RECENT DEVELOPMENTS FROM THE TEXAS COURTS

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EDUCATION

B.A., Summa Cum Laude, Eastern Michigan University (1976)
J.D., Summa Cum Laude, Ohio State University (1979)
LL.M., University of Illinois (1983)
J.S.D., University of Illinois (1990)

SELECTED PROFESSIONAL ACTIVITIES

Bar memberships: United States Supreme Court, Texas, Ohio (inactive status), Illinois (inactive status)
Member: American Law Institute; American College of Trust and Estate Counsel (Regent and Academic Fellow); American Bar Foundation; Texas Bar Foundation; Texas State Bar Association
Editor-in-Chief, REPTL Reporter, State Bar of Texas (2013-present)
Keeping Current Probate Editor, *Probate and Property* magazine (1992-present)

CAREER HISTORY

Private Practice, Columbus, Ohio (1980)
Instructor of Law, University of Illinois (1980-81)
Professor, St. Mary's University School of Law (1981-2005)
Governor Preston E. Smith Regents Professor of Law, Texas Tech University School of Law (2005 – present)
Visiting Professor, Boston College Law School (1992-93)
Visiting Professor, University of New Mexico School of Law (1995)
Visiting Professor, Southern Methodist University School of Law (1997)
Visiting Professor, Santa Clara University School of Law (1999-2000)
Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)
Visiting Professor, The Ohio State University Moritz College of Law (2012)
Visiting Professor (virtual), Boston University School of Law (2014 & 2016)
Visiting Professor (virtual), University of Illinois College of Law (2017)

SELECTED HONORS

Order of the Coif
Estate Planning Hall of Fame, National Association of Estate Planners & Councils (2015)
ABA Journal Blawg 100 Hall of Fame (2015)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech Univ.) (2016) (2015) (2013) (2010) (2009) (2007) (2006)
Excellence in Writing Awards, American Bar Association, Probate & Property (2012, 2001, & 1993)
President's Academic Achievement Award, Texas Tech University (2015)
Outstanding Researcher from the School of Law, Texas Tech University (2017 & 2013)
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)
Most Outstanding Third Year Class Professor – St. Mary's University (1982)
State Bar College – Member since 1986

SELECTED PUBLICATIONS

WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (7th ed. 2019); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (4th ed. 2013); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2021); TEXAS WILLS, TRUSTS, AND ESTATES (2018); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (4th ed. 2019); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).

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RECENT DEVELOPMENTS FROM THE TEXAS COURTS

I. INTRODUCTION

This article discusses recent judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters. The reader is warned that not all recent cases are presented and not all aspects of each cited case are analyzed. You must read and study the full text of each case before relying on it or using it as precedent. Writ histories were current as of April 2, 2022 (KeyCite service as provided on WESTLAW). The discussion of each case concludes with a moral, i.e., the important lesson to be learned from the case. By recognizing situations that have led to time consuming and costly litigation in the past, estate planners may reduce the likelihood of the same situations arising with their clients and judges may increase the likelihood of their decisions being upheld on appeal.

II. INTESTATE SUCCESSION

A. Common-Law Spouse

Estate of Pandozy, 634 S.W.3d 288 (Tex. App.—Texarkana 2021, no pet. h.).

After the court determined that the intestate's three children were his sole heirs, an alleged common-law spouse intervened. The trial court rendered a directed verdict against her and determined that she lacked standing to participate in the probate proceedings. She then refused to return property belonging to the intestate's estate and filed a pro se motion for sanctions and damages. The independent executor filed for sanctions and successfully had her declared a vexatious litigant.

On appeal, the court agreed that the alleged common-law spouse was a vexatious litigant because (1) the independent executor demonstrated that there was no reasonable probability that she could prevail and (2) she had commenced five pro se actions in the past seven years that were determined against her. *See* TEX. CIV. PRAC. & REM. CODE § 11.054.

Moral: An alleged common-law spouse who fails to demonstrate that status and wishes to pursue the matter should hire legal counsel to file a reasonable appeal.

III. WILLS

A. Acceptance of Benefits

Estate of Johnson, 631 S.W.3d 56 (Tex. 2021).

