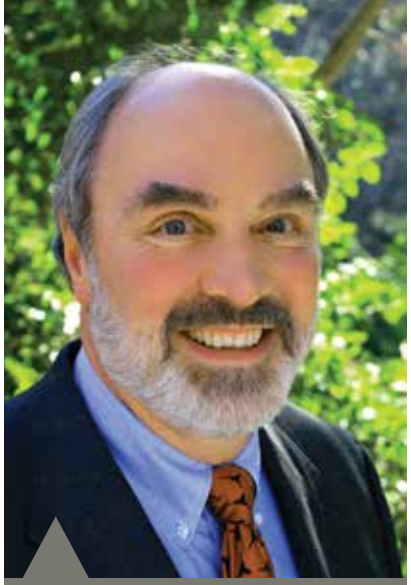
LAW IN ORDER
The Warren Report

TAKING EVICTIONS TO THE NEXT LEVEL



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Given the large number of eviction suits filed, one might think there are many courts writing appellate opinions on eviction issues. That is not the case. All evictions must begin in the Justice Court, and that court is not a court of record. As a result, when there is an appeal from the Justice Court, it is a de novo appeal to the County Court at Law.

In the eviction context, only cases disposed of in the County Court at Law are eligible for appeal to a Court of Appeals. Once at that judicial level, the cases on appeal often take upwards of many months to be resolved. It is rare, moreover, for the Texas Supreme Court to consider eviction appeals, especially a residential eviction.

The eviction rules are different in Justice Court and County Court when it comes to non-attorney representation.

There were some interesting Court of Appeals decisions published in 2018 that addressed issues typically found in an eviction case. This *Law in Order: The Warren Report* will discuss some of these very recent appellate decisions. Just because they are recent does not mean they are the best. But as we enter calendar year 2019, one might argue these 2018 cases are already one year old!

The case of *Ingram v. Barragan* was delivered and filed August 8, 2018. The trial court was County Court at Law Number Two of Bexar County, Texas; the Court of Appeals was the Texas Fourth Court of Appeals in San Antonio. Stephanie Ingram (Ingram) appealed the trial court's judgment in a forcible detainer (eviction) action granting Alberto Barragan (Barragan) possession of a residential property in San Antonio and also awarding Barragan unpaid rent.

The parties entered into an agreement to lease a house owned by Barragan for one year. The lease was to expire in June 2017. Ingram, however, failed to pay rent for February and March 2017. This caused an eviction for non-payment of rent to be filed. The Justice Court entered judgment in Barragan's favor, awarding him possession of the premises plus judgment for unpaid rent totaling $1,900.

Ingram appealed the Justice Court judgment to the County Court at Law. Thereafter, she made a huge mistake. She failed to appear at trial. Instead, Ingram chose her daughter, Siarria Ingram, as her representative in court. While the trial was taking place in San Antonio, Stephanie Ingram remained in Austin. When her daughter attempted to make an appearance at trial on the tenant's behalf, the trial court advised the daughter she could not represent Ingram because she was not an attorney.

The trial proceeded, but no evidence was offered on behalf of the tenant. As expected, that resulted in a judgment for possession, unpaid rent, court costs and interest in favor of Barragan.

This case is interesting because it concerns representation by a non-attorney in the County Court. In her brief filed with the Court of Appeals, the tenant Ingram argued that the trial court should have allowed her daughter to appear and present evidence as the tenant's "authorized representative" at trial. But Ingram faced two major problems. First, the eviction rules are different in Justice Court and County Court when it comes to non-attorney representation. Second, she was the only one with personal knowledge of the facts the tenant might want the trial court to consider. Yet she chose not to appear to present any of those facts.

Section 24.011 of the Texas Property Code provides that "...in eviction suits *in the Justice Court,* parties may represent themselves or be represented by their authorized agents, who need not be attorneys..." The trial, which was the subject of the appeal, however, occurred *in the County Court at Law.* That same section of the Property Code provides that "... in an appeal to the County Court, however, only an owner of a multifamily residential property or a property owner that is a business entity may be represented by a non-attorney agent..."

Ingram's mistake was that she relied upon a statutory provision that only applies to business entities or owners of multifamily residential property. Ingram was an individual

tenant, and therefore neither.

