FIDUCIARY PITFALLS

BY:[1]

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She served on the State Bar of Texas Legal Specialization Estate Planning and Probate Exam Commission from 2004-2010, including as its Chair her last term. She been the course director for the State Bar of Texas Building Block of Wills, Trusts and Estate Planning Course, Nuts and Bolts of Wills, Trusts and Estate Planning Course, the Advanced Estate Planning and Probate Course, Advanced Guardianship and Elder Law Course, the Annual Advanced Estate Planning Strategies Course, and Advanced Fiduciary Litigation Course. In addition, she has served on numerous additional CLE planning committees.

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I. SCOPE OF ARTICLE

The term "fiduciary" generally means "any person who occupies a position of peculiar confidence towards another." While these appointments often arise based on a trusted relationship, the fiduciary role can be a thankless one. Once appointed, a fiduciary faces a host of issues from deciding to serve, to balancing divergent interests, to facing threats of litigation and accounting for and defending his, her or its actions.

As the number of lawsuits involving the role and responsibilities of a fiduciary continue to increase, professionals representing and advising these individuals face an equally tough job. Unfortunately, neither the Texas Estates Code nor the Texas Property Code (which contains the Texas Trust Code) provides definitive guidance as to all the role, responsibility, and potential liability of a fiduciary. But, adherence to some central considerations and measures may allow the fiduciary to fulfill his or her fiduciary duties, and also substantially reduce (but not eliminate) potential claims against, and liability of, the fiduciary.

The following is a discussion of possible ways to reduce the potential for future litigation in this area in light of applicable common and statutory law.

II. FIDUCIARY RELATIONSHIPS

A. Overview

The term "fiduciary" is derived from civil law. Most courts have held that it is not possible to give a definition of the term fiduciary that is comprehensive enough to cover all cases. Courts have generally found that a fiduciary is a person "who occupies a position of peculiar confidence towards another." *Montague v. Brassell*, 443 S.W.2d 703 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.). And, it "refers to integrity and fidelity . . . [and] contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction." But, the term can also include "informal relations that exist whenever one party trusts and relies upon another, as well as technical fiduciary relations." *See id.* (*citing* 25 C.J. p. 1118; *Peckham v. Johnson*, Tex. Civ. App., 98 S.W.2d 408; *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 120 A.L.R. 720; *Swiney v. Womack*, 343 Ill. 278, 175 N.E. 419; *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896; *Niland v. Kennedy*, 316 Ill. 253, 147 N.E. 117; *Lindholm v. Nelson*, 125 Kan. 223, 264 P. 50; *Roecher v. Story*, 91 Mont. 28, 5 P.2d 205; *Roberts v . Parsons*, 195 Ky. 274, 242 S.W. 594; *Seely v. Rowe*, 370 Ill. 336, 18 N.E.2d 874; *Bliss v. Bahr*, 161 Or. 79, 87 P.2d 219; *Kinzbach Tool Co. v. Corbett-Wallace Corp*., 138 Tex. 565, 160 S.W.2d 509, 512).

While not every fiduciary relationship is defined, Texas law has clearly established the following fiduciary relationships:

- Attorney to client. *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999);
- Trustee to beneficiary. *Huie v. DeShazo*, 922 S.W.2d 920,923 (Tex. 1999);
- Executor to beneficiary. *Huie v. DeShazo*, 922 S.W.2d 920,923 (Tex. 1999);
- Guardian to ward. *Byrd v. Woodruff*, 891 S.W.2d 710 (Tex. App.—Dallas, 1994, writ denied);
- Spouse to spouse. *Schleuter v. Schleuter*, 975 S.W.2d 584, 589 (Tex. 1998);
- Partner to partner. *Bohatch v. Butler, Binion*, 977 S.W.2d 543, 545 (Tex. 1998); and
- Agent to principal. *Kinzbach Tool Co. v. Corbett-Wallace*, 160 S.W.2d 509, 512 (Tex. 1942).

B. Trustees

One of the most commonly recognized fiduciary relationships is that of a trustee. A trustee generally means "the person holding the property in trust, including an original, additional, or successor trustee, whether or not the person is appointed or confirmed by a court." TEX. PROP. CODE ANN. § 111.004(18) (Vernon 2007). A trust may be created by any of the following:

- A property owner's declaration that the owner holds the property as trustee for another person:
- A property owner's *inter vivos* transfer of the property to another person as trustee for the transferor or a third person;
- A property owner's testamentary transfer to another person as trustee for a third person;
- An appointment under a power of appointment to another person as trustee for the donee of the power or for a third person; or
- A promise to another person whose rights under the promise are to be held in trust for a third person.

See id.

Once a trust is created, the trustee is a fiduciary to all the beneficiaries of the trust, both current and remaindermen, vested and contingent.

Note the Texas Trust Code was recently amended to include digital assets to the definition of property.

C. Personal Representatives

A personal representative (i.e. an executor or administrator appointed to serve as the legal representative of a decedent's estate) is also a fiduciary. They can be appointed temporarily or permanently, dependently or independently. TEX. ESTATES CODE ANN. § 22.031 (Vernon 2013). The executor or administrator owes fiduciary duties to the beneficiaries of the estate and, in some cases, to a surviving spouse if his or her property is subject to administration. But, they are generally not fiduciaries to creditors. *See Mohseni v. Hartman,* 363 S.W.3d 652 (Tex.App.--Hous. [1st Dist]) 2011, n.p.h.)("under the present statutory scheme, an independent executor does not hold the estate property in trust for the benefit of the estate creditors and therefore does not owe them a fiduciary duty absent any specific undertaking to manage the creditor's interests in the case of a bankrupt estate"); *FCLT Loans, L.P. v. Estate of Bracher*, 93 S.W.3d 469 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *but see Ex parte Buller,* 834 S.W.2d 622 (Tex. App.-Beaumont 1992, orig. proceeding).

D. Guardians

A guardian is the person or entity appointed by a court to serve as the legal representative for an incapacitated person. A guardian is a fiduciary to the ward for which he or she is appointed to serve. It includes a person or entity that is appointed as permanent, temporary or successor guardian.

E. Agents

An attorney in fact or agent is the person or entity appointed to serve as a principal's agent pursuant to a power of attorney. TEX. ESTATES CODE ANN. § 751.002 (Vernon 2013). The attorney in fact or agent is a fiduciary to his or her principal. TEX. ESTATES CODE ANN. § 751.101 (Vernon 2013). If properly drafted, a "durable" power of attorney survives the principal's incapacity and, thus, the agent continues to act on behalf of an incapacitated principal. TEX. ESTATES CODE ANN. § 751.002 (Vernon 2013).

III. SOURCES OF GUIDANCE AND AUTHORITY

A. Trustees

Trust law is primarily a function of state law. Whenever there is a dispute involving a trust governed by Texas law, state law will control. There are generally three sources of binding authority when construing a Texas trust. They include:

1) The trust instrument;
2) The Texas Trust Code; and
3) Texas common law.

In addition, there are a number of other sources that may provide some guidance – albeit no clear precedential value. These sources include:

1) The Restatement of Trusts;
2) The Uniform Trust Code; and
3) Legal Treatises.

A brief discussion of each follows.

1. Binding Authority

i. *The Trust Instrument*

It is well settled in Texas that the first principle of trust construction is to honor the intent of the settlor. Thus, the terms of a trust as set forth in the governing instrument generally control. This principle has been recognized by Section 111.0035(b) of the Texas Property Code which provides that:

> (b) The terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit:
> (1) The requirements imposed under Section 112.031;
> (2) The applicability of Section 114.007 to an exculpation term of a trust;
> (3) The periods of limitation for commencing a judicial proceeding regarding a trust;
> (4) A trustee's duty:
> (A)With regard to an irrevocable trust, to respond to a demand for accounting made under Section 113.151 if the demand is from a beneficiary who, at the time of the demand:
> (i) is entitled or permitted to receive distributions from the trust; or
> (ii) would receive a distribution from the trust if the trust terminated at the time of the demand; and
> (B) To act in good faith and in accordance with the purposes of the trust;
> (5) The power of a court, in the interest of justice, to take action or exercise jurisdiction, including the power to:
> (A) Modify, reform or terminate a trust or take other action under Section 112.054;
> (B) Remove a trustee under Section 113.082;
> (C) Exercise jurisdiction under Section 115.001;
> (D) Require, dispense with, modify, or terminate a trustee's bond; or
> (E) Adjust or deny a trustee's compensation if the trustee commits a breach of trust; or Subsection (6) below is effective for trusts existing or created on or after June 19, 2009.
> (6) The applicability of Section 112.038.

TEX. PROP. CODE ANN. 111.0035(b) (Vernon 2014 & Supp.2018)(emphasis added new amended language); *see also Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.)(when language of trust instrument is unambiguous

and expresses intentions of settlor, trustee's powers are conferred by instrument and neither court nor trustee can add or take away such power).

ii. *Texas Trust Code Section 101.001 et seq*

As previously discussed, Texas has adopted the Texas Trust Code (located in the Texas Property Code). *See* TEX. PROP. CODE ANN. 101.001 *et seq.* (Vernon 2014). The Texas Trust Code applies to all trusts governed by Texas law unless the trust instrument indicates a clear intent to provide otherwise (and only to the extent that the provisions do not limit the matters set forth in Section 111.0035 discussed *supra).*

Therefore, unless the terms of a trust validly provide otherwise, the Texas Trust Code governs:

1) The duties and powers of a trustee;
2) Relations among trustees; and
3) The rights and interests of a beneficiary.

See TEX. PROP. CODE ANN. 111.0035(a) (Vernon 20).

iii. *Texas Common Law*

The powers and duties of a trustee are also governed by common law to the extent (i) the trust instrument does not validly provide otherwise, and (ii) the common law is not inconsistent with the provisions of the Texas Trust Code. *See* TEX. PROP. CODE ANN. § 111.005 (Vernon 2007)("If the law codified in this subtitle repealed a statute that abrogated or restated a common law rule, that common law rule is reestablished, except as the contents of the rule are changed by this subtitle.")

The common law in Texas, as in many other states, is not as extensive as one may expect. There are a small number of cases from the middle of the 20th century that are cited again and again in most of the subsequent decisions. Many of these cases focus on construction of the agreement, distributions standards and the exercise of a fiduciary's discretion. And, later sections of this outline will discuss some of these seminal cases.

2. Potential Sources of Guidance

In addition to the preceding mandatory sources of guidance, additional, albeit non-binding, guidance may include:

i. Restatement of Trusts

Texas has not adopted the Restatement of Trusts and it is not binding authority under Texas law. *See* RESTATEMENT (SECOND) OF TRUSTS § 1 *et seq* (1959); RESTATEMENT (THIRD) OF TRUSTS § 1 *et seq* (2003). But, Texas courts have considered and cited the Restatement (Second) of Trusts in a number of decisions. And, they appear to be considering the more recently adopted Restatement (Third) of Trusts on an increasing basis. *See Estate of Boylan,* 2015 WL 598531 (Tex.App.--Fort Worth n.p.h.); *Highland Homes Ltd. v. State,* 448 S.W.3d 403 (Tex. 2014); *Woodham v. Wallace*, 2013 WL 23304 (Tex.App.—Dallas 2013,n.p.h.); *Wolfe v. Devon Energy Production Co., LP*, 382 S.W.3d 434 (Tex.App.—Waco 2012, rev. denied); *See Mohseni v. Hartman,* 363 S.W.3d 652 (Tex.App.—Hous. [1 Dist]) 2011, n.p.h.); *Longoria v. Lasater,* 292 S.W.3d 156 (Tex. App.—San Antonio 2009)(pet. denied); *Alpert v. Riley,* 274 S.W.3d 277 (Tex. App.—Houston [1st Dist.] 2008)(pet. denied); *In re Townley Bypass Unified Credit Trust*, 252 S.W.3d 715 (Tex. App.—Texarkana 2008)(pet. denied); *Keisling v. Landrum,* 218 S.W.3d 737 (Tex.

App.—Fort Worth 2007, pet. denied); *Pickelner v. Adler*, 229 S.W.3d 516 (Tex. App.—Houston [1st Dist.] 2007)(pet. denied); *Moon v. Lesikar*, 230 S.W.3d 800 (Tex. App.—Houston [14th Dist.] 2007)(no pet.); *Marsh v. Frost National Bank,* 129 S.W.2d 174 (Tex. App.—Corpus Christi 2004, pet. denied); *Bergman v. Bergman Davison Webster Charitable Trust*, 2004 WL 24968 (Tex. App.—Amarillo 2004, no writ)(not designated for publication).

Also note that the more recently adopted Restatement (Third) of Trusts may provide guidance not previously address in the Restatement (Second) of Trusts. For example, the comments to Section 50 entitled "Enforcement and Construction of Discretionary Interests" provide guidance relating to discretionary distributions that was not included in prior restatements. Specifically, Section 50 provides as follows:

> (1) A discretionary power conferred upon the trustee to determine the benefits of a trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion by the trustee.
> (2) the benefits to which a beneficiary of a discretionary111.0035
> (3) interest is entitled, and what may constitute an abuse of discretion by the trustee, depend on the terms of the discretion, including the proper construction of any accompanying standards, and on the settlor's purposes in granting the discretionary power and in creating the trust.

RESTATEMENT (THIRD) OF TRUSTS § 50 (2003).

But before assuming a Restatement may provide guidance, care should be taken to determine whether the applicable provision of the Texas Property Code conflicts with the Restatement's position. If so, the Restatement should be completely disregarded.

ii. *Uniform Trust Code*

Approved in 2000 by the National Conference of Commission on Uniform State Laws, the Uniform Trust Code is the first codification of trust law. The Uniform Trust Code, with some variations, has been adopted by and the District of Columbia and approximately twenty-five states: Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming. *See http://uniformlaws.org/LegislativeFactSheet.aspx?title=Trust Code.* In 2015, New Jersey again introduced a bill seeking its adoption. *See id.*

Texas has not adopted the Uniform Trust Code and there does not appear to be any intention to do so. In fact, legislative history indicates certain provisions of the Texas Trust Code were enacted to expressly disavow attempts to apply certain provisions. But, the Uniform Trust Code may provide some guidance when construing and administering trusts. For example, to the extent that Texas used the Uniform Trust Code as a guide when drafting and enacting Texas' version of the Uniform Principal and Income Act in 2003, it does provide guidance on those adopted provisions. Then again, in other situations, Texas has adopted legislation in direct contradiction of its provisions.

iii. *Treatises*

Finally, there are several treatises that provide guidance on construing and administering trusts. For example, a number of Texas courts have cited Scott on Trusts and Bogerts in decisions involving trusts. *See* William F. Frathcer, *Scott on Trusts* (4th ed. 1988); George Gleason Bogert & George Taylor Bogert, *The Law Of Trusts And Trustees* (6th ed. 2006).

B. Personal Representatives

The powers of a personal representative of a decedent's estate are based on the governing authority. To the extent a personal representative (generally an executor), is appointed pursuant to the term of a will, the personal representative is "vested with unbridled authority over the estate and is authorized to do any act respecting it which the court could authorize to be done if the entire estate were under its control; or whatever testator himself could have done in his lifetime, *except as restrained by the terms of the will itself*." *Marlin v. Kelly*, 678 S.W.2d 582, 588 (Tex. App.—Houston [14th Dist.] 1984, writ granted)(emphasis added)(*affirmed by Kelley v. Marlin*, 714 S.W.2d 303 (Tex. 1986) (*citing Hutcherson v. Hutcherson,* 135 S.W.2d 757 (Tex. Civ. App.—Galveston 1939, writ ref'd)); *see also* TEX. ESTATES CODE ANN. § 356.002 (Vernon 2013).

To the extent a personal representative is appointed in a dependent capacity, the personal representative is generally limited to those powers set forth in the Texas Estates Code. *See* TEX. ESTATES CODE ANN. Subtitle H (Vernon 2013).

The duties of a personal representative are primarily set forth in the Texas Estates Code. But, common law also governs a personal representative's rights, power and duties to the extent it does not conflict with statutory law. *See* TEX. ESTATES CODE ANN. § 351.001 (Vernon 2013). And, a testator may limit some, but not all, of a personal representative's duties under the term of his or her will.

C. Guardians

A guardian's duties are primarily set by statute. Historically, the statutes that regulated decedents' estates also governed guardianships. These sections did not address the specific needs of individuals subject to a guardianship or allow the courts and guardians the flexibility to custom tailor a guardianship to the particular needs and limitations of each ward. In 1993, the Texas legislature completely revamped the then-entitled Texas Probate Code in a continued effort to address and "up-date" the entire guardianship structure. This resulted in the removal of the guardianship statutes from their inclusion with decedents' estates and the other probate statutes and the enactment of Chapter XIII of the Texas Probate Code entitled "Guardianships" which in 2014 became Title 3 of the Texas Estates Code.