After accepting benefits under the testator's will (a mutual fund worth over $143,000), the beneficiary contested the will claiming that the testator either lacked testamentary capacity or was unduly influenced. The beneficiary sought to avoid the long-established rule that a person cannot accept benefits under a will while contesting its validity by showing that the benefits she accepted are less than she would receive by intestacy (over $450,000) if the will contest succeeded. The trial court rejected this argument and dismissed her contest for lack of standing. She successfully appealed to the Dallas Court of Appeals.

The Supreme Court of Texas reversed and dismissed her lawsuit. The court held "that a contestant does not defeat an acceptance-of-benefits defense by showing that the benefit she accepted is worth less than a hypothetical recovery should her will contest prevail." *Id.* at 58. "Equity does not permit the beneficiary of a will to grasp benefits under the will with one hand while attempting to nullify it with the other." *Id.* at 61. The beneficiary had no legal entitlement to the mutual fund she accepted other than as being the beneficiary of the testator's specific gift of the mutual fund. The situation would be different if she had an independent right to the fund such as being named as the fund's pay on death beneficiary.

Moral: Before a beneficiary accepts property left to the beneficiary under a will, the beneficiary must make certain the beneficiary does not desire to contest the will in hopes of receiving a larger share via intestacy. The court recognized that the beneficiary's acceptance of benefits must be voluntary so that "an opportunistic executor [cannot] offensively deny a would-be will contestant's claim by partially distributing the estate to an unwitting beneficiary to avoid a will contest." *Id.* at 65.

B. Interpretation and Construction

Matter of Estate of Wharton, 632 S.W.3d 597 (Tex. App.—El Paso 2020, no pet.).

The testator's will stated his "desire" that the executor sell his majority stake in a company to his business partner. When the executor did not do so, the business partner sued to compel the sale of the stock. The trial court held that the testator's will did not impose a legal obligation on the executor to sell the stock to her and that she is not a beneficiary of the will. The business partner appealed.

The appellate court held instead that the will reflected the testator's intent that the stock be sold and the proceeds given to named beneficiaries. The court recognized that the term "desire" is normally precatory but can be mandatory depending on the context of the entire will especially if it clearly express the testator's intention in making a distribution of property. However, the court agreed that the will did not necessarily impose an obligation on the executor to sell the stock to the business partner. The court agreed with the executor that the testator could not make a sale to the business partner mandatory because such a sale would be contingent on her agreeing to purchase and having the funds to do so. In addition, the testator indicated that the sale was subject to additional terms that would need to be negotiated.

The court concluded that neither the executor nor the business partner had sufficient evidence to justify a summary judgment on whether the sale to the business partner was mandatory. Thus, the court reversed the trial court's judgment and remanded for further proceedings.

Moral: A testator should avoid precatory language. Instead, instructions need to be clearly and completely stated to avoid disputes.

IV. ESTATE ADMINISTRATION

A. Jurisdiction

1. Suit Against Estate

Sullivan v. Pound, 634 S.W.3d 318 (Tex. App.—San Antonio 2021, no pet. h.).

The plaintiff filed suit against a decedent's estate. The appellate court recognized that the estate of a decedent is not a legal entity and thus cannot be sued. However, the trial court had jurisdiction because the personal representative was served with citation and participated in the suit in his capacity as the estate's personal representative.

Moral: A personal representative should avoid participating in a lawsuit if the suit is merely against the estate. Participating in the action will waive the claim that the court lacked jurisdiction because the plaintiff sued the estate rather than the personal representative.

2. Receiver

In re Estate of Hallmark, 629 S.W.3d 433 (Tex. App.—Eastland 2020, no pet.).

The appellate court held that a county court at law sitting as a probate court lacks the authority to appoint a receiver for a Texas partnership. Instead, the receivership provisions in the Texas Business Organizations Code "provide the exclusive statutory basis for appointing a receiver for a Texas partnership." *Id.* at 435. Accordingly, only a district court has the jurisdiction to appoint a receiver for liquidation or rehabilitating purposes.

Moral: A litigant seeking a receivership to liquidate or rehabilitate a partnership should proceed in the appropriate district court.

3. Involving Decedent Property or Heirs

Mortensen v. Villegas, 630 S.W.3d 355 (Tex. App.—El Paso 2021, no pet.).

Decedent's heirs requested a determination of heirship but the court failed to act on the application. Later, Decedent's Neighbor filed a claim against the estate asserting that Decedent's property had been abandoned which was reducing the value of his property and that he had performed work on the property such as pulling weeds and picking up trash. The court then determined Decedent's heirs and also held that Neighbor lacked standing to bring his claim. In an earlier case, the appellate court affirmed the trial court.

