DEFENDING THE TRUSTEE

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CHAPTER 5.1

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I. INTRODUCTION

One of the most commonly recognized fiduciary relationships is that of a trustee. A trustee generally means "the person holding the property in trust, including an original, additional, or successor trustee, whether or not the person is appointed or confirmed by a court." TEX. PROP. CODE ANN. § 111.004(18)(Vernon 2014). A trust may be created by any of the following:

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

See id.

Once a trust is created, the trustee is a fiduciary to all the beneficiaries of the trust, both current and remaindermen, vested and contingent. Generally speaking, the duties of a trustee include the duty of loyalty, full disclosure, competence and to reasonably exercise discretion. And, while the creation of the trustee relationship and the basic duties of a trustee are well established, each trustee's duties, powers and liabilities can vary on a relationship by relationship basis. The defense of a trustee requires an understanding of the fundamental statutory and common law principles applicable to these relationships, along with the extent to which the trust terms can affect these legal principles. This outline discusses these matters, along with various strategies that should be considered when defending a trustee.

Note that references to Section generally refer to those in the Texas Property Code unless otherwise noted. And, the term settlor is used generically to refer to the creator of the trust – whether by will, *inter vivos* transfers or other means.

II. APPLICABLE AUTHORITY

A. Overview

Each trust relationship is governed by a combination of statutory and common law, but these may be significantly impacted by the terms of the trust and nonbinding authority that has been considered by courts from time to time. A brief discussion of the sources of binding and nonbinding authority and their applicability to a particular relationship follows.

B. Binding Authority

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

- The trust instrument;
- The Texas Property Code; and
- Texas common law.

1. The Trust Instrument

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

> (b) ***The terms of a trust prevail over any provision of this subtitle***, except that the terms of a trust may not limit:
> (1) the requirements imposed under Section 112.031;
> (2) the applicability of Section 114.007 to an exculpation term of a trust;
> (3) the periods of limitation for commencing a judicial proceeding regarding a trust;
> (4) a trustee's duty:
> (A) with regard to an irrevocable trust, to respond to a demand for accounting made under Section 113.151 if the demand is from a beneficiary who, at the time of the demand:
> (i) is entitled or permitted to receive distributions from the trust; or
> (ii) would receive a distribution from the trust if the trust

terminated at the time of the demand; and

(B) to act in good faith and in accordance with the purposes of the trust;

(5) the power of a court, in the interest of justice, to take action or exercise jurisdiction, including the power to:

(A) modify or terminate a trust or take other action under Section 112.054;

(B) remove a trustee under Section 113.082;

(C) exercise jurisdiction under Section 115.001;

(D) require, dispense with, modify, or terminate a trustee's bond; or

(E) adjust or deny a trustee's compensation if the trustee commits a breach of trust; or

(6) the applicability of Section 112.038.

TEX. PROP. CODE ANN. § 111.0035(b)(Vernon 2014)(emphasis added); *see also Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.)(when language of trust instrument is unambiguous and expresses intentions of settlor, trustee's powers are conferred by instrument and neither court nor trustee can add or take away such power).

2. Texas Property Code Section 101.001 *et seq.*

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

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

- The duties and powers of a trustee;
- Relationships among trustees; and
- The rights and interests of a beneficiary.

See TEX. PROP. CODE ANN. § 111.0035(a)(Vernon 2014).

3. Texas Common Law

The powers and duties of a trust are also governed by common law to the extent (i) the trust instrument does not validly provide otherwise, and (ii) they are applicable and not inconsistent with the provisions of the Texas Trust Code. *See* TEX. PROP. CODE ANN. § 111.005 (Vernon 2014)("If the law codified in this subtitle repealed a statute that abrogated or restated a common law rule, that common law rule is reestablished, except as the contents of the rule are changed by this subtitle.").

The common law in Texas, as in many other states, is not as extensive as one may expect. There are a small number of cases from the middle of the 20th century that are cited again and again in most of the subsequent decisions. *See* Joyce Moore, *Fiduciary Litigation Case Law Update*, State Bar of Tex. Prof. Fiduciary Litigation Course (2010)(lists top 20 most significant trust/fiduciary cases). Several of these cases focus on construction of the agreement, distributions standards and the exercise of a fiduciary's discretion. Later sections of this outline will discuss some of those seminal cases.

C. Potential Sources of Guidance

In addition to the binding authority, there are a number of other sources that, depending on the facts and circumstances, may provide some guidance–albeit many times with no precedential value. They include:

- The Restatement of Trusts;
- The Uniform Trust Code; and
- Legal treatises.

1. Restatement of Trusts

Texas has not adopted the Restatement of Trusts and they are not binding in Texas. *See* RESTATEMENT (SECOND) OF TRUSTS § 1 *et seq* (1959); RESTATEMENT (THIRD) OF TRUSTS § 1 *et seq* (2003). But, Texas courts have considered and cited the Restatement (Second) of Trusts in a number of decisions. And, they appear to be considering the more recently adopted Restatement (Third) of Trusts on an increasing basis. *See Woodham v. Wallace*, 2013 WL 23304 (Tex. App.—Dallas 2013, n.p.h.); *Wolfe v. Devon Energy Production Co., LP*, 382 S.W.3d 434 (Tex. App.—Waco 2012,

rev. denied); *See Mohseni v. Hartman,* 363 S.W.3d 652 (Tex. App.—Hous. [1st Dist.]) 2011, n.p.h.); *Longoria v. Lasater,* 292 S.W.3d 156 (Tex. App.—San Antonio 2009)(pet. denied); *Alpert v. Riley,* 274 S.W.3d 277 (Tex. App.—Houston [1st Dist.] 2008)(pet. denied); *In re Townley Bypass Unified Credit Trust***,** 252 S.W.3d 715 (Tex. App.—Texarkana 2008)(pet. denied); *Keisling v. Landrum,* 218 S.W.3d 737 (Tex. App.—Fort Worth 2007, pet. denied); *Pickelner v. Adler*, 229 S.W.3d 516 (Tex. App.—Houston [1st Dist.] 2007)(pet. denied); *Moon v. Lesikar*, 230 S.W.3d 800 (Tex. App.—Houston [14th Dist.] 2007)(no pet.); *Marsh v. Frost Nat'l Bank,* 129 S.W.2d 174 (Tex. App.—Corpus Christi 2004, pet. denied); *Bergman v. Bergman Davison Webster Charitable Trust*, 2004 WL 24968 (Tex. App.—Amarillo 2004, no writ)(not designated for publication).

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

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

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

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

2. Uniform Trust Code

Approved in 2000 by the National Conference of Commission on Uniform State Laws, the Uniform Trust Code is the first codification of trust law. The Uniform Trust Code, with some variations, has been adopted by the District of Columbia and approximately twenty-two states: Alabama, Arizona, Arkansas, Florida, Kansas, Maine, Missouri, Michigan, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia and Wyoming. *See* http://uniformlaws.org. In 2012, Maryland, Massachusetts and New Jersey all introduced bills seeking its adoption. *See id.*

Texas has not adopted the Uniform Trust Code and it has no precedential value. In fact, legislative history indicates certain provisions of the Texas Property Code were enacted to expressly disavow attempts to apply certain provisions. But, the Uniform Trust Code may provide some guidance when construing and administering trusts. For example, to the extent that Texas used the Uniform Trust Code as a guide when drafting and enacting Texas' version of the Uniform Principal and Income Act in 2003, it does provide guidance on those adopted provisions. Then again, in other situations, Texas has adopted legislation in direct contradiction of its provisions.

3. Treatises

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

III. FUNDAMENTAL DUTIES OF A TRUSTEE

A. Overview.

The Texas Property Code states that "[t]he trustee shall administer the trust in good faith according to its terms and [the Texas Trust Code] . . . and shall perform all the duties

imposed on trustees by the common law." TEX. PROP. CODE ANN. § 113.051 (Vernon 2014).

B. General Duties of a Trustee

A trust involves a fiduciary relationship. William F. Frathcer, *Scott on Trusts* § 348 (4th Ed. 1989). Just what is expected of a "fiduciary" may have been best summarized by Justice Cardozo in the case of *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545-546, 62 A.L.R. 1 (1928), in which he stated:

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

See also Langford v. Shamburger, 417 S.W.2d 438 (Tex. Civ. App.–Fort Worth 1967, writ ref'd n.r.e.).

A trustee's specific duties will be defined by the trust instrument and/or statutes that alter or negate certain fiduciary duties that would otherwise be imposed by Texas "common law." *See* discussion *supra.* But generally speaking, the duties of a trustee are categorized into the following:

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

It is important to appreciate each of these duties, how and if they can be modified and which party has the burden of proof to establish a trustee's compliance with each of them.

1. Duty of Loyalty

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

The most common breach of the duty of loyalty involves claims of self-dealing. This generally refers to any conduct by a trustee that takes advantage of the trustee's position to benefit the trustee or some third person that the trustee desires to be benefited. But not all self-dealing is improper and a grantor can authorize many forms of self-dealing. *See* Exhibits B-D for sample Pattern Jury Charges regarding self-dealing.

2. Duty of Full Disclosure

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

And, the breach of the duty of full disclosure by a trustee has been argued to be tantamount to fraudulent concealment. *See Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988). The beneficiary is not required to prove the elements of fraud, *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965), *Langford v. Shamburger*, 417 S.W.2d 438 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.), and need not even prove that he "relied" on the fiduciary to disclose the information. *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938), *Miller v.*

Miller, 700 S.W.2d 941, 947 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

Even though a trustee may not have technically violated any other fiduciary duty, the failure to disclose his activities may nonetheless result in liability. For example, the court in *InterFirst Bank Dallas, N.A. v. Risser*, implied that the trustee violated its common law duty of full disclosure by failing to notify the beneficiaries of the sale of a major trust asset. 739 S.W.2d 882 (Tex. App.—Texarkana 1987, writ dism'd by agreement). And, while Texas law does not require the consent of beneficiaries before selling trust assets, the fact that the property is in a trust does not require that the beneficiaries are to be kept in ignorance of the administration of the trust. *See Risser*, 739 S.W.2d at 906 n. 28; *see also*, *Grey v. First Nat'l Bank Dallas*, 393 F.2d 371 (5th Cir. 1968)(bank failed to make full disclosure regarding its own interests in dealing with property it held as trustee).

Omissions or misstatements in accountings have also been argued to violate the common law duty of disclosure. And even previously filed and court approved accountings may be re-examined upon a final accounting. *See Portanova v. Hutchison*, 766 S.W.2d 856 (Tex. App.—Houston [1st Dist.] 1989, no writ); *In re Higganbotham's Estate*, 192 S.W.2d 285 (Tex. Civ. App.1946, no writ); *Thomas v. Hawpe*, 80 S.W. 129 (Tex. Civ. App.—Dallas 1904, writ ref'd). A trustee can be held liable if he knowingly discloses false information or knowingly fails to disclose harmful information regarding his dealings with trust or estate assets. *Cf Montgomery*, 669 S.W.2d at 309.

The trustee's duty of disclosure to disclose material facts is not altered by the existence of litigation between the beneficiaries and the trustee. *See Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996). This duty operates before and after litigation has been filed and is in addition to any obligations of disclosure imposed by the "discovery provisions of the Texas Rules of Civil Procedure." *See Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996), *Montgomery*, 669 S.W.2d at 309 (holding trustees and executors who withheld information from beneficiary in order to induce her to enter into agreed judgment committed "extrinsic" fraud justifying bill of review); *see also Johnson*, 120 S.W.2d at 788 (strained relationship does not mitigate duty to disclosure).

3. Duty of Competence

The duty of competence is not clearly defined by statute but presumes that the trustee acts in accordance with the governing instrument and all applicable laws, such as the Texas Property Code and the Texas Estates Code. The duty of competence implicitly requires that the fiduciary take affirmative actions to properly carry out his, her or its duties. A general listing of the duties encompassed in this duty of competence includes:

- Duty to comply with the prudent investor rule;
- Duty not to delegate except as allowed by law;
- Duty to keep and render accounts;
- Duty to take certain acts at the inception of the acceptance as trustee;
- Duty to exercise reasonable care and skill;
- Duty to take and retain control of trust assets;
- Duty to preserve trust assets;
- Duty to enforce claims;
- Duty to defend;
- Duty to not commingle trust assets;
- Duty in selection of financial depositories; and
- Duty with respect to co-trustees.

See Mary C. Burdette, *Handbook for the Fiduciary: Advising and Counseling Executors and Trustees*, State Bar of Tex. Prof. Dev. Program, Malpractice Avoidance for Estate Planners Webcast (2010).

4. Duty to Reasonably Exercise Discretion

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

settlor's intent must be determined solely by the terms and provisions of the instrument.

But, there are generally no statutory guidelines regarding how discretion must be exercised or what constitutes the reasonable exercise of discretion. And, while some statutes, such as the Texas Property Code, provide some safe harbor rules, what will be considered the reasonable exercise of discretion is often open for dispute. *See* discussion *infra.*

5. Modification of Duties of Trustees

Because it is well settled in Texas that the first principle of trust construction is to honor the intent of the settlor, the terms of a trust as set forth in the governing instrument generally control. Almost all fiduciary duties established under the Texas Property Code can be modified to a great extent. *See* TEX. PROP. CODE ANN. 111.0035(b)(Vernon 2014). For example, the agreement can limit a trustee's duty to diversify the trust assets or even authorize highly speculative and risky investment. Or, the trust agreement may create a duty when one may not otherwise exist, such as a mandate to provide an accounting.

Texas Property Code Section 111.0035(b) sets out the few statutory duties and obligations that *cannot* be modified by the grantor in the trust agreement. Section 111.0035(b) provides that a grantor cannot:

- Negate Section 112.031 which provides that a trust cannot be created for an illegal purpose;
- Negate Section 114.007 which provides that a trustee cannot be exonerated for a breach of trust committed in bad faith, intentionally and/or with reckless indifference to the rights of the beneficiaries;
- Negate Section 114.007 which provides that a trustee cannot be relieved of liability for profits derived by a breach of trust;
- Limit any applicable statutes of limitations;
- Negate Sections 113.151 which provides when a vested beneficiary can demand an accounting;
- Limit the trustee's duty to act in good faith and in accordance with the purposes of the trust;
- Limit a court's jurisdiction of trust proceeding set forth in Texas Property Code Chapter 115 including to modify trust, remove a trustee, require, dispense with, modify, or terminate a trustee's bond, and/or adjust or deny a trustee's compensation if the trustee commits a breach of trust (but see recent sanctioning of arbitration by Texas Supreme Court discussed infra); or
- Negate Section 112.038 which limits the enforcement of any forfeiture clause when the party establishes that he or she acted in just cause and filed and maintained the lawsuit in good faith.

See TEX. PROP. CODE § 111.0035(b); *see also Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.)(when language of trust instrument is unambiguous and expresses intentions of grantor, trustee's powers are conferred by instrument and neither the court nor trustee can add or take away such power).

C. Applicable Statutory Requirements

As discussed previously, Texas has adopted an extensive Trust Code. *See* TEX. PROP. CODE ANN. § 101.001 *et seq.* (Vernon 2014). (Vernon 2014). And, the Texas Property Code includes significant statutory guidelines regarding the accounting and allocation of trust receipts, expenses and distributions known as the "Uniform Principal and Income Act." *See* TEX. PROP. CODE Ch. 116 (Vernon 2014). The Texas Property Code was also expanded in 2004 to include a "Uniform Prudent Investor Act" that fundamentally changed applicable standard of care. *See* TEX. PROP. CODE Ch. 117 (Vernon 2014).

It is important to evaluate a trustee's actions or inactions in light of these current statutory guidelines rather than under prior statutory and common law. A brief discussion of some more significant requirements follows.

1. Texas' Uniform Principal and Income Act

Effective January 1, 2004, Texas enacted the Uniform Principal and Income Act. *See* TEX. PROP. CODE ANN. § 116.001 *et seq.* (Vernon 2014). It generally applies to trusts established before and after January 1, 2004. *See* Section 5(b) of the Acts of 2003, 78th Leg, Ch. 659. But, do not be deceived by its title.

Some provisions mirror the Uniform Acts, while others are tailored to Texas. Therefore, a trustee and his advisors should be familiar with the new requirements.