In 2016, the Texas legislature once again updated the entire guardianship structure, providing for more safeguards for proposed wards and augmenting the procedure to attain a guardianship, and enacted Title 3 of the Texas Estates Code entitled "Guardianship and Related Procedures." *See* TEX. ESTATES CODE §§ 1002.001, *et seq*.

If knowledge of the plethora of guardianship sections is not enough, to the extent applicable and not inconsistent with the provisions of the Texas Estates Code, the laws and rules governing estates of decedents still apply to and govern guardianships. *See* TEX. ESTATES CODE ANN. § 1001.02 (Vernon 2013). Thus, a guardian and his advisors

cannot ignore all these other sections of the Texas Estates Code.

In addition, the powers and duties of a guardian are also governed by common law to the extent they are applicable and not inconsistent with the provisions of the Texas Estates Code. *See* TEX. ESTATES CODE ANN. § 351.001 (Vernon 2013)("The rights, powers, and duties of executors and administrators are governed by common law principles to the extent that those principles do not conflict with the statutes of this state"); TEX. ESTATES CODE ANN. § 1001.002 (Vernon 2013)("To the extent applicable and not inconsistent with other provisions of this code, the laws and rules governing estates of decedents apply to guardianships").

D. Agents

Subtitle P of the Texas Estates Code governs the execution and construction of a durable power of attorney. *See* TEX. ESTATES CODE ANN. §§ 751.001-752.115 (Vernon 2013). Section 752.051 provides a form known as a "statutory" durable power of attorney. A power of attorney, however, is not required to conform or even substantially conform to the statutory forms to be valid in the State of Texas. *See* TEX. ESTATES CODE ANN. § 752.003 (Vernon 2013).

IV. FIDUCIARY DUTIES & STANDARDS

A. Overview

Just as there is no single correct definition of what constitutes a fiduciary relationship, there are no hard and fast rules defining the duties of a fiduciary, and, to a great extent, the duties may overlap considerably. Just what is expected of a "fiduciary" may have been best summarized by Justice Cardozo in the case of *Meinhard v. Salmon*, in which he stated:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A [fiduciary] is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. *Wendt v. Fischer*, 243 N. Y. 439, 444, 154 N. E. 303. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

249 N.Y. 458, 164 N.E. 545-546, 62 A.L.R. 1 (1928); *see also Langford v. Shamburger*, 417 S.W.2d 438 (Tex. Civ. App.–Fort Worth 1967, writ ref'd n.r.e.).

In addition, in the case of particular types of fiduciaries (such as trustees), their duties may be defined by the trust instrument and/or statutes that alter or negate certain fiduciary duties that would otherwise be imposed by Texas "common law."

Generally speaking, the duties of a fiduciary may be roughly categorized under four main headings:

- The duty of loyalty;
- The duty to make full disclosure;
- The duty of competence; and
- The duty to reasonably exercise discretion.

But, it is important to recognize that while different types of fiduciaries have similar duties, they are not all subject to the same duties. For example, the duties of a

trustee will differ from those of an executor as it relates to investment returns. *See* Restatement (Second) of Trusts § 6 cmts (1959)("Although an executor, unlike a trustee, is not ordinarily under a duty to make investments, he may under some circumstances have a power or a duty to invest."); *see also Humane Soc. of Austin and Travis County v. Austin Nat. Bank*, 531 S.W.2d 574 (Tex. 1975)("a dependent executor of an estate has no such power absent an authorization from the probate court or an express grant of authority from testator").

B. Duty Of Loyalty

The duty of loyalty is fundamental to a fiduciary relationship. It requires that a trustee place the interest of a beneficiary above his own and prohibits a fiduciary from using the advantage of his position to gain any benefit for him at the expense of the beneficiaries. And, it is strictly applied. Thus, if a fiduciary accepts a gift from the beneficiary, or takes advantage of an opportunity that presents itself as a direct or end result of a fiduciary relationship, it may give rise to a presumption of unfairness and resolved in the imposition of a harsh liability standard against the fiduciary. *See Texas Bank and Trust Co. v. Moore,* 595 S.W.2d 502 (Tex. 1980); *Slay v. Burnett Trust,* 187 S.W.2d 377 (Tex. 1945).

The most common breach of the duty of loyalty involves a claim of self-dealing. This generally refers to any conduct by the fiduciary that takes advantage of the fiduciary's position to benefit the fiduciary or some third person that the fiduciary desires to benefit.

And, while the client can authorize some forms of self-dealing, Texas law places limits on these waivers. For example, an independent executor cannot be exonerated from self-dealing in the form of a sale unless the will "expressly authorized the sale," or unless there is a binding written buy-sell agreement entered into by the decedent prior to the decedent's death. TEX. ESTATES CODE ANN. § 356.002 (Vernon 2013).

C. Duty Of Full Disclosure

A fiduciary has much more than the traditional obligation not to make any material misrepresentations, he also has an *affirmative* duty to make a full and accurate confession of all his fiduciary activities, transactions, profits, and mistakes—even when, and especially if, it hurts. *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984), *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corn*, 160 S.W.2d 509 (Tex. 1942), *City of Fort Worth v. Pippen*, 439 S.W.2d 660 (Tex. 1969).

And, the breach of the duty of full disclosure by a fiduciary has been argued to be tantamount to fraudulent concealment. *See Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988). The beneficiary is not required to prove the elements of fraud, *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965), *Langford v. Shamburger*, 417 S.W.2d 438 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.), and need not even prove that he "relied" on the fiduciary *to* disclose the information. *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938), *Miller v. Miller*, 700 S.W.2d 941, 947 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). The fiduciary duty of full disclosure operates before and after litigation has been filed and is in addition to any obligations of disclosure imposed by the "discovery provisions of the Texas Rules of Civil Procedure." *See Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996), *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984).

Even though a trustee may not have technically violated any other fiduciary duty,

the failure to disclose his activities may nonetheless result in liability. For example, the court in *InterFirst Bank Dallas, N.A. v. Risser*, implied that the trustee violated its common law duty of full disclosure by failing to notify the beneficiaries of the sale of a major trust asset. 739 S.W.2d 882 (Tex. App.—Texarkana 1987, writ dism'd by agreement).

And, while Texas law does not require the consent of beneficiaries before selling trust assets, the fact that the property is in a trust does not require that the beneficiaries are to be kept in ignorance of the administration of the trust. *See Risser*, 739 S.W.2d at 906 n. 28; *see also*, *Grey v. First Nat'l Bank Dallas*, 393 F.2d 371 (5th Cir. 1968)(bank failed to make full disclosure regarding its own interests in dealing with property it held as trustee).

Furthermore, omissions or misstatements in accountings violate the common law duty of disclosure, and even previously filed and court approved accountings may be re-examined upon a final accounting. *See Portanova v. Hutchison*, 766 S.W.2d 856 (Tex. App.—Houston [1st Dist.] 1989, no writ); *In re Higganbotham's Estate*, 192 S.W.2d 285 (Tex. Civ. App.1946, no writ); *Thomas v. Hawpe*, 80 S.W. 129 (Tex. Civ. App.—Dallas 1904, writ ref'd). A trustee or personal representative will be held liable if he knowingly discloses false information or knowingly fails to disclose harmful information regarding his dealings with trust or estate assets. *Cf Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984)(holding that trustees and executors who withheld information from beneficiary in order to induce her to enter into agreed judgment committed "extrinsic" fraud justifying bill of review). Even the existence of litigation between the beneficiaries and the trustee does not alter the Trustee's duty to disclose material facts. *See Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).

D. Duty Of Competency

The duty of competence is not defined by statute but presumes that the fiduciary will act in accordance with the governing instrument and all applicable laws, such as the Texas Property Code and the Texas Estates Code. For example, a trustee must invest and manage the trust in compliance with the prudent investor rule. TEX. PROP. CODE ANN. § 117.003 (Vernon 2014). And, a personal representative must act as a prudent man would in caring for his own property. TEX. ESTATES CODE ANN. § 351.101 (Vernon 2013).

The duty of competence implicitly requires that the fiduciary take affirmative actions to properly carry out his, her or its duties. Furthermore, it presumes that the fiduciary will not delegate his, her or its fiduciary duties except as allowed by law. *See* discussion *infra.*

E. Duty To Reasonably Exercise Discretion

Furthermore, a fiduciary has a duty to *reasonably* exercise his or her discretion. *See Sassen v. Tanglegrove Townhouse Condominium Ass'n***,** 877 S.W.2d 489 (Tex. App.—Texarkana 1994, writ denied). This is most applicable to trustees, and includes the trustee making informed decisions based primarily on the terms of the trusts and in a manner that carries out the settlor's intent as set forth in the terms of the trust instrument. And, unless the agreement is ambiguous, the settlor's intent must be determined solely by the terms and provisions of the instrument.

But, there are generally no statutory guidelines regarding how discretion must be exercised or what constitutes the reasonable exercise of discretion. And, while some statutes, such as the Texas Property Code,

which provide some safe harbor rules, what is considered the reasonable exercise of discretion is often open for dispute. *See* discussion *infra.*

F. Defining Standards of Conduct

Liability or exoneration from liability is often based on standards of conduct: good faith, bad faith, reckless indifference, etc. It is important to be familiar with how courts will construe such terms when attempting to comply with these obligations.

1. Bad Faith.

Bad faith, in a trustee relationship, is properly defined to mean "acting knowingly or intentionally adverse to the interest of the trust beneficiaries" and with an "improper motive." *See Interfirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 898 (Tex. App.—Texarkana 1987, no writ) (disapproved of on other grounds by *Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 249 (Tex. 2002)). A finding of bad faith requires some showing of an improper motive. *See King v. Swanson*, 291 S.W.2d 773, 775 (Tex. Civ. App.—Eastland 1956, no writ). Further, improper motive is an essential element of bad faith. *See Ford v. Aetna Insurance Company*, 394 S.W.2d 693 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.).

2. Good Faith.

Texas recognizes a standard of good faith that combines subjective and objective tests. *See Lee v. Lee*, 47 S.W.2d 767, 795 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). A fiduciary acts in good faith when he or she: (1) subjectively believes his or her defense is viable, and (2) is reasonable in light of existing law. *See id.* The Pattern Jury Charges for Express Trusts defined good faith as "an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct." PJC 235.11, .235.129.

3. Gross Negligence.

Gross negligence means more than momentary thoughtlessness, inadvertence, or error of judgment; it means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 20 (Tex. 1994). An act or omission that is merely thoughtless, careless, or not inordinately risky is not grossly negligent. *Id*. at 22. Only the fiduciary's act or omission is unjustifiable and likely to cause serious harm can it be grossly negligent. *Id*. Although gross negligence does refer to a different character of conduct than ordinary negligence, a fiduciary's conduct cannot be grossly negligent without being negligent. *See Trevino v. Lightning Laydown, Inc.*, 782 S.W.2d 946, 949 (Tex. App.—Austin 1990, writ denied). Gross negligence means an act or omission that:

> (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
> (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

TEX. CIV. & REM. CODE ANN. § 41.001(11) (Vernon 2008)(definition of gross negligence); *see also Louisiana-Pacific Corp. v. Andrade*, 19 S.W.3d 245, 246-47 (Tex. 1999); *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998) (*citing Moriel*, 879 S.W.2d at 23 (Tex. 1994)).

G. Applicable Standards Of Care

1. Trustees

A trustee must invest and manage the trust in compliance with the prudent investor rule. TEX. PROP. CODE ANN. § 117.003 (Vernon 2007). *See* discussion *infra.*

2. Personal Representatives

A personal representative must act as a prudent man would in caring for his own property. TEX. ESTATES CODE ANN. § 351.101 (Vernon 2013).

3. Guardians

A guardian of the estate has the duty to act and manage the ward's estate as a prudent person would manage the person's own property, except as otherwise provided by the Texas Estates Code. TEX. ESTATES CODE ANN. § 1151.151 (Vernon 2013).

4. Agents

The Texas Estates Code sections dealing with powers of attorney do not specifically set out a standard of care for an agent. The statute does, however, set out specific rules of construction and general powers as they pertain to real estate, tangible personal property, stock and bonds, commodity and options, banking and other financial institutions, business operations, insurance, estate, trust and other beneficiary transactions, claims and litigation, personal and family maintenance, governmental programs, military service, retirement plans, and tax matters. *See* TEX. ESTATES CODE ANN. ch. 752 (Vernon 2013). In at least one other state, an agent has been described as a fiduciary who must observe the standards of care applicable to trustees. Further, if the exercise of the power of attorney is improper, the agent is liable to interested persons for damage or loss resulting from the breach of fiduciary duty to the same extent as the trustee of an express trust. *See Conseco Ins. Co. v. Clark*, 2006 WL 2024402 (M.D. Fla. 2006)(unpublished opinion). It is possible that the definition set forth in the Florida statute will be adopted in Texas.

H. Burden Of Proof

It is important to recognize who would have the burden at trial if the action became the subject of a lawsuit involving a fiduciary's liability. The issue of who has the burden to prove or disprove a claim depends on the type of duty or breach alleged.

1. Burden On Complainant

The complainant has the burden at trial to prove a fiduciary breached the following duties:

- Existence of a Fiduciary Relationship. *See Thigpen v. Locke,* 363 S.W.2d 247 (Tex. 1962);
- Fiduciary Not Acting Competently. *See Jewitt v. Capital National Bank of Austin,* 618 S.W.2d 109 (Tex. App.—Waco 1981, writ ref'd n.r.e.);
- Fraud. *See Archer v. Griffith,* 390 S.W.2d 735 (Tex. 1965);
- Breach of Contract. *See Omohundro v. Matthews,* 341 S.W.2d 401 (Tex. 1960);
- Conversion. *See Avila v. Havana Painting Co.,* 761 S.W.2d 398 (Tex. App.—Houston [14th Dist.] 1988, writ den'd);
- Tortious Interference with Trust Administration. *See* TEX. PROP. CODE § 114.031(a)(1);
- Removal of Trustee by Petition. *See* TEX. PROP. CODE § 113.082; and
- Conspiracy. *See Kinzbach Tool Co., Inc. v. Corbett-Wallace Corporation*, 160 S.W.2d 509 (Tex. 1942); *International Bankers Life Ins. Co. v. Holloway,* 368 S.W.2d 567 (Tex. 1963).

2. Burden On Fiduciary

The fiduciary has the burden at trial to prove he, she, or it did not breach the following duties:

- Self-dealing and presumption of unfairness. *See Texas Bank & Trust Co. v. Moore,* 595 S.W.2d 502;
- Tracing commingled funds. *See Eaton v. Husted,* 172 S.W.2d 493 (Tex. 1943);
- Gifts from beneficiary to fiduciary. *See Sorrell v. Elsen,* 748 S.W.2d 584 (Tex. App.—San Antonio 1988, writ denied);
- Conflict of interest. *See Stephens Cty. Museum, Inc. v Swenson,* 571 S.W.2d 257 (Tex. 1974);
- Usurpation of trust opportunity. *See Huffington v. Upchurch,* 532 S.W.2d 576 (Tex. 1976);
- Purchase, loans, contracts and business transactions of fiduciary in relation to trust or beneficiary. *See Land v. Lee,* 777 S.W.2d 158 (Tex. App.—Dallas, 1989, no writ); *Dominguez v. Brackey Enterprises, Inc.,* 756 S.W.2d 788 (Tex. App.—El Paso 1988, writ denied); *InterFirst Bank Dallas v. Risser,* 739 S.W.2d 882 (Tex. App.—Texarkana 1987, no writ);
- Failure to keep records, exercise discretion or obtain information. *See Corpus Christi Bank & Trust v. Roberts,* 597 S.W.2d 752 (Tex. 1980); *Jewitt v. Capital Nat. Bank of Austin,* 618 S.W.2d 109 (Tex. Civ. App.—Waco 1991, writ ref'd n.r.e.).

Pattern jury charges for the trust and estates have recently been adopted. Some of the more commonly encountered jury questions are attached hereto as Exhibits.

3. Open Issues

There remains an open issue regarding how an issue will be submitted to a jury and who will have the burden based on certain claims and violations.

i. *Government Oversight*

The government has created regulations and rules that impose duties and obligations for national bank trustees. *See* C.F.R. § 9.

ii. *Self-dealing*

With self-dealing allegations, the burden is on the fiduciary to rebut the presumption that the transaction was unfair. The case law indicates the presumption is "rebuttable." *See Stephens County Museum, Inc. v. Swenson,* 517 S.W.2d 257 (Tex. 1974). The question is if the unfairness presumption is rebutted, does the burden shift to the plaintiff to submit a finding as to whether a specific fiduciary duty was breached? If so, does the fairness issue disappear or become a part of an instruction? *See Archer v. Griffith,* 390 S.W.2d 735, 739 (Tex. 1965).

iii. *Fulfillment*

If the transaction is found to be fair, the fiduciary will want the jury question phrased in terms of whether he "fulfilled" his duty, not in terms of whether he "breached" his duty. But, is this the correct placement of the burden? The case law varies on both the burden and the submission as to whether it is submitted as a "breach" or as whether a fiduciary "fulfilled" and "complied" with his or her duties. *See Townes v. Townes,* 867 S.W.2d 414 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *Sorrell v. Elsey,* 748 S.W.2d 584 (Tex. App.—San Antonio 1988, writ denied); *Cole v. Plummer,* 559 S.W.2d 87 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.); *Johnson v. J. Hiram Moore,*

Ltd., 763 S.W.2d 496 (Tex. App.—Austin 1988, writ denied).