Neighbor then filed a slew of new claims in the heirship proceeding such as slander, libel, and nuisance. The appellate court explained that the statutory probate court lacked jurisdiction because Neighbor's claims did not involve a probate proceeding or a matter related to one under Estates Code § 31.001. It is not enough that the causes of action implicated people involved in the heirship determination.

Moral: A claim which merely involves a decedent's property or a decedent's heirs is not necessarily related to probate proceeding over which a statutory probate court has jurisdiction.

B. Standing

1. Party Who Previously Settled

Estate of Maberry, No. 11-18-00349-CV, 2020 WL 7863337 (Tex. App.—Eastland Dec. 31, 2020, no pet.).

Daughter and Alleged Common Law Wife (ACLW) mediated their dispute and resolved their claims. Later, ACLW filed an application to remove Daughter as the independent executor alleging misfeasance in the administration of the estate. Daughter successfully argued to the trial court that ACLW no longer had standing because of the settlement. ACLW appealed.

The appellate court affirmed. ACLW argued that the settlement agreement could not bar her claim because the alleged misfeasance occurred after they signed the agreement and thus she would have standing to pursue her claim. The court explained that ACLW released all claims and demands that "were or could have been asserted" and that included her claim to share in the decedent's estate as a surviving spouse. In fact, ACLW already received personal property and cash from Daughter in consideration of ACLW's release of all claims to the decedent's estate.

The court also rejected ACLW's claim that she was an interested person under Estates Code § 22.018. The court recognized that there is a division of authority in Texas regarding whether a "devisee, heir, spouse, or creditor" must also have a pecuniary interest in the estate to have standing. After reviewing the conflicting cases, the court determined that standing was lost because she agreed to release all of her potential rights and interests in the estate.

Moral: A person who enters into a settlement agreement will lack standing to pursue claims already settled if the person later has "settlement remorse."

2. Antagonistic Personal Representative

Jurgens v. Martin, 631 S.W.3d 385 (Tex. App.—Eastland 2021, mand. denied).

Brother filed suit against Sister in an attempt to recover Parents' property belonging to the estate even though Sister was the personal representative. The appellate court recognized that "the personal representative of the estate of a decedent is the only person entitled to sue for the recovery of property belonging to the estate." *Id.* at 398. However, the court permitted Brother to sue because Sister's interest was antagonistic to those of the estate because Brother's claims were against her.

In addition, the court explained that Brother had standing on two grounds. First, he was named as a beneficiary in the will and its *in terrorem* clause would not prevent him from bring his action against Sister for breach of fiduciary duties. *See* TEX. EST. CODE § 254.005(b). Second, if Brother's will contest action is successful, he would have a pecuniary interest as an heir. It was

not necessary for the will to be set aside before he would have a justiciable interest in the suit.

Moral: A person interested in the estate as a beneficiary or potential heir may be able to bring an action to recover estate property even if a personal representative is serving if the representative's interests are antagonistic to the estate's interests.

C. Bill of Review

Kholaif v. Safi, 636 S.W.3d 313 (Tex. App.—Houston [14th Dist.] 2021, pet. denied).

Decedent's wife executed a premarital agreement which waived her rights to homestead, the family allowance, and exempt property. The trial court granted summary judgment that the agreement was valid and enforceable. The decedent's wife then filed for a bill of review alleging that the agreement was not properly executed and that she did not make an informed decision when she signed it. The court denied the bill of review explaining that she did not prove that the court made a substantial error when it signed the summary judgment.

The Fourteenth Houston Court of Appeals affirmed. The court examined Estates Code § 55.251 and applicable case law which provides that the court may revise or correct an order on the showing of a substantial error proven by a preponderance of the evidence. The court explained that there was insufficient evidence to show that the trial court's denial of the bill of review was an abuse of discretion. The court did not act in an unreasonable or arbitrary manner or without reference to guiding rules and principles. The court also described how the wife's failure to respond to requests for admissions lead to the validity of the premarital agreement being conclusively established.

Moral: Requests for admissions should not be ignored because failure to respond results in the conclusive establishment of those admissions which cannot be controverted in a later proceeding.

