day of August 2018.


Signature of person serving this notice

CR.237.

EXHIBIT

B

NOTICE OF LOCKOUT

ATTENTION: Mary Helen Gill
28535 Calvert Rd.
Tomball, TX 77377

DATE: September 15, 2018

DUE TO non-payment of delinquent rent and other charges, under authority of Section 92.0081, Texas Property Code, we have exercised our statutory right to change or modify the locks. This notice has been posted outside of the main entry.

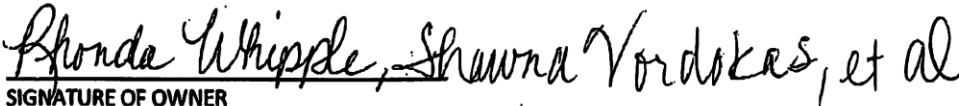
Regardless if you pay any of the delinquent rent, you may obtain a new key by making arrangements to pick up a copy of the key by phoning 281.844.6279. A phone call from anyone else is insufficient. A key will not be provided for anyone except you, Mary Helen Gill.

Also, please be advised of the criminal statute in the Texas Penal Code which relates to tampering with personal property which reads as follows:

"SECTION 28.03 CRIMINAL MISCHIEF. (s) A person commits an offense if, without the effective consent of the owners: ...he intentionally or knowingly tampers with the tangible property of the owner and causes pecuniary loss of substantial inconvenience to the owner or a third person."



SIGNATURE OF WITNESS



SIGNATURE OF OWNER

9/15/18

DATE OF NOTICE

CR.238. However, Ms. Gill was not provided notice of the application to determine heirship.

On December 3, 2018, Georgia Barker was appointed attorney ad litem. CR.27.

On March 13, 2019, Vordokas signed a "Statement of Facts" which read in relevant part that Johnson had not remarried since his prior divorce:

1. My name is SHAWNA VORDOKAS, and I am the daughter of Decedent, and applicant for this proceeding. **BOBBY JOE JOHNSON** ("Decedent") died in Tomball, Harris County, Texas on July 15, 2018, at the age 88. Four years have not elapsed since the date of Decedent's death.

2. So far as I know and believe, Decedent died without a Will.

3. No administration is pending upon Decedent's Estate and none is necessary.

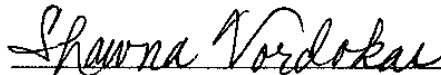
4. At the time of his death, Decedent was not married but had been married previously. The circumstances of each prior marriage of the Decedent are as follows:

CR.37.

9. His residence address was 28535 Calvert Rd, Tomball, HARRIS County, Texas. Decedent owned this real property in its entirety as his separate property.

10. All of Decedent's property was separate property.

Signed this 13th day of March, 2019.


SHAWNA VORDOKAS, Applicant
9006 Guinness Court, Houston, Texas 77095
281-844-6279

CR.39.

The Heirship Hearing was held March 13, 2019. RR.Vol.1. The judgment determining heirship was also signed March 13, 2019. CR.46-47. At no time prior to the judgment declaring heirship did Ms. Gill receive any notice.

On April 12, 2019, Ms. Gill filed a “motion to vacate judgment declaring heirship, motion for new trial, request for declaratory judgment, and request for disclosure”. CR.52. Vordokas filed an answer on May 8, 2019. CR.84. This motion was never expressly ruled on.

On November 5, 2020, Ms. Gill filed a statutory bill of review. CR.88. Vordokas filed an answer on January 7, 2021. CR.130. On March 26, 2021, Vordokas filed a Motion for Summary Judgment, CR.140, the nub of which sounded in *res judicata*: “[a]lthough now a party to the proceedings, Ms. Gill failed to perfect an appeal of the Judgment Declaring Heirship.” CR.141-142.