The Texas Principal and Income Act imposes extensive accounting and allocation rules. And, while these new provisions may be overridden by clear directions to the contrary in the trust agreement, preemption for trusts created before 2004 will be difficult to establish. For example, the adjustment provisions state that trust terms addressing adjustments of principal and income do not affect the new adjustment powers unless the terms "are intended to deny the trustee the power of adjustment conferred by Subsection (a)." TEX. PROP. CODE ANN. § 116.005(f)(Vernon 2014).

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

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

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

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

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

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

And, the Texas Principal and Income Act also provides limitations on the power to adjust. These limitations are generally imposed to prevent the loss of certain tax opportunities. Specifically, a trustee may not make an adjustment that:

- Diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;
- Reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

- Changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;
- Relates to an amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;
- Will cause an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment; and
- Will cause all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment.

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

And, finally it is important to appreciate that Texas Property Code Sections 116.151 through 116.206 provide guidance and in some regards safe harbors relating to trust receipts and distributions. These sections replace former Sections 113.101 through 113.111. These sections should be reviewed carefully to confirm understanding of these new default provisions.

A brief summary of the more common receipts includes:

- Section 116.151 addresses receipts from business entities. Care should be taken when "money" or cash is received as these sections characterize some such receipts as income and others as principal. Generally, money is allocated to income unless it is related to a partial or total liquidation or it meets certain capital gain requirements. Other receipts are generally allocated to principal;
- Section 116.152 addresses receipts from another estate or trust. It provides that a distribution of income from a trust or an estate in which the trust has an interest (other than a purchased interest) shall be allocated to income and amounts received as a distribution of principal are principal;
- Section 116.162 provides for the allocation of receipts from rental property. Generally it provides that the following are allocated to income (i) rents related to real or personal property; and (ii) amount received for cancellation or renewal of a lease. The following are allocated to principal (i) an amount received as a refundable deposit, including a security deposit; and (ii) a deposit that is to be applied as rent for future periods;
- Section 116.163 provides for the allocation of receipts from debt or similar obligations. Generally it provides that the following are allocated to income (i) an amount received as interest (whether fixed, variable, or floating rate); (ii) an amount received as consideration for prepaying principal without any provision for amortization of premium; and (iii) as to obligations held for less than one year, an amount in excess of the purchase price or original debt obligation. The following are allocated to principal (i) as to obligations held for more than one year, an amount received from the sale, redemption, or other disposition of a debt obligation, including an obligation whose purchase price or value when it is acquired is less than its value at maturity; and (ii) as to obligations held for less than one year, an amount equal to the purchase price or original debt obligation;
- Section 116.172 provides that distributions of up to 4% of the value of the plan or IRA in any one year is income and any excess is principal. This section replaced Section 113.109 that provided that of each receipt, five percent was considered income, based on inventory value, recalculated each year; and
- Section 116.174 provides that a trustee is required to allocate these receipts "equitably," and allocating in accordance with the available federal tax depletion deduction is presumed to be equitable; provided, however, an exception exists for trusts created before 2004. Trustees of pre-2004 trusts may continue to apply the old allocation rules of 72-½ % of royalties being allocated to income and the remaining 27-½ % to principal.

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

2. Texas' Uniform Prudent Investor Act

Effective January 1, 2004, Texas enacted the Uniform Prudent Investor Act. *See* TEX. PROP. CODE ANN. § 117.001 *et seq*. (Vernon 2014). But, do not be deceived by its title. Like the Uniform Principal and Income Act, some provisions mirror the Uniform Acts, while others are tailored to Texas. Thus, every trustee and their counsel should be familiar with its requirements.

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

> (a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.
>
> (b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.
>
> (c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:
>
> (1) general economic conditions;
>
> (2) the possible effect of inflation or deflation;
>
> (3) the expected tax consequences of investment decisions or strategies;
>
> (4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
>
> (5) the expected total return from income and the appreciation of capital;
>
> (6) other resources of the beneficiaries;
>
> (7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and
>
> (8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.
>
> (d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.
>
> (e) Except as otherwise provided by and subject to this subtitle, a trustee may invest in any kind of property or type of investment consistent with the standards of this chapter.
>
> (f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

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

Furthermore, Section 117.005, unless modified by the trust agreement, requires a trustee to diversify investments "unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." TEX. PROP. CODE ANN. § 117.005 (Vernon 2014). And, a trustee has an affirmative duty since 2004 to "review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this chapter" within a reasonable period of time of being appointing or receiving additional assets. TEX. PROP. CODE ANN. § 117.006 (Vernon 2014).

D. Applicable Standards of Conduct

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

1. Bad Faith

Bad faith, in a trustee relationship, is defined as "acting knowingly or intentionally adverse to the interest of the trust beneficiaries" and with an "improper motive." *See Interfirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 898 (Tex. App.—Texarkana 1987, no

writ)(disapproved of on other grounds by *Tex. Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 249 (Tex. 2002)). A finding of bad faith requires some showing of an improper motive. *See King v. Swanson*, 291 S.W.2d 773, 775 (Tex. Civ. App.—Eastland 1956, no writ). Further, improper motive is an essential element of bad faith. *See Ford v. Aetna Ins.*, 394 S.W.2d 693 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.).

2. Good Faith

Texas recognizes a standard of good faith that combines subjective and objective tests. *See Lee v. Lee*, 47 S.W.2d 767, 795 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). A trustee acts in good faith when he or she: (1) subjectively believes his or her defense is viable, and (2) is reasonable in light of existing law. *See id.* The newly enacted Pattern Jury Charges for Express Trusts defines good faith as "an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct. PJC 235.11, 235.12. Note that the Pattern Jury Charge drafting Committee states in its comments that the "Committee has found no cases defining "good faith" in the context of breach of fiduciary duty." *See* PJC 235.12 cmts. Therefore, the Committee decided to choose the "conjunctive standard ("and") because the Committee believes that both the subjective standard of intention and the objective standard of reasonableness are appropriate to measure the conduct of a trustee" but acknowledged it may not be conjunctive in other contexts. *See id.* To date, no appellate court has reviewed the Pattern Jury Charge definition.

3. Gross Negligence

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

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

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

4. Reckless Indifference

Section 114.007 provides that a trustee cannot be exonerated for reckless indifference. TEX. PROP. CODE ANN. § 114.007(a)(3)(Vernon 2014). But neither the Pattern Jury Charges nor any Texas reported decision has clearly defined "reckless indifference" in the context of Section 114.007. But, like gross negligence, it appears to imply that the trustee had subject knowledge of the risk or improper actions. For example, Texas Penal Code Section 6.03(c) defines a person who acts with "recklessness" if "he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." TEX. PENAL CODE ANN. § 6.03(c)(Vernon 2011). Section 3.06(a) further provides that "[t]he risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the

circumstances as viewed from the actor's standpoint." *See Id.*

E. Applicable Standards of Care

Unless modified by the agreement, a trustee must invest and manage the trust in compliance with the prudent investor rule. TEX. PROP. CODE ANN. § 117.003 (Vernon 2014). *See* discussion *infra.* Note that prior to 2004, trustees were subject to a prudent man standard of care. Therefore, decisions issued prior to the adoption of the Prudent Investor Act may have limited applicability.

F. Burden of Proof

The issue of whether the trustee or another party has the burden to prove or disprove a claim depends on the type of duty or breach alleged.

1. Burden on Complainant

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

- Existence of a Fiduciary Relationship. *Thigpen v. Locke,* 363 S.W.2d 247 (Tex. 1962);
- Fiduciary Not Acting Competently. *Jewitt v. Capital Nat'l Bank of Austin*, 618 S.W.2d 109 (Tex. App.—Waco 1981, writ ref'd n.r.e.);
- Fraud. *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965);
- Breach of Contract. *Omohundro v. Matthews*, 341 S.W.2d 401 (Tex. 1960);
- Conversion. *Avila v. Havana Painting Co*., 761 S.W.2d 398 (Tex. App.—Houston [14th Dist.] 1988, writ den'd);
- Tortious Interference with Trust Administration. TEX. PROP. CODE ANN. § 114.031(a)(1)(Vernon 2014);
- Removal of Trustee by Petition. TEX. PROP. CODE ANN. § 113.082 (Vernon 2014); and
- Conspiracy. *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 160 S.W.2d 509 (Tex. 1942); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963).

2. Burden on Fiduciary

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

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

In 2012, the pattern jury charges for the trust and estates were approved and included in Volume 5 of the Texas Pattern Jury Charges. Some of the more commonly used jury questions are attached hereto as Exhibits.

G. Judicial Review

Likewise, it is important to appreciate how a trustee's decision will be reviewed by the trial court and subsequently by the appellate courts.

1. Common Law

There are two basic principles that can be derived from the case law in Texas. They generally allow courts the latitude to take whatever action they deem necessary according to the facts in each situation.

The first principle is that courts should not second guess the trustee unless there is an "abuse of discretion." *Coffee v. William Marsh Rice Univ.*, 408 S.W.2d 269, 284 (Tex. Civ. App.—Houston, writ ref'd n.r.e). This rule is still valid today: "Texas courts are prohibited by

law from interfering with the discretion of the trustee absent a clear showing of fraud or other egregious conduct." *In re Bass*, 171 F.3d 1016 (5th Cir. 1999).

The second principle is that any decision by the trustee that subverts the "intent of the grantor" will be overturned. *See State v. Rubion*, 308 S.W.2d 4, 9 (Tex. 1957).

The logical conclusion to be drawn from these two principles is that the "intent of the settlor" is the paramount consideration when a trustee is exercising its discretion. A closer look at these seemingly clear principles reveals that the courts have not actually provided any real guidance. The case law only leads the trustee to the place in which it started. After all, if the grantor's intent is abundantly clear to all parties then there would be no need for court intervention in the first place.

Furthermore, it is apparent from reading the actual cases that the grantor's intent is often, in reality, second fiddle to a trustee's discretion. *See Coffee,* 408 S.W.2d at 269. Unfortunately, these cases seem to give courts broad latitude to evaluate either principle on a case-by-case basis – whether they find in support of the trustee's decision or the plaintiff's allegation of foul play.

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

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

a. Context Of Review

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

b. Extent of Review

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

2. Texas Property Code

Until the enactment of Texas' version of the Uniform Principal and Income Act, there was limited statutory authority for a court to review a trustee's distribution decisions. For example, the Texas Property Code provides that district courts (and statutory probate courts under their enabling legislation) have jurisdiction over all proceedings concerning trusts, including those relating to (i) making determinations of fact that affect distributions from a trust, (ii) determining a question arising in the distribution of a trust, and (iii) relieving a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle. *See* TEX. PROP. CODE ANN. § 115.001(a)(Vernon 2014). The Texas Property Code, however, did not provide any additional guidance.

Thus, trustees and beneficiaries generally sought relief under the declaratory judgment provisions set forth in the Texas Civil Practice & Remedies Code. *See* TEX. CIV. PRAC. &

REM. CODE ANN. § 37.005 (Vernon Supp. 2013)(person interested in trust may seek judicial declaration of rights or legal relations in respect to trust to direct trustees to do or abstain from doing any particular act in their trustee capacity or determine any question arising in administration of trust).

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

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

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

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

H. Accounting Requirements

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

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

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

If the trustee fails to provide the requested accounting, an "interested person" may file a lawsuit to compel the trustee to account to the interested person. *See* TEX. PROP. CODE ANN. § 113.151(c)(Vernon 2014). And, the court may require the trustee to deliver an accounting once the court finds the interested person has a valid interest in the trust, such as being a beneficiary, having a claim against the trust, or other interest that would be sufficient to require an accounting by the trustee. *See id.*

Note that some trust agreements require a trustee to periodically provide some or all the beneficiaries a periodic accounting. Thus, a trust agreement should be reviewed to quickly determine if the trustee was required to provide an accounting without request. And, to the extent required by the terms of the trust, the trustee should try to mitigate any claims by

providing the requisite beneficiaries an accounting that complies with the time and content of the mandated accounting. The failure to meet these requirements can be held to be a breach of trust.

IV. FUNDAMENTALS OF INTERPRETING TRUST DOCUMENTS

A. Overview

The Texas Property Code empowers the trustee of an express trust to perform various acts on behalf of the trust. *See* TEX. PROP. CODE ANN. §§ 113.001 *et seq*. (Vernon 2014). A trustee is generally vested with a wide measure of discretion in prudent operation of the trust. *See Barrientos v. Nava*, 94 S.W.3d 27 (Tex. App.—Houston [14th Dist.] 2002, no writ).

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

B. Unambiguous Instrument

When the trust instrument is unambiguous and expresses the intentions of the grantor, the instrument speaks for itself and it is not necessary to construe the document. *See Keisling v. Landrum,* 218 S.W.3d 737 (Tex. App.—Fort Worth 2007, pet. denied) *citing Corpus Christi Nat'l Bank v. Gerdes*, 551 S.W.2d 521, 523 (Tex. App.Civ.—Corpus Christi 1977, writ ref'd n.r.e); *Eckels v. Davis,* 111 S.W.3d 687, 694 (Tex. App.—Fort Worth 2003, pet. denied); *Wright v. Greenberg,* 2 S.W.3d 666, 671 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). An unambiguous instrument confers the trustee's powers, and neither the court nor the trustee can add or take away such powers. *See id.; see also Beaty v. Bales*, 677 S.W.2d at 754. The trust is entitled to that construction which the grantor intended. *Beaty v. Bales*, 677 S.W.2d at 754. In such circumstances, outside evidence should not be considered. *Id.*

C. Ambiguous Instrument

What if the language is not clear? When the intent of the grantor is not clear from the language of the instrument, the trustee should consider the value of the corpus of the trust, and the relations between the grantor and the beneficiaries, and all circumstances regarding the trust and beneficiaries at the time the trust was executed. *See First Nat'l Bank of Beaumont v. Howard*, 229 S.W.2d 781, 783 (Tex. 1950)(*citing McCreary v. Robinson*, 59 S.W. 536 (Tex. 1900)).

And, if a dispute occurs, consideration should be given to (i) pleading ambiguity as an affirmative defense, and (ii) seeking a judicial construction of the provisions prior to any trial.

1. Actions During Lifetime

If the grantor provided for the beneficiary in a certain manner during his/her lifetime, then that action is relevant in determining what the grantor intended to be provided from the trust. *See Beaumont v. Howard,* 229 S.W.2d at 783. In *Beaumont*, the grantor had been very generous toward both of his daughters during his life. *Id* at 785. The court found that the trustee lacked the same generous attitude in administering the trust and therefore was not "acting in that state of mind in which the grantor contemplated that it should act." *Id.*

2. Other Trusts Created by Grantor

If the grantor created multiple trusts for the beneficiary, the terms of the other trusts may also provide evidence of the grantor's intent. *See* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt e, illus. (g)(1)(2003)(significance of beneficiary's other resources and illustrative situation).

3. Context of the Creation of the Trust

The circumstances that resulted in the creation of the trust may be relevant when determining a grantor's intent. For example, a grantor may have desired to give all of his property outright to his/her spouse but, on advice of counsel, leaves the property to his/her spouse in trust. *See* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt e, illus. g(1)(2003).

4. Framing the Issue: Overall Intent vs. Specific Intent

The decision of *Coffee v. William Marsh Rice University* is frequently discussed in the context of overall intent versus specific intent. 408 S.W.2d 269 (Tex. 1966); *see also* discussion *infra*.

In *Coffee*, the trust document provided that the university was for the use of "the white residents of Houston." *Id.* at 272. The plaintiffs brought suit against the trustees of Rice in order to prevent them from admitting black students. The court acknowledged that the language of the trust was clear. The court reasoned, however, that the overall intent of the grantor was to create and maintain a university. And, conditions had significantly changed between the time when the trust was created and 1966 when the suit was brought. Therefore, the trustees, under the doctrine of *cy pres*, were free to disregard the particular provisions applicable to race in order to accomplish what the court found to be the overall intent of the grantor.

