Texas Fiduciary Litigation Update: 2018-2019

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

> Represented a trustee in federal class action suit where trust beneficiaries challenged whether it was the authorized trustee of over 220 trusts;
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> Represented trustees regarding claims of mismanagement of assets;
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> Represented a trustee who filed suit to modify three trusts to remove a charitable beneficiary that had substantially changed operations;
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> Represented a trustee regarding dispute over the failure to make distributions;
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> Represented a trustee/bank regarding a negligence claim arising from investments from an IRA account;
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> Represented individuals in will contests arising from claims of undue influence and mental incompetence;
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> Represented estate representatives against claims raised by a beneficiary for breach of fiduciary duty;
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> Represented beneficiaries against estate representatives for breach of fiduciary duty and other related claims; and
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> Represented estate representatives, trustees, and beneficiaries regarding accountings and related claims.

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

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

David has published over twenty (20) law review articles on various litigation topics. David's articles have been cited as authority by: federal courts, the Texas Supreme Court (three times), the Texas courts of appeals (Waco, Texarkana, Tyler, Beaumont, and Houston), McDonald and Carlson in their Texas Civil Practice treatise, William V. Dorsaneo in the Texas Litigation Guide, Baylor Law Review, South Texas Law Review, and the Tennessee Law Review. David has presented and/or prepared written materials for over one hundred and fifty (150) continuing legal education courses.

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I. Introduction[1]

The fiduciary field in Texas is a constantly changing area. Over time, statutes change, and Texas courts interpret those statutes, the common law, and parties' documents differently. This paper is intended to give an update on the law in Texas that impacts the fiduciary field from a period of mid-2018 to mid-2019. The author has a blog, the Texas Fiduciary Litigator (www.txfiduciarylitigator.com), wherein he regularly reports on fiduciary issues in Texas.

II. Trust-Related Litigation

A. Court Holds That Drafts Of Trust Documents Are Not Discoverable And Discusses The Attorney-Client Privilege

In *In re Rittenmeyer*, the mother of the decedent was the executor of his estate. No. 05-17-01378-CV, 2018 Tex. App. LEXIS 6647 (Tex. App.—Dallas August 22, 2018, original proceeding). The executor sued her son's wife and his employer, alleging that the estate had the right to certain bonuses due to a pre-nuptial agreement. The decedent's wife alleged that the pre-nuptial agreement may not be enforceable because of fraud, i.e. fair disclosure of property and financial obligations and fraudulent inducement to sign the agreement based on statements that the son made about having the wife cared for by a trust. The wife sought discovery of drafts of wills prepared after the will admitted to probate, trust documents where the decedent was a beneficiary, and communications reflecting the decedent's intentions regarding providing for the wife.

The mother objected to the discovery requests and asserted that the documents were privileged due to the attorney-client privilege. The wife maintained that the documents were excepted from privilege by Texas Rule Evidence 503(d)(2), which provides that the attorney-client privilege does not apply "if the communication is relevant to an issue between parties claiming through the same deceased client." *Id*. The trial court granted the wife's motion to compel, and the mother filed a petition for writ of mandamus.

The court of appeals initially denied the mandamus and issued an opinion. *In re Rittenmeyer*, No. 05-17-01378-CV, 2018 Tex. App. LEXIS 2812 (Tex. App.—Dallas April 19, 2018, original proceeding). The mother filed a motion for rehearing, and the court issued a new opinion, granting the relief sought.

[1] This presentation is intended for informational and educational purposes only, and cannot be relied upon as legal advice. Any assumptions used in this presentation are for illustrative purposes only. This presentation creates no attorney-client relationship.

The Court noted that wife had the burden of establishing that the exception applied and stated the importance of the attorney-client privilege. The court stated:

> For the exception to apply, the rule first requires that the information is "relevant to an issue between parties." It is well-established that evidence is relevant if: "(a) it has any tendency to make a fact more or less probable than it would be without the evidence, and (b) the fact is of consequence in determining the action." Texas courts have applied the rule 503(d)(2) exception when a party contends the information is relevant to a claim that a decedent lacked capacity to execute codicils or trust documents or was subject to undue influence."

Id. The wife argued that she believed that the mother destroyed a subsequent will that her husband had executed, and that drafts of wills and related communications would be relevant to that topic. The court disagreed and stated:

> Significantly, however, Chris could not have revoked the 2011 Will "except by a subsequent will, codicil, or declaration in writing, executed with like formalities, or by . . . destroying or cancelling the same or causing it to be done in his presence." Documents showing Chris's "present intent to change or revoke a testamentary instrument in the future cannot accomplish revocation of the instrument, nor [are they] evidence of the revocation." Consequently, drafts of wills are not relevant to whether Chris executed a later will. For the same reason, drafts of wills are not relevant to Nicole's claims that Hedy and Ashley destroyed "a later Will" that Chris executed.

Id. The court concluded that the wife did not establish that an exception applied to the attorney-client privilege regarding the draft wills and related correspondence.

The mother also challenged the trial court's order requiring her to produce trust documents naming her son and the wife. The court ruled that any trust created by the mother and the father would not be within the exception because they were the settlors and not the husband. Therefore, the court of appeals' new opinion granted mandamus relief for the mother.

B. Court Reversed A Summary Judgment For Trustee And Found That A Contingent Remainder Beneficiary Had Standing And Potentially Had A Removal Claim

In *In the Interest of K.K.W.*, an ex-wife sued an ex-husband and the trustee of a trust that they created for breaches of fiduciary duty and sought to remove the trustee, among other claims, arising out of the trustee's alleged unfair distribution of trust assets. No. 05-16-00795-CV, 2018 Tex. App. LEXIS 6539 (Tex. App.—

Dallas August 20, 2018, pet. denied). The trial court granted a summary judgment for the ex-husband and trustee, and the ex-wife appealed.

The trustee moved for summary judgment on the breach of fiduciary duty, removal and reformation claims on the ground that the ex-wife lacked standing to assert those claims. He argued that because the only relationship the ex-wife had with the trust was as a co-settlor, she did not qualify as an "interested person" under the trust code for standing. The court of appeals disagreed:

> Mother pleaded she had standing pursuant to sections 111.004(2), (6), (7); 115.001(a); and 115.011(a) and (b) of the Texas Trust Code. See Tex. Prop. Code Ann. §§ 111.004 (2), (6), (7); 115.001(a); 115.011(a) and (b) (West 2014). Section 115.011 of the trust code confers standing on any "interested person" which is defined as "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." See id. at §§ 111.004(7) and 115.011(a). A "beneficiary," in turn, is defined as a person for whose benefit property is held in trust, regardless of the nature of the interest. Id. at § 111.004(2). The "interest" may be legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible. Id. at § 111.004(6). 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 purpose of and matter involved in any proceeding. *Id*. at §111.004(7). Applying this law to the facts, we conclude that Trustee failed to establish as a matter of law that Mother lacked standing to pursue these claims.
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> Section 3.9 of the trust provides that if K.K.W and his children and remote descendants die before the trust terminates, the trust's principal and income shall be distributed to Father, if living, otherwise to Mother, if living. Mother, therefore, has a contingent remainder interest and contingent reversionary interest in trust property. Trustee asserts that Mother's interest is "a remote, contingent, inheritance" interest and therefore insufficient to confer standing under the property code. However, even a remote and contingent interest is sufficient to confer standing as an interested person pursuant to the property code. *See Aubrey*, 523 S.W.3d at 313 (future remainder interest sufficient for standing for removal of trustee under code even if interest contingent); *see also Hill v. Hunt*, No. 3:07-CV-2020-O, 2009 U.S. Dist. LEXIS 121494, 2009 WL 5178021, at *2 (N.D. Tex. Dec. 30, 2009) (contingent remainder interest is "interest" under section 111.004(6) and makes holder an "interested person" under section 111.004(7)). Because Trustee failed to conclusively establish that Mother was not an interested person for purposes of bringing suit under section 115.011(a), the trial court erred in granting summary judgment on these claims based on lack of standing.

Id.

The court also reversed the summary judgment as to the removal claim. The ex-wife sought removal of the trustee pursuant to section 113.082 (a)(3) and (4) of the trust code alleging, among other things, that the trustee failed to provide her with a full and complete accounting of the trust after repeated requests, failed to disclose the arrangement between the ex-husband and the trustee, and failed to provide her with notice as required by the trust instrument upon rejection of a reimbursement claim. The court held that because the trustee was not entitled to summary judgment on the sole ground he raised relative to this claim—ex-wife's lack of standing—and none of the other bases for summary judgment which were otherwise affirmed resolved as a matter of law the bases for removal, the court reversed the summary judgment on that claim as well.

The ex-wife argued that the trustee committed constructive fraud based on a failure to disclose an alleged side-agreement with the ex-husband. The court of appeals held that:

> [W]e agree Mother has a contingent remainder interest and contingent reversionary interest in trust property, so she is a beneficiary. Generally, a trustee owes the same fiduciary duty to a contingent beneficiary as to one with a vested interest. *See Brown v. Scherck*, 393 S.W.2d 172, 181 (Tex. Civ. App.—Corpus Christi 1965, no writ) (citing 90 C.J.S. Trust 247, page 235). Therefore, the record contains more than a scintilla of evidence Trustee owed a fiduciary duty to Mother as a contingent beneficiary of the trust. The trial court erred, therefore, when it granted summary judgment on the basis in Trustee's motion for summary judgment against Mother's constructive fraud cause of action.

Id.

Finally, the ex-wife argued that the partial reversal of the summary judgment warrants a reconsideration of the trial court's award of attorney's fees for the trustee. The trustee contended the award of attorney's fees in his favor should not be disturbed because it was not based solely on the outcome of the case and the ex-wife had not challenged the reasonableness and necessity of the fee award. The court stated:

> We review a decision to award attorney's fees under the trust and Declaratory Judgments Act for an abuse of discretion. A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. Section 114.064 of the trust code and section 37.009 of the Declaratory Judgments Act authorize the trial court to make an award of costs and reasonable and necessary attorney's fees as are equitable and just. Whether it is equitable and just to award attorney's fees depends on the concept of fairness, in light in light of all surrounding circumstances. The conclusion that an award is equitable and just is not dependent on a finding that a party substantially prevailed. And reversal of a trial court's decision on a declaratory

> judgment does not necessarily require reversal of the attorney's fees award.
>
> Here, based on the record before us, we cannot conclude the trial court abused its discretion in connection with its award of attorney's fees to Trustee. Although the trial court found Trustee prevailed on all causes of action filed against him by Mother, it also found Trustee only incurred attorney's fees defending against Mother's claims and seeking attorney's fees for that defense. Moreover, the trial court found Mother caused Trustee to incur additional fees by "unnecessarily prolonging this suit," and by having her expert provide "an exorbitant number of opinions," and repeatedly changing her theories of the case.
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> Even with our reversal of the trial court's judgment with respect to Mother's claims for removal of trustee, Trustee has still prevailed on all but one of Mother's claims, including the central premise of case expressed in her declaratory judgment claim, which also authorized the attorney's fees award. Further, Trustee's argument asserted as to Mother's removal claim was asserted against Mother's claims for constructive fraud and breach of fiduciary duty, both of which we have affirmed. Moreover, in light of the trial court's other findings regarding Mother's conduct during the case, we cannot conclude the trial court abused its discretion in connection with its attorney's fee award to Trustee. Accordingly, we resolve Mother's fifth issue against her and will not disturb the trial court's attorney's fees award.

Id.

C. Court Affirms Summary Judgment For A Trustee Against A Beneficiary Due To The Statute of Limitations And Discusses Constructive Knowledge Of Probate Records

In *Gilmore v. Rotan*, a testamentary trust's beneficiaries sued the trustees in 2015 for making a transfer of trust property in 2003 that was evidenced by a deed filed in 2010. No. 11-16-00253-CV, 2018 Tex. App. LEXIS 7705 (Tex. App.—Eastland September 20, 2018, no pet.). The beneficiaries claimed that the trustees engaged in self-dealing when they transferred the real property. The beneficiaries acknowledged that they each received $76,693.55 from the estate of the primary beneficiary after her death and knew of the probate proceedings. The trustees filed a motion for summary judgment on multiple grounds, and the trial court granted that motion. The beneficiaries appealed.

The court of appeals affirmed the judgment on the statute of limitations ground. The court noted that a claim for breach of fiduciary duty is subject to a four-year statute of limitations. The trustees, as summary judgment movants, had the burden to conclusively establish that the statute of limitations applied. The court of appeals held that they did so if "they (1) conclusively established that the cause of action accrued before the commencement of the statute of limitations period and (2) negate the discovery rule, if it applies, by proving as a matter of law that there is no genuine issue of material fact about when Appellees discovered, or in the exercise of reasonable diligence should have discovered, the nature of their injury." *Id*.