Hearing on the summary judgment motion was held May 20, 2021. The following order issued thereafter:

No. 470,396

IN THE ESTATE OF	§	IN THE PROBATE COURT
	§	
BOBBY JOE JOHNSON,	§	NO. FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

On this day, the Court heard and considered the Motion for Summary Judgment filed by SHAWNA KAY VORDOKAS, and the Court finds there is no genuine issue of material fact and Movant proved her affirmative defense of res judicata to the claims set forth in the Petition for Bill of Review filed by MARY HELEN GILL as a matter of law. It is therefore

ORDERED, ADJUDGED, and DECREED that the Motion for Summary Judgment is GRANTED. It is further

ORDERED, ADJUDGED, and DECREED that Plaintiff, MARY HELEN GILL, shall take nothing on any claims in her Petition for Bill of Review due to the affirmative defense / resulting from the failure to timely file an appeal in the underlying cause thereto, and the claims in the Petition for Bill of Review are DENIED. It is further

ORDERED that all other relief requested is denied, and each party shall bear his or her own costs. It is further

ORDERED, ADJUDGED, and DECREED that SHAWNA KAY VORDOKAS is allowed such writs and processes as may be necessary in the enforcement of this judgment.

SIGNED on the _____ day of _____, 2021.

Signed on: 05/30/2021
8:17:36 AM



CR.277.

STATEMENT OF THE ISSUES

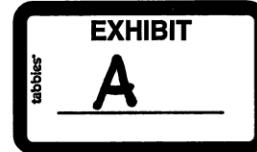
1. Whether the Probate Court reversibly erred in granting summary judgment in favor of Vardokas on procedural grounds- and not reaching the merits of Ms. Gill's statutory bill of review- because the court suffered an incorrect legal premise that failing to perfect appeal of a motion for new trial pretermitted relief under TEX. EST. CODE § 55.251(a).

2. Whether the Probate Court reversibly erred in the aspect of its Order resting on res judicata grounds.

STATEMENT OF FACTS

Mary Helen Gill and the late Mr. Johnson had held themselves out as married for the past quarter century. The Application for Heirship presented a demonstrably false statement that Ms. Gill resided at 404 Tyler Street in Tomball. For at least 23 years, Ms. Gill had resided at 28535 Calvert Road. CR.223 (Ms. Gill Affidavit). Vordokas necessarily knew where Ms. Gill really lived, as evidenced by the fact that she and her sister repeatedly tried to evict Ms. Gill from the Calvert Road address throughout the summer of 2018:

NOTICE TO VACATE



STATE OF TEXAS
COUNTY OF HARRIS

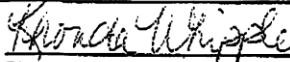
TO: Mary Gill

ADDRESS: 28535 Calvert Road, Tomball, TX 77375

As outlined in Article 24.005, Texas Property Code, you are hereby notified that 3 days after delivery of this notice, I demand possession of said property listed above, now occupied by you, which you illegally detain from me. Unless you vacate at once, I shall proceed to repossess said property which you now owe \$ 10,000.00 for rent thru the 4th day of August, 2018 and / or for the reason(s) listed herein: Non-payment of rent

I HEREBY DEMAND that you pay all past due rent and vacate the property at once or I shall proceed against you as the law directs.

SIGNED this 1 day of August 2018


Rhonda Whipple
10814 Elgar Lane,
Tomball, TX 77375
832-732-2059
Executor, Representing the Heirs and Estate of
BOBBY JOE JOHNSON

.....
This notice was executed at the above address on the 1 day of August 2018, at 1:35 o'clock p.m. by:

- delivering a true copy of this notice to Defendant in person.
- leaving a true copy of this notice with _____ a person over the age of 16 years, at the address listed above.
- posting a true copy of this notice to the premises according to the law. ✓

SIGNED this 13th day of August 2018.


Signature of person serving this notice

CR.237.

EXHIBIT

B

NOTICE OF LOCKOUT

ATTENTION: Mary Helen Gill
28535 Calvert Rd.
Tomball, TX 77377

DATE: September 15, 2018

DUE TO non-payment of delinquent rent and other charges, under authority of Section 92.0081, Texas Property Code, we have exercised our statutory right to change or modify the locks. This notice has been posted outside of the main entry.

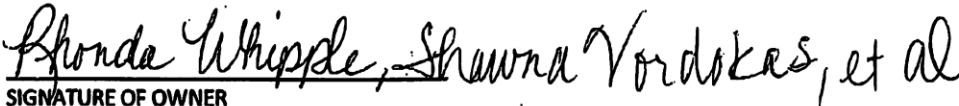
Regardless if you pay any of the delinquent rent, you may obtain a new key by making arrangements to pick up a copy of the key by phoning 281.844.6279. A phone call from anyone else is insufficient. A key will not be provided for anyone except you, Mary Helen Gill.

