



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00727-CV

Margaret Landen **SAKS**,
Appellant

v.

HEINRICHS & DE GENNARO, P.C.,
Appellee

From the Probate Court No. 1, Bexar County, Texas
Trial Court No. 2011-PC-3466
The Honorable Kelly Cross, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: July 27, 2016

AFFIRMED

Margaret Landen Saks appeals a probate court order granting a motion to strike her petition in intervention and a probate court order granting a motion to disburse funds from the registry of the court.¹ Saks contends the probate court erred in granting the motions. We affirm the probate court's orders.

¹ The second order cites section 31.002 of the Texas Civil Practice and Remedies Code and is in the form of a turnover order. *See Schultz v. Fifth Judicial Dist. Court of Appeals*, 810 S.W.2d 738, 740 (Tex. 1991) (holding turnover order is appealable); *In re Hamel*, 180 S.W.3d 226, 229 (Tex. App.—San Antonio 2005, orig. proceeding) (“turnover orders are final, appealable orders”).

DISCUSSION

On August 17, 2011, Lauren Saks filed an original petition asserting claims against Diane Flores, as Trustee of the Saks Children Trust a/k/a ATFL&L (the “Trust”), and Sandra Garza Davis f/k/a Sandra C. Saks, the settlor of the Trust. The appellant Margaret Landen Saks (“Landen”) and Lauren are sisters and are the beneficiaries of the Trust. Lauren filed the petition individually and on behalf of the Trust. With regard to the claims brought on behalf of the Trust, the petition alleged that Diane would be unwilling to pursue the claims and her interests were antagonistic to Lauren’s as beneficiary; therefore, Lauren was a proper person to bring the claims, derivatively, on behalf of the Trust. Lauren sought to recover damages, the imposition of a constructive trust, an accounting, and Diane’s removal as trustee. Although Landen is not listed as a party in the style of the petition, the section of the petition labeled “Parties” lists Landen as a necessary party and provides an address for service.

On December 28, 2011, the probate court signed an order appointing Marcus Rogers as interim trustee of the Trust. On April 2, 2012, a mediated settlement agreement was signed. On May 8, 2012, the probate court approved the mediated settlement agreement. The mediated settlement agreement expressly stated the Trust would pay the attorney’s fees and expenses of Heinrichs & De Gennaro, P.C. The mediated settlement agreement also provided that any future disputes would be referred to mediation and, if the mediation was unsuccessful, to binding arbitration.

On September 5, 2012, the probate court entered an order compelling Sandra, Lauren, Rogers, and Landen to attend mediation and, if any matters were not resolved at mediation, to arbitration. The order noted several disputes had arisen including the amount of fees to be paid to Heinrichs & De Gennaro, P.C.

On October 18, 2012, an arbitration was conducted. Landen failed to appear at the arbitration in violation of the probate court's order. On October 24, 2012, the arbitrator signed his findings and final award. In his findings, the arbitrator found Landen was a party to the mediated settlement agreement, and her refusal to attend the arbitration was arbitrary, unreasonable, and for purposes of unnecessary delay. The arbitrator also found Landen granted Lauren the authority to act on her behalf with regard to the mediated settlement agreement under a Limited Special Power of Attorney which was not revoked prior to the execution of the agreement; therefore, Landen was bound by the mediated settlement agreement. The arbitrator further found Landen ratified the mediated settlement agreement. Finally, the arbitrator found the mediated settlement agreement provided for the payment of the fees and expenses of Heinrichs & De Gennaro, P.C., found the amount of attorney's fees to be paid was \$285,000, and found the amount of expenses to be paid was \$12,358.85. With regard to the payment of those fees and expenses, the arbitrator also found the following:

Further, in addition to the undertaking in the [mediated settlement agreement], Landen derived a direct and significant benefit from the services provided by Heinrichs & De Gennaro, P.C. in the Trust of which she is an equal beneficiary by the Trust recovering approximately \$2.5 million worth of property as the result of the efforts of Heinrichs & De Gennaro, P.C., thereby obligating the Trust, and Landen's interest therein, to pay for the services rendered under the Common Fund Doctrine.