The evidence claim accrued when the property was transferred, which was earlier than four years before suit. The issue in the appeal was the application, if any, of the discovery rule. The court described the discovery rule as follows:

> The discovery rule is an exception that may defer accrual of a claim. The discovery rule has been applied in limited categories of cases to defer accrual of a cause of action until the plaintiff knew or, in the exercise of reasonable diligence, should have known of the facts giving rise to a cause of action. The discovery rule operates as a "very limited exception" to limitations, deferring accrual in cases in which the plaintiff's injury was "both inherently undiscoverable and objectively verifiable." The discovery rule has often been applied to a claim for a breach of fiduciary duty. In explaining why the discovery rule applies to a claim for breach of fiduciary duty, the Texas Supreme Court noted that "a person to whom a fiduciary duty is owed is either unable to inquire into the fiduciary's actions or unaware of the need to do so." Thus, "a person to whom a fiduciary duty is owed is relieved of the responsibility of diligent inquiry into the fiduciary's conduct, so long as that relationship exists." However, once "the fact of misconduct becomes apparent it can no longer be ignored, regardless of the nature of the relationship." Thus, claims for breach of fiduciary duty generally accrue when the claimant knows or in the exercise of ordinary diligence should know of the wrongful act and resulting injury.

Id.

The trustees argued that the beneficiaries had both constructive notice and actual notice of the conveyance when the deed was filed in 2010. The trustees based their assertion of actual notice on an excerpt of the deposition of one of the beneficiaries wherein he testified that he had checked the land records in 2010, he knew in 2010 that the challenged deed had been recorded, and that he told the other beneficiaries about it in 2010. The court held that this was sufficient evidence to support actual knowledge of the conveyance in 2010.

The beneficiaries also asserted that the deed was not sufficient notice because they did not realize in 2010 that the conveyance affected an interest they owned. The court disagreed, stating that "Persons interested in an estate admitted to probate are charged with notice of the contents of the probate records." The court concluded:

> Thus, Appellants had constructive notice of their beneficial interest in the real property when Harry Dean Rotan's will was admitted to probate. Constructive notice creates an irrebuttable presumption of actual notice.

> Accordingly, the summary judgment evidence establishes that Appellants had notice of their alleged injury in 2010. Since the applicable statute of limitations is four years for a claim for breach of fiduciary duty, Appellants' suit filed in 2015 was not timely.

Id. The court affirmed the summary judgment on the statute-of-limitations ground.

D. A Court Held That A Trustee Properly Merged Trusts

In *In re Macy Lynne Quintanilla Trust*, a settlor created three trusts for his children in 2014. No. 04-17-00753-CV, 2018 Tex. App. LEXIS 8223 (Tex. App.—San Antonio October 10, 2018, no pet.). The trust agreements named Perry as trustee and West as trust protector. The trust agreements gave the trust protector the power to remove the trustee and appoint a successor trustee. After the settlor and the trust protector had a falling out, the trust protector requested an accounting of the 2014 trusts and told the settlor that he was considering removing the trustee. The settlor then created three new trusts in 2016. The 2016 trusts were virtually identical to the 2014 trusts, except that they named a new trust protector. The trustee then executed three agreements to merge each of the 2014 trusts into the 2016 trusts. The trustee then filed suit and sought declarations that the trust protector was not an "interested person" under the Texas Trust Code and had no right to demand an accounting or to receive financial information regarding either the 2016 trusts or the merged 2014 trusts. The trust protector answered and asserted counterclaims seeking declarations that: (1) the 2014 trusts cannot be merged into the 2016 trusts; or, alternatively, (2) he was an "interested person" with the right to an accounting and financial information regarding the 2014 Trusts up to the date of merger with the 2016 Trusts; and (3) he fulfilled his duties regarding the 2014 Trusts. The trial court granted two summary judgments for the trustee, and the trust protector appealed.

The trust protector argued that the trustee did not prove that the 2016 trusts were properly created. The court of appeals disagreed. The 2016 trust agreements stated: "Settlor hereby conveys, transfers and assigns to the Trustee, in trust, the separate property of Settlor described on Schedule A. attached hereto and made a part hereof, receipt of which is hereby acknowledged by the Trustee." *Id*. Schedule A stated simply: "$5,000.00." The trust protector argued this evidence did not prove that funds were actually transferred into the 2016 trusts. The court of appeals held that "a trust agreement itself may be sufficient summary judgment evidence that the trust was in fact funded. Absent any evidence in the record to the contrary, we conclude Perry met his summary judgment burden of demonstrating no genuine issue of material fact exists that the 2016 Trusts were funded." *Id*.

The trust protector also argued that the trustee did not conclusively establish that the 2014 trusts were properly merged. A provision entitled "Merger" in each of the 2014 trust agreements expressly provided for merger of the 2014 Trusts into newly formed, substantially identical trusts for the benefit of the same beneficiaries. Therefore, the 2014 trust agreements anticipated and permitted the merger of the 2014 trusts into the 2016 trusts. Each merger agreement stated that "Perry, as Trustee of the [2014] Trust and the 2016 Trust, has determined that the combination of the 2016 Trust and the [2014] Trust will not impair the rights of any beneficiary or adversely affect achievement of the purposes of any of the trusts," and each beneficiary signed his or her respective merger agreement acknowledging and agreeing to its terms. *Id*.

The court of appeals held that the trustee proved that the mergers were proper:

> There is scant authority interpreting when a merger of trusts "impair[s] the rights of any beneficiary or adversely affect[s] achievement of the purposes of one of the respective trusts." West argues the merger adversely affected achievement of the purpose of the 2014 Trusts because it removed him as Trust Protector. However, the 2014 trust agreements do not provide a method for removing or replacing the Trust Protector that was circumvented by merging the trusts. Rather, the 2014 trust agreements are silent regarding the removal and replacement of the Trust Protector. The 2014 trust agreements are not silent regarding the method for merging the trusts and expressly authorize and empower the Trustee to do so "in [his] discretion." Therefore, we disagree that a fact question exists regarding whether the merger impaired the rights of any beneficiary or adversely affected the achievement of the purposes of any of the trusts. Absent any evidence in the record to the contrary, we conclude Perry met his summary judgment burden of demonstrating no genuine issue of material fact exists that the 2014 Trusts were properly merged with the 2016 Trusts.

Id.

The trust protector also argued that the mergers were not proper because he was not given notice. The court of appeals disagreed:

> Neither the 2014 trust agreements nor the Trust Code itself requires notice be given to a trust protector. Rather, a trustee is only required to give notice to "each beneficiary who might then be entitled to receive distributions from the separate trusts being combined or to each beneficiary who might be entitled to receive distributions from the separate trusts once the trusts are funded." Tex. Prop. Code Ann. § 112.057(c)(1). Here, each of the three beneficiaries expressly waived notice of the mergers. Therefore, we conclude Perry met his summary judgment burden of demonstrating no genuine issue of material fact exists that West was not entitled to notice of the mergers.

Id.

Finally, the trust protector argued that the trial court erred in holding that he was not an interested person entitled to raise his counterclaims. The court of appeals, once again, disagreed:

> An "interested person" is "a trustee, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust." Tex. Prop. Code Ann. § 111.004(7) (West 2014). "The phrase 'administration of a trust' refers to when a trustee manages a trust in accordance with its terms and conditions and section 113.051 of the Texas Property Code." *Gonzalez v. DeLeon*, No. 04-14-00751-CV, 2015 Tex. App. LEXIS 8940, 2015 WL 5037396, at *4 (Tex. App.—San Antonio Aug. 26, 2015, pet. dism'd) (mem. op.) (citing *Faulkner v. Bost*, 137 S.W.3d 254, 259 (Tex. App.—Tyler 2004, no pet.)). "Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding." § 111.004(7).
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> We have recognized that "[t]here is very little case law interpreting the meaning of the phrase 'interested person.'" *Gonzalez*, 2015 Tex. App. LEXIS 8940, 2015 WL 5037396, at *4. However, generally, a person who does not manage a trust (a trustee) or stand to inherit any trust assets (a beneficiary) is not an "interested person" by virtue of being a "person who is affected by the administration of the trust." *See Lee v. Rogers Agency*, 517 S.W.3d 137, 159-60 (Tex. App.—Texarkana 2016, pet. denied) (holding settlor who did not manage any aspects of the trust and did not stand to inherit any trust assets was not "affected by the administration of the trust"); *Gonzalez,* 2015 Tex. App. LEXIS 8940, 2015 WL 5037396, at *5 (holding co-attorneys-in-fact and co-executors for settlors who did not manage trust and did not stand to inherit trust assets were not "interested persons"); *Hunter v. NCNB Tex. Nat'l Bank*, No. 14-94-01199-CV, 1996 Tex. App. LEXIS 1754, 1996 WL 223584, at *3 (Tex. App.—Houston [14th Dist.] May 2, 1996, writ denied) (mem. op.) (holding daughter of settlor/beneficiary who had only expectancy to inherit trust property was not interested person); Davis v. Davis, 734 S.W.2d 707, 709 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (holding father of trust beneficiaries who was not managing conservator and only expected to inherit was not interested person).
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> Here, although he is neither a trustee nor a beneficiary, West argues he is affected by the administration of the 2014 Trusts because he is the Trust Protector. As West acknowledges, there is little authority discussing the role of trust protectors, which the Trust Code only recognized in 2015. *See* Tex. Prop. Code Ann. § 114.0031 (West Supp. 2017). The Trust Code provides that a trust protector has only the power and authority granted to him by the trust terms, which may include: (1) the power to remove and appoint trustees, advisors, trust committee members, and other

> protectors; (2) the power to modify or amend the trust terms to achieve favorable tax status or to facilitate the efficient administration of the trust; and (3) the power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the trust terms. *Id*. § 114.0031(d).
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> The unambiguous language of the trust agreements governs our analysis in this case. *See Ray Ellison Grandchildren Trust*, 261 S.W.3d at 121. The 2014 trust agreements only grant the Trust Protector the power to appoint, remove, and replace the Trustee in accordance with the terms of the agreements. Nothing in the 2014 trust agreements grants the Trust Protector any power to manage any aspects of the trust, to request or obtain an accounting or other financial information, or to inherit any trust assets. The 2014 trust agreements also expressly provide that the Trust Protector is not entitled to any compensation. Therefore, by the express terms of the 2014 trust agreements, the Trust Protector is not "affected by the administration of the trust." For these reasons, we conclude West is not an "interested person" under section 111.004(7).

Id. The court of appeals affirmed the summary judgments for the trustee.

E. Court Addresses A Beneficiary's Right To Bring Claims Belonging To A Trust

In *American Bank, N.A. v. Moorehead Oil & Gas, Inc*., plaintiffs (trustees and beneficiaries) filed suit to determine the value of ownership interests in corporate stock under section 10.361 of the Texas Business Organizations Code. No-13-17-00641-CV, 2018 Tex. App. LEXIS 9703 (Tex. App—Corpus Christi November 29, 2018, no pet.). The trial court granted summary judgment for the defendant on two grounds: the statute of limitations and standing. The plaintiffs appealed. The court of appeals first reversed as to the statute of limitations ground, and then addressed the standing issue. In its summary judgment motion, the defendant argued that the plaintiffs lacked standing in their capacity as beneficiaries because of the general rule that only trustees have the power to bring suit on behalf of a trust. The defendant argued that, although there are exceptions to this general rule, they did not apply because the plaintiffs did not plead that the trustee wrongfully refused to bring suit. *Id*. (citing *Interfirst Bank-Hous., N.A. v. Quintana Petrol. Corp.*, 699 S.W.2d 864, 874 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) ("It is only when the trustee cannot or will not enforce the cause of action that he has against the third person that the beneficiary is allowed to enforce it."); *In re XTO Energy Inc.*, 471 S.W.3d 126, 131 (Tex. App.—Dallas 2015, orig. proceeding) (noting that a "trustee's refusal to bring suit must be wrongful for [the beneficiary] to be allowed to step into the trustee's shoes and maintain a suit on the Trust's behalf")). The court of appeals held:

> Here, the live petition named the following as plaintiffs: (1) the Bank as trustee or co-trustee of all three trusts; (2) John J. Buckley Jr. and Kelly

> Rose Kinard in their capacity as co-trustees of their respective trusts; and (3) the Buckleys in their capacity as beneficiaries of their respective trusts. Moorehead is correct that the Buckleys lacked standing in their capacity as beneficiaries because they did not assert in their petition that the trustee wrongfully refused to bring suit. *See In re XTO Energy Inc.,* 471 S.W.3d at 131. Additionally, Moorehead is correct that the Buckleys lacked standing as "beneficial owners" of the stock under section 10.361(g) because the shares were not held "in a voting trust" or "by a nominee." *See* Tex. Bus. Orgs. Code Ann. § 10.361(g).
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> However, Moorehead does not dispute that the Bank had capacity as trustee or co-trustee, or that John J. Buckley Jr. and Kelly Rose Kinard had capacity as co-trustees of their respective trusts, to sue under business organizations code section 10.361. We conclude that they did have such capacity, and the trial court erred in granting summary judgment against them. *See* Tex. Prop. Code Ann. § 113.019; *Ray Malooly Tr.*, 186 S.W.3d at 570. On the other hand, Lisa Marie Buckley, who is not a co-trustee of her trust and therefore brought suit only in her capacity as beneficiary, does not have standing for the reasons stated above, and the trial court did not err in granting summary judgment against her.

