Texas Fiduciary Litigation Update: 2020-2021

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David maintains an active trial and appellate practice for the financial services industry. David has specialized in estate and trust disputes including: trust modification/clarification, trustee resignation/removal, breach of fiduciary duty and related claims, accountings, will contests, mental competency issues, and undue influence. David's recent trial experience includes:

Represented a trustee in federal class action suit where trust beneficiaries challenged whether it was the authorized trustee of over 220 trusts;

Represented trustees regarding claims of mismanagement of assets;

Represented a trustee who filed suit to modify three trusts to remove a charitable beneficiary that had substantially changed operations;

Represented a trustee regarding dispute over the failure to make distributions;

Represented a trustee/bank regarding a negligence claim arising from investments from an IRA account;

Represented individuals in will contests arising from claims of undue influence and mental incompetence;

Represented estate representatives against claims raised by a beneficiary for breach of fiduciary duty;

Represented beneficiaries against estate representatives for breach of fiduciary duty and other related claims; and

Represented estate representatives, trustees, and beneficiaries regarding accountings and related claims.

David is one of twenty attorneys in the state (of the 84,000 licensed) that has the triple Board Certification in Civil Trial Law, Civil Appellate, and Personal Injury Trial Law by the Texas Board of Legal Specialization. Additionally, David is a board member of TBLS and was a member of the Civil Trial Law Commission of the Texas Board of Legal Specialization, which writes and grades the exam for new applicants for civil trial law certification.

David is a graduate of Baylor University School of Law, *Magna Cum Laude*, and Baylor University, B.B.A. in Accounting.

David has published over twenty (20) law review articles on various litigation topics. David's articles have been cited as authority by: federal courts, the Texas Supreme Court (three times), the Texas courts of appeals (Waco, Texarkana, Tyler, Beaumont, and Houston), McDonald and Carlson in their Texas Civil Practice treatise, William V. Dorsaneo in the Texas Litigation Guide, Baylor Law Review, South Texas Law Review, and the Tennessee Law Review. David has presented and/or prepared written materials for over three hundred (300) continuing legal education courses.

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I. Introduction[1]

The fiduciary field in Texas is a constantly changing area. Over time, statutes change, and Texas courts interpret those statutes, the common law, and parties' documents differently. This paper is intended to give an update on the law in Texas that impacts the fiduciary field from a period of mid-2020 to mid-2021. The author has a blog, the Texas Fiduciary Litigator (www.txfiduciarylitigator.com), wherein he regularly reports on fiduciary issues in Texas.

II. Trust-Related Litigation

A. Texas Court Does Not Have Personal Jurisdiction Over A Trustee Of A Trust With Texas Timber Rights

In *JPMorgan Chase Bank, N.A. v. Campbell*, a member of a limited partnership sued other partners, including a trustee of a trust, to dissolve the partnership. No. 09-20-00161-CV, 2021 Tex. App. LEXIS 5001 (Tex. App.—Beaumont June 24, 2021, no pet. history). The trustee was listed as a nominal defendant, and the trustee filed claims seeking declaratory relief regarding it not having to participate in an arbitration proceeding. The plaintiffs then filed additional claims against the trustee including breach of fiduciary duty and for modification of the trust. The trustee filed a special appearance regarding those new claims, which the trial court denied. The trustee appealed.

The court of appeals first held that the trustee did not waive its right to objection to personal jurisdiction by answering the original suit and seeking declaratory relief. The court noted that "Rule 120a allows a party to file a special appearance in any severable action of a lawsuit." *Id*. The court held: "the trust modification claim is a severable action, and that JPMorgan did not waive its challenge to the trial court's exercise of personal jurisdiction over it by appearing in and seeking declaratory relief in the underlying arbitration suit." *Id.*

The plaintiff did not rely on general jurisdiction to establish personal jurisdiction over the trustee and only asserted specific jurisdiction. The plaintiff has alleged that the trustee would not maintain the timber rights in the trust and would liquidate them. The court held that that fact did not support jurisdiction as it did not show how the trustee did business in Texas. The court then reviewed additional facts in the response to the objection to personal jurisdiction:

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> In its response, Foster argues that JPMorgan has benefitted from the sale of timber located in Texas as a trustee. JPMorgan solicited business from the beneficiaries stating it would "maximize the value of the Texas property," and holds the "responsibilities of an owner[.]" Foster states that JPMorgan participated in business meetings of Foster Management and sent representatives to Texas on "nearly half a dozen occasions[,]" meeting with Christy in her Conroe home.

Id. The court concluded that the pleadings alleged sufficient facts that required the trustee to file a sworn denial or its equivalent responding to its allegations that the trustee "does business" in Texas. But the court held that even though the plaintiffs alleged facts that overcame the first prong of the analysis, "that is not necessarily enough to satisfy due process as required under the long-arm statute." The court held:

> Asserting personal jurisdiction comports with due process when (1) the nonresident defendant has minimum contacts with the forum state, and (2) asserting jurisdiction complies with traditional notions of fair play and substantial justice.… For a Texas court to exercise specific jurisdiction, the nonresident defendant must have made minimum contacts with Texas by purposefully availing itself of the privilege of conducting business here, and its liability must have arisen from or be related to those contacts. "[T]here must be a substantial connection between those contacts and the operative facts of the litigation." A "purposeful availment" inquiry involves three parts: (1) consideration of the defendant's contacts with the forum, but "not the unilateral activity of another party or a third person[;]" (2) "the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated[;]" and (3) the defendant must seek a benefit, advantage, or profit by availing itself of the jurisdiction. Id. at 575 (citations omitted). "In contrast, a defendant may purposefully avoid a particular forum by structuring its transactions in such a way as to neither profit from the forum's laws nor subject itself to jurisdiction there."

Id. The court agreed with the trustee's position:

> JPMorgan argues that it did not purposely avail itself in Texas because the Trust was not created or modified in Texas, it administers the Trust in Illinois and never in Texas, the beneficiaries live in California, and one beneficiary's move to Texas does not demonstrate that it is doing business in Texas. JPMorgan also contends that although the timber is located in Texas, JPMorgan does not hold legal title to the land, but that "an interest in a partnership for the benefit of third parties does not constitute 'purposeful activity.'"

Id. The court held that just because a trust beneficiary lived in Texas, and received distributions here, that did not establish jurisdiction over the trustee. The

court also held: "The fact that the timber, being the majority of the Trust corpus, is located in Texas does not in itself demonstrate purposeful availment." *Id*. The court ruled for the trustee and reversed the trial court's denial of the trustee's objection to personal jurisdiction over the plaintiffs' new claims.

B. Court Discusses De Facto Trustee Status In Texas

In *Bird v. Carl C. Anderson*, a trust beneficiary sued a defendant for usurping a trustee's role and breaching fiduciary duties as a de facto trustee. No. 03-21-00140-CV, 2021 Tex. App. LEXIS 5036 (Tex. App.—Austin June 24, 2021, no pet. history). The plaintiff complained that the defendant "reinvested the proceeds into 'high-risk and non-diversified investments that exposed the trusts and [their] beneficiaries to inappropriate levels of risk,' causing the trusts to substantially diminish in value; distributed assets to himself, Jennifer, and perhaps others to the Foundation's detriment; and had Jennifer sign all of the transactional documents in her role as trustee even though she was and is incapacitated." *Id*. The defendant filed a motion to dismiss under Texas Rule of Civil Procedure 91, arguing that there was no de facto trustee status in Texas. The trial court denied the motion, found that "Texas law recognizes the legal capacity of 'de facto trustee' in the context of the administration of private trusts," but certified the issue for permissive appeal.

The court of appeals declined to accept the petition for interlocutory appeal. The court held that resolving that issue would not materially advance the termination of the litigation due to the existence of similar alternative theories:

John does not explain how the termination of this litigation would be materially advanced by a determination that a "de facto" trustee capacity does not exist. Instead, the related alternate theory the Foundation is pursuing against John-knowing participation in Jennifer's alleged breach of fiduciary duty-is based on the same underlying factual allegations and would require substantially the same proof and impose the same liability as the direct claim against him for breach of fiduciary duty.

Id. Without opining on the merits of whether there is a de facto trustee status in Texas, the court did imply that the defendant may owe fiduciary duties depending on the facts of the case even though he was not formally appointed a trustee:

> While the precise legal issue the trial court determined at this stage, per John's motion, is the viability of the de facto trustee "capacity" in which the Foundation has sued John, the trial court has yet to make the more salient determination of whether John owed the beneficiaries a fiduciary duty-either as a "de facto trustee" or under equitable principles-which is a question of law for the court that turns on the specific facts yet to be developed rather than on the legal capacity in which John was sued, considering that "fiduciary duties are equitable in nature and generally not subject to hard and fast rules," *see National Plan Adm'rs, Inc. v. National*

> *Health Ins.,* 235 S.W.3d 695, 702 (Tex. 2007); *see also Ritchie v. Rupe*, 443 S.W.3d 856, 868 (Tex. 2014) (noting that "those acting as directors" owe fiduciary duty to corporation even if not formally appointed as such); *Strebel v. Wimberly*, 371 S.W.3d 267, 281 (Tex. App.-Houston [1st Dist.] 2012, pet. denied) ("Even where no fiduciary duties normally arise, they spring into existence when a limited partner actively engages in control over the operation of the business so as to create duties that otherwise would not exist." (internal quotations and citations omitted)). Even if this Court were to determine that the "de facto" capacity does not exist, such determination would not materially advance the litigation's termination because the issue of whether John owed the beneficiaries a fiduciary duty-in his individual capacity by allegedly and informally acting in the role of a trustee-would nonetheless remain a live issue.

Id.

Interesting Note: There is no precedent exactly on point in Texas on whether a person or entity that acts like a trustee owes fiduciary duties due to that conduct. "An 'officer de jure' is one who is in all respects legally appointed [or elected] and qualified to exercise the office; one who is clothed with the full legal right and title to the office; in other words, one who has been legally elected or appointed to an office and who has qualified himself [or herself] to exercise the duties thereof according to the mode prescribed by law." *Brown v. Anderson*, 210 Ark. 970, 198 S.W.2d 188, 190 (Ark. 1946). There is precedent that an individual may become a de facto trustee by acting as same even though not officially named, appointed, or accepted as a trustee. *Daniel v. Bailey*, 466 P.2d 647 (Ok. Sup. Ct. 1979); *see also Rivera v. City of Laredo*, 948 S.W.2d 787, 794 (Tex. App.—San Antonio 1997, writ denied); *Forwood v City of Taylor*, 208 S.W.2d 670, 673 (Tex. Civ. App.—Austin 1948, no writ). For example, in *Alpert v. Riley*, the court of appeals held that the purported trustee did not properly accept that position under the trust document and was never properly acting as a trustee. 274 S.W.3d 277 (Tex. App.—Houston [1st Dist.] 2008, no pet.). It then later held that because the individual was not the de jure trustee, it was not entitled to any compensation. *Id*.

Courts in other jurisdictions have given their tacit approval of de facto trustees in various contexts. *See, e.g., City of Pueblo v. Grand Carniolian Slovenian Catholic Union of the U.S. of Am.*, 145 Colo. 6, 358 P.2d 13, 16 (Colo. 1960); *In re Woods*, 215 B.R. 623, 627 (10th Cir. 1998) (citing *In re Holiday Isles, Ltd*., 29 B.R. 827, 829 (Bankr. S.D. Fla. 1983) (stating that "[c]ourts faced with a trustee's failure to technically qualify have long recognized the concept of a 'de facto' trustee of a bankrupt estate"); *Shackelford v. Lake*, No. CIV-15-0218-HE, 2016 U.S. Dist. LEXIS 164199, 2016 WL 6993960, at *5 (W.D. Okla. Nov. 29, 2016) ("As his mother's attorney-in-fact, as the manager of the LLC, and as de facto trustee of her trust-like device, Mr. Shackleford [sic] clearly owed his mother fiduciary responsibilities." (internal citation and footnotes omitted)); *United States v. Novotny*, No. 99-D-2196, 2001 U.S. Dist. LEXIS 21795, 2001 WL 1673628, at

*3 (D. Colo. Nov. 8, 2001) ("Novotny and his wife have served as appointed or de facto trustees during the entire existence of the Trusts."); *Yeast v. Pru*, 292 F. 598, 603 (D.N.M. 1923) ("Therefore these trustees, if not de jure, were unquestionably de facto, trustees of the respective towns they assumed to represent and act for as such trustees."); *In re Irrevocable Trust of McKean*, 144 Wn. App. 333, 183 P.3d 317, 321-22 (Wash. App. 2008); *Allen Trust Co. v. Cowlitz Bank*, 210 Ore. App. 648 (Ct. App. Ore. 2007); *Creel v. Martin*, 454 So.2d 1350 (Ala. 1984); *In re Estate of Dakin*, 58 Misc.2d 736, 296 N.Y.S.2d 742 (1968); *In re Trust of Daniel*, 1970 OK 34, 466 P.2d 647 (Okla. 1970); *In re Bankers Trust*, 403 F.2d 16, 20 (7th Cir. 1968).

The Seventh Circuit Federal Court of Appeals has enunciated the standard for becoming a de facto trustee as follows: "Two elements are essential before these trustees can be deemed de facto trustees: 1. The office or position must be assumed under color of right or title. 2. Those claiming de facto status must exercise the duties of the office." *In re Bankers Trust*, 403 F.2d 16, 20 (7th Cir. 1968). The Seventh Circuit explained the first element by stating: "Color of right or title merely means 'authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer.'" *Id.* If one fails under the first element, then the de facto trustee does not have standing to act as a trustee and have standing to represent the trust. *See, e.g., Haynes v. Transamerica Corp*., No. 16-cv-02934-KLM, 2018 U.S. Dist. LEXIS 8465 (D.C. Co. January 18, 2018) (trustee who was a mere volunteer did not have standing to represent trust). A de facto trustee has the same fiduciary duties that a de jure trustee has. *In re Holiday Isles, Ltd*., 29 B.R. 827 (Bankr. S.D. Fla. 1983) ("Likewise, de facto bankruptcy trustees cannot interpose as a defense to a suit brought against them based upon their actions as trustees the fact that they never qualified as de jure trustees."). In this definition of de facto trustee, the court is really concerned with whether the de facto trustee has standing to make decisions for the trust that are binding and potentially whether the de facto trustee should be compensated. *W.J. Services, Inc. v. Commercial State Bank of El Campo*, 990 F.2d 233 (5th Cir. 1993); *In re Lake Region Operating Corp*., 209 B.R. 637 (Bankr. M. D. Pa. 1997); *Crocker-Citizens National Bank v. Younger*, 4 Cal 3d 202, 93 Cal Rptr 214, 481 P.2d 222 (1971)

Even regarding a "volunteer" trustee, someone who assumes the role of trustee without doing so under color of right or title, the "volunteer" trustee should still owe fiduciary duties. *Burton v. Dolph,* 89 Va. Cir. 101 (Cir. Ct. Va. 2015) (finding Virginia did have de facto status trustees); *Pannill v. Calloway*, 78 Va. 387, 395 (1884) ("[I]f a person assume[s] to act as trustee, he shall be treated in equity as a trustee, whether duly appointed as trustee or not."). Some courts call this position trustee de son tort. *Stephan v. Equitable S & L Assn*., 268 Ore. 544, 559, 522 P.2d 478 (1974) ("A person may become a trustee by construction by intermeddling with, and assuming the management of, trust property without authority. Such persons are trustees de son tort. During the possession and management by such constructive trustees, they are subject to the same rules

and remedies as other trustees; and they cannot avoid their liability by showing that they were not, in fact, trustees * * *."); *Allen Trust Co. v. Cowlitz Bank*, 210 Ore. App. 648 (Ct. App. Ore. 2007); *Matter of Sakow*,146 Misc 2d 672[Sur Ct, Bronx County 1990]. Derived from French Law, a trustee de son tort is "[s]omeone who, without legal authority, administers a living person's property to the detriment of the property owner." Black's Law Dictionary (10th ed. 2014). Otherwise there is a similar term called "trustee ex maleficio," which means: "a person treated as a trustee because guilty of wrongdoing and compelled to account as though he were a trustee for property to which he has legal title for the benefit of those injured and equitably entitled to it." www.merriam-webster.com.

In Texas, there have been a handful of cases that reference "trustee de son tort" and "trustee ex maleficio." There are also similar concepts in Texas. "A constructive trust is an equitable, court-created remedy designed to prevent unjust enrichment." *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 87 (Tex. 2015) (citing *Meadows v. Bierschwale*, 516 S.W.2d 125, 131 (Tex. 1974) ("Constructive trusts, being remedial in character, have the very broad function of redressing wrong or unjust enrichment in keeping with basic principles of equity and justice.")). Though "breach of a special trust or fiduciary relationship or actual or constructive fraud" is "generally" necessary to support a constructive trust, but "[t]he specific instances in which equity impresses a constructive trust are numberless—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts." *Id*. *See also Kinsel v. Lindsey*, 526 S.W.3d 411, 425-26 (Tex. 2017). A constructive trustee is not a de jure trustee and may not even necessarily be a de facto trustee, but he or she is held to a trustee status and has fiduciary duties regardless of his or her will in the matter. *Lotus Oil Co. v. Spires*, 240 S.W.2d 357 (Tex. Civ. App.—El Paso 1950, writ refused n.r.e.). *See also Rodriguez v. Rodriguez*, No. 04-07-00252-CV, 2007 Tex. App. LEXIS 8802 (Tex. App.—San Antonio November 7, 2007, no pet.) (constructive trustee owed fiduciary duties and was liable for self-dealing); *Rosenthal v. Rosenthal*, No. 01-99-00058-CV, 2001 Tex. App. LEXIS 7540 (Tex. App.—Houston [1st Dist.] November 8, 2001, pet. denied) (same). Accordingly, in Texas, if a person takes control over trust property and manages the trust in any material respect, equity should impress upon him or her the fiduciary duties of a de jure trustee.

The issue of de facto trustee status was squarely raised in *Clower v. Wells Fargo Bank, N.A*., 2010 U.S. Dist. LEXIS 138795 (E.D. Tex. October 18, 2010) (magistrate's recommendation that was later accepted by the court). In *Clower*, a trust beneficiary sued the trustee, claiming that the trustee was not the same entity that was named in the trust document, that it was acting as a de facto trustee but was not the de jure or legitimate trustee. *Id*. The plaintiff claimed that the defendant breached fiduciary duties as a de facto trustee. The district court denied the defendant's motion to dismiss, holding that the complaint alleged sufficient facts to show that the defendant owed fiduciary duties and breached

those duties by failing to disclose the prior allegedly incorrect transactions regarding the trustee appointments. *Id*. The court also held that the plaintiff had properly pled a claim for fee forfeiture. *Id*. This federal case clearly supports the position that a party can be a de facto trustee and owe fiduciary duties even though the party is not the de jure or legitimate trustee. Interestingly, in *Clower*, the plaintiff had sought, and the district court allowed, class certification for a class of beneficiaries from multiple trusts administered by the trustee. That class certification order was later voided by the court of appeals. Later, the trustee/defendant filed a motion for summary judgment proving up the various transfers of the trustee appointment over the decades, proving it was the de jure trustee, and the district court granted that motion, terminating the case for the defendant/trustee. The author was counsel for the trustee/defendant in the *Clower* federal court case.

C. Wife's Fraudulent Transfer Claim Against Husband For Transferring Business Interests To Trust Failed Due To The Statute Of Repose

In *Austin v. Mitchell*, a wife filed suit alleging her ex-husband fraudulently transferred a portion of his limited partnership interest in a family limited partnership to a trust for the benefit of his children. No. 05-19-01359-CV, 2021 Tex. App. LEXIS 4536 (Tex. App.—Dallas June 8, 2021, no pet. history). The trial court granted summary judgment for the husband and the wife appealed.

The court of appeals first discussed the husband's statute of repose defense. The wife alleged that the transfer of the husband's partnership interest to the trust was fraudulent because it was made: without fair consideration and the husband was left insolvent as a result (Tex. Bus. & Com. § 24.006(a)); with the actual intent to hinder, delay, or defraud the wife (*id*. § 24.005(a)(1)); or without receiving reasonably equivalent value at a time when the husband believed or should have believed his debt to the wife was beyond his ability to pay as payments became due (*id*. § 24.005(a)(2)(B)). The court discussed the statute of repose for fraudulent transfer actions:

> Section 24.010 provides that a cause of action with respect to a fraudulent transfer "is extinguished" unless action is brought: (1) under Section 24.005(a)(1) of this code, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant; (2) under Section 24.005(a)(2) or 24.006(a) of this code, within four years after the transfer was made or the obligation was incurred; or (3) under Section 24.006(b) of this code, within one year after the transfer was made… Statutes of repose are absolute in nature and, while they may work inequitable hardship in some cases, the "Legislature has balanced this hardship against the benefits of the certainty that a statute of repose provides by extinguishing claims upon a specific deadline."

Id. Because the evidence showed that the wife should have known of the transfer more than four years before the suit due to the husband's testimony in a deposition attended by the wife's attorney, the court affirmed summary judgment on the repose defense.

The wife had also asserted an accounting and disgorgement claim against the trustee of the trust. The court of appeals held that the wife did not have a sufficient connection to the trust to have standing to bring those claims. Regarding standing, the court stated:

> The property code provides that an "interested person" may bring an action against a trustee for an accounting and to make determinations of fact affecting a trust, including determinations regarding trust administration and distributions. Tex. Prop. Code §§ 115.011, 115.001. An "interested person" is: [A] trustee, beneficiary, or any other person having an interest in or a 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 of and matter involved in any proceeding. Tex. Prop. Code § 111.004(7).

Id. The wife alleged that because she had a claim against the trust, she had standing. The court disagreed, and held that because the wife's claim was meritless, she did not have sufficient connection to the trust:

> Absent her fraudulent transfer claim against Mitchell, Austin has no claim against the trustee. She did not allege and there is no evidence that the trustee owed any duty to Austin. Any claim she has is through claims against Mitchell, and the only claim alleged was fraudulent transfer, but that claim is extinguished by the statute of repose. Thus, she does not have a "claim against the trust." Prop. § 111.004(7). Mitchell testified in his affidavit that he does not control the trust and has never used its accounts for his personal expenses. Mitchell created the irrevocable trust for the benefit of his children; its purpose is to provide for the health, education, maintenance, and support of the beneficiaries. Austin is not a beneficiary or trustee of the trust. She is not named as a contingent beneficiary and the trust document expressly excludes her from becoming a successor trustee. Considering the purpose of the trust and the matter involved in this proceeding, Austin is not an interested person and does not have standing to bring her claims against the trustee.

Id.

D. Court Upheld A Release In A Family Settlement Agreement That Protected A Former Trustee's Estate From Claims

In *Austin Trust Co. v. Houren*, beneficiaries of a trust executed a family settlement agreement with the trustee and the former trustee's estate. No. 14-19-00387-CV, 2021 Tex. App. LEXIS 1955 (Tex. App.—Houston March 16, 2021, pet. filed). After the settlement agreement was executed, one of the parties sued the former trustee's estate for over a $37 million debt (or due to over distributions). The estate then filed a motion for summary judgment based on the release in the settlement agreement, which the trial court granted. The court of appeals affirmed, finding that the release's language was sufficiently broad to cover these claims:

> In the FSA, the parties agreed that the releases contained therein generally applied to "any and all liability arising from any and all Claims," as defined in the FSA, against the other parties or relating to "Covered Activities," as defined in the FSA. The released claims included, but were not limited to "claims of any form of sole, contributory, concurrent, gross, or other negligence, undue influence, duress, breach of fiduciary duty, or other misconduct by the other parties, the professionals, or their affiliates[.]" The FSA defined "Covered Activities" as (1) "the formation, operation, management, or administration of the Estate, . . . or the Trusts," (2) "the distribution (including, but not limited to, gifts or loans) (or failure to distribute) of any property or asset of or by the Mayor, the Estate, . . . or the Trusts," (3) "any actions taken (or not taken) in reliance upon this Agreement or the facts listed in Article I," (4) "any Claims related to, based upon, or made evident in the Disclosures," and (5) "any Claims related to, based upon, or made evident in the facts set forth in Article I" of the FSA. We conclude that this language specifically and unambiguously released appellants' claims asserted in their First Amended Counterclaim.

Id.

The court also held that the fact that the decedent may have owed fiduciary duties did not impact the enforcement of the release:

> The fact that the Mayor and Houren may have owed the other parties a fiduciary duty, a question we need not reach, does not change this analysis….
>
> This court held that six factors were key to their decision to affirm the settlement agreement: (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 legal counsel; (3) the negotiations occurred as part of an arms-length transaction; (4) the parties were knowledgeable in business matters; (5) the release language was clear;

> and (6) the parties were working to achieve a once and for all settlement of all claims so they could permanently part ways. An examination of the record reveals that all of these factors are present here with respect to appellants, the complaining parties. We therefore conclude that even if the Mayor and Houren owed appellants fiduciary duties, appellants released any claims for breach of those duties when they executed the FSA. *Id*. This decision adheres to the public policy in favor of Texas courts upholding contracts negotiated at arms-length by knowledgeable and sophisticated business players represented by highly competent and able legal counsel.

Id. (citing *Harrison v. Harrison Interests, Ltd.,* 14-15-00348-CV, 2017 Tex. App. LEXIS 1677, 2017 WL 830504, at *4 (Tex. App.—Houston [14th Dist.] Feb. 28, 2017, pet. denied)).

E. Court Reversed Temporary Injunction Against Co-Trustees

In *Marshall v. Marshall*, a beneficiary sued the original trustee and five co-trustees of two trusts regarding claims that they breached fiduciary duties. No. 14-17-00930-CV, 2021 Tex. App. LEXIS 1949 (Tex. App.—Houston [14th Dist.] March 16, 2021, no pet.). After the original lawsuit was filed in Texas, the original trustee filed a petition for declaratory relief in a Louisiana court, requesting the court declare, among other things, that the co-trustees were properly appointed as co-trustees of the trust. The beneficiary obtained a temporary injunction preventing the co-trustees from receiving compensation, disposing of trust assets, and participating in litigation against the beneficiary in Louisiana. The co-trustees appealed.

The court of appeals first reversed the anti-suit injunction aspect of the temporary injunction order because allowing the suit to continue would not create a miscarriage of justice:

> The principle of comity requires that courts exercise the power to enjoin foreign suits "sparingly, and only in very special circumstances." *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649, 651 (Tex. 1996) (quoting *Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161, 163 (Tex. 1986)). An anti-suit injunction may be appropriate to (1) address a threat to the court's jurisdiction, (2) prevent the evasion of important public policy, (3) prevent a multiplicity of suits, or (4) protect a party from vexatious or harassing litigation. *Id*. The party seeking the injunction must show that a clear equity demands the injunction. *Id*. A single parallel proceeding in a foreign forum does not constitute a multiplicity of suits, nor does it by itself create a clear equity justifying an anti-suit injunction. *Id*.
>
> …

> Here, however, there is no special circumstance or clear equity to prevent a Louisiana court from determining issues related to inter vivos trusts that are governed by Louisiana law and that require the trustee to petition a Louisiana court for instructions regarding any questions that might arise regarding their administrations. Any suit in Louisiana by the co-trustees to determine the effect of the Wyoming court's rulings would apply only to the Harrier and Falcon trusts. This single parallel proceeding brought by some of the co-trustees in Louisiana, consistent with the trusts' requirements that the co-trustees file suit in Louisiana, cannot justify issuing an anti-suit injunction. *See Golden Rule*, 925 S.W.2d at 651-52. Even if there are overlapping or identical issues, the Louisiana suit does not create a miscarriage of justice. *See id.* Accordingly, the trial court erred to enjoin the co-trustees from litigating matters related to the Harrier and Falcon trusts in any other court.

Id.

The court also reversed the other aspects of the temporary injunction order as there was no evidence to support an irreparable harm finding:

> [T]here was no evidence that the co-trustees had taken any action or planned to take any action to transfer, sell, or dispose of any unique and irreplaceable assets of the trust. Elaine testified that the co-trustees had not made any attempt to gain access to the Ribosome certificates. Under these circumstances, a temporary injunction is not proper because the claimed injury to unique assets is merely speculative; fear of injury is not sufficient. … The trial court also found that Preston had no adequate remedy because there was "no evidence that the Co-Trustees can answer in damages." This finding reverses the burden of proof. To the extent Preston sought to establish that the co-trustees were insolvent and thus could not satisfy a judgment, it was Preston's burden to adduce some evidence to support the claim. … Here, the only evidence about what the trustees had done with fees was that they had placed the fees into a court's registry to await a judicial determination. And as discussed above, there is no evidence that unique assets of the trusts are in imminent danger of being dissipated. Accordingly, the trial court erred by enjoining the co-trustees from receiving compensation and taking any actions that could affect the trusts' assets.

Id.

F. Co-Trustees Who Managed A Texas Trust With A Texas Beneficiary Had Sufficient Contacts With Texas To Be Subject To A Texas Court's Personal Jurisdiction

In *Alexander v. Marshall*, the original trustee was the beneficiary's mother and the wife of the beneficiary's father, who was the settlor. No. 14-18-00425-CV,

2021 Tex. App. LEXIS 1952 (Tex. App.—Houston [14th Dist.] March 16, 2021, no pet.). In December 2016, the original trustee appointed Louisiana residents as co-trustees of the trusts and signed appointment documents in Texas. The Louisiana co-trustees each signed acceptance documents in Louisiana. All of the co-trustees testified that they knew, at or around the time of their appointments, that the beneficiary was a Texas resident. The trust beneficiary sued the co-trustees for a declaratory judgment that the appointment of the co-trustees and their compensation scheme violated the terms of the trust instruments and that they aided and abetted the original trustee in breaches of duties. The Louisiana co-trustees objected to the Texas court's personal jurisdiction over them and filed special appearances. The trial court overruled those objections, and they appealed.

The court of appeals affirmed the trial court's order. The Louisiana co-trustees first argued that the trial court erred in overruling their objections regarding their personal capacities. The court of appeals disagreed, holding: "a person is always liable for their own torts in an individual capacity, and Preston has alleged that the co-trustees aided and abetted a tort—breach of fiduciary duty. The trial court did not err by not dismissing the co-trustees in their individual capacities." *Id*.

The court of appeals next discussed the law regarding personal jurisdiction:

> Texas's exercise of personal jurisdiction over a nonresident defendant comports with due process if a nonresident defendant has "minimum contacts" with Texas and the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. A defendant's minimum contacts with a forum, i.e., Texas, are established when the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. Id. Three principles govern this analysis: (1) only the defendant's contacts with the forum are relevant, not the unilateral activity of another party or third person; (2) the defendant's acts must be purposeful and not random, isolated, or fortuitous; and (3) the defendant must seek some benefit, advantage, or profit by availing itself of the jurisdiction such that it impliedly consents to suit there.
>
> A nonresident defendant's minimum contacts will give rise to specific personal jurisdiction if the plaintiff's cause of action arises from or relates to those contacts. For a nonresident defendant's contacts with Texas to support an exercise of specific jurisdiction, "there must be a substantial connection between those contacts and the operative facts of the litigation." A nonresident's "directing a tort at Texas from afar is insufficient to confer specific jurisdiction." The proper focus is on the extent of the defendant's activities in the forum, not the residence of the plaintiff.

> However, the absence of physical contacts with Texas does not defeat personal jurisdiction so long as the defendant's efforts are purposefully directed towards residents of Texas. A defendant who reaches out beyond one state and creates continuing relationships and obligations with a citizen of another state is subject to the jurisdiction of the latter state in suits based on those activities.

Id. The court held that the Louisiana co-trustees had sufficient contacts with Texas so that the Texas court's exercise of jurisdiction over them was fair:

> The co-trustees contend that this court should not follow Dugas because it is not binding and distinguishable based on the fact that the trusts in this case are governed by Louisiana law and require the trustees to submit issues regarding trust administration to a Louisiana court. But there are additional facts in this case that indicate the co-trustees purposefully availed themselves of the benefits of a Texas forum. While the trust in Dugas was settled in Florida and had administrative functions performed in Tennessee, here the trust was settled in Texas, has all of its property in Texas, and is run administratively in Texas. The former sole trustee, a Texan, appointed the co-trustees in Texas. Moreover, the co-trustees have received payments from Texas as a result of their appointments as co-trustees, and the appointments and future payments have an indefinite duration. These additional facts support a conclusion that the co-trustees have reached out beyond their state and created continuing relationships and obligations with citizens of another state… The co-trustees have not merely directed a tort at Texas, but they have reached out beyond Louisiana to create continuing relationships and obligations with citizens of Texas. Preston's claim for breach of fiduciary duty arises out of those relationships and obligations… In sum, the trial court did not err by denying the special appearance. The co-trustees' issues are overruled. The trial court's order is affirmed.

Id.

G. Court Holds That Allegations Related To A Trustee's Filing Of Suit Did Fall Under The Protection Of The Texas Citizens Participation Act, That A Trustee's Actions To Modify Administrative Terms Did Not Trigger An In Terrorem Clause, But That Other Actions Unrelated To Suit Filings Were Not Protected From The Act

In *Marshall v. Marshall*, a son, who was a trust beneficiary, sued his mother and brother alleging breaches of fiduciary duty and sought a declaratory judgment that they violated an in terrorem clause of the will. No. 14-18-00094-CV, No. 14-18-00095-CV, 2021 Tex. App. LEXIS 423 (Tex. App.—Houston [14th Dist.] January 21, 2021, pet. filed). The mother had created a similar Wyoming trust

and then merged the original Texas trust into the Wyoming trust. The beneficiaries were essentially the same, but there were administrative differences, including who the trustees and successor trustees were. The mother also had a lawsuit filed in Wyoming to approve all of these changes, but did not serve the plaintiff. The defendants filed motions to dismiss under the Texas Citizens Participation Act ("TCPA"), the trial court denied them, and they appealed.

The mother filed her motion to dismiss solely on the basis that the son's claim for declaratory relief due to the in terrorem clause violated the act. The court noted that "to be entitled to dismissal under the TCPA, the defendant has the initial burden to show by a preponderance of the evidence that the plaintiff's claim "is based on, relates to, or is in response to" the defendant's exercise of the right to petition, association, or speech." The court found that the act facially applied to the claim because "the filing of a petition and an affidavit are communications in or pertaining to a judicial proceeding, and thus, implicate Elaine's exercise of the right to petition. *Id*.

The court then looked at whether there was a prima facie case to support the application of the in terrorem clause. The court explained the son's argument thusly:

> Preston contends that the Company's Wyoming "petition for instructions," and Elaine's consent to it, triggered the in terrorem clause because it was a "proceeding . . . to prevent any provisions [of the will] from being carried out in accordance with its terms." Preston identifies three provisions of the will that the Wyoming proceeding undermined: (1) removing Preston as the designated successor trustee and authorizing Pierce to be the successor trustee; (2) changing the governing law from Texas to Wyoming; and (3) introducing a different in terrorem clause.

Id. The court disagreed, and held that the mother had solely sought to modify administrative terms, which did not violate the in terrorem clause:

> [N]one of the changes that Elaine consented to in the Wyoming proceeding had a substantive effect on the distribution of E. Pierce Marshall's property. Elaine continued to be the income beneficiary, and the inter vivos trusts remained beneficiaries of the corpus. As Preston alleged in his petition, the Wyoming suit had the purpose of "ratifying" the actions Elaine took as trustee before filing the petition for instruction. By the time the Company filed the petition, the Company and Elaine already entered into a non-judicial settlement agreement to, among other things, merge the two trusts. The Wyoming Trust had been created, and that trust's declaration includes the terms that Preston complains of. The Wyoming proceeding sought a construction of the will and trusts to determine if Elaine's prior acts as trustee were lawful. Therefore, the

> proceeding was not one to contest the validity of the will or to prevent any provisions of it from being carried out. Considering the purpose of the Texas Trust and the nature of the Wyoming proceeding, we conclude that Preston has not established a prima facie case for his claims against Elaine based on the in terrorem clause.

Id. The court reversed the order denying the motion to dismiss on the in terrorem claims as against the mother.

The court then reviewed the denial of the son's claims against his brother. The court similarly reversed the order denying the motion to dismiss on the in terrorem claims. However, the court affirmed the denial of the motion to dismiss on the son's breach of fiduciary duty claims. "The vast majority of the allegations in Preston's petitions concern Elaine's conduct unrelated to the Wyoming lawsuit. Under these circumstances, we cannot conclude that Pierce has established by a preponderance of the evidence that Preston's allegations regarding the fiduciary duty claims relate to Pierce's right to petition." *Id*.