I. Limits On Exculpation or Indemnity Provisions

Texas Property Code Section 114.007 provides that a settlor may exculpate a trustee from liability other than for:

> (1) a breach of trust committed:
> (A) in bad faith;
> (B) intentionally; or
> (C) with reckless indifference to the interest of a beneficiary; or
> (2) any profit derived by the trustee from a breach of trust.

TEX. PROP. CODE ANN. § 114.007 (Vernon 2014).

Additionally, some settlors provide that an uncompensated trustee, either by choice or by instrument, shall be entitled to a higher level of exoneration than a compensated trustee.

J. Possible Remedies for Breach of Fiduciary Duty

If a fiduciary is found to have breached one or more duties, remedies and damages may include one or more of the following:
:

- Money damages.
- Breach of contract.
- Actual damages for breach of trust. TEX. PROP. CODE 114.001. PJC 115.2.
- Actual damages for quantum merit recovery. PJC 115.6.
- Direct damages resulting from fraud. PJC 115.19.
- Consequential damages caused by fraud. PJC 115.20.
- Monetary loss from negligent misrepresentation. PJC 115.21.
- Money damages for intentional interference with existing contract or wrongful interference with prospective contractual relations. PJC 115.22.
- Disgorgement of compensation. *Burrow v. Arce*, 997 S.W.2d 229, 238-41 (Tex. 1999).
- Exemplary damages. See PJC 115.15 comments, 115.36 and 115.37. Plaintiff can recover equitable relief, actual damages and exemplary damages. *See Manges v. Guerra*, 673 S.W.2d 180, 184 (Tex. 1984). See PJC 110.18 (actual damages for breach of fiduciary duty) and 110.33-.34 (exemplary damages). *Bennett v. Reynolds*, No. 08-0074, 2010 WL 2541096 (Tex. June 25, 2010). Limitations on busting the cap.
- Pre-Judgment Interest, accrual generally beginning:
  - 180 days after the date a defendant receives written notice of the claim; or
  - The date suit is filed.

  See Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 531 (Tex. 1998). See also *Lee v. Lee*, 47 S.W.3d 767, 800 (Tex. App.—Houston [14th Dist.] 2001, pet. Denied
- Post Judgment Interest.
- Equitable relief. PJC 104.2 (plaintiff is entitled to equitable relief when fiduciary profits or benefits from transaction with beneficiary).
- Disgorgement. PJC 115.16, 115.17; TEX. PROP. CODE § 114.061(d); *Burrow v. Arce*, 997 S.W.2d 229, 238-41 (Tex. 1999).
- Rescission. *See Allison v. Harrison*, 156 S.W.2d 137, 140 (Tex. 1941)(court may grant rescission of transaction accomplished by breach of the fiduciary duty) .

- Removal of trustee. TEX. PROP. CODE § 113.082(a)(1).
- Permanently enjoin trustee from committing a breach.
- Compel trustee to redress breach of trust.
- Order trustee to account.
- Remove trustee.
- Void an act of the trustee.
- Order other appropriate relief. TEX. PROP. CODE § 114.008(a); TEX. CIV. PRAC. & REM. CODE 64, 65.
- Attorney's fees. TEX. PROP. CODE § 114.064 (equitable and just).
- Constructive trust. *See Consolidated Gas & Equip. Co. v. Thompso*n, 405 S.W.2d 333, 336 (Tex. 1966)(court may impose constructive trust to restore property or profits lost to fiduciary's breach); *International Banker's Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963*); Slay v. Burnett Trust*, 187 S.W.2d 377, 380 (Tex. 1945)

V. PRE-ACCEPTANCE CONSIDERATIONS

A. Overview

Every potential fiduciary should first consider whether to accept the job. The fiduciary must initially decide whether he or she has the knowledge and skills to carry out his or her duties, and whether he or she has the time to attend to them. If so, the fiduciary should identify the person or persons he or she will owe duties and responsibilities to, and whether these individuals are reasonable or unreasonable. The instrument should clearly define the involved persons either by individual or class. If these persons appear to have litigious tendencies, the fiduciary should strongly consider declining because – as they say – no good deed goes unpunished.

Furthermore, the governing instrument should be carefully reviewed to determine if it provides the proposed fiduciary both guidance, and reasonable exoneration and protection from unwarranted claims. Also, some provisions may adversely affect the fiduciary when attempting to carry out his or her duties. For example, a power to remove a trustee is sometimes exercised in retaliation to a fiduciary disagreeing with a beneficiary's request for a discretionary distribution. If the instrument is drafted in a manner that will hamper a fiduciary from fulfilling his or her role, the fiduciary should consider declining to serve. Finally, a fiduciary may be appointed in various roles that could create conflicting responsibilities, duties or powers. The fiduciary should consider whether he, she or it should decline to act in certain capacities to avoid future claims and conflicts.

A brief discussion of some of the more common red flags follows.

B. Successor Appointments

History has a tendency to repeat itself. Consideration should be given to how many prior trustees there are and when and why they are no longer serving. Specifically, consider:

- Who has a removal right?
- What are the removal standards?
- How often can it be used?
- Is there a cotrustee that is also a beneficiary and holds a removal right?
- Has the prior administration gone smoothly or have the beneficiaries visited the courthouse?

C. Risk of Pre-Commitments

Some beneficiaries seek upfront to commitments regarding discretionary distribution and other judgments from a proposed trustee. But, committing to certain matters such as distributions may also bring

about liability. Thus, while it is reasonable to discuss and even commit to certain approaches consistent with the instrument and Texas law, commitments that restrict a trustee's obligations to property and impartially administer the trust or that creates unrealistic expectations should be avoided.

D. Family "Dynamite"

Beneficiaries come in all shapes and sizes. Some have no idea what the terms of the trust are and rely on the trustee for the Trustee's wisdom and guidance. Others know that the squeaky wheel gets the grease and they are gladiators for their cause, which may or may not be in the best interest of the trust. And, some beneficiaries have unrealistic expectations of the fiduciaries powers and abilities.

Furthermore, while every trustee faces the inherent balancing of interests, when those interests detest each other it adds a whole new dimension that often results in the trustee being accused by one side of partiality or worse.

E. Road Map for Successor Disaster

As discussed previously, with a few exceptions, the trust agreement sets the parameters for the fiduciary relationship. Before accepting an appointment, the agreement should be reviewed regarding:

- Whether the distribution provisions are clear?
- Is preference given to a particular beneficiary or class of beneficiaries?
- If more than one current beneficiary, are the priorities and distribution provision workable?
- Are there reasonable limits on distributions?
- Are there any beneficiaries with special needs and does the trust agreement provide a reasonable means to address?
- Are there powers of appointment provisions?
- What are the removal and resignation provisions?
- What are the indemnity and exoneration provisions?
- Does the trustee hold a power of sale?
- Does the trust mandate holding certain assets and/or restrict sales of particular assets?
- What are the limitations and powers of any co-trustees?

F. Pitfalls of the Smaller Trusts

The size of the trust does not directly correlate to the complexity of its administration, rather the contrary is often more accurate. A modest trust may be insufficient to provide for the needs and expectations of the beneficiaries. If one or more beneficiaries are unrealistic about the trust's abilities or purposes, the proposed trustee should consider declining.

VI. POST-ACCEPTANCE CONSIDERATIONS

A. Overview

Once the appointment is accepted, it is a relationship that must be continuously monitored as the liability starts with acceptance of the appointment. While there are too many issues and potential claims to predict every one, there are some basic actions that consistently reduce disappointment that can morph into a lawsuit.

B. Review & Interpretation of Governing Documents

The will, trust, power of attorney, etc., at issue generally sets out the duties, powers, and obligations of the fiduciary. These governing instruments provide the terms of the fiduciary's "contract" with the testator, settlor, or principal. By agreeing to serve, the

fiduciary ostensibly agrees to follow and adhere to these terms. Thus, one of the first actions of a fiduciary should be to read, and re-read, the governing documents. These documents provide the direction and road map enabling the fiduciary to stay on course.

The primary focus in interpreting the provisions of the trust is the intent of the settlor. *See State v. Rubion*, 308 S.W.2d 4 (Tex. 1957). Courts generally interpret a trust agreement as it would a contract. *See Goldin v. Bartholow,* 166 F.3d 710, 715 (5th Cir.1999). A court should first determine the intention of the settlor from the language used within the four corners of the document. *See Hurley v. Moody Nat. Bank of Galveston*, 98 S.W.3d 307, 310 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (*citing Rekdahl v. Long*, 417 S.W. 2d 387, 389 (Tex. 1967)); *Myrick v. Moody,* 802 S.W.2d 735, 738 (Tex. App.—Houston [14th Dist.] 1990, writ denied). And in doing so, courts construe the trust instrument to give effect to all provisions so that no provision is rendered meaningless. *See Hurley,* 98 S.W.3d at 310; *Myrick,* 802 S.W.2d at 738.

If the terms or provisions are not clear, the fiduciary should consider filing a declaratory judgment action seeking judicial construction.

1. When the Instrument is Unambiguous

Where the language of the trust instrument is unambiguous and expresses the intentions of the settlor, the instrument confers the trustee's powers and neither the court nor the trustee can add or take away such powers. *See Beaty v. Bales*, 677 S.W.2d at 754. The trust is entitled to that construction which the settlor intended. *Id*. In such circumstances, outside evidence should not be considered. *Id.*

2. When the Instrument is Ambiguous

What if the language is unclear? When the intent of the settlor is not clear from the language of the instrument, the trustee should consider the value of the corpus of the trust, the relationships between the settlor and the beneficiaries, and all circumstances regarding the trust and beneficiaries at the time the trust was executed. *Howard*, 229 S.W.2d at 783.

C. Recognizing Use and Limits of Commonly Used Terms

1. Shall Versus May

Most practitioners understand the literal meaning of these two words: "shall" is mandatory and "may" is discretionary. *See also* TEX. GOV'T CODE ANN. § 311.016 (Vernon 2005) ("The following constructions apply unless the context in which the word or phrase appears necessarily requires a different construction or unless a different construction is expressly provided by statute: (1) "May" creates discretionary authority or grants permission or a power. (2) "Shall" imposes a duty."); TEX. GOV'T CODE ANN. § 312.002 (Vernon. 2005); *but see Penix v. First National Bank of Paris*, 260 S.W.2d 63 (Tex. Civ. App.—Texarkana 1953, writ ref'd)(trustee was within his discretion to withhold portion of income generated by trust despite language of trust that stated: "[income] ***shall*** be used for support, maintenance and schooling").

2. Absolute or Uncontrolled Discretion

Both case law and the Restatement provide that these terms are not to be interpreted literally. A trustee's discretion is always subject to judicial review and control. *See State v. Rubion*, 308 S.W.2d at 9. A trustee continues to be required to act honestly and in a manner contemplated by the settlor. The inclusion of these terms serves to discourage remaindermen from complaining.

3. Sole, Final or Conclusive Discretion

Likewise, terms such as sole, final or conclusive do not vest unlimited discretion in a trustee. *See First Nat'l Bank of Beaumont v. Howard*, 229 S.W.2d 781, 783 (1950) (*citing McCreary v. Robinson*, 59 S.W. 536 (Tex. 1900)). When the settlor's intention is not made clear by the terms of the trust, consideration is given to (i) value of the estate, (ii) the previous relations between him and the beneficiaries, and (iii) all the circumstances in regard both to the estate and the parties existing when the trust instrument was made and when the settlor died. *Id.* (*citing McCreary v. Robinson*, 59 S.W. 536 (Tex. 1900); 101 A.L.R. p. 1462, Ann. II. a. 1). Thus, even when a trustee's discretion is declared to be final and conclusive, courts will interfere if the trustee acts outside the bounds of a reasonable judgment. *See id.; but see Story v. Story*, 176 S.W.2d 925 (Tex. 1944); *Ballenger v. Ballenger*, 668 S.W.2d 467 (Tex. Civ. App—Corpus Christi 1984, writ dism'd)(trial court erred in granting temporary injunction that served to restrict trustees from exercising their "sole discretion" authority by substituting judgment of the trial court for that of named trustees).

D. Modifying and Clarifying the Terms

1. Modifying Without Court Intervention

In order to reduce uncertainty in administering a trust and clarify matters that could not have been foreseen by the settlor, modification of the trust terms may be an option. Texas Property Code Section 112.051 addresses revocation, modification, or amendment by a settlor. It provides:

> (a) A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it.
>
> (b) The settlor may modify or amend a trust that is revocable, but the settlor may not enlarge the duties of the trustee with the trustee's express consent.

TEX. PROP. CODE ANN. § 112.051 (Vernon 2014).

If the trust was created by a written instrument, a revocation, modification, or amendment of the trust must be in writing. And, if the trust agreement provides specific requirements to modify the terms, care should be taken to confirm the requirements are met.

2. Modifying With Court Intervention

Texas Property Code Section 112.054 provides for a judicial option to modify or terminate a trust when it cannot be accomplished under Section 112.051. Specifically, Section 112.054 states:

> (a) On the petition of a trustee or a beneficiary, a court may order that the trustee be changed, that the terms of the trust be modified, that the trustee be directed or permitted to do acts that are not authorized or that are forbidden by the terms of the trust, that the trustee be prohibited from performing acts required by the terms of the trust, or that the trust be terminated in whole or in part, if:
>
> (1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill;
>
> (2) because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust;
>
> (3) modification of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or avoid impairment of the trust's administration;

(4) the order is necessary or appropriate to achieve the settlor's tax objectives or to qualify a distributee for governmental benefits and is not contrary to the settlor's intentions; or

(5) subject to Subsection (d):

(A) continuance of the trust is not necessary to achieve any material purpose of the trust; or

(B) the order is not inconsistent with a material purpose of the trust.

(b) The court *shall* exercise its discretion to order a modification or termination under Subsection (a) or reformation under Section (b-1) in the manner that *conforms as nearly as possible to the probable intention of the settlor.* The court shall consider spendthrift provisions as a factor in making its decision whether to modify, ~~or~~ terminate, or reform but the court is not precluded from exercising its discretion to modify or terminate solely because the trust is a spendthrift trust.

(b–1) On the petition of a trustee or a beneficiary, a court may order that the terms of the trust be reformed if:

(1) reformation of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or impairment of the trust's administration;

(2) reformation is necessary or appropriate to achieve the settlor's tax objectives or to qualify a distributee for governmental benefits and is not contrary to the settlor's intentions; or

(3) reformation is necessary to correct a scrivener's error in the governing document, even if unambiguous, to conform the terms to the settlor's intent.

(c) The court may direct that an order described by Subsection (a)(4) or (b–1) has retroactive effect.

(d) The court may not take the action permitted by Subsection (a)(5) unless all beneficiaries of the trust have consented to the order or are deemed to have consented to the order. A minor, incapacitated, unborn, or unascertained beneficiary is deemed to have consented if a person representing the beneficiary's interest under Section 115.013(c) has consented or if a guardian ad litem appointed to represent the beneficiary's interest under Section 115.014 consents on the beneficiary's behalf.

(e) An order described by Subsection (b–1)(3) may be issued only if the settlor's intent is established by clear and convincing evidence.

(f) Subsection (b–1) is not intended to state the exclusive basis for reformation of trusts, and the bases for reformation of trusts in equity or common law are not affected by this section.

TEX. PROP. CODE ANN. § 112.054 (Vernon 2014 & 2017)(emphasis added on 2017 legislative amendments).

E. Exercise Discretion

Texas courts have held that "it is fundamental that a trustee has a duty to obey [a trust's payment] instructions, unless it is impossible or illegal for him to do so, or unless he is excused by the court." *Doherty v JPMorgan*, 2010 WL 1053053 at *7 (citing G. Bogert, THE LAW OF TRUSTS AND TRUSTEES § 811 (2d ed.1979)). In the context of distributions, the exercise of discretion requires that the trustee actually act to "exercise" his, her or its discretion. *See Sassen v. Tanglegrove Townhouse Condominium Ass'n*, 877 S.W.2d 489 (Tex. App.—Texarkana 1994, writ denied) (agent required to exercise reasonable discretion); *see also Doherty*, 2010 WL 1053053.