Id. Therefore, the court reversed as to the co-trustees but affirmed the summary judgment as against the beneficiary.

F. Court Discusses Diversity of Citizenship Jurisdiction Where A Trustee Removed The Case

In *Thunder Patch II, LLC v. JPMorgan Chase Bank, N.A.*, plaintiffs filed suit against a trustee in state court seeking a declaration regarding the enforceability of a mineral lease, and the trustee removed the case to federal court based on diversity of citizenship. No. 5-18-CV-00629-OLG-RBF, 2018 U.S. Dist. LEXIS 207696 (W.D. Tex. December 10, 2018). The plaintiff filed a motion to remand and argued that there was not complete diversity because the defendant trustee should also have the citizenship of the states where the trust's beneficiaries reside.

The court held that when a trustee is sued in its capacity as a trustee, it is the citizenship of the trustee—not the trust's beneficiaries—that matters for diversity of citizenship purposes. "This rule governs so long as the trustee has 'real and substantial control' over the trust's assets." *Id*. The court held that the trustee had control over the assets and cited to trust provisions that granted that power:

> Here, Plaintiffs sued JPMorgan as the trustee for the Red Crest Trust; the Red Crest Trust is not a named defendant. Indeed, according to Thunder Patch and HOC, Texas law required them to file suit in this exact manner. Accordingly, the rule from Navarro controls here, as the Fifth Circuit has

> explained. It is apparent from the record and pleadings that JPMorgan has sufficiently real and substantial control over the trust's assets, and it therefore is the entity that matters for purposes of diversity jurisdiction.
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> ….
>
> Because JPMorgan is the party with real and substantial control over the trust's assets, it is JPMorgan's citizenship that matters here. The Amended Notice of Removal sufficiently alleges complete diversity in good faith based on information and belief.

Id. The court denied the motion to remand and also denied the plaintiffs' motion for leave to amend their complaint to add a non-diverse defendant.

Interesting Note: Due to a national bank's ability to remove a case to federal court for diversity of citizenship jurisdiction, many plaintiffs are adding bank employees as defendants to defeat complete diversity and diversity jurisdiction. The bank then has the uphill battle to prove that the employee was fraudulently joined. This jurisdictional fight means that more bank employees will be joined in litigation where they formerly were not.

For example, in *Medve v. JPMorgan Chase Bank, N.A.*, a plaintiff sued a bank and three of its employees for breaches of fiduciary duties arising from fiduciary accounts. No. H-15-2277, 2016 U.S. Dist. LEXIS 11961 (S.D. Tex. February 2, 2016). The bank removed the case to federal court based on diversity jurisdiction: the plaintiff was a Texas resident and the bank was a resident of Ohio. The plaintiff filed a motion for remand, asserting that there was not complete diversity as he had sued three of the bank's employees, who also lived in Texas, as defendants. The bank asserted that the employees were fraudulently joined, and therefore, did not count for diversity purposes. The district court reviewed whether the plaintiff pled a reasonable basis for recovery as against the bank's employees. The bank argued that "there is no basis in the law for finding that an employee of a trustee is directly liable for breach of trust." However, the court agreed with the plaintiff that there are three separate legal bases under Texas law for imposing liability on an employee who carries out the fiduciary functions of an entity: "(1) first, the employee owes a fiduciary duty directly as a subagent carrying out the employer's fiduciary functions, (2) second, the employee is liable if he 'participates' in the employer's breach of fiduciary duty, which the employee necessarily does if he is the one carrying out the breaches, and (3) third, the employee is personally liable for any tort he commits in the course of his employment, and breach of fiduciary duty is of course a tort." Id. The court granted the motion to remand, finding it did not have diversity jurisdiction.

G. Court Holds That A "Gun Trust" Can Hold Other Assets

In *Estate of Keener*, two heirs of a trust settlor filed an application to declare heirship. No. 13-18-00007-CV, 2019 Tex. App. LEXIS 1222 (Tex. App.—Corpus Christi February 21, 2019, no pet.). The beneficiary of the trust filed a plea in intervention in the heirship proceeding, but the trial court denied his intervention. The trust beneficiary filed an appeal of that order. The trust was styled a "gun trust." The attorney who drafted the trust document advertised "NFA gun trusts" at gun shows across Texas. "In his promotional materials, Crownover advertises his gun trusts as vehicles used to easily transfer federally regulated firearms upon death and also as a way to legally share the use of a federally regulated category III asset, such as a silencer or suppressor, among multiple individuals. The terms of Crownover's trusts, however, do not limit the trust property to only firearms." *Id*. Under the terms of the trust, the settlor could add any real and personal property to it, and the trust did not specify how property was to be added.

The court of appeals first described the concept of a trust:

> A trust is a mechanism used to transfer property. Generally, to create a trust in real or personal property, the terms of the trust must be in writing and be signed by the settlor or the settlor's authorized agent. An inter vivos trust is a trust that is created and takes effect during the settlor's lifetime. An inter vivos trust is typically created by (1) a declaration of trust, by which the property owner establishes a trust and declares himself or herself to be trustee, or (2) an agreement of trust, by which the property owner establishes a trust and names a third party to be the trustee. Also, a trust cannot be created unless there is trust property [], and the settlor must manifest an intention to create a trust. However, no testamentary intent is required for an inter vivos trust. When a valid trust is created, the beneficiaries become the owners of the equitable or beneficial title to the trust property and are considered the real owners. The trustee is vested with legal title and right of possession of the trust property but holds it for the benefit of the beneficiaries, who are vested with equitable title to the trust property. Acceptance by the trustee of an interest in a trust is presumed. Finally, "[p]roperty may be added to an existing trust from any source in any manner unless the addition is prohibited by the terms of the trust or the property is unacceptable to the trustee."

Id.

The beneficiary alleged that he was the owner of the property that the heirs sought to inherit because the settlor placed the disputed property in the trust and pointed to Schedule A of the trust for this proposition. The court of appeals agreed: "Our review of the record shows that Yarter is the beneficiary of a trust established by Keener, it is undisputed that a valid trust exists, and the trial court correctly issued a finding that a trust was established." *Id*. The court noted that the trust documents also did not limit the purpose of the trust or state that it was intended to only hold firearm-related property. Thus, the heir's argument that the trust was not intended to transfer anything more than the suppressor necessarily failed. The court held that as the beneficiary of a trust, the beneficiary was an interested person under the Texas Estate's Code and was the owner of any property that was placed in the trust. "In other words, he has a claim against the property in Keener's estate that appellees seek to inherit." *Id*. The court found that there was a fact issue as to the overall property in the trust and whether Schedule A added any property to the trust. The court concluded that the beneficiary established a justiciable interest in the proceeding and that the trial court failed to follow controlling legal precedent. The trial court erred in denying his plea in intervention.

H. Breach Of Fiduciary Duty Claim Against Trustee Based On Self-Dealing Real Estate Investment Was Dismissed Due To Limitations, Quasi-Estoppel, And An Exculpatory Clause, But The Attorney's Fees Award Against The Beneficiary Was Reversed Where The Award Was Not Equitable

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

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

The court of appeals issued a very lengthy and detailed opinion affirming in part and reversing in part the trial court's judgment. The court of appeals first addressed the trustee's affirmative defense of the statute of limitations:

> A suit for breach of fiduciary duty or fraud must be brought no later than four years from the date the cause of action accrues… A cause of action accrues when facts have come into existence that authorize a claimant to seek a judicial remedy… When applicable, the discovery rule defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the cause of action… A person to whom a fiduciary duty is owed is relieved of the responsibility of diligent inquiry into the fiduciary's conduct, so long as the relationship exists. However, once the fact of misconduct becomes apparent it can no longer be ignored, regardless of the nature of the relationship.

Id. (internal citations omitted). The beneficiary claimed that she should not have known about the claim until 2011. The court of appeals disagreed:

> The Bighorn transaction occurred on August 30, 2007. To be timely, Deborah's claims for breach of fiduciary duty and fraud, which are based on that transaction, should have been filed by August 30, 2011. The evidence shows that, by August 30, 2011, Deborah knew that the structure of the transaction that occurred was not the one Robert described in July 2007; the housing market was struggling; one of the Bighorn builders withdrew from the project and the other stopped accepting new lots; by mid-August 2009 they ceased construction, the bank started foreclosure proceedings, and Bighorn filed for bankruptcy; and by March 2011, all of the Trust's investments were lost with no possibility of recovery of that money. In his March 28, 2011 email, Robert stated that the Trust loaned money to Bighorn for a preferred returns interest. The emails Robert sent contained sufficient facts giving rise to her causes of action. Additionally, by the end of 2008, Deborah was angry with Robert because of the Bighorn project, and she had already asked Robert to resign from her trust before that date. We disagree with Deborah's assertion that some of her allegations constitute breaches of fiduciary duty separate from the Bighorn transaction. Her allegations that Robert lied about the transaction, failed to provide pertinent information about the transaction, and structured the transaction differently than described in his initial email are all facets of the allegation that Robert breached his fiduciary duty by misusing Trust assets for the Bighorn project. Therefore, these allegations share the same accrual date, August 30, 2007. We conclude that the statute of limitations ran on Deborah's breach of fiduciary duty and fraud claims on August 30, 2011.

Id. The court of appeals held that the statute of limitations also applied to the beneficiary's diversification and defalcation claims as those were the same as the her breach of fiduciary duty claim. *Id*.

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

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

Id. (internal citations omitted).

The court of appeals also affirmed the trustee's affirmative defense of an exculpatory clause in the trust, which negated his liability:

> Generally, subject to the Trustee's duty to act in good faith and in accordance with the purposes of the Trust, the terms of the Trust prevail over provisions of the Texas Trust Code. A term of a Trust exculpates a Trustee from liability if the Trustee's breach of trust is not committed in bad faith, intentionally, or with reckless indifference to the interest of a beneficiary. Paragraph C(5) of the Trust provided that the Trustee shall not "at any time be held liable for any action or default of himself or his agent or of any other person in connection with the administration of the trust estate, unless caused by his own gross negligence or by a willful commission by him of an act in breach of trust." Such an exculpatory clause has been held effective in exonerating a trustee from liability for losses when no evidence of gross negligence was shown.
>
> To prove gross negligence, a plaintiff must show (1) an act or omission that, when viewed objectively from the defendant's standpoint at the time it occurred, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others and (2) that the defendant had an actual, subjective awareness of the risk but proceeded with conscious indifference to the rights, safety, and welfare of others. Under the first element, an "extreme risk is not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff." To determine if acts or omissions involve extreme risk, we analyze the events and circumstances from the defendant's perspective at the time the harm occurred, without resorting to hindsight. Under the second element, "actual, subjective awareness" means that "the defendant knew about the peril, but its acts or omissions demonstrated

> that it did not care." Circumstantial evidence is sufficient to prove either element.

Id. The court of appeals affirmed the trial court's summary judgment on this ground due to the trustee's testimony about his due diligence about the investment, the history of doing successful real estate investments, the consent of the other beneficiaries, his capacity as beneficiary and his loss associated with the investment: "There is no evidence that Robert had an actual, subjective awareness of the risk of a coming financial crisis but nevertheless proceeded with conscious indifference to the rights, safety, and welfare of the Trust, his mother, or his sisters. Thus, there is no evidence of gross negligence or a willful commission by Robert of a breach of trust. We conclude that Robert showed as a matter of law that Deborah's claims were barred by the Trust instrument's exculpatory clause." *Id*.

The beneficiary also complained that the trial court should not have discharged the trustee from liability. The court of appeals affirmed the trial court's discharge related to an accounting:

> Whether a Trustee's resignation should be accepted is within the discretion of the trial court. The trust code and the language of the trust instrument determine the Trustee's powers and duties. The trust code requires that a written statement of accounts shall show (1) all trust property that has come to the trustee's knowledge or into the trustee's possession, (2) a complete account of receipts, disbursements, and other transactions regarding the trust property, (3) a listing of all property being administered, with a description of each asset, (4) the cash balance on hand with the name and location of the depository where the balance is kept, and (5) all known liabilities owed by the trust.… The Trust's accountant testified that the accounting reflects the receipts, disbursements, payment of expenses, distributions, transfers, land sales, and all financial transactions that occurred in the DPH Trust. He stated that the accounting fully and fairly discloses all financial matters relating to the administration of the Trust from 2002 through 2016.
>
> Robert testified regarding the documents that he provided to Deborah showing all financial transactions involved in the administration of the Trust. He presented monthly statements itemizing investment accounts, including their gains, losses, and values, as reported by UBS Financial Services, Inc., for 2002 through 2016 and showing the cash balance on hand. He also presented spreadsheets showing receipts and disbursements from the DPH Trust from 2002 through 2016, documents showing cash available to the DPH Trust, as well as income tax returns for the DPH Trust for 2002 through 2015. The record also contains closing statements relating to the sale of real estate.

