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WILLS & TRUSTS

Gerry W. Beyer*

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This Article discusses developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters during the Survey period of December 1, 2020, through November 30, 2021. The reader is warned that not all newly enacted statutes or decided cases during the Survey period are presented, and not all aspects of each statute or case are analyzed. You must read and study each statute or case's full text before relying on it or using it as precedent. The discussion of most cases includes a moral, that is, the important lesson to be learned from the case. By recognizing situations that resulted in time-consuming and costly litigation in the past, the reader may be able to reduce the likelihood of the same situations arising with his or her clients.

I. INTESTATE SUCCESSION

There have been no significant developments during the Survey period addressing intestate succession issues.

II. WILLS

A. FOREIGN LANGUAGE WILLS

When a will and its accompanying judgment, order, or decree admitting it to probate is written in whole or in part in a language other than English, and it is filed for record in a county where the testator's real property is located, a correct English translation must also be filed.¹ The accuracy of this translation must be sworn to before an officer authorized to administer oaths.²

B. ACCEPTANCE OF BENEFITS

The most significant Texas Supreme Court case during the Survey period was *In re Estate of Johnson*, in which, after accepting benefits (a mutual fund worth over \$143,000.00) under the testator's will, the beneficiary contested the will claiming that the testator either lacked testamentary capacity or was unduly influenced.³ The beneficiary sought to avoid

1. Act of May 31, 2021, 87th Leg., R.S., ch. 521, § 12, sec. 503.002, 2021 Tex. Sess. Law. Serv. 1028, 1031 (codified at TEX. EST. CODE ANN. § 503.002).

2. *Id.*

3. *In re Est. of Johnson*, 631 S.W.3d 56, 59 (Tex. 2021).

the long-established rule that a person cannot accept benefits under a will while contesting its validity by showing that the benefits one accepted were less than what one would have received by intestacy (over \$450,000.00 in this case) if the will contest succeeded.⁴ The trial court rejected this argument and dismissed the beneficiary's contest for lack of standing.⁵ She successfully appealed to the Court of Appeals for the Fifth District of Texas at Dallas.⁶

The supreme court reversed and dismissed the beneficiary's lawsuit.⁷ It 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."⁸ "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."⁹ 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.¹⁰ 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.¹¹

Accordingly, before beneficiaries accept property left to them under a will, they must make certain they do not desire to contest the will in hopes of receiving a larger share via intestacy.¹² The supreme 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."¹³

C. INTERPRETATION AND CONSTRUCTION

1. Reformation to Correct Scrivener's Error

In *Odom v. Coleman*,¹⁴ the Court of Appeals for the First District of Texas at Houston appears to be the first appellate court to apply Texas Estates Code Section 255.451(a)(3), (b). Added in 2015, this code section authorizes a court to reform an unambiguous will because of a scrivener's error if there is clear and convincing evidence of the testator's intent.¹⁵ In *Odom*, the testator's will stated that he intended to dispose of all his property.¹⁶ However, the will's residuary clause covered only personal

4. *Id.*

5. *Id.*

6. *Id.* at 60; see *In re Est. of Johnson*, No. 05-18-01193-CV, 2019 WL 5704109, at *1 (Tex. App.—Dallas Nov. 4, 2019) (mem. op.), *rev'd*, 631 S.W.3d 56 (Tex. 2021).

7. *In re Est. of Johnson*, 631 S.W.3d at 59.

8. *Id.* at 58.

9. *Id.* at 61.

10. *Id.* at 61–63.

11. *Id.*

12. *See id.* at 64.

13. *Id.* at 65.

14. 615 S.W.3d 613, 613 (Tex. App.—Houston [1st Dist.] 2020, no pet.).

15. *Id.* at 616 (quoting TEX. EST. CODE ANN. § 255.451(a)(3), (b)).

16. *Id.* at 619.

property, which passed to his son but if the son predeceased the testator, then to his daughter.¹⁷ A dispute arose as to the disposition of residuary real property.¹⁸ The daughter claimed that the testator died intestate with regard to the real property, so she would inherit one-half.¹⁹ The son argued that, even though the will was unambiguous, he could establish with clear and convincing evidence that reformation was appropriate to correct a scrivener's error.²⁰ The trial court was impressed with the testimony of the drafting attorney, who admitted that he used a former client's will as a template for the testator's will and neglected to delete the word "personal" from the residuary clause when he cut and pasted the form language.²¹ Accordingly, the trial court reformed the will by deleting the word "personal" in the residuary clause, resulting in all property passing under the will.²² The daughter appealed.²³