A fiduciary that establishes a process of determining how they intend to exercise his, her or its discretion is less subject to challenge than a fiduciary with no process in place. Thus, trustees that can present a well thought out and reasonable decision-making process for distributions are often victorious, even if their decisions appear to contradict the language of a trust, *i.e. Penix v. First National Bank of Paris*, 260 S.W.2d at 63, or the clear intent of the settlor, i.e., *Coffee v. Rice,* 408 S.W.2d 269 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e).

1. Gather Relevant Information

In order to properly exercise his or her discretion, a fiduciary cannot make decisions in a vacuum. The fiduciary will generally need to obtain information from the beneficiary in order to make a fully informed distribution decision. Furthermore, a beneficiary may require certain information from the fiduciary in order to properly assess whether to make a distribution request and understand the manner in which the fiduciary decides to exercise his or her discretion.

i. *Information From Beneficiary*

Perhaps one of the more difficult issues is the information that a trustee feels is needed to justify a distribution. Some trustees desire to obtain extensive information from the beneficiary to "paper" their file. But this can lead to feelings of ill-will and invasion of privacy towards the trustee. Other trustees go to the opposite extreme and request no information. This can lead to claims of breach of fiduciary duty against the trustee by the other beneficiaries who may eventually request that the trustee justify his or her prior distributions.

In acting, the Restatement's position is that "the trustee generally may rely on the beneficiary's representations and on readily available, minimally intrusive information requested of the beneficiary." RESTATEMENT (THIRD) OF TRUSTS § 50 cmt e(1). But when the trustee has reason to believe that the information is incomplete or inaccurate, the trustee should request additional information. *See id.*

Relevant information may include the living expenses of the beneficiary and under the general rule of construction what other resources are reasonably available to the beneficiary for his support. Information that is commonly requested by trustees includes the following:

- Income and cash flow information;
- Financial statements;
- Copies of all trust documents under which the beneficiary has a right to funds or request a distribution;
- Copies of tax returns;
- Copies of all tuition and similar agreements relating to the beneficiary's education and maintenance;
- Copies of receipts or invoices as to any amounts to be reimbursed;
- Information regarding a beneficiary's employment status and efforts to obtain such employment;
- Status of the beneficiary's housing, medical insurance, and any other information regarding their support that the trustees deem relevant; and
- Notification of any significant changes in any beneficiary's housing, education, development or medical needs.

While the preceding is not intended to be an exhaustive list or required in all situations, it provides a general listing of the information that may be periodically requested by a trustee to consider distribution requests and carry out the terms of the trust.

ii. *Information From Trustee*

Information regarding distributions is a two-way street. Just as a trustee may seek information to support a distribution, a beneficiary is entitled to information in order to request a distribution or justify a trustee's decisions whether to make a distribution. The Restatement (Third) of Trusts provides that among a trustee's fiduciary duties is the (i) general duty to act, reasonably informed, with impartiality among the various beneficiaries and interests (Section 79), and (ii) duty to provide the beneficiaries with information concerning the trust and its administration (Section 82). The Restatement concludes "this combination of duties entitles the beneficiaries (and also the court) not only to accounting information but also to relevant, general information concerning the bases upon which the trustee's discretionary judgments have been or will be made. *See* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt g (general observations on relevant factors in interpretation of discretionary powers).

2. Understand Applicable Distribution Standards

Any trustee should understand the applicable distribution standard or standards of the trust. They may range from a mandatory distribution standard which does not require the exercise of a trustee's discretion to discretionary distribution standards that are ascertainable or unascertainable.

3. Balance Multiple Interests

Executors and trustees are often faced with the task of balancing various and sometimes divergent interests. A fiduciary should be careful not to favor one interest over another, unless expressly authorized by the governing instrument. *See* TEX. PROP. CODE ANN. § 117.008 (Vernon 2014)("trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries"). A classic example arises when a fiduciary considers investment decisions and returns on investments. Sometimes an investment may generate a larger degree of return for the income beneficiary and a smaller return for the remaindermen.

But, trustees generally do not owe fiduciary duties to third parties or those that may indirectly benefit from the terms of the instrument, such as an individual to whom a beneficiary owes a duty of support. Therefore, in exercising his or her discretion, the fiduciary's primary concern should be what is in the best interest of the beneficiaries of the instrument. *See* TEX PROP. CODE ANN. § 117.008 (Vernon 2014)("trustee shall invest and manage the trust assets solely in the interest of the beneficiaries").

F. Comply With Applicable Statutory Guidelines

1. Texas' Uniform Principal And Income Act

Effective January 1, 2004, Texas enacted the Uniform Principal and Income Act. *See* TEX. PROP. CODE ANN. § 116.001 *et seq.* (Vernon 2014). It applies to both existing trusts and trusts established after January 1, 2004. *See* Section 5(b) of the Acts of 2003, 78th Leg, ch. 659. But, do not be deceived by its title. Like the Uniform Prudent Investor Act, some provisions mirror the Uniform Acts, while other are tailored to Texas and every trustee and their advisors should be familiar with these requirements.

In short, the Texas Principal and Income Act impose extensive rules. And, while these provisions may be overridden by clear directions to the contrary in the trust

agreement, preemption may be difficult to establish with regard to existing trusts. For example, the adjustment provisions provide that trust provisions relating to adjustments of principal and income do not affect the adjustment powers unless the terms "are intended to deny the trustee the power of adjustment conferred by Subsection (a)." TEX. PROP. CODE ANN. § 116.005(f) (Vernon 2014).

Included in the provisions is the ability to make adjustments between principal and income and general rules when doing so. Specifically, Texas Property Code Section 116.005 permits the trustee to make adjustments between principal and income when:

- The trustee considers the adjustment necessary;
- The trustee invests and manages trust assets as a prudent investor;
- The terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income; and
- The trustee determines, after applying the rules in Section 116.004(a)(relating to a trustee's fiduciary duties), that the trustee is unable to comply with Section 116.004(b)(i.e., impartiality except as modified by trust).

TEX. PROP. CODE ANN. § 116.005 (Vernon 2014).

In determining whether and to what extent to exercise the adjustment power, a trustee is *required* to consider all factors relevant to the trust and its beneficiaries; including the following statutory factors to the extent they are applicable:

- The nature, purpose, and expected duration of the trust;
- The intent of the settlor;
- The identity and circumstances of the beneficiaries;
- The needs for liquidity, regularity of income, and preservation and appreciation of capital;
- The assets held in the trust including: the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;
- The net amount allocated to income under the other sections of the Principal and Income Act and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;
- Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;
- The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and
- The anticipated tax consequences of an adjustment.

TEX. PROP. CODE ANN. § 116.005(b) (Vernon 2014).

The Act also provides limitations on the power to adjust. These limitations are

generally imposed to prevent the loss of certain tax opportunities. Specifically, a trustee may not make an adjustment that:

- Diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;
- Reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;
- Changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;
- Relates to an amount that is permanently set aside for charitable purposes under a will or the terms of a trust, unless both income and principal are so set aside;
- Will cause an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment; and
- Will cause all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment.

TEX. PROP. CODE ANN. § 116.005(c) (Vernon 2014).

And, finally the fiduciary and his advisors should be familiar with Texas Property Code Sections 116.151 through 116.206 that address the receipt and distribution of a number of specific assets and distributions. These sections replace former Sections 113.101 through 113.111. These provisions should be reviewed carefully to confirm understanding of these default provisions. A brief summary of the more common receipts include:

- Section 116.151 addresses receipts from business entities. Care should be taken when "money" or cash is received as the provisions characterize some such receipts as income and others as principal. Generally, money is allocated to income unless it is related to a partial or total liquidation or it meets certain capital gain requirements. Other receipts are generally allocated to principal;
- Section 116.152 addresses receipts from another estate or trust. It provides that a distribution of income from a trust or an estate in which the trust has an interest (other than a purchased interest) shall be allocated to income and amounts received as a distribution of principal are principal;
- Section 116.162 provides for the allocation of receipts from rental property. Generally, it provides that the following are allocated to income: (i) rents related to real or personal property; and (ii) amount received for cancellation or renewal of a lease. The following are allocated to principal: (i) an amount received as a refundable deposit, including a security deposit; and (ii) a deposit that is to be applied as rent for future periods;

- Section 116.163 provides for the allocation of receipts from debt or similar obligations. Generally, it provides that the following are allocated to income: (i) an amount received as interest (whether fixed, variable, or floating rate); (ii) an amount received as consideration for prepaying principal without any provision for amortization of premium; and (iii) as to obligations held for less than one year, an amount in excess of the purchase price or original debt obligation. The following are allocated to principal: (i) as to obligations held for more than one year, an amount received from the sale, redemption, or other disposition of a debt obligation, including an obligation whose purchase price or value when it is acquired is less than its value at maturity; and (ii) as to obligations held for less than one year, an amount equal to the purchase price or original debt obligation;
- Section 116.172 provides that distributions of up to 4% of the value of the plan or IRA in any one year is income and any excess is principal. This section will replace Section 113.109 that provided that of each receipt, five percent was considered income, based on inventory value, recalculated each year; and
- Section 116.174 provides that a trustee is required to allocate these receipts "equitably", and allocating in accordance with the available federal tax depletion deduction is presumed to be equitable; provided, however, an exception exists for existing trusts. Trustees of existing trusts may continue to apply the old allocation rules of 72-½ % of royalties being allocated to income and the remaining 27-½ % to principal.

TEX. PROP. CODE ANN. § 116.151 *et seq.* (Vernon 2014).

2. Texas' Uniform Prudent Investor Act

Effective January 1, 2004, Texas enacted the Uniform Prudent Investor Act. *See* TEX. PROP. CODE ANN. § 117.001 *et seq.* (Vernon 2014). Like the Uniform Principal and Income Act, some provisions mirror the Uniform Act, while others are tailored to Texas and every trustee and their advisors should be familiar with the requirements.

Texas Property Code Section 117.004 sets out the general duties and considerations of a prudent investor as follows:

> (a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.
> (b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.
> (c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:
> (1) general economic conditions;
> (2) the possible effect of inflation or deflation;
> (3) the expected tax consequences of investment decisions or strategies;

> (4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
> (5) the expected total return from income and the appreciation of capital;
> (6) other resources of the beneficiaries;
> (7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and
> (8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.
> (d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.
> (e) Except as otherwise provided by and subject to this subtitle, a trustee may invest in any kind of property or type of investment consistent with the standards of this chapter.
> (f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

TEX. PROP. CODE ANN. § 117.004 (Vernon 2014).

Section 117.005 now requires a trustee to diversify investments "unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." TEX. PROP. CODE ANN. § 117.005 (Vernon 2014). And, a trustee has an affirmative duty to "review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this chapter" within a reasonable period of time of being appointing or receiving additional assets. TEX. PROP. CODE ANN. § 117.006 (Vernon 2014).

3. Texas' Decanting Provisions

The 2013 Texas Legislature enacted a decanting statute effective September 1, 013 located in Subchapter D of Chapter 112 of the Texas Property (Trust) Code. *See* Tex. Prop. Code §§ 112.071-112.087.

As with any relatively new law, how these provisions will be interpreted will be decided years in the future. And, there may be soon amendment to these provisions. In the meantime, care should be taken to read and consider the fiduciary implications with this new statute if a trustee is considering decanting, i.e., transferring the trust assets to a new trust. For a more detailed discussion, see Melissa J. Willms, DECANTING WITH BENEFITS, State Bar of Texas 37th Annual Advanced Estate Planning and Probate Course June 2013.

And, as evidenced by the recent statutory change, these sections continue to be amended by the Texas Legislature. Recently, these new sections were amended to provide that trustee can still be sued for breach of fiduciary duty for decanting, even if authorized. *See* SB 617 (85th Legislature).

G. Understand The Delegation Limitations

1. The 'General Rule'

The trustee's duty of competence generally includes restrictions on delegating fiduciary duties. Except as allowed by law, the trustee is under an obligation to personally administer the trust and is under a

duty not to delegate acts that the trustee should personally perform. But, unless the trust instrument provides otherwise, a trustee may delegate to his or her co-trustee the performance of a trustee's function. TEX. PROP. CODE ANN. § 113.085(e)(Vernon 2014).

Texas' general rule is generally consistent with Section 80 of the Restatement (3rd) of Trusts entitled Duty with Respect to Delegation. Section 80 states:

> (1) A trustee has a duty to perform the responsibilities of the trusteeship personally, except as a prudent person of comparable skill might delegate those responsibilities to others.
> (2) In deciding whether, to whom, and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising or monitoring agents, the trustee has a duty to exercise fiduciary discretion and to act as a prudent person of comparable skill would act in similar circumstances.

2. Delegation Between Cotrustees

A trustee may delegate to his or her cotrustee the performance of a trustee's function unless prohibited by the trust. *See* TEX. PROP. CODE ANN. § 113.085(e)(Vernon 2014), as amended by Acts 80th Legislature Ch. 451 § 7, effective September 1, 2007. Section 113.085 has been amended several times during the last decade, thus it is important to consider the statute in effect during the relevant time period.

For example, effective September 1, 2007, Section 113.085(a) was amended to remove the words "that are unable to reach a unanimous decision" as there was a concern it changed pre-2005 law and thus it was revised to state that "cotrustees may act by majority decision." And, in 2009, Section 113.085 was again amended to address situations when a cotrustee is suspended or disqualified or when an action is needed because a cotrustee is unable to participate.

Thus, Section 113.085, as in effect since September 1, 2009, provides as follows:

> (a) Cotrustees may act by majority decision.
> (b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.
> (c) A cotrustee shall participate in the performance of a trustee's function unless the cotrustee:
> (1) is unavailable to perform the function because of absence, illness, suspension under this code or other law, disqualification, if any, under this code, disqualification under other law, or other temporary incapacity; or
> (2) has delegated the performance of the function to another trustee in accordance with the terms of the trust or applicable law, has communicated the delegation to all other cotrustees, and has filed the delegation in the records of the trust.
> (d) If a cotrustee is unavailable to participate in the performance of a trustee's function for a reason described by Subsection (c)(1) and prompt action is necessary to achieve the efficient administration or purposes of the trust or to avoid injury to the trust property or a beneficiary, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.
> (e) A trustee may delegate to a cotrustee the performance of a trustee's function unless the settlor specifically directs that the function be performed jointly. Unless a cotrustee's delegation under this subsection is irrevocable, the cotrustee

making the delegation may revoke the delegation.

Therefore, when naming cotrustees, the settlor should keep in mind that one cotrustee may appoint another to function as an agent for those duties that may lawfully be delegated unless he or she expressly prohibits delegation as between cotrustees. TEX. PROP. CODE ANN. § 113.085(e)(Vernon 2014), as amended by Acts 80th Legislature Ch. 451 § 7, effective September 1, 2007; *see also Bunn v. City of Laredo*, 213 S.W. 320 (Tex. Civ. App.—San Antonio 1919, no writ). For example, if only one of several trustees qualifies to act as an agent, a deed by that one alone will pass title to a purchaser under Texas law.

3. Delegation to Non-Trustees

Section 117.011 permits a trustee to delegate investment and management decisions to an agent if certain conditions are met, and subject to certain limitations. TEX. PROP. CODE ANN. § 117.011 (Vernon 2014). The trustee is not responsible for the decisions of the agent provided the trustee exercises the appropriate judgment and care in selecting the agent (and meets the statutory requirements). This includes establishing the scope and terms of the authority delegated to the agent, investigating the agent's credentials (including the agent's performance history, experience, and financial stability), verifying the agent's professional license and registration, and confirming that the agent is bonded and insured. *Id.* In order to have protection, a trustee should, at a minimum:

- Select an agent with reasonable care, skill and caution;
- Establish the scope and terms of obligation with reasonable care, skill and caution; and
- Periodically review the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation with reasonable care, skill, and caution.
-

If done properly, the trustee cannot be held liable for the decisions and actions of the duly engaged agent. Note that any limitations on the trustee's liability do not alleviate the agent's liability to the trust. Section 117.001(b) expressly provides that an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation. But, a trustee cannot, however, avoid liability for the actions of its agent when:

- The agent is an affiliate (see new definition) of the trustee;
- The delegation agreement requires arbitration; or
- The delegation agreement shortens the statute of limitation.
-

Still, the new Texas delegation standard should be easier for trustees to meet than the former delegation provisions.

Furthermore, Section 113.018 was recently modified to confirm the extent of powers that maybe (subject to limitations in the agreement) be given to agents. Section 113.018, as amended in 2017, now reads as follows:

> Sec. 113.018. EMPLOYMENT AND APPOINTMENT OF AGENTS. (a) A trustee may employ attorneys, accountants, agents, including investment agents, and brokers reasonably necessary in the administration of the trust estate.
> (b) Without limiting the trustee's discretion under Subsection (a), a trustee may grant an agent powers with respect to property of the trust to act for the

trustee in any lawful manner for purposes of real property transactions.