> Robert testified that each of the four trusts started with $115,000 in 1989. Since 2002, when he became Trustee, till the time of trial, he paid Ruth close to a million dollars. He estimated that the value of the DPH Trust at the time of trial was $1.2 or $1.3 million. The record shows that all investments Robert made on behalf of the Trust, with the exception of the Bighorn investment, were profitable. Additionally, Robert sent emails to Ruth and his siblings describing the current financial picture of the Trust and updating them on Trust activities. Based on the evidence presented at the hearing on Robert's petition for resignation, we conclude the trial court did not abuse its discretion by determining that Robert properly administered the Trust and properly performed his duties, including providing the beneficiaries with a complete accounting, and the court properly approved Robert's administration.

Id. The court of appeals also held that the trial court did not give a declaration regarding a trustee's non-liability for tort causes of action, but rather adjudicated the beneficiary's failed tort claims:

> In the final judgment, the court ordered that Robert is fully and completely released and discharged from any and all claims, duties, causes of action or liabilities relating to any and all actions or omissions in connection with his administration of the DPH Trust. Deborah complains that this order constitutes an abuse of discretion. She states that approving a final accounting does not adjudicate a trustee's "potential tort liability" and that a trustee cannot use a declaratory judgment action to determine "potential tort liability." The court's order does not include this phrase, and she does not explain how the order addresses "potential tort liability." We conclude that it does not.… In response to Robert's petition for resignation as Trustee, Deborah filed counterclaims alleging various theories of liability. Those counterclaims were disposed of by partial summary judgments prior to the trial before the court at which the issues of the accounting and Robert's discharge were heard. The final judgment incorporated the prior summary judgments, specifically ordering that Deborah take nothing on all her claims against Robert. Considering the literal meaning of the language used, we conclude that the final judgment's reference to a release of liability contemplates the previously determined counterclaims, not "potential tort liability." As previously explained, the trial court's rulings on Deborah's counterclaims were proper. Therefore, the trial court did not abuse its discretion by releasing Robert from liability for his actions or omissions in connection with his administration of the Trust.

Id.

The beneficiary also complained about the trial court ordering her to reimburse the trust in the amount of $587,585 for the trustee's attorney's fees. The court of appeals set forth the following standards:

> An award of reasonable and necessary attorney's fees that are "equitable and just" is allowed under the Uniform Declaratory Judgments Act and the Texas Trust Code. Whether an award of attorney's fees is equitable and just are matters of law addressed to the trial court's discretion. That determination depends on the concept of fairness in light of all the surrounding circumstances. The party asserting the inequity of an attorney's fee award is not required to present distinct evidence on that question of law. The court may conclude that it is not equitable or just to award even reasonable and necessary fees. In applying the Declaratory Judgments Act or trust code Section 114.064, the conclusion that an award of fees is equitable and just is not dependent on a finding that a party "substantially prevailed." The trial court's determination to award attorney's fees is reviewed for an abuse of discretion. Under an abuse of discretion standard of review, we review the entire record. If there is some evidence in the record that shows the trial court followed guiding rules and principles, then the reviewing court may not find an abuse of discretion. Trial judges, as well as appellate judges, can draw on their common knowledge and experience as lawyers and judges in considering the testimony, the record, and the amount in controversy in determining attorney's fees.

Id. The court of appeals held that the trial court abused its discretion in ordering the beneficiary to pay the trustee's attorney's fees:

> The record shows that there was discord between Robert and Deborah since at least 2007. Deborah asked Robert to resign as Trustee. He offered to resign only if Deborah would provide him with a release of liability which Deborah refused to provide. Robert petitioned the court for approval of his resignation as Trustee in 2011. In that petition, he asked the court to render judgment approving the accounting and "releasing and fully and completely discharging [Robert] from any and all claims, duties and liabilities regarding the Trust and/or his administration of the Trust, . . ." and directing that all costs, expenses and attorney's fees and accounting fees incurred by Robert in connection with his petition be paid out of the assets of the Trust. In her original answer, Deborah asked only for an accounting. A year after Robert filed his original petition, Deborah filed an amended answer that first included her counterclaims. In November 2015, Robert filed his first amended petition in which he stated that he sought a declaratory judgment approving the Trust accountings and releasing and discharging him, as Trustee and individually, from any liability involving matters relating to his administration of the Trust.
>
> While acknowledging that Deborah was not required to give him a release, Robert testified that there would have been no litigation if she had provided the release. Robert's attorney testified that Robert would agree to resign if they designated a Successor Trustee and if Deborah agreed to fully release Robert. At the same time, Robert complains that the litigation

drained the Trust. His actions show that he deemed it more important to obtain the release than to preserve his mother's funds. He asked the court to order Deborah to reimburse the Trust with $587,585 that was used to pay his attorneys and accountants for fees for services rendered to defend against the counterclaims. Robert's attorney testified that Robert was not asking Deborah to pay for amounts predating the lawsuit or for the accounting. In argument to the court, he made it clear that Robert wanted the court to order Deborah to reimburse the Trust for fees that were incurred to defend against her counterclaims...

The record shows that Robert repeatedly engaged in self-dealing. In the summer of 2007, he told the Trust beneficiaries that, with their permission, he would invest approximately $750,000 of Trust money in a project planned by his real estate company. After getting the approval of the beneficiaries, he did not follow through on those terms. Instead, he loaned $2.1 million in Trust funds to an entity he was part owner in and lost all of that money when the deal collapsed. His actions resulted in a material financial loss to the Trust.

It is settled law that a trustee is not entitled to expenses related to litigation resulting from the fault of the trustee. Here, although Deborah asserted that Robert engaged in wrongdoing, there was no trial on Deborah's breach of fiduciary duty and fraud claims. Robert won on those counterclaims, not after a review of the merits, but based solely on his affirmative defenses presented by way of summary judgment motion. Through affirmative defenses the defendant seeks to establish a reason why the plaintiff should not recover independent from an examination of the merits of her claims. If true, the defendant's affirmative defense will defeat the plaintiff's claim, even if all the allegations in the complaint are true. That Deborah's counterclaims are barred by limitations, quasi-estoppel, and the Trust instrument's exculpatory clause is a factor we consider in looking at the equities in this case. For purposes of our discussion, a win on affirmative defenses is not on equal footing with a win on the merits. Moreover, neither the Declaratory Judgments Act nor trust code Section 114.064 are prevailing party statutes, and an award of attorney's fees under those statutes is not dependent on a finding that a party substantially prevailed. It follows that Robert's win does not require a determination that an award of attorney's fees is equitable.

We acknowledge that the judgment orders "that the Trustee has properly performed his duties and responsibilities as the Trustee of the DPH Trust." This language is found in the sentence discharging Robert from the duties of Trustee. This can only refer to Robert's actions that were proven at trial which did not include his defenses against Deborah's counterclaims, the rationale for the award of $587,585.

> Robert complains that Deborah was the only one to contest his actions and her counterclaims cost the Trust an enormous amount of money, depleting the liquid assets to the point that the Trust cannot pay its share of Ruth's mandatory distributions. He argues that this causes Ruth to bear the burden of the cost of this litigation. Therefore, he argues, Deborah should reimburse the Trust. We disagree. Robert and Ruth treated the four trusts as belonging to the remainder beneficiaries by naming the trusts after them, getting their permission to use funds for investments, and by making distributions to the remainder beneficiaries during Ruth's lifetime. Robert engaged in very risky activities and lost a substantial amount of Trust money. Deborah had the right to disagree with and question Robert's actions, and her claims were against him individually, alleging inappropriate actions. Robert did not have the right to insist on a release from Deborah. Robert was not cleared of any wrongdoing by a review of the merits. Considering all of the circumstances, we conclude that it was inequitable as a matter of law for the trial court to order Deborah to pay Robert's $587,585 attorney's fee bill for his defense of her counterclaims.

Id. The court of appeals also held that the trial court erred in ordering the beneficiary to pay the attorney's fees incurred by their mother, who was brought into the suit by the trustee. *Id*. However, the court of appeals rejected the beneficiary's complaint that the trustee should reimburse the trust for funds used to pay for his attorney's fees. The court of appeals construed that complaint to be that the trial court erred in failing to order the disgorgement of that benefit. Because there was no finding of breach of fiduciary duty, the trial court did not err in failing to order disgorgement, a remedy for a breach of fiduciary duty. *Id*.

I. Court Holds That There Is A Fact Issue On Whether There Was A Scrivener's Error And Whether A Party Was Intended To Be A Beneficiary Of A Trust

In *In re Ignacio G. & Myra A. Gonzales Trust*, a couple formed a trust and named their daughter as the trustee. No. 06-19-00014-CV, 2019 Tex. App. LEXIS 4648 (Tex. App.—Texarkana June 6, 2019, no pet. history). The trust identified the settlors' children as the two children that they had together. However, the trust then used the undefined term "descendants" in discussing beneficiaries. After the settlors' death, the trustee filed suit to declare that the wife's child from a prior relationship was not a beneficiary of the trust. The trial court granted summary judgment for the trustee, and the defendant appealed.

The court of appeals held as follows regarding the rules for construing a trust:

> "When we construe a will, we focus on the testator's intent." "We interpret trust instruments the same way as we interpret wills, contracts, and other legal documents." We "ascertain a trust grantor's intent from the language contained in the trust's four corners and focus on the meaning of the

> words actually used, not what the grantor intended to write." "In this light, courts must not redraft [trust documents] to vary or add provisions 'under the guise of construction of the language of the [trust documents]' to reach a presumed intent." "We must interpret a trust to give meaning to all its provisions and to enact the intent of the grantor." "The meaning of a trust instrument is a question of law when there is no ambiguity as to its terms." "If the court is capable of giving a definite legal meaning or interpretation to an instrument's words, it is unambiguous, and the court may construe the instrument as a matter of law." "Only when the trust instrument's language is uncertain or reasonably susceptible to more than one meaning will it be considered ambiguous so that its interpretation presents a fact issue precluding summary judgment." In interpreting a trust document, we "(1) [c]onstrue the agreement as a whole; (2) give each word and phrase its plain, grammatical meaning unless it definitely appears that such meaning would defeat the parties' intent; (3) construe the agreement, if possible, so as to give each provision meaning and purpose so that no provision is rendered meaningless or moot; (4) [ensure that] express terms are favored over implied terms or subsequent conduct; and (5) [note that] surrounding circumstances may be considered—not to determine a party's subjective intent—but to determine the appropriate meaning to ascribe to the language chosen by the parties." Also, we "must be particularly wary of isolating individual words, phrases, or clauses and reading them out of the context of the document as a whole." "[A]n ambiguity does not arise merely because the parties advance conflicting interpretations." "When a [document] contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue."

Id. (internal citations omitted).

The court noted that Section 112.054 of the Texas Property Code provides that a court may order the terms of a trust modified if "reformation is necessary to correct a scrivener's error in the governing document, even if unambiguous, to conform the terms to the settlor's intent" and such intent is established by clear and convincing evidence. *Id*. (citing Tex. Prop. Code Ann. § 112.054(b-1)(3), (e)). That provision was not effective at the time the trust was created. In any event, the court noted that this provision was grounded in common law and the Restatement (Third) of Trusts and Restatement (Third) of Property. Specifically, the Restatement (Third) of Property provides, "A donative document, though unambiguous, may be reformed to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was. In determining whether these elements have been established by clear and convincing evidence, direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered." *Id*. (citing RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 12.1). Reformation may occur "even after the death of the donor." *Id*. (citing RESTATEMENT (THIRD) OF PROP. § 12.1 cmt. c). The court held that the fact that a written instrument is couched in unambiguous language, or that the parties knew what words were used and were aware of their ordinary meaning, or that they were negligent in failing to discover the mistake before signing the instrument, will not preclude relief by reformation. *Id*. The court held:

> "Reformation requires two elements: (1) an original agreement and (2) a mutual mistake made after the original agreement in reducing the original agreement to writing." "A court is without power to make a contract that the parties did not make; an actual agreement reached prior to the drafting of the instrument involved is a requisite to an action for reformation." "The mistake may be shown by parol evidence." "[A]lthough a mutual mistake of the parties is required in most instances, if a settlor of a trust receives no consideration for the creation of the trust, a unilateral mistake . . . is sufficient." "Any mistake of the scrivener which could defeat the true intention may be corrected in equity by reformation, whether the mistake is one of fact or law."

Id.

In this case, the court held that there was a fact question. The court first stated that the petitioners had to meet a high burden of proof, and that the petitioners' summary judgment evidence failed to carry their burden to establish their entitlement to judgment as a matter of law:

> The Trust clearly contained scrivener's errors. However, the question of Ignacio's and Myra's intent was not shown by clear and convincing evidence as a matter of law. Derer did not remember meeting with Ignacio and Myra, had "no direct memory of them," and could not recall whether they informed him of Edna's existence. Based on this testimony, which we view in the light most favorable to Edna, it is quite possible that the scrivener's error occurred in the identification article and should have included Edna. The identification article stated Ignacio and Myra only had two children. This was a scrivener's mistake of fact. It is undisputed that Edna is Myra's natural child and that she was adopted by Ignacio. Further, Derer made clear that his opinions were based on his assumption that Ignacio and Myra intended to disinherit Edna from his reading of the Summary and Identification article. An assumption is not proof. Thus, in light of the evidence in this case, Ignacio's and Myra's intent is a question of fact for a jury.