D. Common Terms

It is important to identify and understand the use of various terms in the trust agreement when defending a trust. Texas courts have consistently held that common words should be given their plain meaning unless the context indicates the words were used in another sense. *Patrick v. Patrick*, 182 S.W.3d 433, 436 (Tex. App.—Austin 2005, no pet.); TEX. GOV'T CODE ANN. § 312.002 (Vernon. 2005)("Meaning of Words: (a) Except as provided by Subsection (b), words shall be given their ordinary meaning. (b) If a word is connected with and used with reference to a particular trade or subject matter or is used as a word of art, the word shall have the meaning given by experts in the particular trade, subject matter, or art."). Some of the more commonly used terms are discussed below.

1. Shall vs. May

Most practitioners understand the literal meaning of these two words: "shall" is mandatory and requires that distributions be made and "may" provides the trustee with discretion to make distributions. *See also* TEX. GOV'T CODE ANN. § 311.016 (Vernon. 2005)("The following constructions apply unless the context in which the word or phrase appears necessarily requires a different construction or unless a different construction is expressly provided by statute: (1) "May" creates discretionary authority or grants permission or a power. (2) "Shall" imposes a duty."); *see also Roberts v. Clark,* 188 S.W.3d 204, 210 (Tex. App.—Tyler 2002, pet. denied)(citing BLACK'S LAW DICTIONARY 1379 (7th ed.1999)("shall" as used in contracts is generally mandatory, operating to impose duty)); *but see Penix v. First Nat'l Bank of Paris*, 260 S.W.2d 63 (Tex. Civ. App.—Texarkana 1953, writ ref'd).

But, not all courts apply this logical interpretation in trust litigation. For example, the court in *Penix* ruled that the trustee in the case was within his discretion to withhold a portion of the income generated by the trust despite the language of the trust that stated: "[income] ***shall*** be used for support, maintenance and schooling." *Id* at 64 (emphasis added). The *Penix* decision, when viewed within the context of the entire body of case law, should not, however, be interpreted to stand for the proposition that "shall" and "may" are interchangeable terms. Rather it is one of many examples of the courts looking to the desired outcome and elevating "trustee discretion" or "intent of the settlor" over the plain language of the trust.

2. Necessary vs. Appropriate

Likewise, the term "necessary" provides a basis for the trustee to consider the beneficiary's other resources when the trust is silent as to the consideration of other resources. *See First Nat'l Bank of Beaumont v. Howard*, 229 S.W.2d at 786. The term "appropriate" provides the trustee with more discretion. But, the

Restatement (Third) of Trusts, in discussing the intent of the grantor, states:

> . . . the settlor may manifest an intention that other resources *are not* to be taken into account (as in an absolute gift of support) or that they *must* be (as in a provision for payments 'only if and as needed' to maintain an accustomed standard of living), with the trustee to have no discretion in the matter. (Contrast, however, the common phrase "necessary for support," which without more normally does not limit the trustee's discretion in this way.).

RESTATEMENT (THIRD) OF TRUSTS § 50 cmt e (2003)(significance of beneficiary's other resources); *see also Keisling v. Landrum,* 218 S.W.3d 737 (Tex. App.—Fort Worth 2007, pet. denied).

3. Absolute or Uncontrolled Discretion

Both case law and the Restatement provide that the terms "absolute" and "uncontrolled" are not to be interpreted literally. And, therefore, defense counsel should not place too much reliance on these terms. Rather, a trustee's discretion is always subject to judicial review and control. *See State v. Rubion*, 308 S.W.2d at 9. A trustee continues to be required to act honestly and in a manner contemplated by the grantor. *See* discussion *supra.* The inclusion of these terms serves to discourage remaindermen from complaining if the distributions are generous.

The provision does not serve to cut completely the other way to allow the trustee to make no distributions. The Restatement discusses this lopsided interpretation stating: "The overall tenor of the terms of a power may, however, in the context of the trust's more general purposes, lead to an interpretation granting the trustee ordinary discretion with respect to the benefits to which the discretionary beneficiary is minimally entitled (e.g. reasonable support), with the extended discretion applicable to the trustee's allowance of more." RESTATEMENT (THIRD) OF TRUSTS § 50 cmt c (2003)(effect of extended discretion).

4. Sole, Final or Conclusive Discretion

Likewise, the terms such as "sole," "final" or "conclusive" do not vest an unlimited discretion in a trustee. *See Howard*, 229 S.W.2d at 783. And, therefore, again defense counsel should not place too much reliance on these terms.

In *Howard,* the court held that the "test to be applied is: When it makes payments to the beneficiaries out of the corpus of the estate, is the trustee acting in that state of mind in which the settlor contemplated that it should act?" *Id.* (*citing* William F. Frathcer, *Scott on Trusts*, Vol. 2, Sec. 187, p. 987; *see also* 65 C.J., Trusts, Sec. 727, p. 847).

When the grantor's intention is not made clear by the terms of the trust, consideration is given to (i) the value of the estate, (ii) the previous, relations between him and the beneficiaries, and (iii) all the circumstances in regard both to the estate and the parties existing when the will was made and when the grantor died. *Id.* (*citing McCreary v. Robinson*, 59 S.W. 536 (Tex. 1990); 101 A.L.R. p. 1462, Ann. II. a. 1). Consequently, even when a trustee's discretion is declared to be final and conclusive, courts will interfere if the trustee acts outside the bounds of reasonable judgment. *See id.; but see Story v. Story*, 176 S.W.2d 925 (Tex. 1944); *Ballenger v. Ballenger*, 668 S.W.2d 467 (Tex. Civ. App.—Corpus Christi 1984, writ dism'd)(trial court erred in granting temporary injunction that served to restrict trustees from exercising their "sole discretion" authority by substituting the judgment of the trial court for that of the named trustees).

E. Distributions Standards

Perhaps no area of discretion is more complex that those relating to trust distributions. A trustee is not only required to exercise his or her discretion in a purely discretionary trust, but also when the trust includes a standard for distribution. If the trust provides for mandatory distribution of income, the Trustee may also need to determine whether any adjustment can or should be made to income under the Uniform Principal and Income Act and, if so, the amount of the adjustment. A brief discussion of some of the more fundamental concepts that often arise when advising and defending a trustee follows.

1. Mandatory Distributions Standards

A mandatory distribution standard is one that requires the distribution of income or principal, or both, in a manner that generally does not require the exercise of a trustee's discretion. The most common mandatory distributions involve the distribution of all income. For example, for Qualified Terminable Interest Property held in trust, the trustee is required to distribution all income to a spouse at least annually in order to qualify for the marital deduction. *See* I.R.C. 2056(b)(7)(surviving spouse must be "entitled to all the income from the property, payable annually or at more frequent intervals").

A grantor can also provide for mandatory distributions of principal. For example, some trusts provide that the trust distribute a certain percentage of principal each year. A trust could also require that a certain percentage of principal be distributed to a beneficiary upon reaching a particular age or goal, such as graduating from college.

While a mandatory distribution standard may be required in certain situations, such as with a QTIP Trust, they should be used with caution. A mandatory distribution standard will generally result in the loss of the spendthrift protection as to the portion required to be distributed and may require distributions to persons who because of age or incapacity are unable to handle the funds. *See* discussion *infra.*

2. Discretionary Distributions Standards

In contrast, discretionary distributions standards generally require the exercise of a trustee's discretion. Discretionary distribution standards may be ascertainable or unascertainable. The selection of the distribution standards is often based on a number of factors including:

- Purpose of trust;
- Whether a beneficiary may serve as trustee;
- Preference between current and remainder beneficiaries; and
- Preference for objective versus subjective standard of review.

3. Ascertainable Standard

The most commonly used ascertainable standard for making trust distributions is "health, education, maintenance and support." *See* Treas. Reg. §20.2041-1(c)(2)("A power to consume, invade, or appropriate income or corpus, or both, for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent is, by reason of section 2041(b)(1)(A), not a general power of appointment. A power is limited by such a standard if the extent of the holder's duty to exercise and not to exercise the power is reasonably measurable in terms of his needs for health, education, or support (or any combination of them"); *see also* Treas. Reg. 1.674(b)-1(b)(5)(i)("A clearly measurable standard under which the holder of a power is legally accountable is deemed a reasonably definite standard for this purpose. For instance, a power to distribute corpus for the education, support, maintenance, or health of the beneficiary; for his reasonable support and comfort; or to enable him to maintain his accustomed standard of living; or to meet an emergency, would be limited by a reasonably definite standard."). This is commonly referred to as the HEMS standard.

Treasury Regulation § 20.2041-1(c)(2) provides the following examples of powers limited by an ascertainable standard:

- Support;
- Support in reasonable comfort;
- Maintenance in health and reasonable comfort;
- Support in his accustomed manner of living;
- Education, including college and professional education;
- Health; and
- Medical, dental, hospital and nursing expenses and expenses of invalidism.

See Treas. Reg. §20.2041-1(c)(2).

An ascertainable or HEMS standard is often used when the grantor desires to include more objective distribution standard. It is also used when the grantor is concerned about maintaining the trust principal for the reminder beneficiaries.

a. "Support" and "Maintenance"

The terms support and maintenance are generally considered to be similar. In fact, under the Restatement (Third) of Trusts, these terms are considered synonymous. In *State v. Rubion*, the Texas Supreme Court noted that these terms evidence the creation of a support trust. 308 S.W.2d at 8.

When the distribution standard includes the terms support or maintenance, a trustee's discretion is not unbridled discretion. *See Id.* (citing *First Nat'l Bank of Beaumont v. Howard*, 229 S.W.2d 781, 785 (Tex. 1950); *Anderson v. Menefee*, 174 S.W. 904 (Tex. Civ. App.—Fort Worth, writ refused, writ ref'd); William F. Frathcer, *Scott on Trusts*, Vol. 2, § 187, p. 986). Rather, the trustee's discretion must be "reasonably exercised to accomplish the purposes of the trust according to the grantor's intention and his exercise thereof is subject to judicial review and control". *Id.* (citing William F. Frathcer, *Scott on Trusts*, §§ 187, 187.1, 187.2, and 187.3; *Kelly v. Womack*, 268 S.W.2d 903, 907 (Tex. 1954); *Powell v. Parks*, 86 S.W.2d 725 (Tex. 1935); *Davis v. Davis*, 44 S.W.2d 447 (Tex. Civ. App.—Texarkana 1931, no writ)).

The Texas Supreme Court in *Rubion* recognized a number of factors that should be considered by a trustee exercising its discretion in a "support" or "maintenance" trust. *Rubion*, 308 S.W.2d at 10. They include:

- The size of the trust estate;
- The beneficiary's age, life expectancy, and condition in life;
- The beneficiary's present and future needs;
- The other resources available to the beneficiary's individual wealth; and
- The beneficiary's present and future health, both mental and physical.

Id. at 10-11; see *also In re Gruber's Will*, 122 N.Y.S.2d 654, 657 (N.Y. Sur. 1953)(age and condition of beneficiary, amount of trust fund, and other factors); *Hanford v. Clancy*, 183 A. 271, 272 (N.H. 1936)(size of fund, present situation of beneficiary, present and future needs, other resources, and future emergencies); *Falsey's Estate, Sur.*, 56 N.Y.S.2d 556, 563 (N.Y. Sur. 1945). (age of beneficiary, physical and mental health of beneficiary, size of trust compared to beneficiary's life expectancy).

There are common factors in all of these cases and the most relevant factors when a trustee is exercising its discretion are discussed below.

(i) *Bare Necessities*

Support means more than the bare necessities of life. *Hartford-Connecticut Trust Co. v. Eaton*, 36 F.2d 710 (2d Cir. 1929). Rather, it generally includes the beneficiary's ordinary living expenses. Ordinary living expenses may include "regular mortgage payments, property taxes, suitable health insurance or care, existing programs of life and property insurance and continuation of accustomed patterns of vacation and charitable and family giving." RESTATEMENT (THIRD) OF TRUSTS § 50 cmt d (2003).

(ii). *Educational Expenses*

Support has also been held to include the educational expenses of the beneficiary's dependents. *See First Nat'l Bank of Beaumont v. Howard*, 229 S.W.2d 781 (Tex. 1950). In *First Nat'l Bank of Beaumont*, the Texas Supreme Court held that the fact that the grantor had paid for his daughters' college education indicated that he considered the expense of a college education for a dependent a "necessary" expenditure. *Id.*; *see also* discussion of actions during lifetime *supra*.

(iii). *Implied Standard of Living*

The standard of living of the beneficiary is usually determined as of the time of the grantor's death or when the trust became irrevocable. The implication that support is to be interpreted at that time is in keeping with interpreting the trust according to the grantor's intent.

(iv). *Trust Size*

The interpretation of the terms of the trust requires a constant balancing of all relevant factors. The Restatement provides that the standard may be increased if either: (1) the beneficiary's standard of living has increased, the increase is consistent with the trust's productivity and the increase is not inconsistent with the productivity of the trust estate, or (2) considering the productivity of the trust, the

failure to increase the beneficiary's standard of living results in favoring the remainder beneficiaries over the current beneficiaries.

(v). *Present Versus Future Needs*

The needs of the beneficiary both present and future are to be considered by the trustee. But when the trust is potentially insufficient to provide for both needs, the trustee is faced with a difficult decision. Unfortunately, the few courts that have addressed this issue have not held consistently. For example, compare the decision of *State v. Rubion*, 308 S.W.2d at 4, with *Penix v. First Nat'l Bank of Paris,* 260 S.W.2d 63 (Tex. Civ. App. – Texarkana, writ ref'd).

In *Rubion*, the Texas Supreme Court ruled that the trustee had abused his discretion by refusing to invade the principal of the trust to make payments for the beneficiary's care while she was in a state mental hospital. *Rubion*, 308 S.W.2d at 8. The trustee argued that he was within his discretion to withhold payments of principal because the corpus of the trust should be preserved for her support if she were ever discharged from the hospital, and further, that if the trust corpus were used to pay all of her medical care it would completely destroy the trust. *Id*. Disagreeing, the court held the trustee abused his discretion by withholding the entire principal and the trustee should have determined what amount could have been distributed while still preserving the long-term health of the trust. *Id.* at 9.

In *Penix*, the appellate court ruled that a trustee was within its discretion to withhold principal as well as *income* in the present, in order to meet the future needs of the beneficiary. *See Penix*, 260 S.W.2d at 67. The trustee argued successfully that the beneficiary was a 9-year old girl, that the income produced from the trust was well in excess of what was needed for her current support etc., and that any excess above the beneficiary's current needs should be held in reserve for emergencies. *Id* at 64-65. The court found that the trustee was within its discretion, relying heavily on the language granting the trustee the power to carry out the terms of the trust "free from any supervision by the probate or other courts." The court discounted any significance of the word "shall" within the grant. *Id.*

While *Penix* and *Rubion* appear to conflict with each other, they consistently adhere to the same rule. When exercising discretion in a support trust, a trustee should consider both the present and future needs of the beneficiary.

b. Education

Without limiting or expanding provisions, education is considered to include living expenses, tuition, fees, books and other cost of higher education and/or technical training. *See* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt d(3)(2003).

c. Health

The term health typically includes distributions for health as would be implied from a support standard alone. *See* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt d(3)(2003).

4. Consideration of "Other Resources"

The issue of "other resources" continues to be an issue in trust litigation. The question is: *when making discretionary distributions, whether the trustee is or was obligated to consider the beneficiary's other resources*? If the grantor has provided guidance in this area, the grantor's intent will control. Also, as is reflected in the discussion below, all rules are tempered by the grantor's intent as reflected in the overall purpose of the trust.

a. General Rule

If the trust document is silent, a trustee should generally consider other resources but has some discretion in determining the impact of the resources on the distributions to be made from the trust. The consideration of other resources, however, is a balancing of the intent of the grantor regarding the treatment of the beneficiary and the other purposes of the trust and, these considerations may change the general rule. *See* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt e (2003)(significance of beneficiary's other resources).

b. Restatement Exceptions

The Restatement provide two exceptions to the general rule. The first exception is when the grantor has created other trusts of which the beneficiary receives distributions, then the trustee is to take into account the other distributions in making discretionary payments. *See Id*.