(c) A trustee acting under Subsection (b) may delegate any or all of the duties and powers to:

(1) execute and deliver any legal instruments relating to the sale and conveyance of the property, including affidavits, notices, disclosures, waivers, or designations or general or special warranty deeds binding the trustee with vendor's liens retained or disclaimed, as applicable, or transferred to a third-party lender;

(2) accept notes, deeds of trust, or other legal instruments;

(3) approve closing statements authorizing deductions from the sale price;

(4) receive trustee's net sales proceeds by check payable to the trustee;

(5) indemnify and hold harmless any third party who accepts and acts under a power of attorney with respect to the sale;

(6) take any action, including signing any document, necessary or appropriate to sell the property and accomplish the delegated powers;

(7) contract to purchase the property for any price on any terms;

(8) execute, deliver, or accept any legal instruments relating to the purchase of the property or to any financing of the purchase, including deeds, notes, deeds of trust, guaranties, or closing statements;

(9) approve closing statements authorizing payment of prorations and expenses;

(10) pay the trustee's net purchase price from funds provided by the trustee;

(11) indemnify and hold harmless any third party who accepts and acts under a power of attorney with respect to the purchase; or

(12) take any action, including signing any document, necessary or appropriate to purchase the property and accomplish the delegated powers.

(d) A trustee who delegates a power under Subsection (b) is liable to the beneficiaries or to the trust for an action of the agent to whom the power was delegated.

(e) A delegation by the trustee under Subsection (b) must be documented in a written instrument acknowledged by the trustee before an officer authorized under the law of this state or another state to take acknowledgments to deeds of conveyance and administer oaths. A signature on a delegation by a trustee for purposes of this subsection is presumed to be genuine if the trustee acknowledges the signature in accordance with Chapter 121, Civil Practice and Remedies Code.

(f) A delegation to an agent under Subsection (b) terminates six months from the date of the acknowledgment of the written delegation unless terminated earlier by:

(1) the death or incapacity of the trustee;

(2) the resignation or removal of the trustee; or

(3) a date specified in the written delegation.

(g) A person who in good faith accepts a delegation under Subsection (b) without actual knowledge that the delegation is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely on the delegation as if:

(1) the delegation were genuine, valid, and still in effect;

(2) the agent's authority were genuine, valid, and still in effect; and

(3) the agent had not exceeded and had properly exercised the authority.

> (h) A trustee may delegate powers under Subsection (b) if the governing instrument does not affirmatively permit the trustee to hire agents or expressly prohibit the trustee from hiring agents.

TEX. PROP. CODE ANN. § 113.018 (Vernon Supp. 2018), as amended by Acts 85th Legislature, Ch. 62, effective September 1, 2017 (revised language emphasized).

4. Liability For Acts of Cotrustees

Unless the instrument provides otherwise, Texas Property Code Section 114.006 addresses when a cotrustee is liable for the acts of other cotrustees. Section 114.006 provides that:

> (a) A trustee who does not join in an action of a cotrustee is not liable for the cotrustee's action, unless the trustee does not exercise reasonable care as provided by Subsection (b).
> (b) Each trustee shall exercise reasonable care to:
> (1) prevent a cotrustee from committing a serious breach of trust; and
> (2) compel a cotrustee to redress a serious breach of trust.
> (c) Subject to Subsection (b), a dissenting trustee who joins in an action at the direction of the majority of the trustees and who has notified any cotrustee of the dissent in writing at or before the time of the action is not liable for the action.

See TEX. PROP. CODE ANN. § 114.006 (Vernon 2014).

H. Be Transparent About Compensation & Reimbursement

Unless the terms of the trust instrument provide otherwise, a trustee is entitled to *reasonable* compensation from the trust for acting as trustee. *See* TEX. PROP. CODE ANN. § 114.061 (Vernon 2014). Section 114.061 provides as follows:

> (a) Unless the terms of the trust provide otherwise and except as provided in Subsection (b) of this section, the trustee is entitled to reasonable compensation from the trust for acting as trustee.
> (b) If the trustee commits a breach of trust, the court may in its discretion deny him all or part of his compensation.

TEX. PROP. CODE ANN. § 114.061 (Vernon 2014).

The trustee is entitled to compensation even if the trust instrument does not address compensation. *See id.*; *see also City of Austin v. Austin Nat. Bank*, 488 S.W.2d 586 (Tex. Civ. App.—Austin 1972 writ granted), *aff'd in part and rev'd in part on other grounds*, 503 S.W.2d 759 (Tex. 1973)(trustee is entitled to be paid for his or her work on behalf of trust estate).

What remains unclear is exactly how a trustee's compensation should be determined and what is reasonable. Traditionally, a trustee has been compensated based on a percentage of the assets contained in the trust, and other factors such as the extent of the risk, the responsibilities of the trustee, the degree of difficulty in administering the trust, and the skill and success of the trustee. RESTATEMENT (SECOND) OF TRUSTS § 242 cmt. b.

And, while a trustee is not permitted to profit individually in the course of trust transactions, this does not prohibit a trustee from being compensated for his, her or its services. Compensation for services actually rendered does not make a trustee a beneficiary of a trust or disqualify him or her from serving as trustee. *See McCauley v. Simmer*, 336 S.W.2d 872 (Tex. Civ. App.—

Houston [1st Dist.] 1960, writ dism'd). But, a trustee should make effort to both disclose any compensation received and the basis for such compensation to reduce future claims and attempts to disgorge the compensation as excessive.

Likewise, unless modified by the trust instrument, a trustee is entitled to reimbursement for:

> (1) Advances made for the convenience, benefit, or protection of the trust or its property;
> (2) Expenses incurred while administering or protecting the trust or because of the trustee's holding or owning any of the trust property; and
> (3) Expenses incurred for any action taken under Section 113.025.

TEX. PROP. CODE ANN. § 114.063 (Vernon 2014).

And, while a trustee's attorneys' fees and expenses appear to fall within these statutory provisions and/or the express provisions of the trust, many beneficiary-litigants will argue to the contrary. They instead insist to be awarded under Section 114.064, which provides:

> In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just.

TEX. PROP. CODE ANN. § 114.064 (Vernon 2014).

I. Keep Good Books And Records

An executor, trustee, guardian, or agent has a duty to maintain complete books and records relating to his or her actions and administration. Therefore, the fiduciary should establish an organized system to maintain the books and records at the onset of the relationship and continue to maintain them during the administration. It is preferable to maintain detailed financial records that reflect all assets on hand, all sources and uses of cash, all receipts, all distributions, and all investments. Utilizing one of the various financial computer programs is one of the most effective and least costly means to maintain up-to-date books and records. And, the fiduciary should maintain all such information for the duration of the relationship or entity at issues.

J. Provide Periodic Accountings

It is advisable for a fiduciary to provide periodic accountings to all interested persons. Accountings not only allow a fiduciary to comply with his or her duty of disclosure, they also often commence the statute of limitations with regard to transactions adequately disclosed on the statements. Corporate fiduciaries generally provide accountings monthly or quarterly. An individual fiduciary should consider providing an accounting at least annually. Regardless of the period covered, an accounting should reflect all receipts and disbursements, and allocate each, as receipt or expenditure to income or principal. The type of accounting depends on the fiduciary relationship.

1. Trustees

Some trust agreements require a trustee to periodically provide some or all the beneficiaries a periodic accounting. To the extent required by the terms of the trust, the trustee should provide the requisite beneficiaries an accounting that complies with the time and content of the mandated accounting. The failure to meet these requirements can be held to be a breach of trust.

Furthermore, regardless of whether the trust mandates an accounting requirement, a trust beneficiary may make a written demand on the trustee for an accounting covering all transactions since the last accounting, or since the creation of the trust, whichever is later. *See* TEX. PROP. CODE ANN. § 113.151(a) (Vernon 2014). Section 113.151 provides as follows:

> A beneficiary by written demand may request the trustee to deliver to each beneficiary of the trust a written statement of accounts covering all transactions since the last accounting or since the creation of the trust, whichever is later. If the trustee fails or refuses to deliver the statement on or before the 90th day after the date the trustee receives the demand or after a longer period ordered by a court, any beneficiary of the trust may file suit to compel the trustee to deliver the statement to all beneficiaries of the trust. The court may require the trustee to deliver a written statement of account to all beneficiaries on finding that the nature of the beneficiary's interest in the trust or the effect of the administration of the trust on the beneficiary's interest is sufficient to require an accounting by the trustee. However, the trustee is not obligated or required to account to the beneficiaries of a trust more frequently than once every 12 months unless a more frequent accounting is required by the court. If a beneficiary is successful in the suit to compel a statement under this section, the court may, in its discretion, award all or part of the costs of court and all of the suing beneficiary's reasonable and necessary attorney's fees and costs against the trustee in the trustee's individual capacity or in the trustee's capacity as trustee.

See TEX. PROP. CODE ANN. § 113.151(a) (Vernon 2014).

If requested, the trustee is required to prepare and provide an accounting that complies with Section 113.152 of the Texas Property Code. The form of the accounting requires a written statement of accounts that shows:

- All trust property that has come to the trustee's knowledge or into the trustee's possession, and that has not been previously listed or inventoried as trust property;
- A complete account of receipts, disbursements, and other transactions regarding the trust property for the period covered by the account, including their source and nature, with receipts of principal and income shown separately;
- A listing of all property being administered, with an adequate description of each asset;
- The cash balance on hand and the name and location of the depository where the balance is kept; and
- All known liabilities owed by the trust.

See TEX. PROP. CODE ANN. § 113.152 (Vernon 2014).

If the trustee fails or refuses to deliver the accounting within 90 day of the request, unless extended by a court, the beneficiary of the trust may file suit to compel the trustee to do so. *See id.* If the court finds that the beneficiary's interest in the trust is sufficient to require an accounting by the trustee, it may order the trustee to account to all the trust beneficiaries. *See id.* But, a trustee is not required to account more frequently than once every 12 months unless ordered to do so by the court. *See id.* Also, if a beneficiary

successfully compels an accounting, the court may, "in its discretion, award all or part of the costs of court and all of the suing beneficiary's reasonable and necessary attorney's fees and costs against the trustee in the trustee's individual capacity or in the trustee's capacity as trustee." *See id.*

Likewise, an interested person may file suit to compel the trustee to account to the interested person. TEX. PROP. CODE ANN. § 113.151(a) (Vernon 2014). If the court finds that the nature of the interest, the claim against the trust, or the effect of the trust administration on the interested person is sufficient to require an accounting by the trustee, the court may require the trustee to account to the interested person. *See* TEX. PROP. CODE ANN. § 113.151(b) (Vernon 2014).

Finally, as previously discussed, a settlor may not limit "any common-law duty to keep a beneficiary of an irrevocable trust who is 25 years of age or older informed at any time during which the beneficiary: (1) is entitled or permitted to receive distributions from the trust; or (2) would receive a distribution from the trust if the trust were terminated." TEX. PROP. CODE ANN. 111.0035(c) (Vernon 2014). Therefore, any attempts to override the accounting requirement for a person over 25 who meet the statutory requirements should be ignored.

2. Personal Representatives

With regard to an independent personal representative, a beneficiary can demand an accounting fifteen months after his, her or its appointment. Once demanded, the independent personal representative has sixty days from the receipt of the request, to prepare and provide an accounting that complies with Section 404.001of the Texas Estates Code. The accounting must be sworn and subscribed by the independent personal representative and set forth, in detail, the following information:

- The property belonging to the estate that has come into the executor's hands;
- The disposition that has been made of such property;
- The debts that have been paid;
- The debts and expenses, if any, still owing by the estate;
- The property of the estate, if any, still remaining in the executor's hands;
- Such other facts as may be necessary to a full and definite understanding of the exact condition of the estate; and
- Such facts, if any, that show why the administration should not be closed and the estate distributed.

See TEX. ESTATES CODE ANN. § 404.001 (Vernon 2013).

With regard to a dependent personal representative, they are required to file an annual accounting, until discharged, which includes the following information:

(1) All property that has come to his knowledge or into his possession not previously listed or inventoried as property of the estate.
(2) Any changes in the property of the estate which have not been previously reported.
(3) A complete account of receipts and disbursements for the period covered by the account, and the source and nature thereof, with receipts of principal and income to be shown separately.
(4) A complete, accurate and detailed description of the property being administered, the condition of the property and the use being made thereof, and, if rented, the terms upon and the price for which rented.

> (5) The cash balance on hand and the name and location of the depository wherein such balance is kept; also, any other sums of cash in savings accounts or other form, deposited subject to court order, and the name and location of the depository thereof.
> (6) A detailed description of personal property of the estate, which shall, with respect to bonds, notes, and other securities, include the names of obligor and obligee, or if payable to bearer, so state; the date of issue and maturity; the rate of interest; serial or other identifying numbers; in what manner the property is secured; and other data necessary to identify the same fully, and how and where held for safekeeping.
> (7) A statement that, during the period covered by the account, all due tax returns have been filed and that all taxes due and owing have been paid and a complete account of the amount of the taxes, the date the taxes were paid, and the governmental entity to which the taxes were paid.
> (8) If any tax return due to be filed or any taxes due to be paid are delinquent on the filing of the account, a description of the delinquency and the reasons for the delinquency.
> (9) A statement that the personal representative has paid all the required bond premiums for the accounting period.

TEX. ESTATES CODE ANN. § 359.001(b) (Vernon 2013).

3. Agents

An agent has a duty to account to his or her principal regarding actions taken on the principal's behalf. Due to ongoing concerns, Texas Estates Code Section 751.104 was enacted to impose a statutory duty to account. TEX. ESTATES CODE ANN. § 751.104 (Vernon 2013).

But, Section 751.104 was not intended to limit the principal's ability to impose additional requirements on or instructions to his or her attorney-in-fact. TEX. ESTATES CODE ANN. § 751.106 (Vernon 2013). Therefore, a durable power of attorney may also include additional provisions relating to his or her agent's duty to account and inform. *See* Id. For example, a client may require his agent to account not only to the client's representatives but also to his or her spouse and the spouse's representatives, including the spouse's guardian or attorney-in-fact. An agent may also be required to keep certain family members, financial advisors, or other individuals designated by the client, informed and apprised of the agent's activities on behalf of the principal. The power of attorney should be reviewed to determine if any additional reporting or accounting requirements were included.

K. Consistency Matters

A fiduciary should attempt to be consistent when carrying out his or her duties and responsibilities in order to avoid claims of unauthorized preference or abuse of discretion. For example, a trustee is often required to exercise his or her "discretion" when managing assets or deciding whether to distribute assets to or between one or more beneficiaries. The governing instrument may provide some guidance by setting out a distribution standard: health, education, maintenance and support. Even so, the fiduciary should generally attempt to be consistent with regard to determinations as between beneficiaries (such as what is appropriate for support or maintenance), unless the instrument expressly provides otherwise.

L. Document, Document, Document

Almost every fiduciary has a duty to account for his or her actions if called on to do so. Many trusts impose standards that require the trustee to determine a beneficiary's (i) current or past standard of living to set a benchmark for trust distributions, (ii) assets available for his or her support, or (iii) income available for his or her own support. In order to provide adequate accounts or defend prior decisions, every fiduciary should maintain detailed files on his or her actions and decisions. Requests for distributions should be made, if possible, in writing, and include a description of the reason for the requested distribution. Written invoices should support expenses paid by the trust. When appropriate, the fiduciary should place a memo or note in the file to document notable issues. All records should be maintained until the fiduciary is released or discharged.

M. Communicate, Communicate, Communicate

Communication is perhaps the most effective tool to avoid misunderstandings that lead to claims and lawsuits against fiduciaries. Many lawsuits are filed due to the failure of a fiduciary to: (i) inform a beneficiary of his or her interest, (ii) meet with beneficiaries, (iii) discuss the basis for his or her decisions, (iv) provide status reports, or (v) disclose relevant information and periodic accounts during the relationship.

While a fiduciary does not have to involve the beneficiaries or principal in every decisions, the fiduciary should at a minimum advise the beneficiary or interested person of his or her interest, provide a means to contact the fiduciary, provide periodic information, and advise all interested persons of significant events, in a timely manner. If possible, a fiduciary such as a trustee should attempt to periodically meet with each beneficiary to address any issues or concerns. By building a personal relationship, the fiduciary can both better fulfill his or her job while also mitigating potential litigation that arises from feelings of exclusion. The fiduciary's counsel should, however, not engage in communications that create or appear to create an attorney-client relationship between the beneficiary and the fiduciary's attorney.

N. Understand Standards Of Judicial Review

Likewise, it is important to recognize how a decision may be reviewed if it becomes the subject of litigation.