D. Determination of Heirship

Estate of Trickett, No. 13-19-00154-CV, 2020 WL 6164324 (Tex. App.—Corpus Christi-Edinburg Oct. 22, 2020, pet. filed).

Intestate died in 1972. When disputes arose over the ownership of Intestate's property, the trial court examined the evidence and the report of the attorney ad litem. Thereafter, the court issued a judgment declaring Intestate's heirs.

On appeal, the claim was made that the statute of limitations prevented the court from determining heirship. The appellate court began its analysis by explaining that Estates Code § 202.0025 which provides that there is no statute of limitations for heirship determinations applies only if the intestate died on or after January 1, 2014. Nonetheless, the court examined case authority from the San Antonio Court of Appeals from which this case was transferred which holds that even if the intestate's death was prior to effective date of Estates Code § 202.0025, "no limitations period applies to heirship proceedings absent the existence of a prior administration of the decedent's estate or a prior conveyance of the decedent's property to a third party." *Estate of Ripley*, No. 04-18-00968-CV, 2019 WL 4179128, at *3 (Tex. App.—San Antonio Sept. 4, 2019, pet. denied). Because there was no prior administration or conveyance of the decedent's property in this case, the heirship determination was not barred by the statute of limitations.

The court also noted that the enabling legislation for Estates Code § 202.0025 explained that the statute was "intended to clarify current law" and that an inference that there was a statute of limitations applicable for prior intestate deaths may not be made. Acts 2013, 83rd Leg., R.S., ch. 1136, § 62(f).

Moral: It is arguable that no statute of limitations applies to heirship actions even if the intestate died prior to January 1, 2014.

E. Executor Powers

Lockhart v. Chisos Minerals, LLC, 621 S.W.3d 89 (Tex. App.—El Paso 2021, pet. denied).

A parcel of the decedent's property passed via the residuary clause of his will to an inter vivos trust. The same person was named as the executor of the estate and the trustee of the trust. This person conveyed the property. A dispute arose over whether this conveyance was effective. Both the trial and appellate court held that the conveyance was valid.

The person who made the conveyance claimed that it was ineffective for several reasons. First, she successfully argued she did not convey the property in her capacity as a trustee because she did not sign the deeds in her trustee capacity. However, she did sign the deeds in her capacity as the executor. Because the property was part of the decedent's estate and subject to administration, she had the capacity and authority to sell the property. This conclusion was supported by the terms of the will which granted her the power of sale and the powers of a trustee under the Texas Trust Code which includes the power to sell in Property Code § 113.010.

Moral: Once an executor with the power to sell property makes a valid sale, it will be difficult for the executor to claim later that the sale was invalid.

F. Executor Removal

Matter of Estate of Collins, 638 S.W3d 814 (Tex. App.—Tyler 2021, no pet. h.).

The sole beneficiary of the testator's estate convinced the trial court to remove the independent executor from office. The beneficiary asserted that the executor in his individual capacity had misappropriate funds from a joint bank account which the executor had with the testator when he withdrew substantially more than his net contributions. The trial court determined that this was gross misconduct and a material conflict of interest under Estates Code § 404.0035(b) and ordered the removal.

The appellate court reversed. The court explained that the joint account had survivorship rights and thus was a non-probate asset. Even if the executor's withdrawals during the testator's life were improper, the funds would have been returned to the joint account. The executor would then be entitled to them as the survivor. Accordingly, the court held that the trial court abused its discretion in removing the executor.

Moral: An executor's alleged mismanagement of a decedent's non-probate assets is not a ground for removal.

G. Partition of Community Property

Estate of Tillotson, No. 05-20-00258-CV, 2021 WL 1034842 (Tex. App. – Dallas Mar. 18, 2021, no pet. h.).

After Wife died intestate, the court appointed Wife's daughter from a previous marriage as the administratrix. She obtained a court order requiring Husband to turn over Wife's share of the community property. Husband objected.

The court rejected Husband's claim that only he may request a partition of the community property. The court studied Estates Code § 360.254(a) which authorizes the surviving spouse to apply to the court for a partition of the community property. However, this section does not preclude the administratrix from asking for a partition, especially because none of Wife's community property passes by intestacy to Husband.

The court also rejected Husband's claim that he is entitled to retain possession and control of the community property which was under his sole management under Estates Code § 453.009. The court examined the statute and held it expressly applies only when no administration is pending.