After reviewing the evidence, the appellate court agreed with the trial court's reformation and that it was supported by clear and convincing evidence.²⁴ For example, the appellate court pointed to a prior holographic will in which all property was left to the son and to the daughter only if the son had already died.²⁵ The attorney's testimony made it clear that the testator intended all of his property to pass in this manner.²⁶ The appellate court also noted that it would set aside the trial court's determination only upon finding that the trial court abused its discretion in reforming the will.²⁷

2. Ripeness

Ackers v. Comerica Bank & Tr., N.A. teaches that the identity of contingent class gift beneficiaries is not ripe for judicial determination until the contingency is removed.²⁸ A testamentary trust provided that, upon termination, all remaining property would pass to the beneficiary's "then-living descendants."²⁹ The beneficiary sought to determine the identity of the remainder beneficiaries, despite the fact that the beneficiary was still alive.³⁰ The trustee claimed that the case was not ripe for review.³¹ Both the trial court and the Court of Appeals for the Eleventh District of Texas

17. *Id.*

18. *Id.* at 620.

19. *Id.*

20. *Id.*

21. *Id.* at 621.

22. *Id.*

23. *Id.* at 623.

24. *Id.* at 629–30, 632.

25. *Id.* at 630.

26. *Id.* at 630–31.

27. *Id.* at 629.

28. *Ackers v. Comerica Bank & Tr., N.A.*, 630 S.W.3d 292, 295–96 (Tex. App.—Eastland 2020, pet. filed).

29. *Id.* at 294.

30. *Id.*

31. *Id.*

at Eastland agreed.³²

The remainder gift is a class gift that is contingent on both the beneficiary dying and the descendants outliving the beneficiary.³³ Thus, although there are foreseeable disputes regarding whether certain individuals would qualify as descendants if the beneficiary were to die today, the case was not ripe for judicial determination because it was based on an event, the beneficiary's death, which had yet to occur.³⁴

The beneficiary also claimed that a determination of who would be descendants now was needed so that they could agree to terminate the trust and distribute the assets prior to the beneficiary's death.³⁵ The existence of a spendthrift clause in the trust would have precluded them from assigning their beneficial interests, even if the trial court had determined the identity of the nonvested-contingent beneficiaries.³⁶

D. IN TERROREM PROVISION

1. *Applicability of Texas Citizens Participation Act*

Marshall v. Marshall demonstrates that use of the Texas Citizens Participation Act in will and trust disputes adds a new dimension to litigation.³⁷ Appellee claimed that appellants violated an in terrorem clause because they brought proceedings to change trustees, change the state which governed the trust, and introduce a different in terrorem clause.³⁸ Appellants demonstrated that disputing conduct as violating the in terrorem provisions triggered the Texas Citizens Participation Act because the conduct was based on filing a petition.³⁹ Because there was no evidence that any of these actions affected the property to which the appellee may have been entitled, the Court of Appeals for the Fourteenth District of Texas at Houston concluded that the appellee did not establish a prima facie case that appellants violated the in terrorem clause.⁴⁰ Accordingly, the appellate court held that the trial court erred in denying appellants' motion to dismiss appellee's claims based on the in terrorem clause.⁴¹

2. *Funeral Expenses Reimbursement*

Both the trial court and the Court of Appeals for the Fourteenth District of Texas at Houston in *Isaac v. Burnside* held that an in terrorem clause was not triggered when a beneficiary sought reimbursement for

32. *Id.* at 293.

33. *Id.* at 295–96.

34. *Id.*

35. *Id.* at 296.

36. *Id.*

37. See *Marshall v. Marshall*, No. 14-18-00094-CV, 2021 WL 208459, at *1 (Tex. App.—Houston [14th Dist.] Jan. 21, 2021, pet. filed) (mem. op.).

38. *Id.* at *5.

39. *Id.* at *4–5.

40. *Id.* at *6, *8.

41. *Id.* at *9.

expenses incurred for the testator's funeral.⁴²

E. WILL CONTEST AND WILL CONSTRUCTION PROCEEDINGS

A party, rather than the court, must now serve process on institutions of higher education and charitable organizations that are necessary parties to a suit.⁴³

F. WILL CONTEST GROUNDS

A probate court's finding that a testator had testamentary capacity and was not unduly influenced is difficult to overturn on appeal.⁴⁴ For example, in *Neal v. Neal*, the probate court admitted the decedent's will to probate as a muniment of title over the objections of an omitted child, who claimed his mother lacked testamentary capacity and was unduly influenced by another child.⁴⁵ After reviewing medical and banking records and hearing testimony from the decedent's relatives and the attorney who drafted the will, the probate court found that the decedent was of sound mind and admitted the will to probate.⁴⁶ The probate court did not make a specific finding regarding the existence of undue influence.⁴⁷ The omitted child appealed.⁴⁸