1. Common Law

There are two basic principles that can be derived from the case law in Texas. They allow courts the latitude to take whatever action they deem necessary according to the facts in each situation. The first principle is that courts will not second guess the fiduciary unless there is an "abuse of discretion." *Coffee v. William Marsh Rice Univ.*, 408 S.W.2d 269, 284 (Tex. Civ. App.—Houston, writ ref'd n.r.e). This rule is still valid today: "Texas courts are prohibited by law from interfering with the discretion of the trustee absent a clear showing of fraud or other egregious conduct." *In re Bass*, 171 F.3d 1016 (5th Cir. 1999). The second principle is that any decision by the fiduciary that subverts the "intent of the settlor" will be overturned. *See State v. Rubion*, 308 S.W.2d 4, 9 (Tex. 1957).

The logical conclusion to be drawn from these two principles is that the "intent of the settlor" is the paramount consideration when a fiduciary is exercising its discretion. A closer look at these seemingly clear principles reveals that the courts have not actually provided any real guidance. The case law only leads the fiduciary to the place

in which it started. After all, if the settlor's intent is abundantly clear to all parties then there would be no need for court intervention in the first place. Furthermore, it is apparent from reading the actual cases that the settlor's intent is often, in reality, second fiddle to a trustee's discretion. *See Coffee*, 408 S.W.2d at 269. While this line of thinking does not serve those of us who would like better guidance in this area, it does allow the courts the freedom to evaluate either principle on a case-by-case basis. This gives courts a position of authority whether they uphold the trustee's decision, or the complaining plaintiff's allegation of foul play.

Currently, fiduciaries have only one clear mandate. Any action taken should conform to the creator's intent, as expressed in the governing instrument. Unfortunately, determining the creator's intent, or rather what the court will accept as the creator's intent, is a difficult undertaking. As discussed, the primary source for determining a creator's intent is the governing instrument. Still, the courts will consider a number of factors outside of the instrument when (in the determination of the court) the instrument itself is not clear.

The lack of clarity in this area does not make life any easier for a fiduciary that is faced with a tough decision. On the other hand, the entire purpose for having a fiduciary of a "discretionary trust" is to burden the fiduciary with the responsibility of making decisions based on future events, and to have the benefit of the fiduciary's judgment and discretion. *In Re Shea's Will*, 254 N.Y.S. 512 (1931). The lack of clarity also explains why the case law is so sparse. Trial courts have wide latitude under the rules as they stand now, and appellate courts have not as of yet devised any better guidance.

i. *Context Of Review*

Generally the review arises either in the context of a beneficiary seeking to compel or prohibit distributions, *see generally*, *State v. Rubion*, 308 S.W.2d 4 (Tex. 1957), or a creditor seeking to reach the assets of the trust, *see Penix v. First National Bank of Paris*, 260 S.W.2d 63 (Tex. Civ. App.—Texarkana 1953, writ ref'd).

ii. *Extent Of Review*

The extent that courts are willing to intervene in the administration of a trust is dictated by the two principles of law discussed above. Courts in Texas are free to intervene in the administration of trusts under *Rubion*, and free to wash their hands of such matters when they see fit under *Coffee*. *Coffee*, 408 S.W.2d at 269. Therefore, it can reasonably be inferred that courts are likely to intervene when the facts of a particular case offend the court's sensibilities, and likely to cite *Coffee* or its progeny when the courts are agreeable to the decisions the trustee has made. *See id.*

2. Texas Property Code

Until the enactment of Texas' version of the Uniform Principal and Income Act in 2004, there was limited statutory authority for a court to review a trustee's distribution decisions. For example, the Texas Property Code provided that a district court (and statutory probate courts under their enabling legislation) had jurisdiction over all proceedings concerning trusts, including those relating to (i) making determinations of fact that affect distributions from a trust, (ii) determining a question arising in the distribution of a trust, and (iii) relieving a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle. *See* TEX. PROP.

CODE ANN. § 115.001(a) (Vernon 2014). The Texas Property Code, however, did not provide any additional guidance.

Thus, trustees and beneficiaries generally sought relief under the declaratory judgment provisions set forth in the Texas Civil Practice & Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.005 (Vernon Supp. 2018)(person interested in a trust may seek judicial declaration of rights or legal relations in respect to trust to direct the trustees to do or abstain from doing any particular act in their fiduciary capacity or determine any question arising in administration of trust).

Now, Texas Property Code Section 116.006 provides for judicial review of a trustee's decisions relating to adjustments to income, which may directly or indirectly affect a trustee's distribution decisions. Texas Property Code Section 116.006 allows a trustee to seek a court declaration (in certain cases) that a contemplated adjustment will not be a breach of trust. There are limitations on a trustee's right to pursue such a determination. Furthermore, Section 116.006 addresses the payment of a trustee and beneficiary's legal fees relating to a judicial proceeding. Section 116.006 requires the trustee to advance attorney's fees related to the proceeding from the trust; however, it also permits the court to charge these fees between or among the trust, the trustee, individually, or one or more beneficiaries (or their trust interests), at the conclusion of the proceeding based on the circumstances.

Before a trustee considers initiating a judicial proceeding, it is advisable to determine if a non-judicial means exists to resolve any issues involving a contemplated principal/income adjustment. Section 116.006 requires that before a trustee may initiate a judicial proceeding: (i) a trustee makes reasonable disclosure to all beneficiaries, and (ii) have a reasonable belief that a beneficiary will object to the proposed allocation. Some means to determine if an objection exists may include:

- Written notification of the proposed allocation to all trust beneficiaries including clear communication as to the effect of the allocation (reduced principal, etc.);
- Request that the beneficiary advise the trustee if he objects or consents to the distribution;
- Request that the beneficiary indicate his or her consent in writing (perhaps provide written consent forms); and
- Inform beneficiaries that if they have any questions, they should seek counsel before signing any documents or responses.

Note, the refusal of a beneficiary to sign a waiver or release is not reasonable grounds for a trustee to claim that the beneficiary will object to the adjustment or allocation. *See id.*

O. Consider If A Change In The Trust Principal Office Or Situs Is Appropriate

Typically, the domicile of the grantor controls the rules related to the trust. A grantor, however, is free to pick his choice of law which can impact the trustee as the rules, the right to a jury trial, arbitration, creditors and taxes may differ from one situs to another.

The Restatement (Second) of Conflicts of Law, Sections 270, comment c, and 272 comment d provides as follows:

> If the settlor has not manifested an intention that the trust should be administered in a particular state, and

> has not designated the law to control it, the administration of the trust will be determined by the local law of the state in which the administration is most substantially related.

Restatement (Second) Conflicts of Law, §§ 270 comment c, and 272 comment d.

Contacts determining the state include: 1) the state of the domicile of the settlor; 2) the state where the trust instrument was executed and delivered, 3) the state where the trust assets are located, and 4) the state of the beneficiary's domicile.

P. Terminating The Relationship

A fiduciary relationship may terminate either due to: (i) the removal of the fiduciary, (ii) the fulfillment of the terms of the trust or estate, or (iii) the resignation of the fiduciary. Regardless, once the relationship is terminated, the former fiduciary should seek to settle his or her accounts and, if possible, resolve any pending issues. For example, the Restatement of Trusts provides that a former trustee is authorized to wind-up his or her affairs and retain authority to do so. Therefore, a former fiduciary should consider whether they have entered into any contractual relationships that need to be resolved. Further, if a trustee is removed, the trustee should consider notifying the other trust beneficiaries so that they will know whom to contact regarding trust matters.

Q. Consider Possible Defenses

While a trust relationship cannot be administered purely on a defensive nature, a fiduciary should be aware of possible defenses available in a future proceeding. Some include:

- No fiduciary relationship or breach fell within scope of fiduciary role. *See Blieden v. Greenspan,* 751 S.W.2d 858 (Tex. 1988);
- *Res judicata. Coble Wall Trust Co., Inc. v. Palmer,* 859 S.W.2d 475 (Tex. App.—San Antonio 1993, writ denied);
- Accord and Satisfaction. *See King v. Cliett,* 31 S.W.2d 350 (Tex. Civ. App.—Waco 1930, no writ);
- Release. Tex. Prop. Code § 114.005;
- Estoppel. *See Langford v. Shamburger,* 417 S.W.2d 438 (Tex. Civ. App.—Ft. Worth 1967, writ ref'd n.r.e.);
- Waiver. *See Ford v. Culbertson,* 308 S.W.2d 855 (Tex. 1958);
- Ratification. *See Burnett v. First Nat. Bank of Waco,* 536 S.W.2d 600 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.);
- Laches. *See Fitzgerald v. Hull,* 237 S.W.2d 256 (Tex. 1951);
- Avoidance or Exculpatory Clauses. *See Moulton v. Alamo Ambulance Service, Inc.,* 414 S.W.2d 444 (Tex. 1967); TEX. PROP. CODE §113.059;
- Statute of Limitations. TEX. CIV. PRAC. REM. CODE §16.004; *Peek v. Berry,* 184 S.W.2d 272 (Tex. 1944); see conversely *Estate of Degley,* 797 S.W.2d 299 (Tex. App.—Corpus Christi 1990, no writ)..

R. Settling Fiduciary Accounts

A fiduciary is generally not required to wait for years to determine if someone is going to bring a claim against them relating to his or her administration. Rather, a fiduciary can seek to settle his or her accounts with the successor trustee, beneficiaries, or other appropriate person or entity. Often this can be accomplished in a non-judicial manner by accounting to the appropriate person and seeking a non-judicial release. For example, the Texas Property Code was amended, as of September 1, 1999, to allow

trust beneficiaries to enter into binding releases. Considerations include:

- What type of actions are sought to be released for?
- Do the statements and/or accountings fully and fairly disclose the transactions?
- Can and will all necessary and proper parties sign?
- Do all beneficiaries have capacity to sign?
- Will successor trustees sign the release?
- Does the agreement require any court involvement?
- Are trustees and attorney's fees addressed?
- Is an indemnity appropriate?
- Does the agreement address future disputes?
- Does the agreement address distribution or transfer of trust assets?
- Does the agreement address access or transfer of trust records?
- Does the successor have power or duty to redress?
- Did the beneficiaries disclaim reliance and acknowledge access to information?
- How will the agreement be enforced?

If a nonjudicial settlement is sought via a release, the fiduciary should be aware that there is generally a presumption of unfairness involving transactions between the fiduciary and the beneficiary. *See Harrison v. Harrison,* 2017 WL: 830504 (Tex. App.—Houston [14th] February 28, 2017, no pet. h.)(*citing Collins v. Smith*, 53 S.W.3d 832, 840 (Tex. App.–Houston [1st Dist.] 2001, no pet.)(citing *Texas Bank & Trust Co. v. Moore,* 595 S.W.2d 502, 507–08 (Tex. 1980). Where a transaction between a fiduciary and a beneficiary, the burden is often on the fiduciary. *See* id. But recently, the Houston Court of Appeals has held that an agreement altering or releasing fiduciaries duties may be reviewed to determine the release – but not necessarily all the resulting transactions, I fair or valid. *See* id. In doing so the appellate court considered the following:

> (1) the terms of the contract were negotiated, rather than boilerplate, and the disputed issue was specifically discussed; (2) the complaining party was represented by counsel; (3) the parties dealt with each other in an arms-length transaction; (4) the parties were knowledgeable in business matters; and (5) the release language was clear. *Frankel Offshore Energy*, 394 S.W.3d at 763.

Harrison at 4.

The appellate court further noted that "the fact that the parties "are effecting a 'once and for all' settlement of claims" weighs in favor of upholding the release. *Harrison* at 4 (*citing Frankel Offshore Energy*, 394 S.W.3d at 763).

If, however, the beneficiary or other persons have raised claims regarding the accounting or refuse to execute the requested releases, the fiduciary should generally seek to judicially settle his or her accounts. A trustee may do so pursuant to the Texas Property Code and the Civil Practice and Remedies Code. An independent executor may also do so pursuant to recent amendments to the Texas Estates Code.

VII. JURISDICTION AND VENUE CONSIDERATIONS

A. Generally

Jurisdiction and venue of claims involving a trustee can substantially affect

the outcome of the lawsuit. Jurisdiction considerations can include:

- District court versus statutory probate court;
- District court versus county courts at law;
- State court versus federal court;
- Agreements to submit to arbitration;
- In rem proceedings;
- A defendant's personal contacts;
- Right to transfer to other jurisdictions; and
- Jurisdiction selection clauses.

B. Jurisdiction

The jurisdiction applicable to trusts is set out in Texas Property Code Chapter 115 and Texas Estates Code Chapter 32.

1. <u>District Courts</u>

District courts generally have original and exclusive jurisdiction over all proceedings by or against a trustee, including the following:

> (1) construe a trust instrument;
> (2) determine the law applicable to a trust instrument;
> (3) *appoint or remove a trustee*;
> (4) *determine the powers, responsibilities, duties, and liability of a trustee;*
> (5) ascertain beneficiaries;
> (6) *make determinations of fact affecting the administration, distribution, or duration of a trus*t;
> (7) *determine a question arising in the administration or distribution of a trust*;
> (8) *relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle*;
> (9) *require an accounting by a trustee, review trustee fees, and settle interim or final accounts;* and
> (10) *surcharge a trustee*.

TEX. PROP. CODE ANN. § 115.001(a)(1)-(10)(Vernon 2014)(emphasis added).

But, there are some exceptions. Section 115.001 further provides that the district court's exclusive jurisdiction ***may be*** concurrent with or in some cases be secondary to:

> (1) a statutory probate court;
> (2) a court that creates a trust under Section [1301 Texas Estates Code];
> (3) a court that creates a trust under Section 142.005;
> (4) a justice court under Chapter 27, Government Code;
> (5) a small claims court under Chapter 28, Government Code; or
> (6) a county court at law.

TEX. PROP. CODE Ann. § 115.001(d)(Vernon 2014)(emphasis added).

2. <u>Statutory Probate Courts</u>

Statutory probate courts' jurisdiction is generally concurrent with the district courts. *See* TEX. ESTATES CODE Ann. § 32.007 (Vernon 2014). And, with regard to trusts, Texas Estates Code Section 32.006 (adopted in 2009 as Probate Code Section 4G) provides that a statutory probate court has jurisdiction of:

> (1) an action by or against a trustee;
> (2) an action involving an *inter vivos* trust, testamentary trust, or charitable trust;
> (3) an action by or against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent; and
> (4) an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney.

See TEX. ESTATES CODE Ann. § 32.009 (Vernon 2014).

3. County Courts at Law

But, a county court at law's jurisdiction of trust disputes is more complicated. Not all county courts at law have jurisdiction of trust matters.

For example, the Texas Supreme Court has held that a county court at law in Hill County lacked jurisdiction to hear a trust lawsuit transferred from a district court that resulted in the removal of the trustee. *Carroll v. Carroll,* 304 S.W.3d 366 (Tex. 2010). In its decision, the Court noted that the "[r]emoval of a trustee, an accounting by a trustee, and appointment of a successor trustee are all "proceedings concerning a trust" expressly governed by the statute and fall under the exclusive jurisdiction of the district court." *Id.* at 368 (citing TEX. PROP. CODE ANN. § 115.001(a)(Vernon 2014)). And, because the issue involved subject matter, the issue could not be waived and raised for the first time on appeal. *See Id.*

Therefore, a determination should be made if the specific county court at law has expanded jurisdiction under the Government Code. For example, Montgomery County's county court at law has jurisdiction of matters involving *inter vivos* trusts. *See* TEX. GOV'T CODE Ann. § 25.1722 (Vernon 2004 & Supp. 2018).

But, when a particular county's jurisdiction is expanded, it is likewise to confirm any related procedural issues – like the number of jurors, limits of damages, etc. *See id.* Because, unless the specific county court at law has expanded jurisdiction under the Government Code and any related statutory requirements are met, the resulting judgment may be void. *See Carroll,* 304 S.W.3d at 368.

4. Arbitration

Arbitration clauses in trusts have been sanctioned by the Texas Supreme Court. *See Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013). In *Rachal,* the Texas Supreme Court issued its opinion holding that an arbitration clause in an *inter vivos* trust instrument was enforceable in a lawsuit brought by the trust beneficiaries – who indisputably never signed the trust agreement. It is particularly notable as such a provision seems to violate the mandates of Texas Property Code Section 111.0035, which prohibits a grantor limiting a court's jurisdiction. *See* discussion *supra.* Therefore, while historically such provisions have not been used, a determination should be made early on (and prior to any alleged waiver of the right to invoke arbitration) whether the agreement allows a trustee or any party to invoke the right to arbitrate and, if so, under what rules.

5. Personal Jurisdiction

Finally, if a trustee is not a resident of the state where he or she is being sued, considerations should be given to whether the court would have personal jurisdiction over the trustee. A Texas court "may assert *in personam* jurisdiction over a nonresident if (1) the Texas long-arm statute authorizes the exercise of jurisdiction, and (2) the exercise of jurisdiction is consistent with federal and state constitutional due-process guarantees." *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex. 2009)(*citing Moki Mac River Expeditions v. Drugg,* 221 S.W.3d 569, 574 (Tex.2007)).