On May 7, 2013, the probate court signed an order confirming the arbitrator's findings and final award and made the award the judgment of the probate court. Sandra and Landen appealed the probate court's judgment confirming the arbitration award. *See Davis v. Merriman*, No. 04-13-00518-CV, 2015 WL 1004357 (Tex. App.—San Antonio Mar. 4, 2015, pet. denied) (mem. op.). One of the issues Sandra and Landen raised on appeal was whether the probate court's judgment "approving a void arbitration award [was] also void." *Id.* at *3 n.2. This court overruled

all of the issues Sandra and Landen presented and affirmed the probate court's judgment confirming the arbitration award. *Id.* at *3-5.

On July 24, 2015, Heinrichs & De Gennaro, P.C. filed a motion seeking to order the disbursement of funds held in the registry of the court in payment of the probate court's judgment confirming the arbitration award. The funds were deposited into the registry of the court following a court-ordered sale of real property. Heinrichs & De Gennaro, P.C. filed an abstract of judgment against the property prior to the sale and asserted the law firm was entitled to the sales proceeds to pay the judgment lien.

On August 25, 2015, Landen filed a plea in intervention asserting the judgment in favor of Heinrichs & De Gennaro, P.C. was void because the Trust was not legally obligated to pay the judgment. Heinrichs & De Gennaro, P.C. filed a motion to strike the intervention.

As previously noted, the probate court granted the motion to strike Landen's intervention and the motion to disburse funds to Heinrichs & De Gennaro, P.C. Landen appeals.

INTERVENTION

In her first issue, Landen contends the probate court erred in granting the motion to strike her plea in intervention. We review a trial court's ruling on a contested intervention under an abuse of discretion standard. *See State v. Naylor*, 466 S.W.3d 783, 792-93 (Tex. 2015).

As the Texas Supreme Court has stated, Rule 60 of the Texas Rules of Civil Procedure governs interventions by "defin[ing] the category of *non-parties* who may, without consultation with or permission from the original parties or the court, interject their interests into a pending suit to which the intervenors have not been invited." *In re Union Carbide Corp.*, 273 S.W.3d 152, 154-55 (Tex. 2008) (emphasis added). Similarly, this court also has noted, "An intervention is an equitable motion filed by a *nonparty* voluntarily seeking to become a party in a pending suit to protect the *nonparty's* own rights." *In re H.G.*, 267 S.W.3d 120, 122 n.1 (Tex. App.—San Antonio

2008, pet. denied) (emphasis added). In this case, Landen was named as a party in the underlying lawsuit, she signed the mediated settlement agreement, and the arbitrator found she was a party to the mediated settlement agreement during an arbitration the probate court ordered her to attend.² Because Landen was a party to the underlying cause, the trial court did not abuse its discretion in granting the motion to strike her plea in intervention. Landen's first issue is overruled.

ORDER DISBURSING FUNDS

In her second issue, Landen challenges the probate court's order disbursing funds from the registry of the court to pay the judgment the probate court awarded Heinrichs & De Gennaro, P.C. in confirming the arbitration award. In its brief, Heinrichs & De Gennaro, P.C. responds that Landen's issues are impermissible collateral attacks against the probate court's judgment confirming the arbitration award. In her reply brief, Landen contends the probate court's judgment confirming the arbitration award was void; therefore, her collateral attacks are permissible.

Landen is correct that a void judgment can be collaterally attacked at any time. *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 271-72 (Tex. 2012). A judgment is only void, however, "when the court rendering judgment has no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act." *Id.* at 272 (internal citations omitted).

Having reviewed Landen's briefs, Landen appears to have raised the following three jurisdictional arguments: (1) the probate court's judgment is facially void because the trust is not an entity against which a judgment can be rendered; (2) the probate court lost jurisdiction when Diane resigned as trustee because the Trust provided for the non-judicial appointment of a successor trustee; and (3) the probate court lost jurisdiction over Lauren's claims when Rogers

² As previously noted, the arbitrator found Landen's failure to appear was arbitrary, unreasonable, and for purposes of unnecessary delay.

failed to pursue Lauren's claims after he was appointed as interim trustee.³ Asserting her second and third arguments are issues of first impression, Landen admits she found no case law to support these arguments.