The second exception is when the beneficiary is in a situation in which he or she is not intended to be self-supporting (such as enrolled full-time in school), then the beneficiary's other resources are generally not considered. *See Id*.

c. Other Resources

Other resources normally include the beneficiary's other income, but not principal available to the beneficiary. *See Keisling v. Landrum,* 218 S.W.3d 737 (Tex. App.—Fort Worth 2007, pet. denied). In the *Keisling* decision, the appellate court held that a beneficiary was not required to exhaust all her assets, other than a house and car, in order to receive distributions from a trust that provided the trustee shall distribute trust income when the beneficiary's "own income and other financial resources from sources other than this trust are not sufficient" to maintain her standard of living. *See Id.* at 740. In reaching its decision, the appellate court found that "other financial resources" is limited to "income and other periodic receipts, such as pension and other annuity payments and court-ordered support payments." *Id.* at 743 *citing* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt e(2)(2003)(significance of beneficiary's other resources).

Depending on the terms and purpose of the trust, the principal of the beneficiary may be relevant. Once again, the determination of what resources to consider includes (i) the grantor's relationships both to the current beneficiary and the remainder beneficiaries, (ii) the liquidity of the beneficiary's assets, and (iii) the purposes of the trust both tax and non-tax. *See* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt e(2)(2003)(what other resources are to be considered).

F. Priority of Beneficiaries

A trustee should consider whether he or she is obligated to give preference to one or more beneficiaries prior to making a discretionary distribution.

1. Grantor's Intent Controls

The grantor may express a specific intent to favor a beneficiary or class of beneficiaries over another. If so, the grantor's intent will control. Some trusts will do so by expressly providing that it is the grantor's intent to provide for a certain beneficiary even to the extent of exhausting the trust. Other trusts will implicitly favor a beneficiary or a class of beneficiaries. For example, language that authorizes the distribution of principal, without regard to preservation of principal for the remaindermen, clearly expresses the intent of the grantor that the current beneficiary or beneficiaries are to be favored. *See* discussion *infra.*

2. Guidelines Under Texas Property Code When No Expression of Intent

The Texas Property Code provides that a trustee must act impartially when the trustee does not provide preference or priority as between the beneficiaries. Specifically, Section 116.004(b) provides as follows:

> In exercising the power to adjust under Section 116.005(a) or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a trustee shall administer a trust *impartially*, based on what is fair and reasonable to all of the beneficiaries, *except* to the extent that the terms of the trust clearly manifest an intention that the trustee shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

TEX. PROP. CODE ANN. § 116.004(b)(Vernon 2014).

Furthermore, Section 117.006 provides as follows:

> If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into

account any differing interests of the beneficiaries.

TEX. PROP. CODE ANN. § 117.006 (Vernon 2014)

3. Guidelines Under Restatement When No Expression of Intent

If there is no stated priority, the Restatement (Third) of Trusts suggests several inferences and constructional preferences as starting points. They include:

- Relationship to the grantor is relevant, leading in the most common situations to an inference that the beneficiary at the top of a line of descendants is favored over his or her own issue, with the grantor's spouse also so favored whether or not an ancestor of the others (e.g. grantor's issue by prior marriage).
- Among multiple lines of descent (e.g., all of the grantor's issue) there is an inference of priorities per stirpes, that is, that (i) the various lines are entitled to similar, impartial (... but not necessarily equal) treatment, with disparities to be justified on a principled basis consistent with the trust purposes, and that (ii) the inference of favored status within a descending line begins with the person(s) at the top (e.g. the grantor's child or the children of a deceased child).

See RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. f (multiple beneficiaries or groups as concurrent discretionary distributes).

Note, as discussed previously, Texas has not adopted the Restatement. Therefore, the instrument should be first construed under the Texas Property Code that provides for impartially. If, however, the trust is found to ambiguous, the Restatement guidelines may be considered by the court in construing the instrument.

G. Parents Obligation to Support Beneficiary

Under Texas law, a parent has a legal obligation to support his or her minor children. The Texas Family Code provides that such a duty of support includes the duty to provide a child with clothing, food, shelter, and medical and dental care. *See* TEX. FAM. CODE ANN. § 151.001 (Vernon 2014); *see also Daniels v. Allen,* 811 S.W.2d 278 (Tex. Civ. App.—Tyler 1991, no writ)(parent has obligation to support his minor children and provide necessities). A parent's obligation of support exists without the need for a court order. *See In Interest of A.D.E.*, 880 S.W.2d 241 (Tex. Civ. App.—Corpus Christi 1994, no writ)(father has duty to support child, even when not ordered by trial court to make payments of support); *Boriack v. Boriack,* 541 S.W.2d 237 (Tex.Civ.App—Corpus Christi 1976, dism'd.)(mother, as well as a father, has duty to support her minor children).

This duty of support must be considered when making distributions from a trust. *See Gray v. Bush,* 430 S.W.2d 258 (Tex. Civ. App.—Fort Worth 1968, ref. n.r.e.)(in absence of financial necessity to do so, mother was not authorized to invade funds provided by trust that was separate estate of children and was created for purpose of prescribed support payments). Unfortunately, no Texas decision has provided clear guidance as to the extent to which a trustee must consider a parent's obligation of support. But, the decision of *Deweese v. Crawford* provides some guidance in this area. 520 S.W.2d 522 (Tex. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e). In *Dewees*, the court considered a demand by the parents of minor children on a third party to distribute social security benefits the third party was receiving as "trustee" for the minor children. The court noted that the parents are principally responsible for the minor children's support and maintenance. Therefore, only when it was shown that the parents were unable to meet their obligation to properly support and maintain the children was the trustee required to distribute funds for their benefit. Until the parents established they were unable to provide the requisite support, the court held that the trustee could appropriately choose to accumulate the benefits.

In reaching its decision, the *Deweese* court noted that issues regarding distributions of social security benefits are governed by federal law. Therefore, while it is not certain that the court's decision would have been the same if the case involved a traditional trust instead of a trust created to administer federal benefits, the analysis and results should be the same.

Furthermore, the decision in *Deweese* is consistent with Texas courts historical hesitancy to interfere with the reasonable exercise of a trustee's discretion.

H. Beneficiary's Obligation to Support Family Members

Beneficiaries will often seek or use distributions to support their family. This raises the issue of whether a trustee may take into account the needs of a beneficiary's family, or his obligation of support when making distributions. Again, the intent of the grantor is paramount.

For example, in *Cutrer*, the guardian of the estate of a minor attempted to enforce a claim to an undivided interest in the corpus of three trusts. *See Cutrer v. Cutrer*, 345 S.W. 2d 513, 518-19 (Tex. 1961). Construing the terms of the trusts, the court held it was clear that the trust did not contemplate the adopted child as a potential contingent beneficiary. *Id*. at 517-18. Clearly the *Cutrer* court saw no need to stretch the class of beneficiaries using unrelated "family" definitions, but instead focused on the intent of the grantor and the terms of the trust.

Regardless of the grantor's intent, a trustee of a support or discretionary trust may be required to make distributions for support of a beneficiary's child when the beneficiary has been ordered to make child support payments. The extent of the payments depends on the type of trust: support versus discretionary.

A trustee of a support trust may be required to make distributions for the support of the beneficiary's child. *See* TEX. FAM. CODE ANN. § 154.005 (Vernon 2002)("The court may order the trustees of a spendthrift or other trust to make disbursements for the support of a child to the extent the trustees are required to make payments to a beneficiary who is required to make child support payments as provided by this chapter."). A trustee of a pure discretionary may only be ordered to make payments for the benefit of the child from income but not principal. *See Id.* ("If disbursement of the assets of the trust is discretionary, the court may order child support payments from the income of the trust but not from the principal.).

A condition precedent to such an obligation is that the beneficiary has been ordered to pay child support. *See Kolpack v. Torres*, 829 S.W.2d 913 (Tex.Civ.App—Corpus Christi 1992, writ denied); *see also Matter of Marriage of Long,* 542 S.W.2d 712 (Tex. Civ. App.—Texarkana 1976, no writ)(trial court, instead of ordering trustees to pay to wife a certain sum per month for benefit of child, should have first ordered trust beneficiary parent to make child support payment or payments, after which it could have then ordered trustees to make disbursements for support of child.). In *Kolpack*, the appellate court held that a trial court could not obligate a trustee of a discretionary trust to make disbursement of trust income directly to a beneficiary's child until it first imposed that obligation on the beneficiary/parent. *Id.* at 916.

V. LIABILITY RELATED TO CO-TRUSTEES AND AGENTS

A. Generally

The trustee's duty of competence generally includes restrictions on delegating fiduciary duties. Except as allowed by law, the trustee is under an obligation to personally administer the trust and is under a duty not to delegate acts that the trustee should personally perform. But, unless the trust instrument provides otherwise, a trustee may delegate to his or her co-trustee the performance of a trustee's function. TEX. PROP. CODE ANN. § 113.085(e)(Vernon 2014).

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

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

RESTATEMENT (THIRD) OF TRUSTS § 80 (2003).

B. Delegation Between Co-trustees

A trustee may delegate to his or her co-trustee the performance of a trustee's function unless prohibited by the trust. *See* TEX. PROP. CODE ANN. § 113.085(e)(Vernon 2014), as amended by Acts 80th Legislature Ch. 451 § 7, effective September 1, 2007. Section 113.085 has been amended several times during the last decade, thus it is important to consider the statute in effect during the relevant time period. For example, effective September 1, 2007, Section 113.085(a) was amended to remove the words "that are unable to reach a unanimous decision" as there was a concern it changed pre-2005 law and thus it was revised to state that "cotrustees may act by majority decision." And, in 2009, Section 113.085 was again amended to address situations when a co-trustee is suspended or disqualified or when an action is needed because a co-trustee is unable to participate.

Thus, Texas Property Code Section 113.085, which has been in effect since September 1, 2009, currently provides as follows:

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

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

C. Liability for Acts of Co-trustees

Unless the instrument provides otherwise, Texas Property Code Section 114.006 addresses when a co-trustee is liable for the acts of other co-trustees. Section 114.006 provides that:

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

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

D. Delegation to Non-Trustees

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

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

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

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

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

VI. EXONERATION AND INDEMNITY

A. Generally

Fiduciary relationships based on a formal document generally provide some level of exoneration or indemnity. But, these agreements must be in writing. *See* TEX. BUS. & COM. CODE § 26.01. And, while Texas courts consistently uphold these provisions, they will also strictly construe them. And, not all actions can be protected because various Texas statutes and common law place limits on the extent of these agreements.

B. Statutory Limits

Section 114.007 of the Texas Property Code provides that a trustee cannot be exonerated for the following:

> (a) 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 ANN. § 114.007 (Vernon 2014).

C. Pattern Jury Charges

The Texas Pattern Jury Charges Volume 5, entitled Family & Probate, includes a pattern jury charge on exculpatory clauses. Assuming a trustee is found to have breached one or more duties, the jury is then asked if the trustee's conduct exceeds the exculpation provided in the trust agreement as follows:

> Did Trustee engage in the *conduct inquired about in Question ___ [PJC 235.9-.12 (breach of duty] in bad faith, or intentionally, or with reckless indifference to the interests of BENEFICIARY*?
>
> Answer "Yes" or "No."
>
> Answer: _____

PJC 235.15 (the italicized language should be modified based on the terms of the agreement, subject to the limitations of Section 114.007 discussed *supra.*).

D. Other Considerations

When a trustee may invoke a claim of indemnity or exoneration, consideration should be given to who may be the obligor and whether it can be satisfied by the very trustee property sought to be restored. And, pleading considerations include:

- Pleading specifically the indemnity or exoneration provisions as an affirmative defense;
- Seeking a summary judgment to confirm the extent of the indemnity or exoneration provisions as applicable to alleged claims; and
- Seeking a summary judgment on all claims subject to the indemnity or exoneration provisions (such as negligence when there is a gross negligence standard).

VII. JURISDICTION AND VENUE

A. Generally

Jurisdiction and venue of claims involving a trustee can substantially affect the outcome of the lawsuit. Jurisdiction considerations can include:

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

B. Jurisdiction

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

1. District Courts

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

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

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

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

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

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

2. Statutory Probate Courts

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

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

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

3. County Courts at Law

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

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

Therefore, a determination should be made if the specific county court at law has expanded jurisdiction under the Government Code. For example, Montgomery County's county court at law has jurisdiction of matters involving *inter vivos* trusts. *See* TEX. GOV'T CODE Ann. § 25.1722 (Vernon 2004 & Supp. 2014).

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

4. Arbitration

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

5. Personal Jurisdiction

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

In *Retamco* the Court noted that "personal jurisdiction is achieved when (1) the nonresident defendant has established minimum contacts with the forum state, and (2) the assertion of jurisdiction complies with "traditional notions of fair play and substantial justice." *Id.* at 338 (*citing Moki Mac,* 221 S.W.3d at 575 (quoting *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). Therefore, the state court must focus on the trustee's "activities and expectations when deciding whether it is proper to call the defendant before a Texas court." *Id* at 338 (*citing Int'l Shoe Co.,* 326 U.S. at 316, 66 S.Ct. 154).

In the trust context, there are very few cases addressing the issue, but one of the few to do so is *Dugas Ltd. Partnership v. Dugas*, 341 S.W.3d 504 (Tex. App.—Fort Worth 2011, pet. granted, judgment set aside, and remanded by agreement.). In *Dugus*, the personal jurisdiction was generally tied to the foreseeability by the out-of-state trustee that he would have contacts with Texas when initially appointed. In *Dugas*, one trust was found to create personal contacts

and the other one was not. *Id.* at 518; *see also* Lauren K. Davis, CAPACITY, STANDING AND JURISDICTION, State Bar of Texas Prof. Dev. Adv. Estate Planning and Probate Course (2013)(excellent discussion of personal jurisdiction and issues with requirement of necessary parties under the Texas Property Code).

C. Venue

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

- For a single individual trustee, venue is proper where "(1) the trustee resides or has resided at any time during the four-year period preceding the date the action is filed; or (2) the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed." TEX. PROP. CODE ANN. § 115.002(b)(Vernon 2014);
- For multiple individual trustees that "maintain a principal office" in Texas, venue is proper where "(1) the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed; or (2) the trustees maintain the principal office." TEX. PROP. CODE ANN. § 115.002(b-1)(Vernon 2014);
- For multiple individual trustees that "do not maintain a principal office" in Texas, venue is proper where "(1) the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed; or (2) any trustee resides or has resided at any time during the four-year period preceding the date the action is filed." TEX. PROP. CODE ANN § 115.002(b-2)(Vernon 2014);
- For a corporate trustee, venue is proper where "(1) the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed; or (2) any corporate trustee maintains its principal office in this state." TEX. PROP. CODE ANN. § 115.002(c)(Vernon 2014).
- When the administration of a deceased grantor's estate is still pending and the lawsuit involves interpretation and administration of trust, venue is proper where "(1) in a county in which venue is proper under Subsection (b), (b-1), (b-2), or (c); or (2) in the county in which the administration of the grantor's estate is pending." TEX. PROP. CODE ANN. § 115.002(c-1)(Vernon 2014).
- When the attorney general files a lawsuit alleging breach of fiduciary duty, venue is proper in Travis County or "where defendant resides or has its principal office." TEX. PROP. CODE ANN. § 123.005 (Vernon 2014).

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

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

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

VIII. STANDING & CAPACITY

A. Generally

One of the first considerations is whether the plaintiff has a cause of action. Unlike other types of civil litigation, the claims sought to be pursued and the resulting damages may range from those personal to the plaintiff, to claims for damages to the *res* and, thus, derivatively for a class of persons, of which the plaintiff is one of many. For example, a plaintiff who is a

remainder beneficiary, limited partner or shareholder may only be affected because the entire estate, trust, partnership or corporation has been damaged.

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

B. Standing

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

1. Vested Standing

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

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

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

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

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

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

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

2. Potentially Vanishing Standing

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

survivorship or revocation. Considerations may include:

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

For example, a remainder beneficiary of a revocable trust has been held to lack standing to pursue claims regarding such trust. *See Moon v. Lesikar* 230 S.W.3d 800 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). But, the ability to revoke the trust is not the only consideration. Irrevocable trust agreements should also be reviewed to determine if a beneficiary's interest can be divested through a power of appointment vested in the potential defendant or third party. If the interest is subject to a power of appointment, the next question is: Can the power of appointment be exercised prior to the conclusion of the anticipated litigation? If so, the beneficiary or beneficiaries may have what is known as a "vested remainder interest, subject to divestment." *Grohn v. Marquardt*, 487 S.W.2d 214, 215 (Tex. Civ. App.– San Antonio 1972, writ ref'd n.r.e.).