Also, please be advised of the criminal statute in the Texas Penal Code which relates to tampering with personal property which reads as follows:

"SECTION 28.03 CRIMINAL MISCHIEF. (s) A person commits an offense if, without the effective consent of the owners: ...he intentionally or knowingly tampers with the tangible property of the owner and causes pecuniary loss of substantial inconvenience to the owner or a third person."



SIGNATURE OF WITNESS



SIGNATURE OF OWNER

9/15/18

DATE OF NOTICE

CR.238.

The chasm between the statements made in the eviction matter versus the probate matter show that this was a scheme to deprive Ms. Gill of her inheritance rights.

SUMMARY OF ARGUMENT

The statute is clear: so long as the bill of review is filed timely, not “more than two years after the date of the order or judgment,” an interested person may “have an order or judgment rendered by the court revised and corrected on a showing of error in the order or judgment.” TEX. EST. CODE § 55.251. The former pendency of a motion for new trial [and the lack of appeal therefrom] is beside the point.

At the same time, res judicata (an alternative ground stated in the Probate Court’s Order) did not dispose of Ms. Gill’s Bill of Review because res judicata was not established as a matter of law.

ARGUMENT

I. THE PROBATE COURT REVERSIBLY ERRED IN DENYING MS. GILL’S STATUTORY BILL OF REVIEW

A. Standards of Review

“We review a trial court’s ruling on a petition for statutory bill of review for an abuse of discretion, indulging every presumption in favor of the trial courts ruling.” *Nguyen v. Intertex, Inc.*, 93 S.W.3d 288, 293 (Tex. App.—Houston [14th Dist.] 2002, no pet.). A trial court abuses its discretion if it acts in an unreasonable or arbitrary manner or without reference to guiding rules and principles.

“Our standard of review thus does not depend on whether the original probate court previously heard the same arguments. Our standard is based on whether a petitioner who files a timely bill of review has shown, by a preponderance of the evidence, that the trial court’s order or judgment contains substantial error.” *Kholaiif v. Safi*, 14-20-00218-CV, 2021 WL 4999071, * 4 (October 28, 2021).

Ms. Gill’s case presents in the posture of a summary judgment. The granting of a summary judgement is reviewed de novo to determine whether a party’s right to prevail is established as a matter of law. *Dickey v. Club Corp.*, 12 S.W.3d 172, 175 (Tex. App.—Dallas 2000, pet. denied).

B. Form and Function Of A Statutory Bill of Review Under The Probate Code

A bill of review is a separate, independent suit to set aside a judgment that is no longer subject to a motion for new trial or appealable. *Woods v. Kenner*, 501 S.W.3d 185, 190 (Tex. App.—Houston [1st Dist.] 2016, no pet.). There are two types of bills of review: equitable and statutory. *See id.* at 191. Ms. Gill petitioned for a statutory bill of review. The purpose of a statutory bill of review is “to revise and correct errors, not merely to set aside decisions, orders, or judgments rendered by the probate court.”

Nadolney v. Taub, 116 S.W.3d 273, 278 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

Ms. Gill filed her petition under section 55.251 of the Estates Code, which provides, in relevant part, that “[a]n interested person may, by a bill of review filed in the court in which the probate proceedings were held, have an order or judgment rendered by the court revised and corrected on a showing of error in the order or judgment, as applicable.”² Tex. Est. Code § 55.251(a). The error must be “substantial” and must be proven by a preponderance of the evidence. *Valdez v. Hollenbeck*, 465 S.W.3d 217, 226–27 (Tex. 2015); *Nadolney*, 116 S.W.3d at 278.