Moral: The surviving spouse of an intestate spouse who has at least one child from another partner will have a difficult time preventing a partition of the community property, even the surviving spouse's sole management community, so that the descendants of the deceased spouse can obtain their shares.

H. Claim – Fraud on the Community

Jurgens v. Martin, 631 S.W.3d 385 (Tex. App.—Eastland 2021, mand. denied).

The appellate court held that a spouse's claim for fraud on the community, a gift from a predeceased spouse to a child, does not survive the spouse's death. Thus, "an heir or personal representative of an estate does not have standing to prosecute a claim for fraud on the community because the estate does not have standing to purse the claim." *Id*. at 403.

Moral: A spouse who wishes to assert a claim of fraud on the community must bring that action before the alleged defrauded spouse dies.

I. Reimbursement of Community Funds Used on Separate Property

Matter of Estate of Baker, 627 S.W.3d 523 (Tex. App.—Waco 2021, no pet. h.).

After Husband's death, Wife sought reimbursement for community funds used to enhance the value of Husband's separate property. The trial court granted reimbursement and gave Wife an equitable lien on the separate property. However, the trial court refused to authorize other assets in Husband's estate to be used to satisfy the reimbursement claim.

The appellate court agreed that Wife was entitled to reimbursement. The court rejected the argument that reimbursement was precluded because Husband's will did not provide for reimbursement. The court explained that Family Code § 3.402 provides for reimbursement and that Wife did not waive her right in a marital agreement. The appellate court also determined that the trial court did not abuse its discretion when it determined the difference in value between Husband's separate property with and without the improvements.

The court disagreed with the trial court's holding that other assets of Husband's estate could not be used to satisfy her claim. The court explained that the equitable lien is to secure the reimbursement claim under Family Code § 3.406. Thus, the reimbursement claim is a debt against the estate entitled to be paid using the statutory abatement order provided in Estates Code § 355.109. The court noted that Husband's will neither provided for a different abatement order nor exoneration of debts on gifted property. Thus, Husband's other property given to Wife could be used to satisfy the reimbursement claim.

Moral: The reimbursement claim of a surviving spouse when community property is used to enhance the value of the deceased spouse's separate property may actually end up reducing the amount of property to which the surviving spouse is entitled as a beneficiary under the deceased spouse's will.

J. Attorney Fees

Matter of Estate of Collins, 638 S.W3d 814 (Tex. App.—Tyler 2021, no pet. h.).

The trial court removed the independent executor from office and denied the executor's request for attorney's fees. On appeal, the court determined that the removal was an abuse of the trial court's discretion. Accordingly, the court held that the executor was entitled to reasonable attorney's fees because Estates Code § 404.0037(a) makes the award of attorney's fees mandatory if the executor's defense of a removal action is in good faith. Because the removal was held to improper, it follows that the defense was in good faith.

Moral: The court must award attorney's fees if the executor defends a removal action in good faith even if unsuccessful. If the defense is successful, it is deemed in good faith and the court must award attorney's fees.

V. TRUSTS

A. Pro Se

Lorie Bernice Sharpe Trust v. Phung, 622 S.W.3d 929 (Tex. App.—Austin 2021, no pet. h.).

Trustee, a non-attorney, filed a notice of appeal from a trial court's summary judgment. The appellate court explained to Trustee that a trustee may not appear pro se in a representative capacity because doing so is the unauthorized practice of law. Accordingly, the court advised Trustee that an attorney needed to file an amended notice of appeal to prevent the court

from dismissing the appeal. Because no attorney did so, the court dismissed the appeal.

Moral: A trustee cannot appear pro se in a representative capacity.

B. Jurisdiction

1. Out-of-State Trustees

Alexander v. Marshall, No. 14-18-00425-CV, 2021 WL 970760 (Tex. App.—Houston [14th Dist.] Mar. 16, 2021, pet. denied).

A trust has six trustees, one is a Texas resident and five are Louisiana residents. The primary trust beneficiary is a Texas resident and the trust property is located in Texas. The Louisiana trustees often traveled to Texas on trust business. The Louisiana trustees asserted that Texas courts lacked jurisdiction to hear the beneficiary's claims that they breached their fiduciary duties.

Both the trial and appellate courts held that the Louisiana trustees had sufficient contacts with Texas so that Texas courts had specific personal jurisdiction over them even though the trust instrument indicated the trust was to be governed by the Louisiana Trust Code and the trustees were directed to apply to a specified Louisiana court for instructions on trust issues.