There are two key take-aways from the *Ingram v. Barragan* case. First, always read the statutes and rules upon which you intend to rely. They rarely have universal application to all persons and factual scenarios. Second, realize that you need to be well prepared for your day in court, which needs to be taken very seriously.

The case of *Eckman v. Northgate Terrace Apartments* was an eviction appeal from a County Court at Law of Travis County. It was appealed to the Third Court of Appeals in Austin, which filed its opinion June 28, 2018.

Anthony Eckman appealed the trial court's judgment granting possession of an apartment he occupied to Northgate Terrace Apartments, LLC. The case addressed some interesting issues concerning ownership of the apartments and assumed name usage. When the lease was entered into, "Northgate Terrace Apartments" was designated as the owner of the leased premises. Jelita Mills and her husband, Ronald Mills, owned the premises at the time the lease was signed. In 1996, they had filed an assumed name certificate in which Ronald Mills identified Northgate Terrace Apartments as his assumed name. Such certificates, however, expire after 10 years.

In February 2016, before the duration of the assumed name certificate had expired, the Millses sold the premises to a third-party, *"Northgate Terrace Apartments, LLC."* That occurred while the eviction trial was pending in the County Court at Law.

The tenant, Eckman, contended the entity that filed the eviction suit, the one that had no LLC in its name, had no standing to file the eviction case. He claimed the court lacked jurisdiction. The court pointed out that a plaintiff's failure to have a valid assumed name certificate on file is not a jurisdictional issue but rather a capacity issue. Legally, the difference would be whether one would have an opportunity to cure the expired certificate or whether the case would have to be dismissed.

The tenant, Eckman, did not take action until after Jelita and Ronald Mills had sold the apartments to Northgate Terrace Apartments, LLC. After that sale, the parties amended the pleadings, substituting the LLC for the individual (Ronald Mills) who had owned the assumed name of Northgate Terrace Apartments.

The court notes the record clearly demonstrates the correct plaintiff (i.e., the owner of the premises) has been involved since the filing of the original petition. The court also notes "...because Jelita and Ronald Mills were the owners of the premises at the time the lease was executed and at the time the suit was filed, they had standing to maintain the suit, despite the misnomer..."

The Eckman case appears, from language in the opinion, to have had the TAA lease as the controlling agreement. There is an interesting discussion in the appellate court opinion about the month-to-month automatic renewal that occurs at the end of the lease term, (under paragraph 3 of the TAA lease), unless either party gives the requisite notice of termination or intent to move out as required by paragraph 37 of the TAA lease.

Here, Eckman sought a reversal of the County Court at Law judgment in favor of the landlord by arguing the notice of non-renewal - given to him by the landlord - was ineffective under the provisions of paragraph 37. The appellate court ruled while paragraph 37 of the lease requires *a tenant to obtain from the landlord* written acknowledgment of receipt of the tenants' 30-day notice of intent to move out, the lease does not impose the same burden on the landlord. To be effective, the landlord's notice of termination does not require a written acknowledgment of receipt by the tenant.

A key take-away from this case is always read your lease. The same obligations that apply to one party may not apply to the other.

To be effective, the landlord's notice of termination does not require a written acknowledgment of receipt by the tenant.

The case of *Schor v. U.S. Bank NA* generated another interesting 2018 appellate opinion. This August 9, 2018, decision comes from the Seventh Court of Appeals in Amarillo. It involved an appeal of a case from a County Court at Law in Denton County, Texas.

The *Schor* case was an appeal from a forcible detainer suit concerning the adequacy of the notice to vacate. The tenant argued the notice was inadequate and that she should win as a result. The Court of Appeals determined otherwise.

To begin with, the appellate court noted the facts and procedural background were not in dispute. The only matter at issue, it noted, is whether U.S. Bank provided proper notice to vacate as required by Section 24.005 of the Texas Property Code.