Further, in *In re Grandchildren's Trust*, a beneficiary sued a trustee, his mother, concerning a trust and the trustee appealed the denial of her motion to dismiss under the Texas Citizens Participation Act (TCPA). No. 14-18-01097-CV, 2020 Tex. App. LEXIS 9941 (Tex. App.—Houston [14th Dist.] December 17, 2020, no pet. history). The beneficiary alleged that a co-trustee should make all distributions decisions because he had filed other lawsuits against his mother. The mother filed the TCPA motion to dismiss because the beneficiary's petition "target's Mrs. Marshall's exercise of her right to petition by defending herself in court." *Id*. She argued that her "responses to Preston's lawsuits" were protected by the TCPA, and that "Preston's suit was based on, related to, or in response to Elaine's making or submitting of a statement or document in or pertaining to a judicial proceeding." *Id*. The trial court did not rule on the motion, so it was denied by operation of law, and the trustee appealed.

The court of appeals affirmed the denial of the motion. The court noted that: "To be entitled to dismissal under the TCPA, Elaine has the initial burden to show by a preponderance of the evidence that Preston's claim "is based on, relates to, or is in response to" Elaine's exercise of the right to petition." *Id*. Further, an "exercise of the right to petition" means "a communication in or pertaining to . . . a judicial proceeding," and a "communication" is broadly defined as "the making or submitting of a statement or document in any form or medium." *Id*. The court held that the beneficiary's claim did not arise out of the trustee's exercise of her right to petition:

> Preston's petition does not assert a claim related to any particular statement that Elaine has made in any other lawsuit. Preston's petition refers generally to the fact that Preston "filed several suits" against Elaine and there is "ongoing litigation" between them. Elaine notes that she filed

> answers in those lawsuits. But, Preston's petition and the documents referenced by Elaine do not show by a preponderance of the evidence that Preston's request for a declaratory judgment regarding Article XV of the GTC #2 is related to Elaine's answers in those lawsuits. For the TCPA to apply, the plaintiff's claims must relate to the movant's right to petition, i.e., the movant's "communication." Preston's reference to the fact that he sued Elaine does not demonstrate that Preston's claims relate to any statement or document that Elaine made in or pertaining to any judicial proceedings. Accordingly, Elaine has not demonstrated by a preponderance of the evidence that Preston's claim is based on, relates to, or is in response to Elaine's exercise of the right to petition.

Id.

H. Court Reversed Jury Trial And Determined That Settlement Agreement Dividing Real Property Owned By Trusts Was Not Ambiguous

In *Maxey v. Maxey*, in a dispute that arose from the probate of an estate, two sisters mediated and reached a settlement agreement concerning the division of certain real property. No. 01-19-00078-CV, 2020 Tex. App. LEXIS 10281 (Tex. App.—Houston [1st Dist.] December 29, 2020, no pet.). The two sisters disagreed on how they would divide property among certain trusts, and they sued one another. After mediation, they entered into a settlement agreement that purported to divide the real property. Then the parties disagreed on what the settlement agreement meant, and once again sued each other regarding breach of the agreement. The trial court found the settlement agreement was ambiguous and submitted the meaning of the agreement to a jury. After the jury trial, the court entered judgment on the verdict, and the losing sister appealed.

The court of appeals reversed and held that the settlement agreement was not ambiguous:

> We disagree with the trial court that the Settlement Agreement is ambiguous. The Settlement Agreement identifies the Marble Falls Property, provides that it is to be divided in such a way that Mary's trust receives a tract worth one-half of the value of the entire property and Carolyn's trust receives a tract worth one-half of the value of the entire property, and further provides that Mary's trust is to receive the "West 50%" and Carolyn's trust the "East 50%." As Mary argues, this language is clear and can be given definite meaning: the sisters agreed that the Marble Falls Property was to be divided into two tracts, equivalent in value, and that Mary would receive the western tract and Carolyn the eastern tract. This language is not reasonably susceptible to more than one meaning. To the extent the trial court ruled that the Settlement Agreement was ambiguous because it was silent on precisely how the Marble Falls Property was to be divided and did not set out metes and

> bounds for the two specific tracts, we note that our sister courts have repeatedly held that ambiguity in contract language is not to be confused with silence. An ambiguity results when the intention of the parties is expressed in language that is susceptible to more than one meaning. In contrast, when a contract is silent, the question "is not one of interpreting the language but, rather, one of determining its effect." Courts may not and will not rewrite contracts to insert provisions that the parties could have included, but did not, and that are not essential to the construction of the language of the contract.
>
> The fact that the Settlement Agreement did not specify, through metes and bounds or some other method, how Carolyn was to divide the Marble Falls Property does not make the language in the Settlement Agreement ambiguous. The agreement provided that the property was to be divided into two tracts of equivalent value, with Mary receiving the western tract and Carolyn receiving the eastern tract. As we have held, this language can be given certain and definite legal meaning, and it is not susceptible to more than one reasonable interpretation. We therefore conclude that the Settlement Agreement is not ambiguous.
>
> …
>
> We conclude that, because the language of the Settlement Agreement is unambiguous, the trial court—and not the jury—should have determined the parties' intent as a matter of law, "and it could not do so by relying on extrinsic evidence to create an intent that the contract itself does not express." We therefore hold that the trial court reversibly erred by ruling that the Settlement Agreement was ambiguous, admitting and instructing the jury to consider parol evidence concerning whether the parties intended to divide the Marble Falls Property according to the Brookes Baker Survey, and submitting Question Number One to the jury.

Id. The court therefore remanded the case back to the trial court to construe the settlement agreement and properly divide the real property. The court also reversed and remanded the prevailing party's request for specific performance.

Interesting Note: Parties in trust and estate cases often have to mediate and settle disputes that involve real property interests. When the parties agree to undivided interests, this is often not a problem. For example, parties often agree to split undivided interests in mineral estates so that they can each have the same chance of having a productive well. However, undivided interests in surface estates rarely settles disputes and only generates future confrontations. So, parties typically want to have divided interests in surface estates. Without having a surveyor on the property as the mediation is being conducted, the parties are often challenged in creating metes and bounds descriptions of tracks of real property. The parties and their attorneys worry about whether the

settlement agreement will be enforceable where they do not have definite descriptions of the tracks. This case is very good in that is shows that parties can enter into enforceable and unambiguous settlement agreements that divide real property where they provide as much description as possible (short of metes and bounds) on how to divide the property.

I. Court Held That The Issue Of Who Was Included In The Class Of Descendants Was Not Ripe Until The Current Beneficiary Dies

In *Ackers v. Comerica Bank & Trust, N.A.*, an income beneficiary sued a trustee for a declaration regarding the construction of a testamentary trust. No. 11-18-00352-CV, 2020 Tex. App. LEXIS 10442 (Tex. App.—Eastland December 31, 2020, pet. filed). The will provided that the income beneficiary was to receive the income from the corpus of the trust during his lifetime, and upon his death, the trust would terminate and the corpus of the trust would pass to the "then-living descendants" of the income beneficiary. The income beneficiary brought a declaratory judgment action seeking a determination that some of his descendants should be excluded at his death, and the trial court entered summary judgment that the relief sought was not ripe for consideration.

The court of appeals noted that "[r]ipeness examines when an action may be brought, while standing focuses on who may bring an action, and that ripeness 'emphasizes the need for a concrete injury for a justiciable claim to be presented.'" *Id*. "If the plaintiff's claimed injury is based on 'hypothetical facts, or upon events that have not yet come to pass,' then the case is not ripe, and the court lacks subject-matter jurisdiction." *Id*. The court then reviewed the Uniform Declaratory Judgments Act (UDJA), which states that "[a] person interested under a . . . will . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder." *Id*. (citing Tex. Civ. Prac. & Rem. Code Ann § 37.004(a)). "However, a plaintiff bringing suit under the UDJA must still properly invoke the trial court's subject-matter jurisdiction[,] [and] the UDJA does not permit courts to render advisory opinions…, and does not authorize a court to decide a case in which the issues are hypothetical or contingent—the dispute must still involve an actual controversy." *Id*.

The beneficiary argued that the issue was ripe because he sought a declaration as to who was not included in the class of "descendants" and was not seeking a declaration regarding who was included. The court of appeals disagreed and held:

> We disagree with Appellant's analysis of ripeness. Appellant's claim involves making a determination of class membership of a gift made to a class. Appellant acknowledges that the gift to his descendants is a class gift and that his descendants are contingent, non-vested beneficiaries….Under Wilkes, the time for ascertaining Appellant's

> descendants who will receive the corpus of the trust is to be determined at Appellant's death and not before. Until Appellant's death, the interests of his descendants are only contingent interests. As such, the interests of Appellant's potential descendants are not ripe for determination because they are based upon an event that "[has] not yet come to pass." Accordingly, the court lacked subject-matter jurisdiction to consider Appellant's requested relief.

Id. (internal citation omitted) (citing *Wilkes v. Wilkes,* 488 S.W.2d 398 (Tex. 1972)).

J. Court Affirmed An Order Modifying A Trust Where The Complaining Beneficiaries Were Not Affected By The Modification, Where The Modification Was Not Contrary To The Purpose Of The Trust, And Where The Beneficiaries Waived Their Right To A Jury Trial

In *In re Ruff Mgmt. Trust*, the settlor and primary beneficiary sought and obtained a modification of a trust regarding who could name a successor trustee. No. 05-19-01505-CV, 2020 Tex. App. LEXIS 9467 (Tex. App.—Dallas December 3, 2020, no pet.). The trust document provided that the settlor and her son would name a successor trustee. If they did not do so, then the settlor's children would automatically be named co-trustees. The settlor had previously had a very contentious arbitration dispute with her son, and sought to modify the trust to have it state that she could, by herself, name a successor trustee. After the trial court granted that relief, the settlor's other children (other than the son) appealed that decision. The court of appeals affirmed the modification, not because there was evidence to support it, but because the modification allegedly did not affect the appealing children's rights. The court held that the children were automatically co-trustees as the mother and her son did not appoint a successor, and that they were still co-trustees. The court stated: "Therefore, as a practical matter, the order does not affect the Children's rights. Under the Trust agreement's express terms, the Children became co-trustees when Frost resigned, and the complained-of order does not remove them. Although Suzann may seek court approval to have the Children removed, she has not done so. In short, the only person whose rights are affected by this order is Mike, and he is not a party to this appeal." *Id*.

The children also alleged that the modification was contrary to the trust's purpose. The court disagreed:

> The Trust agreement further provides that "[t]he Trustee shall distribute to Settlor so much of the net income and principal of the trust estate as the Trustee determines for Settlor's Needs or Best Interests." "Needs" are defined to include "health, support maintenance and education." But "Best Interests" are as the trustee "deems advisable." The Children argue that the modification is contrary to the Trust's terms because it leaves Suzann

> "unassisted and unchecked relative to her expenditure of the Trust's dwindling assets," terminated the remainder beneficiaries' rights, and removed the Children as co-trustees. We disagree. As previously discussed, the order at issue does not remove the Children as co-trustees. Likewise, it does not appoint Suzann trustee, or affect how the trustees makes distributions. The only Trust term affected by the order is who may participate in decisions concerning the appointment of a new trustee. Before modification, § 6.2 (A) required Suzann and Mike to act jointly to appoint a new trustee. This reflects the Trust's intent that someone join Suzann in this decision to ensure that the Trust's purpose and all beneficiaries are served. That person was Mike. The modification, however, simply substitutes the trial court for Mike by requiring Suzann to seek court approval for § 6.2 (A) decisions. Accordingly, because an objective third party is still participating in Suzann's decisions, the modification is consistent with the Trust's intent.

Id. Finally, the children alleged that the modification was improper because they were denied their rights to a jury trial. The court of appeals held that they waived the right to a jury trial by failing to assert that right before the first witness testified. *Id*. The court affirmed the order.

K. Court Reverses Turnover Order That Disregarded A Trust Where The Trustee Was Not A Party To The Proceeding

In *Tomlinson v. Khoury*, a judgment creditor discovered that the judgment debtor was the trustee and beneficiary of a spendthrift trust and brought a turnover action to invalidate the trust. No. 01-19-00183-CV, 2020 Tex. App. LEXIS 8427 (Tex. App.—Houston [1st Dist.] October 27, 2020, pet. filed). The judgment creditor was never sued in his capacity as trustee of the trust, but the trial court invalidated the trust and ordered a turnover of trust assets. The court of appeals reversed, holding that the trustee was a necessary party to the proceeding concerning a trust. The court of appeals held:

> In Texas, a trust is not a separate legal entity, but instead is a fiduciary relationship between the trustee and the trust property. Texas law is clear that in all suits "by or against a trustee and all proceedings concerning trusts," the trustee is a necessary party to the action. And where the trustee is not properly before the court as a result of service, acceptance, waiver of process, or an appearance, Texas courts have invalidated orders that grant relief against a trust.
>
> ….
>
> Accordingly, in light of the limited purpose of the Turnover Statute—which is merely to ascertain whether an asset is in the possession or control of a judgment debtor and not to determine third parties' substantive rights—and the underlying due process and personal-jurisdiction concerns, we

> conclude that the requirement that a trustee must be added as a party to actions involving purported trust assets, including the invalidation of a trust, is even more appropriate in the context of turnover proceedings.6Link to the text of the note We therefore apply it here. Like the order at issue in Asche, the two modified, post-judgment turnover orders in this case expressly invalidate the Trust and order the parties to treat the Trust assets as Tomlinson's personal property—without first having the Trust, through its trustee, properly before the trial court. But this is undoubtedly a proceeding concerning a trust in which the trustee was a necessary party. Although Tomlinson was before the court in his individual capacity, he was not sued, and did not appear, in his capacity as trustee of the Trust. Therefore, he, as trustee of the Trust, was not "properly before the trial court as a result of service, acceptance, or waiver of process, or an appearance." Under these circumstances, we conclude the trial court lacked jurisdiction over the Trust and thus erroneously invalidated the Trust, and erroneously required the turnover of Trust assets, in its February 12 and 14, 2019 modified turnover orders. Accordingly, we hold that these two post-judgment, modified turnover orders are void.

Id.

L. Court Held That The Term "Spouse" In A Trust Meant The Primary Beneficiary's Wife At The Time Of The Trust's Execution And Not A Subsequent Wife

In *Ochse v. Ochse*, a mother created a trust that provided that the trustee was authorized to make distributions to her son and the son's spouse. No. 04-20-00035-CV, 2020 Tex. App. LEXIS 8922 (Tex. App.—San Antonio November 18, 2020, pet. filed). At the time of the trust's execution, the son was married to his first wife, but he later divorced and married his second wife. The son's children then sued the son for breaching fiduciary duties as trustee and joined their mother, the first wife, as a necessary party. The first wife and the son then filed competing summary judgment motions on whether the first wife or the second wife was the son's "spouse" as referenced in the trust agreement. The trial court ruled the second wife was the correct beneficiary at the time of the suit, and the first wife appealed.

The second wife and the son argued that the use of the term "spouse" in the trust document did not mean the first spouse's actual name, but that the term meant a class of whoever was currently married to the son. The court of appeals disagreed:

> Cynthia responds that in the absence of an expression of contrary intent, a gift to a "spouse" of a married person must be construed to mean the spouse at the time of the execution of the instrument and not a future

> spouse. Thus, Cynthia contends that the terms "primary beneficiary's spouse" and "son's spouse" in the Trust solely referred to her because she was William's spouse at the time the Trust was executed. We agree. Carol and William's interpretation would ask this Court to view "spouse" as a status or class gift. This interpretation is inconsistent with Texas precedent regarding the use of classes in trust instruments and wills and, further, fails to harmonize all provisions of the irrevocable Trust before us. A class gift is defined as a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift. Here, it was possible to identify a specific "spouse" at the time the Trust was executed in 2008. In contrast, there is no evidence Amanda intended the term "spouse" to encompass a body of persons uncertain in number at the time of the gift. Therefore, we hold that the grantor's use of the term "spouse" referred to William's spouse at the time the Trust was executed, and did not refer to a class of persons including future spouses.

Id. (internal citations omitted). The court therefore reversed and rendered for the first wife.

M. Court Holds That Venue For Suit Over Royalties By A Trustee Was Proper Due To Statutory Venue Provision Even Though The Suit Did Not Pertain To The Trust

In *In re Equinor Tex. Onshore Props.*, a trustee filed two cases against different defendants in the same county regarding a royalty dispute under oil and gas leases. No. 05-20-00578-CV, 2020 Tex. App. LEXIS 8042 (Tex. App.—Dallas October 7, 2020, original proceeding). Because the second-filed case was transferred to Dallas County, Texas, lacked dominance over the interrelated case still pending in the original venue, the court of appeals held that mandamus relief was appropriate to order the trial court to grant the plea in abatement. In conjunction with this ruling, the court resolved whether Dallas was an appropriate venue for the second case. The court held:

> Equinor objected to venue in Dallas County by denying "Plaintiffs [sic] venue facts and contention that venue is appropriate under Tex. Prop. Code § 115.002 because this action is not brought pursuant to Tex. Prop. Code § 115.011 [sic] which pertains to administration of a trust." The objection rests on a misreading of the property code and the statutory language. "[S]ection 115.001 was amended in 2007 to provide that a district court has original and exclusive jurisdiction over not only all proceedings concerning a trust, but also 'all proceedings by or against a trustee.'" Thus, Equinor's challenge failed to demonstrate improper venue pursuant to the property code.
>
> In addition, although Equinor argues to this Court that Bank failed to establish it maintained more than a mailbox or a designated agent or

> representative in Dallas County, in the trial court Equinor failed to specifically challenge Dallas County as Bank's principal place of business. Properly pleaded venue facts "shall be taken as true unless specifically denied by the adverse party." "Specifically denied" requires denial of the challenged fact; not just denial of unspecified facts upon which the plaintiff relies for its venue choice. Equinor failed to specifically deny Bank's venue facts, and accordingly those facts are presumed true. Bank's third amended petition pleaded facts sufficient to lay venue in Dallas County pursuant to the property code.

Id.

N. Court Holds That A Trustee Had The Power To Sell Trust Property To An Affiliate, Though Such An Act May Be In Breach Of A Duty

In *Pense v. Bennett*, the ward in a guardianship proceeding sued to invalidate the sale of real property from a trust created for his benefit to an affiliate of the trustee. No. 06-20-00030-CV, 2020 Tex. App. LEXIS 8002 (Tex. App.—Texarkana October 8, 2020, no pet.). The trial court granted summary judgment for the trustee, held that the sale was effective, but expressly refused to rule on a breach of fiduciary duty claim based on the transaction as it was pending in another proceeding. The ward appealed.

The court of appeals explained how the guardian had sought and obtained court approval for the creation of a management trust and the transfer of real property from the guardianship estate to the new trust. The trustee of that trust had the express authority to sell trust property:

> Article VIII of the Trust Instrument lists the powers of the trustee. And, "[w]here the language of the trust instrument is unambiguous and expresses the intentions of the maker, the trustee's powers are conferred by the instrument and neither the court nor the trustee can add or take away such power." As pertinent here, the Trust Instrument authorized the trustee to: "[P]artition, exchange, release, convey or assign any right, title or interest of the trust in any real estate or personal property owned by the trust"; "[S]ell, exchange, alter, mortgage, pledge or otherwise dispose of trust property"; "[E]xecute and deliver any deeds, conveyances, assignments, leases, contracts, stock or security transfer powers, or any other written instrument of any character appropriate to any of the powers or duties herein conferred on the Trustee"; and "[H]old title to investments in the name of the Trustee or a nominee."
>
> In addition to these powers specified in the Trust Instrument, the Texas Trust Code authorizes "a trustee [to] exercise any powers . . . that are necessary or appropriate to carry out the purpose of the trust." Those powers include the power to "contract to sell, sell and convey, or grant an

> option to sell real or personal property at public auction or private sale for cash or for credit or for part cash and part credit, with or without security."

Id. (internal citations omitted).

Under these terms, the court held that the trial court correctly held that the trustee had the authority to sell the trust's real property to his affiliate. The ward complained that the transfer was invalid due to the breach of fiduciary duty claim. The court of appeals held that the ward waived any issue concerning the breach of fiduciary duty claim because he did not complain on appeal that the trial court erred in refusing to consider it:

> The trial court did not consider this issue because the same issue was then pending in the Guardianship Court. Pense has never contended otherwise. And Pense has made no complaint in this Court that the trial court erred in failing to consider the issue of whether the alleged breach of fiduciary duty was sufficient to raise a fact issue to overcome summary judgment.… Because the trial court did not consider the breach of fiduciary duty issue, and because Pense did not object, on appeal, to that lack of consideration, Pense has offered nothing to contest the validity of the transfers as previously outlined.

Id. The court of appeals affirmed the summary judgment for the trustee. Presumably the ward's breach of fiduciary duty claim against the trustee continued in the guardianship case (though the trustee's affiliate got to keep the property).

Interestingly, the court discussed the propriety of the sale of the trust's property from the trustee to the trustee's affiliate. The court cited to Section 113.053(a) of the Texas Property Code, which provides:

> (a) Except as provided by Subsections (b), (c), (d), (e), (f), and (g), a trustee shall not directly or indirectly buy or sell trust property from or to: (1) the trustee or an affiliate; (2) a director, officer, or employee of the trustee or an affiliate; (3) a relative of the trustee; or (4) the trustee's employer, partner, or other business associate. Tex. Prop. Code Ann. § 113.053(a).

Id. (Tex. Prop. Code § 113.053(a)). The court held that "because Section 113.053(a) of the Texas Property Code prohibits self-dealing with respect to property held in trust, its violation amounts to a breach of fiduciary duty." *Id*. (citing *Snyder v. Cowell*, No. 08-01-00444-CV, 2003 Tex. App. LEXIS 3139, 2003 WL 1849145, at *2 (Tex. App.—El Paso Apr. 10, 2003, no pet.) (mem. op.)). This note does not bode well for the trustee in the guardianship proceeding.

O. Court Addresses Claims Against A Trustee Arising From The Management Of A Limited Partnership Interest

In *Benge v. Thomas*, a settlor created a trust and appointed her daughter, Missi, as the trustee. No. 13-18-00619-CV, 2020 Tex. App. LEXIS 6888 (Tex. App.—Corpus Christi August 27, 2020, no pet.). The trust owned an interest in a limited partnership that contained mineral interests. Missi's daughter, Benge, was a beneficiary of the trust. Benge sued Missi for various claims of breach of fiduciary duty arising from the operation of the limited partnership and other issues. The trial court granted summary judgment for Missi, and Benge appealed.

The court of appeals first addressed Benge's claim that Missi breached her fiduciary duty to the trust by allowing the limited partnership' general partner to make objectionable transactions. Benge claimed that Missi breached her fiduciary duty in her capacity as trustee because she should have prevented the general partner from making the transactions. The court disagreed:

> AFT Property as general partner had the authority to make these decisions. The evidence establishes as a matter of law that the 2012 Trust as a limited partner had no decision-making rights regarding AFT Minerals' assets. Benge's complaints all involve alleged damages to AFT Minerals and not to Benge herself. Thus, AFT Minerals would have had to bring these claims and not Missi in her capacity as trustee or Benge as a remainder beneficiary. *See Hall v. Douglas*, 380 S.W.3d 860, 873 (Tex. App.—Dallas 2012, no pet.) ("[C]laims for "a diminution in value of partnership interests or a share of partnership income" may be asserted only by the partnership itself."); *see also Adam v. Harris*, 564 S.W.2d 152, 156-57 (Tex. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.) ("A clear line exists between actions of a trustee and those of an officer of a corporation owned wholly or in part by the trust, even where the same person 'wears both hats.'").

Id.

Benge also complained that Missi did not keep adequate records of the trust, and specifically complained that "Missi had a duty to keep records of AFT Minerals' transactions pursuant to her role as trustee of the 2012 Trust." *Id.* The court acknowledged that a trustee has a duty to maintain accurate records regarding a trust's transactions, but disagreed that the trustee had a duty to maintain records regarding the transactions of a limited partnership that the trust has an interest in:

> Here, Benge is not complaining of Missi's failure to perform any of the above-listed duties or of Missi's noncompliance with above-listed statutorily required maintenance of accounting records for the 2012 Trust. Benge does not complain about a lack of records of transactions involving the 2012 Trust, and she does not claim that Missi failed to maintain

> records of transactions in her capacity as trustee of the 2012 Trust. Instead, without supporting authority, she complains that Missi's duties of maintaining accounting records in her capacity as trustee encompassed a duty to also provide an accounting of AFT Minerals' transactions and that Missi failed to maintain records of those transactions.
>
> …
>
> Moreover, as part of the agreements, as set up by Anne, AFT Property's limited partners, including the 2012 Trust, were not guaranteed any distributions from AFT Minerals and owned no interest in AFT Minerals' assets. Thus, to the extent that Benge argues that Missi had a duty to maintain records of AFT Minerals' transactions because AFT Minerals is a trust asset, we conclude that argument is without merit. Therefore, without more, we are unable to conclude that Missi had a duty in her capacity as trustee of the 2012 Trust to make an accounting of AFT Minerals' transactions to Benge and that Benge in her capacity as a remainder beneficiary of the 2012 Trust can demand such an accounting of AFT Minerals' transactions.

Id.

The court then addressed Benge's claim that Missi breached duties by failing to sue third parties to protect the trust's assets. The court framed this as a derivative claim on behalf of the trust against the trustee. The court stated that Benge solely relied on her standing as a "vested" remainder beneficiary of the trust to provide her standing to bring that claim. The court held that Benge was not a "vested" beneficiary, but a "contingent" beneficiary. The court held that a contingent remainder beneficiary does not have standing to sue regarding the administration of a trust:

> Section 115.011 explicitly states, "Contingent beneficiaries designated as a class are not necessary parties to an action under Section 115.001." *Id.; see also id.* § 115.001. Section 115.011 explains that "necessary parties" to an action under § 115.001 are those beneficiaries of the trust "designated by name," "a person who is actually receiving distributions from the trust estate at the time the action is filed," and the trustee serving at the time the action is filed. Id. § 115.011(b)(2), (3), (4). In addition, in *Berry v. Berry*, this Court held that a contingent remainder beneficiary seeking relief individually did not have standing to sue the trustee because a contingent remainder beneficiary is not a necessary party, and we upheld the trial court's summary judgment dismissing the contingent remainder beneficiary's individual claim against the trustee. No. 13-18-00169-CV, 2020 Tex. App. LEXIS 1884, 2020 WL 1060576, at *4 (Tex. App.—Corpus Christi-Edinburg Mar. 5, 2020, no pet.) (mem. op.) (citing *Davis v. First National Bank of Waco*, 139 Tex. 36, 161 S.W.2d 467, 472

> (Tex. 1942) (noting that the court held that "[a]n expectant heir has no present interest or right in property that he may subsequently inherit and consequently he cannot maintain a suit for the enforcement or adjudication of a right in the property"; *Davis v. Davis*, 734 S.W.2d 707, 709-10 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (explaining that the potential beneficiary "did not have standing to sue based on his claim that he is a potential beneficiary of trust assets" and "[o]ne cannot maintain a suit for the enforcement or adjudication of a right in property that he expects to inherit, because he has no present right or interest in the property"))). We conclude that Benge is a contingent remainder beneficiary as further explained below.
>
> …
>
> Benge made no other argument in the trial court and makes no other argument on appeal supporting a conclusion that she has standing to bring a derivative claim on behalf of the 2012 Trust. *See* Tex. Prop. Code Ann. § 115.011; *see also id*. § 115.001. Thus, having concluded that Benge is a contingent remainder beneficiary with no standing and that her breach of fiduciary claims are meritless, we are unable to reverse the trial court's granting of Missi's plea to the jurisdiction on this basis.

Id. The court therefore concluded that Benge did not have standing to assert the claim because the way that she framed her standing was incorrect.

The court also affirmed the dismissal of Benge's claims against third parties on behalf of the trust because she did not have standing to do so:

> In addition, in *In re Benge*, 2018 Tex. App. LEXIS 1512, 2018 WL 1062899, at *1 we cited *In re XTO Energy Inc*., 471 S.W.3d 126, 131 (Tex. App.—Dallas 2015, no pet.), among other cases, stating that generally beneficiaries cannot bring derivative suits on behalf of the trust and concluded that the trial court in this case did not err in dismissing Benge's derivative claims. See Jacobs v. Jacobs, 448 S.W.3d 626, 630 (Tex. App.—Houston [14th Dist.] 2014, no pet.) ("The 'law of the case' doctrine is defined as that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages."). In *Berry*, we noted as an exception to this general rule, a "beneficiary [may] step into the trustee's shoes and maintain a suit on the Trust's behalf when "the trustee's refusal to bring suit [against a third party on behalf of the trust is] wrongful." *Berry*, 2020 Tex. App. LEXIS 1884, 2020 WL 1060576, at *5. Here, Benge has not shown that Missi's acts of not suing AFT Property, O&G, and AFT Minerals was a result of wrongful conduct. *See id*. Therefore, Benge has not shown that she has standing to sue Missi derivatively on behalf of the 2012 Trust on this basis.

Id. The court of appeals then affirmed an award of attorney's fees to Missi under the Uniform Declaratory Judgment Act and also the Texas Trust Code. The court affirmed the trial court's orders dismissing Benge's claims.

Interesting Note: This case raises a very common and complex issue in trust administration: a trustee managing business interests. A trustee has a duty to act prudently in managing and investing trust assets. A trustee has the duty to make assets productive while at the same time preserving the assets. *Hershbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied). It has a duty to properly manage, supervise, and safeguard trust assets. *Hoenig v. Texas Commerce Bank*, 939 S.W.2d 656, 661 (Tex. App.—San Antonio 1996, no writ). There is a duty to invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. Tex. Prop. Code Ann. § 117.004. The proper standard against which a trustee is measured is that of an ordinary person in the conduct of his own affairs. *Stone v. King,* No. 13-98-022-CV,2 000 Tex. App. LEXIS 8070, 2000 WL 35729200 (Tex. App.—Corpus Christi 2000, pet. denied) (not designated for publication) (citing *Hoenig v. Texas Commerce Bank, N.A*., 939 S.W.2d 656, 661 (Tex. App.--San Antonio 1996, no writ)). However, the Texas Uniform Prudent Investor Act provides that in a trustee's management of assets: "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 § 117.004(f).

"The trustee's duties apply not only in making investments but also in monitoring and reviewing investments, which is to be done in a manner that is reasonable and appropriate to the particular investments, courses of action, and strategies involved." RESTATEMENT (THIRD) OF TRUSTS, §90(b). The trustee has a fiduciary duty to exercise his control of investments for the benefit of the trust beneficiaries. This would require the trustee to supervise corporate management to ensure that the officers and directors of the corporation are at all times managing the corporation in the best interest of the beneficiaries of the trust. SCOTT at §193 ("The trustee will be held accountable by the court if in the exercise of his power of control over the corporation he acts for his own interest rather than for the interest of the beneficiaries.); *Johnson v. Witkowski*, 573 N.E.2d 513, 519 (Mass. App. Ct. 1991); *In Re Koretzky's Estate*, 86 A.2d 238, 248 (NJ 1951); In the Matter of Hubbell, 97 N.E.2d 888, 891 (N.Y. 1950); *In the Matter of the Estate of Sakow*, 601 N.Y.S.2d 991 (N.Y. Surr. Ct. 1994); *In the Matter of the Estate of Schulman*, 568 N.Y.S.2d 669 (N.Y. App. Div. 1991); *Jennings v. Speaker*, 571 P.2d 358 (Ca. Ct. App. 1977).

The trustee has a duty to the trust beneficiaries to exercise the rights of a minority shareholder prudently. The Texas Business Organizations Code provides the statutory requirements for shareholder derivative proceedings. Tex. Bus. Orgs. Code Ann. §§ 21.551–.563. Under these statutes, a minority

shareholder or partner may sue the managers/officers of a company or partnership for breaching duties owed to the entity. *Id*. If the trustee fails or refuses to exercise such rights (e.g., if the trustee individually is the alleged wrongdoer as an officer/director), the trust beneficiary has a claim for breach of fiduciary duty against the trustee for failing to exercise such minority shareholder rights. *See, e.g., Spear v. Fenkell*, No. 13-02391, 2015 U.S. Dist. LEXIS 76191 (D. Pa. June 12, 2015) (court did not dismiss claim by plaintiff that ESOP trustee breached fiduciary duties by not brining a shareholder derivative action); *Atwood v. Burlington Indus. Equity*, No. 2L92CV00716, 1994 U.S. Dist. LEXIS 12347 (D.N.C. August 3, 1994) (plaintiff had claim that ESOP trustee breached fiduciary duties by failing to initiate a state law shareholder derivative action to recover for alleged breaches of fiduciary duty). *See also Pudela v. Swanson*, No. 91-C-3559, 1995 U.S. Dist. LEXIS 2148 n.6 (D. Ill. February 21, 1995) (ESOP trustee may have had a duty to bring shareholder derivative action to challenge over compensation to himself in other capacity).

This issue is even more complex where the trustee is also involved in the management of the business as an officer or director. *See* Mary Burdette, *Fiduciary Duties Within Fiduciary Duties: Trust Owning Stock in a Closely-Held Corporation*, State Bar of Texas, Advanced Estate Planning and Probate Course (2012). The issue is whether the trustee is liable for breach of fiduciary duty as a trustee due to the actions or inactions it committed as an officer or director of a business owned or partially owned by the trust. There is very little authority in Texas on this issue. The authority that exists is old and holds that the trustee is not liable for its actions as an officer or director because those actions were taken in a different capacity. *See Adam v. Harris*, 564 S.W.2d 152 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.). *But see Cleaver v. Cleaver,* 935 S.W.2d 491 (Tex. App.—Tyler 1996, no writ). Cases from other jurisdictions hold that the trustee may be liable for actions taken as an officer or director where the trust owns a controlling interest in the business. *See, e.g., In re Sylvester's Estate*, 172 N.Y.S.2d 57 (S. Ct. 1958); *Taylor v. Errion*, 44 A.2d 356 (N.J. 1945); *Brown v. McLanahan*, 148 F.2d 703 (4th Cir. 1945); *In re Ebbets's Estate*, 267 N.Y.S. 268, 270 (Surrogate's Court 1933). One Texas case held that an executor did not breach any duties to liquidate a business where the estate only owned a minority interest. *See Guerra v. Guerra*, No. 04-10-00271-CV, 2011 Tex. App. LEXIS 6730 (Tex. App.—San Antonio August 24, 2011, no pet.).

P. Court Had Jurisdiction To Declare That The Majority Of Co-Trustees Had The Authority To Sell Trust Property And The Declaration Was Proper

In *Duncan v. O'Shea,* three co-trustees brought a declaratory judgment action against a fourth co-trustee, seeking a declaration that the sale of trust real property was valid over the objection of the fourth co-trustee. No. 07-19-00085-CV, 2020 Tex. App. LEXIS 6564 (Tex. App.—Amarillo August 17, 2020, no pet.).

The trial court granted the relief via summary judgment, and the fourth co-trustee appealed.

The fourth co-trustee first complained that the trial court erred in awarding declaratory relief because she had filed a suit in Maine that raised breach of fiduciary duty claims, and that the relief in Texas "will not settle the dispute between the parties or resolve all of the issues pending in the Maine lawsuit, such relief cannot be granted." Based on the Texas Uniform Declaratory Judgment Act, the court of appeals disagreed:

> Appellant's argument disregards the plain language of section 37.003 of the TUDJA which provides: "[a] court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." While Appellant argues that a declaratory judgment must terminate any and all controversies between the parties, such a conclusion is not required under the language of the TUDJA, nor has it been interpreted in such a way by any known case law, including *Annetta South*… So long as there is a justiciable controversy existing between the parties and the declaratory judgment will resolve that dispute, a declaratory judgment may be sought with respect to that dispute.
>
> That being said, a question of jurisdiction does arise "if there is pending, at the time of the commencement of the declaratory action, another action or proceeding to which the same persons are parties, in which are involved and may be adjudicated the same identical issues that are involved in the declaratory action." However, the "mere pendency of another action between the same parties, without more, is no basis for refusing declaratory relief." A declaratory judgment may not be refused because of the pendency of another suit if the controversy will not necessarily be determined in that suit. Where speedy relief is "necessary to the preservation of rights which otherwise may be impaired or lost, courts will entertain an action for a declaratory judgment as to questions which are determinable in a pending action or proceeding between the same parties."
>
> While we agree with Appellant that the suit in Maine involves the same parties and the same real property at issue here, the dispute between the parties here, i.e., the authority of a majority of cotrustees to act on behalf of the Marital Trust, will not be determined in the Maine suit. Therefore, we agree with Appellees that the trial court had the authority to grant declaratory relief in this matter.

Id. The fourth co-trustee argued that the district court did not have jurisdiction because it should have been in probate court. The court of appeals disagreed,

and held that the Texas Property Code specifically provided for jurisdiction over trust disputes to district courts. *Id*. (citing Tex. Prop. Code Ann. § 115.001(a)).

The court of appeals also disagreed with an argument that the judgment was improper due to a failure to add necessary parties:

> [N]ecessary parties to an action like the one before us include (1) a beneficiary of the trust on whose act or obligation the action is predicated; (2) a beneficiary of the trust designated by name, other than a beneficiary whose interest has been distributed, extinguished, terminated, or paid; (3) a person who is actually receiving distributions from the trust estate at the time the action is filed; and (4) the trustee, if a trustee is serving at the time the action is filed. See Tex. Prop. Code Ann. § 115.011 (West Supp. 2019). There is nothing in the record showing that any of the beneficiary grandchildren satisfy the criteria set forth above. As such, those parties are not necessary and are not required to be joined in this matter.