The Court of Appeals for the First District of Texas at Houston affirmed.⁴⁹ The appellate court began its discussion by reviewing the basic principles of when a person has testamentary capacity.⁵⁰ Then, the appellate court examined the evidence, including witnesses' testimonies and medical records, and held that the trial court's finding that the decedent had capacity was not against the great weight and preponderance of the evidence.⁵¹ The appellate court recognized that the decedent did have a stroke and a cerebrovascular disease leading to cognitive deficits.⁵² In addition, there was conflicting testimony from the witnesses regarding the decedent's mental condition.⁵³ However, this evidence was not sufficient to set aside the probate court's finding of testamentary capacity.⁵⁴

The appellate court next examined the probate court's disregard of evidence allegedly showing the decedent was subject to undue influence.⁵⁵

42. *Isaac v. Burnside*, 616 S.W.3d 609, 613–14 (Tex. App.—Houston [14th Dist.] 2020, pet. denied).

43. Act of May 24, 2021, 87th Leg., R.S., ch. 244, § 1, sec. 55.053, 2021 Tex. Sess. Law Serv. 520, 521 (codified at TEX. EST. CODE ANN. § 55.053).

44. *See Neal v. Neal*, No. 01-19-00427-CV, 2021 WL 1031975, at *8, *13 (Tex. App.—Houston [1st Dist.] Mar. 18, 2021, no pet.) (mem. op.).

45. *Id.* at *2–3.

46. *Id.*

47. *Id.* at *3.

48. *Id.*

49. *Id.* at *13.

50. *Id.* at *4.

51. *Id.* at *8.

52. *Id.* at *7.

53. *Id.* at *8.

54. *Id.*

55. *Id.*

The appellate court explained that there was no evidence that any family member was involved with the will.⁵⁶ The decedent contacted her lawyer directly and even told her that she did not want her family involved with how she was planning on distributing her estate.⁵⁷ In addition, the fact that the primary beneficiary was in a position to exercise undue influence was not evidence that he exercised it.⁵⁸ The appellate court concluded its analysis by stating that there was no evidence beyond speculation of the exercise of undue influence; thus, the probate court's implied finding of no undue influence was not against the great weight and preponderance of the evidence.⁵⁹

III. ESTATE ADMINISTRATION

A. NEW STATUTORY PROBATE COURT IN DENTON COUNTY

Effective January 1, 2022, Denton County has a second statutory probate court.⁶⁰

B. APPLICATIONS

The requirements of initial pleadings were clarified to make it clear that those filed in probate or guardianship proceedings must include the last three numbers of the party's driver's license number and the last three numbers of the party's social security number.⁶¹

C. STANDING

1. *Standing of Someone Other Than Personal Representative*

A person interested in an estate, as a beneficiary or potential heir, may be able to bring an action to recover estate property, even if the serving personal representative's interests are antagonistic to the estate's interests.⁶² For example, in *Jurgens v. Martin*, a brother filed suit against his sister in an attempt to recover the parents' property belonging to the estate, even though the sister was the personal representative.⁶³ The Court of Appeals for the Eleventh District of Texas at Eastland 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."⁶⁴

56. *Id.* at *10.

57. *Id.*

58. *Id.* at *12.

59. *Id.* at *13.

60. Act of May 31, 2021, 87th Leg., R.S., ch. 934, § 2.04, sec. 25.0631, 2021 Tex. Sess. Law Serv. 2379, 2381 (codified at TEX. GOV'T CODE ANN. § 25.0631(b)).

61. Act of May 31, 2021, 87th Leg., R.S., ch. 521, § 1, 2021 Tex. Sess. Law Serv. 1028, 1029 (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 30.014(a)).

62. See *Jurgens v. Martin*, 631 S.W.3d 385, 398 (Tex. App.—Eastland 2021, orig. proceeding [mand. denied]).

63. *Id.*

64. *Id.* (first citing *Moody v. Moody*, 613 S.W.3d 707, 718 (Tex. App.—Houston [14th Dist.] 2020, pet. filed); and then citing *In re Estate of Preston*, 346 S.W.3d 137, 163 (Tex. App.—Fort Worth 2011, no pet.)).