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

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

3. Acquiring Standing

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

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

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

4. Minors, Incapacitated, and Unborn and Unascertained Beneficiaries

Standing to bring claims of minors, incapacitated persons, and/or unborn or

contingent remainder beneficiaries is complicated, to say the least.

With regard to minors, a determination should be made prior to filing whether the claim would be best pursued by a parent, managing conservator, next friend or guardian. TEX. R. CIV. P. 44 (appearance by next friend); TEX. R. CIV. P. 173 (general provision regarding appointment of guardian ad litem in civil litigation); TEX. PROP. CODE ANN. § 115.014 (Vernon 2014); (provides for appointment of guardian or attorney ad litem in trust proceedings). And, the court generally has the right to appoint a guardian ad litem or, in certain cases, an attorney ad litem, for the minor. *See* TEX. R. CIV. P. 173 (general civil litigation); TEX. PROP. CODE ANN. § 115.014 (Vernon 2014)(trust proceedings).

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

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

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

5. Charities

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

- Terminate a charitable trust/gift or distribute its assets to other than charitable beneficiary;
- Take an action that is different that the stated purpose of the charitable trust/gift stated in the instrument, including a proceeding in which the doctrine of *cy-pres* is invoked;
- Construe, nullify, or impair the provisions of a testamentary or other instrument creating or affecting a charitable gift/trust;
- Contest or set aside the probate of an alleged will under which includes a charitable gift;
- A contest to an alleged will by a charity
- Determine matters relating to the probate and administration of an estate involving a charitable gift/trust; and
- Obtain a declaratory judgment involving a charitable gift/trust.

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

- Initially, by sending a copy of the pleading by registered or certified mail within 30

days of the filing of the pleading, but no less than 25 days prior to a hearing in the proceeding; and
- Subsequently when new causes of action or additional parties are added; and
- Any proposed settlement.

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

6. Capacity

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

IX. RESPONSIVE PLEADINGS

A. Pre Answer Considerations

Before filing an appearance, including any answer, consideration should be given to the following:
- Has the defendant been properly joined? For example, if the petition names the trust instead of the trustee – the plaintiff has failed to properly join the trustee as a trust is not a legal entity in Texas. *See* Henson v. Estate of Crow, 734 S.W.2d 648 (Tex. 1987); Richardson v. Lake, 966 S.W.2d 681 (Tex. App.—San Antonio 1998, no pet.). But the issue can be waived if the trustee enters an appearance and participation in this lawsuit. *See Dueitt v. Dueitt*, 802 S.W.2d 859 (Tex. App.—Houston [1st Dist.] 1991, no writ); *Miller v. Estate of Self*, 113 S.W.3d 554 (Tex. App.—Texarkana 2003, no pet.), *but see Waste Disposal Center, Inc. v. Larson*, 74 S.W.3d 578 (Tex. App.—Corpus Christi 2002, no pet. h.).
- Should the lawsuit be removed to Federal Court?
- Should a motion to transfer venue be filed?
- Should a motion to transfer the proceeding to a statutory probate court be filed?
- Should a motion to compel arbitration be filed?
- Should a motion to stay be filed pending compliance with any pre-filing requirements in the governing documents?

B. Answer

The trustee's initial answer can be as simple as a general denial but often more is warranted. Rule 85 of the Texas Rules of Civil Procedure provide that:

> The original answer may consist of motions to transfer venue, pleas to the jurisdiction, in abatement, or any other dilatory pleas; of special exceptions, of general denial, and any defense by way of avoidance or estoppel, and it may present a cross-action, which to that extent will place defendant in the attitude of a plaintiff. Matters in avoidance and estoppel may be stated together, or in several special pleas, each presenting a distinct defense, and numbered so as to admit of separate issues to be formed on them.

TEX. R. CIV. P. 85.

At a minimum, the answer should include any verified pleas required by Rule 93 and affirmative defenses required by Rule 94, including the following:
- Release;
- Res judicata;
- Statute of frauds;
- Statute of limitations;
- Waiver;
- Ratification;
- Laches;
- Accord and satisfaction;
- Arbitration and award;
- Assumption of the risk;
- Contributory negligence;
- Discharge in bankruptcy;
- Duress;
- Estoppel;
- Failure of consideration;
- Payments;
- Confession and avoidance; and
- Any "other matter constituting an avoidance or affirmative defense."

TEX. R. CIV. P. 94:

Also, because appellate courts have not deemed the specific items in Rule 94 to be an exclusive list of affirmative defenses, it is advisable to specifically plead any additional defenses to the extent possible. These may include:

- Specific provision of the trust agreement.
- Ambiguity if relevant;
- Exoneration;
- Indemnity;
- Legal justification;
- *In* pari *delicto;*
- Limitation on punitive damages;
- Privity; and
- The trustee acted in good faith.

Finally, the answer is also an opportunity to educate the court and possibly plaintiff's counsel on the history of the case, the burdens, the defenses and other issues in the lawsuit. Thus, consideration should be given to including statement of facts. These may be helpful if a new Rule 91a is to be filed as any determination is based solely on the pleadings.

C. Cross and Counter Claims

While most fiduciary defendants have limited cross or counterclaims, they should not be overlooked. Some possible cross and counter claims may include:

- Claims against the defendant that may otherwise be barred by limitations, provided they are brought within 30 days of the filing of the answer. *See* TEX. CIV. PRAC. REM. CODE § 16.069.
- Claims against the defendant-beneficiary because he or she "misappropriated or otherwise wrongfully dealt with the trust property." TEX. PROP. CODE ANN. § 114.031(a)(1)(Vernon 2014);
- Claims against the defendant-beneficiary because he or she "expressly consented to, participated in, or agreed with the trustee to be liable for a breach of trust committed by the trustee." TEX. PROP. CODE ANN. § 114.031(a)(2)(Vernon 2014);
- Claims against the defendant-beneficiary because he or she "failed to repay an advance or loan of trust funds." TEX. PROP. CODE ANN. § 114.031(a)(3)(Vernon 2014);
- Claims against the defendant-beneficiary because he or she "failed to repay a distribution or disbursement from the trust in excess of that to which the beneficiary is entitled." TEX. PROP. CODE ANN. § 114.031(a)(4)(Vernon 2014);
- Claims against the defendant-beneficiary because he or she "breached a contract to pay money or deliver property to the trustee to be held by the trustee as part of the trust." TEX. PROP. CODE ANN. § 114.031(a)(4)(Vernon 2014);
- Claims against a current co-trustee for contribution and/or liability. *See* TEX. PROP. CODE ANN. § 114.006 (Vernon 2014);
- Claims against a predecessor trustee. *See* TEX. PROP. CODE ANN. § 114.002 (Vernon 2014);
- Claims for exculpation. *See* TEX. PROP. CODE ANN. § 114.007 (Vernon 2014);
- Claims for indemnity based on release or written agreements. *See* TEX. PROP. CODE ANN. §§ 114.005, 114.032 (Vernon 2014); and
- Claims for attorney's fees and expenses. *See* TEX. PROP. CODE ANN. §§ 114.064 (Vernon 2014).

D. Special Exceptions

Plaintiffs are required to set forth their claims in "plain and concise language." TEX. R. CIV. P. 45. This includes fair and adequate notice of the facts upon which the plaintiff bases his claim so that defendant can obtain adequate information to prepare a defense. *See Paramount Pipe & Supply Co., Inc. v. Muhr*, 749 S.W.2d 491, 494-95 (Tex. 1988).

But, plaintiffs often file pleadings that include generic claims and causes of action against a trustee. For example, a pleading that advises a trustee he or she breached his fiduciary duty does not allow the trustee to conduct discovery on an efficient basis. And, when claims are asserted that could be personal and/or derivative, the plaintiffs should be force to the extent possible to replead so the trustee can set up additional motions as to these different claims.

Furthermore, the filing of special exceptions may be required to avoid waiving any "defect, omission, or fault in a pleading that is not

specifically pointed out by a special exception." *Smith v. Grace,* 919 S.W.2d 673, 678 (Tex. App.—Dallas 1996, writ denied Smith v. Grace, 919 S.W.2d 673, 678 (Tex. App.—Dallas 1996, writ denied)(*citing* TEX. R. CIV. P. 90; *J.K. & Susie L. Wadley Research Inst. & Blood Bank v. Beeson,* 835 S.W.2d 689, 693 (Tex. App.—Dallas 1992, writ denied)). And, when filed, the movant has "the burden to obtain a hearing to present its special exceptions to the trial court and obtain a ruling." *Id.* at 678 (*citing Hanners v. State Bar,* 860 S.W.2d 903, 912 (Tex. App.—Dallas 1993, no writ); *R.I.O. Sys., Inc. v. Union Carbide Corp.,*780 S.W.2d 489, 491 (Tex. App.— Christi 1989, writ denied)). The failure to obtain a ruling will generally result in the failure to preserve the right to raise the issue on appeal. *See Id. (citing* TEX. R. APP. P. 52(A); *Hanners,* 860 S.W.2d at 912; *R.I.O. Sys., Inc.,* 780 S.W.2d at 491).

E. Responsible Third Parties

Chapter 33 of the Texas Civil Practice & Remedies Code provides a means for a defendant to shift liability to "responsible third parties." *See* TEX. CIV. PRAC. REM. CODE Ch. 33. *See* Randall O. Sorrels & Brant J. Stogner, SHIFTING LIABILITY, State Bar of Texas Prof. Dev. Adv. Estate Planning and Probate Course (2009); D. Hull Youngblood, RESPONSIBLE THIRD PARTIES & SETTLING PARTIES, State Bar of Texas Prof. Dev. Fiduciary Litigation Course (2013). Civil Practice and Remedies Code Section 33.002(a) provides that Chapter 33 applies to "any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought." TEX. CIV. PRAC. REM. CODE § 33.002(a). And, in at least one case, there include claims under the Texas Property Code. *See Villarreal v. Wells Fargo Brokerage Services*, 315 S.W.3d 109 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

Possible responsible third parties may include:

- Prior Fiduciaries: executor, agents, trustees, employees, officers and directors;
- Current fiduciaries: co-trustees and agents;
- Investment advisors/brokers;
- Accountants;
- Attorneys;
- Property managers;
- Another beneficiary; and
- Party to any contract or relationship at issue.

But note that the designation of responsible third parties in trust cases can be complicated. For example, if the issue involves whether a beneficiary validly released a trustee, Chapter 33 may be used to designate the beneficiary's counsel as responsibility for any claimed invalidity as to the agreement. But if the designee is liable under some type of *respondent superior* basis, then the defendant may not be able to shift liability under Chapter 33. *See Villarreal v. Wells Fargo Brokerage Services*, 315 S.W.3d 109 (Tex. App.—Houston [1st Dist.] 2010, no pet.)(*citing Rosell v. Cent. W. Motor Stages, Inc.,* 89 S.W.3d 643, 656–57 (Tex. App.—Dallas 2002, pet. denied)(explaining that, "while the statute on its face requires all defendants to be included in the apportionment question, it would not be proper for an employer to be included along with the driver if its only responsibility was that of respondeat superior")).

X. COMMON DEFENSES

A. Generally

The next consideration is the viability of the trustee's possible defenses. Some of the more common include:

- No fiduciary relationship or breach fell within scope of trustee role. *Blieden v. Greenspan,* 751 S.W.2d 858 (Tex. 1988);
- Release. TEX. PROP. COD ANN. § 114.005 (Vernon 2014);
- *Res judicata. Coble Wall Trust Co., Inc. v. Palmer,* 859 S.W.2d 475 (Tex. App.—San Antonio 1993, writ denied);
- Ratification. *Burnett v. First Nat'l Bank of Waco,* 536 S.W.2d 600 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.);
- Waiver. *Ford v. Culbertson,* 308 S.W.2d 855 (Tex. 1958);
- Estoppel. *Langford v. Shamburger,* 417 S.W.2d 438 (Tex. Civ. App.—Ft. Worth 1967, writ ref'd n.r.e.);
- Laches. *Fitzgerald v. Hull,* 237 S.W.2d 256 (Tex. 1951);

- Accord and Satisfaction. *King v. Cliett,* 31 S.W.2d 350 (Tex. Civ. App.—Waco 1930, no writ);
- Statute of Limitations. TEX. CIV. PRAC. REM. CODE §16.004; *Peek v. Berry,* 184 S.W.2d 272 (Tex. 1944); *see conversely Estate of Degley,* 797 S.W.2d 299 (Tex. App.—Corpus Christi 1990, no writ).; and
- Avoidance or Exculpatory Clauses. *Moulton v. Alamo Ambulance Service, Inc.,* 414 S.W.2d 444 (Tex. 1967); TEX. PROP. CODE §113.059.

Some of the more commonly plead defenses are discussed in more detail below.

B. Prior Release

It is important to consider any documents that the plaintiff may have signed that could be argued to have released his or her claims. Such release may be part of a prior lawsuit, in a contract with the trustee to do or not do certain act, in a funding agreement or allegedly part of a request for distribution, buyout or other document. As a general rule, releases and settlement agreements are highly favored by Texas courts and will not be disturbed because of ordinary mistake of law or fact, and will be upheld when all parties have the same knowledge or a means to obtain the same knowledge provided there is no fraud, misrepresentation, concealment or other inequitable conduct. *See Crossley v. Staley*, 988 S.W.2d 791 (Tex. App.—Amarillo 1999, mand. denied). And, even unilateral mistake of law of the party to a settlement agreement is not grounds to avoid the agreement. *See Crossley* 988 at 796, *citing Atkins v. Womble*, 300 S.W.2d 688 (Tex. Civ. App.—Dallas, 1957, writ ref'd n.r.e.).

But, a release is a contract and, like any other contract, is subject to avoidance on grounds such as fraud or mistake. *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171, 178 (Tex. 1997). When a trustee enters into a contract with its beneficiary, there is a presumption of unfairness or invalidity attaching to such contracts. *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692, 699 (Tex. 2000)(discussing release between attorney and client). The duty of fidelity required of a trustee forbids the trustee from placing itself in a situation where there is or could be a conflict between its self-interest and its duty to the beneficiaries. *See InterFirst Bank Dallas v. Risser, supra,* at 899; *Slay v. Burnett Trust*, 187 S.W.2d 377, 387 (Tex. 1945); *Kinney v. Shugart*, 234 S.W.2d 451, 452 (Tex. Civ. App.–Eastland 1950, writ ref'd); *see also* PJC 235.20 (release of trustee will have the burden to show the beneficiary had knowledge of all "material facts" at the time he executed the release).

And, some releases do not release all potential claims or all possible defendants. *See Angus Chem. Co. v. I.M.C. Fertilizer, Inc.*, 939 S.W.2d 138, 139 (Tex. 1997)(tortfeasor's release did not include his insured); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 419 (Tex. 1994)(release of "any other corporations... responsible" in settlement involving airplane pilot did not include airplane manufacturer); *see also, Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 806 (Tex. 1980)(release of employee did not release employer); *Victoria Bank and Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991)(release of unknown claims will, however, be narrowly construed and can be challenged because of mutual mistake or fraud); *but see Morris v. Landoll Corp.,* 822 S.W.2d 653 (Tex. App.–Fort Worth 1991, no writ)(limited application of language purporting to release all claims which are made "the basis of the lawsuit or that could have been asserted therein"). At a minimum, to effectively release a claim, the releasing instrument should at least "mention" the claim to be released. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d at 938. And, any claims not "clearly within the subject matter" of the release are not discharged, even if those claims exist when the release is executed. *Id*. It is not necessary, however, for the parties to anticipate and identify every potential cause of action relating to the subject matter of the release. *Keck, Mahin & Cate*, 20 S.W.3d at 698.

Other releases, even when well drafted, cannot prevent certain actions. For example, a prior release may not completely protect the trustee from the following.

- A beneficiary seeking to compel an accounting. *See In re Estate of Rowan*, 2007 WL 1634054 (Tex. App.—Dallas 2007, no writ)(neither settlement agreement

nor arbitration resulted in court losing jurisdiction to compel Section 149A accounting).