Id.

The court of appeals also held that the three co-trustees had the authority to sale the real property over the objection of the fourth co-trustee:

> [T]he declaratory judgment granted does not specifically authorize the sale of any property. It merely declares that under applicable law and the terms of the Marital Trust, if Appellees, being a majority of the cotrustees, decide to sell a piece of real property held in the Marital Trust, then they may do so without her agreement. Appellees also note that if an actual sale violated the terms of the trust instrument or otherwise breached a fiduciary duty, Appellant would have a claim at that time.

Id. The court also held that this declaratory relief was not an impermissible advisory opinion:

> Appellees contend the declaratory relief sought is not some abstract question of law, but is, instead, a justiciable controversy existing between the parties. Appellees contend that, in situations like the present controversy, where multiple trustees serve concurrently, cotrustees may act by majority decision. Appellees' position is not contrary to either the terms of the Marital Trust or applicable statutory authority. Reviewing the trust and the applicable statutes, the trial court's judgment did not determine an abstract question of law, nor did it address a hypothetical injury only. When this declaratory judgment becomes final, Appellees will be able to move forward with a sale of real property held in the Marital Trust, with the assurance that the agreement of all four cotrustees is not needed, so long as a majority of the cotrustees are in agreement. Under

> the facts of this case, we see nothing advisory about the trial court's declaratory judgment.

Id. The court affirmed the trial court's judgment in all things.

Interesting Note: This case raises several interesting issues that arise when co-trustees manage trusts; such as how co-trustees are to manage trusts, what rights co-trustees in the minority have, etc. Co-trustees are obligated to manage the trust together. The first place to look for who co-trustees are to manage a trust is the trust document itself. If the trust document requires unanimity or allows action by a minority of co-trustees, the trust document should control. However, in the absence of language in the trust expressly stating how the co-trustees are to manage the trust, Texas has statutory guidelines.

At common-law, the co-trustees had to act with unanimity: "The traditional rule, in the case of private trusts, was that if there were two or more trustees, all had to concur in the exercise of their powers." SCOTT AND ASCHER ON TRUSTS, WHEN POWERS ARE EXERCISABLE BY SEVERAL TRUSTEES, § 18.3. The Texas Property Code, however, provides that, in the absence of trust direction, co-trustees generally act by majority decision. Tex. Prop. Code § 113.085(a); *Berry v. Berry*, no. 13-18-00169-CV, 2020 Tex. App. LEXIS 1884 (Tex. App.—Corpus Christi March 5, 2020, no pet.). See also RESTATEMENT (THIRD) OF TRUSTS, § 39. Co-Trustees in the majority have the power to act for the trust. They can, of course, abuse that power. A co-trustee in the minority has the right and duty to sue its co-trustees when they have a serious breach of fiduciary duty. Tex. Prop. Code § 114.006. Under this provision a co-trustee has a duty to prevent its co-trustee from committing a serious breach of trust and/or compel a co-trustee to redress such a breach. *In re Cousins*, 551 S.W.3d 913, n.2 (Tex. App.—Tyler 2018, orig. proceeding).

Absent trust language to the contrary, co-trustees who are in the minority do not have authority or power to act for the trust. For example, one court held that a co-trustee did not have authority to sue a third party on behalf of the trust where he was in the minority. *Berry v. Berry*, no. 13-18-00169-CV, 2020 Tex. App. LEXIS 1884 (Tex. App.—Corpus Christi March 5, 2020, no pet.). His remedy was to sue his co-trustees. *Id*. *See also Ward v. Stanford*, 443 S.W.3d 334 (Tex. App.—Dallas 2014, pet. denied) (the court of appeals held that a trust would not have accelerated a note where two of the three trustees voted against that action.).

There are circumstance when less than a majority of co-trustees can act for the trust under the Texas Trust Code. If a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust. Tex. Prop. Code § 113.085(b). If a co-trustee is unavailable to participate 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 co-trustee or a majority of the remaining co-trustees may act for the trust. *Id*. § 113.085(d). Otherwise, an act by less than

a majority of the co-trustees (absent trust document approval) is not valid, may result in liability to the improperly acting co-trustee, and may be voided depending on the innocence of the third party.

Co-trustees each owe fiduciary duties, and they should exercise their duties jointly, as a unit. So, one co-trustee should not take any action without the consent of the other co-trustees. *Shellberg v. Shellberg*, 459 S.W.2d 465, 470 (Civ. App.—Fort Worth 1970, ref. n.r.e.) ("The trust instrument conveyed the property to two trustees and provided that their powers were joint; the management, control and operation of the trust was to be by the joint action of the two trustees."). For example, if a trust calls for two co-trustees, it cannot operate with just one. *Id*. For further example, in *Conte v. Conte*, the court of appeals affirmed a trial court's order denying a co-trustee's request for reimbursement for attorney's fees expended in connection with a declaratory judgment action brought by another co-trustee. 56 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The court noted that the trust expressly provided that "any decision acted upon shall require unanimous support by all co-trustees then serving," and "[c]learly, Joseph Jr.'s decision to employ counsel to defend against his co-trustee's declaratory judgment action was not the subject of unanimous support by all co-trustees." *Id*. Thus, he was not entitled to reimbursement from the trust for his attorneys' fees, despite the trust's provision that "[e]very trustee shall be reimbursed from the trust for the reasonable costs and expenses incurred in connection with such trustee's duties." *Id*. In a footnote, the court also noted that the other co-trustee had paid for her attorneys from the trust without the consent of the other co-trustee and noted that this was an issue that the successor trustee or beneficiary could raise in a later proceeding. *Id*. *See also Stone v. King*, No. 13-98-022-CV,2000 Tex. App. LEXIS 8070, 2000 WL 35729200 (Tex. App.—Corpus Christi 2000, pet. denied) (co-trustee had no authority to pay funds to third party without consent of co-trustee or to pay his attorneys for defense of claims).

Of course, co-trustees have duties to cooperate and work together, to facilitate a positive relationship, and they can be removed for hostility that impacts the management of the trust. Co-trustees also have duties to participate in management and disclose information to each other. The Author suggests that anyone interested in co-trustee management of trusts refer to his article and webinar from September of 2020 that is posted on this blog.

Q. Court Affirmed Arbitration Decision Because Multiple Documents Regarding The Resignation And Appointment Of A Trustee Constituted One Large Transaction

In *Ruff v. Ruff*, a beneficiary of a trust sued a former trustee, and that dispute was sent to arbitration. No. 05-18-00326-CV, 2020 Tex. App. LEXIS 6344 (Tex. App.—Dallas August 11, 2020, pet. denied). After the arbitrators ruled for the

beneficiary, awarding her over $49 million, the former trustee appealed arguing that the dispute should not have been sent to arbitration.

The court of appeals affirmed the arbitration award. It stated that "it is well-established that one document containing an arbitration clause is sufficient to require arbitration of claims arising under other documents—if they are part of one transaction." The court then described the transaction in having three trustees resign and the appointment of a successor trustee:

> Here, the Frost Release was part of a larger transaction whereby the prior trustees (Mark, Kelly, and Tracy) resigned and Frost was appointed to replace them. As Mike described to the trial court, this transaction involved an interrelated seven-step process: Mark, Kelly, and Tracy resign as trustees; the resigning trustees ask the Trust protectors to appoint a new trustee; the beneficiaries (including Mike) each waive the thirty-day notice of the trustees' resignations; the Trust protectors appoint Frost as trustee; Suzann accepts Frost as trustee and executes the Frost Release; each beneficiary, including Mike, signs a release and indemnity agreement; and Frost accepts the trustee position. Each document executed in each step was part of the same transaction and each one was necessary for the transaction to be completed. Consequently, they are construed as a single, unified agreement.

Id. The court then held that the beneficiary's claims against the former trustee were subsumed in this larger transaction that contained an arbitration clause:

> Significantly, each of the Frost transition documents (including the Frost Release and the releases signed by Mike, Tracy, Kelly, and Mark) ratify the FSA. And each of the releases contain an identical arbitration clause. Although Suzann, Mike, Kelly, Tracy, Mark and Frost all signed separate documents, each was for the single purpose of effecting Kelly, Tracy, and Mark's resignations as co-trustees and Frost's appointment as successor trustee. When parties include an arbitration clause in one document that is an essential part of the overall transaction, courts presume that they intended the arbitration clause to reach all aspects of the transactions governed by other contemporaneously executed agreements that are part of the same transaction. The single transaction here concerns the issues Mike sought to arbitrate, including the validity and enforceability of the Trust, the FSA's release, and the acknowledgement and appointment of Frost as successor trustee. And as later discussed, those issues necessarily relate to and are intertwined with Suzann's counterclaims. Therefore, in this context, Mike's status as a non-signatory to the specific Frost Release is not dispositive. His March 1, 2010, release, and all the other documents comprising that single transaction, include an arbitration clause in which the parties agree to submit their disputes to arbitration. Mike is a party to that agreement.

Id. The court also held that the claims fell within the scope of the arbitration clause: "In light of the clause's expansive, inclusive language, we cannot conclude that Suzann's tort claims are not within its broad scope. Indeed, Mike's breach of fiduciary duties and related torts are inextricably enmeshed and factually intertwined with the very agreement he claims releases him from liability. Suzann's claims cannot be made without reference to that contract." *Id*. The court also held against the former trustee on the theories of third-party beneficiary and direct-benefits estoppel.

R. Court Affirmed Summary Judgment For Successor Trustees Due To Clause Stating That They Had No Duty To Investigate Former Trustee's Actions

In *Benge v. Roberts*, a beneficiary sued co-trustees and sought to remove them for breaching duties by not considering claims against a former trustee. No. 03-19-00719-CV, 2020 Tex. App. LEXIS 6335 (Tex. App.—Austin August 12, 2020, no pet.). The co-trustees filed a motion for summary judgment based on a clause in the trust that provided:

> No successor Trustee shall have, or ever have, any duty, responsibility, obligation, or liability whatever for acts, defaults, or omissions of any predecessor Trustee, but such successor Trustee shall be liable only for its own acts and defaults with respect to the trust funds actually received by it as Trustee.

Id. The beneficiary appealed, and the court of appeals affirmed. The court stated that these types of clauses are generally enforceable: "The Trust Code expressly permits such clauses." *Id*.

The beneficiary argued that a cause exists for the co-trustees' removal because they have "actual conflicts of interest" due to their participation with the former trustee. She contended that removal of the co-trustees because of their conflict of interest was a distinct claim from one alleging that they have liability for the former trustee's alleged breaches of fiduciary duty and, therefore, was not subject to the exculpatory clause.

The court disagreed:

> We reject this argument because it directly conflicts with the broad language in the exculpatory clause relieving the co-trustees from any "duty, responsibility, [or] obligation" for the "acts, defaults, or omissions" of Missi. While ordinarily a successor trustee has the duty to "make a reasonable effort to compel a redress" of any breaches by a predecessor, see Tex. Prop. Code § 114.002(3)—which presumably would include impartially evaluating whether to "fight" Benge in the appeal of the Consolidated Matter—the exculpatory clause in the Trust relieves the co-

> trustees of that duty, as permitted by the Trust Code. *See id*. §§ 111.0035(b), 114.007(c). The co-trustees cannot as a matter of law have a conflict of interest due to allegedly lacking the ability to be "impartial" about deciding whether or how to redress Missi's alleged breaches when they have no duty to redress such breaches in the first instance. Accordingly, we hold that the trial court properly granted summary judgment on the basis of the Trust's exculpatory clause.

Id.

The court also held that the construction and application of the exculpatory clause was a question of law that the trial court had to determine:

> [T]he trial court did not abuse its discretion in denying the motion because the effect of the exculpatory clause on the facts alleged—that is, whether it relieves the co-trustees of any duties vis à vis Missi's alleged breaches—is a legal question that we review de novo, and thus the trial court had no discretion but to determine that summary judgment was proper on the basis of the clause. *See Nowlin v. Frost Nat'l Bank*, 908 S.W.2d 283, 286 (Tex. App.—Houston [1st Dist.] 1995, no writ) ("Construction of a trust instrument is a question of law for the trial court when no ambiguity exists."); *see also Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) ("A trial court has no discretion in determining what the law is or in applying the law to the facts."); *Clifton*, 107 S.W.3d at 760-61 (holding that because exculpatory clause was valid, and based on facts alleged, there was no issue of fact about whether trustee was exculpated).

Id.

Interesting Note: Normally, a successor trustee has the duty to "make a reasonable effort to compel a redress" of any breaches by a predecessor. Tex. Prop. Code § 114.002(3). So, can a trust abrogate a successor trustee's liability for a prior trustee's actions?

The Texas Trust Code provides that the terms of a trust prevail over the statutory terms except for certain enumerated instances. *See id*. at 111.0035(b). A trust may not limit Texas Property Code Section 114.007 to an exculpation term of a trust. *Id*. Section 114.007 provides:

> A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that the term relieves a trustee of liability 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 § 114.007(a). So, if the co-trustees breached their duties to review the conduct of the prior trustee in bad faith, intentionally, or with reckless indifference to the beneficiary's interests or where the co-trustees acted with or without negligence where the trustee derived a profit, then the exculpatory clause would not be enforceable regarding the co-trustees' liability.

The allegations were that the co-trustees acted intentionally, without good faith, and with a conflict of interest in not pursuing claims against the prior trustee because they had actually participated with the prior trustee in some of those breaches. The beneficiary argued that that was sufficient to create a fact issue on whether the application of the exculpatory clause was appropriate and on the underlying claim. However, the analysis does not end there. Section 114.007(c) provides:

> This section applies only to a term of a trust that may otherwise relieve a trustee from liability for a breach of trust. Except as provided in Section 111.0035, this section does not prohibit the settlor, by the terms of the trust, from expressly: (1) relieving the trustee from a duty or restriction imposed by this subtitle or by common law; or (2) directing or permitting the trustee to do or not to do an action that would otherwise violate a duty or restriction imposed by this subtitle or by common law.

Tex. Prop. Code § 114.007(c). This provision states that a settlor can relieve a trustee of a duty imposed by the Texas Trust Code, such as the duty to review prior trustee's conduct. So, under this provision, the co-trustees would be relieved of a duty to review the prior trustee's actions, but the co-trustees' liability may not be waived if they acted in bad faith, with intent, or with gross negligence. When could the co-trustees be liable when they have no duty? This is the issue that the court wrestled with in the opinion and found for the co-trustees.

But the analysis should not have ended with Section 114.007(c). There is another important statutory provision that the court did not address. It provides that a trust term may not limit a trustee's "duty to act in good faith and in accordance with the purposes of the trust." Tex. Prop. Code § 111.0035(b)(4)(B); *Martin v. Martin*, 363 S.W.3d 221, 2012 Tex. App. LEXIS 2146 (Tex. App.—Texarkana Mar. 20, 2012, no pet.) (even though a trust provision allowed the trustee to have conflicts of interest, the provision was not enforceable as a jury found that the trustee did not act in good faith). There is no statutory exception to this duty of good faith. In *Benge*, if the co-trustees acted in bad faith, as alleged, in not pursuing claims against the former trustee then under this statutory provision the exculpatory clause may not be enforceable. In that circumstance, the trial court would have erred in enforcing the exculpatory clause and granting summary judgment for the co-trustees. There has been no authority on the interplay between Section 114.007(c) and Section 111.0035(b)(4)(B).

It is also troubling that the court in this case cited to *Texas Commerce Bank v. Grizzle*, 96 S.W.3d 240, 249 (Tex. 2002) in support of the application of the exculpatory clause. The Texas Legislature subsequently overruled the *Grizzle* opinion in 2005 by repealing Texas Property Code Section 113.059 and adding Sections 111.0035 and 114.007. *See* Act of May 12, 2005, 79th Leg., R.S., ch. 148, § 21, 2005 Tex. Gen. Laws 287, 293-94.

S. Appellate Court Held That Judgment Construing A Trust Was Enforceable And Had Effect When The Trust Was Later Challenged

In *Neal v. Neal*, the court of appeals affirmed a trial court's judgment resolving who were the correct beneficiaries of a trust. No. 05-19-00364-CV, 2020 Tex. App. LEXIS 4514 (Tex. App.—Dallas June 17, 2020, no pet.). The trial court's judgment declaring the decedent's sister's children the remainder beneficiaries of his trust was in line with a prior agreement judgment and was proper because the estate's assumption ignored the parties' compromise settlement agreement and the agreed judgment, both of which clearly provided that the trust was amended. The court held: "We interpret an agreed judgment like a contract between the parties, seeking to harmonize and give effect to all its provisions so that none are rendered meaningless." *Id*. The court then concluded that the earlier agreed judgment unambiguously stated that the sister's children were the only remainder beneficiaries of the decedent's trust. The trial court's judgment was affirmed.

T. Texas Supreme Court Held That The Reformation Statute For The Rule Against Perpetuities Could Apply To An Instrument Created By A Corporation Because Corporations Can Create Inter Vivos Trusts

In *Yowell v. Granite Operating Co*., the Texas Supreme Court reviewed the validity of an interest in a mineral lease regarding the rule against perpetuities ("Rule"). No. 18-0841, 2020 Tex. LEXIS 425 (Tex. May 15, 2020). The court of appeals held the reserved overriding royalty interest ("ORRI") in new leases violated the Rule and was not subject to reformation under the Property Code. The Texas Supreme Court held that the ORRI is a real property interest that violates the Rule and must be reformed, if possible, in accordance with section 5.043 of the Property Code.

Regarding the Rule, the Court held:

> The Texas Constitution prohibits perpetuities: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed . . . ." Tex. Const. art. I, § 26. A perpetuity is a restriction on the power of alienation that lasts longer than a prescribed period. *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 866-67 (Tex. 2018). Our common law defines this period for real property conveyances, providing that "no [property] interest is valid unless it must vest, if at all,

> within twenty-one years after the death of some life or lives in being at the time of the conveyance." *Peveto v. Starkey*, 645 S.W.2d 770, 772 (Tex. 1982).

Id. The Court then held that the ORRI did not vest and violated the Rule. The Court then turned to reformation. The Court noted Texas Property Code Section 5.043, which provides:

> (a) Within the limits of the rule against perpetuities, a court shall reform or construe an interest in real or personal property that violates the rule to effect the ascertainable general intent of the creator of the interest. A court shall liberally construe and apply this provision to validate an interest to the fullest extent consistent with the creator's intent.
>
> (b) The court may reform or construe an interest under Subsection (a) of this section according to the doctrine of cy pres by giving effect to the general intent and specific directives of the creator within the limits of the rule against perpetuities.
>
> (c) If an instrument that violates the rule against perpetuities may be reformed or construed under this section, a court shall enforce the provisions of the instrument that do not violate the rule and shall reform or construe under this section a provision that violates or might violate the rule.
>
> (d) This section applies to legal and equitable interests, including noncharitable gifts and trusts, conveyed by an inter vivos instrument or a will that takes effect on or after September 1, 1969 . . . .

Tex. Prop. Code § 5.043. The Court held that this provision applied to many instruments and not just wills and trusts. *Id.*

The Court then addressed whether the statute could apply where a corporation was making a commercial instrument. "The court [of appeals] interpreted 'inter vivos instrument' to require that the conveying party have a true lifetime for the reformation statute to apply, noting that a corporation's perpetual existence is shortened only if stated in its certificate of formation." *Id.* The Court disagreed:

> First, corporations can execute inter vivos instruments—trusts, for example. The Property Code articulates different methods a "property owner" may use to create a trust. Prop. Code § 112.001. One method is "a property owner's inter vivos transfer of the property to another person as trustee for the transferor or a third person." *Id*. § 112.001(2). Although this provision does not define either "property owner" or "person," we know from other sections of the Property Code that a "settlor" is a "person who creates a trust." *Id*. § 111.004(14) (emphasis added). And both the Property Code and the Code Construction Act define "person" to include a corporation. *See id*. § 111.004(10)(B) (defining person to include a

> corporation); Gov't Code § 311.005(2) ("'Person' includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity."). Thus, a corporation can be a settlor that creates a trust by an "inter vivos transfer of [its] property." *See* Prop. Code § 112.001(2) (emphasis added). Because a corporation can make an inter vivos conveyance of property to create a trust, we decline to hold that the Legislature's choice of the term "inter vivos" excludes corporate conveyances of property interests from the reformation statute. The court of appeals erred when it declined to reform a commercial instrument executed by Aikman—a corporation—on the ground that it lacked the ability to create an inter vivos instrument. 557 S.W.3d at 804.

Id. Because the reformation statute could apply to the instrument that created the ORRI, and because the parties disagreed on the creator's intent, the Court remanded the case for further proceedings.

U. Texas Supreme Court Holds That There Was No Trust Protecting Church Assets And A Withdrawing Faction Was Entitled To Those Assets

In *Episcopal Diocese of Fort Worth v. Episcopal Church*, the Texas Supreme Court addressed whether a withdrawing faction was entitled to church property and also addressed a trust issue. No. 18-0438, 2020 Tex. LEXIS 434 (Tex. May 22, 2020). Following a disagreement over religious doctrine dealing with homosexuals, the Episcopal Diocese of Fort Worth and a majority of its congregations withdrew from The Episcopal Church. The church replaced the diocese's leaders with church loyalists, and both the disaffiliating and replacement factions claimed ownership of property held in trust for the diocese and local congregations. Interestingly, on a congregation by congregation approach, the withdrawing factions may be been in the minority.

The church relied on the Dennis Canon and argued that it was a trust that protected the property for it. That canon provided, in relevant part, that "all real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for [TEC][.]" The parties dispute the trust's validity under Texas law and its revocability.

The Texas Supreme Court held that under Texas trust law, a trust may be created by any of the following methods: (1) a property owner's declaration that the owner holds the property as trustee for another person; (2) a property owner's inter vivos transfer of the property to another person as trustee for the transferor or a third person; (3) a property owner's testamentary transfer to another person as trustee for a third person; (4) an appointment under a power of appointment to another person as trustee for the donee of the power or for a third person; or (5) a promise to another person whose rights under the promise are to be held in trust for a third person. *Id*. (citing Tex. Prop. Code § 112.001).

The Texas Supreme Court held that the Dennis Cannon did not create an irrevocable trust that could not revoked:

> A trust is created only if the settlor manifests, in writing, an intention to create a trust, and a settlor may revoke a trust "unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it." Id. The court of appeals held that the Dennis Canon is not a valid trust under Texas law because "an entity that does not own the property to be held in trust cannot establish a trust for itself simply by decreeing that it is the beneficiary of a trust." As to revocability, we held in Masterson and Episcopal Diocese that even assuming the Dennis Canon is a valid trust, it is revocable under Texas law because it was not made expressly irrevocable. Moreover, "[e]ven if the Canon could be read to imply the trust was irrevocable, that is not good enough under Texas law. The Texas statute requires express terms making [the trust] irrevocable." For the reasons stated by the court of appeals (among others), the Majority Diocese asserts the Dennis Canon is not a valid trust, but even if it were valid, it was revocable and revoked by the 1989 amendment to the Diocesan Constitution and Canons, nearly two decades before this dispute arose.
>
> TEC contends the Dennis Canon creates a valid trust and argues it is entitled to possession of the disputed property under that trust for two independent reasons: (1) the 1989 amendment was ineffective to revoke the Dennis Canon trust because, at that time, the Diocesan Constitution and Canons only authorized amendments to the diocese's canons that were "not inconsistent" with the national church's constitution and canons and (2) the trust is irrevocable because it is a contractual trust supported by valuable consideration. Neither argument is persuasive.
>
> While it is true, as TEC says, that the diocese's organizational documents prohibited the adoption of canons inconsistent with the national church's constitution and canons, revocation is not inconsistent with a revocable trust. Moreover, in the twenty years between revocation and eruption of a dispute over the property, TEC lodged no objection to the amended canon and does not now contend the 1989 amendment is invalid for any other reason than purported "inconsistency."
>
> In the alternative, and contrary to our holdings in Masterson and Episcopal Diocese, TEC insists that the Dennis Canon is irrevocable notwithstanding the absence of express language of irrevocability, as required by Texas Property Code section 112.051.… TEC has not identified any provision constraining revocation of the Dennis Canon, so the statutory requirement of express language retains its legal force.

Id. Therefore, the Court held for the faction that left the church.

V. Court Rejected A Trustee's Objection To Personal Jurisdiction In His Individual Capacity But Affirmed The Objection In His Capacity As Trustee

In *Hanschen v. Hanschen*, a trustee challenged a default judgment. No. 05-19-01134-CV, 2020 Tex. App. LEXIS 4075 (Tex. App.—Dallas May 28, 2020, no pet.). The family sued the trustee in his personal capacity and in his capacity as trustee for breaching fiduciary duties. While the trustee was in Texas, the family served him in his personal capacity. The family then obtained a default judgment against him in both capacities when he did not file an answer. Later, the trustee filed a special appearance challenging the court's personal jurisdiction, and the trial granted the motion. The family then appealed.

The court of appeals reversed the special appearance against the trustee in his personal capacity. The court held that because the trustee was personally served in Texas, the trial court had personal jurisdiction over him:

> In this case, the family personally served James with the petition and citation while he was in Texas. The family concedes they "have never asserted that Texas has general jurisdiction over James or that the traditional minimum contacts analysis would be met in the absence of his physical presence." They are correct and the case law is clear that a trial court has authority to exercise in personam jurisdiction over a nonresident where the court's jurisdiction grew out of the personal service of citation upon the nonresident within the state. A nonresident, merely by reason of his nonresidence, is not exempt from a court's jurisdiction if he voluntarily comes to the state and thus is within the territorial limits of such jurisdiction and can be duly served with process.

Id. The trustee also argued that the court did not have adequate jurisdiction over him in his personal capacity because there were no claims against him in that capacity, but the court of appeals disagreed:

> While we may agree with James that the default judgment granted relief against the entities for which it would be necessary for Texas courts to have jurisdiction over James in representative capacities, the family's petition pleaded causes of action against James individually for breaches of fiduciary duties arising from his role as trustee of the Progeny Trust and his roles in NBR-C2, NBR-C3, and NBR-Needham. The family seeks exemplary damages against James for these alleged breaches of fiduciary duties. James does not make a specific argument why these claims are not pleaded against him personally. In Texas, generally an agent is personally liable for his own tortious conduct. For these reasons, we agree with the family that James was personally served with process in Texas, so the trial court has personal jurisdiction over him in that capacity.

Id.

The court of appeals then turned to whether the trial court had personal jurisdiction over the trustee in his capacity as trustee. The court noted that the citation was not issued to him in that capacity. The court held that this defect was dispositive and affirmed the special appearance for the trustee in his representative capacity:

> We have held, "[t]he capacity in which a non-resident has contact with a forum state must be considered in the jurisdictional analysis." James was not served with a citation directed to him in any representative capacity; only "JAMES HANSCHEN WHEREEVER HE MAY BE FOUND." At oral argument, the family argued the listing of all the parties in the citation was sufficient to constitute service on James in each representative capacity he was listed as a defendant. We reject this contention and the family's counsel acknowledged in oral argument a citation addressed to one defendant inadvertently served on a different, unrelated defendant would not constitute good service of process merely because all defendants' names were in the list of defendants in the style of the lawsuit... In this case, James was not served with citations which were returned to the court clerk stating he had been served in his representative capacities. Any failure to comply with the rules regarding service of process renders the attempted service of process invalid, and the trial court acquires no personal jurisdiction over the defendant. A default judgment based on improper service is void. Accordingly, the trial court did not have personal jurisdiction over James in his representative capacities.

Id.

III. Probate Litigation

A. Relative Had Standing To Assert Slayer Statute And Declaration Regarding Rights To Insurance Proceeds Over Victim's Estate

In *Lawrence v. Bailey*, a son killed his parents with a sledge hammer. No. 01-19-00799-CV, 2021 Tex. App. LEXIS 4716 (Tex. App.—Houston [1st Dist.] June 15, 2021, no pet. history). The son was a named beneficiary of the father's life insurance policy. The insurance company filed an interpleader action regarding the life insurance proceeds. The trial court awarded those to the father's estate, and the father's brother then filed a motion for new trial. The brother alleged that under the slayer statute, that he was entitled to the proceeds. The trial court denied the motion, and the brother appealed.

The court of appeals first held that the brother had standing to seek a declaration regarding the ownership of the insurance proceeds. The court noted that the brother argued:

> Under the Texas Slayer Statute, a beneficiary of a life insurance policy or contract forfeits the beneficiary's interest in the policy or contract if the beneficiary is a principal or an accomplice in willfully bringing about the death of the insured." *See* Tex. Ins. Code. § 1103.151. He pointed out that, "[i]f there is no contingent beneficiary entitled to receive the proceeds of a life insurance policy or contract, the nearest relative of the insured is entitled to receive the proceeds." *Id*. § 1103.152(c).

Id. The agreed that based on the fact that the brother was the closest relative to the father, that he had standing assert a claim for the proceeds. The court also disagreed with the estate representative's argument that the brother did not have standing until the criminal case against the son was concluded, the court held that "the administrator fails to recognize that the Slayer Statute does not require that any criminal case relating to whether the beneficiary wilfully brought about the insured's death be resolved before the wilfulness determination is made. *See id.* §§ 1103.151, 1103.152*; see also In Re Estate of Stafford*, 244 S.W.3d 368, 370 (Tex. App.—Beaumont 2008, no pet.) ("Section 1103.151 does not require a 'final conviction' before a beneficiary forfeits his rights to the [insurance] proceeds.")." *Id*. The court also held that the brother had standing even though an heirship proceeding in probate court (which would determine the father's relatives) was not completed. That was not a prerequisite under the Slayer statute. The court then ruled that the trial court erred in denying the brother's motion for new trial because he was denied due process as he was not given notice of the trial court's hearing on the father's dispositive motion. The trial court's order was reversed.

B. Texas Supreme Court Holds That A Beneficiary May Not Accept Any Benefit From A Will And Then Later Challenge The Will

In *In the Estate of Johnson*, a child of the decedent accepted over $143,000 from the decedent's estate and then decided to challenge the will due to mental capacity and undue influence. No. 20-0424, 2021 Tex. LEXIS 426 (Tex. May 28, 2021). The trial court ruled that the child could not accept a benefit under the will and then challenge the will and dismissed the child's claim. The court of appeals reversed, holding that the child did not receive anything that the child would not also receive if there was no will, and therefore, she was not inconsistent and was not estopped from bringing her will contest. The court held that the executor "failed to satisfy her burden, as the Will's proponent, by failing to demonstrate that [MacNerland] accepted greater benefits than those to which she was entitled under the Will or intestacy laws." *Id*. The Texas Supreme Court accepted the will proponent's petition for review and reversed the court of appeals.

The Supreme Court held that the contestant first had the burden to prove that he or she had a sufficient interest in the estate. Once the contestant meets that burden, the burden shifts to the will's proponent to provide evidence of an affirmative defense to preclude the contestant from proceeding with his or her

claim. An affirmative defense that the will's proponent can raise is the acceptance-of-benefits doctrine. The Court describes that defense as follows:

> The acceptance-of-benefits doctrine bars a party from contesting the validity of a will while enjoying its benefits. It arises out of equity's aversion to a claimant who seeks to exploit irreconcilable positions. Equity does not permit the beneficiary of a will to grasp benefits under the will with one hand while attempting to nullify it with the other. A contestant may rebut the doctrine's applicability by showing that she did not accept the benefit through the will. The law does not deprive a contestant of standing when she otherwise has a present legal right to the benefit. That is, if the contestant is otherwise presently entitled to the accepted benefit, then her acceptance of it is not inconsistent with suing to set aside the will. For example, a contestant who accepts a bank account payable to the contestant upon the decedent's death or as an assertion of her interest in a community estate does not act inconsistently with a will contest because she does so through means other than the will. In such a case, there is no inconsistent position justifying estoppel because the contestant does not seek to nullify the will while she simultaneously enjoys its benefits.

Id. The Court then rejected the theory that "a will contestant may presently accept benefits under the will based on a hypothetical claim to greater benefits should a court declare it invalid." *Id*. The Court stated:

> We rejected the idea more than sixty years ago in *Wright v. Wright*. As we explained in that case, the test for determining whether a contestant's acceptance of benefits estops her from bringing a will contest "does not depend upon the value of the benefits," "[n]or is it to be determined by comparing them with what the statutes of descent and distribution would afford the beneficiary in the absence of a will." Rather, the doctrine asks whether the contestant has an existing legal entitlement to these benefits other than under the will. If there is no existing entitlement save for the testator's bequest, then the contestant's acceptance of it is inconsistent with a claim that the will is invalid.

Id. The Court also stated that this bright-line test would not harm a beneficiary that accepts a benefit without sufficient knowledge of the facts:

> MacNerland argues that an opportunistic executor could offensively deny a would-be will contestant's claim by partially distributing the estate to an unwitting beneficiary to avoid a will contest. The doctrine sufficiently accounts for this concern, however, by requiring that a beneficiary voluntarily accept the benefit. If a beneficiary or devisee lacks knowledge of some material fact at the time of acceptance, she may take steps to reject the benefit. MacNerland did not attempt to return the mutual fund

> account to the estate or assert in this case that her acceptance of the account was involuntary.

Id. The Court, thus, reversed the court of appeals and affirmed the trial court's dismissal of the suit.

Interesting Note: This case highlights the danger that an estate beneficiary has when offered assets from the estate. If the beneficiary has any notion that he or she may want to contest the will, the beneficiary should not accept the asset. Otherwise, the beneficiary will face an acceptance-of-the-benefits defense by the will's proponent. There are exceptions to the defense, primarily when the beneficiary accepts the asset without knowing material facts and the beneficiary later attempts to return the asset. There may be other defenses as well, such as duress. In any event, the acceptance-of-the-benefits defense only precludes a beneficiary from challenging the will, the beneficiary can still sue the executor for breaching duties and/or seeking to remove the executor.

C. Court Holds That An Executor May Breach Duties In Making A Non-Pro Rata Distribution Of Assets

In *In re Estate of Stewart*, siblings filed claims regarding the administration of their father's estate. No. 04-20-00103-CV, 2021 Tex. App. LEXIS 3897 (Tex. App.—San Antonio May 19, 2021, no pet. history). Among other claims, a sister claimed that her brother breached fiduciary duties as executor by distributing real property to three of the siblings, but not to her. The brother claimed that he had the right to do so under the Estates Code. The jury found that the brother breached his fiduciary duties, but found that the sister had not been harmed. The brother appealed. The court of appeals first discussed an executor's fiduciary duties to the estate's beneficiaries:

> "The relationship between an executor and the estate's beneficiaries is one that gives rise to a fiduciary duty as a matter of law." "An executor's fiduciary duty to the estate's beneficiaries arises from the executor's status as trustee of the property of the estate." "The executor thus holds the estate in trust for the benefit of those who have acquired a vested right to the decedent's property under the will." "The fiduciary duties owed to the beneficiaries of an estate by an independent executor include a duty of full disclosure of all material facts known to the executor that might affect the beneficiaries' rights." "A fiduciary also 'owes its principal a high duty of good faith, fair dealing, honest performance, and strict accountability.'" "When an independent executor takes the oath and qualifies in that capacity, he or she assumes all duties of a fiduciary as a matter of law which, in addition to other duties, includes the duty to avoid commingling of funds."

Id.

Regarding the brother's claim that the Texas Estates Code allowed him to make a non-pro rata distribution of the real property, the brother cited to section 405.0015 of the Texas Estates Code, which states:

> Unless the will, if any, or a court order provides otherwise, an independent executor may, in distributing property not specifically devised that the independent executor is authorized to sell: (1) make distributions in divided or undivided interests; (2) allocate particular assets in proportionate or disproportionate shares; (3) value the estate property for the purposes of acting under Subdivision (1) or (2); and (4) adjust the distribution, division, or termination for resulting differences in valuation.

Id. (citing Tex. Est. Code § 405.0015). The sister claimed that even if the brother could make a non-pro rata distribution, that he still had a duty to make disclosures to her. The brother argued as follows:

> Wayne further argues that Jennifer based her breach of fiduciary claims on (1) Wayne's failure to disclose his distribution plan and his decision to deed the Goliad Property to the three brothers; (2) Wayne's failure to disclose the AEP easement to her; and (3) Wayne's failure to value the Goliad Property at $11,250.00 per acre, which is the amount AEP paid for its easement. According to Wayne, under section 405.0015 and the will, he had the authority to determine whether and how to make non-pro rata distributions of the residuary estate, and thus to exclude Jennifer from distribution of the Goliad Property. Wayne argues neither his plan or ultimate distribution of the Goliad Property could have affected Jennifer's rights so long as she received equal value of the residuary estate. Thus, Wayne argues the information Jennifer claims she did not receive was not material, and his failure to disclose that information, constitutes no evidence that he failed to comply with his fiduciary obligations.