However, the appellate court permitted the brother to sue because the sister's interests were antagonistic to those of the estate and because the brother's claims were against her.⁶⁵

In addition, the appellate court explained that the brother had standing on two grounds.⁶⁶ First, he was named as a beneficiary in the will, and its in terrorem clause would not prevent him from bringing his action against the sister for breach of fiduciary duties.⁶⁷ Second, if the brother's will contest action were successful, he would have a pecuniary interest as an heir.⁶⁸ It was not necessary for the will to be set aside before he would have a justiciable interest in the suit.⁶⁹

2. *Loss of Standing Due to Settlement Agreement*

A person who enters into a settlement agreement will lack standing to pursue claims already settled if the person later has "settlement remorse," according to *In re Estate of Maberry*.⁷⁰ A daughter and the alleged common law wife (ACLW) mediated their dispute and resolved their claims.⁷¹ Later, the ACLW filed an application to remove the daughter as the independent executor, alleging misfeasance in the administration of the estate.⁷² The daughter successfully argued to the trial court that the ACLW no longer had standing because of the settlement.⁷³ The ACLW appealed.⁷⁴

The Court of Appeals for the Eleventh District of Texas at Eastland affirmed.⁷⁵ The ACLW argued that the settlement agreement could not bar her claim because the alleged misfeasance occurred after they signed the agreement; thus, she would have standing to pursue her claim.⁷⁶ The appellate court explained that the ACLW released all claims and demands that "were or could have been asserted," which included her claim to share in the decedent's estate as a surviving spouse.⁷⁷ In fact, the ACLW had already received personal property and cash from the daughter in consideration of the ACLW's release of all claims to the decedent's estate.⁷⁸

The appellate court also rejected the ACLW's claim that she was an interested person under Texas Estates Code Section 22.018.⁷⁹ The appel-

65. *Id.*

66. *Id.*

67. *Id.* (citing TEX. EST. CODE ANN. § 254.005(b)).

68. *Id.*

69. *Id.*

70. *In re Estate of Maberry*, No. 11-18-00349-CV, 2020 WL 7863337, at *3 (Tex. App.—Eastland Dec. 31, 2020, no pet.) (mem. op.).

71. *Id.* at *1.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at *2.

78. *Id.*

79. *Id.* at *3 (citing TEX. EST. CODE ANN. § 22.018).

late 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.⁸⁰ After reviewing the conflicting cases, the appellate court determined that the ACLW’s standing was lost because she agreed to release all of her potential rights and interests in the estate.⁸¹

D. JURISDICTION

Mortensen v. Villegas serves as a reminder that a claim that merely involves a decedent’s property or a decedent’s heirs is not necessarily related to probate proceedings over which a statutory probate court has jurisdiction.⁸² The decedent’s heirs requested a determination of heirship, but the probate court failed to act on the application.⁸³ Later, the decedent’s neighbor filed a claim against the estate, asserting that (1) decedent’s property had been abandoned, which was reducing the value of his property, and (2) he had performed work on the property, such as pulling weeds and picking up trash.⁸⁴ The probate court then determined who the decedent’s heirs were and also held that the decedent’s neighbor lacked standing to bring his claim.⁸⁵ The decedent’s neighbor appealed, and the Court of Appeals for the Eighth District of Texas at El Paso affirmed the probate court.⁸⁶

The decedent’s neighbor then filed a slew of new claims in the heirship proceeding, such as slander, libel, and nuisance.⁸⁷ The appellate court explained that the statutory probate court lacked jurisdiction because the decedent’s neighbor’s claims did not involve a probate proceeding or a matter related to one under Texas Estates Code Section 31.001.⁸⁸ It is not enough that the causes of action implicated individuals involved in the heirship determination.⁸⁹

E. CLAIM: FRAUD ON THE COMMUNITY

The Court of Appeals for the Eleventh District of Texas at Eastland held in *Jurgens v. Martin* that a spouse who wishes to assert a claim of fraud on the community must bring that action before the alleged defrauded spouse dies.⁹⁰ The appellate court explained that a spouse’s claim

80. *Id.*

81. *Id.*

82. *Mortensen v. Villegas*, 630 S.W.3d 355, 363 (Tex. App.—El Paso 2021, no pet.).

83. *Id.* at 359.

84. *Id.*

85. *Id.*

86. *Id.* (citing *In re Estate of Casares*, 556 S.W.3d 913, 915–16 (Tex. App.—El Paso 2018, no pet.).

87. *Id.* at 360.

88. *Id.* at 363–64 (citing TEX. EST. CODE ANN. § 31.001).

89. *Id.* at 363 (citing *In re Hannah*, 431 S.W.3d 801, 808–09 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding)).