- Potential for future claims that a release is invalid or unenforceable due to lack of disclosure. *See Avary v. Bank of America*, 72 S.W. 3rd 779 (Tex. App.—Dallas 2002, pet. denied)(claim based on alleged tort for failing to disclose to heirs effect of apportionment on estate's remaining assets and liabilities); *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988)(breach of duty of full disclosure may be tantamount to fraudulent concealment); *but see Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997)(recognized disclaimers of reliance); Atlantic Lloyds Insurance Company v. Butler, 137 S.W.3d 199 (Tex. App.—Houston [1st Dist.] 2004, pet. denied)(disclaimer of reliance in settlement agreement conclusively negated other parties alleged reliance on any representations or lack of disclosure by other parties).
- Subsequent claims that a release is invalid or unenforceable based on extrinsic or intrinsic fraud. *See Crouch v. McGaw*, 138 S. W. 2d 94, 97 (Tex. 1940)(extrinsic fraud denied beneficiary right to fully litigate rights); *Mills v. Baird*, 147 S. W. 2d 312, 316 (Tex. Civ. App.—Austin, 1941, writ ref'd)(intrinsic fraud may include fraudulent documents or false testimony).
- Subsequent claims that a release is invalid or unenforceable based on fraudulent inducement, mistake or negligent misrepresentation, etc. *See McCamish, Martin, Brown & Koeffler v. Appling Interests*, 991 S.W.2d 787 (Tex. 1999); *but see Harris v. Archer*, 134 S.W.3d 411 (Tex. App.—Amarillo 2004, pet. filed April 26, 2004)(disclaimer of reliance may bar fraudulent inducement claim when fiduciary relationship exists between parties); *but see Prudential Ins. Co. v. Jefferson Assocs.*, 896 S.W.2d 156, 162 (Tex. 1995)(concealment or obstruction of party's investigation may negate disclaimer of reliance).
- Release is enforceable and possibly avoidable under principles of contract law. Thus, a release may bar a claim based on release, estoppel or waiver but will not be necessarily barred by *res judicata* until a judgment is entered on the contract.
- Potential future challenges to valid consideration. *See McDonald v. Carroll*, 783 S. W. 2d 286 (Tex. App.–Dallas 1990, writ denied)("A release and acceptance of benefits thereunder for an undisputed, liquidated and vested property right in an estate is without legal consideration."); *Southwestern Fire & Cas. Co. v. Atkins*, 346 S.W.2d 892, 897 (Tex. Civ. App.–Houston 1961, no writ)(agreement totally lacks consideration, court will not enforce agreement); *Farrell v. Cogley*, 146 S. W. 315, 318 (Tex. Civ. App.–San Antonio, 1912, writ ref'd); *but see Tobbon v. State Farm Mut. Auto. Ins. Co.*, 616 S.W.2d 243, 245 (Tex. Civ. App.–San Antonio 1981, writ ref'd n.r.e.)(mere inadequacy of consideration is not sufficient to destroy effect of release).
- A beneficiary may be able to use the terms or scope of a proposed release in subsequent litigation. *See* TEX. R. EVID. 408 (evidence of settlement may be offered for certain purposes such as bad faith).

Finally, when a plaintiff has released certain potential defendants, considerations should be given to the impact the release will have on any non-settling defendant's right to seek a settlement credit. *See* TEX. CIV. PRAC. & REM. CODE Ch. 33.

C. Ratification & Waiver

Ratification and waiver can be asserted in response to a breach of fiduciary claim. But, the defense is generally predicated on knowledge and disclosure. For example, a transaction between a corporate fiduciary and the corporation is capable of ratification by the shareholders' or the board of directors "specific approval or acquiescence, laches, or acceptance of benefit." *General Dynamics v. Torres*, 915 S.W.2d 45, 50 (Tex. App.—El Paso 1995, writ denied); *Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc*., 779 S.W.2d 474, 478 (Tex. App.—El Paso 1989, writ denied). But ratification first requires full disclosure of all material facts of the transactions to the board of

directors or shareholders. *Torres,* 15 S.W.2d at 50.

Likewise, waiver is the intentional relinquishment of a known right or conduct inconsistent with claiming that right. *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003)(per curiam). The defendant bears the burden of pleading and proving it. Tex.R.Civ.P. 94; *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex.1988); *Labrado v. County of El Paso*, 132 S.W.3d 581, 594 (Tex. App.—El Paso 2004, no pet.). But, recognizing that waiver is an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right, the Texas Supreme Court explained that implied waiver requires actions inconsistent with an intent to rely upon a party's rights. "There can be no waiver of a right if the person sought to be charged with waiver says or does nothing inconsistent with an intent to rely upon such right." *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003)(citing *Maryland Cas. Co. v. Palestine Fashions, Inc.*, 402 S.W.2d 883, 888 (Tex. 1966)). And, as the *Jernigan* Court explained, waiver is largely a matter of intent, and for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances. *Id*. at 156-57 (citing *Motor Vehicle Bd. v. El Paso Indep. Auto Dealers Ass'n, Inc.*, 1 S.W.3d 108, 111 (Tex. 1999)).

Therefore, it is important to discover what the plaintiff knew and when he or she knew certain facts as they relates to the claims he or she now seeks to pursue. A review of emails, tweets, social media and texts can also provide valuable information regarding statements by the trustee and responses by the plaintiff that could be used to defeat the claims.

D. Statute of Limitations

The statute of limitation on breach of fiduciary duty is generally four years. TEX. CIV. PRAC. & REM. CODE § 16.004; *see also Dernick Resources, Inc. v. Wilstein*, 312 S.W.3d 864, 878 (Tex. App. – Houston [14th Dist.] 2009, no pet.). But what is not as clear is when the statute starts to run because the discovery rule often tolls these claims for years. The Texas Supreme Court has twice held a trustee's misconduct to be inherently undiscoverable. *See Willis v. Maverick*, 760 S.W.2d 642, 647 (Tex. 1988)(attorney-malpractice actions subject to discovery rule because of fiduciary relationship between attorney and client and client's lack of actual or constructive knowledge of injury); *Slay v. Burnett Trusts*, 187 S.W.2d 377, 394 (1945)(trustee). The discovery of such claims may relate to the attorney's representation of the trustee and/or the trustee's actions or inactions.

However, the discovery rule is limited only to exceptional cases. Thus, while there is some presumption that a fiduciary's actions are inherently undiscoverable, inherent undiscoverability is not automatic in fiduciary cases. *See S.V. v. R.V.*, 933 S.W.2d 1, 24-25 (Tex. 1996). This is so because an injury is not inherently undiscoverable if a plaintiff failed to look at or appreciate available information. *See Chemical Corp. v. Winograd*, 956 S.W.2d 529, 533 (Tex. 1997). In fact, the Texas Supreme Court has held that constructive notice negates a finding that an injury is inherently undiscoverable. *See Champlin Oil & Refining Co. v. Chastain*, 403 S.W.2d 376 (Tex. 1965).

Another facet of the discovery rule in the fiduciary context is the applicability of the fraudulent concealment doctrine, which is an affirmative defense to limitations that resembles equitable estoppel. *Seureau v. ExxonMobil Corp.*, 274 S.W.3d 206, 228 (Tex. App. – Houston [14th Dist.] 2008, no pet.). The fraudulent concealment doctrine defers accrual of a claim because "a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run." *S.V. v. R.V.*, 933 S.W.2d at 6. For the doctrine to apply, however, the plaintiff must prove the defendant: (1) had actual knowledge of the wrong; (2) had a fixed purpose to conceal the wrong; and (3) did conceal the wrong from the plaintiff. *See Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001). The fraudulent concealment doctrine does not bar limitations when the plaintiff discovers the wrong or could have discovered it through the exercise of reasonable diligence.

Kerlin v. Sauceda, 263 S.W.3d 920, 925 (Tex. 2008).

The Texas Supreme Court has made it clear that neither the discovery rule, nor the fraudulent concealment doctrine, will apply unless the plaintiffs have used reasonable diligence to discover a claim. As such, this is something that must be considered in every fiduciary litigation matter, regardless of the party being represented.

As such, it is important to determine what information exists and when it was it publically available because defendants commonly use the existence of "public" information as constructive notice that begins the statute of limitation. For example, the Texas Supreme Court held in *Mooney v. Harlin* that individuals are "charged with constructive notice of the actual knowledge that could have been acquired by examining public records." 622 S.W.2d 83, 85 (Tex. 1981). And, the Court held that the statute of limitations runs from the time fraud could have been discovered. *See Id.* In the cases that followed, the unanswered question is how far the courts will construe that duty to "examine" the public records and what they will consider "public records." For example, if a trustee files an affidavit in the public records in a remote county in Texas unrelated to the parties and issues, will a person be deemed to have constructive notice of its content? Some records that may be argued to begin the applicable statute of limitations include:

- Probate records, including wills, inventories and accountings for certain types of estates;
- Court filings for any judicial proceedings, including pleadings, answers, discovery filed of record, releases and judgments;
- Bankruptcy filings;
- Deed records, including all conveyance documents, deeds of trusts, some notes, release of liens, powers of attorney and terminations of authority, and some trusts;
- Tax return services that provide records for charities, such as Guidestar, including 990s which can be requested as public records;
- Secretary of State records, including most articles or certificates of formation, amendments thereto, tax forfeiture documents, public information reports filed with the franchise tax return, registered agent information, certificates of merger and conversion and assumed names;
- Texas Comptroller for determination of good standing status;
- Documents subject to the Freedom of Information Act including bid contracts and certain disclosures made;
- EDGAR for SEC filings for public companies;
- LinkedIn;
- Obituaries to establish the termination of trustee relationships;
- Professional licenses such the State Bar of Texas, AIPCA, SEC, etc.; and
- Company websites and other information available on the internet.

Note also that the discovery rule is often tied to the end of the trustee relationship. When a fiduciary continues to act, the period can be decades. For example, in *Lee v. Lee*, the executor began his administration of the estate in 1976. *See* 47 S.W.2d 767, 773 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). A cause of action for his removal and for damages incurred as a result of his administration was initiated some twenty-eight years later. *Id*. at 774. The executor was held to answer for his breaches of fiduciary duty that occurred during that twenty-eight year period. *Id*. at 801; *see also Bailey v. Commissioner*, 741 F.2d 801 (5th Cir. 1984). But, if the fiduciary has died, the statute of limitations can be argued to run 4 years from the appointment of the deceased trustee's executor (but not later than 5 years from death due to the tolling provisions of up to one year pending the appointment of a personal representation) due to the uncertainty under Texas law regarding the application to the discovery rule after the complete termination of a fiduciary's role.

XI. EFFECTIVE DISCOVERY

A. Generally

Most trust litigation involves claims of breach of fiduciary duties related to the financial transactions of the trust. To avoid unnecessary costs, discovery should be broad enough to obtain all relevant evidence but limited to the specific claims at issue. A discussion of some of these considerations follows.

B. Identify Early Trial Witnesses

It is preferable to begin the process of identifying possible fact and expert witnesses early in the lawsuit. This allows time to confirm facts and positions (perhaps by affidavits) and begin preparing the defense. Possible fact witnesses include.

- Other parties/beneficiaries;
- Prior fiduciaries;
- Agents;
- Attorneys;
- Accountants;
- Banker/financial advisors;
- Investment advisors;
- Real estate agents;
- Appraisers;
- Compliance persons;
- Trust committee members;
- Corporate representatives; and
- Custodian of records.

There are times that it is important to solidify the testimony of a potential fact witness before the other side has the opportunity to intimidate or dissuade them for testifying. In other cases, it is important to test the witnesses' claims or statements by asking them to verify them under oath. In such cases, there can be substantial benefit to obtain affidavits or other witness statements prior to initiating the lawsuit.

It is also advisable to begin the process of identifying possible expert witnesses – retained and non-retained. Commonly designated experts include:

- Attorneys;
- Accountants;
- Tracing experts;
- Economists;
- Trust officers;
- Investment/financial advisors;
- Appraisers;
- Real estate agents;
- Fiduciary experts; and
- Standard of care experts.

C. Identify Early Claimed Breaches

As discussed previously, it is important to force the plaintiff to identify all claimed breaches of duty as soon as possible. The claimed breaches will impact every aspect of trial preparation including potential parties, relevant documents, possible witnesses, type of experts, etc. The process identifying begins with a review of the plaintiff's petition. And, when it fails to clearly identify the actions and/or inactions on which the plaintiff is suing, defendants should generally file special exceptions to force the plaintiff to replead with sufficient information to prepare for trial. *See* discussion *supra.* Likewise, the defendant should use all other discovery tools to confirm the plaintiff's claimed breaches and/or resulting damages.

D. Request for Production

Trust litigation can be paper intensive. And, while the trustee may have some if not all of the trust records in their possession and control, these records will often not be admissible. Due to the type of records and the time periods involved, obtaining these records can take a significant length of time and discovery of any documents should begin early.

Some of records, sources of documents and/or areas of discovery include:

- Professionals retained by the current and former trustees;
- Accountants retained by the current and former trustees;
- Banker/financial advisor retained by the current and former trustees;
- Investment advisor retained by the current and former trustees;
- Insurance Agent the current and former trustees;
- Financial records of the trust, including the current and former trustees;
- Trust financial records;
- Bank statements and checks;
- Tax returns (1040/1041/706);
- Invoices paid by the trust and/or trustee;
- Communications with investment advisors;
- Process of investment review;
- Documents provided to or from other parties or potential witnesses;
    - Agents of the trustees;
    - Current/former trustees;
    - Financial Institutions; and
    - Title companies.
- Partnership/LLC records;
- Related minutes/resolutions;

- Distribution support/responses;
- All communications with beneficiaries, other parties, potential witnesses; and\
- Motion to inspect property.
    - Real estate
    - Computers
    - Personal property

E. Interrogatories

Similarly, interrogatories are a valuable tool when preparing a trustee's defense. But some interrogatories have more value that other. Some that may be particularly helpful include:

- Identification of trial witnesses;
- Proof of prior disclosure, for example persons with whom the plaintiff may have discussed the trust, prior attorneys, investigations, etc.;
- Claimed sources/witnesses who allegedly support the plaintiff's allegations;
- Specific transactions that the plaintiff claims constitute a breach of fiduciary duty;
- Impeachment/rebuttal evidence; and
- Alleged damages.

Furthermore, contention interrogatories are sanctioned under the Texas Rules of Civil Procedure and can have some benefits when used at the proper time. But, the responses are often drafted by the attorney rather than the plaintiff. As a result, they can create a script for the plaintiff during his or her deposition. Thus, one strategy is to send these interrogatories after taking the plaintiff's deposition.

Note that while some of interrogatories cannot be answered fully at the beginning of the case, all too often a plaintiff fails to timely supplement and, as result, the defendant may be able to limit trial witnesses at trial to those timely designated. *See* TEX. R. CIV. PROC. 193.6 (late designated non-party witnesses shall "be excluded unless the Court finds that: there was good cause for the failure to timely make, amend, or supplement the discovery response; or the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties").

This is based in part on the provisions of Texas Rule of Civil Procedure 215(5) which require complete responses to discovery so as to promote responsible assessment of settlement and prevent trial by ambush. *See* TEX. R. CIV. P. 215(5); *Clark v. Trailways, Inc.*, 774 S.W.2d 644, 646 (Tex. 1989); *Gee v. Liberty Mut. Fire Ins. Co.,* 765 S.W.2d 394, 396 (Tex. 1989); *Gutierrez v. Dallas Indep. Sch. Dist.*, 729 S.W.2d 691, 693 (Tex. 1987). Rule 215(5) is mandatory, and its sole sanction—exclusion of evidence—is automatic, unless there is good cause to excuse its imposition. *Alvarado v. Farah Mfg. Co., Inc.*, 830 S.W.2d 911, 914 (Tex. 1992). The burden of showing good cause to admit the testimony of a late-designated witness is on the offering party and is within the trial court's discretion. *Id*. Standing alone, inadvertence of counsel does not constitute good cause. *Id.* at 915, citing *Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669 (Tex. 1990)(per curiam); *E.F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363 (Tex. 1987)(per curiam). Because, as the Court in *Alvarado* opined:

> While it is certainly important for the parties in a case to be afforded a full and fair opportunity to present the merits of their contentions, it is not in the interest of justice to apply the rules of procedure unevenly or inconsistently. It is both reasonable and just that a party expect that the rules he has attempted to comply with will be enforced equally against his adversary. To excuse noncompliance without a showing of good cause frustrates that expectation.