Id. The court disagreed with the brother, and stated:

> In looking at the plain meaning of section 405.0015, it clearly grants an independent executor, unless otherwise limited, authority to make distributions in divided or undivided interests; to allocate particular assets in proportionate or disproportionate share; to value the estate property; and to adjust the distribution, division or termination for resulting differences in valuation. See Tex. Est. Code § 405.0015. However, section 405.0015 states nothing about divesting an independent executor of the fiduciary duties he owes the beneficiaries of the will. We agree with Jennifer that Wayne's interpretation would lead to an absurd result. We also agree with Jennifer that it is not a coincidence section 405.0015 became effective simultaneously with the Texas Uniform Partition of Heir's Property Act (the "Heirs Partition Act"). See Tex. Prop. Code § 23A.001 (effective Sept. 1, 2017). The Heirs Partition Act provides a streamlined

> process by which heirs can either force partition in kind, or alternatively effectuate the buyout, of undivided interests in inherited property. See Tex. Prop. Code §§ 23A.001-.013. We conclude section 405.0015 merely provides an independent executor with the tools necessary to make non-pro-rata distributions and avoid the common partition litigation among heirs anticipated and addressed by the Heirs Partition Act. Thus, the typical fiduciary duties of good faith, fair dealing, and full disclosure still apply to Wayne's actions notwithstanding section 405.0015.

Id. The court then held that there was sufficient evidence to support the jury's finding that the brother breached his fiduciary duties to the sister by failing to disclose material facts:

> As noted previously, an independent executor owes a fiduciary duty to fully disclose all material facts known to him that might affect the beneficiaries' rights. "This duty exists independently of the rules of discovery, applying even if no litigious dispute exists between the trustee and beneficiaries." Further, "[t]he existence of strained relations between the parties [does] not lessen the fiduciary's duty of full and complete disclosure." Here, there was evidence at trial that Wayne repeatedly did not disclose material facts to Jennifer about the administration of the estate. With regard to the Goliad Property, there was evidence that he did not disclose the AEP easement offer to her or to Mark Barnes, the appraiser hired to perform the valuation on the Goliad Property for the estate. The evidence shows Wayne then applied the lower valuation found by Barnes in distributing the estate's assets while, at the same time, intentionally waiting to sell the easement until after he had deeded the property to himself and his brothers, at the exclusion of Jennifer. That is, between August and December 2017, Wayne and his brother Steven negotiated the easement purchase price from the initial offer of $7,500 per acre to $11,250 per acre. On December 19, 2017, after agreeing to the easement price of $11,250 per acre but before executing the easement, Wayne deeded the Goliad Property to himself and his brothers. Wayne testified he took these actions knowing he was going to receive $73,000 from AEP that Jennifer would not. Wayne's failure to timely disclose material facts to Jennifer affected her ability to challenge valuation of the Goliad Property. In addition to the Goliad property, Wayne admittedly did not disclose to Jennifer the nature of the securities distributed to her. Without this information, Jennifer could not establish the fairness or completeness of the distribution to her in lieu of an in-kind share in the Goliad property. We conclude there was evidence that Wayne failed to disclose to Jennifer material facts that might have affected her rights.

Id. The court also held that the fact that the jury found that the sister had not damages was not dispositive because the evidence showed that the brother had a benefit from his breach of fiduciary duties: "Wayne's repeated non-disclosures

to Jennifer about the material facts relevant to her interest in the Goliad Property, as well as his decision to apply a lower valuation to Jennifer's share of the Goliad Property and exclude her from the more lucrative offer made on the AEP easement, resulted in a benefit to himself at the exclusion of Jennifer. That is, Wayne received a larger portion of the remaining residuary estate for himself because he chose to pay Jennifer thousands of dollars an acre less for her share of the Goliad property prior to negotiating a higher price for the easement he agreed to with AEP." *Id*. Thus, the court affirmed the jury's finding of breach of fiduciary duty as against the brother.

That affirmance was pivotal in the case, as due to the breach finding, the court of appeals affirmed: the trial court's award of the sister's attorney's fees against the brother, the trial court's refusal to allow the brother's fees to be paid by the estate, the trial court's order to require the brother to pay back the money from the estate used to pay his attorneys, and the trial court's refusal to discharge the executor.

D. Court Properly Admitted A Will To Probate Where The Evidence Did Not Establish Mental Incompetence Or Undue Influence As A Matter Of Law

In *Neal v. Neal*, the decedent died leaving three sons. No. 01-19-00427-CV, 2021 Tex. App. LEXIS 2051 (Tex. App.—Houston [1st Dist.] March 18, 2021, no pet.). She had several wills in the last five years of her life, but her final will left all of her estate to one son. The other sons alleged that the last will was invalid due to mental incompetence and due to undue influence. The trial court found against the contestants and admitted the will to probate, and the contestants appealed.

The court of appeals first reviewed the law regarding mental competence to execute a will:

> A testator has testamentary capacity when, at the time of the execution of the will, she possesses sufficient mental ability to (1) understand the business in which she was engaged, the effect of making the will, and the general nature and extent of her property; (2) know her next of kin and the natural objects of her bounty; and (3) have sufficient memory to assimilate the elements of executing a will, to hold those elements long enough to perceive their obvious relation to each other, and to form a reasonable judgment as to them. The key to this inquiry is whether the testator had testamentary capacity on the day the will was executed. This may be inferred from the testimony of lay and expert witnesses concerning their observations of the testator's conduct prior or subsequent to the execution of the will. Evidence that the testator was incompetent at other times can be used to establish a lack of testamentary capacity on the day the will was executed if the evidence "demonstrates that the condition persists

> and 'has some probability of being the same condition which obtained at the time of the will's making.'"

Id. The court reviewed the evidence and noted that the decedent had been diagnosed with dementia: "These records demonstrate that Florene had a stroke in July 2011, and she was subsequently diagnosed with cerebrovascular disease and dementia. The records, from both her primary care physician and a home healthcare agency, reflect that Florene had cognitive deficits, including hallucinations, confusion, and problems with her short-term memory." *Id*. However, the records also indicated that the decedent had some improvement: "The records also reflect that Florene's condition improved throughout August and September 2011, that she practiced journaling and used calendar aids to help with her short-term memory problems, and that, by September 2011, she was no longer considered 'homebound.' A notation on a record from September 23, 2011, states, 'vascular dementia stable at this time.'" *Id.* The new will was executed in January of 2012. Medical records from mid-2012 indicated that the decedent's condition worsened and that she was having hallucinations. Multiple witnesses testified that during this entire time period that the decedent did not have mental competence to understand the complexities of a will. However, the applicant son testified that she did have competence in January of 2012. He admitted that she had mental competence issues before that time, but that she had improved and was making her own decisions at the time of the will. The attorney that drafted the will also testified that the decedent had capacity. The court of appeals held that the evidence was sufficiently contradictory such that it could not overrule the trial court's decision to admit the will.

The court of appeals then discussed the undue influence ground. The court described the law thusly:

> The party contesting the execution of a will generally bears the burden of proving undue influence. "The contestant must prove the existence and exertion of an influence that subverted or overpowered the testator's mind at the time she executed the testament such that the testator executed a will that she otherwise would not have executed but for such influence." Not every influence exerted by a person onto the will of another is undue. An influence is not considered undue "unless the free agency of the testator is destroyed and a testament is produced that expresses the will of the one exerting the influence rather than the will of the testator."

Id. However, the court noted that a fiduciary relationship between the applicant and the decedent created a presumption of undue influence:

> A will contestant may raise a presumption of undue influence by introducing evidence that a fiduciary relationship existed between the testator and the will proponent. If the contestant's challenge to the will is based on a purported confidential or fiduciary relationship between the

> testator and the will proponent, the contestant bears the burden to establish such a relationship. "A power of attorney creates an agency relationship, which is a fiduciary relationship as a matter of law." Once the contestant presents evidence of a fiduciary relationship, a presumption of undue influence arises and the will proponent bears the burden to produce evidence showing an absence of undue influence. This presumption is rebuttable and shifts only the burden of production; it does not shift the ultimate burden of proof. Once evidence contradicting the presumption has been introduced, the presumption is extinguished, and the case proceeds as if no presumption ever existed.

Id.

The court noted that the decedent executed a power of attorney document at the same time as the new will. The court questioned whether this simultaneous execution would be sufficient to create a presumption of undue influence. In any event, the court held that the applicant had sufficient evidence of no undue influence so as to shift the burden on that issue back to the contestants:

> David presented both his testimony and Ferringer's testimony that Florene was the one who contacted Ferringer about revising her will in January 2012. Ferringer testified that Florene called her and discussed the changes that she wanted made to her will. She also testified that Florene told her that she did not "want any of her family to be involved with her decisions on what she was doing with her estate." The record contains no evidence that David requested that Florene change her will, or that he was otherwise involved in the drafting and preparation of the January 2012 will. Ferringer's testimony is evidence rebutting any presumption of undue influence. This evidence therefore extinguishes the presumption of undue influence arising out of any fiduciary relationship existing between Florene and David. We conclude that Randall, as the will contestant, retained the ultimate burden of proof to demonstrate undue influence.

Id. The court then concluded that the contestants did not meet their burden to prove that the decedent executed a will that she otherwise would not have executed but for the undue influence of the applicant. The court noted that evidence that the decedent was not in good physical or mental health and that she changed her will to cut out two of her three children was not sufficient to prove undue influence. The court held:

> At most, Randall presented evidence that due to Florene's mental and physical condition, David, as the person primarily responsible for Florene's care, had the opportunity to exercise undue influence over Florene. Mere opportunity to exercise undue influence is not enough; there must be evidence that that influence was actually exerted upon the testator with respect to the testamentary document in question. The record contains no

> evidence—beyond speculation on the part of Randall, Lorraine, and Louise—that David actually exercised undue influence over Florene in order to procure execution of the January 2012 will. There is no evidence in the record that David ever requested that Florene change her will from the April 2011 will—which included specific bequests for David but did not leave any portion of the residuary estate to him due to his obtaining full ownership of the Pflugerville property—to the January 2012 will, which left the entirety of Florene's estate to David. Furthermore, there is no evidence that David played any role in Florene's decision to change her will or in preparation of the January 2012 will. As stated above, both David and Ferringer testified that Florene was the one who contacted Ferringer about changing her will. David was not present at the time or at the time of the new will's execution. Considering all the evidence in a neutral light, we conclude that the probate court's implied finding that no undue influence occurred in connection with execution of the January 2012 will was not against the great weight and preponderance of the evidence.

Id. The court of appeals affirmed the trial court's judgment admitting the contested will to probate.

E. Administrator Of An Estate Has The Power To Seek The Partition Of Community Property

In *Estate of Tillotson*, an administrator of a decedent's estate filed a turn over motion to have the decedent's husband turn over the decedent's community property interest in certain accounts. No. 05-20-00258-CV, 2021 Tex. App. LEXIS 2097 (Tex. App.—Dallas March 18, 2021, no pet.). After the trial court granted the motion, the surviving spouse appealed. The court of appeals first held that the administrator had the power to file a motion to seek the partition of community property:

> The Estates Code provides that at any time after the first anniversary of the date original letters testamentary or of administration are granted, an executor, administrator, heir, or devisee of a decedent's estate, by written application filed in the court in which the estate is pending, may request the partition and distribution of the estate. *See* Est. § 360.001(a). The Estates Code further provides that if an intestate deceased spouse is survived by a child, the deceased spouse's undivided one-half interest in the community estate passes to the deceased spouse's children. *See id.* § 201.003… Accordingly, we conclude Hoyl in her capacity as administratrix could request partition of the community property and that the trial court did not err by granting Hoyl's request to partition community property.

Id. The court discussed that Estates Code section 360.253(a) allows a surviving spouse to seek a partition, but holds that it does not make that right an exclusive one to the surviving spouse.

The surviving spouse also argued that he was entitled to maintain possession and control over all community property that was legally under his management during the marriage. The court disagreed and noted that the Estates Code provides that the surviving spouse is entitled to retain possession and control of the community property that was legally under the sole management of the surviving spouse during the marriage and exercise over that property any power authorized by the Estates Code *if there is no administration pending on the deceased spouse's estate*. *Id*. (citing Tex. Est. Code § 453.009(b)). The court held that that section only applies when there is no administration pending and that the trial court did not err in ordering the surviving spouse to turn over amounts related to the Rollover IRA, Roth IRA, and Fidelity individual stock account. *Id*. The court of appeals affirmed the trial court's order in part.

F. Court Finds That Party Lacked Standing In A Probate Proceeding Where She Was Not An Informal Spouse

In *In re Estate of Pandozy*, a woman attempted to intervene in a probate proceeding claiming that she was the informal spouse of the decedent. No. 05-19-00755-CV, 2021 Tex. App. LEXIS 1265 (Tex. App.—Dallas February 22, 2021, no pet.). The trial court heard evidence and ruled that she was not an informal spouse, and the woman appealed. The court of appeals first discussed the standards for proving an informal marriage:

> As the proponent of the marriage, Gonzalez bore the burden to prove by a preponderance of the evidence that she and Pandozy were informally married. Specifically, Gonzalez was required to prove: (1) she and Pandozy agreed to be married; (2) after the agreement, they lived together in Texas as spouses; and (3) and there represented to others that they were married. The existence of a common law marriage is a question of fact to be resolved by the fact finder.

Id. The court of appeals then reviewed the evidence and held that although the decedent's girlfriend presented some evidence relevant to the elements of an informal marriage, the evidence was contradicted and not sufficient to conclusively prove as a matter of law all vital facts in support of the existence of an informal marriage. Importantly, the court noted:

> Although Gonzalez alleged that she and Pandozy discussed marriage in around 2009, she offered no evidence that the discussion ever culminated in an agreement to be married. At most, Gonzalez's testimony describes an agreement to get married at some point in the future, not an agreement to be married. This distinction is significant. The agreement-to-be-married element requires proof of an intent to create an immediate and permanent marital relationship and that the couple did in fact agree to be husband and wife. There is no such evidence here.

Id. The appellate court affirmed the trial court's order.

G. Courts Rule On Jurisdictional Issues Involving Probate Orders

One of the most difficult areas for probate litigation is determining when a party has an order that is appealable. There have been several recent cases that discuss this important area of probate litigation. In *In re Estate of Mims*, a party attempted to appeal an order denying his motion to remove an executor. No. 06-21-00005-CV, 2021 Tex. App. LEXIS 1650 (Tex. App.—Texarkana March 4, 2021, no pet.). The court of appeals dismissed the appeal for lack of jurisdiction. Regarding general principals of finality, the court stated:

> "It is well settled that appellate courts have jurisdiction over final judgments and interlocutory orders made appealable by statute." "A judgment is final for purposes of appeal if it disposes of all pending parties and claims." "Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law." "Probate proceedings are an exception to the 'one final judgment' rule." "A final order issued by a probate court is appealable to the court of appeals." The Texas Supreme Court has adopted the following test to determine when a court order in a decedent's estate is final and appealable: "If there is an express statute, such as the one for the complete heirship judgment, declaring the phase of the probate proceedings to be final and appealable, that statute controls. Otherwise, if there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or parties not disposed of, then the probate order is interlocutory." There is no statute that declares an order refusing to remove an executor to be final and appealable.

Id. The court held that because this was an order denying a motion to remove an executor and because the trial court did not rule on requests for attorney's fees, the order was not final for appealable. Courts commonly hold that an unadjudicated claim for attorney's fees means that a judgment or order is not final, and this case uses that concept in the context of a probate order.

In *In the Estate of Harris*, a party appealed an order of a trial court order authorizing payment of an attorney ad litem's fees and terminating the ad litem's representation. No. 02-19-00333-CV, 2021 Tex. App. LEXIS 1632 (Tex. App.—Fort Worth March 4, 2021, no pet.). The court of appeals first held that the probate court's order was appealable: "There is not an express statute declaring a probate order authorizing payment of an attorney ad litem's fees or terminating the ad litem's representation to be final and appealable. But such an order concludes a discrete phase of the probate proceeding and has been held to be appealable under *De Ayala*." *Id*. The court then held that the probate court had authority to reappoint the ad litem even though an earlier order was appealable. The court held:

> Harris's reiteration of his plenary-power challenge demonstrates the lingering confusion surrounding the finality of appealable orders in the probate context. Specifically, Harris continues to rely on the understandable assumption that all appealable probate orders necessarily trigger the thirty-day expiration of plenary power under Rule 329b. This is not so. While probate proceedings are an exception to the one-final-judgment rule and may give rise to multiple appealable orders, such orders do not necessarily deprive the probate court of plenary power. Although an interlocutory order issued in a probate proceeding may be sufficiently final to permit appellate review under De Ayala, the interlocutory order remains just that—interlocutory. The probate court retains authority over the probate proceeding—including the authority to modify its prior orders—despite the appealability of certain interlocutory orders that conclude discrete phases of the proceeding. Harris's challenge is thus misguided. Despite the appealability of the probate court's March 2018 order awarding Cooper attorney's fees and terminating her representation as attorney ad litem, the probate court did not lose plenary power to reinstate or to reappoint Cooper in her former role. We overrule Harris's first issue.

Id. This case presents an interesting issue in Texas. The case holds that even though a probate order is sufficiently final for appeal, that a trial court has continuing jurisdiction over the order until the entire probate proceeding is terminated. In Texas, probate proceedings are rarely terminated as parties normally just leave them open in case some future event occurs. So, can a party file a motion to modify an order that was entered twenty, thirty, or fifty years ago where the probate is still pending? This opinion would support a "yes" answer to that question.

H. Court Affirmed Trial Court's Reformation Of A Will To Omit The Word "Personal" From The Term "Property" In A Residuary Clause

In *Odom v. Coleman*, a brother and a sister sued each other regarding their father's estate. 615 S.W.3d 613 (Tex. App.—Houston [1st Dist.] 2020, no pet.). The dispute centered on whether the father's will should be reformed pursuant to Texas Estates Code Section 255.451(a)(3) that permits a court to modify or reform a will if "necessary to correct a scrivener's error in the terms of the will, even if unambiguous, to conform with the testator's intent," which must be established by clear and convincing evidence. *Id*. The will contained a residuary clause that devised "personal property" to the son and then to the daughter. A strict reading of the will meant that the decedent's real property would not be included in the residuary clause and would pass by intestancy. The son sued to reform the will to omit the word "personal" in the residuary clause. The trial court ruled for the son and the daughter appealed.

The daughter alleged that the will was unambiguous and had to be construed to mean that the residuary clause only applied to personal property. The court of appeals rejected this argument because "[r]eformation and modification cases involving written instruments are fundamentally different than construction cases, and, as a result, the same legal principles do not apply." Id. Moreover, "[r]eformation cases involve a party claiming that the instrument, as written, contains an error and does not reflect the intent of the party or parties executing it." *Id*. The court held that the trial court could hear evidence regarding the testator's intent in this reformation case:

> Significantly, Estates Code subsection 255.451(a)(3) expressly provides that a will may be reformed or modified to correct a scrivener's error in the will's terms, even if the will's terms are unambiguous. Because reformation is permitted even when the will's language is unambiguous, reliance on extrinsic evidence to determine whether the terms of the will accurately reflect the testator's intention may be necessary. While extrinsic evidence is admissible in will-construction cases only when a term is open to more than one construction, courts have considered extrinsic evidence in reformation cases in other contexts, such as reformation of trust instruments, even when the language in the instrument is unambiguous.

Id.

The court then reviewed the evidence and affirmed the trial court's determination that the will should be reformed. The testator had a hand written will that stated that he intended to "leave all my worldly goods, land, property accounts all that I own to my son Howard W. Coleman, on this day 6-15-2015. If anything happens to Howard W Coleman it will go to my daughter Nadine Odom then to Thomas B. Coleman." The court held that the attorney drafting the will made an error in adding the term "personal" to the term "property" in the residuary clause:

> We conclude that the handwritten will showed an intent by Mr. Coleman to covey both personal and real property to Howard. The Final Will prepared by Iverson did not "mirror" Mr. Coleman's handwritten will because it conveyed only Mr. Coleman's personal property. Thus, the evidence shows that the placement of the word "personal" before the word "property" in the Final Will was an error.

Id.

The court held that the attorney's mistake was a scrivener's error:

> The Estates Code does not define the phrase "scrivener's error." Generally, when a statute uses an undefined word, a court should apply the word's common, ordinary meaning. "We often look to dictionary definitions to shed light on the ordinary meaning of a statutory term."

> Black's Law Dictionary defines "scrivener's error" as a synonym for "clerical error." A "clerical error" is one "resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." Iverson's failure to delete the word "personal" from the residuary clause falls within the definition of "scrivener's error." As discussed, Iverson testified that he used a former client's will as a template to draft Mr. Coleman's will. Iverson stated that, to make the will conform to Mr. Coleman's "wishes," he had to delete "a lot of things" from the former client's will. Iverson intended to delete the word "personal" before the word "property" but failed to do so. Iverson testified that his failure to remove the word "personal" was "just a cut-and-paste mistake." The evidence showed that the error was not a result of Iverson's professional judgment or based on a decision that he or Mr. Coleman made to limit the property he devised to personal property. Instead, the evidence showed that Iverson's error in failing to delete the word "personal" resulted from an "inadvertence." See id. Thus, we conclude that the evidence and the plain and ordinary meaning of what constitutes a scrivener's error supports the probate court's determination that Iverson's failure to delete the word "personal" was a scrivener's error for purposes of Estates Code subsection 255.451(a)(3).

Id. The court also held that the trial court's determination was based on clear and convincing evidence. The court also rejected an argument that the son's claim to reform the trust triggered an in terrorem clause. The court held:

> Here, Howard's petition shows that he did not bring the action to attack the will's terms selected by Mr. Coleman. Instead, Howard brought the action to attack a term not selected by Mr. Coleman, which was frustrating Mr. Coleman's intent to dispose of all his property. The entire focus of the action was to ensure that Mr. Coleman's intent was preserved and given effect by reforming the will to conform with his intent. Thus, given the facts of this case, we hold that the probate court did not err in rejecting Nadine's claim that Howard forfeited his right to inherit under the will by violating the in terrorem clause.

Id. The court affirmed the trial court's judgment reforming the will to omit the word "personal" from the residuary clause so that the son was entitled to all of the decedent's property (personal or real) that was not otherwise disposed of in the will.

I. Court Held That An Heir Of An Estate Who Released All Claims Against The Estate Via A Settlement Agreement No Longer Had Standing To Bring Suit

In *In the Estate of Maberry*, the alleged common-law wife of an intestate decedent did not have standing to seek to remove the decedent's daughter as independent administrator because she was not an "interested person" following

her voluntary release of all her rights in the estate in a settlement agreement. No. 11-18-00349-CV, 2020 Tex. App. LEXIS 10447 (Tex. App.—Eastland December 31, 2020, no pet.). In the agreement, the alleged heir agreed to accept $2,000 "as consideration for compromise, settlement and release of all claim of [Harper] to any part of the Estate." The heir then contended that she did not release her right to receive an inheritance from the estate, she only released "claims" against the estate, and her right to receive an inheritance from the estate was not a claim against the estate. The court of appeals disagreed.

The court first discussed family settlement agreements:

> The settlement agreement and release executed by Harper and Bradshaw was in the nature of a family settlement agreement. The family settlement doctrine is applicable generally when there is a disagreement on the distribution of an estate and the beneficiaries enter into an agreement to resolve the controversy. Family settlement agreements are favored in law because they tend to put an end to family controversies by way of compromise.

Id. The court then held that he heir no longer had an interest in the estate as she released any such interest:

> The next step in our analysis is to determine the effect of the settlement agreement on Harper's status as an "interested person" under the Estates Code. Section 22.018(1) defines an "interested person" as "an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered." Prior to the enactment of Section 22.018, the Texas Supreme Court held that "[t]he interest referred to must be a pecuniary one . . . . An interest resting on . . . any other basis other than gain or loss of money or its equivalent[] is insufficient." The Texas Supreme Court recently reaffirmed the *Logan* requirement in *Ferreira v. Butler*:
>
> The statutory definition of interested person includes anyone "having a property right in or claim against an estate". We have reframed this standing test broadly as whether "the proponent[] possesse[s] a pecuniary interest to be benefited and affected by the probate of the will and one which would . . . be[] materially impaired in the absence of its probate."
>
> However, since the enactment of Section 22.018, Texas courts have differed in their analysis of whether a claimant who falls under the statutory categories of "devisee, heir, spouse, or creditor" must also have a pecuniary interest in order to have standing. A few courts have held that the plain language of Section 22.018 is that an heir, devisee, spouse, or creditor does not need to also have a pecuniary interest to have standing. Other courts have held that a spouse, devisee, or heir who no longer has

> a pecuniary interest in the estate has no standing in further probate proceedings. [T]he instant case involves a claimant who voluntarily released her rights to the estate. Harper lost standing by clearly and unambiguously agreeing to release any right or interest she had or may have had to the decedent's estate. Accordingly, she no longer constituted an interested person under the Estates Code. We overrule Appellant's sole issue on appeal.

Id.

J. Court Holds That Holographic Will Was Not Valid As There Was No Signature

In *In the Estate of Hohmann*, the decedent died without leaving an executed will, but his caretaker found a hand written document wherein the decedent stated his wishes for his property. No. 04-20-00237-CV, 2020 Tex. App. LEXIS 9216 (Tex. App.—San Antonio November 25, 2020, no pet.). The decedent's cousin filed an application to probate the hand written document as a written will, and an heir of the decedent filed an opposition. The trial court granted summary judgment for the opponent, and the applicant appealed.

The court of appeals held that generally, "a valid last will and testament must be: (1) in writing; (2) signed by the testator; and (3) attested by two or more credible witnesses." *Id*. "However, a document that does not meet the attestation requirement may be admitted to probate as a holographic will if it "is handwritten entirely by the testator" and the testator "affix[ed] a signature or initial to the document to execute the instrument." *Id*. The applicant contended "the handwritten phrase "R. Hohmann Estate" in the body of the written instrument constitutes more than a scintilla of evidence that Raymond signed that document." *Id*. The court held that the hand-written document had not been signed and was not valid:

> Bobby notes that "Texas courts have been lenient concerning the location and form of a 'signature'" on a holographic will. "However, while the signature may be informal and its location is of secondary importance, it is still necessary that the maker intend that his name or mark constitute a signature, i.e., that it expresses approval of the instrument as his will." Here, we see no evidence in the written instrument indicating that Raymond intended the phrase "R. Hohmann Estate" to serve as his signature. That phrase is used only once, in connection with a purported bequest to three named individuals. When the written instrument is viewed as a whole, the phrase "R. Hohmann Estate" bears no apparent connection to any of its other provisions. Because nothing in the written instrument indicates the phrase "R. Hohmann Estate" expresses Raymond's approval of that document as a whole, these facts are distinguishable from the authority upon which Bobby relies.

Id. (internal citations omitted).

K. Court Affirmed Finding That An Applicant Was Not Equitably Adopted Where There Was No Evidence Of An Agreement To Adopt The Applicant

In *In re Estate of Hines*, the trial court held that an applicant was not equitably adopted by the decedent in an heirship proceeding. No. 06-20-00007-CV, 2020 Tex. App. LEXIS 8000 (Tex. App.—Texarkana July 27, 2020, no pet.). The applicant appealed, and the court of appeals affirmed. The court first addressed the law on equitable adoption:

> Adoption by estoppel takes place "when [a person's] efforts to adopt [a child] are ineffective because of failure to strictly comply with statutory procedures or because, out of neglect or design, agreements to adopt are not performed." The doctrine of equitable adoption is not "the same as legal adoption" and does not contain "all of the legal consequences of a statutory adoption." Courts in Texas have "long" recognized the doctrine of equitable adoption. The Texas Estates Code recognizes the doctrine, defining "child" as including a person adopted by "acts of estoppel." For example, a child has been adopted by estoppel "when a natural parent delivers a child into the custody of others under an agreement between the parent and the custodians that the child will be adopted, and thereafter the custodians and child live in relationship with that of parent and child." "In no case" has a court in Texas "upheld the adoptive status of a child in the absence of proof of an agreement or contract to adopt." The agreement may be oral. Adoption by estoppel must be proved by a preponderance of the evidence. Even though Texas recognizes the doctrine of equitable adoption, it has "done so only with caution and within certain well-defined boundaries." It exists to prevent "a situation where it would be inequitable and grossly unfair to the adopted child, who has performed services and rendered affection, for the adoptive parent or his privies to deny the adoption." Yet, adoption by estoppel is not a statutory doctrine. Instead, it is a judicially created equitable doctrine… [T]o establish that there was an agreement, Hilton was required to prove that Hines (1) executed "a statutory instrument of adoption in the office of the county clerk"; (2) attempted to complete the statutory adoption but failed "to do so because of some defect in the instrument of adoption, or in its execution or acknowledgment"; or (3) agreed with "[Hilton] to be adopted, or with [Hilton]'s parents, or some other person in loco parentis that he . . . would adopt [Hilton]."

Id. (internal citation omitted).

The court held that here was evidence that the applicant considered the decedent to be his father, that the decedent referred to him as his "son," and that

they spent a significant amount of time together. There was evidence to show that decedent and applicant presented themselves to the public as a family. Even so, the court held that there was evidence to support the trial court's decision as there was no evidence that the decedent had promised to adopt the applicant:

> The record established that Danny never entered into a written or oral agreement with Hines allowing Hines to adopt Hilton. Likewise, there was no evidence that Betty Jo agreed to Hines's adoption of Hilton. That said, there was some evidence that Hines had potentially intended to adopt Hilton sometime in the future. According to Hilton, Hines had discussed with him the possibility of adoption when he was younger, but no agreement was made at the time, and Hines and Hilton chose to put off the issue of adoption until a later date. Likewise, Petty testified that Hines told her that he wanted to adopt Hilton, but because of an issue regarding the possibility of Hilton's name being changed, the matter was dismissed. And contrary to Petty's initial testimony, she also said that Hines had told her that he did not "need a piece of paper to tell [him] who [his] kid [was] or tell [him] who [his] son [was]," which is evidence that Hines never intended to adopt Hilton. Regardless, in Hines's conversations with all of those witnesses, there was no evidence that Hines ever followed-up by actually entering into an agreement to adopt Hilton. Moreover, many of the witnesses testified that they had no knowledge of the existence of an agreement for Hines to adopt Hilton. Because there was some evidence to support the trial court's finding that no agreement to adopt Hilton existed between Hines and Hilton, or Hines and Hilton's parents, we find that the evidence was legally sufficient to support the trial court's finding.

Id.

L. Court Dismissed Appeal By Pro Se Individual Who Could Not Represent An Estate

In *Kankonde v. Mankan*, an attorney appealed the entry of an arbitration award on behalf of his clients, a doctor and his practice. No. 08-20-00052-CV, 2020 Tex. App. LEXIS 7040 (Tex. App.—El Paso August 31, 2020, no pet.). The attorney then withdrew, and the wife of deceased doctor then filed an appellant's brief. After providing time to obtain counsel, the court of appeals struck the brief and dismissed the appeal because a non-attorney could not represent an estate:

> Peggy Kankonde, a non-attorney acting pro se, filed an Appellant's Brief purportedly on behalf of Mutombo Kankonde (deceased) and East-Side Oncology Clinic, P.L.L.C. However, a pro se litigant who is not an attorney cannot file pleadings on behalf of an estate or a corporation; only an attorney may do that. *See In re Estate of Maupin*, No. 13-17-00555-CV, 2019 Tex. App. LEXIS 6321, 2019 WL 3331463, at *2 (Tex. App.—Corpus Christi July 25, 2019, pet. denied)(mem. op.)(citing cases holding that

> non-lawyer cannot appear pro se on behalf of an estate as independent executor and that an attorney must represent the interests of the estate); *Moore v. Elektro-Mobil Technik GmbH*, 874 S.W.2d 324, 327 (Tex. App.—El Paso 1994, writ denied)(corporation must be represented in Texas courts by an attorney on appeal).
>
> …
>
> In order to prosecute proceedings and make valid filings in this Court, the Estate and the Corporation must be represented by a licensed attorney. We have provided Appellants with the opportunity to obtain counsel. As of this date, Appellants remain unrepresented. Because the Estate and the Corporation have not obtained counsel despite notice from this Court via order that counsel was required, we will dismiss this appeal.

Id.

M. Court Reverses Receivership Order In Partnership Dispute Because The Probate Court Did Not Have Jurisdiction To Enter A Rehabilitative Receivership

In *In re Estate of Hallmark,* an executrix of an estate filed suit in probate court for declarations regarding a partnership and sued the other partners. No. 11-18-00187-CV, 2020 Tex. App. LEXIS 7063 (Tex. App.—Eastland August 31, 2020, no pet.). One partner filed a cross-claim against the other partner for mismanagement and sought a receivership, which was granted. The managing partner then appealed.

The court of appeals held that the probate court did not have jurisdiction to enter the receivership. The trial court's order held that it was awarding a receivership under the Texas Civil Practice and Remedies Code Chapter 64 and under the Texas Business Organizations Code. However, the Business Organizations Code provides that "[a] receiver may be appointed for a domestic entity or for a domestic entity's property or business only as provided for and on the conditions set forth in this code." *Id*. (citing Tex. Bus. Orgs. Code § 11.401). Because the partnership was a domestic entity, the receivership order had to stand, if at all, under the Texas Business Organizations Code.

The court then looked at the Texas Business Organizations Code and held that because the receivership order gave the receiver control over the entirety of the partnership's business, it was a rehabilitative receivership and not one for a specific asset. The court held: "the characterization of the receivership order as a rehabilitative receivership under Section 11.404 or a receivership for specific property under Section 11.403 is significant from a jurisdictional standpoint because a rehabilitative receivership can only be ordered by a district court." *Id*. Because the probate court did not have statutory jurisdiction under the Texas

Organizations Code to award a rehabilitative receivership, the court reversed the order.

N. Court Affirmed Finding That Testator Had Capacity To Execute A Will, Was Not Unduly Influenced, And That The Appointment of Co-Executors Was Appropriate

In *In the Estate of Flarity*, a son of the testator challenged the trial court's probating of a 2004 will and the appointment of two of his siblings, named in that will, as executors. No. 09-19-00089-CV, 2020 Tex. App. LEXIS 7536 (Tex. App.—Beaumont September 17, 2020, pet. denied). The contestant alleged that the testator did not have mental competence. The court of appeals disagreed. The court first addressed the standard for mental competency challenges:

> In reviewing evidence addressing a testator's capacity, we focus on the condition of the testator's mind on the day the testator executed the will. Under Texas law, whether a testator has the testamentary capacity hinges on the condition of the testator's mind the day the testator executed her will. Thus, the proponents of the will must prove that, when the testator signed the will, she could understand: the business in which she was engaged, the nature and extent of her property, the persons to whom she meant to devise and bequeath her property, the persons dependent on her bounty, the mode of distribution that she elected to choose among her beneficiaries, a sufficient memory so she could collect the elements of the business she wanted to transact and hold it in mind long enough to allow her to perceive the relationship between property and how she wanted to dispose of it, all so she could form reasonable judgments about doing those things.

Id. Applying those legal principals, the court held that the evidence was sufficient to support the trial court's finding that the testator had capacity. There was testimony from the two children that were executors that the testator knew what she was doing. The contestant relied on his own testimony that the testator suffered from recurring depression many times in her life, including 2004. The court held:

> But there is no expert testimony showing Paula was clinically depressed. There are not medical records in evidence that support Joe's claim. While Joe argues Paula was not being treated for her condition in 2004, he never established that she was suffering from depression that year, as the parties never developed evidence about whether Paula was or was not seeing doctors at any time for any reasons at a time relevant to the day Paula signed the will. Furthermore, even Joe and Becky never testified that Paula told them at any time in 2004 that she was being treated for depression.

Id. Further, the court held that the testator had a reason for her will and there was no evidence that the executors influenced her:

> Generally, the evidence admitted in the trial reflects that Paula chose to give her children a percentage share of her estate based on how much time they spent with her as she aged. Joe does not contend the evidence shows he spent more time with Paula than his siblings. Nor does he suggest that Paula miscalculated how much time he spent with her when compared with his siblings. Instead, Joe argues that Wes and Merrie obtained a larger share because they spent more time with her. That may be true, but that evidence does not show that Merrie and Wes used their influence to get Paula to change her will in a way that favored them during a period that Paula could not freely make that decision on her own.

Id.