90. *Jurgens v. Martin*, 631 S.W.3d 385, 403 (Tex. App.—Eastland 2021, orig. proceeding [mand. denied]).

for fraud on the community—in this case, a gift from a predeceased spouse to a child—does not survive the spouse’s death.⁹¹ Thus, “an heir or a 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 pursue [sic] the claim.”⁹²

F. EXECUTOR POWERS

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.⁹³ For example, in *Lockhart v. Chisos Minerals, LLC*, a parcel of the decedent’s property passed via the residuary clause of his will to an *inter vivos* trust.⁹⁴ The same person was named as the executor of the estate and the trustee of the trust.⁹⁵ This person conveyed the property.⁹⁶ A dispute arose over whether this conveyance was effective.⁹⁷ Both the trial court and the Court of Appeals for the Eighth District of Texas at El Paso held that the conveyance was valid.⁹⁸

The person who made the conveyance claimed that it was ineffective for several reasons.⁹⁹ First, she successfully argued that she did not convey the property in her capacity as a trustee because she did not sign the deeds in her trustee capacity.¹⁰⁰ However, she did sign the deeds in her capacity as the executor.¹⁰¹ Because the property was part of the decedent’s estate and subject to administration, she had the capacity and authority to sell the property.¹⁰² 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, including the power to sell provided for in Texas Property Code Section 113.010.¹⁰³

G. PARTITION OF COMMUNITY PROPERTY

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 so that the descendants of the deceased spouse can obtain their shares, even when the surviving spouse’s community property is sole management community property.¹⁰⁴ For example, in *In*

91. *Id.* at 402.

92. *Id.* at 403.

93. *See* *Lockhart v. Chisos Mins., LLC*, 621 S.W.3d 89, 104–05 (Tex. App.—El Paso 2021, pet. denied).

94. *Id.* at 94.

95. *Id.*

96. *Id.* at 95.

97. *Id.* at 96.

98. *Id.* at 97, 112.

99. *Id.* at 97.

100. *Id.* at 101, 104.

101. *Id.* at 104.

102. *Id.* at 106.

103. *Id.*; *see* TEX. PROP. CODE ANN. § 113.010.

104. *See In re Estate of Tillotson*, No. 05-20-00258-CV, 2021 WL 1034842, at *1–3 (Tex. App.—Dallas Mar. 18, 2021, no pet.) (mem. op.).

re Estate of Tillotson, after the wife died intestate, the trial court appointed the wife's daughter from a previous marriage as the administratrix.¹⁰⁵ She obtained a court order requiring the husband to turn over the wife's share of the community property.¹⁰⁶ The husband objected.¹⁰⁷

The Court of Appeals for the Fifth District of Texas at Dallas rejected the husband's claim that only he could request a partition of the community property.¹⁰⁸ The appellate court studied Texas Estates Code Section 360.253(a), which authorizes the surviving spouse to apply to the court for a partition of the community property.¹⁰⁹ However, this section does not preclude the administratrix from asking for a partition, especially because none of the wife's community property would pass by intestacy to the husband.¹¹⁰

The appellate court also rejected the husband's claim that he was entitled to retain possession and control of the community property, which was under his sole management under Texas Estates Code Section 453.009(b).¹¹¹ The appellate court examined the statute and held it expressly applies only when no administration is pending.¹¹²

H. REIMBURSEMENT OF COMMUNITY FUNDS USED ON SEPARATE PROPERTY

When community property is used to enhance the value of a deceased spouse's separate property, the reimbursement claim of a surviving spouse may end up reducing the amount of property to which the surviving spouse is entitled as a beneficiary under the deceased spouse's will.¹¹³ For example, in *In re Estate of Baker*, after the husband's death, the wife sought reimbursement for community funds used to enhance the value of the husband's separate property.¹¹⁴ The trial court granted reimbursement and gave the wife an equitable lien on the separate property.¹¹⁵ However, the trial court refused to authorize other assets in the husband's estate to be used to satisfy the reimbursement claim.¹¹⁶

The Court of Appeals for the Tenth District of Texas at Waco agreed that the wife was entitled to reimbursement.¹¹⁷ The appellate court rejected the argument that reimbursement was precluded because the husband's will did not provide for reimbursement.¹¹⁸ The appellate court

105. *Id.* at *1.

106. *Id.*

107. *Id.*

108. *Id.* at *3.

109. *Id.* at *1–2 (quoting TEX. EST. CODE ANN. § 360.253(a)).

110. *Id.* at *1–3.

111. *Id.* at *3 (citing TEX. EST. CODE § 453.009(b)).

112. *Id.*

113. *See In re Estate of Baker*, 627 S.W.3d 523, 529 (Tex. App.—Waco 2021, no pet.).

114. *Id.* at 525.

115. *Id.* at 525–26.

116. *Id.* at 526.

117. *Id.* at 527–28.