Id.

J. Court Held That A Trust Beneficiary Could Raise A Claim Against A Trustee's Estate For An Interest In Trust Property And A Constructive Trust

In the *Estate of Gibbs*, Bell transferred money to Gibbs for the purchase of real property and a trust agreement was executed that clarified that they owned the property equally. No. 02-18-00086-CV, 2019 Tex. App. LEXIS 4452 (Tex. App.—Fort Worth May 30, 2019, no pet. history). Later, Bell learned that Gibbs had transferred Bell's half of the property to Gibbs' wife during a divorce proceeding. Bell sued Gibbs's estate and his wife's estate for a declaration that she owned the property and for a constructive trust. The trial court entered a judgment for the defendants, and Bell appealed.

The court of appeals first addressed whether Bell could raise her claim to an interest in the property via a declaratory judgment claim and not as a trespass to try title. The court concluded: "Bell's request for a declaratory judgment to ascertain the nature of that equitable interest is a proper subject of a declaratory judgment claim rather than a trespass to try title claim." *Id*. "Bell [was] entitled to bring her claim seeking clarification of her equitable status under the Trust Agreement as a declaratory judgment claim." *Id*.

The court then addressed whether Bell could raise a constructive trust claim:

> Bell argues that Bert owed her a fiduciary duty by holding the Real Property -- an identifiable res -- partially in trust for her and that he breached that duty by attempting to convey her equitable interest in the Real Property to a third party without her knowledge. She also argues that Kenneth, as the Estate's executor, has further breached a duty to her by refusing to acknowledge her trust interest. She further argues that Bert and the Estate have been unjustly enriched by disclaiming her interest, which she claims entitles her to part of any income from the Real Property. This is the type of claim for which the trial court may consider imposing a constructive trust as an equitable remedy.

Id. The court also rejected the defendant's statute of limitations argument and found that there was a fact issue on that defense. The court reversed the summary judgment motion and remanded for further proceedings.

K. Court Holds That A Testamentary Trust Did Not Fail Because The Primary Beneficiary Predeceased The Decedent

In *In re Estate of Moore*, a decedent executed a will that provided that the residuary of his estate would be held in trust for his mother, and such trust would terminate on her death with the assets then passing to certain charitable remainder beneficiaries. No. 05-18-00019-CV, 2019 Tex. App. LEXIS 3871 (Tex. App.—Dallas May 14, 2019, no pet. history). The decedent's mother predeceased him. The decedent's sole heir then alleged that the trust failed because the sole beneficiary predeceased the decedent and that she should receive the assets. The remainder beneficiaries of the trust alleged that the trust did not fail and that they should receive the assets. The trial court ruled for the charities, and the heir appealed.

The court of appeals first discussed construing a will:

> Our primary "objective in construing a will is to discern and effectuate the testat[or]'s intent as reflected in the instrument as a whole." In doing so, we do not focus on what the testator may have meant to write; rather, we focus on the meaning of the words the testator actually used. We must, however, construe the instrument as a whole and seek to harmonize any apparent conflicts or inconsistencies in the language. Moreover, we should avoid, whenever possible, a construction that results in partial intestacy. Indeed, "[t]he mere making of a will is evidence that the testator had no intent to die intestate and creates a presumption that the testator intended to dispose of his entire estate, and that he did not intend to die intestate as to the whole or any part of his property." Where, as here, a "will contains a residuary clause, the presumption against intestacy is especially strong."

Id. The court stated that the appellant's challenge to the trial court's construction was based on two arguments: (1) there were no living beneficiaries of the trust at the time of the decedent's death; and (2) the trust's creation was made expressly contingent on the decedent's mother surviving him. The court disagreed with both arguments. The court noted that a trust beneficiary is "a person for whose benefit property is held in trust, regardless of the nature of the interest." The court stated that the trust provided for two types of property interests—"a life estate for Moore's mother and remainder interests for the other named individuals and entities." *Id.* Regarding the first argument, the court concluded:

> Here, Section IV manifests Moore's intent to create a trust for the benefit of multiple beneficiaries, including his mother and the Arkansas Entities. His mother was intended to be a life beneficiary of the residuary estate, to the extent she survived Moore, and the Arkansas Entities were intended to be beneficiaries with vested interests in the remainder of the residuary estate held in trust following the death of Moore's mother. Thus, even though the trust's life beneficiary (Moore's mother) was no longer living at the time the conveyance became operative, there were other named remainder beneficiaries sufficient to prevent the trust from failing.

Id. Regarding the second argument, the court held:

> Section IV provides: "My residuary estate shall pass and vest in the Trustee hereinafter named, IN TRUST, in the following manner . . . ." This statement is not qualified by a condition precedent; rather, it is the subsequent statement creating Moore's mother's interest in the trust that

> is qualified by a condition precedent: "My residuary estate shall be held as a trust for the benefit of my mother, . . . if she is surviving at the time of my death[.]" Because Moore's mother did not survive him, the condition precedent to her interest was not satisfied. Thus, her interest in the trust terminated, and the remainder interests either became present interests or became closer to present interests.

Id. The court concluded:

> The will explains what must happen upon the death of Moore's mother: "The trust herein created shall terminate at the death of my said mother, . . . and the trust estate shall be distributed as follows . . . ." On Moore's death, the residuary estate passed into a trust for the benefit of its life and remainder beneficiaries. Because the life beneficiary was no longer living, the trust immediately terminated according to its own terms, leaving the corpus to be distributed to the remainder beneficiaries. The probate court did not err by concluding that Moore's residuary estate passed into a valid trust and that it should be distributed according to Section IV.C.4 of the will.

Id.

III. Probate Litigation

A. A Fractured Texas Supreme Court Holds That There Is No Tortious Interference With Inheritance Claim In Texas

In *Archer v. Anderson*, Jack, who had no children, executed a will leaving his estate to his brother and his brother's children, the Archers. No. 16-0256, 2018 Tex. LEXIS 611 (Tex. June 22, 2018). Later, Jack had a stroke and was mentally incompetent. Jack's friend Anderson, an attorney, drafted durable and medical powers of attorney appointing himself as Jack's attorney-in-fact. Jack signed the documents, but his medical records showed that the day he signed them he was delusional and appeared confused. Anderson also tried to have Jack change his estate plan. Anderson proposed that Jack sell his ranch and transfer the proceeds into a charitable remainder trust with the 12 charities as beneficiaries so that Jack's entire estate would go to the charities and the Archers would be disinherited. At Anderson's request, Jack sign new wills and trust documents, all disinheriting the Archers and leaving Jack's entire estate to the charities. With Jack still alive, the Archers sued for a declaratory judgment that Jack had lacked the mental capacity to execute the wills and trust documents. The charities were defendants, and the parties settled with the Archers agreeing to give the charities Jack's coin collection and pay their attorney fees, which totaled $588,054.

After Jack's death, the Archers sued Anderson's estate, who had also died, for intentional interference with their inheritance. Anderson never profited personally from his efforts, and the Archers received all that Jack left them in his earlier will, but they claimed the $588,054 they gave the charities in settlement, plus $2,865,928 in attorney fees and litigation expenses they incurred avoiding Jack's post-1991 wills and trusts. The jury found in favor of the Archers, and the trial court rendered judgment for them for well over $2 million dollars. Anderson's estate appealed. The court of appeals reversed and rendered for Anderson's estate, holding that there was no tortious interference with inheritance claim in Texas.

The Texas Supreme Court affirmed the court of appeals's holding. The Court noted that there was a split in the courts of appeals regarding whether such a claim existed and noted its recent opinion in *Kinsel v. Lindsey,* 526 S.W.3d 411, 423 (Tex. 2017), where the Court held that the it and the Texas Legislature had never expressly recognized such a claim. The Court stated:

> A tort of intentional interference with inheritance is needed, it is argued, as a gap-filler when probate and other law do not provide an adequate remedy. Texas law thoroughly governs inheritance through probate and restitution and, as we noted in *Kinsel*, provides remedies for unfairness, such as a constructive trust. If these remedies are inadequate, it is because of legislative choice or inaction, and filling them is work better suited for further legislation than judicial adventurism.

Id. at *17-18. Ultimately, the Court held that a new tort is not needed in Texas even if other remedies would not be complete. The Court concluded: "The fundamental question is why tort law should provide a remedy in disregard of the limits of statutory probate law. We think here it should not. The tort of intentional interference with inheritance is not recognized in Texas. The decisions of the courts of appeals to the contrary are overruled." *Id*. at *25-26.

The majority of the court affirmed the court of appeals and held that there was never going to be a claim for tortious interference with inheritance, at least not until the Texas Legislature created such a cause of action. There were four justices of the nine member Court, however, that only agreed in the result in this case. They would hold that the Court should not have held that such a claim could never be recognized in Texas. The dissenting justices stated:

> The Court concludes that the Archers had an adequate remedy because they ultimately received their inheritance, albeit minus attorney's fees and a settlement with the charities. But rather than leaving open the issue of whether to recognize the cause of action as we did in *Kinsel*, the Court changes course and closes that door. It does so even though that door might, in some instances, provide the only avenue to relief for parties who suffer loss at the hands of actors who intentionally—not merely negligently—caused the loss.
>
> …

> The Court says that a judicially recognized gap-filler cause of action is unnecessary because statutory probate law provides adequate remedies. My overriding concern is that neither we nor the courts of appeals have considered a sufficient spectrum of factual circumstances for us to confidently conclude that foreclosing the cause of action will not leave parties without any avenue of relief against those whose actions intentionally and wrongfully divest an elderly person with diminished capacity of assets and thus interfere with that person's last-expressed true intentions about the disposition of his or her property.
>
> …
>
> The Court recognizes that a constructive trust can provide a remedy for unfairness. But the typical remedy of imposing a constructive trust resulting from a successful restitution action is not always available or may not provide an adequate remedy, as this Court has recognized. While we have stated that "[t]he specific instances in which equity impresses a constructive trust are numberless," we have also acknowledged that "the reach of a constructive trust is not unlimited." The imposition of a constructive trust generally requires the requesting party to establish (1) a breach of a special trust or fiduciary relationship or actual or constructive fraud, (2) unjust enrichment of the wrongdoer, and (3) an identifiable res that can be traced back to the original property. As applied in the inheritance context, the would-be beneficiary must trace the fraudulently obtained property to funds received by the wrongdoer. However, if the property has been dissipated or traceable funds have been depleted, there will be nothing remaining upon which to impose a constructive trust. A judgment obtained from a tort action, on the other hand, would provide the expectant beneficiary with at least potential redress.

Id. *42-44. In the end, the majority of the Court abdicated its role as a common-law court and placed all responsibility on the Legislature to create causes of action. The concurring and dissenting justices would have held that a tortious interference with inheritance rights claim may be permissible under the right circumstances (where a constructive trust claim is not a remedy because the ill-gotten gains have been dissipated) and would not have closed the door at this time.

So, at this point, plaintiffs will have to rely on other causes of action to vindicate their rights when the elderly and infirm are taken advantage of by bad people. It appears that the Court believes that a constructive trust is the principal claim in this situation. For example, in *Kinsel v. Lindsey,* 526 S.W.3d 411, 423 (Tex. 2017), family members and an attorney convinced an elderly woman, who did not have mental capacity, to execute new estate planning documents and sell a ranch. The ranch would have gone to other family members, but since the ranch was sold, its proceeds (cash) went to the bad individuals. The Court held that a constructive trust, based on a mental incapacity finding, provided an adequate remedy and there was no need to recognize the tort of tortious interference with inheritance rights. *Id*.

Regarding a constructive trust, the defendants had several arguments for why the trial court abused its discretion in creating a constructive trust in this case. *Id*. at *31-35. The Court disagreed and held that there does not have to be a breach of a fiduciary duty by the defendants owed to the plaintiffs. *Id*. There was no duty owed by the defendants to the plaintiff. *Id.* Citing to an earlier opinion, the Court held: "It is true that we recently recognized that a 'breach of a special trust or fiduciary relationship or actual or constructive fraud' is 'generally' necessary to support a constructive trust. But in that same case we reaffirmed our statement in *Pope* that '[t]he specific instances in which equity impresses a constructive trust are numberless—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts.'" *Id.*

Even though the defendants did not breach any duty owed to the plaintiffs, the Court concluded that the trial court acted within its discretion in imposing a constructive trust: "We hold the mental-incapacity finding, coupled with the undue-influence finding, provided a more than adequate basis for the trial court to impose a constructive trust." *Id.*

But, the issue remains, what if the ranch proceeds had been dissipated? How would the plaintiffs recover what was due to them?

The Court's opinion in *Archer* is good news for parties who regularly deal with the elderly and infirm. Trusted advisors have been at risk for tortious interference claims. Attorneys that draft wills and trusts, financial advisors, financial institutions, broker/dealers, insurance agents, accountants, and others who provide advice have been at risk for tortious interference claims. For example, the Archers sued Anderson, who was an attorney. The Kinsels sued Jackson Walker, who were attorneys, for tortious interference. The risk of such a claim is now gone. Of course, creative plaintiffs may think of other claims and theories to bring trusted advisors into litigation against the "bad guy" that influenced an elderly or infirm person. Claims such as conspiracy, aiding and abetting breach of fiduciary duty, and knowing participation in breach of fiduciary duty, may be raised under the correct circumstances.