In *Retamco* the Court noted that "personal jurisdiction is achieved when (1) the nonresident defendant has established minimum contacts with the forum state, and (2) the assertion of jurisdiction complies with "traditional notions of fair play and substantial justice." *Id.* at 338 (*citing Moki*

Mac, 221 S.W.3d at 575 (quoting *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). Therefore, the state court must focus on the trustee's "activities and expectations when deciding whether it is proper to call the defendant before a Texas court." *Id* at 338 (*citing Int'l Shoe Co.,* 326 U.S. at 316, 66 S.Ct. 154).

In the trust context, there are very few cases addressing the issue, but one of the few to do so is *Dugas Ltd. Partnership v. Dugas*, 341 S.W.3d 504 (Tex. App.—Fort Worth 2011, pet. granted, judgment set aside, and remanded by agreement.). In *Dugus*, the personal jurisdiction was generally tied to the foreseeability by the out-of-state trustee that he would have contacts with Texas when initially appointed. In *Dugas*, one trust was found to create personal contacts and the other one was not. *Id.* at 518; *see also* Lauren K. Davis, CAPACITY, STANDING AND JURISDICTION, State Bar of Texas Prof. Dev. Adv. Estate Planning and Probate Course (2013)(excellent discussion of personal jurisdiction and issues with requirement of necessary parties under the Texas Property Code).

C. Venue

Likewise, a detailed discussion of jurisdiction is beyond the scope of this outline. But venue, unlike jurisdiction, is waiveable and subject to other considerations. Generally, venue of lawsuits involving trustees are determined under the Texas Property Code based on the type of trustee involved – individual versus corporate. They are as follows:

- For a single individual trustee, venue is proper where "(1) the trustee resides or has resided at any time during the four-year period preceding the date the action is filed; or (2) the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed." TEX. PROP. CODE ANN. § 115.002(b)(Vernon 2014);
- For multiple individual trustees that "maintain a principal office" in Texas, venue is proper where "(1) the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed; or (2) the trustees maintain the principal office." TEX. PROP. CODE ANN. § 115.002(b-1)(Vernon 2014);
- For multiple individual trustees that "do not maintain a principal office" in Texas, venue is proper where "(1) the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed; or (2) any trustee resides or has resided at any time during the four-year period preceding the date the action is filed." TEX. PROP. CODE ANN § 115.002(b-2)(Vernon 2014);
- For a corporate trustee, venue is proper where "(1) the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed; or (2) any corporate trustee maintains its principal office in this state." TEX. PROP. CODE ANN. § 115.002(c)(Vernon 2014).
- When the administration of a deceased grantor's estate is still pending and the lawsuit involves interpretation and administration of trust, venue is proper where "(1) in a county in which venue is proper under Subsection (b), (b-1), (b-2), or (c); or (2) in the county in which the administration of the grantor's estate is pending." TEX. PROP. CODE ANN. § 115.002(c-1)(Vernon 2014).
- When the attorney general files a lawsuit alleging breach of fiduciary duty, venue

is proper in Travis County or "where defendant resides or has its principal office." TEX. PROP. CODE ANN. § 123.005 (Vernon 2014).

In addition, considerations should be given to the various venue statutes that may be concurrent or override the general venue provisions of the Texas Property Code:

- Mandatory venue provisions. *See* TEX. CIV. PRAC. & REM. CODE §§ 15.011-15-020.
- Permissive venue provisions. *See* TEX. CIV. PRAC. & REM. CODE §§ 15.031-15.039.
- Cross claims and counterclaims, and third party claims. *See* TEX. CIV. PRAC. & REM. CODE § 15.062.
- Multiple defendants. *See* TEX. CIV. PRAC. & REM. CODE § 15.0641.
- Conflicts between probate and other venue. *See* TEX. CIV. PRAC. & REM. CODE § 15.007.

As with any lawsuit, a determination of venue should be made before any appearance is filed to avoid claims of waiver.

VIII. STANDING & CAPACITY CONSIDERATIONS

A. Generally

One of the first considerations is whether the plaintiff has a cause of action. Unlike other types of civil litigation, the claims sought to be pursued and the resulting damages may range from those personal to the plaintiff, to claims for damages to the *res* and, thus, derivatively for a class of persons, of which the plaintiff is one of many. For example, a plaintiff who is a remainder beneficiary, limited partner or shareholder may only be affected because the entire estate, trust, partnership or corporation has been damaged.

When the claim arises from an estate, trust or entity, consideration must be given to what claims the plaintiff can bring, whether the plaintiff can sustain those to judgment and what type of fee arrangements are options in these cases. A brief discussion follows.

B. Standing

The question of a person's standing is often raised in fiduciary litigation, but not always easy to answer. In short, standing is a party's justiciable interest in a controversy. See *Esty v. Beal Bank S.S.B.,* 298 S.W.3d 280 (Tex. App.—Dallas 2009, no pet); *(citing Nootsie, Ltd. v. Williamson County App. Dist.,* 925 S.W.2d 659, 661–62 (Tex.1996); *Town of Fairview v. Lawler,* 252 S.W.3d 853, 855 (Tex. App.–Dallas 2008, no pet.)). Standing is a necessary component of subject matter jurisdiction and a constitutional prerequisite to maintaining a lawsuit under Texas law. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 444–45 (Tex.1993). Without a breach of a legal right belonging to a plaintiff, that plaintiff has no standing to litigate. *See id. (citing Cadle Co. v. Lobingier,* 50 S.W.3d 662, 669–70 (Tex. App.—Fort Worth 2001, pet. denied)). And, the test for standing is whether there is a real controversy between the parties that will be actually determined by the judicial declaration sought. *See Tex. Air Control Bd.,* 852 S.W.2d at 446.

1. Vested Standing

It is important to confirm that the plaintiff has a *vested* interest that creates the necessary standing to redress any alleged wrongful acts. Beneficiaries of a trust generally have a vested interest that gives them sufficient standing to pursue claims. *See e.g. In re Townley Bypass Unified Credit Trust*, 252 S.W.3d 717 (Tex. App.—Texarkana 2008, pet. denied)(remainder vests when conditions

precedent exist other than termination of prior estates).

For example, the Texas Property Code defines an "interested person" as follows:

> A trustee, beneficiary, or any other person having an interest in or claim against the trust or any person who is affected by the administration of the trust. *Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes and matter involved in the proceeding*.

TEX. PROP. CODE. § 111.004(7)(emphasis added).

And, Texas Property Code Section 115.01 provides the following are necessary parties:

- Beneficiary on whose act or obligation the action is predicated;
- Beneficiary designated in the trust by name;
- Person actually receiving distributions from the trust estate at the time the action is filed; and
- Trustee, if the trustee is serving at the time the action is filed.
-

But, standing generally relates to the plaintiff's personal claims – not claims brought derivatively on behalf of the estate, trust or entity. For example, a shareholder generally does not have standing to pursue a corporate cause of action as that is reserved for the corporation's officers and directors. *See Pace v. Jordon,* 999 S.W.2d 615, 622, (Tex. App.—Houston [1st Dist.] 1999, pet. denied)("A shareholder's derivative cause of action is based on a corporate cause of action."). Likewise, a beneficiary of a trust generally lacks standing to pursue a claim against someone other than the trustee. *See Interfirst Bank–Houston, N.A. v. Quintana Petroleum Corp*., 699 S.W.2d 864, 874 (Tex. App—Houston [1st Dist.] 1985, writ ref'd n.r.e.); *but see Grinnell v. Munson,* 137 S.W.3d 706, 714 (Tex. App.—San Antonio 2004, no pet.)("[a] beneficiary is authorized to enforce an action when the trustee cannot or will not enforce it").

2. <u>Potentially Vanishing Standing</u>

Continuation of a plaintiff's standing is not guaranteed. Thus, equal consideration must be given to whether a beneficiary or other possible plaintiff's rights may be subject to divestment or contingent on future events or actions, such as survivorship or revocation. Considerations may include:

- Is the trust revocable by the grantor, trustee or other person?
- Does the trust agreement contain a provision that would allow another person to strip the plaintiff of his or her standing?
- Does the will or trust agreement contain a no contest clause or other provision that could be invoked by the litigation?
- Does the governing agreement or regulations contain a provision that would allow another person to call the plaintiff's interest based on a value, such as book value, that would not include the alleged claims?
-

For example, a remainder beneficiary of a revocable trust has been held to lack standing to pursue claims regarding such trust. *See Moon v. Lesikar* 230 S.W.3d 800 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). But, the ability to revoke the trust is not the only consideration. Irrevocable trust agreements should also be reviewed to determine if a beneficiary's interest can be divested through a power of appointment

vested in the potential defendant or third party. If the interest is subject to a power of appointment, the next question is: Can the power of appointment be exercised prior to the conclusion of the anticipated litigation? If so, the beneficiary or beneficiaries may have what is known as a "vested remainder interest, subject to divestment." *Grohn v. Marquardt*, 487 S.W.2d 214, 215 (Tex. Civ. App.– San Antonio 1972, writ ref'd n.r.e.).

Note that it is only the immediately effective exercise of a power of appointment that may terminate a beneficiary or beneficiary's interests, and, thus, make it "subject to divestment." *Grohn*, 487 S.W.2d at 215. Therefore, most beneficiaries will maintain standing to file a lawsuit regarding the trust until the holder of the power of appointment effectuates the removal of the beneficiary or beneficiaries' interest in the trust.

An understanding of the ability to divest a plaintiff of standing is critical. The ability to do so can have substantial benefits of the holder of the power is willing to do so to protect the sued trustee. And, the resulting exercise can remove a plaintiff's standing even after the lawsuit was filed. Once effective, the person no longer has a justiciable interest in the trust and, thus, no standing to pursue any claims relating to the trust. *See* Lauren K. Davis, CAPACITY, STANDING AND JURISDICTION, State Bar of Texas Prof. Dev. Adv. Estate Planning and Probate Course (2013); *Frank N. Ikard, Jr.,* ISSUES RELATED TO REMOTE BENEFICIARIES, State Bar of Texas Advanced Estate Planning and Probate Course 2010; *John K. Round,* VIRTUAL REPRESENTATION: ROLE OF AD LITEM IN NON-GUARDIANSHIP CASE, State Bar of Texas Advanced Estate Planning and Probate Course 2002.

3. Acquiring Standing

Just as a plaintiff's standing can be divested, there are also times that standing can be acquired. For example, an interest in an entity may be transferred to the individual as a result of a purchase, gift, the exercise of a power of appointment, or even under a settlement arrangement. Assuming the interest was validly acquired, standing may be obtained even though the person lacked sufficient standing prior to the transaction.

Furthermore, a plaintiff may acquire standing when the trustee refuses to act. In *Interfirst Bank–Houston, N.A. v. Quintana Petroleum Corp*., the appellate court noted that a beneficiary of a trust generally lacks standing to pursue a claim against someone other than the trust. But, the beneficiary may be able to pursue a claim when the trustee refuses to do so. *See* 699 S.W.2d at 874; *see also Grinnell v. Munson,* 137 S.W.3d 706, 714 (Tex. App.—San Antonio 2004, no pet.*)(*stating that "[a] beneficiary is authorized to enforce an action when the trustee cannot or will not enforce it").

In these cases, it is important to determine if an argument can be made that the acquisition is void – for example, it violates the spendthrift provisions of the trust agreement or the transfer is not effective yet – or that the requirements of *Quintana* have not been established. *See* discussion *infra.*

4. Minors, Incapacitated, and Unborn and Unascertained Beneficiaries

Standing to bring claims of minors, incapacitated persons, and/or unborn or contingent remainder beneficiaries is complicated, to say the least.

With regard to minors, a determination should be made prior to filing whether the claim would be best pursued by a parent, managing conservator, next friend or guardian. TEX. R. CIV. P. 44 (appearance by

next friend); TEX. R. CIV. P. 173 (general provision regarding appointment of guardian ad litem in civil litigation); TEX. PROP. CODE ANN. § 115.014 (Vernon 2014); (provides for appointment of guardian or attorney ad litem in trust proceedings). And, the court generally has the right to appoint a guardian ad litem or, in certain cases, an attorney ad litem, for the minor. *See* TEX. R. CIV. P. 173 (general civil litigation); TEX. PROP. CODE ANN. § 115.014 (Vernon 2014)(trust proceedings).

With regard to incapacitated adults, the claim generally must be pursued by an attorney-in-fact, next friend or guardian. TEX. ESTATES CODE ANN §§ 751.001 *et seq.* (Vernon 2014); (Durable Power of Attorney Act); TEX. ESTATES CODE ANN. § 1105.103 (guardians)(Vernon 2014); TEX. R. CIV. P. 44 (appearance by next friend); TEX. R. CIV. P. 173 (guardian ad litem in civil litigation); TEX. PROP. CODE ANN. § 115.014 (Vernon 2014)(ad litem in trust proceedings). And, similar to lawsuits involving minors, courts generally have the right to appoint a guardian ad litem or, in certain cases, an attorney ad litem to represent the incapacitated person or his or her interests in the lawsuit. *See id.*

But, claims by unborn or contingent remainder beneficiaries, which often arise in trust cases, are the most difficult to address. These nebulous plaintiffs require a determination whether (i) they have a sufficient interest to pursue, and (ii) who has standing to represent them. In some instances, they can be represented by other members of the class or other parties that have similar interests. *See* TEX. PROP. CODE ANN. § 115.013(c)(4)(Vernon 2014)(unborn and unascertained beneficiaries may be virtually represented by another party with substantially identical interest in proceeding). And, if the lawsuit is subject to the Texas Property Code, it expressly allows for the appointment of a guardian ad litem for unborn or unascertained beneficiaries. *See* TEX. PROP. CODE ANN. § 115.014 (Vernon 2014)(guardian or attorney ad litem in trust proceedings).

When any of the parties are potential plaintiffs, by or through others, consideration should be given to filing a motion to show authority to determine if the representative can establish he or she has the requisite authority to pursue the claim on behalf of the minor, incapacitated person or class. Furthermore, consideration should be given to requesting the appointment of a guardian ad litem and/or attorney ad litem. The appointment may avoid future issues of *res judicata* as to certain parties but also limit the ability of certain parties to convey a contingency fee – which can create a future hurdle when trying to resolve these matters.

5. Charities

If a party to a trust lawsuit is a charity, the charity can engage such private counsel as it chooses. But, regardless of whether the charity is represented by counsel, the Texas Attorney General's office must also be notified of any judicial proceeding which seeks to:

- Terminate a charitable trust/gift or distribute its assets to other than charitable beneficiary;
- Take an action that is different that the stated purpose of the charitable trust/gift stated in the instrument, including a proceeding in which the doctrine of *cy-pres* is invoked;
- Construe, nullify, or impair the provisions of a testamentary or other instrument creating or affecting a charitable gift/trust;
- Contest or set aside the probate of an alleged will under which includes a charitable gift;

- A contest to an alleged will by a charity
- Determine matters relating to the probate and administration of an estate involving a charitable gift/trust; and
- Obtain a declaratory judgment involving a charitable gift/trust.
-

If required, which is in virtually every case against a trustee, notice must be given to the Texas Attorney General's office in the following situations:

- Initially, by sending a copy of the pleading by registered or certified mail within 30 days of the filing of the pleading, but no less than 25 days prior to a hearing in the proceeding; and
- Subsequently when new causes of action or additional parties are added; and
- Any proposed settlement.

Furthermore, it is necessary for one or more of the parties to file an affidavit confirming notification prior to any final trial. And, if the required notice is not given, any judgment or settlement agreement is voidable by the Attorney General's office.

6. Capacity

In addition, a determination should be made whether the plaintiff has the capacity to sue and recover in the capacity he or she is suing. For example, the plaintiff may bring a suit in his or her individual capacity, but only have the right to funds as a successor trustee. Capacity affects in what capacity the plaintiff can recover the damages. If capacity is an issue, it is important to file a verified denial by the pleadings

IX. OTHER CONSIDERATIONS

A. Recognize That Almost Anything May Be Discoverable And Act And Write Accordingly

Because of the nature of the fiduciary relationship, it is possible virtually any document could be discovered (rightly or wrongly) in litigation. Thus, it should never be presumed that any written communication would be protected from disclosure. Perhaps no form of communication has raised more issues in the last few years than emails. As this form of communication is rapidly becoming the norm with many clients, they have become a favorite of litigators. Furthermore, individuals have a tendency to say things in email that they would not say in more formal communications, including personal comments that can be taken out of context in subsequent litigation. Thus, every document should be written in a manner that assumes that a potential adverse litigant may read it in the future.