Alvarado, 830 S.W.2d at 914.

F. Admissions

Admissions provide a cost effective way to force a plaintiff to take a position on some basic facts and positions. Admissions can be particularly beneficial when the trustee is attempting to establish:

- Disclosure of information/ transactions;
- plaintiff had access to information/records;
- Terms of the trust agreement;
- Validity of specific transactions;
- Appropriateness of specific expenditures;
- Appropriateness of prior transaction;
- Prior Distributions;
- Time of knowledge of certain material facts;
- Fairness;
- Lack of investigation prior to filing suit; and
- Receipt of distributions or property.

G. Depositions

Finally, depositions are obvious critical to preparing the defense. Depositions may be sought of:

- Plaintiffs;
- Prior fiduciaries;
- Accountants;
- Banker/financial advisors;
- Investment advisors;
- Compliance persons;
- Trust committees;
- Corporate representatives; and
- Custodians of records.

And, as in any case, preparation for the plaintiff's and other witness's deposition can be critical to a successful defense. Defense counsel should understand the elements of each claimed cause of action, each affirmative and other defense, and the applicable jury charge prior beginning depositions. This allows the defense attorney to solicit testimony, obtain concessions and otherwise develop evidence that can be used at trial or in support of a summary judgment.

H. Trustee Accounting

Furthermore, regardless of whether the trust mandates an accounting requirement, a beneficiary can generally request an accounting from the trustee in the course of litigation. Specifically, Texas Property Code Section 113.151 states:

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

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

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

But, a trustee should consider preparing an accounting even before receiving a formal demand. A formal accounting is often critical to establish the transactions of the trust during the relevant period of time, evidence rates of return, establish the value of the trust in comparison to the compensation paid, etc. Furthermore, fiduciary experts often rely on the accounting when formulating and testifying about their opinions.

I. Spoliation

Claims of spoliation are made with increasing frequency in fiduciary cases. For example, a spoliation claim may be made against a trustee based on some alleged failure to preserve the trust books and records prior to any claims or threats of litigation. While no Texas case has clearly addressed how the duty of preservation results in a spoliation claim, in 2014 the Texas Supreme Court clarified the standards governing spoliation and the parameters of a trial court's discretion to impose spoliation remedies based on the facts of the

case. *See Brookshire Bros. v. Aldridge*, 438 S.W.3d. 9 (Tex. 2014). In *Brookshire,* the Court held that a spoliation instruction is a severe sanction the trial court may use to remedy an act of intentional spoliation that prejudices the nonspoliating party. *Brookshire Bros.*, 438 S.W.3d. at 23. And, to find intentional spoliation, the spoliator must have "acted with the subjective purpose of concealing or destroying discoverable evidence." *Id.* A jury instruction is warranted "[o]nly when the trial court finds that the spoliating party acted with the specific intent of concealing discoverable evidence, and that a less severe remedy would be insufficient to reduce the prejudice caused by the spoliation." *Brookshire Bros.*, 438 S.W.3d. at 15.

But the Court left open the possibility that a negligent breach of the duty to reasonably preserve evidence may support the submission of a spoliation instruction. *Id.* And, when the spoliation "so prejudices the nonspoliating party that it is irreparably deprived of having any meaningful ability to present a claim or defense," the court has discretion to remedy the extreme prejudice by submitting a spoliation instruction. *Brookshire Bros.*, 438 S.W.3d at 34.

XII. POTENTIAL REMEDIES AND DAMAGES

A. Generally

As discussed previously, one of the initial questions in any litigation is the extent of a plaintiff's damages and other possible remedies. While a discussion of the potential damages that may be awarded against a trustee is beyond the scope of this outline, a general discussion in the context of investigating these claims follows.

B. Monetary Damages

Any evaluation of damages begins with the type of claim involved. And, depending on the claims, the monetary damages may be actual and consequential, including the following:

- Actual damages for breach of trust. TEX. PROP. CODE ANN. § 114.001 (Vernon 2014). PJC 115.2;
- Actual damages for *quantum meruit* recovery. PJC 115.6;
- Direct damages resulting from fraud. PJC 115.19;
- Consequential damages caused by fraud. PJC 115.20;
- Monetary loss from negligent misrepresentation. PJC 115.21;
- Money damages for intentional interference with existing contract or wrongful interference with prospective contractual relations. PJC 115.22;
- Disgorgement of compensation. *See Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999); and
- Disgorgement of profits. *See* PJC 115.16, 115.17; TEX. PROP. CODE ANN. § 114.061(d)(Vernon 2014).

C. Non-Monetary: Remedies

When a trustee profits or benefits from a transaction with the beneficiary that may be subject to Pattern Jury Charge 104.2, the plaintiff may be also entitled to equitable relief. Some remedies, such as rescission, constructive trust, profit disgorgement and fee forfeiture can be pursued without first establishing the breach caused damage. *See Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942). It is well settled that the jury decides disputed facts and the court then must decide whether to grant equitable relief based on the circumstances. *See Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999)(court decides whether breach is clear and serious and remedy is equitable and just).

Non-monetary relief may include:

- Dissolution, buy-out, partition. TEX. R. CIV. P. 756, *et seq*.; TEX. PROP. CODE ANN. § 23.001 *et seq*. (Vernon 2014);
- Rescission. The court may grant rescission of a transaction accomplished by breach of the defendant's fiduciary duty. *Allison v. Harrison*, 156 S.W.2d 137, 140 (Tex. 1941);
- Removal of trustee. TEX. PROP. CODE ANN. § 113.082(a)(1)(Vernon 2014);
- Compel trustee to perform duties. TEX. PROP. CODE ANN. § 114.008(a)(3)(Vernon 2014);
- Permanently enjoin trustee from committing a breach. TEX. PROP. CODE ANN. § 114.008(a)(2)(Vernon 2014);

- Compel trustee to redress breach of trust. TEX. PROP. CODE ANN. § 114.008(a)(3)(Vernon 2014);
- Order trustee to account. TEX. PROP. CODE ANN. § 114.008(a)(4)(Vernon 2014);
- Remove trustee. TEX. PROP. CODE ANN. § 114.008(a)(7)(Vernon 2014);
- Void an act of the trustee. TEX. PROP. CODE ANN. § 114.008(a)(9)(Vernon 2014);
- Constructive trust. The court may impose a constructive trust to restore property or profits lost to the fiduciary's breach. *Consolidated Gas & Equip. Co. v. Thompson*, 405 S.W.2d 333, 336 (Tex. 1966); *International Banker's Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963); *Slay v. Burnett Trust*, 187 S.W.2d 377, 380 (Tex. 1945);
- Order other appropriate relief. TEX. PROP. CODE ANN. § 114.008(a)(10)(Vernon 2014); TEX. CIV. PRAC. & REM. Code Ch 64, 65.

D. Punitive Damages

Consideration should be given with nominal damages whether the plaintiff could be awarded exemplary damages. *Manges v. Guerra*, 673 S.W.2d 180, 184 (Tex. 1984). *See* PJC 115.36-.45 (exemplary damages). *Bennett v. Reynolds,* 315 S.W.3d 867 (Tex.2010).

E. Attorney's Fees

The recovery of legal fees for some plaintiffs and their attorneys are often a significant consideration when pursuing a lawsuit as any litigation generally must make economic sense for both the plaintiff and the attorney. Therefore, consideration should be given to actions and inactions of their trustee in light of the ability to recover fees and costs related to certain claims. And, while tort claims do not automatically give rise to the recovery of legal fees and expenses, a number of statutes may provide a basis to do so if pled and proved properly. Some include:

- Attorney's fees and expenses relating to estates. TEX. ESTATES CODE ANN. §§ 352.052, 352.053, 351.003 (Vernon 2014);
- Attorney's fees and expenses relating to trusts. TEX. PROP. CODE ANN. §§ 114.063, 114.064 (Vernon 2014;
- Breach of contract. TEX. CIV. PRAC. & REM. CODE § 38.001, et seq;
- Declaratory judgment action. TEX. CIV. PRAC. & REM. CODE § 37.001, *et seq*; and
- Recovery for a common fund. *See City of Dallas v. Arnett*, 762 S.W.2d 942, 954 (Tex. App.—Dallas 1988, writ denied)(*citing Trustees v. Greenough,* 105 U.S. 527, 26 L.Ed. 1157 (1881); *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 799–801 (Tex.1974)).

F. Prejudgment Interest

Pre-judgment interest generally begins to accrue on the earlier of:

- 180 days after the date a defendant receives written notice of the claim; or
- The date the lawsuit is filed. *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc*., 962 S.W.2d 507, 531 (Tex. 1998). *See also Lee v. Lee*, 47 S.W.3d 767, 800 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)(rejected plaintiff's argument *Kenneco* should not apply breach of fiduciary duty claims because such holding would "nullify [defendants'] duty of disclosure as a fiduciary").

Thus, when the plaintiff made demand and/or filed the lawsuit sets the date that pre-judgment interest may start accruing.

XIII. CHECKLISTS WHEN PREPARING FOR TRIAL

A. **Generally**

When preparing for trial, consideration should always be given to:

- Docket Control Order;
- Local Rules; and
- Any court specific instructions and procedures.

B. **Pretrial Conference**

When preparing for the pretrial, some pretrial considerations include:

- Filing dilatory pleas, motions and exceptions;
- Seeking a realignment of the parties (including the right to open and close);
- Amending pleadings;
- Preparing written statement of parties'

contentions;
- Preparing contested issues of fact and simplification of issues;
- Seeking possible stipulations of fact;
- Identifying of legal matters to be decided by court;
- Exchanging list of direct fact witnesses who will be called to testify including name, address and subject matter;
- Supplementing production – including fee invoices if evidentiary issue on fees;
- Preparing deposition cuts;
- Exchanging list of expert witnesses including name, address and subject matter of testimony and opinions;
- Filing motions to exclude:
  - Fact witness; and
  - Expert witnesses.
- Entering into agreed propositions of law and contested issues of fact;
- Submitting proposed jury questions, instructions and definitions;
- Marking and exchanging exhibits for use at trial;
- Filing written objections to exhibits with the basis for objections;
- Addressing settlement credit related issues;

C. **Trial Preparation**

As trial nears, considerations include:
- Subpoenaing witnesses;
- Preparing Voir Dire:
  - Review juror information;
  - Questionnaire; and
  - Oral questions.
- Jury selection:
  - Shuffle;
  - Challenges for Cause; and
  - Peremptory challenges.
- Opening:
  - Planning;
  - Objections; and
  - Preservation of error.
- Witnesses & Evidence:
  - Case in chief;
    - Rebuttal;
    - Depositions;
    - Documents;
    - Offers of proof/bills of exceptions; and
    - Re-urge *Robinson* challenges.
- Motions:
  - Directive verdict;
    - Reopen for additional evidence; and
    - Amend pleadings.
- Charge;
  - Tendering proposed charge;
  - Preserving objections;
  - Obtain ruling on objections (in writing; and on record).
- Closing:
  - Charge; and
  - Demonstrative aids.
- Verdict:
  - Motion for Judgment;
  - Motion for Judgment Notwithstanding Verdict; and
  - Motion to Reinstate after dismissal for want of prosecution.

D. **Post Trial Motions & Appeal**

Possible post-trial motions include:
- Motion for New Trial;
- Motion to Modify/Correct Judgment;
- Motion for Judgment Nunc Pro Tunc;
- Findings of Fact and Conclusions of Law;
- Motion to Extend Post Judgment Deadlines; and
- Notice of Appeal.

XIV. SETTLEMENT

A. **Generally**

While some trust lawsuits are sometimes resolved by judges and juries, the majority are resolved by settlement. These settlements can be more complex due to the continued existence of the fiduciary relationship, tax considerations and limitations under Texas statutory and common law. Some issues unique to trust settlements are discussed below.

B. **Parties**

In order for a settlement to be enforceable and binding on all involved, considerations should be given to both necessary and advisable parties. And, as discussed previously, planning and perhaps additional pleadings may be necessary to bind minor, incapacitated and unascertained beneficiaries.

1. Necessary Parties

Section 115.011(b) of the Texas Property Code provides that the following are necessary parties to a trust suit:

- Beneficiary on whose act or obligation the action is predicated;
- Person designated by name in the instrument creating the trust *other than a beneficiary whose interest has been distributed, extinguished, terminated or paid*;
- Person actually receiving distributions from the trust estate at the time the action is filed; and
- Trustee, if the trustee is serving at the time the action is filed.

See TEX. PROP. CODE ANN. § 115.011(b)(Vernon 2014)(emphasis added on 2011 amendment).

If a necessary party is a charity, notice must also be given to the Texas Attorney General's office. *Id.* at § 115.011(c). To avoid future enforcement issues, all these persons should be parties to a settlement agreement relating to a trust. Furthermore, if the proceeding involves a declaratory judgment involving the trust, all persons who have an interest that would be affected by the outcome must be joined as a party. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.006 (a)(Vernon 2008). This may include successor trustees and contingent beneficiaries.

2. Proper Parties

In addition to all necessary parties (as required by the Texas Property Code), consideration should be given to requiring any other persons who may have standing to complain to consent to the agreement.

Such additional parties may include:

- Born or ascertainable contingent beneficiaries designed by a class (such as children or grandchildren); and
- Successor trustees.

Contingent beneficiaries designated by a class are not necessary parties to a trust suit, however, they may have standing to challenge the agreement to the extent it affects his or her contingent interest. *See* TEX. PROP. CODE ANN. § 115.011(b) (Vernon 2007) (contingent beneficiaries designated by class not necessary parties to trust suit); *see also Musick v. Reynolds*, 798 S.W.2d 626 (Tex. App.–Eastland 1990, writ denied)(trust can be modified without consent of unascertained beneficiary of trust). The decision to join contingent beneficiaries is a judgment call based on the disputed issues, effect of the agreement and the comfort level sought. Successor trustees should also be joined to avoid a future claim that they hold the claims of the trust and that a settlement with a beneficiary does not bind the successor trustee. *See* discussion *supra.*

3. Minors, Unborn or Unascertained Beneficiaries

Until September 1, 1999, it was more difficult to enter into a binding settlement with minors or unborn or unascertained beneficiaries because the doctrine of virtual representation was limited to judicial proceedings. This was necessary because the Texas Property Code Section 115.013 provides that unborn and unascertained beneficiaries may be virtually represented by another party having a substantially identical interest in the proceeding. *See* TEX. PROP. CODE ANN. § 115.013(c)(4)(Vernon 2007 & Supp. 2013). Furthermore, an enforceable settlement with a next friend generally requires court approval. *See* TEX. R. CIV. P. 44; *see also Byrd v. Woodruff*, 891 S.W.2d 689 (Tex. App.—Dallas 1994, writ dism'd by agree.).

Thus, parties to a proposed settlement agreement involving unborn or unascertained beneficiaries were often forced to initiate a "friendly" suit (assuming a lawsuit is not currently pending) to approve the proposed settlement. *See Robinson v. Nat'l Cash Register Co.,* 808 F.2d 1119 (5th Cir. 1987)(no party may be bound by judgment if non-party's and party's interest is so closely aligned that party is non-party's "virtual representative").

Effective September 1, 1999, parties can invoke the virtual representation doctrine outside a court proceeding. Provided the agreement does not purport to modify or terminate a trust, parties can enter into out-of-court agreements, including fiduciary releases and other agreements, and bind minor, unborn or unascertained beneficiaries. Section 114.032 provides that "written agreement between a trustee and a beneficiary, including a release,

consent, or other agreement relating to a trustee's duty, power, responsibility, restriction, or liability, is final and binding on the beneficiary and any person represented by a beneficiary" if:

- The instrument is signed by the beneficiary;
- The beneficiary has legal capacity to sign the instrument; and
- The beneficiary has full knowledge of the circumstances surrounding the agreement.

See TEX. PROP. CODE ANN. § 114.032 (Vernon 2007).