B. Court Holds That Administrator Is Not Bound By Arbitration Clause In A Will

In *Ali v. Smith*, a successor administrator of an estate sued the former executor for breach of fiduciary duties arising from his management of the finances of the estate, converting assets of the estate, and using estate funds. No. 14-18-00003-CV, 2018 Tex. App. LEXIS 5129 (Tex. App.—Houston [14th Dist.] July 10, 2018, no pet. history). The defendant filed a motion to compel arbitration based on an arbitration provision contained in the will. The will provided:

> If a dispute arises between or among any of the beneficiaries of my estate, the beneficiaries of a trust created under my Will, the Executor of my estate, or the Trustee of a trust created hereunder, or any combination thereof, such dispute shall be resolved by submitting the dispute to binding arbitration. It is my desire that all disputes between such parties be resolved amicably and without the necessity of litigation.

Id. The trial court denied the motion, and the defendant appealed.

On appeal, the defendant argued that the trial court erred by not enforcing the will's arbitration clause because the arbitration clause was enforceable under the doctrine of direct-benefits estoppel as the plaintiff had (1) "enforced the will" and brought claims against defendant "for failing to comply with the will" and (2) "received appointee fees." *Id*.

The court of appeals held that the party asserting a right to arbitration has to prove a binding arbitration agreement. "Typically, a party manifests its asset by signing an agreement." *Id*. The parties agreed that they were not signatories to the will. "But the Texas Supreme Court has 'found assent by nonsignatories to arbitration provisions when a party has obtained or is seeking substantial benefits under an agreement under the doctrine of direct benefits estoppel.'" *Id*. (citing *Rachal v. Reitz*, 403 S.W.3d 840, 843 (Tex. 2013)). The court described direct-benefits estoppel thusly:

> This doctrine precludes a plaintiff from seeking to hold a defendant liable based on the terms of an agreement that contains an arbitration provision while simultaneously asserting the provision lacks force because the plaintiff or defendant is a non-signatory. "When a claim depends on the contract's existence and cannot stand independently—that is, the alleged liability arises solely from the contract or must be determined by reference to it—equity prevents a person from avoiding the arbitration clause that was part of that agreement." On the other hand, "when the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law, direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract or would not have arisen but for the contract's existence." Additionally, a non-signatory may be compelled to arbitrate if they deliberately seek or obtain substantial benefits from the contract by a means other than the lawsuit itself. This analysis focuses on the non-signatory's "conduct during the performance of the contract." This doctrine will not apply if the benefits are either insubstantial or indirect.

Id. (internal citations omitted).

The court held that the plaintiff was not seeking any relief under the will, but was seeking relief under Texas statutes and common law and thus direct-benefits estoppel did not apply:

Smith alleges in the petition that Ali (1) “Failed to responsibly handle the finances of the estate”; (2) “Converted assets of the Estate to his own personal use”; and (3) “Used estate funds in violation and dereliction of his fiduciary duties.” Unlike the beneficiary in Rachal who alleged violations of the trust terms, Smith does not allege in the petition that Ali violated any terms of the will. Rather, Smith contends that her claims are based on common law and statutory provisions such as Sections 351.001 and 351.101 of the Estates Code: “The rights, powers, and duties of executors and administrators are governed by common law principles to the extent that those principles do not conflict with the statutes of this state. An executor or administrator of an estate shall take care of estate property as a prudent person would take of that person’s own property . . . .” An executor such as Ali also has a statutory duty to deliver the property of the estate to a successor representative such as Smith. And, Smith alleges in the petition that this action was brought pursuant to Section 361.153, which provides that a successor representative is “entitled to any order or remedy that the court has the power to give to enforce the delivery of the estate property” to the successor representative.

…

The plain language of the statutes impose duties on both executors and administrators, but executors and administrators are not the same. An executor is named in a will, while an administrator with will annexed is not. The source of the executor’s power to act is the will. The source of an administrator’s power to act is the statutes and the court. Nothing in Smith’s petition indicates that Ali’s liability need be determined by reference to the will, even though he would not have been an executor “but for” the will. The substance of the claims arise from general duties imposed by statutes and the common law. Smith has not alleged that Ali violated any terms of the will, so this theory of direct-benefits estoppel is inapplicable.

…

Under the second avenue for proving direct-benefits estoppel, Ali contends that Smith has obtained a benefit from the will by collecting “appointee fees” from the estate. Smith contends that she was entitled to the fees by statute, not the will. We agree with Smith. The trial court’s order authorizing Smith to collect appointee fees does not state that Smith collected a benefit under the will. And, the authorizing statute does not make a distinction based on the existence of a will. Because the trial court awarded fees and expenses to Smith without reference to the will, Ali has not shown that Smith deliberately sought or obtained substantial benefits from the will by a means other than the lawsuit.

Id. (internal citations omitted). The court of appeals affirmed the trial court's order denying the motion to compel arbitration.

There was a dissenting justice who would have reversed the order and compelled the case to arbitration. That justice would hold that both parties agreed to the arbitration clause by accepting an appointment to administer the estate:

> It is self-evident that neither Ali nor Smith physically signed Sultan's will at the time it was executed. However, it can hardly be said that they are strangers to the will. Their acceptance of appointments to serve as executors of the will (and all its provisions) constitutes the assent required to form an enforceable agreement to arbitrate under the Texas Arbitration Act. Texas jurisprudence regarding non-signatories to an arbitration agreement, therefore, should not be applied to this dispute. Because the majority has done so, I respectfully dissent.

Id. (Jamison, J. dissenting). The dissenting justice continued: "Smith agreed to her appointment, which was to carry out Sultan's clearly expressed intent in his will, including the intention for disputes to be arbitrated. As Smith's counsel stated in oral argument, '[The administrator] does not get to re-write the will.' Exactly." *Id*.

C. Independent Executor Had Authority To Sell Estate Real Property Despite Nothing In Will Giving Him That Authority

In *Graff v. 2920 Park Grove Venture, Ltd.*, an executor was sued after selling estate real estate because the executor allegedly sold the property for less than fair market value. No. 05-16-01411-CV, 2018 Tex. App. LEXIS 4266 (Tex. App—Dallas June 13, 2018, no pet. history). Among other claims and arguments, the plaintiff alleged that the executor had no authority to sell the property because the will was silent with regards to the authority to sell real property, and therefore, the transaction should be rescinded.

The court of appeals held that the executor had that authority:

> It is undisputed that the will did not expressly state the executor had the authority to sell the estate's real property. However, under Texas law, independent executors like Hayden have authority to do any act which an ordinary executor may do under an order of the probate court without the need for an order. Where the will contains no restrictive terms upon his authority, an independent executor may incur reasonable expenses in the management of the estate, adjust and pay debts against the estate and for that purpose may sell property of the estate, although the will does not expressly grant that power.
>
> The existence of debts against the estate is sufficient to authorize the independent executor to sell real property. Stanley does not dispute that

> the estate had certain outstanding debts at the time of the sale. In fact, the summary judgment record reveals at the time Hayden decided to sell the apartment complex, the estate had limited cash and several outstanding debts, including federal estate taxes of over $3 million, a mortgage on the apartment complex, executor's fees of about $800,000, as well as outstanding attorney's fees incurred in the administration of the estate. Accordingly, Hayden had authority to sell real property to satisfy the outstanding debts of the estate.
>
> As for his contention with respect to probate court authorization, Stanley argues that because the record does not conclusively establish that Hayden needed to sell the property in order to satisfy the estate's outstanding debts, Park Grove has not shown the probate court would have authorized the sale. According to Stanley, because he put forth evidence of an alternative way to satisfy the outstanding debt without the sale, Park Grove was not entitled to summary judgment on this rescission claim for lack of authority. However, Stanley cites no cases to support his position. To the contrary, the cases upon which he relies suggest that all that is required to authorize a sale is to show the existence of such facts as would authorize the probate court to order a sale, such as outstanding estate debts.

Id. The court of appeals affirmed a summary judgment for the executor on this claim.

D. Court Affirmed The Probate Of A Will Where The Testator, A Quadriplegic, Blinked His Desires To Draft And Execute The Will

In *Estate of Luce*, the court of appeals affirmed a trial court's admitting a will to probate where the decedent did not personally sign it and only communicating his desires by blinking. No. 02-17-00097-CV, 2018 Tex. App. LEXIS 9341 (Tex. App.—Fort Worth November 15, 2018, op. withdrawn by agr.). The testator was in a serious accident that left him a quadriplegic. A week after he was admitted to the hospital, he was intubated, which rendered him unable to speak. Paralyzed from the chest down and unable to speak, the testator was able to communicate by blinking his eyes to indicate "yes" and "no." Using this blinking system, his attorney was able to draft a will based on the testator's blinked responses to a series of leading questions, and through this system, he directed a notary to sign the will for him. After he died, his estranged wife filed an application to probate an earlier will. The testator's sister filed an application to probate the most recent 2015 will. After a jury trial, the trial court admitted the 2015 will to probate and appointed the sister as independent executor but awarded the wife nearly $200,000 in attorney's fees and expenses. Both parties appealed.

The court of appeals first discussed the various burdens. Because the 2015 will had not been admitted to probate, the sister, as the proponent, bore the burden to prove that it was properly executed and that the testator had testamentary capacity at the time of execution. She made out a prima facie case on these issues by introducing the 2015 will, which was self-proving into evidence. The burden of producing evidence then shifted to the wife, as the will's opponent, to overcome the prima facie case, but the burden of persuasion remained with the sister. The wife argued that the sister failed to carry her burden because there was no evidence that the 2015 will was duly executed or that the testator had testamentary capacity.

Regarding execution, Texas Estates Code Section 251.051(2) requires that a will be signed by the testator or by another person on the testator's behalf in the testator's presence and under the testator's direction. Here the attorney testified that when he arrived at the hospital, a nurse told him that the testator was able to communicate by blinking, so they established a "signal system" by blinking. The attorney testified that he was able to communicate with the testator based on the testator's blinked responses to a series of leading questions. Through these questions and blinked responses, they established an attorney-client relationship and the attorney determined that the testator wanted to make a new will that revoked any earlier ones. Further, Texas Government Code Section 406.0165 provides: "A notary may sign the name of an individual who is physically unable to sign or make a mark on a document presented for notarization if directed to do so by that individual, in the presence of a witness who has no legal or equitable interest in any real or personal property that is the subject of, or is affected by, the document being signed." *Id*. (citing Tex. Gov't Code Ann. § 406.0165(a)). Based on this provision, the attorney determined that a notary could sign the will for the testator. When the attorney returned to the hospital with the drafted will, he met with the testator privately to explain the execution process and that the law allowed a notary to sign the will for him. Through the blinking system, the testator confirmed to the attorney that he understood the execution process, that the notary was signing the will for him, and that he was requesting the notary to sign for him. Other witnesses to the execution also testified to the soundness of the system and the testator's intent. The court of appeals found that this was sufficient evidence to support the finding that the will had been properly executed.

The wife also challenged the evidence that supported the finding that the testator had mental capacity. Testamentary capacity requires that the testator, at the time the will is executed, have sufficient mental ability to understand he is making a will, the effect of making the will, and the general nature and extent of his property. He must also know his next of kin and the natural objects of his bounty, the claims upon them, and have sufficient memory to collect in his mind the elements of the business transacted and hold them long enough to perceive their obvious relation to each other and form a reasonable judgment about them.

The evidence showed that testator did not have a brain injury from the accident. The medical records indicated that he was lucid. The attorney met with the testator alone and determined that they could communicate using the blinking system. The testator communicated that he wanted to make a new will disposing of his assets and property, who he wanted to inherit under the new will, and that he intended to revoke any prior wills. The attorney further testified that the testator understood the nature and extent of his assets and knew who his family members were. The testator, who was in a divorce proceeding with his wife, made clear that he did not want his wife to take under the new will. According to the attorney, the testator was of sound mind, and the attorney had no concerns about the testator's capacity.

Two days after the will's execution, a doctor examined the testator who was still unable to speak because he was intubated, but they communicated by the testator nodding his head "yes" and "no" or by him casting his gaze at index cards labeled "yes" and "no." As a result of the examination, the doctor determined that the testator was fully competent and able to make his own decisions, including financial and medical decisions. Based on all of the evidence, the court of appeals determined that the jury's finding of mental competence should be affirmed.

The wife also challenged the finding that sister did not unduly influence the testator. The court held that exertion of undue influence cannot be inferred by opportunity alone and there must be some evidence that the influence was not only present but was in fact exerted in connection with the making of the will. The court held:

> Although weakness of mind and body caused by infirmities of disease, age, or otherwise may be considered as material in establishing the testator's physical incapacity to resist or the susceptibility of his mind to an influence exerted, such weakness does not establish that his mind was in fact overpowered or subverted at the time the will was executed. But not every influence exerted by one person on another's will is undue. Influence is not undue unless it destroys the testator's free agency and the testament produced expresses the will of the person exerting the influence. Even if one requests, entreats, or importunes another to execute an instrument that makes a favorable disposition, the entreaties and importunities will not render the instrument invalid based on undue influence unless they were so excessive that they subverted the will of the maker. Undue influence may be exerted-among other ways-through force, duress, intimidation, excessive importunity, or deception used to try to subvert or overcome the testator's will and induce the testator to execute the instrument contrary to his will.