This eviction lawsuit did not involve a lease, rather a change of ownership of the premises following

a foreclosure sale. Kristin and William Schor were purchasing the premises. They did not adhere to their contract, which led to a foreclosure by the lender. Following foreclosure, the Schors remained in possession, and legally became what are known as "tenants at sufferance." U.S. Bank became the new owner at the foreclosure sale after the old owners, the Schors, were foreclosed upon. The bank no longer wanted the Schors to occupy the premises, so they gave them a three-day notice to vacate addressed to Kristin Schor, William Schor and "OCCUPANT."

Contrary to common sense, *the notice to vacate was mailed to the property address,* by both certified mail - return receipt requested, and "regular mail." The certified mail notices were returned, *undelivered.* The notices to vacate sent by regular mail were not returned.

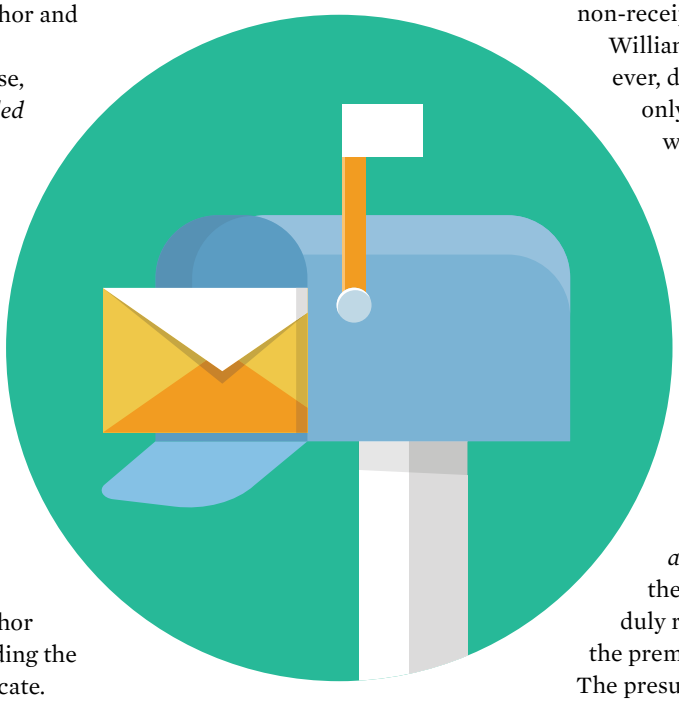
"Contrary to common sense, the notice to vacate was mailed to the property address..."

At trial, William Schor testified that *he* never received the notice sent by regular mail. Kristin Schor, however, did not testify. As a result, only the testimony of William Schor was presented at trial regarding the adequacy of the notice to vacate.

The appellate court discussed the acceptability, under the statute, of the giving of a notice to vacate by either regular mail, registered mail, or certified mail - return receipt requested, all of which must be sent to the premises in question. Mailing, delivery and receipt became the issue here.

First, the appellate court noted that when a letter, properly addressed and postage prepaid, is deposited with the United States Postal Service, there exists *a presumption* that the notice was duly received by the addressee. The court went on to state that this presumption, however, *may be rebutted* by an offer of proof of non-receipt. In the absence of proof of non-receipt, said the Amarillo Court of Appeals, the presumption stands and has the force of a rule of law.

U.S. Bank took the position that section 24.005(f) of the Texas Property Code requires only that notice be provided, not that the tenant-at-sufferance actually received the notice. Essentially, U.S. Bank contended that proof of sending notice is sufficient and that receipt is irrelevant. "While we disagree with U.S. Bank's position that "receipt" is irrelevant, we do find the evidence is legally and factually sufficient to establish statutorily adequate service of notice to vacate pursuant to section 24.005..."



Remember, the certified mailings in this case were returned, *undelivered.* The Court of Appeals stated, therefore, that it was confronted with *actual evidence* establishing that the certified mail sending of the notice to vacate was returned to the sender without being claimed by the addressee. In such circumstances, *the unclaimed notice does not establish effective notice.*

With regard to the mailings by "regular mail," the evidence was clear William Schor resided at the address in question. He testified at trial that he never received the notice by regular mail. As such, the presumption of delivery to *him* was rebutted based on William Schor's offer of proof of non-receipt.