118. *Id.* at 526.

explained that Texas Family Code Section 3.402 provides for reimbursement and that the wife did not waive her right in a marital agreement.¹¹⁹ The appellate court also ruled that the trial court did not abuse its discretion when it determined the difference in value between the husband's separate property with and without the improvements.¹²⁰

The appellate court disagreed with the trial court's holding that other assets of the husband's estate could not be used to satisfy her claim.¹²¹ The appellate court explained that the equitable lien is to secure the reimbursement claim under Texas Family Code Section 3.406.¹²² Thus, the reimbursement claim is a debt against the estate entitled to be paid using the statutory abatement order provided in Texas Estates Code Section 355.109.¹²³ The appellate court noted that the husband's will provided for neither a different abatement order, nor exoneration of debts on gifted property.¹²⁴ Thus, the husband's other property given to the wife could be used to satisfy the reimbursement claim.¹²⁵

IV. TRUSTS

A. RULE AGAINST PERPETUITIES

Article I, § 26 of the Texas constitution adopts the common law version of the Rule Against Perpetuities (the Rule).¹²⁶ The 2021 Texas legislature enacted extensive revisions to Texas Property Code Section 112.036, which may operate to extend the perpetuities period to 300 years from the effective date of a trust.¹²⁷ "The constitutionality of the 2021 amendments is subject to considerable debate."¹²⁸

Below is a summary of these revisions:

- The "effective date" of a trust is the date it becomes irrevocable (i.e., because the settlor of a revocable trust dies, or the settlor expressly made the trust irrevocable).¹²⁹
- If the effective date is on or after September 1, 2021, the interest must vest (or not vest) not later than 300 years after the effective date of the trust.¹³⁰
- If the effective date is before September 1, 2021, the trust must vest (or not vest) "not later than 21 years after some life in being at the

119. *Id.* (citing TEX. FAM. CODE ANN. § 3.402).

120. *Id.* at 527–28.

121. *Id.* at 529.

122. *Id.* at 528–29 (quoting TEX. FAM. CODE § 3.406).

123. *Id.* (quoting TEX. EST. CODE ANN. § 355.109).

124. *Id.* at 529.

125. *Id.*

126. *See* TEX. CONST. art. I, § 26.

127. Act of May 18, 2021, 87th Leg., R.S., ch. 792, § 1, sec. 112.036, 2021 Tex. Sess. Law Serv. 1877, 1877 (codified at TEX. PROP. CODE ANN. § 112.036).

128. Gerry W. Beyer, *Summary of Probate Changes Made by the 2021 Texas Legislature*, 59-3 REPTL REP. 33, 34 (2021) (citing Catherine Bright Haws & Ashley E. McMillan, *A New Texas Rule Against Perpetuities for Trusts*, 59-3 REPTL REP. 37, (2021)).

129. TEX. PROP. CODE ANN. § 112.036(b).

130. *Id.* § 112.036(c)(1).

time of the creation of the interest, plus a period of gestation.”¹³¹ However, this restriction is inapplicable if the trust references Texas Property Code Section 112.036 for how the Rule is to operate.¹³²

- Regardless of the Rule’s applicable time period, the settlor may not require a real property asset to be retained by the trust (or not sold) for a period longer than 100 years.¹³³

B. PRO SE

Lorie Bernice Sharpe Trust v. Phung holds a trustee cannot appear pro se in a representative capacity.¹³⁴ The trustee—a non-attorney—filed a notice of appeal from a trial court’s summary judgment.¹³⁵ The Court of Appeals for the Third District of Texas at Austin explained to the trustee that a trustee may not appear pro se in a representative capacity because doing so is the unauthorized practice of law.¹³⁶ Accordingly, the appellate court advised the trustee that an attorney needed to file an amended notice of appeal to prevent the appellate court from dismissing the appeal.¹³⁷ Because no attorney did so, the appellate court dismissed the appeal.¹³⁸

C. JURISDICTION

Alexander v. Marshall serves as a reminder that trustees domiciled in other states may be subject to the personal jurisdiction of Texas courts if they have sufficient minimum contacts with Texas.¹³⁹ In this case, the trust had six trustees: a Texas resident and five Louisiana residents.¹⁴⁰ The primary trust beneficiary was a Texas resident, and the trust property was located in Texas.¹⁴¹ The Louisiana trustees often traveled to Texas on trust business.¹⁴² The Louisiana trustees asserted that Texas courts lacked jurisdiction to hear the beneficiary’s claims that they breached their fiduciary duties.¹⁴³

Both the trial court and the Court of Appeals for the Fourteenth District of Texas at Houston held that the Louisiana trustees had sufficient contacts with Texas; thus, Texas courts had specific personal jurisdiction over them, even though the trust instrument indicated the trust was to be

131. *Id.* § 112.036(c)(2).

132. *See id.* § 112.036(d).

133. *Id.* § 112.036(f).