Finally, the court of appeals affirmed the trial court's appointment of the co-executors. The court stated the legal standard as:

> When a testator nominates a person to be the executor of her will, the law requires the probate court to appoint that person to that office unless one of the enumerated exceptions in the Estates Code applies. The exceptions allow the probate court to choose someone else other than the person the testator named if the person the testator named renounces the appointment, or the evidence shows the person is "not qualified," statutorily disqualified, or "unsuitable" for the office. Since the Estates Code requires probate courts to appoint the person the testator nominated in her will absent one of the listed exceptions, Joe was required to prove in the trial that Wes and Merrie were not qualified, statutorily disqualified, or unsuitable for the office. Thus, since Joe is attacking an adverse finding on which he had the burden of proof in the trial, he "must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue." To do that, he must show the evidence before the probate court conclusively shows one of the enumerated exceptions to the provisions requiring probate courts to appoint the person the testator designated applies

Id. The court held that evidence from the contestant of hostility was not sufficient to show that the co-executors were not suitable. The court also held that the fact that one of the co-executors let her son live a home owned by the estate without the payment of rent was not a conflict as that could be viewed as a benefit to the estate (having someone protect and upkeep estate property) and that the co-executor was a part owner of the home and had the right to have her son live there without paying rent (in the absence of an objection co-owner). The court of appeals affirmed the trial court in all things.

O. Court Granted Mandamus Relief To Reverse A Probate Court's Order Transferring A Case To A District Court

In *In re McCown*, a county court had a contested probate matter, and a party filed a motion to assign a statutory probate judge and another party filed a motion to transfer the case to a district court. No. 10-20-00128-CV, 2020 Tex. App. LEXIS 6276 (Tex. App.—Waco August 10, 2020, original proceeding). After the county court entered an order transferring the case to the district court, the party seeking a statutory probate judge filed a petition for writ of mandamus.

The court of appeals first cited the applicable statute:

> (a) In a county in which there is no statutory probate court or county court at law exercising original probate jurisdiction, when a matter in a probate proceeding is contested, the judge of the county court may, on the judge's own motion, or shall, on the motion of any party to the proceeding, according to the motion: (1) request the assignment of a statutory probate court judge to hear the contested matter, as provided by Section 25.0022, Government Code; or (2) transfer the contested matter to the district court, which may then hear the contested matter as if originally filed in the district court.
>
> (b) If a party to a probate proceeding files a motion for the assignment of a statutory probate court judge to hear a contested matter in the proceeding before the judge of the county court transfers the contested matter to a district court under this section, the county judge shall grant the motion for the assignment of a statutory probate court judge and may not transfer the matter to the district court unless the party withdraws the motion.

Id. (citing Tex. Estates Code § 32.003 (a)-(b)). The court of appeals granted mandamus relief because the petitioner filed a motion to appoint a statutory probate judge prior to the entry of the trial court's order transferring the proceedings to the district court. The court held that "the trial court abused its discretion by its transfers and by not appointing a statutory probate court judge in these proceedings as the statute expressly requires." *Id*. The court also held that the petitioner did not waive his complaint by filing an answer in the district court after transfer. *Id*. Interestingly, the court of appeals did not discuss the inadequate remedy at law requirement for mandamus relief and granted mandamus solely due to an abuse of discretion.

P. What Did He Say? A Court Reverses A Statutory Probate Court's Order Because There Was No Record

In *Smith v. Malone*, parties litigated the propriety of certain transactions in an estate proceeding before a statutory probate court. No. 01-19-00266-CV, 2020 Tex. App. LEXIS 4622 (Tex. App.—Houston [1st Dist.] June 23, 2020, no pet.). At trial, the estate's representative asked for a record, but the court refused. After

there was an adverse judgment, the representative appealed and asserted, among other arguments, that the judgment must be reversed due to the failure of the court to make a transcript of the evidence. Then court of appeals agreed.

The court first discussed the general requirements for trial courts to make a record:

> Section 52.046(a) of the Government Code placed the obligation on Scott, not the probate court, to ensure that a court reporter recorded oral testimony. *See* Tex. Gov't Code § 52.046(a) (requiring an official court reporter to take full shorthand notes of oral testimony "on request"). An official court reporter must take full shorthand notes of oral testimony "on request." *Id*. § 52.046(a). As Smith notes, Section 52.046(d) of the Government Code creates an exception to the "on request" language found in 52.046(a). Subsection (d) mandates that a "judge of a county court or county court at law shall appoint a certified shorthand reporter to report the oral testimony given in any contested probate matter in that judge's court." *Id*. § 52.046(d).

The court then addressed whether this rule applied to statutory probate courts:

> The Estates Code defines the generic term "court" to include "a court created by statute and authorized to exercise original probate jurisdiction." Tex. Estates Code § 22.007(a)(2). The Code provides that the terms "county court" and "probate court" are synonymous and both include "a court created by statute and authorized to exercise original probate jurisdiction." *Id*. § 22.007(b)(2). The Estates Code defines a "statutory probate court" as "a court created by statute and designated as a statutory probate court under Chapter 25 [of the] Government Code. For purposes of this code, the term does not include a county court at law exercising probate jurisdiction unless the court is designated a statutory probate court under Chapter 25 [of the] Government Code." *Id*. § 22.007(c).
>
> [A] plain reading of these statutory provisions leads us to conclude it does [apply to statutory probate courts]. A statutory probate court is a court created by statute and authorized to exercise original probate jurisdiction. *See id*. §§ 22.007(c), 32.002(c). As such, a statutory probate court meets the definition of a "county court." *Id*. § 22.007(b)(2). And the Government Code directs that a judge of a "county court . . . shall appoint a certified shorthand reporter to report the oral testimony given in any contested probate matter in that judge's court." Tex. Gov't Code § 52.046(d)…

Id. The court concluded that the requirement of a court reporter was mandatory on the statutory probate court, and as the court did not have a reporter, the error required reversal.

Interesting Note: A party should always request a record for any evidentiary hearing. When no reporter's record is filed, a court of appeals must assume the evidence supports the trial court's ruling and summarily affirm. *Bryant v. United Shortline Inc. Assurance Servs*., 972 S.W.2d 26, 31 (Tex. 1998). So, if a party wants to challenge a trial court's ruling or judgment based on evidentiary complaints, it must present a record of the evidence to the court of appeals. This is why the *Malone* opinion is so important. If a statutory probate court could deny a party the right to a record, even when requested, then the court would effectively eviscerate any right of appellate review. A judge may like that, but it is not fair and not due process.

Further, a party wanting to challenge the trial court's ruling on an evidentiary matter should also request findings of fact and conclusions of law. When no findings of fact and conclusions of law are filed, a court of appeals must presume the trial court made all the necessary findings to support its judgment. *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989). This may seem a little counter-intuitive: why would a losing party want the trial court to explain why the party lost? I have had many attorneys (even smart ones) make this exact point. But, if the trial court does not enter findings, the appellate court will presume that the losing party lost on *all* issues of fact. So, express findings cannot make it any worse and likely will assist the losing party in some respect. It should be mentioned that a party has a right to findings and conclusions after a bench trial if the party properly preserves that right, which can be a little tricky. A party does not have a right to findings and conclusions after an interlocutory order, but a trial court can enter findings and conclusions after such an order and often does when requested. So, a party who wants to challenge an interlocutory order should also request findings and conclusions.

Q. Court Holds That Decedent's Residence Was Homestead That Was Exempt From Claims Against Her Estate

In *Caceres v. Kerri Grahamas Dependent Adm'r of the Estate of Alicia Maribel Procell*, decedent was survived by a minor child and her estate was insolvent. No. 14-18-00826-CV, 2020 Tex. App. LEXIS 4198 (Tex. App.—Houston [14th Dist.] May 28, 2020, no pet.). The trial court appointed a dependent administrator and approved the administrator's inventory, appraisement, and list of claims. The administrator had included the decedent's homestead on the estate's inventory and represented that the estate had a claim for the rental income from the homestead. The trial court overruled the objections of two of the children to the inventory, appraisement, and list of claims, and granted the administrator's motion to terminate the property's homestead protection and to subject it, and the income it generated, to the dependent administration.

On appeal, the appellate court disagreed with the trial court because one of the decedent's children was a minor when her mother died. The court held that the homestead remains exempt as a matter of law from the claims of the estate's

creditors and is not subject to administration. The court also held that title to the homestead vested in the decedent's four children upon her death; thus, rent due after her death belongs to the estate. The court discussed the law governing homestead and a decedent's minor children:

> [A]n application by a person authorized to act on the minor's behalf, the court must "set aside . . . the homestead for the use and benefit of . . . the minor children." This means that, with a few narrow exceptions not presented here, the homestead is not liable for the payment of any of the estate's debts. Unless one of the express exceptions applies, the homestead is not subject to administration. Instead, the decedent's children share "absolute title" to the homestead. Second, a trial court has discretion to permit a minor's guardian to "to use and occupy" the homestead under a court order. Third, the homestead may not be partitioned among the decedent's heirs for so long as the trial court permits the guardian of the decedent's minor children "to use and occupy" the homestead.

Id. The court held that the fact that the administrator included the homestead property in the inventory did not mean that it was presumptively homestead:

> Although there is case law holding that inclusion of real property in the administrator's inventory is prima facie evidence that the property is not a homestead, and thus, a homestead should not be included on the inventory, we cannot say that the inclusion of homestead property in the administrator's inventory is per se erroneous, because the Texas Estate Code appears to permit its inclusion. "Estate" is statutorily defined to include all of a decedent's property, and the homestead falls within that broad definition.

Id.

The court also disagreed with the trial court's conclusion that the minor's homestead's rights should have been terminated when she turned eighteen. The court held: "the homestead passed free of claims by or against the estate to the decedent's children upon their mother's death, and it continues to be exempt homestead property even though Jennifer is no longer a minor." *Id*.

The court reversed the trial court's orders and remanded for further proceedings.

R. Court Affirms Default Judgment Against A Foreign Corporate Fiduciary Because Service Was Proper Under The Texas Estates Code

In *United States Bank Nat'l Ass'n v. Moss*, U.S. Bank (USB) sought to vacate a default judgment in an underlying suit involving title to real property through a bill

of review based on allegedly improper service under the Texas Estates Code. No. 05-19-00223-CV, 2020 Tex. App. LEXIS 4030 (Tex. App.—Dallas May 21, 2020, pet. filed). In the underlying case, a home owner sued the lender, who was assigned the deed of trust as a trustee, alleging that the lender's claims were barred by the statute of limitations. After the trial court entered a default judgment for homeowner, the lender filed a collateral bill of review action to set it aside, claiming that service was not appropriate. The trial court granted summary judgment for the homeowner, and the lender appealed.

The court of appeals first discussed service of process under the Texas Estates Code and the Texas Civil Practice and Remedies Code:

> Under the Texas Estates Code, a foreign corporate fiduciary is defined as a "corporate fiduciary that does not have its main office or a branch office in [Texas]." Tex. Est. Code § 505.001. A foreign corporate fiduciary "may be appointed by will, deed, agreement, declaration, indenture, court order or decree, or otherwise and may serve in this state in any fiduciary capacity, including as: trustee of a personal or corporate trust." Tex. Est. Code § 505.003(a). A foreign corporate fiduciary must appoint the secretary of state as its agent for service of process and "[s]ervice of notice or process . . . on the secretary of state as agent for a foreign corporate fiduciary has the same effect as if personal service had been had in [Texas] on the foreign corporate fiduciary." Tex. Est. Code §§ 505.004, 505.005. "[T]he appointment of the secretary of state as the agent to receive service of process . . . is limited to matters related to an estate in which the foreign bank or trust company is acting as an executor, administrator, trustee, guardian of the estate, or in any other fiduciary capacity." Bank of N.Y. v. Chesapeake 34771 Land Trust, 456 S.W.3d 628, 635 (Tex. App.—El Paso 2015, pet. denied); see also Bank of N.Y. Mellon v. NSL Prop. Holdings, LLC, No. 02-17-00465-CV, 2018 WL 3153540, at *5 (Tex. App.—Fort Worth 2018 no pet.) (mem.op).
>
> The Civil Practice and Remedies Code provides that service may be made on a financial institution by "serving the registered agent of the financial institution; or if the financial institution does not have a registered agent, serving the president or branch manager at any office located in this state." Tex. Civ. Prac. & Rem. Code § 17.028(b). USB's status as a foreign financial institution is irrelevant to the statute's application. *See Bank of N.Y. Mellon v. Redbud 115 Land Tr.,* 452 S.W.3d 868, 871 (Tex. App.—Dallas 2014, pet. denied) (nothing in § 17.028 limits its application to Texas financial institutions).

Id. The court of appeals held that these two statutes do not conflict: "Both statutes permit service on the secretary of state, and § 505.005 applies specifically to foreign corporate fiduciaries when they are sued in that capacity." *Id.* The court then held that the lender was properly served by the secretary of

state and was negligent in not keeping its designee for receiving process updated.

Finally, the court held against the lender on three issues: it held that the plaintiff's pleading was sufficient to support service under the Texas Estates Code, service on the lender's registered agent (the Texas Secretary of State) was appropriate, and the Whitney Certificate from the Secretary of State was sufficient to show proper service. The court affirmed the trial court's summary judgment for the homeowner.

S. Court Held A Claim For An Heirship Proceeding Was Barred By Limitations Even Though A New Statute Provides For No Limitations For Heirship Proceedings

In *In the Estate of Trickett*, two petitioners filed an heirship proceeding to establish their status as the sole heirs and rightful owners of a royalty interest. No. 13-19-00154-CV, 2020 Tex. App. LEXIS 3949 (Tex. App.—Corpus Christi May 14, 2020, no pet.). Others opposed the application as they claimed the same interest from the decedent's husband's estate. The trial court ruled for the petitioners, and the opposing parties appealed. The court of appeals first held that the statute of limitations for heirship proceedings is four years. The court then held that the applicant's claim was barred because it accrued over forty years ago:

> [A]ny alleged legal injury of which the appellees now complain occurred in 1972 when Claralyn passed away and Claralyn's property vested in Robert. The deeds gave at least constructive knowledge that any interest appellees possessed in the property was at stake. However, appellees did not file suit until March 25, 2015, more than forty-two years after her death. We therefore conclude that appellees' claims are barred by the four-year statute of limitations.

Id.

Interesting Note: The residual four-year statute of limitations should not apply in cases moving forward because Section 202.0025 of the Texas Estates Code now allows an heirship proceeding to be filed at any point in time after the person's death. Tex. Est. Code Ann. § 202.0025. That statute did not apply to the case cited above because the decedent died before January 1, 2014. See Act of May 27, 2013, 83rd Leg., R.S., ch. 1136, § 62(f), 2013 Tex. Gen. Laws 2737, 2754. Instead, the court of appeals had to apply the statutes in force at the time of death. *See Dickson v. Simpson*, 807 S.W.2d 726, 727 (Tex. 1991).

IV. Business Divorce: Fiduciary Duties In Business Relations

A. Court Affirms Jury Finding That A Manager Did Not Breach Her Fiduciary Duties

In *Trinh v. Cent. River Healthcare Group*, a brother sued his sister over the management of a PLLC. No. 03-19-00393-CV, 2021 Tex. App. LEXIS 4542 (Tex. App.—Austin June 9, 2021, no pet. history). The brother claimed that the sister promised to pay him a salary, and she did not. The court of appeals affirmed the jury's finding that there was no such promise based on the sister's testimony that she did not remember making such a proposal, and even so: "evidence of a proposal does not prove an agreement." *Id*.

The brother also challenged the jury's finding that the sister complied with her duty by disputing that "the transactions in question were fair and equitable to Khiem . . . and 4. Loann [] placed the interests of Khiem [] before her own and did not use the advantage of her position to gain any benefit for herself at the expense of Khiem." The brother argued that he contributed more than a half million dollars to the business when the sister claimed to own 100% of it and that the sister required the brother to pay federal income tax on 5% of the company's profits most years, and on 50% of the profits one year while the brother received nothing in return. The jury heard testimony from the sister that Khiem may have forfeited whatever interest he had in CRHG. In October 2011, he emailed Loann: "I don't want to run the clinics. I am saving it before they collapse. Those are your clinics. I built them in the beginning for you. . . . I want you to take over without any headache. . . . Every investment in there is yours." Loann testified to the point of Khiem's email: "So basically he's willing to forfeit everything so that way I can come back and run and resuscitate the clinic. That to me means that everything is under my management, my care[]. The whole business is legally under my direction[]." She also testified that she understood this email to mean "that he's relinquished all his positions whether management, ownership, all investment. So it says every investment is yours."

Id. Further, regarding the taxes, the court noted:

> [T]he evidence does not support Khiem's assertion that Loann "required" Khiem to pay those amounts of federal income tax. Khiem testified that he and Loann were equally responsible for the preparation of the tax return, that he sent the tax documents to the tax advisor and relied on him to prepare the filings, that he signed the tax filings that indicated the profit attribution of 95% for Loann and 5% for Khiem for the relevant tax years (2005-2012) except the 2007 tax filing indicated a 50% split, and that he "wasn't interest[ed] in the profit [during] that period of time because there's no profit."

Id. The court affirmed the trial court's judgment and the jury's verdict for the sister.

B. Exiting Member of LLC May Still Owe Fiduciary Duties

In *Villareal v. Saenz*, two co-owners of a limited liability company sued each other regarding conduct surrounding a business divorce. 5-20-CV-00571-OLG-RBF, 2021 U.S. Dist. LEXIS 94183 (W.D. Tex. May 18, 2021). After the parties asserted allegations against each other, they entered into a release agreement. The parties agreed that "Saenz would assign his entire interest to ZroBlack LLC to Villarreal." After the release, Saenz refused to return certain property to the company. Villarreal sued for breach of fiduciary duty and other claims.

Saenz filed a motion to dismiss, and the district court magistrate judge recommended that the claims that arose before the release be dismissed, but recommended that the claims that arose after the release continue. Regarding Saenz's fiduciary duties after the release agreement was executed, the court stated:

> As discussed, any claim premised on Saenz's conduct as ZroBlack's CEO before the parties executed the Release is barred by the Release's plain terms. But Plaintiffs also argue that Saenz violated his fiduciary duties by maintaining dominion and control over ZroBlack's domain and email server to the company's detriment after the parties executed the Release. Citing case law on partnerships, Saenz contends that his fiduciary duties to ZroBlack ceased once he assigned his interest in the LLC to Villarreal. See Dkt. No. 41 at 21. But under Texas law, "[a] member of a limited liability company may not withdraw or be expelled from the company." Tex. Bus. Org. Code § 101.107. Further, "an assignor member does not cease to be a member merely by assigning the member's interest." Miller & Ragazzo, 13 Tex. Prac., Texas Methods of Practice § 59:2 (3d ed. 2021) (citing id. § 101.111(a)). At the same time, the Operating Agreement refers to an assignor as an "exiting member" without defining that term or discussing its implications. See Dkt. No. 33-3 at 9. Ultimately, Saenz hasn't addressed the interplay between Texas law on LLCs and the language in the Operating Agreement. Accordingly, on the present briefing, the Court can't conclude as a matter of law that Saenz didn't owe ZroBlack any fiduciary duties after he assigned his interest in the company to Villarreal.

Id.

C. Court Affirms Denial Of SLAPP Motion Regarding Partnership Divorce Suit

In *TSA-Tex. Surgical Assocs., L.L.P. v. Vargas*, one partner sued his other partners for various claims regarding the defendants attempt to squeeze the plaintiff out of the partnership. No. 14-19-00135-CV, 2021 Tex. App. LEXIS 1330 (Tex. App.—Houston [14th Dist.] February 25, 2021, no pet.). The defendants

filed a motion to dismiss under the Texas Citizens Participation Act (TCPA), and the trial court denied the motion. The defendants appealed.

The TCPA was enacted "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." *Id*. (citing Tex. Civ. Prac. & Rem. Code § 27.002). It does so by authorizing a party to file a motion to dismiss a legal action that "is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association." *Id*.

The court of appeals affirmed the denial of the motion to dismiss under the TCPA. The defendants argued that the plaintiff's claims were based on, related to, or in response to the exercise of free speech because the claims purportedly involve communications regarding the provision of medical services. The court of appeals disagreed:

> We do not agree that Vargas's claims are based on communications regarding the provision of medical services because the communications at issue relate to Vargas's withdrawal from the partnership and occurred after Vargas stopped practicing medicine. This case involves a private contract dispute affecting only the fortunes of the partners. The alleged representations were made to a limited business audience concerning a business dispute among the partners related to Vargas's withdrawal from the partnership. Because the statements are not relevant to a wider audience of potential patients, the statements were not made "in connection with a matter of public concern." The issues presented by this case are simply not a matter of public concern.

Id. The court of appeals also addressed whether plaintiff's claims were based on, related to, or in response to the exercise of the right of association. The exercise of the right of association is defined in the applicable version of the TCPA as "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." The court held that the communications did not constitute an exercise of the right of association:

> We have defined the word "common" in the TCPA to mean "`of or relating to a community at large: public.'" The only communications at issue in Vargas's claims are based on Vargas's allegations that appellants (1) breached the Partnership Agreement and breached their fiduciary duties by "making false statements and denying [Vargas] access to important records," (2) wrongfully assumed and exercised control over Vargas's partnership interest, (3) sought to deprive Vargas of his partnership interest, and (4) attempted to fraudulently induce Vargas "to surrender his stake in the venture below its proper value." These communications

> therefore are related to disagreements about Vargas's withdrawal from the partnership. These communications concern a private transaction between private parties, not a matter of "common interest," as we have held that expression is used in the applicable version of the TCPA. Accordingly, the communications do not constitute an exercise of the right of association protected by the TCPA.

Id.

D. Partnership Agreement Was Invalid Where It Was Entered Into Between A Fiduciary And Principal And Was Otherwise Unfair And The Principal Did Not Owe Fiduciary Duties As A Partner Where There Was No Enforceable Partnership

In *Adam v. Marcos*, an attorney and his client agreed to a joint venture/partnership. 620 S.W.3d 488 (Tex. App.—Houston March 18, 2021, pet. filed). The attorney sued the client for breaching the agreement. The trial court ruled for the client on the attorney's breach of the partnership agreement claim and a breach of fiduciary duty claim. The court of appeals affirmed. The court of appeals first held that the partnership agreement was presumptively invalid because the attorney owed fiduciary duties to the client when it was entered into:

> Contracts between attorneys and their clients negotiated during the existence of the attorney-client relationship are closely scrutinized. Because the relationship is fiduciary in nature, there is a presumption of unfairness or invalidity attaching to such contracts. The burden is on the attorney to prove the fairness and reasonableness of the agreement. Moreover, as a fiduciary, Marcos had the burden to establish that Adam was informed of all material facts relating to the agreement. Additional important factors in determining the fairness of a transaction involving a fiduciary include whether the consideration was adequate and whether the beneficiary obtained independent advice.

Id. The court of appeals held that the jury's finding of breach of duty by the attorney supported invalidating the partnership agreement: "Because the jury found that Marcos failed to fulfill his fiduciary duties to Adam in regard to the alleged partnership agreement, and the evidence supports that finding, the presumption that the contract was invalid applies. Thus, the trial court did not err in holding the agreement was invalid and unenforceable." *Id*.

The court of appeals then held that the client did not owe any fiduciary duties to the attorney and affirmed the trial court's judgment for the client on that claim:

> To recover on a breach of fiduciary duty claim, a plaintiff must prove that (1) a fiduciary relationship existed between the plaintiff and the defendant, (2) the defendant breached his or her fiduciary duty to the plaintiff, and (3) the defendant's breach resulted in an injury to the plaintiff or a benefit to

> the defendant. The only basis Marcos alleges for a fiduciary relationship in which Adam owes fiduciary duties to him is the partnership agreement. As discussed in the previous section, the alleged partnership agreement between Marcos and Adam was invalid and unenforceable. Fiduciary relationships do not arise from unenforceable contracts. Without a fiduciary relationship between Marcos and Adam, Adam could not be liable for breaching any fiduciary duties to Marcos; thus, the trial court did not err in granting a directed verdict on Marcos's breach of fiduciary duty claim.

Id. The court of appeals affirmed the judgment for the client.

Interesting Note: This case is an example of the risks involved with fiduciaries entering into business deals with their principals. Other examples of fiduciaries who may enter into transactions with principals are trustee/beneficiary, power of attorney agent/principal, and executor/beneficiary. Additionally, certain confidential relationships can lead to fiduciary duties. A fiduciary owes a principal a duty of loyalty and should look out for the principal's interests above the fiduciary's interests. Due to this, transactions between a fiduciary and principal are closely monitored by the courts, and there is a presumption that they are invalid. The fiduciary has the burden to prove that the transaction is fair. *Fitz-Gerald v. Hull*, 150 Tex. 39, 49, 237 S.W.2d 256, 261 (1951). *See also Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, 20 S.W.3d 692, 699 (Tex. 2000) (considering whether a release agreement could bar claims arising from a fiduciary relationship and holding that the presumption of unfairness or invalidity applied). To establish the fairness of a transaction between a fiduciary and his principal, relevant factors include: (1) there was full disclosure regarding the transaction, (2) the consideration (if any) was adequate, (3) the beneficiary had the benefit of independent advice, (4) the party owing the fiduciary duty benefited at the expense of the beneficiary, and (5) the fiduciary significantly benefited from the transaction as viewed in light of the circumstances in existence at the time of the transaction. *Jordan v. Lyles*, 455 S.W.3d 785, 792 (Tex. App.—Tyler 2015, no pet.); *Lee v. Hasson*, 286 S.W.3d 1, 21 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). For example, in *In re Estate of Miller*, the court held that the fiduciary failed to prove the fairness of a loan transaction between the principal and agent and that transaction was, therefore, a breach of fiduciary duty. 446 S.W.3d 445, 450 (Tex. App.—Tyler 2014, no pet.). So, before a fiduciary enters into a transaction with the principal, it should be very careful to: disclose all known facts about the transaction and the risks involved with same and the benefits that the fiduciary may gain from the transactions, ensure that the fiduciary pays fair consideration for the interest that it is obtaining, and make sure that the principal has independent counsel and advice. It is a good idea to enter into a written agreement between the fiduciary and principal that, in addition to other provisions, makes the required disclosures, provides that the consideration by the fiduciary is adequate and that the benefits are fair, provides that the

principal has obtained independent counsel, and provides that the principal is not relying on the fiduciary's duties to him or her regarding the transaction.

E. Court Held That Parties Did Not Form A Partnership Where Certain Express Conditions Precedent Were Not Met

Parties often begin a business together without thinking through all of the legal details that define their rights. When they eventually divorce, they need to resort to the language in agreements that they entered into and also rely on statutory and common-law principles. In one recent case, the court held that the parties' agreement's language on the requirements for the formation of a partnership will trump other legal theories. In *Anubis Pictures, LLC v. Selig*, entities sued a defendant for choosing not to proceed with them and working with directly with a film company. No. 05-19-00817-CV, 2021 Tex. App. LEXIS 1580 (Tex. App.—Dallas March 3, 2021, no pet.). The plaintiffs asserted a claim that they formed a partnership with the defendant, and that the defendant breached fiduciary duties by cutting the plaintiffs out of business deals. The trial court granted summary judgment for the defendant, and the plaintiffs appealed. Regarding the plaintiffs' breach of fiduciary duty claim, the court of appeals held:

> Anubis contends it presented evidence of the factors indicating the creation of a partnership under section 152.052(a) of the Texas Business Organizations Code. These factors are irrelevant, however, where the parties have agreed that no binding or enforceable obligations will be created unless certain conditions are met. Such an agreement to not be bound absent the specified conditions is ordinarily conclusive on the issue of partnership formation. In this case, Selig and Anubis agreed they were not obligated to work together on any transaction unless both parties signed a formal, written transactional contract. It is undisputed that this did not occur. Although performance of a condition precedent to forming a partnership can be waived, in determining whether such waiver has occurred, we consider only evidence directly tied to the condition precedent, and not the factors relevant to partnership creation set out in section 152.052(a). As discussed above, the evidence conclusively shows Selig did not waive her right to require a signed contract before being obligated to work with Anubis. Accordingly, Selig negated the creation of a partnership as a matter of law.

Id.

F. Court Found That There Was A Fact Question On Whether Officers Violated Fiduciary Duties By Obtaining A Side Bonus From A Purchaser When Negotiating A Sale Of The Company's Assets

A business divorce may mean that the owners need to sell the business or the business's assets. In the following case, some of the owners/officers took advantage of a sale transaction to benefit from that transaction at the expense of their co-owners. In *Rex Performance Prods., LLC v. Tate*, a company sued its former officers for breaching fiduciary duties related to the sale of the company's assets. No. 02-20-00009-CV, 2020 Tex. App. LEXIS 10465 (Tex. App.—Fort Worth December 31, 2020, no pet.). The company alleged that the officers intentionally drove down the price of the sale in order to obtain a separate bonus from the buyer. The defendants alleged that the plaintiff knew of the side bonus agreement and consummated the transaction anyway, thereby establishing a waiver or ratification. The trial court granted summary judgment for the defendants, and the plaintiff appealed.

The court of appeals discussed the fiduciary duties owned by officers and directors:

> Corporate officers and directors owe a fiduciary duty to the corporation that they serve. A corporate fiduciary is under an obligation not to usurp corporate opportunities for personal gain, and equity will hold him accountable to the corporation for his profits if he does so. The responsibility of the corporate fiduciary includes the dedication of his uncorrupted business judgment for the sole benefit of the corporation. As this court has noted before, it is without question that corporate officers and fiduciaries are "held 'in official action, to the extreme measure of candor, unselfishness, and good faith.'" The duty of loyalty dictates that a corporate officer or director must act in good faith and must not allow his personal interest to prevail over that of the corporation. Directors and officers of a corporation must make full disclosure of their personal interest in a transaction that they are negotiating for the corporation. A transaction in which a corporate fiduciary derives personal profit is subject to the closest examination, and the form of the transaction will give way to the substance of what actually occurred.

Id.

The court of appeals first addressed the duty to disclose, and held that there was a fact question on that issue. The court held:

> RPP did not have full knowledge of all information about the retention bonus agreements until after this lawsuit was filed. Considering the evidence in the light most favorable to RPP, whatever information RPP

> knew was learned only after the conduct by Tate and Cuffia had occurred and before the retention bonus agreements had been finalized… even assuming that RPP had some knowledge of the retention bonus agreements before it signed the asset purchase agreement, such knowledge does not bar a claim for breach of fiduciary duty. An after-the-fact disclosure of the facts that form the basis of a breach-of-fiduciary duty claim does not restore the parties to a position as if there had been no breach.

Id. The court also held that the defendants' conduct also violated other fiduciary duties, other than a duty to disclose, and that the defendants did not move for summary judgment on those other breach claims.

The court then addressed the defendants' ratification and waiver arguments. The court found that those were not proven as a matter of law because the sale transaction and the bonus transaction were separate transactions. The company approving the sale of the assets for a certain price did not preclude it from challenging the separate bonus transaction for the officers to which it did not consent. The court stated: "the retention bonus agreements were solely for the benefit of Tate, Cuffia, and two others. RPP neither agreed to nor accepted these agreements. In addition, only Pregis was responsible for paying the bonuses. Therefore, signing of the agreements by Tate, Cuffia, and Pregis cannot act as a waiver or ratification of RPP's rights." *Id*.

Finally, the court held that there was a fact question on whether the plaintiff suffered damages. There were emails that showed that the price for the assets went down due to the bonus agreement. In any event, the court held that damages were not necessary for the plaintiff to recover forfeiture or disgorgement relief. The court held:

> [A] party seeking forfeiture and equitable disgorgement need not prove damages as a result of the breach of fiduciary duty. To remedy a breach of fiduciary duty, courts may fashion equitable remedies such as profit disgorgement and fee forfeiture. As explained by the Texas Supreme Court: "A fiduciary cannot say to the one to whom he bears such relationship: You have sustained no loss by my misconduct in receiving a commission from a party opposite to you, and therefore you are without remedy. It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired." Courts may disgorge all ill-gotten profits from a fiduciary when a fiduciary agent usurps an opportunity properly belonging to a principal or competes with a principal. Even if a fiduciary does not obtain a benefit from a third party by violating his duty, a fiduciary may be required to forfeit the right to compensation for the fiduciary's work. "The main purpose of forfeiture is not to compensate an injured principal, even

> though it may have that effect. Rather, the central purpose . . . is to protect relationships of trust by discouraging agents' disloyalty." In its third amended petition, RPP pled for profit disgorgement or fee forfeiture due to Tate's and Cuffia's "many breaches of their fiduciary duties." By relying on these equitable theories, RPP was not required to show actual damages.

Id. The court reversed the summary judgment, in part, and remanded the case for further proceedings.

G. Bankruptcy Court Discussed The Fiduciary Duties Owed To A Limited Liability Company And Its Creditors By Its Manager

In *In re Silver State Holdings*, in a bankruptcy proceeding a trustee of a limited liability company sued its former manager for breach of fiduciary duty and another entity for conspiracy to breach fiduciary duty arising out of a sale of property owned by the company. No. 19-41579-MXM 26 LLC, ADVERSARY NO. 19-4043-MXM 7901, 2020 Bankr. LEXIS 3531 (N.D. Tex. Bankr. December 17, 2020). The court first found that the manager owed fiduciary duties to the company:

> The Texas Business Organizations Code does not directly address the duties a manager or member owes to an LLC, but duty-of-loyalty concerns appear to underlie statutory provisions addressing transactions with governing persons and renunciation of business opportunities. Provisions of the Business Organizations Code permitting governing persons (including managers and managing members of an LLC) to rely on various types of information in discharging a duty implicitly recognize that such persons are charged with a duty of care in their decision making. Finally, the Business Organizations Code provides that, to the extent managers or members are subject to duties and liabilities, including fiduciary duties, the company agreement may expand or restrict the duties and liabilities. Based on these statutory provisions, Morash's status as an agent of 7901, and the particular facts of this case, the Court finds and concludes that he owed fiduciary duties to the company.

Id. The court then discussed what those fiduciary duties entailed:

> The duty of loyalty holds officers and directors to an "extreme measure of candor, unselfishness and good faith," particularly where there is an interested transaction. Interested transactions include those in which officers or directors derive personal profit as well as those which deprive the corporation of an opportunity to profit. A transaction between a fiduciary's company and another company in which the fiduciary has a significant financial interest is also an interested transaction. In such a situation, an officer or director must not allow his personal interests to prevail over the interests of the corporation. "A director who diverts profits

> from the corporation in violation of his fiduciary relationship is personally liable even though the profits are acquired by an agency controlled by the director." The burden is on the officer or director to establish the fairness of the transaction.

Id. The court held that the manager breached his fiduciary duties by allowing a foreclosure to occur and a sale to a third party because the company had equity in the property and the sale was not for a fair value. The court also held that the buyer was liable for conspiring with the manager and was jointly liable for the damages.

However, the court held that the manager did not owe fiduciary duties to the company's creditors:

> Officers and directors of [an operating corporate debtor] have fiduciary duties to the corporation - not the corporation's creditors" under Texas law. The Court is aware of no reason the same rule would not apply to managers of LLCs in Texas. Even though 7901 faced financial difficulties, it was not yet a defunct company. Morash, therefore, owed duties to 7901 but not to 7901's creditors.

Id.

H. Court Holds That Purchaser Of Partnership Property Was Not Liable For Aiding And Abetting A General Partner's Breach Of Fiduciary Duty

In *Cohen v. Newbiss Prop.*, a limited partner sued a transferee of real property for aiding and abetting breach of fiduciary duty and conspiracy to breach fiduciary duty. No. 01-19-00397-CV, 2020 Tex. App. LEXIS 9190 (Tex. App.—Houston [1st Dist.] November 24, 2020, no pet.). While the limited partners were suing the general partner, the defendants/transferees bought the property. The trial court granted the transferees' motion for summary judgment, and the limited partners appealed.

The court of appeals held that "to prevail on his claim that the purchasers aided and abetted Dilick's breach of fiduciary duty, Cohen must show that (1) Dilick committed a breach of fiduciary duty to Cohen, (2) the purchasers knew that Dilick's conduct constituted a breach of his fiduciary duties, (3) the purchasers intended to assist Dilick in breaching his fiduciary duty, (4) the purchasers gave Dilick assistance or encouragement in his breach, and (5) the purchasers' assistance or encouragement was a substantial factor in causing the tort." *Id*.

The court of appeals affirmed the summary judgment on the aiding and abetting claim as there was not sufficient evidence to support multiple elements:

> In this case, it is undisputed that the purchasers were not involved in anything Dilick and or his related companies may have done before the sales. Cohen's only allegation is that the purchasers were aware of his dispute (and lawsuit) with Dilick before they purchased their properties. Cohen brought forth no evidence that either Sandcastle or NewBiss were aware of what Dilick intended to do with the proceeds from the sales. While the purchasers' knowledge of the underlying lawsuit between Cohen and Dilick might deprive them of a bona fide purchaser defense in a title dispute, such knowledge, without more, is no evidence that they intended to assist Dilick in committing a tort by diverting the proceeds from the sales for his personal use, assisted and encouraged Dilick in doing so, or that their actions were a substantial factor in Dilick's breach of his fiduciary duty. Because Cohen failed to come forth with evidence raising a genuine issue of material fact as to these three elements of his claim that the purchasers aided and abetted Dilick's breach of fiduciary duty, the trial court properly granted the purchasers' no-evidence summary judgment on this claim.