Furthermore, an agreement with a beneficiary who has the power to revoke the trust or a general power of appointment is final and binding on any person who takes under the power of appointment or who takes in default if the power of appointment is not executed. *See* TEX. PROP. CODE ANN. § 114.032 (Vernon 2007).

As to minors, a written agreement is final and binding when all of the following provisions are met:

- The minor's parent, including a parent who is also a trust beneficiary, signs the instrument on behalf of the minor;
- No conflict of interest exists; and
- No guardian, including a guardian ad litem, has been appointed to act on behalf of the minor.

See TEX. PROP. CODE ANN. § 114.032 (Vernon 2007).

An agreement will be binding on an unborn or unascertained beneficiary when a beneficiary who has an interest substantially identical to the interest of the unborn or unascertained beneficiary signs the instrument; provided the unborn or unascertained beneficiary has a substantially identical interest with a trust beneficiary from whom the unborn or unascertained beneficiary descends. Therefore, these beneficiaries will only be bound if there is no conflict between the virtual representative and the beneficiary. *See* TEX. PROP. CODE ANN. § 114.032 (Vernon 2007).

4. Who Lacks Standing

There are certain cases in which the named and other beneficiaries of a trust lack standing to intervene in the pending litigation or any resulting settlement. These include disputes between the trustee and a third party. On point is *Davis v. Ward*, 905 S.W.2d 446 (Tex. App.–Amarillo 1992, writ denied). In *Davis*, a beneficiary attempted to intervene in litigation brought by the current trustee against the former trustee for breach of fiduciary duty, fraud and conversion. The parties ultimately entered into a settlement agreement under which the defendants would convey assets to the trust. A motion to approve settlement was filed with the court. The beneficiary intervened in the litigation and opposed the motion to approve settlement. The trial court held that the beneficiary had no cause of action or standing in the proceeding and the trustee alone had authority to enter into the settlement and the beneficiary is bound by the trustee's actions. *See Id.* at 448; *see also Cogdell v. Fort Worth Nat'l Bank,* 544 S.W.2d 825 (Tex. App.–Eastland 1977, writ ref'd n.r.e.)(beneficiary of testamentary trust lacks standing to oppose settlement between trustee and executor of estate).

C. **Disclosure Issues**

A settlement agreement, like any contract, is subject to a voidance on grounds of fraud or material misrepresentation. *See Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990). The rationale is that a contract induced by fraud is, in effect, "no contract because there is no real assent to the agreement." *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997), *citing Brown Thompson Co. v. Sawyers*, 234 S.W. 873 (Tex. 1921).

When the release is of a trustee, it is well settled law that a trustee generally has a duty of full and fair disclosure of all its acts. This duty is not negated because the trustee is being sued by the beneficiary or because the beneficiary is willing to enter into a settlement agreement. For example, Section 114.032 provides that a settlement agreement between a trustee and a beneficiary is binding if, among other factors, the beneficiary had "full knowledge of the circumstances surrounding the agreement." TEX. PROP. CODE ANN. § 114.032(a)(3)(Vernon 2014). To date, no Texas decision has defined "full knowledge" or determined whether such disclosures can be waived by a beneficiary. Therefore, it is advisable for settling trustees to

provide beneficiaries and their advisors the opportunity to review its books and records prior to any settlement and require the beneficiary to confirm such information was made available prior to completion of the settlement agreement.

Furthermore, this duty of disclosure also requires that negotiations related to settlement of claims of an estate or trust be disclosed and provided to beneficiaries so that they may have adequate knowledge of the fiduciaries acts. In a recent case of first impression, the issue of disclosure required by a fiduciary versus the obligation of full and fair disclosure was considered. In *Avary v. Bank of America*, 72 S.W. 3rd 779 (Tex. App.—Dallas 2002, pet. denied), a beneficiary filed a lawsuit against the executor of a decedent's estate arising out of a court-ordered mediation of a wrongful death and survival action related to the decedent's estate. The executor moved for summary judgment on all grounds alleging that communications made at the mediation were confidential under Section 154.973 of the Texas Civil Practice and Remedies Code. The trial court granted the executor's summary judgment after permitting limited discovery. The appellate court, however, reversed, holding that a separate independent tort was alleged to have occurred during the mediation and discovery was warranted in the context of the executor's duty of full and fair disclosure to the beneficiaries of the estate. Although the beneficiary accepted the settlement proceeds reached in mediation, he contended that another offer would have actually resulted in a greater recovery once estate tax considerations had been taken into consideration when then total recovery was apportioned. The appellate court further held that evidence that is discoverable independent of the alternate dispute resolution procedure is discoverable regardless of the mediation. The court noted that the executor's acceptance of an apportionment of the settlement proceeds without consideration of the estate's tax obligations and without any disclosure to the heirs of the effect of the apportionment on the estate's remaining assets and liabilities is some evidence of a breach of fiduciary duty. The court stated that because of the fiduciary relationship, the beneficiary was entitled to question the executor fully regarding its handling of the estate and other matters regarding the estate.

D. Disclaimer of Reliance

While parties may condition a release or agreement on certain representations, they can also expressly disclaim any reliance. A disclaimer of reliance generally allows parties to avoid future disputes. *See Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997); *Atlantic Lloyds Insurance Company v. Butler*, 137 S.W.3d 199 (Tex. App.—Houston [1st Dist.] 2004, pet. filed July 6, 2004)(disclaimer of reliance in settlement agreement conclusively negated other parties alleged reliance on any representations or lack of disclosure by other parties).

A clear cut specific disclaimer effectively negates a claim of fraudulent release in most circumstances. *Id.* at 179; *but see Prudential Ins. Co. v. Jefferson Assocs.*, 896 S.W.2d 156, 162 (Tex. 1995)(concealment or obstruction of party's investigation may negate disclaimer of reliance); *Harris v. Archer*, 134 S.W.3d 411 (Tex. App.—Amarillo 2004, pet. filed April 26, 2004)(disclaimer of reliance may bar fraudulent inducement claim when fiduciary relationship exists between the parties).

In *Schlumberger*, the Texas Supreme Court held that the following language unequivocally disclaimed reliance:

> [E]ach of us [the parties] expressly warrants and represents and does hereby state … and represent … that no promise or agreement which is not herein expressed has been made to him or her in executing this release, and that none of us is relying upon any statement or representation of any agent of the parties being released hereby, each of us is relying on his or her judgment and each has been represented by … as legal counsel in this matter.

Id. at 180 *citing Prudential*, 896 S.W.2d at 163.

If a fiduciary relationship exists between the parties, it is advisable to disclose any material information regarding the transaction to the extent possible. Additionally, the agreement should specifically disclaim reliance on any and all statements, representations, or non-disclosure of material information by the other parties.

The agreement should also expressly release claims for breach of fiduciary duty to disclose material information. *See Harris*, 134 S.W.3d at 431.

E. Checklist

For a more detailed discussion of the issues involved in trust settlements *see Sarah Patel Pacheco,* Settlement Agreements: Considerations When Negotiating, Drafting and Enforcing Settlement Agreements Involving Probate, Trust and Guardianship Disputes, State Bar of Texas Prof. Dev., 33th Annual Advanced Estate Planning & Probate Law (2009), and *Mickey Davis and Sarah Patel Pacheco,* Tax Considerations of Settlement Agreements and Judgments, State Bar of Texas Prof. Dev., 29th Annual Advanced Estate Planning & Probate Law (2005). But, the following is a basic checklist of considerations when drafting releases in these type of fiduciary lawsuits:

- Identify Parties:
  - State all names;
  - State all relevant capacities;
  - Define appropriately;
  - State how minors and unknown beneficiaries are bound; and
  - State any ad litems joining as parties.
- Include Recitals:
  - Identify trust or trusts at issue;
  - Identify trustees;
  - State facts giving rise to contest or dispute;
  - State facts evidencing each settling party's standing and validity of his or her claim;
  - Identify pending legal action, including court, style of case, etc.; and
  - State settlement is to avoid continued litigation and buy peace.
- Definitions and scope:
  - Define claims;
  - Define relevant entities and persons included in settlement, i.e. other trusts, partnerships, businesses, etc.;
  - State what claims or matters, if any, are excluded from agreement; and
  - Define relevant terms – including successor, affiliates, predecessors, litigation, transactions, etc.
- Recite consideration:
  - Good and valuable;
  - Other payments provided under terms negotiated; and
  - Terms of settlement.
- Resignation of Trustee:
  - Basis for resignation;
  - Time for resignation;
  - Any contingent events or actions;
  - Appoint successor trustee;
  - Means to qualify; and
  - Who must bring suit to seek appointment, if necessary.
- Distribution standard issues:
  - How future distributions will be determined;
  - Documentation beneficiaries must submit to support future distributions;
  - Property to be distributed in settlement of claims for failure to distribute sufficient amounts in past;
  - Whether payments are from income or principal; and
  - How past, current and future payments will be accounted for.
- Disclosure, discharge and redress:
  - Disclosures of Books, Records and Accounts;
  - Successor trustee has no duty to redress;
  - Judicial accounting;
  - Indemnify successor trustee from claims of unknown or minor beneficiary or third parties; and
  - Time and place books and records will be made available.
- Breach of fiduciary duty:
  - Payment from fiduciary to trust and/or beneficiary;
  - Return of trustee fees and expenses paid by trust;
  - Return of compensation by trustee;
  - Whether payment to trustee and property taken by trustee will constitute income to trustee; and
  - Note or other means to secure payments.
- Continued administration of trust:
  - Who will be appointed or continue to serve as the trustee of the trust;
  - Future reporting requirements to parties or third parties;
  - Payment of trustee's fees and expenses; and

  - Right to compensation.
- Possible Termination of Trust:
  - Basis for termination;
  - Means to terminate – agreement or by court;
  - Who prepares paperwork and pleadings;
  - Payment of any debt, obligations and taxes;
  - How pending debts, notes, leases, contracts or other obligations will be handled; and
  - Tax effects of termination – income and generation-skipping transfer.
- Possible Modification of Trust:
  - Provision to be modified;
  - Basis for modification;
  - Means to modification – agreement or by court;
  - Who prepares paperwork and pleadings;
  - Tax implications; and
  - generation-skipping transfer considerations.
- Tax matters:
  - Consider tax implications;
  - Obtain tax opinions;
  - Request private letter rulings;
  - Determine who is responsible for filing tax returns;
  - Whether distributions will take into account the amount of taxes the beneficiary must pay; and
  - Will settlement result in loss of generation-skipping transfer tax "grandfathered" status.
- Representations:
    - Capacity of parties;
  - Disclosure of assets;
  - Authority to act in stated capacity;
  - Party has not assigned, pledged or disclaimed interest;
  - Discharge any reliance on statement by any other party's attorney or advisor; and
  - Include disclaimer of reliance other than expressly stated in written settlement agreement.
  - Release and indemnities.
  - Release claims;
  - Limitations in release of parties and/or attorney or other advisors;
  - Exclude from release obligations under settlement agreement;
  - Verify all required parties release and are released in all desired capacities;
  - Verify successor, affiliates and predecessor are released, if desired; and
  - Indemnities for taxes, third party claims, tenant claims, environmental claims, alleged spouses, etc.
- Disposition of litigation:
  - Dismissal with prejudice;
  - Consent judgment;
  - Time to dispose;
  - Who is responsible for preparation of paperwork;
  - Rights of counsel to review; and
  - Whether parties must attend hearing.
- Remedies in default:
  - Settlement agreement enforced as contract;
  - Settlement agreement to be incorporated in judgment and enforced accordingly;
  - Specific performance; and
  - Right to attorney's fees and expenses.
- Court approvals, if any.
- Effective date:
  - Immediately;
  - Upon necessary court approvals; and
  - Upon a subsequent event.
- Confidentiality agreement.
- Miscellaneous.
  - Agreement supersedes any oral or prior agreements (exclude any agreements to remain in effect);
  - Agreement must be modified in writing;
  - Choice of law;
  - Incorporate exhibits;
  - Advise of own counsel;
  - Whether agreement can be executed in multiple counterparts;
  - Whether facsimile signature same as original;
  - Where future notices should be sent;
  - Headings and titles are for descriptive purposes only; and
  - Agreement to mediate/arbitrate future disputes.

XV. OTHER CONSIDERATIONS

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

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

B. Be Clear Who the Advisor Represents

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

- Any meetings should be preceded with a statement that the attorney only represents the trustee;
- A written notice of non-representations can be given to any potential beneficiaries and creditors in the initial letter or contact;
- An acknowledgement of no representation may be requested before any meetings with the third parties; and
- The attorney should not generally answer any questions regarding the third parties rights.

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

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

It is common for an attorney representing a trustee to communicate with the beneficiaries of the trust on the trustee's behalf. These contacts may create, however, a claim that the beneficiary, creditor, etc., believed that the professional advisor owes a duty to the beneficiary, creditor, etc. And, it may likewise cause the trustee to be liable for the attorney-agent's actions.

Thus, it is suggested that any written communication with any potential non-client reiterate (i) who the advisor represents, and (ii) that the advisor does not represent the recipient. It is also advisable for trustee's advisors to avoid preparing documents, such as waivers, disclaimers, etc., for non-clients. However, given the realities of the trust area, it is sometimes necessary for the trustee's advisor to prepare such documents to expedite his or her appointment or the settlement of the trust. If the attorney is providing the non-client a document for execution, the correspondence should clearly suggest that the recipient have the document reviewed by his or her own advisors. Finally, any letter to a potential beneficiary should be written, if possible, in a manner that confirms, each time, that the advisor is not providing advice to the recipient.

D. Consider the Possible Rights of Successor Fiduciaries

Attorneys and a trustee's other advisors should be aware that an issue exists regarding the privity of a successor trustee with the prior trustee's advisors. When a trustee has been removed or died, a successor trustee is generally imposed with a duty to redress his or her predecessor's actions. When a fiduciary is represented by counsel, the question then becomes whether the successor is entitled to the

predecessor's legal files. While the Texas Supreme Court decision of *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996), seems to imply that the attorney only represented that fiduciary/client, no Texas court has clearly addressed this issue in the context of trust and at least one trial court has ordered the turnover of the prior attorney's files.

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

E. Be Cognizant of the Discovery Rule

While the standard statute of limitation on breach of fiduciary duty is four years, the discovery rule can toll this applicable period for years into the future. The Texas Supreme Court has twice held a fiduciary's misconduct to be inherently undiscoverable. *See Willis v. Maverick*, 760 S.W.2d 642, 547 (Tex. 1988)(attorney-malpractice actions subject to discovery rule because of fiduciary relationship

between attorney and client and client's lack of actual or constructive knowledge of injury); *Slay v. Burnett Trusts*, 187 S.W.2d 377, 394 (1945)(trustee). The discovery of such claims may relate to the fiduciary's actions or inactions. As a result, consideration should be given to retaining files and other information or documentation relevant to these engagements far beyond the standard period.

F. Take the High Road

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

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

XVI. CONCLUSION

Each lawsuit involving a trustee often has common themes coupled with unique facts. There is rarely a right or wrong way to defend the trustee. But an appreciation of the statutory provisions and common law unique to the defense of these fiduciaries can be invaluable in preparing the case for trial and obtaining a good outcome for the trustee. Hopefully, the foregoing discussion provides some guidance during the process.

XVII. EXHIBITS

Exhibit A

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

QUESTION ___

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

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

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

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

PJC 236.9

Exhibit B

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

QUESTION ___

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

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

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

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

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

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

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

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

Answer "Yes" or "No."

Answer: _____

PJC 236.10

Exhibit C

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

QUESTION ___

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

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

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

Answer "Yes" or "No."

Answer: _____

by trust).

PJC 235.11

Exhibit D

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

QUESTION ___

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

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

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

Answer "Yes" or "No."

Answer: _____

PJC 235.12

Exhibit E

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

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

QUESTION 1

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

Answer "Yes" or "No."

Answer: _____

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

QUESTION 2

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

Answer "Yes" or "No"

Answer: _____

PJC 235.17

Exhibit F

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

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

QUESTION ____

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

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

PJC 235.18

Exhibit G

Texas Pattern Jury Charge on Release

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

QUESTION ___

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

Answer "Yes" or "No."

Answer: _____

PJC 235.18