Id.

The wife alleged that the will was the result of sister's undue influence because at the time the will was executed, the testator was in physical and mental distress; the sister isolated him from the wife and the testator's sons; he was entirely dependent on the sister; the sister was directly involved in the planning, preparation, and execution of the will; and the will's property disposition was inconsistent with the 1998 will and was unnatural because it disinherited his wife and sons. The court of appeals disagreed:

> Michael was indisputably in a state of severe physical distress at the time the 2015 will was executed. Unable to move or speak, he was confined to a hospital room and was totally reliant on others. But there is no evidence that Michael was experiencing the type of "mental distress" that made him susceptible to undue influence. Michael had not suffered a head or brain injury, and as we detailed above, he was alert and lucid when he executed the will.
>
> It is also undisputed that Michael was isolated from his wife and adopted sons. Tina admitted that she never informed GayeLynne, Kevin, or Jeremy about the accident. GayeLynne did not find out that Michael was in the hospital until a friend told her on November 18, over a month after the accident. Before then, GayeLynne had unsuccessfully tried to contact Michael by calling friends, family members, hospitals, and the police. According to GayeLynne, during this time, Tina left her a telephone message "saying that Michael was perfectly fine."
>
> After GayeLynne learned about Michael's accident, Tina told her that she was not allowed at the hospital and threatened to have her arrested if she came there. When Kevin and Jeremy went to visit Michael in the hospital sometime after November 18, Tina and Melissa told them that GayeLynne was not allowed to come to the hospital. GayeLynne never went to the hospital and had no contact with Michael before he died on November 26.
>
> But Michael's isolation from GayeLynne and his sons and his leaving them out of the 2015 will is not altogether surprising. At the time of the accident, he and GayeLynne (his adopted sons' biological mother) were separated, and they were in the middle of a contested divorce. Despite GayeLynne's testimony that at the time of the accident she and Michael were considering reconciling, there was evidence that the divorce was contentious. And when Michael was admitted to the hospital, he made clear to hospital staff that he did not want GayeLynne making medical decisions for him, explicitly telling staff that he wanted his daughters or his sister to do so.
>
> Contrary to GayeLynne's assertions on appeal, Tina was not "directly involved in the planning, preparation[,] and execution of the 2015 will." Tina contacted Ferrier and provided information about Michael's family to Ferrier, but she was not involved in the will's preparation and execution. As explained above, Ferrier met with Michael privately to discuss the will, and Michael made clear to Ferrier that he did not want GayeLynne, Kevin, and Jeremy to inherit. Indeed, his will states that he is "specifically not making any provisions for [GayeLynne] in this Will because [they] are in

> the process of divorcing." Tina was not present when Ferrier drafted the will, when he walked through it with Michael, or when the will was executed. Viewing the evidence under the applicable standards of review, we hold that there is some evidence to support the jury's no-undue-influence finding and that the jury's failure to find undue influence is not against the great weight and preponderance of the evidence.

Id.

Finally, the court of appeals sustained the sister's appeal of the trial court's award of attorney's fees to the wife. The trial court had entered judgment notwithstanding the verdict after the jury found that the wife was not in good faith in attempting to probate an earlier will. The court of appeals held that there was sufficient evidence to support the jury's finding and that the trial court erred in disregarding that finding:

> But as we have explained in detail, at the time of the 2015 will's execution, GayeLynne and Michael were in the process of divorcing. Michael's medical records-all of which GayeLynne stated that she had read before trial-reflected that, when Michael was admitted to the hospital a week before the will's execution, he told hospital staff that because of the divorce, he did not want GayeLynne to make decisions for him and wanted his daughters to do so. His medical records also reflected that he had not suffered any brain or head injury because of the accident and that when the will was executed, Michael was alert and oriented as to person, place, and time and had not had any pain medication for several hours. The jury also heard videotaped deposition testimony from four witnesses regarding the drafting and execution of the 2015 will and Michael's testamentary capacity. This evidence (of which GayeLynne was aware before trial) is some evidence to support the jury's finding that GayeLynne did not act in good faith in trying to have the 1998 will admitted to probate, and we certainly cannot say that GayeLynne conclusively proved the opposite. Accordingly, the trial court erred by disregarding the jury's good-faith-and-with-just-cause finding against GayeLynne and by implicitly finding that she acted in good faith and with just cause to be entitled to an award of attorney's fees and expenses for probating the 1998 will. We thus sustain this part of Dowdy's second issue, which is dispositive of his appeal.

Id. The court of appeals affirmed the trial court's judgment admitting the 2015 will to probate and reversed the trial court's award of attorney's fees to the wife.

E. Court Holds That A Judgment Was Not Effective Against Three Estates Where The Plaintiffs Did Not Sue The Estates' Representatives And The Decedents' Attorney Did Not Represent The Estates' Representatives

In *Delgado v. Garza*, the plaintiffs sued for breach of a warranty of title, trespass to try title, and other related claims all stemming from a land transaction between an ancestor of the Salinases and an ancestor of the Garzas. No. 13-15-00344-CV, 2018 Tex. App. LEXIS 9619 (Tex. App.—Corpus Christi November 27, 2018, no pet.). After a bench trial, the court signed a judgment in favor of the Garzas on all causes of action. On appeal, the Salinases challenged the validity of the judgment entered against three individuals who were sued but died prior to trial. The court of appeals explained:

> It is well-settled that the estate of a decedent is not a legal entity and may not sue or be sued as such. A suit seeking to establish the decedent's liability on a claim and subject property of the estate to its payment should ordinarily be instituted against the personal representative or, under appropriate circumstances, against the heirs or beneficiaries. However, when the suit is not instituted against the personal representative, heirs, or beneficiaries of the deceased defendant, a judgment involving "the estate" may validly bind the personal representative of the estate if he appears and participates in the case in his official capacity as personal representative of the estate.

Id. In this case, the suit was not instituted against the personal representative, heirs, or beneficiaries of any of the three deceased defendants. So, the court of appeals had to determine whether any personal representative of any of the three estates actively appeared and participated in the case. The court concluded that the estate representatives did not adequately participate in the case to have the judgment bind them:

> We find no authority for the proposition that legal representation, without more, or continuation of the trial, by default, satisfies the personal representative requirement.… On November 6, 2013, Schell filed a suggestion of death for Saenz, Hernandez, and Perez. The suggestion of death requested that a personal representative appear and defend the suit for their estates. It did not serve as Schell's appearance as personal representative for these estates. Moreover, as discussed below, we find no record support for the conclusion that Schell appeared and actively participated in the capacity of the estates' personal representative…. The confusing record before us simply does not support the conclusion that Schell participated sufficiently in this case as the purported representative of the estates of Saenz, Hernandez, or Perez to make the judgment binding against him in that capacity.

Id. Accordingly, the court held that the judgment was not effective as against the estates because the record simply showed that the decedents' attorney participated in the suit and not the attorney for the estates' representatives.

F. Court Holds That A Will Left A Partial Intestacy

In *Sullivan v. Hatchett*, a husband executed a will giving his wife a life estate in his property. No. 07-17-00296-CV, 2019 Tex. App. LEXIS 980 (Tex. App.—Amarillo February 11, 2019, no pet.). The will then provided:

> THIRD: In the event [Juanita] should predecease me, or if we should die in or as a result of the same accident or disaster, or if she should not survive until ninety (90) days after my death . . . I hereby give, devise, grant and bequeath outright and in fee simple, fifty per cent (50%) of my said estate unto my Daughter, SHERRY LAYNE GIBSON HATCHETT . . . ten per cent (10%) of my said estate unto THE FIRST BAPTIST CHURCH, 2201 Broadway, Lubbock, Texas . . . .
>
> FOURTH: All of the rest and residue of my said estate . . . I do hereby give, devise and bequeath in trust, twenty per cent (20%) of said rest and residue unto each of the two named beneficiaries, unto SHERRY LAYNE GIBSON HATCHETT as Trustee, for the use and benefit of two (2) of our three (3) grandchildren if they are still attending a college or university full time . . . such grandchildren being CHRISTINA MICHELLE HATCHETT and LISA MARIE HATCHETT . . .

Id. After the wife passed, her nephew, who was her executor, entered into a farm and ranch contract regarding a ranch former owned by the husband and wife as community property. Before closing, Sherry Gibson asserted she owned fifty percent of the husband's estate under the third paragraph of his will, thereby creating a cloud on the title to the property. The mother's executor then filed a declaratory judgment action to establish the interests of the parties in the property, and Sherry counter-claimed. The trial court ruled for Sherry, and the mother's executor appealed.

The court of appeals reversed and ruled for the mother's executor. The court first discussed the rules of will construction:

> When interpreting a will, the primary focus of the court is the determination of the testator's intent, as reflected in the will as a whole, and the effectuation of that intent as far as is legally possible. The intent must be drawn from the will, not the will from the intent. Ascertaining intent from the four corners of a will requires careful examination of the words the testator chose and the sense in which the words were used by the testator is the ultimate criterion. Words and phrases must be construed together and in context, not in isolation. A court should focus on the meaning of the words actually used by the testator and not on what he intended to write.

Id. (internal citations omitted).

The mother's executor alleged that he was entitled to summary judgment because the second paragraph of the father's will created a life estate only and the remaining paragraphs of the will did not establish a remainder interest or dispose of one hundred percent of the residual estate. The court of appeals agreed:

> The third paragraph of Charles's will, the survivor paragraph, provided three contingencies to effectuate a survival clause, none of which occurred… Thus, without any of the contingencies having occurred, the third paragraph became moot—thereby effectively distributing nothing to the named contingent beneficiaries, i.e., Sherry and the First Baptist Church. As such, it does not function to establish either a remainder interest or dispose of any residual interest. Because the third paragraph does not bear on the disposition of any residual interest, it does not pass title to the beneficiaries named in the trial court's judgment. While the fourth paragraph, the residuary paragraph, does dispose of forty percent of any residual estate (twenty percent to Christina and twenty percent to Lisa), it makes no provision for the remaining sixty percent, thereby creating a partial intestacy.

Id. The court acknowledged that there is a general reluctance to find partial intestacy, but the plain words of the will control. The court held that half of the property belonged to the wife's estate because it was her community property, forty percent of the husband's half community interest passed via the fourth paragraph to Christina and Lisa and the remaining sixty percent of the husband's half passed by the rules of intestate succession.

There was a dissenting justice who would have affirmed the trial court's judgment:

> There is nothing inconsistent between the Third paragraph's provisions naming Sherry and the church as recipients of the sixty percent under the stated contingencies and the Second paragraph's identification of them as remaindermen after the life estate given Juanita. The two paragraphs do not provide conflicting dispositions; they provide alternative dispositions. If any of the eventualities described in the Third paragraph occurred, no life estate would be created in Juanita. Read together, the Second and Third paragraphs thus consistently provide for Sherry and the church to receive the disputed sixty percent after Charles and Juanita both were deceased, regardless of the order or timing of their deaths, subject only to Juanita's life estate.

Id.

G. Court Holds That Testator's Granddaughter Was A Beneficiary Of The Will

In *McDaniel v. Meador*, parties sued for declaratory relief regarding whether a granddaughter was a beneficiary of a will. No. 01-18-00041-CV, 2019 Tex. App. LEXIS 1315 (Tex. App.—Houston [1st Dist.] February 21, 2019, no pet.). The will stated that the testator left her estate: "(a) To those of my children (JASPER "LEE" MCDANIEL, JR., AND ANDREW DOUGLAS MCDANIEL) who survive me and to the issue who survive me of those of my children who shall not survive me, in equal shares per stirpes." *Id*. It also provided that if no issued survived her then she gave her estate to those who would take if the testator died intestate. One son predeceased the grandmother, and the son's daughter, the granddaughter, claimed to be a beneficiary and entitled to a third of the estate. The trial court determined that the granddaughter was a beneficiary and was entitled to a third of the grandmother's estate. The granddaughter's loving uncles appealed.

The court of appeals described the rules for construing a will:

> "The cardinal rule for construing a will is to ascertain the true intent of the [testatrix] as expressed in the will." The "objective in construing a will is to discern and effectuate the testatrix's intent as reflected in the instrument as a whole." We ascertain the testatrix's intent from the language within the four corners of the will. Courts "determine intent by construing the instrument holistically and by harmonizing any apparent conflicts or inconsistencies in the language." We must focus on the meaning of the words the testatrix actually used rather than speculate about what she may have intended to write.