Moral: Trustees domiciled in other states may be subject to the personal jurisdiction of Texas courts if they have sufficient minimum contacts with Texas.

2. Statutory Probate Court

Goepp v. Comerica Bank & Trust, N.A., No. 03-19-00485, 2021 WL 2878562 (Tex. App.—Austin July 9, 2021, no pet. h.).

Trustee sought to settle the final trust accounting and receive an order that Trustee has no liability for its administration of the trust. One of the beneficiaries filed a plea to the jurisdiction which the trial court rejected and then made various findings favoring Trustee.

On appeal, the court held that the trial court had jurisdiction. Although it is true that a district court has original and exclusive jurisdiction of trusts, there is an exception for statutory probate courts. TEX. PROP. CODE § 115.001. Thus, the trial court had jurisdiction. Next, the beneficiary claimed that the trust contains an Illinois choice-of-law provision. The court explained that this type of provision cannot prevent a Texas court from exercising jurisdiction. Finally, the court rejected the beneficiary's claim that because an Illinois court had previously heard the case, it had dominant jurisdiction over the case. Even if her claim could be construed as a motion to stay based on comity, the court held that the trial court did not abuse its discretion by hearing the case.

Moral: It is difficult to show that a proper Texas court lacks jurisdiction.

C. Standing

Austin v. Mitchell, No. 05-19-01359-CV, 2021 WL 2327870 (Tex. App.—Dallas June 8, 2021, no pet. h.).

Ex-husband created a trust for his children. Ex-wife filed suit against the trustee claiming standing as an interested person under Property Code § 111.004(7) because she has a claim against the trust. The trial and appellate court agreed that filing a claim against a trustee does not make a person an interested party. Because ex-wife was neither a beneficiary nor a trustee, she need to demonstrate to the court an interest sufficient to satisfy the court that she should be deemed an interested person under the statute's language that a non-beneficiary, non-trustee's ability to be an interested person that "may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding."

The courts agreed with ex-husband that ex-wife did not satisfy her burden of showing a sufficient interest to be deemed an interested person. The only possible interest she had was because of a claim that part of ex-husband's funding of the trust was a fraudulent transfer. Because this claim was barred, she had no claim against the trust and thus was not an interested person.

Moral: It is difficult for a non-beneficiary, non-trustee to demonstrate standing as an interested person.

D. Party

Tomlinson v. Khoury, 624 S.W.3d 601 (Tex. App.—Houston [1st Dist.] 2020, pet. denied).

In a case involving a turnover order against a trust, the court restated the established law that a trust is not a legal entity but rather a fiduciary relationship. The court explained that a trust cannot be sued but instead a suit against a trust must be brought against the trustee in the trustee's capacity as a trustee. The court also stated that "where the trustee is not properly before the court as a result of service, acceptance, waiver of process, or an appearance, Texas courts have invalidated orders that grant relief against a trust." *Tomlinson* at 608. According the trial court's turn over order against the trust was void because the trustee in his representative capacity was not before the court.

Moral: An action against a "trust" must be brought against the trustee in the trustee's representative capacity.

E. Property

Austin v. Mitchell, No. 05-19-01359-CV, 2021 WL 2327870 (Tex. App.—Dallas June 8, 2021, no pet. h.).

Ex-wife claimed that ex-husband fraudulently transferred a portion of his limited partnership interest to a trust for the benefit of his children. Ex-husband successfully argued to both the trial and appellate courts that it was too late for ex-wife to complain under Business & Commerce Code § 24.010 which requires suit to be filed within four years of the transfer or within one year after discovery of the transfer if after the four year period.

The court explained that the restriction on bringing a fraudulent transfer action is a statute of repose rather than a statute of limitations. The purpose of the statute is "to provide absolute protection to certain parties from the burden of indefinite potential liability." *Id*. at *3. The claim was brought more than four years after the transfer and thus ex-wife was required to show that she brought the action within one year after she discovered or reasonably could have discovered the transfer. The court then did a comprehensive review of the facts to conclude that she should have known about the transfer more than one year prior to her filing suit.

Moral: A person attempting to claim that the funding of a trust was via a fraudulent transfer must file suit in a timely manner.