William Schor's testimony, however, did not establish he was the only occupant of the home when the notice was sent. He also failed to establish he was the only person who could have received the notice if it was delivered as addressed. There were two other potential addressees who could have received the notice: Kristin Schor and OCCUPANT. The court ruled that *in the absence of evidence that none of the addressees received the notice,* the presumption the notice was duly received by an addressee, at the premises in question, still exists. The presumption was not rebutted and, therefore, is legally and factually sufficient to satisfy the statutory requirements of the Property Code.

The key take-away of this case is bad things can and do happen when notices to vacate are mailed. Personal delivery to the premises, even if taped to the inside or outside of the main entry door, is far and away preferable.

The case of *Moore v. Subia* also involved delivery of notices by the landlord. This was another opinion from the San Antonio Fourth Court of Appeals, delivered and filed May 16,

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2018. It was an appeal from a County Court at Law in San Antonio.

In the Justice Court, David Subia brought a forcible detainer action against Anthony and Joann Moore. Judgment for possession plus attorney fees was awarded to Subia in the Justice Court. The Moores appealed. Evidence showed that the Moores had a six-month lease to rent a parcel of real property owned by Subia, which was adjacent to Subia's residence. At the end of the six-month term, the Moores continued in possession (while paying rent each month) but became holdover tenants by remaining on the property without entering into a new lease.

The lease between Subia and the Moores *did not contain an automatic renewal provision.* The lease in question did not state that if the tenant holds over after the expiration of the lease, the lease will automatically convert the agreement to a month-to-month tenancy. It is also clear Subia and the Moores did not enter into a new lease following expiration of the original lease.

In fact, following expiration of the original lease, the Moores continued to possess the property and pay monthly rent, which Subia accepted. At the end of July 2015, the original lease expired. In early February 2016, Sylvia advised Mr. Moore that he had plans to move his parents onto the subject property, and that the Moores needed to move out by April 2016. The Moores did not surrender possession of the property.

The appellate court commented how the Texas Supreme Court had established a common-law holdover rule. Under that rule, when the landlord has knowledge of the tenants' possession, and continues to accept the rent without objection to the continued possession, the tenant becomes a tenant-at-will. Under that scenario, the terms of the prior lease will continue to govern the new arrangement absent an agreement to the contrary.

This case is interesting because *it requires two notices* before the owner can regain possession *when there is an at-will tenancy.* First, the owner must make demand upon the tenant to surrender possession of the property. Following that demand, the tenant must continue to hold over. Second, after a notice to terminate the tenancy-at-will is given, a notice to vacate must also be given. Stated another way, due to the at-will nature of the tenancy (because the lease contained no automatic renewal provision), the at-will tenancy created by the payment and acceptance of rent needed to be terminated under Section 91.001 of the Texas Property Code.

Once that is done, a written notice to vacate follows. The court noted, however, the written notice to vacate is not a step for terminating the lease.

It is a separate notice, required for obtaining possession of the premises via forcible detainer once the lease has been terminated.

The San Antonio Court of Appeals noted that unlike the notice to vacate, the Property Code does not require the landlord to give a holdover tenant *written notice* of his intention to terminate the lease or a month-to-month tenancy.

Another interesting twist to the Moore case concerns the delivery of the notice to vacate. Noteworthy it is the court's discussion of the posting of the notice to vacate *on the inside of the Moore's front gate.* Subia testified that on the day he posted the notice, there was a lock on the Moore's gate for which he did not have a key. Because the gate was locked, Subia could not enter, and so, he affixed the notice inside of the gate because Subia was able to reach the inside of the gate with his hand.

The court noted a reasonable jury could have concluded the Moore's front gate constituted the "main entry door" of the premises. The court referred to Section 24.0061(a) of the Texas Property Code, which defines "premises" as "the unit that is occupied or rented and any outside area or facility that the tenant is entitled to use under a written lease."

The key take-away from the *Moore* case is compliance with the law is essential. Here, the law created the agreement between the parties since the expired document itself did not. Also, the law contained a definition permitting the interpretation that a locked gate becomes the main entry door.

In conclusion, the foregoing discussion illustrates how the facts and issues determining the ultimate outcome of a lawsuit are often not what one would expect. Without a doubt, calendar year 2019 will bring more interesting legal opinions relating to evictions. Not only that, but 2019 is a year in which the Texas Legislature will be in session. Stay tuned.