Thus, to prevail on a petition for bill of review under section 55.251, the petitioner must prove, by a preponderance of the evidence, that the trial court’s order or judgment contains substantial error. *Valdez*, 465 S.W.3d at 226–27; *Nadolney*, 116 S.W.3d at 278. The error need not appear on the face of the record and may be proved at trial. *Nadolney*, 116 S.W.3d at 278. If the petitioner meets her burden, the trial court vacates the erroneous order or judgment, and renders a revised and corrected one after a new trial. *Cf. Caldwell v. Barnes*, 154 S.W.3d 93, 97–98 (Tex. 2004) (per curiam) (involving equitable bill of review).

**C. Finality Of The March 2019 Judgment Is Edentulous Viz
The Statutory Bill of Review**

“A statutory bill of review under section 55.251 is a unique creature that allows any interested person to attack a judgment by bill of review after the appellate deadlines have expired.” *Kholaiif v. Safi*, 14-20-00218-CV, 2021 WL 4999071, * 4 (October 28, 2021) (citing *Woods v. Kenner*, 501 S.W.3d 185, 191 (Tex. App.—Houston [1st Dist.] 2016).

In other words, the former pendency of a motion for new trial [and the lack of appeal therefrom] is beside the point. The statute is clear: so long as the bill of review is filed timely, not “more than two years after the date of the order or judgment,” an interested person may “have an order or judgment rendered by the court revised and corrected on a showing of error in the order or judgment.” TEX. EST. CODE § 55.251.

This parameter of procedure- perhaps different from the usual course in collateral attack on final judgments- is the legal error on which the court must reverse and remand to the trial court.

D. Ms. Gill Established Common Law Marriage to Johnson

An informal or common-law marriage exists in Texas if the parties (1) agreed to be married, (2) lived together in Texas as husband and wife after the agreement, and (3) there presented to others that they were married. See Tex. Fam. Code § 2.401(a)(2); *Mills v. Mest*, 94 S.W.3d 72, 73 (Tex.App.-

Houston [14th Dist.] 2002, pet. denied). The existence of an informal marriage is a fact question, and the party seeking to establish existence of the marriage bears the burden of proving the three elements by a preponderance of the evidence. *Weaver v. State*, 855 S.W.2d 116, 120 (Tex.App.-Houston [14th Dist.] 1993, no pet.). An informal marriage does not exist until the concurrence of all three elements. *Eris v. Phares*, 39 S.W.3d 708, 713 (Tex.App.-Houston [1st Dist.] 2001, pet. denied) (citing *Winfield v. Renfro*, 821 S.W.2d 640, 645 (Tex.App.-Houston [1st Dist.] 1991, writ denied)).

Ms. Gill's notarized affidavit is at CR.61; she satisfied her pleadings requirements by at least a preponderance of the evidence. Hence, it was error to grant summary judgment on these grounds. *See, e.g., McDonald v. Carroll*, 783 S.W.2d 286, 288 (Tex. App.—Dallas 1989):

McDonald proved all the essential elements of his statutory bill of review. The probate court erred in granting Carroll's motion for summary judgment and in not granting McDonald's. We reverse the trial court's ruling granting Carroll's summary judgment, render judgment for McDonald granting him a statutory bill of review, and hold that he is entitled to recover an undivided one-half of the net community estate. We order the probate court to vacate its order dated October 3, 1985, approving the final accounting and remand this cause to the trial court for further proceedings consistent with this opinion and the Probate Code.

II. NO RES JUDICATA BAR

Res judicata does not bar a statutory bill of review:

The ordinary rules as to diligence in making motions for new trial and in appealing from the judgment complained of do not apply to statutory bills of review under section 31.

In re Estate of Blevins, 202 S.W.3d 326, 329 (Tex. App.—Tyler 2006) (issue of whether children still had the right to contest the validity of their father’s will under section 93 even though they were personally served with a copy of the initial application to probate the will).

Res judicata requires the following:

- a. a prior final judgment on the merits by a court of competent jurisdiction;
- b. identity of the parties or those in privity with them; and
- c. a second action based on the same claims as were raised or could have been raised in the first action;

Amstadt v. United States Brass Corp., 919 S.W.2d 644, 652 (Tex. 1996).

A. The Judgment Declaring Heirship Was Not a Final Judgment on the Merits

The Judgment Declaring Heirship is a final judgment on the merits declaring that Defendants were the sole and only heirs. However, the Judgment Declaring Heirship is *not a final judgment on the merits that Ms. Gill was or was not Mr. Johnson’s spouse*.