Id. The court also affirmed the dismissal of the conspiracy claim as there was no evidence of a meeting of the minds:

> We agree with the purchasers' argument that knowledge of the lawsuit between Cohen and Dilick is no evidence that there was any "meeting of the mind" between the purchasers and Dilick regarding Dilick's intention to breach his fiduciary duty to Cohen. … [w]hile the purchasers may have known about Dilick's breach of fiduciary duty to Cohen via the lawsuit, their only involvement was to pay fair market value for the properties. In this case, the underlying tort of breach of fiduciary duty was that Dilick sold the properties to pay off his own personal loan. However, there is simply no evidence that the purchasers had any knowledge about what Dilick intended to do with the proceeds once he sold the properties. In a civil conspiracy case, "the parties must be aware of the harm or wrong at the inception of the combination or agreement," or there is no meeting of the minds. "One 'cannot agree, either expressly or tacitly, to the commission of a wrong which he knows not of.'" Absent evidence that the purchasers knew that Dilick intended to misappropriate the proceeds of the sale for his own personal use, they cannot have, as a matter of law, intended to facilitate that wrong.

Id.

I. Court Addressed A Shareholder Derivative Suit Against Officers And Directors For Self-Interested Transactions, Misuse Of Company Assets, And Dereliction Of Duties

In *Roels v. Valkenaar*, a shareholder filed a shareholder derivative suit against former and current officers and directors of the company based on multiple

claims of breach of fiduciary duty. No. 03-19-00502-CV, 2020 Tex. App. LEXIS 6684 (Tex. App.—Austin August 20, 2020, no pet.). The defendants filed a motion to dismiss, and the trial court denied it. The defendants appealed, and the court of appeals reversed in part and affirmed in part.

The plaintiffs' first claim dealt with certain interested-direction transactions that were loans from the company. The court dismissed these claims because the evidence showed that regarding one transaction that there was director consent to the loan and regarding the other loans that there was not sufficient evidence of damages. The court stated:

> Self-dealing (i.e., an "interested transaction") may constitute breach of an officer's or director's fiduciary duty to the corporation. However, we need not determine whether the shareholders met their prima facie burden as to the element of breach because we conclude that they have not met the burden as to the element of damages. To prove the damage-to-plaintiff or benefit-to defendant element of a claim for breach of fiduciary duty based on self-dealing, a plaintiff must demonstrate that the fiduciary obtained a benefit for itself either at the expense of its principal or without equally sharing the benefit with the principal. While the shareholders have alleged in conclusory fashion that the loans contained "non-market terms" and have "disproportionately benefitted" Roels and Barshop, they have not identified any specific harm to the Company or benefit to the defendants as a direct result of the loans.

Id.

The court affirmed the denial of the motion to dismiss regarding the plaintiff's misappropriation of company resources claim as against one defendant. That defendant was an officer that inappropriately used company assets to do due diligence on a transaction:

> [W]e conclude that based on the above evidence it may be reasonably inferred that Roels pursued the acquisition with the intent that he benefit from the Company's expenditure of funds on due diligence, as he initially entered into the letter of intent on behalf of MBlock, brought the unsolicited proposal to the Company and advanced it (including restructuring the deal in MBlock's favor), voted against the proposal on behalf of the Company, and then closed on the deal on behalf of MBlock.

Id.

The court dismissed the plaintiffs' dereliction of duty claim due to the business judgment rule. The court stated:

> In Texas, the business judgment rule generally protects company officers and directors for alleged breaches of duties that are based on actions that are negligent, unwise, inexpedient, or imprudent if the actions were "within the exercise of their discretion and judgment in the development or prosecution of the enterprise in which their interests are involved." In contrast, "an officer or director's breach of duty that would authorize court interference 'is that which is characterized by ultra vires, fraudulent, and injurious practices, abuse of power, and oppression on the part of the company or its controlling agency clearly subversive of the rights of the minority, or of a shareholder, and which, without such interference, would leave the latter remediless.'" Essentially, the business judgment rule, as pronounced long ago by the supreme court in Cates and reaffirmed more recently in Sneed, operates at this stage of a lawsuit as a requirement that a plaintiff plead more than "mere mismanagement," neglect, abuse of discretion, or unwise and inexpedient acts to state a cause of action… Because the shareholders have not identified clear and specific evidence of conduct by Pabst that does not fall within the business judgment rule, we conclude that the trial court should have granted his motion to dismiss as to the shareholders' "dereliction of duties" claims.

Id.

J. Court Correctly Dismisses Breach Of Fiduciary Duty Suit Against Employee For Reporting Owner's Criminal Behavior

In *Keel Recovery, Inc. v. Tri City Adjusters, Inc.,* a company sued its former employee for breach of fiduciary duty related to reporting certain alleged criminal activity related to the repossession of vehicles. No. 05-19-00686-CV, 2020 Tex. App. LEXIS 7273 (Tex. App.—Dallas September 4, 2020, no pet.). The defendants filed a motion to dismiss, which was denied, and they appealed. The court of appeals rendered that the trial court should have dismissed the plaintiff's claim as against the former employee:

> Specifically, while Arion may have had a fiduciary duty to her employer, TCA, that does not mean she owed any fiduciary duty to Peters as owner of TCA. Arguably, to the extent Arion owed TCA a fiduciary duty, that duty was fulfilled by reporting Peters' criminal activity that could subject TCA to negative consequences.

Id. The court also held that without a breach of fiduciary duty claim, there could be no aiding and abetting breach of fiduciary duty: "Because plaintiffs failed to establish Arion breached her fiduciary duty, we further conclude plaintiffs failed to establish any of the other Keel defendants aided and abetted Arion in any such breach of fiduciary duty." *Id*.

K. Court Affirms The Equitable Forfeiture Of A Manager's Partnership Interest Due To Breach Of Fiduciary Duty And Discussed Interesting Jury Instruction Issues

In *Michael D. Heatley v. Red Oak 86, L.P. & Charles Johnson*, investors in a limited partnership sued the managing member for breach of fiduciary duty. No. 05-18-01083-CV, 2020 Tex. App. LEXIS 6592 (Tex. App.—Dallas August 17, 2020, no pet.). The jury found that the defendants owed a fiduciary duty, breached the duty, but that the plaintiffs did not incur any damages. The trial court then, after trial, entered an award of equitable forfeiture and awarded the plaintiffs over $250,000, which accounted for the defendants' total contributions to the partnership. The defendants appealed.

The defendants argued that the plaintiffs waived any right to equitable forfeiture by failing to submit a question as to the level of the defendants' intent in breaching duties. The court of appeals first discussed equitable forfeiture:

> A trial court may order fee forfeiture as equitable relief when normal damages measures may not adequately address a breach of fiduciary duty. In ruling on a request for forfeiture, a trial court must determine three elements: [1] whether a "violation is clear and serious, [2] whether forfeiture of any fee should be required, and [3] if so, what amount." In making that determination, the court must consider non-exclusive factors: "[t]he gravity and timing of the breach of duty"; "the level of intent or fault"; "whether the principal received any benefit from the fiduciary despite the breach"; "the centrality of the breach to the scope of the fiduciary relationship"; "any threatened or actual harm to the principal"; "the adequacy of other remedies"; and "[a]bove all" whether "the remedy fit[s] the circumstances and work[s] to serve the ultimate goal of protecting relationships of trust." These "several factors embrace broad considerations which must be weighed together and not mechanically applied." Thus, for example, "the 'willfulness' factor requires consideration of the [fiduciary's] culpability generally; it does not simply limit forfeiture to situations in which the [fiduciary's] breach of duty was intentional." Nor would "the adequacy-of-other-remedies factor . . . preclude forfeiture in circumstances where the principal could be fully compensated by damages." The Heatley parties correctly note that, in the fee-forfeiture context, "when contested fact issues must be resolved before equitable relief can be determined, a party is entitled to have that resolution made by a jury." And "a dispute concerning an agent's culpability—whether he acted intentionally, with gross negligence, recklessly, or negligently, or was merely inadvertent—may present issues for a jury."

Id. (internal citations omitted). The court then looked to whether the defendants had preserved their complaint about the missing findings on intent. The court held that the plaintiffs had the burden to plead, prove, and obtain jury findings on

fee forfeiture. The court state that Texas Rule of Civil Procedure 278 states that "[f]ailure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment." *Id*. The court held that the defendants waived their objection by failing to request any question on the plaintiff's claim or by failing to object to the omission:

> The Heatley parties argue that because there was a fact issue requiring jury determination on their level of intent or fault, the lack of a jury question and answer is fatal to the trial court's conclusion to order fee forfeiture. We cannot reverse on this basis because they neither objected nor submitted a question "in substantially correct wording." In the absence of a submitted question, an objection will preserve error where, as here, the party seeking reversal did not have the burden of proof with respect to the question at issue. Objections to a jury charge must be made "before the charge is read to the jury" and "must be specific, pointing out 'distinctly the objectionable matter and the grounds of the objection.'" "Failure to timely object to error in a jury charge waives that error." The Heatley parties did not tender a question related to fee forfeiture, addressing the level of intent with which they breached their fiduciary duties or specifically addressing any other *Burrow* factor. They did not object to the lack of such a question. Thus, we cannot reverse in their favor, as parties who failed to object to the absence of a jury question or to submit one at all.

Id. The court then reviewed the evidence and determined that it was sufficient to support the trial court's forfeiture award. The court held that the evidence supported the trial court's finding that the breach was serious as the defendants failed to disclose information that went the heart of the investment and also disclosed that same information to other investors. The court held that even though the evidence was conflicting, it supported a finding of intentional conduct by the defendants. The court then held that the fact that the plaintiffs were not damaged and that the defendants did not obtain an improper benefit were not dispositive:

> This argument ignores a central tenet of forfeiture: "The main purpose of forfeiture is not to compensate an injured principal . . . . Rather, the central purpose is to protect relationships of trust by discouraging agents' disloyalty. . . . or other misconduct." A "client need not prove actual damages in order to obtain forfeiture" for breach of fiduciary duty. And, "even if a fiduciary does not obtain a benefit . . . by violating his duty, a fiduciary may be required to forfeit the right to compensation for the fiduciary's work." Forfeiture punishes a breach of fiduciary duty and exists as an equitable manner of compensating principals in situations where strict legal analysis does not support traditional measures of damages. The "threatened or actual harm to a principal" is only one relevant factor to be considered, while the most important consideration, "[a]bove all," is

> whether "the remedy . . . fit[s] the circumstances and work[s] to serve the ultimate goal of protecting relationships of trust.
>
> And, contrary to the Heatley parties' argument, the jury's refusal to find unjust enrichment cannot prevent forfeiture in this case. Here, unjust enrichment required the jury to find they acted intentionally; forfeiture, as we have noted, can be based on less than intentional conduct. In any event, the Heatley parties acquired interests adverse to their principals, Johnson and Red Oak, "without a full disclosure," a betrayal of "trust and a breach of confidence."

Id. The court also affirmed the trial court's award of joint and several liability between the defendants based on knowing participation in the breach. The court of appeals held that the fact that the plaintiffs failed to obtain any jury findings on knowing participation was not important. The trial court's judgment was affirmed.

Interesting Note. This is a highly interesting case from a procedural standpoint. It appears that the plaintiffs went to the jury on actual damages, but the jury found that they had no damages and that the defendants were not unjustly enriched. So, the breach of fiduciary duty finding was somewhat meaningless at that time. The plaintiffs then went to the trial court after trial and sought the equitable forfeiture award based on the jury's breach of fiduciary duty finding so that they could recovery something. The trial court then evaluated the evidence and found that equitable forfeiture was appropriate and entered findings to support it.

First, the court of appeals should have properly discussed who should make the determination for equitable relief. The Texas Supreme Court held: "A jury does not determine the expediency, necessity, or propriety of equitable relief such as disgorgement or constructive trust." *Energy Co. v. Huff Energy Fund LP*, 533 S.W.3d 866 (Tex. 2017). However, "If 'contested fact issues must be resolved before a court can determine the expediency, necessity, or propriety of equitable relief, a party is entitled to have a jury resolve the disputed fact issues.'" *Id*. So, a jury decides fact issues that must be resolved before a trial court can award equitable relief. As one court recently held: "as a general rule, when contested fact issues must be resolved before equitable relief can be determined, a party is entitled to have that resolution made by a jury. *In re Troy S. Poe Trust*, No. 08-18-00074-CV, 2019 Tex. App. LEXIS 7838 (Tex. App.—El Paso August 28, 2019, no pet.) (reversing trial court's award of equitable relief where underlying fact issues needed to go to the jury). For example, the Texas Supreme Court reversed a trial court's award of profit disgorgement where the jury only found a revenue number and did not find the amount of profit made by the fiduciary defendant. *Energy Co. v. Huff Energy Fund LP*, 533 S.W.3d 866.

The *Heatley* court expressly stated that there was conflicting evidence on the factors for forfeiture relief. Those underlying fact issues had to go the jury, and

the trial court had no authority to resolve them. The court of appeals held that there were no forfeiture factors submitted to the jury. It would seem that this case should fall under Texas Rule of Civil Procedure 279. "Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived." Tex. R. Civ. P. 279; *Eagle Oil & Gas Co. v. Shale Expl., LLC*, 549 S.W.3d 256, 281 (Tex. App.—Houston [1st Dist.] 2018, pet. dism'd). Where a party fails to submit any element of its claim or affirmative defense, that claim or defense is waived unless the evidence conclusively establishes it under the law. *Gulf States Utils. Co. v. Law*, 79 S.W.3d 561, 565 (Tex. 2002); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222-23 (Tex. 1992); *Harmes v. Arklates Corp.*, 615 S.W.2d 177, 179 (Tex. 1981). The court of appeals should have reversed and rendered that the plaintiffs waived their right to forfeiture relief by failing to submit questions to support its claim.

The court of appeals in *Heatley*, however, held in a footnote that Rule 279 does not apply to equitable relief: "the jury never considers the "elements" of fee forfeiture; that inquiry is specifically reserved to the trial court in its equitable capacity, and thus Rule 279 has no operation here." *Michael D. Heatley v. Red Oak 86, L.P. & Charles Johnson*, 2020 Tex. App. LEXIS 6592, n. 4. But this ignores the fact that fact issues must be submitted to a jury before a trial court can award equitable relief.

Further, the court's conclusions on error preservation are suspect. Basically, the court of appeals held that the defendants had a duty to request that the plaintiff's claim for equitable relief be submitted in the charge or object to its omission from the charge to preserve error that there were no findings to support the trial court's equitable award. A party only has to request a question if it is a question upon which it has the burden of proof. Tex. R. Civ. P. 278. A party can object to the failure to submit a question if it is a question upon which the opposing party has the burden of proof. *Id*. If a claim is completely omitted, a party should not object to its omission because the other party waived the claim pursuant to Rule 279.

A party should object to the omission where the claim or defense is partially submitted. Tex. R. Civ. P. 279. As the Texas Supreme Court described: "[W]hen some but not all elements of a claim or cause of action are submitted to and found by a jury, and there is no request or objection with regard to the missing element, a trial court may expressly make a finding on the omitted element, or if it does not, the omitted element is deemed found by the court in a manner supporting the judgment if the deemed finding is supported by some evidence." *In re J.F.C*., 96 S.W.3d 256 (Tex. 2002). Where one or more elements of a claim or defense are submitted in the charge, then the party opposing the claim or defense can either request or object to preserve error as to the omitted element. *Morris v. Holt*, 714 S.W.2d 311 (Tex. 1986). As Rule 279 requires, the omitted element that a party desires to have implied must have been necessarily referable to elements that were submitted. Tex. R. Civ. P. 279. The necessarily

referable requirement is intended to give parties fair notice of, and an opportunity to object to, a partial submission. *Superior Trucks, Inc. v. Allen*, 664 S.W.2d 136, 144 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

In *Heatley*, the court should have analyzed whether the plaintiffs' forfeiture claim was partially submitted because the plaintiffs did submit a breach of fiduciary duty question. Were the fact questions involved in the forfeiture claim "necessarily referable" to the submitted breach of fiduciary duty claim? If so, then potentially the defendants waived an objection to the missing fact findings being made by the trial court, which the trial court expressly found against the defendants. If they were not "necessarily referable," then the defendants did not waive their complaint and the plaintiffs waived their claim. The court of appeals never addressed this issue, which is the real issue in the appeal.

L. Old College Friends Do Not Generally Owe Fiduciary Duties To Each Other

In *Gill v. Grewal*, the suit arose out of a failed business venture between old college friends. No. 4:14-CV-2502, 2020 U.S. Dist. LEXIS 104461 (S. D. Tex. June 15, 2020). Gill and Grewal attended college together in the late 1960s. After falling out of touch with each other for over thirty years, the two reconnected at a wedding. The day after the wedding, Grewal pitched Gill an entrepreneurial venture related to the healthcare industry. The parties then formed Healthema. After a dispute arose, Grewal sued his former friend for breaching fiduciary duties arising from the formation and operation of the business. Gill filed a motion for summary judgment, alleging that he did not owe any fiduciary duties to Grewal. The district court granted the summary judgment motion on this issue. The court stated:

> Apart from formal fiduciary relationships, Texas courts "also recognize an informal fiduciary duty that arises from 'a moral, social, domestic or purely personal relationship of trust and confidence.'" That being said, "[i]n order to give full force to contracts, [Texas courts] do not create such a relationship lightly." "It has long been recognized that not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship." "[I]n the context of a business transaction, to impose an informal fiduciary duty, the special relationship of trust and confidence must exist prior to, and apart from, any agreement made the basis of the suit." "Where the underlying facts are undisputed, determination of the existence, and breach, of fiduciary duties are questions of law, exclusively within the province of the court."
>
> Here, Grewal contends that he placed "'complete' trust in J. Gill based on their history of close friendship, and this high degree of personal trust was the reason he allowed J. Gill and S. Gill to maintain exclusive control over Healthema's bank account while he was in India." The extent of the personal relationship between J. Gill and Grewal is summed up in the

> affidavit by Grewal that accompanied his motion for summary judgment… Summarized, Grewal and J. Gill were college friends who kept in touch for a few years, then fell out of contact for thirty-five years. They reconnected at a wedding, and based upon a number of written contracts, Healthema was launched within two months of the duo reconnecting. J. Gill argues that these facts fall well short of creating a fiduciary duty, especially in light of the Supreme Court of Texas's statement that it "do[es] not create such a relationship lightly."
>
> The Court agrees. While we all hope that our old college friends hold us in high regard, few would expect these long-lost friends to make their interests subservient to our own, much less following a thirty-five-year break in communication. Yet "[t]he effect of imposing a fiduciary duty is to require the fiduciary party to place someone else's interests above its own." For that reason, the Supreme Court of Texas has declined to "impos[e] a fiduciary duty based on the fact that, for four years, [the parties] were friends and frequent dining partners." Moreover, "mere subjective trust does not . . . transform arm's length dealing into a fiduciary relationship." Therefore, "the fact that [Grewal] [completely] trusted [S. Gill] does not transform their business arrangement into a fiduciary relationship." For those reasons, the Court also grants J. Gill's motion for summary judgment on Grewal's breach of fiduciary duty claims.

Id.

M. Court Held That Manager Owed Limited Liability Company Fiduciary Duties And That A Derivative Action Could Still Be Pursued After The Company Dissolved

In *Katz v. Intel Pharma, LLC*, a minority member of a limited liability company sued a former manager for breach of fiduciary duty in a derivative action. No. H-18-1347, 2020 U.S. Dist. LEXIS 120389 (S.D. Tex. July 9, 2020). The defendant filed a motion for summary judgment, alleging that he did not owe any fiduciary duties, and even if he did, the minority member could not raise them after the company was no longer in existence. The federal district court denied the motion.

The court stated: "A derivative action provides 'a procedural pathway for a minority shareholder to sue on behalf of the company for wrongs committed against the company.'" *Id*. (citing *In re Murrin Bros. 1885, Ltd.*, No. 18-0737, 2019 Tex. LEXIS 1266, 2019 WL 6971663, at *4 (Tex. Dec. 20, 2019)). The court stated that it had not found a case expressly stating that under Texas law, an LLC's managing member owes the company fiduciary duties as a matter of law. "The Texas Business Organization Code is silent as to an LLC member's fiduciary duties, except to state that '[t]he company agreement of a limited liability company may expand or restrict any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person has to the company or to a member or manager of the company.'" Id. (citing Tex. Bus. Org.

Code Ann. § 101.401)). The court noted, however, that the cases support finding that "Suggs owed Intel Pharma fiduciary duties based on agency-law principles." Id. Further, the court noted:

> Intel Pharma's operating agreement also supports finding that Suggs, as its managing member, acted as the company's agent. The agreement provides that "[t]he Members, within the authority granted by the Act and the terms of this Agreement shall have the complete power and authority to manage and operate the Company and make all decisions affecting its business and [affairs]." The agreement does not "expand or restrict" fiduciary duties that Suggs owed to Intel Pharma.

Id. The court found, therefore, that the defendant did owe fiduciary duties as a manager to the company.

Regarding the defendant's argument that the plaintiff could not bring a derivative action where the company no longer existed, the court held:

> The record does not provide details of why Intel Pharma no longer exists. Katz's Second Amended Complaint alleges that in January 2017, the Texas Secretary of State revoked Intel Pharma's certificate of formation. Assuming that to be true, and that it caused a dissolution, Katz could still bring a derivative claim on the company's behalf. Under the Texas Business Organizations Code, a domestic business entity continues in existence for three years after termination or dissolution, for limited purposes. Tex. Bus. Org. Code Ann. § 11.356 (West 2006). One purpose is for "prosecuting or defending in the terminated filing entity's name an action or proceeding brought by or against the terminated entity." *Id*. § 11.356(a)(1). If the Texas Secretary of State revoked Intel Pharma's certificate and caused a dissolution, the company would continue to exist for three years for the purpose of having a derivative claim filed on its behalf. *See Gill v. Grewal*, No. 4:14-cv-2502, 2020 U.S. Dist. LEXIS 104461, 2020 WL 3171360, at *7 (S.D. Tex. June 15, 2020) (an LLC continued to exist for three years after dissolution for the purpose of a derivative suit). Katz sued in April 2018, less than three years from when the State allegedly revoked Intel Pharma's certificate of formation. (Docket Entry No. 1).

Id. Accordingly, the court denied the motion for summary judgment.

N. Companies Should Know When Their Customers Die: Court Rendered Judgment For An Estate Who Was Sued By An Annuity Company For Overpayments

In *In re Estate of Scott*, an annuity company sued a customer's estate for not reporting the death of his wife, which resulted in him receiving larger monthly payments after her death than he was entitled to under the contract. No. 04-19-

00592-CV, 2020 Tex. App. LEXIS 4059 (Tex. App.—San Antonio May 27, 2020, no pet.). The customer died in 2013, and the annuity company discovered the overpayments in 2014. In 2016, the annuity company filed suit against the customer's estate for the overpayments. Both parties filed summary judgment motions, and the trial court entered judgment for the annuity company. The estate appealed.

The court of appeals reversed and rendered for the estate. The court first addressed the annuity company's breach of contract claim. The court held that the contract did not expressly or impliedly require the surviving spouse to report the death of the first spouse. The court held:

> In sum, the annuity contract, taken as a whole, does not evidence an intent to impose an implied obligation on Harold to notify Principal of Emily's death or an implied obligation to return money Harold received in excess of the stated contract amount. Moreover, it is undisputed that this was Principal's contract. "In Texas, a writing is generally construed most strictly against its author and in such a manner as to reach a reasonable result consistent with the apparent intent of the parties." Principal, a sophisticated commercial enterprise, did not include express provisions requiring Harold to notify Principal of Emily's death or to return money received in excess of the stated contract amount. The annuity contract, as written, does not evidence an intent to imply these obligations. Because we conclude the annuity contract, taken as a whole, does not support imposition of an implied obligation on Harold to notify Principal of Emily's death or an implied obligation to return money Harold received in excess of the stated contract amount, Principal cannot show Harold breached the annuity contract.

Id.

The court then reviewed the annuity company's money-had-and-received claim. The court described the claim thusly: "Money had and received is an equitable doctrine designed to prevent unjust enrichment. To prevail on a claim for money had and received, the plaintiff need only prove that the defendant holds money which in equity and good conscience belongs to the plaintiff." Id. The court held that the claim was barred by the two-year statute of limitations as the annuity company did not file its claim within two years of discovering the overpayments.

Finally, the court rejected the annuity company's fraud by nondisclosure claim. To establish fraud by non-disclosure, "Principal must prove: (1) Harold deliberately failed to disclose material facts; (2) Harold had a duty to disclose such facts to Principal; (3) Principal was ignorant of the facts and did not have an equal opportunity to discover them; (4) by failing to disclose the facts, Harold intended to induce Principal to act or refrain from acting; and (5) Principal relied on the non-disclosure, which resulted in injury." Id. The court held that the annuity company had an equal opportunity to discover its customer's death:

> Principal had an equal opportunity to discover Emily's death. Principal had internal procedures in place to discover this very type of information. Angela Essick, Principal's corporate representative, testified that between 2001 and the present, Principal utilized a third-party company and the Social Security Master Index to provide it with a list of names and social security numbers of the deceased on a quarterly basis. Principal would compare these names and social security numbers with those of its annuitants. Principal failed to discover Emily's death through these channels because it never obtained Emily's social security number. Principal cannot rely on its internal oversight to claim it did not have an equal opportunity to discover Emily's death.

Id. Accordingly, the court dismissed all of the annuity company's claims and rendered judgment for the estate of the customer.

V. Potpourri Issues

A. Insurance Broker Does Not Ordinarily Owe Fiduciary Duties To A Client

In *Hitchcock Indep. Sch. Dist. v. Arthur J. Gallagher & Co*., a school district sued it insurance broker for failing to obtain insurance policies that did not have arbitration and choice-of-law clauses that favored New York. No. 3:20-CV-00125, 2021 U.S. Dist. LEXIS 57452 (S. D. Tex. February 26, 2021). According to the school district, the insurance broker "knowingly failed to disclose the burdensome and onerous arbitration provisions and choice of law clause[s] to [the school district]"; "misrepresented to [the school district] the nature, quality, and coverage(s) afforded under the Policies"; and "knowingly provided false and fraudulent information concerning the coverages under the Policies and the endorsements, exclusions[,] and provisions of the Policies." The school district alleged six causes of action against the broker, including breach of fiduciary duty, and sought more than $ 14 million in actual and punitive damages, plus an undetermined amount of attorney's fees, interest, and costs. The broker moved to dismiss the claims.

A magistrate judge recommended that the motion be granted on the breach of fiduciary duty claim:

> To put the fiduciary duty claim into context, Texas law views the fiduciary relationship as "an extraordinary one [that] will not be lightly created." There are two types of fiduciary relationships: (1) a "formal" relationship in which a duty arises as a matter of law (such as attorney-client, principal-agent, trustee-beneficiary, or between partners in a partnership); and (2) an "informal" relationship arising from a moral, social, domestic, or personal relationship called a "confidential" relationship. It is widely recognized that the relationship between an insurance agent and an insured does not give rise to a formal fiduciary duty. An informal fiduciary

> relationship "may arise where one person trusts in and relies upon another, whether the relationship is a moral, social, domestic, or purely personal one." To impose an informal fiduciary duty in a business transaction, however, "the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit." … The First Amended Complaint sets forth bare assertions, and nothing more, that a fiduciary relationship existed between HISD and Gallagher. The fact that Gallagher assisted HISD in procuring insurance in the past is insufficient, by itself, to give rise to a fiduciary relationship. There is nothing in the First Amended Complaint to suggest that the Gallagher-HISD relationship was anything more than a routine, arms-length business transaction. Gallagher's motion to dismiss this claim should be granted.

Id.

B. Court Holds That A Defendant Did Not Owe A Fiduciary Duty To An Affiliate's Licensee Because Its In-House Attorneys Did Not Have An Attorney/Client Relationship To The Plaintiff And There Was No Informal Confidential Relationship

In *Belliveau v. Barco, Inc.*, a licensor of intellectual property sued the owner of the licensee for breach of fiduciary duty related to the sublicensing to a third party. No. 19-50717, 2021 U.S. App. LEXIS 2489 (5th Cir. January 28, 2021). The district court dismissed the claim, and the plaintiff appealed. The court of appeals affirmed, holding that the defendant did not owe a fiduciary duty to the plaintiff.

The court of appeals described that there can be two types of fiduciary relationships, a formal and an informal relationship. The plaintiff alleged both in this case. He alleged that the defendant had an attorney/client relationship with him because its in-house counsel represented him in the sublicense transaction. Regarding this issue, the court stated:

> First, Belliveau asserts there was an implied attorney-client relationship between himself and Barco's in-house lawyers. "An agreement to form an attorney-client relationship may be implied from the conduct of the parties." "But whether the agreement is express or implied, there must be evidence both parties intended to create an attorney-client relationship—one party's subjective belief is insufficient to raise a question of fact to defeat summary judgment." In other words, courts "determine whether a[n] [attorney-client] contract can be implied using an objective standard . . . and . . . do not consider [the parties'] unstated, subjective beliefs." Belliveau alleges that two of Barco's in-house lawyers, Kurt Verheggen and Carolyn Vignery, represented him in sublicensing his intellectual property.

Id. The court disagreed, however, that the evidence supported such a relationship. The court noted that the plaintiff's affidavit merely reflected his subjective beliefs and otherwise was vague and conclusory. For example, the court noted: "Rather, the paragraph that Belliveau cites states that 'Barco employees, including its in-house lawyers, agreed to act at my direction on matters related to my IP.' As the district court held, Belliveau fails to explain what in-house lawyers acted at his discretion, or whether they did so with the intention of representing him in a legal capacity." *Id*. The court affirmed that there was no formal fiduciary relationship.

The court then turned to the plaintiff's informal, confidential relationship argument and held:

> Belliveau argues, in the alternative, that there was an informal confidential relationship between himself and Barco. "Texas law does not recognize a fiduciary relationship lightly, especially in the commercial context." "It is well settled that 'not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship.'" Instead, "[t]o impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit."
>
> To show an informal fiduciary relationship, Belliveau alleges, again based on his declaration, that Barco ensured, for almost a decade, that High End met its contractual duty to commercialize Belliveau's IP on reasonable terms, and that Barco involved Belliveau in all sublicensing efforts. But, as the district court found, the 2008 High End License is the basis of Belliveau's suit, and he offers no evidence of a relationship predating that agreement. Indeed, the record suggests that Barco did not enter the picture until 2008, when it purchased all High End's shares. Belliveau has not demonstrated the existence of an informal confidential relationship with Barco.
>
> Still, Belliveau contends that the 2017 Barco Sublicense, not the High End License, is the agreement that should be used to measure the existence of a prior relationship. As noted, however, the test is whether the "special relationship of trust and confidence" existed prior to the "agreement made the basis of the suit." But the agreement that forms the basis of Belliveau's lawsuit is the High End License. After all, Belliveau sued Barco for breach of that agreement. Further, even if the court used the Barco Sublicense as the start of the relationship look-back period, Belliveau provides no evidence that his preexisting relationship with Barco consisted of anything more than arms-length transactions commencing with the High End License. The Texas Supreme Court has expressly rejected the use of such interactions to establish a relationship predating the challenged agreement.

> Belliveau reasons that the preexisting relationship rule does not necessarily apply here. Citing *Jacked Up, L.L.C. v. Sara Lee Corp*., 854 F.3d 797 (5th Cir. 2017), and *Schlumberger Tech. Corp. v. Swanson,* 959 S.W.2d 171 (Tex. 1997), he insists that courts only look to a preexisting relationship when "the plaintiff transacts with the defendant and then claims that the defendant betrayed his trust in that transaction." Belliveau correctly distinguishes *Jacked Up* and *Schlumberger* on the facts; both cases involved disputes between litigants over transactions to which they were both parties. By contrast, Belliveau and Barco had no contractual relationship. But this is a commercial case in which Belliveau is attempting to impose a fiduciary duty on Barco based on the parties' business relations. Belliveau's foundational theory of liability is that Barco should be held responsible for High End's contractual obligations. Belliveau can hardly argue that he does not need to show a prior relationship because the parties have no formal contractual relationship.

Id. The court affirmed the dismissal.

C. Court Holds That Bank Did Not Owe Fiduciary Duties To Depositor/Customer

In *Denson v. JPMorgan Chase Bank, N.A*., Sandra Denson went to her bank to deposit $730 when a $50 bill became temporarily stuck in the cash counting machine, causing the teller to miscount the amount of the deposit as $680. No. 01-19-00107-CV, 2020 Tex. App. LEXIS 9412 (Tex. App.—Houston [1st Dist.] December 3, 2020, no pet.). Denson then cursed at the teller, calling her "stupid" and a "dumb bitch," told her that she needed her "ass whipped," and suggested that the teller needed to be retrained and that the teller was "going to keep that $50 for lunch." The missing bill was discovered moments later, and Denson's account was immediately credited with the full deposit amount of $730. In light of this and previous documented incidents during which Denson verbally abused bank employees, the bank decided to end its relationship with Denson and close her accounts. Denson then sued the bank for numerous claims, including breach of fiduciary duty. The trial court awarded summary judgment for the bank, and Denson appealed. The court of appeals affirmed:

> [JPMorgan] asserted that it owed no duty to Denson regarding the accounts, which were general deposit accounts, because the relationship was only one of creditor/debtor. It further argued that the DAA authorizes the very actions that Denson claims constitute a breach of fiduciary duty. The burden shifted to Denson to come forward with more than a scintilla of evidence for each challenged element. Denson's summary judgment response and "reply in opposition" wholly failed to address JPMorgan's arguments. She did not address the challenged elements or point to any evidence supporting any of the challenged elements.… In her brief on appeal, Denson addresses only one of the challenged elements, stating in a conclusory manner that "the Bank owed Sandra Denson and Robert

> Denson a fiduciary duty." As noted above, however, Denson did not make this argument to the trial court below. Denson also bore a burden in the trial court to identify evidence creating a fact issue on each challenged element of her breach of fiduciary duty claim. Having failed to carry the burden, she may not now make the argument for the first time on appeal… Having failed to carry her burden in response to JPMorgan's no-evidence motion, the trial court did not err in granting summary judgment on her breach of fiduciary duty claim.

Id.

D. Court Holds That Insurers Do Not Generally Owe Fiduciary Duties To Insureds

In *Ec & Sm Guerra v. Phila. Indem. Ins. Co.*, an insured sued its property insurer for breach of fiduciary duty and other claims arising from the insurer's denying a claim for wind damage and disagreeing with an appraiser's report. SA-20-CV-00660-XR, 2020 U.S. Dist. LEXIS 196735 (W.D. Tex. October 21, 2020). The insurer filed a motion to dismiss, which the court granted. The court stated:

> Under Texas law, "there is no general fiduciary duty between an insurer and its insured." *Wayne Duddlesten, Inc. v. Highland Ins. Co*., 110 S.W.3d 85, 96 (Tex. App.—Hou. [1st Dist.] 2003, pet. denied). "Proving the existence of a fiduciary relationship requires more than just evidence of prior dealings between the parties, and subjective trust by one party in another does not establish the requisite confidential relationship." *Id*. "To impose an informal fiduciary relationship in a business transaction, the requisite special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit." *Id.*
>
> Plaintiff has not presented facts that establish a duty owed by PIIC prior to, or apart from the issue at suit. Plaintiff's allegations rely on the fact that the PIIC holds a percentage of funds from the premium to pay out claims. However, even accepting this as true, this does not establish that a relationship existed prior to or part from Plaintiff's and PIIC's insurance agreement. The Court cannot reasonably infer that Defendant owed Plaintiff a fiduciary duty because the Amended Complaint does not set forth any facts to establish the existence of an informal relationship with PIIC's agents outside of the policy. *Wayne Duddlesten, Inc*., 110 S.W.3d 85 at 96. Even if an insurance contract's mere existence created a fiduciary duty, the Amended Complaint's factual allegations do not give the Court any indication of how Defendant allegedly breached this heightened duty. Accordingly, the claim for breach of fiduciary duty must be dismissed.

Id.

E. A Rose By Any Other Name Would Not Smell As Sweet: Court Holds That Texas Does Not Have An Aiding And Abetting Breach Of Fiduciary Duty Claim

In *Hampton v. Equity Trust Co.*, an individual sold fraudulent investments to the plaintiff. No. 03-19-00401-CV, 2020 Tex. App. LEXIS 5674 (Tex. App.—Austin July 23, 2020, no pet.). The individual ran a Ponzi scheme and had recommended that the plaintiff open a retirement account with Equity Trust Company. Equity Trust Company was the custodian of the plaintiff's self-directed IRA, from which the plaintiff made the investments. After the scheme came a halt, the plaintiff sued the individual for various claims and Equity Trust Company of aiding and abetting breach of fiduciary duty. After a jury trial, the trial court entered judgment for the plaintiff against Equity Trust Company for aiding and abetting breach of fiduciary duty.