F. Settlement Agreement

Austin Trust Company as Trustee of the Bob and Elizabeth Lanier Decendants [sic] Trusts v. Houren, No. 14-19-00387-CV, 2021 WL 970819 (Tex. App.—Houston [14th Dist.] Mar. 16, 2021, pet. filed).

Wife established a marital trust for Husband. Husband's will exercised a power of appointment Wife granted him in the trust to give all remaining assets to trusts in favor of their children. After Husband died, claims were made that Husband violated his fiduciary duties by distributing excessive funds ($37+ million) to himself. All parties signed a family settlement agreement resolving all issues. Nonetheless, the trustee of trusts to which Husband appointed the remainder of the trust property asserted that it was entitled to these funds. The trial court agreed with the executor of Husband's estate that the settlement agreement barred the trustee's claim. The trustee appealed.

The appellate court affirmed. The court analyzed the settlement agreement. First, the court recognized that because all parties agreed that the agreement was unambiguous, the court would construe it as a matter of law. The court then examined the language of the agreement concluding that it "specifically and unambiguously released" the trustee's alleged claims. The court explained that its "decision adheres to the public policy in favor of Texas courts upholding contracts negotiated at arms-length by knowledgeable and sophisticated business players represented by highly competent and able legal counsel."

Moral: Before signing a settlement agreement, be sure you are in agreement with all of the terms. It is difficult to bring a claim when settlement remorse sets in.

G. Guardian Ad Litem Fees

Boyce v. Eberstein, 636 S.W.3d 708 (Tex. App.—Dallas 2021, pet. filed).

The court appointed a guardian ad litem in a case regarding breach of fiduciary duty and tortious interference with inheritance rights. After the case was nonsuited, a dispute arose regarding the correct person to pay the ad litem's fee of $121,000 – the non-suiting party or the trustee. The trial court ruled that the trustee was responsible.

On appeal, the Dallas Court of Appeals affirmed. The court conducted an extensive review of statutory and judicial authority regarding the party against whom costs should be taxed when a case is non-suited. Although normally the party who non-suits the case is responsible for the ad litem's fee, in this case the non-suiting party's claims had some merit, the trust was in the best position to pay, and the trust benefited from the ad litem's participation in the case. Accordingly, the trial court did not abuse its discretion and reasonably concluded that it was fair to tax the ad litem's cost against the trust.

Moral: Under appropriate circumstances, a guardian ad litem's fee may be taxed against a trust even when the opposing party non-suits the case.

VI. OTHER ESTATE PLANNING MATTERS

A. Challenging Marital Property Agreement Using Estates Code

Moody v. Moody, 613 S.W.3d 707 (Tex. App.—Houston [14th Dist.] 2020, pet. filed).

One of the decedent's children successfully challenged the validity of the decedent's marital property agreement for lack of capacity. Executor appealed asserting this child lacked standing and the appellate court agreed.

The court examined, among other statutes, Estates Code § 22.012 which grants standing in estate matters to "an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered." The court explained that the child was (1) not an heir because the decedent was testate and the will was uncontested, (2) not a beneficiary because she was not named as beneficiary in the will, (3) not the decedent's spouse because she was his daughter, (4) not a creditor as the decedent did not owe her money, and (5) she did not have a right or claim against the decedent's property. Accordingly, the child lacked standing to assert the invalidity of the marital property agreement using the Estates Code.

Moral: A litigant cannot bootstrap "together several statutory definitions without more" to obtain standing.

B. Disposition of Remains

Isaac v. Burnside, 616 S.W.3d 609 (Tex. App.—Houston [14th Dist.] 2020, pet. denied).

Beneficiary sued Independent Executor alleging breach of fiduciary duty for not reimbursing for Decedent's funeral expenses. The trial court rendered judgment in favor of Beneficiary and Executor appealed.

The appellate court affirmed. The court studied Health & Safety Code § 711.002 which provides that Decedent's instructions in a will have priority to govern the disposition of remains. Decedent's will directed Executor to "make all arrangements for my funeral in keeping with my beliefs and station in life." Decedent also precluded Beneficiary from making funeral or other arrangements. These instructions, however, did not address the disposition of remains and thus the court held that this section was inapplicable and did not bar Beneficiary's reimbursement claim.

Moral: Granting a person authority to make "arrangements" for a funeral does not encompass the disposition of the remains. Thus, a person must explain his or her intent for arrangements and remains disposition separately.