This Court has determined that an heirship proceeding did not fully litigate the common law status of a surviving spouse. *Buster v. Metropolitan Transit Authority*, 835 S.W.2d 236 (Tex. App.—Houston [14th Dist.] 1992, no pet). In that case, the issue was whether a

judgment by the probate court precluded Metro from litigating or contesting the existence of a common law marriage in a wrongful death suit. The probate court's judgement declaring heirship determined that appellant was the husband and sole surviving heir of the decedent. The Court opined that "in order to preclude litigation of the common law marriage issue, appellant had the burden of proving the facts sought to be litigated in the second action were fully and fairly litigated in the prior action ..." *Id.*, at 236. The Court concluded that there was nothing in the record to show that the common law marriage issue was fully and fairly litigated in the probate heirship proceeding. Although the defense in that case was collateral estoppel and not res judicata, the first element is the same for both defenses. *State Farm Lloyds vs. Borum*, 53 S.W.3d 877, 886 (Tex. App.—Dallas 2001, Pet. denied). ("[B]oth res judicata and collateral estoppel require that the parties involved in the second lawsuit be the same parties, or in privity with the parties involved in the first lawsuit").

This Court considered a similar issue in *In re Estate of Bruce Clayton Howard*, 543 S.W.3d 397 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). In that case, Mr. Howard was killed as a result of a tank explosion while he was at work. Ms. Sosa asserted she was informally married to Mr. Howard and was appointed administrator of his estate in an

uncontested heirship proceeding. Ms. Sosa then filed a claim for death benefits through the Division of Workers Compensation and later filed a wrongful death suit against Mr. Howard's employer and others in the probate court. The DWC hearing officer determined Ms. Sosa was not formally married to Mr. Howard and denied the death benefits. CES filed a traditional motion for summary judgment claiming that Ms. Sosa's common law status was determined by the DWC when the DWC held a hearing on the common law status and made findings of fact and conclusion of law regarding the common law marriage. During that hearing, Ms. Sosa presented affidavits and testimony as evidence to prove up her informal marriage to Mr. Howard. The Court concluded that the DWC conclusion is binding on the trial court and precludes Ms. Sosa from relitigating the common law marriage.

Sosa argued that before the summary judgment, the Court signed a judgment declaring heirship which concluded that Ms. Sosa was Mr. Howard's common-law spouse. The Court concluded that "because the heirship proceeding was uncontested and the issue of informal marriage was not fully and finally litigated in the heirship proceeding and CES was not a party or privy to the heirship proceeding, the heirship has no preclusive effect." *Id.* at 403

In this case, the issue of Ms. Gill’s status as a common law spouse was not litigated or even considered in the heirship proceeding because Vordokas intentionally precluded that right. In fact, Ms. Gill was not provided any notice of the heirship proceeding. It is undisputed that Ms. Gill did not participate in the heirship hearing. It is well settled that an uncontested heirship proceeding is not a determination of the merits of an informal marriage. *In re: Estate of Bruce Clayton Howard, Deceased*, 543 S.W.3d 397 (Tex App.—Houston [14th Dist.] 2018, pet. denied). Vordokas failed to cite any authority holding that an uncontested heirship proceeding which did not address any issue of an informal marriage is a “final judgment on the merits” of common law marriage. Mere conclusory statements with no supporting authority was wholly insufficient to support any contested issue. Vordokas failed to conclusively establish her first element of res judicata. Therefore, Vordokas’s Motion for Summary Judgment should have been denied.

1. Ms. Gill was Not a Party or In Privity with a Party to the Heirship Determination

Although Vordokas failed to conclusively establish the first element of res judicata which is sufficient to defeat her summary judgment as a matter of law, she also failed to conclusively establish Ms. Gill was a party or in privity with a party to the heirship proceeding.

Again, Vordokas asserted conclusory statements with no factual or legal support. Unfounded conclusory statements are insufficient to conclusively establish that Ms. Gill was a party to the heirship proceeding.