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

135. *Id.*

136. *Id.* at 930.

137. *Id.* at 929.

138. *Id.* at 930.

139. *Alexander v. Marshall*, No. 14-18-00425-CV, 2021 WL 970760, at *1 (Tex. App.—Houston [14th Dist.] Mar. 16, 2021, pet. denied) (mem. op.).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at *6.

governed by the Louisiana Trust Code and the trustees were directed to apply to a specified Louisiana court for instructions on trust issues.¹⁴⁴

D. STANDING

As *Austin v. Mitchell* demonstrates, it is difficult for a non-beneficiary, non-trustee to obtain standing as an interested person.¹⁴⁵ In this case, the ex-husband created a trust for his children.¹⁴⁶ The ex-wife filed suit against the trustee, claiming standing as an interested person under Texas Property Code Section 111.004(7) because she had a claim against the trust.¹⁴⁷ The trial court and the Court of Appeals for the Fifth District of Texas at Dallas agreed that filing a claim against a trustee does not make a person an interested party.¹⁴⁸ Because the ex-wife was neither a beneficiary nor a trustee, she needed to demonstrate an interest sufficient to satisfy the appellate 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 "may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding."¹⁴⁹

The trial court and the appellate court agreed with the ex-husband that the ex-wife did not satisfy her burden of showing a sufficient interest to be deemed an interested person.¹⁵⁰ The only possible interest she had was a claim that part of the ex-husband's funding of the trust was a fraudulent transfer.¹⁵¹ Because this claim was barred, she had no claim against the trust; thus, she was not an interested person.¹⁵²

E. PROPERTY

A person attempting to claim that the funding of a trust was via a fraudulent transfer must file suit in a timely manner.¹⁵³ For example, in *Austin v. Mitchell*, the ex-wife claimed that the ex-husband fraudulently transferred a portion of his limited partnership interest to a trust for the benefit of his children.¹⁵⁴ The ex-husband successfully argued to both the trial court and the appellate court that it was too late for the ex-wife to complain under Texas Business & Commerce Code Section 24.010, which requires suit to be filed within four years of the transfer or within one year after discovery of the transfer following the four year period.¹⁵⁵

144. *Id.* at *1, *7.

145. *Austin v. Mitchell*, No. 05-19-01359-CV, 2021 WL 2327870, at *6 (Tex. App.—Dallas June 8, 2021, no pet.) (mem. op.).

146. *Id.* at *1.

147. *Id.* at *2, *6 (quoting TEX. PROP. CODE ANN. § 111.004(7)).

148. *Id.* at *1, *6.

149. *Id.* (citing TEX. PROP. CODE § 111.004(7)).

150. *Id.* at *7.

151. *Id.* at *6.

152. *Id.* at *6–7.

153. *See id.* at *3.

154. *Id.* at *1.

155. *Id.* at *1, *3 (quoting TEX. BUS. & COM. CODE ANN. § 24.010).

The appellate court explained that the restriction on bringing a fraudulent transfer action is a statute of repose rather than a statute of limitations.¹⁵⁶ The purpose of the statute is “to provide absolute protection to certain parties from the burden of indefinite potential liability.”¹⁵⁷ The claim was brought more than four years after the transfer; thus, the ex-wife was required to show that she brought the action within one year after she discovered, or reasonably could have discovered, the transfer.¹⁵⁸ The appellate 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.¹⁵⁹

F. SETTLEMENT AGREEMENT

Austin Trust Company v. Houren reminds litigants that before signing a settlement agreement they must be certain they agree with all of the terms because it is difficult to bring a claim when settlement remorse sets in.¹⁶⁰ The wife established a marital trust for her husband.¹⁶¹ The husband’s will exercised a power of appointment, that the wife granted him in her will, to give all remaining assets to trusts in favor of their children.¹⁶² After the husband died, claims were made that he violated his fiduciary duties by distributing excessive funds (\$37+ million) to himself.¹⁶³ All parties signed a family settlement agreement resolving all issues.¹⁶⁴ Nonetheless, the trustee of trusts—to which the husband appointed the remainder of the trust property—asserted that it was entitled to these funds.¹⁶⁵ The trial court agreed with the executor of the husband’s estate that the settlement agreement barred the trustee’s claim.¹⁶⁶ The trustee appealed.¹⁶⁷

The Court of Appeals for the Fourteenth District of Texas at Houston affirmed.¹⁶⁸ The appellate court analyzed the settlement agreement.¹⁶⁹ First, the appellate court recognized that, because all parties agreed that the agreement was unambiguous, it would construe it as a matter of law.¹⁷⁰ The appellate court then examined the language of the agreement, concluding that it “specifically and unambiguously released” the trustee’s

156. *Id.* at *3.