A. Trust Not Legal Entity

We first address Landen's contention that the judgment was void because the Trust is not a legal entity against which a judgment can be rendered. Texas law distinguishes between the concepts of standing and capacity. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848-49 (Tex. 2005). While standing is a jurisdictional requirement that can be raised for the first time on appeal, capacity is not jurisdictional. *Id.* at 849. Instead, "a challenge to a party's capacity must be raised by a verified pleading in the trial court." *Id.* In this case, Landen's contention that the judgment was required to be rendered against the trustee instead of the trust is a challenge to capacity. *See Ray Malooly Trust v. Juhl*, 186 S.W.3d 568, 570-71 (Tex. 2006). Because the lack of capacity is not a jurisdictional concept that renders a judgment void, Landen's contention that the trust is not a legal entity against which a judgment can be rendered is an impermissible collateral attack on the probate court's judgment confirming the arbitration award.

B. Appointment of Interim Trustee

We next address Landen's contention that the probate court lacked jurisdiction to appoint a successor trustee, making its order appointing Rogers as interim trustee and authorizing Rogers to take actions on behalf of the Trust void. In support of this contention, Landen relies on Article

³ Landen also challenges the payment of the judgment as a violation of the spendthrift provision of the Trust Agreement; however, Landen does not contend such a violation would render the probate court's judgment confirming the arbitration award void. Moreover, section 114.064 of the Texas Trust Code gives the trial court discretion to award costs and attorney's fees in any proceeding under the Code, and the arbitrator expressly found the Trust recovered approximately \$2.5 million worth of property as a result of the attorneys' efforts. TEX. PROP. CODE ANN. § 114.064 (West 2014); *see also Hachar v. Hachar*, 153 S.W.3d 138 (Tex. App.—San Antonio 2004, no pet.) (affirming order in which attorney's fees were taxed against trust in accordance with settlement agreement).

V of the Trust Agreement which contains provisions regarding the appointment of a successor trustee.

Section 113.083(a) of the Texas Trust Code provides:

On the death, resignation, incapacity, or removal of a sole or surviving trustee, a successor trustee shall be selected according to the method, if any, prescribed in the trust instrument. If for any reason a successor is not selected under the terms of the trust instrument, a court may and on petition of any interested person shall appoint a successor in whom the trust shall vest.

TEX. PROP. CODE ANN. § 113.083(a) (West 2014). In this case, the record reflects that Lauren filed a motion requesting the court to appoint a successor trustee, and Lauren's motion states two successor trustees named in the Trust Agreement declined to serve.⁴ Landen points to no evidence in the record that a successor trustee could be selected under the terms of the trust instrument. Accordingly, Landen fails to establish that the probate court's appointment was improper. Even if we assume, however, that the probate court's appointment was not in accordance with section 113.083(a), Landen cites no authority to support the proposition that such an appointment would be void. Instead, the case law suggests the propriety of the appointment of a successor trustee is an issue that must be raised on direct appeal. *See Conte v. Ditta*, 312 S.W.3d 951, 961 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (holding trial court abused its discretion in appointing successor trustee); *Alpert v. Riley*, 274 S.W.3d 277, 296 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (same). Because Landen cites no authority to support her contention that the probate court's appointment of Rogers as the interim trustee was void, and we have found none, Landen's contention relating to Rogers's appointment as interim trustee is an impermissible collateral attack on the probate court's judgment affirming the arbitration award.

⁴ We take judicial notice of the appellate record in appeal number 04-13-00518-CV challenging the probate court's judgment confirming the arbitration award. *See Davis*, 2015 WL 1004357.

C. Assertion of Claims by Interim Trustee

Finally, we address Landen's contention that Rogers did not join Lauren's claims against Diane after he was appointed as interim trustee. Because the record fails to support Landen's contention, we do not address whether this contention raises a jurisdictional issue. First, the order appointing Rogers as interim trustee expressly authorized him to "conduct an investigation into the administration of the Trust, its assets, the various contentions regarding trust asset ownership interests, and all other matters relating to the Trust relevant to the proceeding before the Court." On February 29, 2012, Rogers submitted a report to the probate court stating his investigation "substantially confirm[ed] the facts supporting the allegation of Lauren Saks in paragraph 12 of her lawsuit," in which Lauren alleged Diane abdicated her responsibilities as trustee and engaged in willful misconduct, gross negligence and/or bad faith. Thereafter, Rogers participated in the mediation and arbitration undertaken to resolve those claims. Therefore, we reject Landen's contention that Rogers did not join the claims asserted against Diane after he was appointed as interim trustee.

CONCLUSION

The probate court's orders are affirmed.

Marialyn Barnard, Justice