It is undisputed that Vordokas did not provide Ms. Gill with notice of the filing of the Application to Determine Heirship. It is further undisputed that Vordokas did not provide notice of the hearing on the Application to Determine Heirship. It is further undisputed that Ms. Gill had no knowledge of the heirship proceeding until Vordokas instituted eviction proceedings. It is undisputed that Ms. Gill did not participate in the heirship proceedings in any manner. Vordokas offered no evidence, let alone conclusive evidence, that Ms. Gill was a party to the proceedings that resulted in the purported final judgment on the merits. Instead, Vordokas argued that by filing a Motion to Vacate and Motion for New Trial *after* the heirship proceedings make her a party and satisfies the second element of res judicata. Vordokas cited no authority for her claim.

“The rules of res judicata rest upon the policy of protecting a party from being twice vexed for the same cause, together with that of achieving judicial economy in precluding a party who has had *a fair trial from relitigating the same issue* (emphasis added).” *Benson v. Wanda*

Petroleum, 468 S.W.2d 361 (Tex. 1971). In coming to its conclusion, the Texas Supreme Court recognized the Restatement (Second) of Judgments. The Court further stated “[D]ue process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party, or as a privy, and, where not so, that, at the least, the presently asserted interest was actually and adequately represented in the prior trial.” *Id.*, at 363. In *Benson*, Mrs. Benson was neither a party nor in privity to a party in the first personal injury trial filed by another person but relating to the same collision. She had no voice in the first trial and did not participate in the first trial. Wanda Petroleum argued that Ms. Benson was in privity with the other plaintiff. The Court concluded that the requirements of due process compel the conclusion that a privity relationship which will support application of the rules of res judicata did not exist in that matter. *Id.* at 364.

Moreover, Restatement (Second) of Judgments, which has been cited and recognized by many courts in Texas, including, the Texas Supreme Court, *supra*, specifically provides that “[A] party is bound by and entitled to the benefits of the rules of res judicata with respect to determinations made while he was a party . . .” Restatement (Second) of Judgments §34(2).

Assuming *arguendo* that filing a motion to vacate and motion for new trial made her a party, which it did not, Ms. Gill was clearly not a party when the heirship proceeding was decided. Is undisputed that Ms. Gill was not a party to the suit with respect to determinations made while she was not a party. Indeed, a person who is not a party to an action is not bound by the rules of res judicata. Restatement (Second) of Judgments §34(3).

Vordokas cited no authority that filing a motion for new trial well after the determination of heirship makes her a party, retroactively, to the heirship proceeding. Not only is Vordokas' position unsupported, such finding would clearly violate Ms. Gill's due process right to have her day in Court and have the issue of informal marriage decided by trial. *See Benson v. Wanda Petroleum, Id.* Tex Est. Code §55.002.

Because Vordokas has not- and cannot- conclusively establish that Ms. Gill was a party to the actual heirship hearing when the heirship was decided, the second element of res judicata also fails. Vordokas Motion for Summary Judgment should have been denied.

2. Filing a Motion for New Trial is Not a Second Action that Would Satisfy the Third Element of Res Judicata

Vordokas argued, again with no authority, that filing a motion for new trial is a “second action” which satisfies the third element of res judicata. Vordokas’s reliance that the mere filing of a motion to vacate and motion for new trial acts as an adjudication on the merits is incorrect.

A motion for new trial is not an “action” and is clearly not “a trial on the merits”. It is a procedural tool to vacate a prior order or judgment. The fact that it was overruled by operation of law does nothing other than keep the declaration of heirship unchanged. Since the declaration of heirship is not a final judgment on the merits of an informal marriage, *see In re: Estate of Bruce Clayton Howard, supra*, clearly a motion to vacate and motion for new trial cannot impose greater relief than the actual judgment. Ms. Gill’s requested relief was to vacate the judgment and allow an opportunity to present evidence of her common law marriage to Mr. Johnson. Even if the motion for new trial was granted, a trial would be required.