B. Be Clear Who The Advisor Represents

With regard to attorneys, the existence of an attorney-client relationship may be either express or implied from the parties' conduct. *See Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied). Once established, the attorney-client relationship gives rise to corresponding duties on the attorney's part. Thus, an advisor engaged by a fiduciary should be careful never to unintentionally create the impression that he or she represents or is advising a beneficiary, creditor or other third party. These impressions can be formed via meetings, letters and other communications with third parties. Ways to reduce such potential claims include the following:

- Any meetings should be preceded with a statement that the advisor only represents the fiduciary;
- A written notice of non-representations can be given to any potential beneficiaries and creditors in the initial letter or contact;
- An acknowledgement of no representation may be requested

before any meetings with the third parties;
- The advisor should not generally answer any questions regarding the third parties rights; and
- Documents to be signed by the third party should not be prepared by the advisor, if possible.

While the preceding list is not exclusive or even mandatory, these reflect efforts to reduce claims made in actual proceedings over the past few years.

C. Be Careful In All Written Communications With Beneficiaries & Third Parties

It is common when representing a fiduciary to communicate with the beneficiaries of the estate or trust on the fiduciary's behalf. These contacts may create, however, a claim that the beneficiary, creditor, etc., believed that the professional advisor owes a duty to the beneficiary, creditor, etc. Thus, it is suggested that any written communication with any potential non-client reiterate (i) who the advisor represents, and (ii) that the advisor does not represent the recipient.

Furthermore, it is advisable for fiduciary advisors to avoid preparing documents, such as waivers, disclaimers, etc., for non-clients. But, given the realities of the estate and trust area, it is sometimes necessary for the fiduciary's advisor to prepare such documents to expedite his or her appointment or the settlement of the estate or trust. If the attorney is providing the non-client a document for execution, the correspondence should clearly suggest that the recipient have the document reviewed by his or her own advisors. Finally, any letter to a potential beneficiary should be written, if possible, in a manner that confirms, each time, that the advisor is not providing advice to the recipient.

D. Avoid Making Alleged Representations And Use Disclaimers Of Reliance When Appropriate

It is common for interested parties to request that a fiduciary make certain express representations to verify certain facts or conditions. Representations may be used to confirm assets, liabilities, past events or other matters that an interest party deems relevant to an estate or trust. While such information is needed or even mandatory to meet certain fiduciary duties, the attorney or other advisor for the fiduciary should avoid being the one making such representations. When he or she does, and it turns out to be incorrect, the attorney or other advisor may face claims of negligent misrepresentation.

Furthermore, the Texas Supreme Court has sanctioned the use of disclaimers of reliance in documents to mitigate potential claims of reliance or negligent misrepresentation. *See Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997); *Atlantic Lloyds Insurance Company v. Butler*, 137 S.W.3d 199 (Tex. App.—Houston [1st Dist.] 2004, pet. filed July 6, 2004)(disclaimer of reliance in settlement agreement conclusively negated other parties alleged reliance on any representations or lack of disclosure by other parties). A disclaimer of reliance may provide as follows:

> Each party confirms and agrees that such party (i) has relied on his or her own judgment and has not been induced to sign or execute this Agreement by promises, agreements or representations not expressly stated herein, (ii) has freely and willingly executed this Agreement and hereby expressly disclaims reliance on any fact, promise, undertaking or

representation made by the other party, save and except for the express agreements and representations contained in this Agreement, (iii) waives any right to additional information regarding the matters governed and effected by this Agreement, (iv) was not in a significantly disparate bargaining position with the other party, and (v) has been represented by legal counsel in this matter.

E. Consider the Possible Rights Of Successor Fiduciaries

Attorneys and other advisor's representing a fiduciary should consider that an issue exists regarding the right and privity of a successor fiduciary to the agents of the prior fiduciary. When a fiduciary has been removed or died, a successor fiduciary is generally imposed with a duty to redress his or her predecessor's actions. When a fiduciary is represented by counsel, the question then becomes whether the successor is entitled to the predecessor's legal files. While the Texas Supreme Court decision of *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996), seems to imply that the attorney only represented that fiduciary/client, no Texas court has clearly addressed this issue in the context of an estate, or guardianship and at least one trial court has ordered the turnover of the prior attorney's files.

Until this issue is decided, an attorney or other advisor for a former fiduciary should request the consent of the client or the client's representative's before releasing his or her files to a successor fiduciary. If consent cannot be obtained, the advisor should request a court order compelling the turnover.

F. Be Cognizant Of The Discovery Rule

While the standard statute of limitation on breach of fiduciary duty is four years, the discovery rule can toll this applicable period for years into the future. The Texas Supreme Court has twice held a fiduciary's misconduct to be inherently undiscoverable. *See Willis v. Maverick*, 760 S.W.2d 642, 547 (Tex. 1988) (attorney-malpractice actions subject to discovery rule because of fiduciary relationship between attorney and client and client's lack of actual or constructive knowledge of injury); *Slay v. Burnett Trusts*, 187 S.W.2d 377, 394 (1945) (trustee). The discovery of such claims may relate to the fiduciary's actions or inactions. As a result, consideration should be given to retaining files and other information or documentation relevant to these engagements far beyond the standard period.

G. There Are Criminal Implications in the Fiduciary Area

1. Penal Code Section 22.04: Injury to Elderly or Disabled Person.

Section 22.04 of the Texas Penal Code provides that it is a criminal offense for a person with a legal or statutory duty to act or has "assumed care, custody or control" and "intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual: (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; or (3) bodily injury." TEX. PENAL CODE ANN. § 22.04(a) (Vernon 2011). Section § 22.04(c) defines child, elderly individual and disabled person as follows:

a. "Child" means a person 14 years of age or younger.
b. "Elderly individual" means a person 65 years of age or older.
c. "Disabled individual" means a person older than 14 years of age who by reason of age or physical or mental disease, defect, or injury is substantially unable to protect himself from harm or to provide

> food, shelter, or medical care for himself.

See TEX. PENAL CODE ANN. § 22.04(c) (Vernon 2011).

If the injury results in serious bodily injury or mental deficiency, impairment, or injury, the offender could be charged with a felony of the first degree if the conduct is committed intentionally or knowingly. TEX. PENAL CODE ANN. § 22.04(e) (Vernon 2011). If the conduct resulted from recklessness, the offender could be charged with a felony of the second degree. *See Id.* If the conduct resulted from criminal negligence, the offender could be charged with a state jail felony. TEX. PENAL CODE ANN. § 22.04(g) (Vernon 2011).

When the injury results in bodily injury, the offender could be charged with a felony of the third degree if the conduct is committed intentionally or knowingly. TEX. PENAL CODE ANN. § 22.04(f) (Vernon 2011). If the conduct resulted from criminal negligence, the offender could be charged with a state jail felony. TEX. PENAL CODE ANN. § 22.04(g) (Vernon 2011).

2. Penal Code Section 31.03: Theft.

Section 31.03 of the Texas Penal Code provides that it is a criminal offense when a person "unlawfully appropriates property with intent to deprive the owner of property." TEX. PENAL CODE ANN. § 31.03(a) (Vernon 2011). While Section 31.03 does not specifically apply to fiduciaries, anyone deemed to be acting in that capacity could also be charged with an offense under this section in addition to more specific offenses. *See Billings v. State* 725 S.W.2d 757 (Tex. App.—Houston [14th Dist.} 1987, no writ) (conviction under general theft statute would not be reversed even though prohibited conduct was covered by more special statute prohibiting fiduciary from misapplying fiduciary property, where both statutes were graded equally depending upon value of property misappropriated, and prosecution under either statute subjected offender to same range of punishment).

If charged with theft, the severity of the offense will range from a Class C misdemeanor for property less than $50, to a first-degree felony for property in excess of $200,000. *See* TEX. PENAL CODE ANN. § 31.03(e) (Vernon Supp. 2018). However, when the legal owner is an elderly person, the possible punishment is increased to the next higher category of offense. *See* TEX. PENAL CODE ANN. § 31.03(f) (Vernon 2011).

3. Section 32.45: Misapplication of Fiduciary Property.

Section 32.45 of the Texas Penal Code provides that it is a criminal offense for a person, with a legal or statutory duty to act, to "intentionally, knowingly, or recklessly misapply property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held." TEX. PENAL CODE ANN. § 32.45(b) (Vernon. 2011). Section 32.45(a)(1) defines a fiduciary to include an attorney in fact, agent, trustee, guardian or anyone else acting in a fiduciary capacity. TEX. PENAL CODE ANN. § 32.45(c) (Vernon 2011). The offender will be charged with an offense dependent on the value of the misappropriated property. They range from a Class C misdemeanor for property less than $20, to a first-degree felony for property in excess of $200,000. TEX. PENAL CODE ANN. § 32.45(c) (Vernon 2011).

4. Penal Code Section 32.53. Exploitation of Child, Elderly Individual, or Disabled Individual

Section 32.46 of the Texas Penal Code addresses fraud based on the execution of documents by deception. Section 32.46(a) provides that a "person commits an offense if, with intent to defraud or harm any person, he, by deception, "causes another to sign or execute any document affecting property or service or the pecuniary interest of any person." TEX. PENAL CODE ANN. § 32.46(c) (Vernon 2011). The punishment depends on the value of the property involved. It is felony when the value is $1,500 and the degree depends of the actual value. See Id.

5. Penal Code Section 32.53. Exploitation of Child, Elderly Individual, or Disabled Individual

Section 32.53 was recently added to the Texas Penal Code. TEX. PENAL CODE ANN. § 32.53 (Vernon Supp. 2018). It specifically adopts the definitions of "child," "elderly individual," and "disabled individual" in Texas Penal Code Section 22.04. It also defines exploitation to mean "the illegal or improper use of a child, elderly individual, or disabled individual or of the resources of a child, elderly individual, or disabled individual for monetary or personal benefit, profit, or gain." *Id.* A person can be guilty of a third degree felony if they "intentionally, knowingly, or recklessly cause the exploitation of a child, elderly individual, or disabled individual." *See* Id.

6. Duty to Report Abuse, Neglect or Exploitation.

To the extent that a guardian or other becomes aware of any specific acts of abuse, neglect, or exploitation, he or she is required to report it to the Texas Department of Human Services and Department of Protective and Regulatory Services. *See* TEX. HUM. RES. CODE ANN. § 48.051 (Vernon 2013). Section 48.051(c) provides that the duty imposed to report the abuse, neglect, or exploitation, include a person "whose knowledge concerning possible abuse, neglect, or exploitation is obtained during the scope of the person's employment or whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, and mental health professional." *See Id.*

Therefore, not only is a guardian required to report such abuse, neglect, or exploitation, but also an attorney ad litem, guardian ad litem, employee of the ward's 867 trust, etc.

The required report may be made orally or in writing but must include the following:

d. the name, age, and address of the elderly or disabled person;
e. the name and address of any person responsible for the elderly or disabled person's care;
f. the nature and extent of the elderly or disabled person's condition;
g. the basis of the reporter's knowledge; and
h. any other relevant information.

See TEX. HUM. RES. CODE ANN. § 48.051(d) (Vernon 2013).

A person may be subject to criminal charges if he or she fails to report the abuse, neglect, or exploitation as required by Section 48.051. *See* TEX. HUM. RES. CODE ANN. § 48.052(a) (Vernon 2013 & Supp. 2018). If discovered, he or she may be charged with a Class A misdemeanor. *See* TEX. HUM. RES. CODE ANN. § 48.052(b) (Vernon 2013).

H. Take The High Road

Finally, common sense probably provides the best guide to avoiding fiduciary-related litigation. When representing a fiduciary, both the fiduciary and his or her attorney (as the fiduciary's agent) appear to be held to a higher standard. Thus, care should be taken by both in carrying out their respective roles. Some final suggestions include:

- Avoid "Rambo" litigation;
- Be cognizant of a fiduciary's duties of disclosure;
- Do not allow fiduciary-client to use attorney's services to enable a clear breach of his or her duties;
- Consider when to put matters in writing and when not to – even to the fiduciary; and
- Appropriate payment and segregation of fees and expense;

X. CONCLUSION

In short, fiduciary litigation will never be eliminated. But, careful fiduciaries and their advisors can often reduce potential litigation through careful planning and taking certain actions during the duration of the fiduciary relationship. Hopefully, the proceeding discussion provides some guidance during the process.

XI. EXHIBITS

Exhibit A

Texas Pattern Jury Charge on
Breach of Duty by Trustee—Other Than Self-Dealing

QUESTION ___

Did *TRUSTEE* fail to comply with one or more of the following duties?

Answer "Yes" or "No" as to each.

[*List duties alleged to have been breached and the standard of care applicable to each, using language from the trust document*, *Texas Trust Code, or common law, as appropriate. See comment below*].

1 Answer: _____
2. Answer: _____
3. Answer: _____

PJC 236.9

Exhibit B

Texas Pattern Jury Charge on
Breach of Duty by Trustee—Self-Dealing—Duties Not Modified or Eliminated by Trust

QUESTION ___

Did *TRUSTEE* comply with his fiduciary duty to *BENEFICIARY* in connection with *[describe self-dealing transaction]*?

TRUSTEE owed *BENEFICIARY* a fiduciary duty. To prove he complied with this duty in connection with *[describe self-dealing transaction]*, *TRUSTEE* must show that—

a. the *transaction in question was* fair and equitable to *BENEFICIARY*; and

b. *TRUSTEE* made reasonable use of the confidence placed in *him by SETTLOR*; and

c. *TRUSTEE* acted in good faith and in accordance with the purposes of the trust in connection with the *transaction* in question; and

d. *TRUSTEE* placed the interests of *BENEFICIARY* before *his* own, did not use the advantage of *his* position to gain any benefit for *himself* at the expense of *BENEFICIARY*, and did not place *himself* in any position where *his* self-interest might conflict with *his* obligations as trustee; and

e. *TRUSTEE* fully and fairly disclosed to *BENEFICIARY* all material facts known to *TRUSTEE* concerning the *transaction* in question that might affect *BENEFICIARY*'s rights.

"Good faith" means an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct.

Answer "Yes" or "No."

Answer: _____

PJC 236.10

Exhibit C

Texas Pattern Jury Charge on
Breach of Duty by Trustee—Self-Dealing—Duties Modified But Not Eliminated by Trust

QUESTION ___

Did *TRUSTEE* comply with his duties as trustee in connection with the *purchase of trust property*?

TRUSTEE complied with *his* duties if *his purchase of the trust property was for fair and adequate consideration* and *he* acted in good faith and in accordance with the purposes of the trust.

"Good faith" means an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct.

Answer "Yes" or "No."

Answer: _____

by trust).

PJC 235.11

Exhibit D

Texas Pattern Jury Charge on
Breach of Duty by Trustee—Self-Dealing—Duty of Loyalty Eliminated

QUESTION ___

Did *TRUSTEE* fail to comply with *his* duty as trustee when *he purchased the trust property*?

A trustee fails to comply with his duty as trustee if he fails to act in good faith or fails to act in accordance with the purposes of the trust.

Good faith" means an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct.

Answer "Yes" or "No."

Answer: _____

PJC 235.12

Exhibit E

Texas Pattern Jury Charge on
Liability of Cotrustees—Not Modified by Document

If you have answered Question _____ ["Yes"] ["No"], *[see comment]* then answer the following question. Otherwise, do not answer the following question.

QUESTION 1

Was *TRUSTEE*'s *failure to insure the trust property* a serious breach of *his* duties as trustee?

Answer "Yes" or "No."

Answer: _____

If you have answered Question 1 "Yes," then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Did *OTHER TRUSTEE* exercise reasonable care to prevent *TRUSTEE* from *failing to insure the trust property* and to compel *TRUSTEE* to redress *the failure to insure the trust property*?

Answer "Yes" or "No"

Answer: _____

PJC 235.17

Exhibit F

Texas Pattern Jury Charge on
Liability of Successor Trustees—Not Modified by Document

If you have answered Question _____ ["Yes"] ["No"], *[see comment]* then answer the following question. Otherwise, do not answer the following question.

QUESTION ____

Did *SUCCESSOR TRUSTEE,* the successor trustee, fail to comply with duties with respect to the conduct of *PREDECESSOR TRUSTEE*, the predecessor trustee?

> A successor trustee fails to comply with his duties with respect to the conduct of a predecessor trustee if the successor trustee knows or should have known that the predecessor trustee failed to comply with his duties and the successor trustee *(1) improperly permits the situation to continue or (2) fails to make a reasonable effort to compel the predecessor trustee to deliver the trust property or (3) fails to make a reasonable effort to compel a redress of a breach of trust committed by the predecessor trustee.*
>
> Answer "Yes" or "No."
>
> Answer: _____

PJC 235.18

Exhibit G

Texas Pattern Jury Charge on Release

If you have answered Question _____ ["Yes"] ["No"], *[see comment]* then answer the following question. Otherwise, do not answer the following question.

QUESTION ___

Did *BENEFICIARY* have full knowledge of all the material facts related to *TRUSTEE*'s *failure to insure the trust property* when *he* signed the document dated *DATE*?

Answer "Yes" or "No."

Answer: _____

PJC 235.18