The court of appeals reversed, holding that Texas does not have a claim for aiding and abetting breach of fiduciary duty. The court first noted that "Absent legislative or supreme court recognition of the existence of a cause of action, we, as an intermediate appellate court, will not be the first to do so." The plaintiff alleged that Texas should adopt Section 876 of the Restatement of Torts, which states that a person can be held liable for the conduct of another that causes harm if the defendant: (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." *Id.* (citing Restatement (Second) of Torts § 876 (1979)). However, the court of appeals noted that the Texas Supreme Court has not adopted this provision. *Id*. (citing *Juhl v. Airington*, 936 S.W.2d 640, 643 (Tex. 1996); *First United Pentecostal Church of Beaumont v. Parker,* 514 S.W.3d 214, 224 (Tex. 2017) (reiterating that "this Court has not expressly decided whether Texas recognizes a cause of action for aiding and abetting")). The court concluded: "In the absence of recognition by the Supreme Court of Texas or the Legislature, we conclude that a common-law cause of action for aiding and abetting does not exist in Texas." *Id*. The court reversed and rendered for the defendant Equity Trust Company.

Interesting Note: The court held that there is no *aiding and abetting* breach of fiduciary duty claim in Texas because the Texas Supreme Court has not used those words. But what is clear is that there *is* a claim for *knowing participation* in breach of fiduciary duty in Texas. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942). The general elements for a knowing-participation claim are: 1) the existence of a fiduciary relationship; 2) the third party knew of the fiduciary relationship; and 3) the third party was aware it was participating in the breach of that fiduciary relationship. *Meadows v. Harford Life Ins. Co*., 492 F.3d 634, 639 (5th Cir. 2007).

Several courts have held that regarding knowing participation or aiding and abetting, that "A rose by any other name would smell as sweet." William Shakespeare, Romeo and Juliet. For example, in *Rhymes v. Filter Res., Inc*., the defendant argued that knowing participation could not support the jury's finding of tortious interference because there was no separate question on that issue. No. 09-14-00482-CV, 2016 Tex. App. LEXIS 10394 (Tex. App.—Beaumont September 22, 2016, no pet.). The court of appeals disagreed, and held: "Such findings are subsumed within the jury's conclusion that Industrial knew that interference with Filter's relationships was certain or substantially certain to occur as a result of Rhymes's conduct. The trial court was not required to submit a separate question on knowing participation." *Id*. Further, in *OrchestrateHR, Inc. v. Trombetta*, a former employer sued its prior employee for breach of fiduciary duty and other related claims arising from the former employee's competition with the former employer. No. 3:13-CV-2110-KS-BH, 2016 U.S. Dist. LEXIS 117986 (N.D. Tex. September 1, 2016). The former employer also sued other defendants for aiding and abetting the former employee in that breach of fiduciary duty. The defendants filed a motion for summary judgment, arguing that Texas does not recognize an aiding-and-abetting breach-of-fiduciary-duty claim. The district court denied this aspect of the motion, stating: "it is well-established under Texas law that third parties may be liable as a joint tortfeasor where they 'knowingly participate in the breach of the duty of a fiduciary.'" *Id*.

So, it is really hard to understand how the Austin Court of Appeals issued an opinion reversing and rendering that there is no aiding and abetting cause of action when there is a knowing participation cause of action. The plaintiff sued Equity Trust Company for assisting a Ponzi scheme criminal, presented evidence of same to a jury, and the jury returned a verdict that Equity Trust Company did assist in that breach of fiduciary duty. The court of appeals did not reverse the judgment because the evidence was insufficient or because there was some defense to the claim. Rather, it held that Texas does not have a claim specifically called "aiding and abetting." Actually, the court completely disregarded the concept of knowing participation and did not discuss how it is different from aiding and abetting or why the factual findings by the jury could not support that recognized claim.

F. Court Reversed Breach Of Fiduciary Duty Judgment Due To A Lack Of Damages

In *In the Interest of M.G.G*., an ex-husband was made a constructive trustee of stocks that he held in his retirement account for his ex-wife. No. 05-19-00777-CV, 2020 Tex. App. LEXIS 6291 (Tex. App.—Dallas August 10, 2020, no pet.). The divorce order stated that upon sale of the stock, the ex-husband should send the gross receipts from the sale to the ex-wife. When the ex-husband sold the stock, he paid taxes and sent the net receipts to his ex-wife. She sued the ex-husband for breach of fiduciary duty, and the trial court found for her and awarded her damages after a bench trial.

On appeal, the court of appeals described her claim as follows:

> The only theory of harm Ms. Gatewood advanced in the trial court is that, by withholding and paying taxes based on his own tax rate instead of hers, Mr. Gustafson forced her to pay taxes at a higher rate. The proper measure of damages for that harm, however, is the difference between the taxes she would have paid at her purportedly lower tax rate and the amount Mr. Gustafson paid the IRS. To prove Mr. Gustafson harmed her in that manner, Ms. Gatewood had to prove there was a disparity between their tax rates.

Id. The court held that there was no evidence in the record as to what the ex-wife's tax rate was and no evidence that it was lower than the rate paid by the ex-husband. Accordingly, the court reversed and rendered for the ex-husband.

G. Attorney For Lender Did Not Owe Any Fiduciary Duties To Borrower As An Escrow Agent

In *JTREO, Inc. v. Hightower & Assocs*., the buyer of a note and mortgage sued the attorney for the lender who facilitated the transaction by loaning money to the buyer for breach of fiduciary duty arising from the fact that there was no mortgage title policy endorsement as represented in the transaction. No. 03-19-00255-CV, 2020 Tex. App. LEXIS 4523 (Tex. App.—Austin June 18, 2020, pet.denied). The attorney filed a no-evidence motion for summary judgment, alleging that he did not owe a fiduciary duty. The trial court granted the motion, and the plaintiff appealed.

The court of appeals affirmed. The court noted that there was no written escrow agreement, and that the attorney was not a properly appointed escrow agent as a matter of law and did not owe any fiduciary duties as an escrow agent. The court stated:

> Furthermore, the evidence conclusively establishes that at all relevant times, Hightower served solely as Libertad's attorney with respect to the transaction, and JTREO acknowledged as much in a two-page disclosure that it signed. Texas courts have routinely held that no fiduciary duty exists between a lender (i.e., Libertad and its agent Hightower) and a borrower (i.e., JTREO). Moreover, as Libertad's attorneys, Hightower could not have held the funds in "escrow" for its own principal (or anyone else), because as long as the funds are in the possession and control of the principal's attorney, they remain subject to the control of the principal.

Id. Nonetheless, JTREO contends that Hightower "served as the closing/escrow agent for the sale of the Note" through its actions, despite the lack of a written escrow agreement and Hightower's undisputed role as Libertad's attorneys. The court disagreed because the attorney was not acting as a title company and

earned no fees for being an escrow agent. “We hold that Hightower did not owe a fiduciary duty to JTREO as a matter of law…” *Id*.

VI. Legislative Changes

A. New Texas Bill Would Provide Release Relief To Trustees Who Deliver Adequate Accountings Without A Timely Objection By The Beneficiary

A bill was submitted that would provide a trustee release relief for transactions described in an accounting where a beneficiary fails to timely object to the accounting and there is no fraud, intentional misrepresentation, or material omission. The bill provided:

> Sec. 113.153. BENEFICIARY’S APPROVAL OF ACCOUNTING.
>
> (a) This section does not apply to a trust that is under judicial supervision.
>
> (b) If a beneficiary does not object to a trustee’s accounting before the 180th day after the date a copy of the accounting has been delivered to the last known address of the beneficiary: (1) the beneficiary is considered to have approved the accounting; and (2) absent fraud, intentional misrepresentation, or material omission, the trustee is released from liability relating to all matters in the accounting.

The bill did not pass in this legislative session.

This provision is similar to the Uniform Trust Code, which provides: “A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding. A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.” Uniform Trust Code Sec. 1005.

This statute does not address whether a trustee can voluntarily provide accountings and trigger the release relief in this statute or whether the proposed statute would only apply when a beneficiary demands an accounting under the Texas Trust Code. For example, if routine account statements provide the information required by the Trust Code to be an accounting, does this trigger a beneficiary’s duty to review and object? It also does not address whether the release relief in the statute would apply when the beneficiary does not receive the accounting (lost in mail) or is incompetent to understand it (cannot read, cannot read English, cannot see, is mentally incompetent, etc.).

If passed in the future, there will likely be constitutional challenges to this statute. For example, there are public policy and constitutional limitations on lowering the statute of limitations in Texas (due process, due course of law, open courts, etc.). However, this proposed statute is similar to another Texas Statute that has passed constitutional muster. Texas Business and Commerce Code Section 4.406 creates a statute of repose and addresses a bank customer's duty to discover and report unauthorized signatures. If a bank sends or makes available a statement of account, "the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized." Tex. Bus. & Comm. Code §4.406(c). Further, "If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts." *Id.* If the customer fails to comply with these duties, then the customer is precluded from asserting against the bank that: 1) the customer's signature or any alteration on the item if the bank also proves that it suffered a loss by reason of the failure, and 2) the customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding 30 days, in which to examine the item or statement of account and notify the bank. *Id*. at §4.406(d). *See also Compass Bank v. Calleja-Ahedo*, 569 S.W.3d 104 (Tex. 2018).

B. Texas Legislature Extends The Rule Against Perpetuities To 300 Years For Trusts

The Texas Legislatures recently passed a bill that takes effect on September 1, 2021 that extends the rule against perpetuities to 300 years for trusts. The Texas Constitution prohibits perpetuities: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed . . . ." Tex. Const. art. I, § 26. A perpetuity is a restriction on the power of alienation that lasts longer than a prescribed period. *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 866-67 (Tex. 2018). The rule against perpetuities "should be a check on vain, capricious action by wealthy empire builders. But it should not be a constantly present threat to reasonable dispositions which slightly overstep a technical line." *Rekdahl v. Long*, Tex., 417 S.W.2d 387 (1967) (Steakley, J., dissenting) (citing W. B. Leach & O. Tudor, THE RULE AGAINST PERPETUITIES § 24.11 at 43 (1957)).

Historically, the rule against perpetuities renders invalid any will or trust that "attempts to create any estate or future interest which by any possibility may not become vested within a life or lives in being at the time of the testator's death and twenty-one years thereafter, and when necessary the period of gestation." *Foshee v. Republic Nat'l Bank of Dallas*, 617 S.W.2d 675, 677 (Tex. 1981) (citing *Kettler v. Atkinson*, 383 S.W.2d 557, 560 (Tex.1964)). The rule against

perpetuities also applies to non-charitable trusts, and a perpetual trust of indefinite duration is void. *See* Tex. Prop. Code § 112.036.

The Texas Legislature recently amended Texas Trust Code Section 112.036, and that section now provides that an interest in a trust must vest, if at all: (1) not later than 300 years after the effective date of the trust, if the effective date of the trust is on or after September 1, 2021; or (2) except as provided by Subsection (d), not later than 21 years after some life in being at the time of the creation of the interest, plus a period of gestation, if the effective date of the trust is before September 1, 2021. Tex. Prop. Code 112.036(c). The effective date of the trust is the date that the trust becomes irrevocable. *Id*. at 112.036(b).

A trust that has an effective date before September 1, 2021 may still have the 300 year period apply to it if the trust instrument provides that an interest in the trust vests under the provisions of Section 112.036 applicable to trusts on the date that the interest vests. Tex. Prop. Code 112.036(d). The new Section 112.036 does not address its interplay with Texas Trust Code Section 112.054(b-1), which was added in 2017. Acts 2017, 85th Leg., ch. 62 (S.B. 617), §§ 4, 5, effective September 1, 2017. Texas Trust Code Section 112.054(b-1) states:

> 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.

Tex. Prop. Code 112.054(b-1). Further, "the reformation of a trust under an order described by Subsection (b-1) is effective as of the creation of the trust." *Id*. at 112.054(c). A trustee or beneficiary who wants to continue a trust that predates September 1, 2021 and is about to terminate due to the rule against perpetuities could seek to reform the trust instrument to state that an interest in the trust vests under the provisions of Section 112.036. If a court were to grant that relief, then the trust would be reformed to its creation to comply with Section 112.036(d)'s exception that allows trusts that predate September 1, 2021 to have a 300 year rule against perpetuities period. Courts in other jurisdictions have reformed trusts to alleviate a rule against perpetuities violation. See, e.g., *In re Estate of Chun Quan Yee Hop*, 52 Haw. 40, 469 P.2d 183 (1970) (reformation of will to comply with common law rule against perpetuities by using equitable approximation); *In re Foster's Estate*, 190 Kan. 498, 376 P.2d 784 (Kan. 1962) (excision of part of will which would invalidate gift); *Carter v. Berry*, 243 Miss. 356, 140 So.2d 843 (Miss. 1962) (reduction of the age contingency); *Estate of Grove* (1977), 70 Cal.App.3d 355, 138 Cal. Rptr. 684; *In Re Ghiglia's Estate* (1974), 42 Cal.App.3d

433, 116 Cal.Rptr. 827; *Scott v. South Trust Asset Management Co*., 274 Ga. 523, 555 SE2d 732 (2001) (use of statute to reform trust to comply with rule against perpetuities); *May v. Hunt* (1981), Miss., 404 So.2d 1373; *Estate of Sophie D. Githens*, 1991 NYLJ LEXIS 7347 (N.Y. Sur. Ct. April 11, 1991) (reformed will under statute to comply with rule against perpetuities); *Edgerly v. Barker* (1891), 66 N.H. 434, 31 A. 900; *Berry v. Union National Bank* (1980), 164 W. Va. 258, 262 S.E.2d 766. Hoover v. Jolley, 45 Va. Cir. 309, 1998 Va. Cir. LEXIS 83 (Va. C.C. April 7, 1998) (used statute to reform will to comply with rule against perpetuities). These cases deal with courts reforming trusts to comply with the rule against perpetuities so that they do not fail. They do not deal with trusts that are in compliance with the rule and where the parties wish to reform trusts to extend them after a change in the rule against perpetuities. There are good arguments both for and against allowing such a reformation (certainly, the statutory change would not be anticipated by most settlors at the time that they created their trusts). However, there should be thought given to whether such a reformation, even if possible, may have negative tax implications.

Further, Section 112.036(e) provides that a trust may be reformed or construed to the extent and as provided by Section 5.043. Tex. Prop. Code 112.036(e). Section 5.043 deals with real and personal property interests and provides:

> (a) Within the limits of the rule against perpetuities, a court shall reform or construe an interest in real or personal property that violates the rule to effect the ascertainable general intent of the creator of the interest. A court shall liberally construe and apply this provision to validate an interest to the fullest extent consistent with the creator's intent.
>
> (b) The court may reform or construe an interest under Subsection (a) of this section according to the doctrine of cy pres by giving effect to the general intent and specific directives of the creator within the limits of the rule against perpetuities.
>
> (c) If an instrument that violates the rule against perpetuities may be reformed or construed under this section, a court shall enforce the provisions of the instrument that do not violate the rule and shall reform or construe under this section a provision that violates or might violate the rule.
>
> (d) This section applies to legal and equitable interests, including noncharitable gifts and trusts, conveyed by an inter vivos instrument or a will that takes effect on or after September 1, 1969, and this section applies to an appointment made on or after that date regardless of when the power was created.

Tex. Prop. Code § 5.043. *See also Yowell v. Granite Operating Co*., No. 18-0841, 2020 Tex. LEXIS 425 (Tex. May 15, 2020) (discussing reformation of

document to comply with rule against perpetuities); *Marsh v. Frost Nat'l Bank*, 129 S.W.3d 174, 177(Tex. App.—Corpus Christi 2004, pet. denied)(remanding trust case to trial court to consider reformation to alleviate rule against perpetuities issues). "Before the reformation as stated in [Section] 5.043 can occur, there must be an attempt to convey an interest in real or personal property that violates the rule against perpetuities." *Ball v. Knox*, 768 S.W.2d 829, 831–832 (Tex. App.—Houston [14th Dist.] 1989, no writ).

The statute does clarify that a settlor of a trust may not direct that a real property asset be retained or refuse that a real property asset may be sold for a period of longer than 100 years. Tex. Prop. Code 112.036(f). Accordingly, a party cannot use a trust to tie up real property for longer than 100 years.

Accordingly, this statutory change will have a drastic effect on the operation and termination of trusts in Texas as it changes Texas's historical treatment of trusts and the rule against perpetuities. Attorneys who draft wills and trusts need to be aware of this statutory change and discuss with settlors how long the settlors want a trust to last and when it should terminate. For those settlors that want long-term trusts, they now have the power to have them last 300 years after the effective date of the trust. Though not perpetual, 300 years is still a very long time.

VII. Receiverships in Trust and Estate Litigation in Texas

A. Introduction

A plaintiff in a trust or estate dispute often needs to seek a remedy before trial to protect it from immediate injury, to protect the assets made the basis of the suit, or to discover the real condition of the parties' relationship or business. There are different types of relief that a plaintiff can seek. For example, a plaintiff may seek a writ of injunction to prohibit or require certain conduct where the plaintiff proves the elements for injunctive relief. However, an injunction may not be sufficient where there is an ongoing business or relationship that requires regular management. In that circumstance, a plaintiff may need an independent third party to step in and manage the business or relationship until there is a trial on the merits of the parties' claims and defenses. A receivership takes the business or relationship out of the hands of the parties, and for that reason, it is a drastic remedy that should be carefully scrutinized and only granted when adequately proven.

A receiver is an "officer of the court, the medium through which the court acts. He or she is a disinterested party, the representative and protector of the interests of all persons, including creditors, shareholders and others, in the property in receivership." *Akin, Gump, Strauss, Hauer and Feld, L.L.P. v. E-Court, Inc*., No. 03-02-00714-CV,2003 Tex. App. LEXIS 3966, 2003 WL 21025030 (Tex. App.—Austin May 8, 2003, no pet.) (quoting *Security Trust Co. of Austin v. Lipscomb County*, 142 Tex. 572, 180 S.W.2d 151, 158 (Tex. 1944)). There are multiple

statutes in Texas that allow for receivership relief. The most commonly used statute allowing for receiverships is Texas Civil Practice and Remedies Code Chapter 64 that allows receiverships in specified types of cases and when permitted by the usages of equity. Tex. Civ. Prac. & Rem. Code § 64.001 et seq. There are other statutes that allow receiverships in various areas of law. For example, there are statutes that allow receiverships for trusts (Tex. Prop. Code 114.008), business entities (Tex. Bus. Orgs. Code § 11.403 et seq.), religious congregations (Tex. Civ. Prac. & Rem. Code § 126.001 et seq.), insurers (Tex. Ins. Code Art. 21.28), family law situations (Tex. Fam. Code §§ 6.502(5), 6.709(3)), and mineral interests (Tex. Civ. Prac. & Rem. Code §§ 64.091, 64.092).

The most prevalent statute used for receiverships in estate disputes is the Texas Civil Practice and Remedies Code Chapter 64 and the most prevalent statute for receiverships in trust disputes is the Texas Property Code Section 114.008. This article will address those statues and common law equity as a basis.

B. Receiverships for Estates: Texas Civil Practice and Remedies Code Chapter 64

"Chapter 64 of the Civil Practice and Remedies Code sets forth the circumstances under which a trial court may appoint a receiver." *Perry v. Perry*, 512 S.W.3d 523 (Tex. App.—Houston [1st Dist.] Dec. 13, 2016, no pet.) (citing Tex. Civ. Prac. & Rem. Code Ann. §§ 64.001 et seq.). Section 64.001 provides:

> (a) A court of competent jurisdiction may appoint a receiver: (1) in an action by a vendor to vacate a fraudulent purchase of property; (2) in an action by a creditor to subject any property or fund to his claim; (3) in an action between partners or others jointly owning or interested in any property or fund; (4) in an action by a mortgagee for the foreclosure of the mortgage and sale of the mortgaged property; (5) for a corporation that is insolvent, is in imminent danger of insolvency, has been dissolved, or has forfeited its corporate rights; or (6) in any other case in which a receiver may be appointed under the rules of equity.
>
> (b) Under Subsection (a)(1), (2), or (3), the receiver may be appointed on the application of the plaintiff in the action or another party. The party must have a probable interest in or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured.
>
> (c) Under Subsection (a)(4), the court may appoint a receiver only if:(1) it appears that the mortgaged property is in danger of being lost, removed, or materially injured; or (2) the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt.

> (d) A court having family law jurisdiction or a probate court located in the county in which a missing person, as defined by Article 63.001, Code of Criminal Procedure, resides or, if the missing person is not a resident of this state, located in the county in which the majority of the property of a missing person's estate is located may, on the court's own motion or on the application of an interested party, appoint a receiver for the missing person if: (1) it appears that the estate of the missing person is in danger of injury, loss, or waste; and (2) the estate of the missing person is in need of a representative.

Tex. Civ. Prac. & Rem. Code Ann. § 64.001.

Under Subsection (a)(1), (2), or (3), the receiver may be appointed on the application of the plaintiff in the action or another party. *Id*. at § 64.001(b). The party must have a probable interest in or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured. *Id*.

Section 64.001(a)(3) provides the court may appoint a receiver in an action between parties jointly interested in any property." *Hawkins v. Twin Montana, Inc.*, 810 S.W.2d 441, 444 (Tex. App.—Fort Worth 1991, no writ). Prior to the appointment of a receiver under subsection (a)(3), the trial court must find that the party seeking appointment of the receiver has "a probable interest in or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured." Tex. Civ. Prac. & Rem. Code Ann. § 64.001(b); *In re Estate of Martinez*, NO. 01-18-00217-CV, 2019 Tex. App. LEXIS 2614 (Tex. App.—Houston [1st Dist.] April 2, 2019, no pet.) (reversed receivership in estate case where there was no evidence that property was in danger of being lost, removed, or materially injured). However, the plaintiff does not have to plead or prove that the defendant is insolvent, which is a normal requirement for an equitable receivership. *Hawkins v. Twin Montana, Inc*., 810 S.W.2d 441, 444 (Tex. App.—Fort Worth 1991, no writ).

A court's order appointing a receiver does not impermissibly interfere with the independent administration of an estate. *See In re Estate of Trevino,* 195 S.W.3d 223, 226(Tex. App.—San Antonio 2006, no pet.); *Kanz v. Hood*, 17 S.W.3d 311, 315 (Tex. App.--Waco 2000, pet. denied) (noting district court has the power to appoint a receiver to assume management and control of estates in the process of independent administration); *Metting v. Metting*, 431 S.W.2d 906, 908 (Tex. Civ. App.--San Antonio 1968, no writ) (noting district court has power to appoint a receiver of an estate which is in the process of independent administration).

For example, in *In re Estate of Price*, Ray Price, a renowned country music singer and songwriter, died in 2013 and was survived by his wife and his biological son. 528 S.W.3d 591 (Tex. App.—Texarkana 2017, no pet.). Shortly before Price's death, and while he was in the hospital, he transferred most of his

assets to his spouse via various deeds and assignment documents. The spouse's sister, who was a secretary, drafted the various documents. The spouse and son filed competing motions to probate wills purportedly executed by Price, as well as competing will contests. The court appointed a temporary administrator, but almost all of the assets did not belong to the estate due to the last-minute transfers to the spouse. So, the son filed an application to appoint a temporary administrator as receiver over the assets purportedly transferred to the spouse in the month of Price's death. The son alleged that Price did not have the mental capacity to execute the documents. The application for the receiver argued that the spouse had possession and control over all of the contested assets and that she could sell them or "allow them to waste away as she is currently doing." *Id.* The trial court appointed a receiver to take possession of property subject to the will contests. The spouse alleged that Price had capacity to execute the transfer documents, and appealed that order.

The court of appeals cited to Section 64.001(a)(3) of the Texas Civil Practice and Remedies Code that provides that a court may appoint a receiver "in an action between parties jointly interested in any property." *Id*. The court of appeals determined that due to the contest to the transfers, the son had a showing of the requisite interest in the property. The court also determined that the trial court did not abuse its discretion in determining that there was a danger that the property would be lost, removed, or materially injured:

> The trial court heard evidence that Janie had disposed of, and believed she could dispose of, assets subject to the will contests and Clifton's petition to set aside the December 9 documents. In light of the pleadings and evidence presented in this case, we will not disturb the trial court's finding that property Clifton had a probable right or interest in was in danger of being lost, removed, or materially injured.

Id. Therefore, the court of appeals affirmed the appointment of the receiver.

In *In re Estate of Martinez*, an administrator sought and obtained a receiver to sell real estate that was subject to competing claims by the heirs. No. 01-18-00217-CV, 2019 Tex. App. LEXIS 2614 (Tex. App.—Houston [1st Dist.] April 2, 2019, no pet). On appeal, the court reversed the receivership as there was no evidence that the real estate was in danger of being lost, removed, or materially injured. The court noted:

> [T]he administrator relies on three categories of support for the appointment of a receiver. First, she relies on arguments made in pleadings and hearings and factual assertions in pleadings and motions. Second, she presumes that the trial court took judicial notice of its own records. Third, she relies on the judge's recollection of testimony adduced at a prior hearing in connection

> with another motion. None of this is legally competent evidence capable of supporting the appointment of a receiver.

Id. at *10-11.

In *Krumnow v. Krumnow*, the court of appeals reversed a receivership order in an estate and trust case where there was a personal representative and a trustee appointed to maintain the assets. 174 S.W.3d 820, 829-30 (Tex. App.—Waco 2005, pet. denied). The court stated: "both the trust property and the probate property were subject to management by a fiduciary--the trustee or the personal representative of the estate. Thus, we find that these facts do not justify the appointment, on the court's own motion, of a receiver to preserve the trust and probate property." *Id*.

In *Temple State Bank v. Mansfield*, the court relied on a predecessor statute to affirm a receivership order in a trust case, stating:

> We think when the trustee of a special fund held under an express trust not only refuses to execute the trust, but refuses to give any information to a joint owner of the fund as to its condition or as to where or in whose name it is held or deposited, it may be reasonably inferred that the fund is in danger of being "lost, diverted, misapplied, and put beyond the reach of plaintiff and of this court," and such allegation in the petition in this case, being a reasonable inference from the facts alleged, is not a mere conclusion of the pleader. The right to have a receiver appointed under any of the first three sections of the article above cited is a legal right not dependent upon the general rules of practice in courts of equity, and, when the facts alleged in a particular case as grounds for the appointment of a receiver bring the case within the provisions of either of these sections of the article, allegations and proof of insolvency of the defendant, inadequacy of legal remedy, or other equitable grounds for the appointment of a receiver, are not required to authorize such action by the court.

215 S.W. 154 (Tex. Civ. App.—Galveston 1919, writ dismissed w.o.j.). *See also Carroll v. Carroll*, 464 S.W.2d 440 (Tex. Civ. App.—Amarillo 1971, writ dism'd) (affirming receivership in estate case where property was in jeopardy and family had dissention); *General Ass'n of Davidian Seventh Day Adventists, Inc. v. General Ass'n of Davidian Seventh Day Adventists*, 410 S.W.2d 256, 260 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.) (proper to appoint receiver to take charge of and dispose of trust corpus when trust fails).

Under Subsection (a)(6), a "court of competent jurisdiction may appoint a receiver" in any case "in which a receiver may be appointed under the rules of equity." Tex. Civ. Prac. & Rem. Code § 64.001(a)(6). Courts have affirmed receivership orders under this provision. *A-Medical Advantage Healthcare Sys.,*

Associated v. Shwarts, No. 10-18-00050-CV, 2019 Tex. App. LEXIS 11278 (Tex. App.—Waco Dec. 31, 2019); *Pajooh v. Royal W. Invs. LLC*, 518 S.W.3d 557, 2017 Tex. App. LEXIS 2759 (Tex. App.—Houston [1st Dist.] Mar. 30, 2017, no pet.); *In re Estate of Trevino*, 195 S.W.3d 223 (Tex. App.—San Antonio 2006, no pet.); *Haugen v. Olson*, 2003 Tex. App. LEXIS 10495, No. 05-03-00501-CV, 2003 WL 22939728, at *4 (Tex. App.—Dallas Dec. 15, 2003, no pet.) (appointing receiver in probate matter affirmed); *In re Estate of Herring*, 983 S.W.2d 61 (Tex. App.—Corpus Christi 1998 no pet.). *But see In re Estate of Martinez*, No. 01-18-00217-CV, 2019 Tex. App. LEXIS 2614 (Tex. App.—Houston [1st Dist.] April 2, 2019, no pet.); *Genssler v. Harris County,* 584 S.W.3d 1 (Tex. App.—Houston [1st Dist.] Oct. 7, 2010, no pet.) (equity did not allow trial court to institute a liquidating receivership).

In *In re Estate of Herring*, the court noted that a receiver may properly be appointed under section 64.001(a)(5) in a probate proceeding when "the appointment of a receiver will solve most, if not all, of the vexations and problems confronting the parties on the issue of partition, as well as management of the properties." 983 S.W.2d at 65.

For example, in *In re Estate of Trevino*, the executrix of an estate was the sole beneficiary, and she inherited a bar. 195 S.W.3d at 226. The bar's operator claimed an ownership interest under a handwritten bill of sale. *Id*. The executrix engaged an attorney to recover the property and resolve the operator's ownership claims, and for that representation she agreed to 40% contingency fee. *Id*. When the attorney prevailed in favor of the executrix, he became a 40% owner of the bar, which he contended the executrix was mismanaging. *Id*. at 228. The attorney then petitioned the court for partition by sale and appointment of a receiver, which the court granted. *Id*. On appeal the executrix argued that, in an action between co-owners of property, a receiver may be appointed under section 64.001(a)(3) upon a showing that the property is "in danger of being lost, removed, or materially injured." *Id*. at 231. The court of appeals noted that, under what was then subsection (a)(5), a trial court could appoint a receiver based on the rules of equity. *Id*. The court of appeals observed that "the appointment of a receiver will solve most, if not all, of the vexations and problems confronting the parties on the issue of partition, as well as management of the properties." *Id*. at 231 (quoting *Herring*, 983 S.W.2d at 65). The court of appeals concluded that the court could have appointed a receiver on an equitable basis due to the years of disputes and ongoing litigation about the management of the bar:

> The probate court could have determined that the appointment of the receiver would resolve two years of ongoing litigation and problems confronting the parties in regard to the management of the business of the bar. The ongoing litigation and nature of those problems are supported by the record. Even if the probate court were required to find that the property was in danger of being lost, removed, or materially injured, the probate court could have supported its finding with evidence that the revenues of the bar had

> decreased and with evidence of the decrease in value of the business as reflected in appraisals and offers to purchase the business. Although the evidence is conflicting with regard to this issue, the probate court would not have abused its discretion in concluding that sufficient evidence of such a danger was presented.

Id.

However, in *Mueller v. Beamalloy, Inc.*, 994 S.W.2d 855 (Tex. App.—Houston [1st Dist.] 1999, no pet.), a court considered an interlocutory appeal from an order appointing a receiver to liquidate a corporation. 994 S.W.2d at 857. Mueller and Wilson jointly owned an electron-beam welding business. *Id*. After about 15 years, Mueller brought a shareholder's derivative suit against Wilson. *Id*. On Wilson's application, which was based on the Business Corporations Act and the "rules of equity" provision of section 64.001, the trial court appointed a receiver to liquidate Beamalloy. *Id*. at 857-58. Mueller appealed. *Id*. at 858. On appeal, the court noted that then section 64.001(a)(5) applied to corporations, but required a showing of insolvency, dissolution, or forfeiture of corporate rights to justify appointment of a receiver. *Id*. at 861. Beamalloy could not satisfy that requirement. *Id.* at 861 The court also considered the language of the rules-of-equity provision, which was then section 64.001(a)(7) and is currently codified as section 64.001(a)(6). *Id.; see* Tex. Civ. Prac. & Rem. Code § 64.001(a)(6). That provision authorized the appointment of a receiver "in any other case in which a receiver may be appointed under the rules of equity." *See Mueller*, 994 S.W.2d at 861. The court explained: "In authorizing a receiver in any other case, subsection (a)(7) applies to instances beyond those listed" in the other subsections." *Mueller*, 994 S.W.2d at 861. "Given the specific grant of authority to appoint a receiver for a corporation under the circumstances listed in section 64.001(a)(5), the trial court had no authority to appoint a receiver" for Beamalloy under the rules-of-equity provision. *Id. See also In re Estate of Martinez*, No. 01-18-00217-CV, 2019 Tex. App. LEXIS 2614 (Tex. App.—Houston [1st Dist.] April 2, 2019, no pet.).

Even though "[a] receiver appointed pursuant to section 64.001(a) and (b) of the Texas Civil Practice and Remedies Code is not required to show that no other adequate remedy exists," "[t]he appointment of a receiver is a harsh, drastic, and extraordinary remedy, which must be used cautiously." *In re Estate of Trevino*, 195 S.W.3d 223, 231 (Tex. App.—San Antonio 2006, no pet.); *see also Anderson & Kerr Drilling Co. v. Bruhlmeyer,* 134 Tex. 574, 136 S.W.2d 800, 806 (Tex. 1940); *In re Estate of Price*, 528 S.W.3d 591 (Tex. App.—Texarkana 2017, no pet.); *Estate of Benson*, No. 04-15-00087-CV, 2015 Tex. App. LEXIS 9477, 2015 WL 5258702, at *7 (Tex. App.—San Antonio Sept. 9, 2015, pet. dism'd); *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. E-Court, Inc.*, No. 03-02-00714-CV, 2003 Tex. App. LEXIS 3966, 2003 WL 21025030, at *4 (Tex. App.—Austin May 8, 2003, no pet.). *But see Benefield v. State*, 266 S.W.3d 25, 31 (Tex. App.—Houston [1st Dist.] 2008, no pet.),

C. Receiverships for Trusts: Texas Property Code Section 114.008

An interested party may file suit against a trustee and seek a receivership. For example, the Restatement (Second) of Trusts provides:

> A receiver will be appointed by the court to take possession of the subject matter of the trust or a part thereof and to administer the trust in respect thereto, if this is necessary for the protection of the interest of the beneficiary. If proceedings are brought for the removal of the trustee and it appears necessary or proper during the course of the proceedings that the trust should be administered under the supervision of the court, the court may appoint a receiver until it is determined whether the trustee should be removed and a new trustee appointed. The receivership will be terminated by the court when it is determined by the court that the trustee may properly continue as trustee, or when a new trustee is appointed and the title to the trust property is vested in him.

RESTATEMENT (SECOND) TRUSTS, §199.

The Texas Property Code expressly provides for a receivership as a remedy for an actual or suspected breach of trust. Section 114.008 provides in part: "(a) To remedy a breach of trust that has occurred or might occur, the court may: … (5) appoint a receiver to take possession of the trust property and administer the trust; (6) suspend the trustee; (7) remove the trustee as provided under Section 113.082; … (10) order any other appropriate relief." Tex. Prop. Code § 114.008; *Estate of Hoskins*, 501 S.W.3d 295, 301(Tex. App.—Corpus Christi 2016, no pet.).

For example, in *Estate of Benson*, a beneficiary of a trust sought to remove the trustee, her father, for allegedly violating his fiduciary duties in administering the trust assets. No. 04-15-00087-CV, 2015 Tex. App. LEXIS 9477 (Tex. App.—San Antonio Sept. 9, 2015, pet. dism. by agr.). The trustee's relationship with the beneficiary and her adult children (who were remainder beneficiaries under the trust) became strained in December of 2014, when, according to the beneficiary, the trustee began exhibiting troubling behavior with them, as well as other business associates involved in managing trust assets. In a two-day evidentiary hearing, the beneficiary presented evidence that her father had cut off contact with her, banned her and her children from the trust's assets' facilities, and made a substantial and abrupt withdrawal from Lone Star Capital Bank, which the trust owned a 97% interest in and which placed the bank in an urgent situation. The beneficiary also presented evidence that the trustee had secretly relocated the office of the trust's bookkeeper to the trustee's condominium without telling anyone where she was going. Although the trustee himself did not testify at the hearing, he presented evidence that his relationship with the beneficiary was strained and that he no longer wanted any contact with them. Following the

hearing, the trial court entered an order appointing two temporary co-receivers to take control of the trust and the estate that created the trust, and further authorized the co-receivers to manage the business and financial affairs of the trust and essentially perform any actions necessary to preserve the trust's value. A few days later, the court issued a temporary injunction enjoining the trustee from taking any action related to the trust.