In *In re Jackson v. Honorable Gary H. Gatlin*, memorandum opinion, nos. 12-11-00341- CV and 12-11-00342-CV (Tex. App.—Tyler July 18, 2012, orig. proceeding) the relators filed a mandamus proceeding

seeking an order to the trial court to vacate its order denying a motion for partial summary judgment. The relators alleged in their summary judgment that the heirship of Buster Jackson had been declared in a judgment. They alleged further that Janine Hughes filed a motion for new trial asserting that she was Mr. Jackson's common law wife which they claimed was an impermissible attempt to relitigate Mr. Jackson's heirship and was barred by res judicata. They further alleged that the trial court had lost plenary power to modify the judgment declaring heirship. The trial court denied relators' motion. They then filed a mandamus proceeding and request to stay the hearing on Ms. Hughes' claim. The hearing proceeded as scheduled. After hearing evidence, the trial court denied Ms. Hughes' common law marriage claim. The Court of Appeals determined the mandamus proceeding as moot and dismissed same. *Id.*

Vordokas argued that by filing the motion for new trial she had the "opportunity to raise and litigate her claims of purported common law spouse." Vordokas claimed, with no legal authority to support such claim, that because the motion was overruled by operation of law the final judgment of heirship became binding upon her and, therefore, she had an additional sixty days to appeal. As discussed above, the declaration of heirship is not a final judgment on the merits of Ms. Gill's informal

marriage issue. Accordingly, a motion for new trial cannot transform a declaration of heirship into something it was never before.

Importantly, it is disingenuous for Vordokas to seek relief under res judicata claiming that Ms. Gill had “an opportunity to raise her claim by filing a motion for new trial” when Vordokas intentionally did not provide Ms. Gill with any notice of the heirship proceeding. Vordokas’ wrongful conduct should not be rewarded. If a party can commit fraud on an estate by refusing to provide notice to all potential heirs and when a person finds out and complains after the fact is precluded by res judicata, the policies of res judicata and due process are destroyed.

Vordokas failed to conclusively satisfy any of the three elements of her affirmative defense of res judicata. Therefore, Vordokas’ motion for summary judgment should have been denied.

B. Ms. Gill was not Required to Appeal the Judgment Declaring Heirship or Motion for New Trial

Ms. Gill properly filed a statutory bill of review and served Mr. Johnson’s adult children who were parties to the heirship proceeding. Ms. Gill was not required to file an appeal of the Judgment Determining Heirship or a motion for new trial. Vordokas failed to conclusively establish the elements of her affirmative defense of the res judicata and the statutory bill of review is proper and is currently pending before this Court.

In other words, Ms. Gill did not have to file a motion for new trial before the court's 2019 judgment became final. That she did so does not elicit any sort of res judicata affect viz-a-viz the timely filed statutory bill of review.

CONCLUSION

This Court should reverse and remand to the trial court.

Dated: November 22, 2021

Respectfully submitted,

Lewis Chandler
SBN: 24036350
THE CHANDLER LAW FIRM
4141 Southwest Freeway; Suite 300
Houston, TX 77027
[Tel.] (713) 228-8508
lewis@chandlerlawllp.com

Seth Kretzer
SBN: 24043764
LAW OFFICES OF SETH KRETZER
9119 South Gessner; Suite 105
Houston, TX 77074
[Tel.] (713) 775-3050
seth@kretzerfirm.com

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief were served on all parties by electronic filing on the 22nd day of November 2021.

/s/ Seth Kretzer

Seth Kretzer

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 4,000 words.

/s/ Seth Kretzer

Seth Kretzer

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Seth Kretzer
Bar No. 24043764
seth@kretzerfirm.com
Envelope ID: 59417830
Status as of 11/23/2021 10:01 AM CST

Associated Case Party: MaryHellenGill

Name	BarNumber	Email	TimestampSubmitted	Status
Seth Kretzer	24043764	seth@kretzerfirm.com	11/23/2021 9:56:21 AM	SENT
Sherry ScottChandler		sherry@chandlerlawllp.com	11/23/2021 9:56:21 AM	SENT
Christy Dorman		christy@chandlerlawllp.com	11/23/2021 9:56:21 AM	SENT
Lewis Chandler		Lewis@chandlerlawllp.com	11/23/2021 9:56:21 AM	SENT
Jesseca Wilson		jesseca@kretzerfirm.com	11/23/2021 9:56:21 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
John Thomas Elliott	24055444	john.elliott@scslawyer.com	11/23/2021 9:56:21 AM	SENT