157. *Id.* (citing *Nathan v. Whittington*, 408 S.W.3d 870, 873, 875 (Tex. 2013) (per curiam)).

158. *Id.*

159. *Id.* at *5.

160. *Austin Tr. Co. v. Houren*, No. 14-19-00387-CV, 2021 WL 970819, at *3 (Tex. App.—Houston [14th Dist.] Mar. 16, 2021, pet. filed) (mem. op.).

161. *Id.* at *1.

162. *Id.* at *2.

163. *Id.* at *4.

164. *Id.* at *2–3.

165. *Id.* at *4.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at *6.

170. *Id.*

alleged claims.¹⁷¹ The appellate court explained that its “decision adheres to the public policy in favor of Texas courts upholding contracts negotiated at arm’s length by knowledgeable and sophisticated business players represented by highly competent and able legal counsel.”¹⁷²

V. OTHER ESTATE PLANNING MATTERS

A. DISCLAIMERS

A disclaimer must now contain an additional statement under penalty of perjury.¹⁷³ The disclaiming individual must state whether the disclaimant is a child support obligor whose disclaimer is barred under Texas Property Code Section 240.151(g).¹⁷⁴ However, the disclaimant’s failure to include the statement will not invalidate the disclaimer if the disclaimer is not barred under Section 240.151(g).¹⁷⁵

B. TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

After an approval by a vote of the State Bar of Texas, the Texas Supreme Court approved the addition of Rule 1.16 and its comments to provide extensive guidance to attorneys in dealing with clients who have diminished capacity.¹⁷⁶ Rule 1.16 took effect on July 1, 2021.¹⁷⁷ Note that the lengthy comments, over seven times longer than the rule itself, should be carefully studied to understand the practical impact of Rule 1.16.¹⁷⁸ Rule 1.16 reads as follows:

Rule 1.16. Clients with Diminished Capacity

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with

171. *Id.* (first citing *Province Fire Ins. Co. v. Ashy*, 162 S.W.2d 684, 687 (Tex. 1942); and then citing *Bennett v. Comm’n for Law. Discipline*, 489 S.W.3d 58, 70 (Tex. App.—Houston [14th Dist.] 2016, no pet.)).

172. *Id.* at *7 (citing *Harrison v. Harrison Ints., Ltd.*, No. 14-15-00348-CV, 2017 WL 830504, at *5 (Tex. App.—Houston [14th Dist.] Feb. 28, 2017, pet. denied) (mem. op.)).

173. Act of May 29, 2021, 87th Leg., R.S., ch. 552, § 11, sec. 240.009, 2021 Tex. Sess. Law Serv. 1113, 1117 (codified at TEX. PROP. CODE ANN. § 240.009(e)).

174. TEX. PROP. CODE § 240.009(e).

175. *Id.*

176. See *Final Approval and Adoption of Amendments to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure*, SUPREME COURT OF TEXAS 1, 10 (May 25, 2021), <https://www.txcourts.gov/media/1452266/219061.pdf> [<https://perma.cc/V5DS-MC97>] [hereinafter *Amendment to Texas Disciplinary Rules*].

177. *Id.* at 1.

178. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.16 cmt. 1–11, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9).

individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests.¹⁷⁹

VI. CONCLUSION

The new cases and statutes address a wide array of issues—some very narrow and some with potentially broad impact. This Article has already discussed the practical application of many of the cases and statutes. It is also important to understand some overarching principles that transcend individual cases and form a pattern. Here are some examples of patterns this author detected:

- The poor drafting of wills, by attorneys or the testators themselves, is a prominent cause for appellate litigation, regarding the interpretation of a will in Texas. For example, although only a clerical error, the failure to delete the singular word “personal” in *Odom v. Coleman* led to tedious and divisive litigation.
- The area of estate planning and probate touches on various other areas of law, such as marital property, land titles, and taxation. It is important for attorneys to be aware of how their work product may impact their clients' legal claims and rights in these other areas of law.
- To the best of their ability, attorneys should inform their clients of any possible, even if seemingly unlikely, consequences to any action a client may undertake, especially when the action involves release of legal claims (e.g., family settlement agreement scenarios) or statutory limitations (e.g., statutes of repose and who may be considered an interested party).
- Although litigation involving wills, estates, and trusts will be unique from case to case because of individual facts, Texas case law continues to reaffirm core principles, such as the acceptance-of-benefits doctrine, the high burden of proving undue influence, and the importance of adhering to a testator or contracting person's express intent.

This indicates that these principles are likely here to stay.

179. See Amendment to Texas Disciplinary Rules, *supra* note 176, at 10.