The court of appeals rejected the trustee's challenges to the appointment of temporary co-receivers and affirmed that part of the trial court's order. The court determined that the trial court had some evidence that there was a breach of trust to support its decision to appoint co-receivers, relying on the evidence presented at the temporary injunction hearing. The trustee not only had a duty to exercise the care and judgment that he would exercise when managing his own affairs, but also a duty to fully disclose any material facts that *might* affect the beneficiary's rights. Rejecting the trustee's arguments that appointment of co-receivers could not be defended under requirements of equity, the court noted that the beneficiary had sought receivers under section 114.008(a)(5) of the Texas Property Code, not under equitable grounds. Under the statute, a movant need not prove the elements of equity; thus, the beneficiary in this case was not required to produce evidence of irreparable harm or lack of another remedy:

> Here, Renee requested the appointment of a receiver pursuant to section 114.008(a)(5) of the Texas Property Code, not based on equity. Section 114.008(a)(5) authorizes the appointment of a receiver to take possession of trust property and administer the trust so long as the court finds that "a breach of trust has occurred or might occur." Tex. Prop. Code § 114.008(a)(5). Thus, Renee was not statutorily required to produce evidence showing irreparable harm or lack of another remedy. The appointment of a receiver is listed as one of many other equally available remedies that an applicant can request. See Tex. Prop. Code § 114.008(a)(1)-(10). Accordingly, Renee was only required to produce evidence satisfying the statutory requirements of section 114.008(a)(5), and as discussed above, there was some evidence establishing a breach of trust occurred so as to support the probate court's discretionary decision to appoint co-receivers to oversee the Trust.

Id. at *20.

The court of appeals's holding that the requirements of equity need not be satisfied for receivership applications under section 114.008 of the Texas Trust Code appears to be an issue of first impression. In another recent case involving a receivership appointment over trust assets, *Elliott v. Weatherman*, the court recognized the Texas Trust Code as providing separate authority for receivership appointments but held that even if a specific statutory provision authorized a receivership, "a trial court should not appoint a receiver if another remedy exists

at law or in equity that is adequate and complete." 396 S.W.3d 224, 228 (Tex. App.—Austin 2013, no pet.) (holding trial court abused its discretion in appointing a receiver over the property and citing cases not involving receiverships over trust property).

Under this provision, a court does not have to grant a receiver all powers and may limit those powers. In *In re Estate of Hoskins*, the appellate court held that the trial court's appointing of a receiver to create a report did not require a finding that all other measures would be inadequate. 501 S.W.3d 295 (Tex. App.—Corpus Christi Sept. 8, 2016, no pet.). The court held that there was evidence of a breach of trust, and the order did not grant the duties and powers ordinarily conferred upon a receiver but instead resembled appointing an auditor. *Id*. The court also held that a trial court has authority to appoint a receiver to remedy breaches by prior trustees, and that Section 114.008 does not limit it application to only current trustees. *Id*.

In *Elliott v. Weatherman,* the appellate court held that the trial court abused its discretion in appointing a receiver over trust assets because the evidence was insufficient to justify the appointment of a receiver without notice to the trustee and the opportunity to be heard. 396 S.W.3d 224 (Tex. App.—Austin Feb. 8, 2013, no pet.).

In *In re Estate of Herring*, the trial court issued an order to an estate administrator to sell some of the estate's community property so that the proceeds could be partitioned among the family members. 983 S.W.2d 61, 65 (Tex. App.—Corpus Christi 1998, no pet.). After the administrator failed to carry out the order, the administrator asked the court to appoint a receiver to assist him in his duties. *See id*. The appellate court upheld the trial court's appointment of a receiver with the bona fide authority to control matters of the estate. *Id*. It saw no harm or harshness in appointing a receiver to work alongside the administrator "to take an action which [the administrator] had full authority to take on his own . . . ." *Id*. The court reasoned:

> the past, this Court approved of the appointment of a receiver to partition property within an estate where the heirs cannot agree, noting that "the appointment of a receiver will solve most, if not all, of the vexations and problems confronting the parties on the issue of partition, as well as management of the properties. . . ."

Id. (quoting *Gonzalez v. Gonzalez*, 469 S.W.2d 624, 632 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.)).

D. Common-Law Equity As A Basis for A Receivership

Rules of equity govern all matters relating to the appointment, powers, duties, and liabilities of a receiver, and to the powers of a court regarding receivers, to the extent that they are not inconsistent with applicable statutory provisions or

with the general laws of the state. Tex. Civ. Prac. & Rem. Code Ann. § 64.004. Where, however, a receivership is sought under one of the statutory provisions authorizing the appointment of a receiver, the right to the remedy is legal and determinable primarily by the statute rather than by rules of equity. *Batchelor v. Pacific Finance Corp.*, 202 S.W.2d 857 (Tex. Civ. App.—Dallas 1947, no writ). Questions such as the adequacy of some other remedy, the existence of a less drastic remedy in equity, and the insolvency of the defendant are not controlling with reference to the statutory right to an appointment. *Friedman Oil Corporation v. Brown,* 50 S.W.2d 471 (Tex. Civ. App.—Texarkana 1932); *Hunt v. State*, 48 S.W.2d 466 (Tex. Civ. App.—Austin 1932); *Temple State Bank v. Mansfield*, 215 S.W. 154 (Tex. Civ. App.—Galveston 1919, writ dismissed w.o.j.).

Regarding trust property, Texas Jurisprudence states:

> Under some circumstances, a court of equity will appoint a receiver of trust property in the hands of a trustee or of anyone that may be in possession of the property. A court will not generally interfere with the interests or rights of a trustee in the absence of a showing of abuse or danger of abuse of the trust fund or unless there is danger of loss or injury if the property remains in the trustee's possession. A receiver may be appointed where the trustees omit to act, repudiate their trust, or refuse to act. A receiver may also be appointed on a showing of the insolvency of a trustee where receivership is necessary to protect the trust fund or where the trustee has allowed trust property to be wasted by a trespasser. Similarly, where a debtor conveys property to a trustee with directions to sell it and pay certain debts, an unsecured creditor may have a receiver appointed. A receivership may also be ordered for the purpose of winding up the affairs of a common law trust and on the failure of a trust

64 TEX. JUR. 3RD, RECEIVERS, § 45. Courts have affirmed receiverships in trust disputes. *See, e.g., General Ass'n of Davidian Seventh Day Adventists, Inc. v. General Ass'n of Davidian Seventh Day Adventists*, 410 S.W.2d 256 (Tex. Civ. App.—Waco 1966, writ refused n.r.e.); *O'Dell v. Grubstake Inv. Ass'n*, 38 S.W.2d 151 (Tex. Civ. App.—San Antonio 1931, writ dismissed); *Driskill v. Boyd*, 181 S.W. 715 (Tex. Civ. App.—Austin 1915, writ refused); *Cotton v. Rand*, 92 S.W. 266 (Tex. Civ. App.—1905, writ dismissed).

For example, in *Pfeiffer v. Pfeiffer*, the court of appeals affirmed an order granting a receivership over trust assets where there was evidence that there was a "danger that the property remaining in the trust fund would be lost, destroyed or materially injured unless a receiver was appointed, and that ultimate recovery by applicants was probable." 394 S.W.2d 679 (Tex. Civ. App.—Houston 1965, writ dism.). The court stated:

> The assets consisted of the stock certificate and a claim to certain real estate. The order grants the receiver no other powers and imposes on him no other duties. Under the record before us we are unable to say with certainty that injunctive relief would be as effective as a receivership in preserving the estate, bearing in mind the power of the court to issue further order to the receiver respecting the property. Nor can we say that the receivership is materially more onerous than an injunction would have been. The trial court, therefore, did not abuse his discretion in appointing the receiver.

Id. In *Looney v. Doss*, the court of appeals held that a receivership should be terminated where there was a new successor trustee that could take over management of the trust's assets. 189 S.W.2d 207, 211 (Tex. Civ. App.—Fort Worth 1945, no writ).

Regarding estates, Texas Jurisprudence states:

> Although the authority of a personal representative will not generally be displaced by the appointment of a receiver, a receiver may be appointed for property in the possession of an executor or administrator where necessary to protect the estate. A receivership is not authorized, however, merely because an executor has made some improper charges or fails to conduct a business for the estate in the most efficient manner.

64 TEX. JUR. 3RD, RECEIVERS, § 44.

A court has the power to appoint a receiver to take charge of an independent administration in order to protect the estate from mismanagement or unauthorized dissipation. *Griggs v. Brewster,* 122 Tex. 588, 62 S.W.2d 980 (1933)*; First State Bank of Bellevue v. Gaines,* 121 Tex. 559, 50 S.W.2d 774 (1932); *Stanley v. Henderson*, 139 Tex. 160, 162 S.W.2d 95 (1942); *Oldham v. Keaton*, 597 S.W.2d 938 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.); *Laurie v. Stabel*, 482 S.W.2d 652 (Tex. Civ. App.—Amarillo 1972, no writ); *Metting v. Metting,* 431 S.W.2d 906 (Tex. Civ. App.—San Antonio 1968, no writ); *O'Connor v. O'Connor,* 320 S.W.2d 384 (Tex. Civ. App.—Dallas 1959, writ dism'd); *Huth v. Huth,* 110 S.W.2d 1011 (Tex. Civ. App.—San Antonio 1937, writ dism'd). The Texas Supreme Court stated: "The district court, having properly assumed jurisdiction to construe the will of Mrs. Potts and adjudicate the issues raised by the pleadings and the evidence, had the power to appoint a receiver for the preservation of the property involved. This power was inherent in the court, and was incident to the exercise of its jurisdiction until the case was finally determined." *Griggs v. Brewster,* 122 Tex. 588, 62 S.W.2d at 774.

In *Carroll v. Carroll*, the court of appeals affirmed a receivership order in an estate case where there was much dissention in the family. 464 S.W.2d 440

(Tex. Civ. App.--Amarillo 1971, writ dism'd). The court considered a trial court order approving a receiver's sale of farm land that constituted substantially all the corpus of a trust estate created by a joint will that expressly prohibited any sale of the trust property without consent of the trustee and various specified beneficiaries. 464 S.W.2d at 442. Some of the beneficiaries opposed the sale. The court of appeals affirmed the trial court's order, citing evidence that the land was subject to an imminent foreclosure sale and that family dissension precluded any likelihood of agreement among the beneficiaries, and finding that "the conditions disclosed by the evidence" justified the trial court's exercise of its inherent equitable powers. *Id*. at 446.

In *Blalack v. Blalack*, a court of appeals affirmed a receivership in an estate dispute where the co-executors were in a deadlock and were not managing the estate. 424 S.W. 2d 646, 650 (Tex. Civ. App.--Texarkana 1968, no writ). The court explained:

> Evidence was presented in the receivership hearing from which the trial judge might conclude that the two joint legal representatives of the decedent's estate had not been able to agree upon any important managerial decision affecting the estate for a period of several months prior to the hearing. Production of oil and gas from estate owned property by a long-time employee was condoned rather than agreed to by the joint legal representatives. Thousands of dollars of the indebtedness represented by notes payable had matured and demand for payment had been made. The joint legal representatives were unable to agree to use a part or all of available funds or liquidate assets to pay indebtedness or agree upon any course of action that would avert foreclosure of liens attaching to estate property. The stalemate in management caused the loss of trade discounts. The impasse was eroding the estate and subjecting its assets to the threat and danger of loss at a distress sale and ultimately the estate to bankruptcy.

Id.

In *Van Grinderbeck v. Lewis,* the court of appeals reversed a receivership in an estate case where the appointment of a temporary administrator was an adequate remedy. 204 S.W. 1042 (Tex. Civ. App.—Dallas 1918, no writ).

In equity, an applicant should show a right to, or interest in, the property or fund in litigation or show at least a probable right or interest in either. *Continental Homes Co. v. Hilltown Property Owners Ass'n, Inc*., 529 S.W.2d 293 (Tex. Civ. App.—Fort Worth 1975); *Pelton v. First Nat. Bank of Angleton*, 400 S.W.2d 398 (Tex. Civ. App.—Houston 1966, no writ); *Wadsworth v. Cole*, 265 S.W.2d 628 (Tex. Civ. App.—El Paso 1954). An applicant must show that the property or fund in litigation is in danger of being lost, removed, or materially injured. *B & W Cattle Co. v. First Nat. Bank of Hereford,* 692 S.W.2d 946 (Tex. App.—Amarillo 1985);

Smith v. Smith, 681 S.W.2d 793 (Tex. App.—Houston [14th Dist.] 1984, no writ); *Rubin v. Gilmore*, 561 S.W.2d 231 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). An applicant must show that there is some advantage from the appointment as equity does not do vain thing. *Grandfalls Mut. Irr. Co. v. White*, 62 Tex. Civ. App. 182, 131 S.W. 233 (1910); *Simpson v. Alexander*, 188 S.W. 285 (Tex. Civ. App.—Austin 1916); *Bounds v. Stephenson*, 187 S.W. 1031 (Tex. Civ. App.—Dallas 1916 writ ref'd). An applicant must show that another remedy does not exist at law or in equity. *Trevino v. Starr County*, 660 S.W.2d 140 (Tex. App.—San Antonio 1983, writ dism); *Robinson v. Thompson*, 466 S.W.2d 626 (Tex. Civ. App.—Eastland 1971, no writ); *Pfeiffer v. Pfeiffer,* 394 S.W.2d 679 (Tex. Civ. App.—Houston 1965, writ dism.). Otherwise stated, an applicant must show that there is a necessity for the receivership in order to have an equitable receivership. *Pouya v. Zapa Interests, Inc*., No. 03-07-00059-CV, 2007 Tex. App. LEXIS 7243, 2007 WL 2462001 (Tex. App.—Austin Aug. 13, 2007, no pet.); *Whitson Co. v. Bluff Creek Oil Co.*, 256 S.W.2d 1012, 1015 (Tex. Civ. App.—Fort Worth 1953, writ dism'd w.o.j.). In equity, the claim for a receiver must be ancillary to an independent cause of action. *Pelton v. First Nat'l Bank of Angleton*, 400 S.W.2d 398, 401 (Tex. Civ. App.—Houston 1966, no writ). A party cannot solely seek an equitable receivership.

Although insolvency of the owner or the one in possession of a fund or property in controversy is usually an important element bearing on the necessity and propriety of appointing a receiver, not every case of receivership according to the usage of the court of equity depends on a showing of insolvency. *Dillingham v. Putnam*, 109 Tex. 1, 14 S.W. 303 (1890); *Duncan v. Thompson*, 25 S.W.2d 634 (Tex. Civ. App.—Dallas 1930); *Rische v. Rische*, 46 Tex. Civ. App. 23, 101 S.W. 849 (1907, writ dism.); *Richardson v. McCloskey*, 228 S.W. 323 (Tex. Civ. App.—Austin 1920, writ dismissed w.o.j.).

E. Conclusion

A pre-trial receivership is a very valuable remedy that can preserve the substance of a plaintiff's claims in trust and estate litigation. It places an independent third party in charge of managing the trust's or estate's assets. This third party then owes duties and may be liable for any violations. *See, e.g., Alpert v. Gerstner*, 232 S.W.3d 117, 123(Tex. App.—Houston [1st Dist.] 2006, pet. denied) (trust beneficiaries could sue receiver for violating duties in management of trust assets). So, there are many benefits to a receivership when a trustee or estate representative are mismanaging, wasting, or otherwise misappropriating assets that are in their charge. However, it is an extreme remedy that takes a party's business out of its hands and places it into the hands of another. For these reasons, courts should carefully balance the parties' interests in awarding such relief.

VIII. Use Of Equitable Defenses In Breach Of Fiduciary Duty Litigation

A. Introduction

It is not uncommon for beneficiaries to sue a trustee for actions that the beneficiaries had knowledge of but where they failed to object to that conduct for a period of time. In this circumstance, the trustee may want to raise certain equitable defenses to those claims, such as laches, ratification, waiver, and estoppel. Equitable defenses are appropriate for breach of fiduciary duty claims as fiduciary relationships originate in equity. At the core of these equitable defenses is the concept that a party should not be allowed to act inconsistently: have knowledge of conduct and fail to object to it for a period of time (thereby tacitly agreeing to the conduct) and then later raising claims against the trustee for the same conduct.

For example, a beneficiary may claim that the trustee has compensated itself too much. A trust document may not allow for "reasonable compensation," but have a specific formula or limit on compensation. The trustee may inadvertently use its standard formula for compensation, which was technically too much and over the amount allowed under the trust document. The trustee, however, has disclosed the actual compensation it paid itself on quarterly statements. Later, a beneficiary is in conflict with the trustee and then, for the first time, alleges that the trustee has breached its duties by overcompensating itself. Can the trustee point to the quarterly statements and argue that the beneficiary is not allowed to complain about the overcompensation by waiting to challenge it and by allowing the trustee to continue to do work without objection?

Like all equitable claims and defenses, these defenses largely depend on the facts and circumstances of the case. This note is intended to provide a legal framework for the most common equitable defenses and provide some common arguments to avoid those defenses.

B. Legal Basis for Equitable Defenses

Laches may bar an action where the plaintiff acquiesces in the way and manner a trust is handled for many years. *Garver v. First Nat'l Bank*, 432 S.W.2d 745 (Tex. App.—Amarillo 1968, writ ref'd n.r.e.). The defense of laches requires the establishment of two distinct elements: (1) an unreasonable delay by the moving party in asserting their rights and (2) the person raising the defense must be disadvantaged as a result of this delay by the moving party. *Culver v. Pickens*, 176 SW2d 167 (Tex. 1943); *Knesek v. Witte*, 754 S.W.2d 814, 816 (Tex. App.—Houston [1st Dist.] 1988, writ denied). For example, in *Garver*, a husband and wife filed suit against a bank seeking recovery of an interest in the proceeds of oil and gas leases that had been deposited with the bank for the benefit of the heirs of the wife's parents. 432 S.W.2d at 746. The bank had handled the deposits for many years, as directed by the estate's executors, who were the wife's brothers. The court of appeals affirmed a summary judgment in favor of the bank, holding

among other things that the plaintiffs' claims were barred by laches because the plaintiffs had acquiesced in the brothers' handling of the estate's proceeds for a period of nineteen years. 432 S.W.2d at 749. The court held that no one has the right to remain inactive when action is demanded while another party so changes his position that great damage will be inflicted by granting the remedial writ. *Id*. Laches applied to bar such a claim. *Id*.

The elements of ratification are: (1) approval by act, word, or conduct; (2) with full knowledge of the facts of the earlier act, and (3) with the intention of giving validity to the earlier act. *Sandi Samms v. Autumn Run Cmty. Improvement Ass'n.*, 23 S.W.3d 398, 403 (Tex. App.—Houston [1st. Dist.] 2000, pet. denied). In order to prove the intent required for ratification, a party must show that the opposing party, after obtaining knowledge of the facts of the transaction, either (1) continued to accept benefits under the transaction or (2) conducted himself so as to recognize the transaction as binding. *LSR Joint Venture No. 2 v. Callewart*, 837 S.W.2d 693, 699 (Tex. App.—Dallas 1992, writ denied). A ratification may be shown by an express act or word or may be inferred from a party's course of conduct. *Curtis v. Pipelife Corp*., 370 S.W.2d 764, 768 (Tex. Civ. App.—Eastland 1963, no writ). An express ratification is not necessary; any act based on a recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it has the effect of waiving the right of rescission. *Rosenbaum v. Tex. Bldg. & Mort. Co*., 140 Tex. 325, 167 S.W.2d 506 (1943); *Newsom v. Starkey*, 541 S.W.2d 468 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.). Any retention of the beneficial part of the transaction affirms the contract and bars an action for rescission as a matter of law. *Daniel v. Goesl*, 161 Tex. 490, 341 S.W.2d 892 (1960). Where a party affirms a contract through his actions and conduct after knowledge of the facts, the defense of waiver or ratification is established as a matter of law. *Id*.

Waiver is defined as an intentional relinquishment of a known right or intentional conduct inconsistent with claiming such right. *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987). The elements of waiver include the following: (1) existing right, benefit, or advantage; (2) actual or constructive knowledge of its existence; and (3) an actual intent to relinquish the right inferable from the conduct. *Perry Homes v. Cull*, 258 S.W.3d 580, 602–03 (Tex. 2008); *Tenneco Inc. v. Enter. Prods. Co*., 925 S.W.2d 640, 643 (Tex. 1996); *Bass & Co. v. Dalsan Props.—Abilene*, 885 S.W.2d 572, 577 (Tex. App.—Dallas 1991, no writ). A party can impliedly waive the other party's breach where he fails to object to a deviation by the other party from the strict terms of the contract. *Childress v. Cook*, 245 F.2d 798 (5th Cir. 1957). A party may evidence waiver by conduct of such a nature as to mislead the opposite party into an honest belief that the waiver was intended or assented to. *Shaver v. Schuster*, 815 S.W.2d 818 (Tex. App.—Amarillo 1991, no writ). Waiver can be established as a matter of law. *H.A. Lott, Inc. v. Pittsburgh Plate Glass Co*., 432 S.W.2d 583, 586 (Tex. Civ. App.—Amarillo 1968, no writ). Further, the doctrine of waiver is applicable to all rights and privileges to which a person is legally entitled. *Burton v. Nat'l Bank of Commerce*, 679 S.W.2d 115 (Tex. App.—Dallas 1984, no writ).

Estoppel prevents one party who has induced another to act in a particular way from adopting an inconsistent position, attitude, or course of conduct that will cause loss or injury to the other person. *Houtchens v. Matthews*, 557 S.W.2d 581, 585 (Tex. Civ. App.—Fort Worth 1977, writ dism.). The elements of equitable estoppel are: (1) a false representation or concealment of material facts, (2) made with the knowledge, actual or constructive, of those facts, (3) to a party without knowledge, or the means of knowledge, of those facts, (4) with the intention that it should be acted on, and (5) the party to whom it was made must have relied or acted on it to his prejudice. *Gulbenkian v. Penn*, 151 Tex. 412, 252 S.W.2d 929 (1952). A false representation may be accomplished by conduct, or when one has a duty to speak, by mere silence. *Champlin Oil & Refining Co. v. Chastain*, 403 S.W.2d 376 (Tex. 1965).

Additionally, quasi estoppel is a defense that prevents a party from obtaining a benefit by asserting a right to the disadvantage of another that is inconsistent with the party's previous position. *Vessels v. Anschutz Corp*., 823 S.W.2d 762 (Tex. App.—Texarkana 1992, writ denied). Quasi estoppel refers to conduct such as ratification, election, acquiescence, or acceptance of benefits. *Steubner Realty 19 v. Cravens Road 88*, 817 S.W.2d 160, 164 (Tex. App.—Houston [14th Dist.] 1991, no writ). Further, quasi estoppel may be asserted even though there has been no concealment or misrepresentation on one side, and no ignorance or detrimental reliance on the other side. *Vessels*, 823 S.W.2d at 762. The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit. *Steubner Realty 19*, 817 S.W.2d at 164. One who retains benefits under a transaction cannot avoid its obligations and is estopped to take an inconsistent position. *Vessels*, 823 S.W.2d at 762; *Theriot v. Smith*, 263 S.W.2d 181, 183 (Tex. Civ. App.—Waco 1953, writ dism'd). In other words, a party may not accept the benefits of a transaction and then later take "an inconsistent position to avoid corresponding obligations or effects." *Lindley v. McKnight*, 349 S.W.3d 113, 131 (Tex. App. —Fort Worth 2011, no pet.).

Accord and satisfaction exists when the parties agree to discharge "an existing obligation in a manner other than in accordance with the terms of their original contract." *Avary v. Bank of Am., N.A.,* 72 S.W.3d 779, 788 (Tex. App.—Dallas 2002, pet. denied). The defense involves a new contract, either express or implied, in which the existing obligation is released by agreement of the parties through "means of [a] lesser payment tendered and accepted." *Richardson v. Allstate Tex. Lloyd's,* 235 S.W.3d 863, 865 (Tex. App.—Dallas 2007, no pet.). To establish the affirmative defense of accord and satisfaction, the defendant must show that in the new contract: (1) the parties agree to discharge the existing obligation; (2) the parties agree that one party will perform and the other will accept something different from what each expected from the existing obligation; (3) the parties unmistakably communicate that the different performance will discharge the existing obligation; (4) the agreement to discharge the existing obligation is plain, definite, certain, clear, full, explicit, and not susceptible of any other interpretation; and (5) the parties' agreement must be accompanied by acts

and declarations that the creditor is "bound to understand." *Honeycutt v. Billingsley*, 992 S.W.2d 570, 576-77 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (quoting *Jenkins v. Henry C. Beck Co*., 449 S.W.2d 454, 455 (Tex. 1969)). *See also Collins v. Moroch*, 339 S.W.3d 159, 164 (Tex. App.—Dallas 2011, pet. denied). Critically, the evidence must establish the parties' assent to the new agreement, and "[t]here must be an unmistakable communication to the creditor that tender of the lesser sum is upon the condition that acceptance will constitute satisfaction of the underlying obligation." *Ind. Lumbermen's Mut. Ins. Co. v. State*, 1 S.W.3d 264, 266 (Tex. App.—Fort Worth 1999, pet. denied). *See also Hemink Farms, Ltd. v. BCL Constr., LLC*, No. 07-17-00457-CV, 2019 Tex. App. LEXIS 2209, at *8 (Tex. App.—Amarillo Mar. 20, 2019, pet. denied) ("To show the necessary meeting of the minds, there should be a statement that accompanies the tender of the lesser sum, which statement also must be so clear and so explicit and so complete that the statement is simply not susceptible of any other interpretation but one of complete accord and complete satisfaction." (internal quotations omitted)). Accord and satisfaction can apply to torts as well as breach of contract claims.

C. Recent Case Using Quasi-Estoppel to Forgive A Trustee's Breach of Duty

In *Goughnour v. Patterson*, a beneficiary sued a trustee based on a failed real estate investment. No. 12-17-00234-CV, 2019 Tex. App. LEXIS 1665 (Tex. App.—Tyler March 5, 2019, pet. denied). In 2007, the trustee of four trusts invited his mother, the primary beneficiary, and his siblings, also beneficiaries, to participate in a real estate investment that he created by allowing the use of trust funds. They all agreed, and the trustee transferred a total of $2.1 million from the four trusts to the real estate investment entity. The project failed, and the trusts lost the $2.1 million. In 2011, the trustee filed suit to resign and obtain a judicial discharge. A sister filed a breach of fiduciary duty claim based on this failed investment.

After a bench trial, the court rendered judgment approving the trust accounting, approving the trustee's administration, and holding that the trustee, individually and in his capacity of trustee, was "completely discharged and relieved of all duties" and was "fully and completely released and discharged from any and all claims, duties, causes of action or liabilities (including taxes of any kind) relating to any and all actions or omissions in connection with his administration of the DPH Trust." *Id*. The court ordered that the successor trustee pay all outstanding legal and accounting fees incurred by the trust, appointed a successor trustee, and relieved the successor trustee of any and all duty, responsibility, or authority to investigate the actions or inactions of the trustee as prior trustee. The court further ordered that the sister take nothing on all her claims and ordered her to pay attorney's fees for the trustee. The sister appealed.

The court of appeals issued a very lengthy and detailed opinion affirming in part and reversing in part the trial court's judgment. The court of appeals affirmed the

application of the trustee's affirmative defense of quasi-estoppel based on the beneficiary's prior consent to trust investments in other real estate investments:

> The affirmative defense of quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position she has previously taken. The doctrine applies when it would be unconscionable to allow a party to maintain a position inconsistent with one in which she acquired or by which that party accepted a benefit. The record shows that Robert initiated approximately fifty real estate transactions in which he invested Trust assets. Deborah agreed to all of these transactions. All transactions except Bighorn were successful and the Trust benefitted from those prior investments. Therefore, Deborah's claims for breach of fiduciary duty are barred by the affirmative defense of quasi-estoppel.

Id. (internal citations omitted).

D. Potential Arguments To Defeat Equitable Defenses

Beneficiaries may argue that the trustee did not prove all of the elements if the equitable defenses set forth above. Also, the beneficiaries may also argue other theories prevent the use of the equitable defenses.

Beneficiaries may argue that the trustee has acted with unclean hands and therefore may not take advantage of equitable defenses. Equitable theories, such as estoppel, waiver, and ratification, are subject to traditional equitable defenses. *In re EGL Eagle Global Logistics, LP*, 89 S.W.3d 761, 766 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding). The clean-hands doctrine is "[t]he principle that a party cannot seek equitable relief or assert an equitable defense if that party had violated an equitable principle, such as good faith. . . . Such party is described as having 'unclean hands.'" *Design Elec. v. Cadence McShane Corp*., No. 14-06-00703-CV, 2007 Tex. App. LEXIS 8586, at *45 (Tex. App.—Houston [14th Dist.] Oct. 30, 2007). Equitable relief is not warranted when the party seeking relief has engaged in unconscionable, unjust, or inequitable conduct with regard to the issue in dispute. *Dunnagan v. Watson*, 204 S.W.3d 30, 41 (Tex. App.—Fort Worth 2006, pet. denied); *see also Flores v. Flores*, 116 S.W.3d 870, 876 (Tex. App.--Corpus Christi 2003, no pet.) ("The doctrine applies against a litigant whose own conduct in connection with the same matter or transaction has been unconscientious, unjust, marked by a want of good faith, or violates the principles of equity and righteous dealing."). Thus, when seeking an equitable remedy, a party must do equity and come to the court with clean hands. *Adams v. First Nat. Bank of Bells/Savoy*, 154 S.W.3d 859 (Tex. App.—Dallas 2005, no pet.); *In re EGL*, 89 S.W.3d at 766; *Texas Enters., Inc. v. Arnold Oil Co*., 59 S.W.3d 244, 249 (Tex. App.—San Antonio 2001, no pet.); *Breaux v. Allied Bank*, 699 S.W.2d 599, 604 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). The doctrine of estoppel, including quasi-estoppel, is designed to protect the innocent; thus, a party may not urge this defense as a shield against its own

tortious acts. *Stimpson v. Plano ISD*, 743 S.W.2d 944, 946 (Tex. App.—Dallas 1987, writ denied); *Brodrick Moving & Storage Co. v. Moorer*, 685 S.W.2d 75, 77 (Tex. App.—Beaumont 1984, writ ref'd n.r.e.).

More specifically, to invoke equitable doctrines such as estoppel, waiver, or ratification the defendant must come with "clean hands." *Ford Motor Co. v. Motor Vehicle Bd*., 21 S.W.3d 744, 758 (Tex. App.—Austin 2000, pet. denied) (estoppel); *Texas Workers' Compensation Ins. Facility v. Personnel Servs., Inc.,* 895 S.W.2d 889, 894 (Tex. App.—Austin 1995, no writ) (estoppel); *Pickett v. Heygood, Orr & Reyes, L.L.P*., No. 05-07-00079-CV, 2008 Tex. App. LEXIS 4048, 2008 WL 2266133, at *5 (Tex. App.—Dallas Jun. 4, 2008, no pet.) (mem. op.) (quasi-estoppel); *Spangler v. Jones*, 861 S.W.2d 392, 397-98 (Tex. App.—Dallas 1993, writ denied) (ratification). For example, in *Bank of Am., N.A. v. Prize Energy Res., L.P.,* 510 S.W.3d 497, 505 (Tex. App.—San Antonio 2014, pet. denied), a court found that a trustee was not barred from challenging an oil and gas lease under an equitable ratification theory by accepting royalty payments. Specifically, the court considered the defendant's argument that the trustee was precluded from recovery under the defense of equitable estoppel, and held that it could not conclude, "that as a matter of law, [the defendants] came to the table with clean hands and [were] entitled to raise the equitable defense of quasi-estoppel." *Id*. at 513.

Beneficiaries may argue that they were compelled to accept the trustee's improper conduct and that their acceptance was not voluntary. Where one party's tortious conduct has placed the other party in a position of forced conduct—i.e. where the tortious conduct leaves the innocent party with no real choice but to act in a manner consistent with the tortious conduct, the innocent party's actions do not constitute ratification of the tortious conduct. *See Vessels v. Anschutz Corp.*, 823 S.W.2d 762, 765 (Tex. App.—Texarkana 1992, writ denied). *See also Herider Farms-El Paso, Inc. v. Criswell,* 519 S.W.2d 473, 477-78 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.) (implicitly holding that, by selling his business, plaintiff did not ratify the tortious conduct that put him in the position of having to sell it). For example, in *Vessels*, the court overturned summary judgment on the defendant's defense of ratification. 823 S.W.2d at 765. The plaintiffs had agreed to be bound by the terms of a mineral lease following the settlement of a lawsuit with the FDIC. *Id.* at 764. However, it was the defendants' tortious conduct which placed the plaintiffs in a position of either having to accept the lease or else lose the property. *Id.* at 765. Specifically, the court found "[i]n this case, by agreeing to be bound by the lease, [plaintiffs] did not ratify the tortious conduct that cause them to have to accept the lease or else lose the property. Summary judgment should not have been granted on the basis of ratification." *Id.*

The Beneficiaries may argue that they did not know all of the material facts to make an informed decision in accepting the trustee's conduct and/or they were misled by untrue statements by the trustee. It is well settled that "there can be no ratification or waiver from the acceptance of benefits by a person who did not

have knowledge of all material facts." *Byrd v. Woodruff*, 891 S.W.2d 689, 699-700 (Tex. App.—Dallas 1994, writ dism'd) (citing *Frazier v. Wynn*, 472 S.W.2d 750, 753 (Tex. 1971)). Ratification occurs when a person who knows all the material facts confirms or adopts a prior act that did not then legally bind him and which he could have repudiated. *K.B. v. N.B.*, 811 S.W.2d 634, 638 (Tex. App.—San Antonio 1991, writ denied). Further, waiver is largely a question of intent. *Vessels*, 823 S.W.2d at 765. "There can be no waiver unless so intended by one party and so understood by the other." *Id*. (citing *Loggins v. Gates*, 301 S.W.2d 525, 527 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.). Thus, to find waiver through a party's conduct, intent must be clearly demonstrated by the surrounding facts and circumstances. *Van Indep. Sch. Dist. v. McCarty*, 165 S.W.3d 351, 353 (Tex. 2005). The Texas Supreme Court stated:

> [A]cts done in affirmance of the contract can amount to a waiver of the fraud only where they are done with full knowledge of the fraud and of all material facts, and with the intention, clearly manifested, of abiding by the contract and waiving all right to recover for the deception. Acts which, although in affirmance of the contract, do not indicate any intention to waive the fraud, cannot be held to operate as a waiver.

Fortune Prod. Co. v. Conoco, Inc., 52 S.W.3d 671, 677 (Tex. 2000) (quoting *Kennedy v. Bender*, 104 Tex. 149, 135 S.W. 524, 525 (Tex. 1911)) (internal quotation marks omitted). While waiver may be inferred from conduct, waiver by implication should not be inferred contrary to the intention of the party whose rights would be injuriously affected thereby, unless the opposite party has been misled to his or her prejudice. *Cecil Pond Constr. Co. v. Ed Bell Invs*., 864 S.W.2d 211, 215 (Tex. App.—Tyler 1993, no writ). Furthermore, the acceptance of benefits of an agreement or contract cannot, as a matter of law, preclude a party from challenging the agreement if the party was led into the agreement by virtue of fraud or similar misconduct. *In re Marriage Stroud,* 376 S.W.3d 346, 356-57 (Tex. App.—Dallas 2012, pet. denied). For example, in *In Re Marriage Stroud*, the wife accepted benefits of the terms of a divorce settlement, which she later sought to challenge in court. *Id*. at 350-51. The husband argued that she was estopped from pursuing such action, under the doctrines of both judicial estoppel and quasi-estoppel, as she had accepted benefits of the divorce settlement. *Id*. at 356. However, the wife submitted evidence that she was led into the agreement by the husband's fraud and threats. *Id*. at 357. The court therefore concluded the husband was not entitled to summary judgment on his affirmative defense of estoppel, whether couched in terms of judicial or quasi-estoppel. Specifically:

> The same evidence that created a fact issue as to [the husband's] extrinsic fraud precludes a finding that [he] conclusively proved his affirmative defense of estoppel, whether couched in terms of judicial or quasi-estoppel. Specifically, [the wife's] summary-judgment evidence that her approval and acceptance of the terms

> of the settlement were the product of [the husband's] threats and misrepresentations creates fact issues as to the validity of her acceptance of benefits and representations in the documents she signed.

Id. See also DeCluitt v. DeCluitt, 613 S.W.2d 777, 781 (Tex. App.—Waco 1981, writ dism'd) (petitioner's affidavit created fact issue on whether she accepted the benefits due to financial need and duress precluding summary judgment on estoppel).

E. Conclusion

There are very few hard-and-fast rules in fiduciary litigation, and there is a lot of gray area. The use and application of equitable defenses are perfect examples of this gray area. Beneficiaries should not generally be allowed to lay behind the log, have knowledge of a trustee's conduct, not object to such conduct for a period of time, and then later complain in litigation of that conduct. However, there may be other facts and circumstances that may justify a beneficiary in waiting to complain and that may defend against a trustee using equitable defenses. Sometimes, the application or inapplication of equitable defenses can be proven as a matter of law by a judge; but more often, these defenses will have be resolved by a fact finder (by a judge, or if requested, by a jury).

IX. Conclusion

This paper was intended to provide an update of recent legal issues in the complex area of fiduciary litigation in Texas. For more information, please visit www.txfiduciarylitigator.com.