Id. The uncles contended that, because they survived the testator, the will designates only them as the beneficiaries of the residuary estate. The court of appeals disagreed:

> When viewed holistically and harmonizing any apparent conflicts, we agree with Mandy that Frances did not intend to limit the term "children" to Jasper and Andrew in the second beneficiary clause... Frances defined who her children were in the opening provision of the Will, listing all three of her children: Jasper, James, and Andrew. By way of the parenthetical, Frances, at most, expressed her intent that she did not want James to be a beneficiary should he survive her. However, that same limitation was not placed on the term "children" in the second beneficiary clause to indicate that Frances did not intend the term "children" to include James in accordance with the definition in the Will's opening paragraph. The Will contains no other indication that Frances intended to disinherit her granddaughter, Mandy, if James predeceased Frances… Even when given its ordinary meaning, the term "children" would also include James. And, under well-established rules of probate law, James would also be

> included as one of Frances's children. The only place in the Will indicating that the "children" was intended to have a meaning different than the meaning ascribed in the opening paragraph or under the common, ordinary definition is the first beneficiary clause. Further, defining the term "children" in the second beneficiary clause to exclude James from that definition, and as a result exclude Mandy from being a beneficiary, would give rise to a potential conflict with Paragraph 2(b), which provides, "If no issue of mine survives me, I give my residuary estate to those who would take from me as if I were then to die-without a will . . . ." Paragraph 2(b) makes no exception for Frances's issue descending through James. Thus, we read Paragraph 2(b) to affirm that Frances intended Mandy to be a beneficiary if she survived Frances.

Id. The court of appeals affirmed the trial court's judgment for the granddaughter.

H. The Texas Supreme Court Holds That The Only Consideration In Probating A Will After The Four-Year Limitations Period Is Evidence Of The Applicant's Default

In *Ferreira v. Butler*, a husband and wife divorced, and the husband married a second wife. No. 17-0901, 2019 Tex. LEXIS 375 (Tex. April 12, 2019). The second wife died, and the husband never probated her will, which left everything to him. Nine years later, the husband died and his will left most of his estate to his first wife. The first wife was the executor of his estate, and she then attempted to probate the second wife's will. The second wife's intestate heirs contested the probate of that will on the ground that it was barred by the four-year limitations period in Section 256.003(a) of the Texas Estates Code. The trial court granted the heirs' motion for summary judgment and dismissed the application to probate the second wife's will. The court of appeals affirmed, and the first wife appealed.

The Texas Supreme Court reversed for the first wife. Section 256.003(a) of the Texas Estates Code states: "Except as provided by Section 501.001 with respect to a foreign will, a will may not be admitted to probate after the fourth anniversary of the testator's death unless it is shown by proof that the applicant for the probate of the will was not in default in failing to present the will for probate on or before the fourth anniversary of the testator's death." *Id*. (quoting Tex. Est. Code § 256.003(a)). The Court held that the husband's estate qualified as an interested person because he was the second wife's heir, devisee, and spouse. The Court agreed with the lower courts that the first wife was barred from probating the second wife's will in her capacity as executor because the first wife was standing in the shoes of the husband's estate, the default inquiry must focus on the husband and there was no proof that the husband was not in default in failing to probate the second wife's will within four years of her death.

The Court then held that the first wife also had standing to probate the second wife's will in her individual capacity as she was the beneficiary of the husband's estate, who was the beneficiary of the second wife's estate. The Court then reversed prior precedent and held that "under Section 256.003(a), when an applicant seeks late-probate of a will in her individual capacity, only the applicant's conduct is relevant to determining whether she 'was not in default.'" Id. The Court held that if the first wife had applied to probate the will in her individual capacity the husband's default would be irrelevant under Section 256.003(a). As the first wife did not assert individual standing, the Court could not render for her. However, the Court vacated the judgments of the lower courts in the interest of justice and remanded the case to the trial court to give the first wife an opportunity to amend her pleadings to pursue probate of the will in her individual capacity.

Interesting Note: It is probably safe to say that the second wife would roll over in her grave if she knew that the first wife would receive the second wife's assets over the second wife's own children. This case brings up a very frequent issue: second marriages where the husband and wife have children from previous relationships. The spouse loves and wants to provide for his or her surviving spouse. But the spouse probably wants to leave his or her estate to his or her own children after the surviving spouse dies. If the spouse leaves everything to his or her surviving spouse outright, then the deceased spouse will have no say in where the assets go after the surviving spouse's death. That is the exact case set forth above. This issue can be remedied by leaving the deceased spouse's assets in a trust with the surviving spouse as the primary beneficiary and the deceased spouse's children as the remainder beneficiaries. A word of warning is that the deceased spouse should make a third party (bank) the sole trustee or have the surviving spouse be a co-trustee with the remainder beneficiaries also being co-trustees. It is all too common for the surviving spouse, who is a sole trustee of the trust, to treat the trust assets as his or her own assets and not give consideration to his or her fiduciary duties to the remainder beneficiaries. Also, the spouse could leave property to the surviving spouse in a life estate with the remainder interest going to the deceased spouse's children. There are other potential methods to solve this thorny issue. A person should seek legal advice from an qualified estate planning attorney to ensure that his or her assets do not end up with an unintended person or persons.

I. Trial Court Had Jurisdiction To Appoint A Temporary Administrator After A Will Contest Had Been Filed Regarding A Will That Had Been Probated As A Muniment of Title

In *Chabot v. Estate of Sullivan*, the decedent's attorney probated a holographic will as a muniment of title. No. 03-17-00865-CV, 2019 Tex. App. LEXIS 2145 (Tex. App.—Austin March 20, 2019, no pet.). A claimant then asserted a claim that the decedent sexually abused him. The tort claimant and the decedent's sister filed will contests. The court signed an order appointing the temporary administrator and then signed a subsequent order authorizing the administrator to settle the tort claimant's claims. The party who would take under the will alleged that the orders appointing the temporary administrator and approving the settlement were void. The court of appeals disagreed, holding that the orders were not void because the decedent's sister and the tort claimant filed will contests well within the two-year deadline under Texas Estates Code Section 256.204(a), no representative of the estate existed at the time as it was a muniment of title, and the trial court appointed the temporary administrator pursuant to its authority under Texas Estates Code Section 452.051(a). The court noted that the Estates Code provides at least two mechanisms for challenging a probate court's order: a bill of review and a will contest. "Section 256.204, therefore, allows for the filing of a will contest within two years of the date the will was admitted to probate. It is undisputed that both Chabot and the Tort Claimants filed timely will contests." *Id*. The court concluded:

> Chabot and the Tort Claimants filed will contests well within the two-year deadline. See Tex. Estates Code § 256.204(a). No representative of Sullivan's estate existed at the time, and the trial court appointed Deadman as temporary administrator pursuant to its authority under Section 452.051. See id. § 452.051(a). Chabot has not cited any authority prohibiting the trial court's actions, and we are not aware of any. We therefore hold that the trial court's order appointing Deadman was not void ab initio and that the court's subsequent order authorizing Deadman to settle the Tort Claimants' suits was not void on that ground.

Id.

J. Codicil Was Properly Rejected Because It Did Not Adequately Refer To Last Will And Testament

In *In the Estate of Hargrove*, two daughters offered their mother's last will and testament dated in 2017 for probate. No. 04-18-00355-CV, 2019 Tex. App. LEXIS 1703 (Tex. App.—San Antonio March 6, 2019, no pet.). Their brother offered a subsequent codicil. After an evidentiary hearing, the trial court admitted the will to probate, issued letters testamentary to the daughters as co-independent executors, and denied the son's application to admit the codicil to probate. The son appealed.

The court of appeals noted that a codicil must contain "a sufficient reference to a prior will" and that, if it does so, it "operates as a republication of the will in so far as it is not altered or revoked by the codicil; the will and codicil are then to be regarded as one instrument speaking from the date of the codicil." *Id*. (citing Hinson v. Hinson, 154 Tex. 561, 567, 280 S.W.2d 731, 735 (1955)). The court held that the Hinson rule does not require that a codicil make a "specific" or "exact" reference to a prior will, but it does require that it state "enough information to permit adequate identification of the will being republished." *Id*. The court held that the codicil in this case did not make a sufficient reference:

> The Codicil does not contain a generic reference to an existing will that could be construed to mean the February 2017 Will. Instead, it contains a

> specific reference to a will executed at a specific time that is incompatible with identifying the Will at issue here. As noted, Mary Jane's Will was executed on February 13, 2017. But the Codicil, which was executed a mere six weeks later, refers to "my Last Will and Testament, which was executed in the Summer of 2016." Jim Bob contends that this is actually a reference to the February 2017 Will. But the express language of the Codicil refers to a will executed at least seven months earlier. We cannot simply overlook the discrepancy. Nor can we, in the guise of interpreting the Codicil, rewrite it to state "executed in February 2017" rather than "executed in the Summer of 2016."

Id. The court affirmed the trial court's rejection of the codicil.

K. Court Affirms Finding Of Undue Influence Regarding Execution Of Will

In *In re Estate of Russey*, the decedent was going through a divorce and signed a will. No. 12-18-00079-CV, 2019 Tex. App. LEXIS 1536 (Tex. App.—Tyler February 28, 2019, no pet.). She died before the divorce was finalized. Her children took their father's side on some issues. During this time, a sister of a friend of the decedent "swooped in," befriended the decedent, began taking her to her medical appointments and to the hospital, and assisted with the divorce proceedings. After the decedent's phone texted her attorney that she wanted to draft a will and name her new friend as her sole beneficiary, the decedent executed the will. The decedent passed away shortly thereafter, and the will was offered to probate. The decedent's daughter challenged the will. Following a bench trial, the trial court entered its order denying the admission of the will to probate and granting the daughter's application for independent administration. The friend appealed.

The court of appeals discussed the standards for undue influence. "To establish undue influence, a contestant must show the following: (1) the existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and (3) the execution of a testament which the maker thereof would not have executed but for such influence." *Id*. (citing *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963)).

The court first considered whether there was sufficient evidence that the friend had a fraudulent motive in having the decedent sign the will. The friend was subject to an order of deferred adjudication for theft of $55,471.20, and she was required to pay restitution in the amount of $38,721.96. At the time the decedent signed the will, her estate was worth more than the $28,000. "This monetary need on Watson's part amounts to some circumstantial evidence underlying her motive to seek to influence Russey to name her as her sole devisee of her will." *Id*. The court also looked at evidence that the friend poisoned the decedent's relationship with her daughter. The daughter testified that the friend "froze her out," thereby preventing her from being able to reestablish any type of relationship with the decedent. The court considered the circumstances surrounding the drafting and execution of the will. The friend and her husband were present when the decedent executed the will in her home. The court held that the evidence was legally and factually sufficient to support the trial court's findings that an influence existed and was exerted by the friend.

Regarding whether the influence overpowered the decedent's mind, the court first considered the decedent's mental and physical capacity to resist and her susceptibility to the type and extent of the influences exerted. The trial court found that, due to her health problems, the decedent was reliant on others for transportation, and that the friend befriended the decedent while she was suffering from these health problems and that the decedent became dependent on the friend during her last illness for much of her care and transportation. The decedent was lonely at a time when the friend "swooped in" to provide assistance and became deeply involved in divorce proceedings. The court concluded that this evidence was sufficient to establish that the decedent was incapable of resisting her susceptibility to the influence. The court stated:

> Further, in considering Russey's state of mind at the time she executed her will, we note that Watson and Beatty actively sought to continue Russey's estrangement from Stevens and her grandchildren. The record also reflects that Watson and her husband made certain they were present when Russey signed the will, in which Watson was designated as her sole devisee; no family members were present or were invited to attend the signing of the will.

Id. The court concluded:

> Considering the cumulative effect of the evidence related to (1) Russey's susceptibility and dependence on Watson at the end of her life, (2) the details surrounding the signing of the March 2, 2017, will, and (3) Watson's successfully keeping Stevens and her children away from Russey during this time, we conclude that a factfinder reasonably could determine that Watson exerted her influence and subverted and overpowered Russey's mind at the time she signed the will.

Id.

Lastly, the court consider whether the decedent would not have executed the instrument, but for the influence. "Satisfaction of this element usually is predicated on whether the disposition of property is unnatural." *Id*. The court stated:

> One of the main objects of the acquisition of property by the parent is to give it to his child; and that child in turn will give it to his, in this way the debt of gratitude we owe to our parent is paid to our children. Thereby,

> each generation pays what it owes to the preceding one by payment to the succeeding one. This seems to be the natural law for the transmission of property. Any departure from that course, though it may not be uncommon or unusual, is unnatural.

Id. The evidence showed that the decedent never made a will until the friend reentered her life during her last illness. Because the evidence supported that the friend unduly influenced the decedent when she never had before sought to create such a document, the court concluded that the trial court reasonably could have determined that the will was unnatural in that it passed all of her property to the friend with no apparent consideration given to her children or grandchildren. The court affirmed the trial court's finding of undue influence.

L. Court Held That Heirs Has Standing To Participate In Estate Even After They Received The Assets They Were Due

In *In re Estate of Daniels*, after the decedent's death, his wife and his other heirs filed competing applications for independent administration of his estate. No. 06-18-00049-CV, 2019 Tex. App. LEXIS 2905 (Tex. App.—Texarkana April 11, 2019, no pet.). After the homestead property was set aside and the temporary administrator conveyed the interests in that property to the wife and the heirs, the wife moved to dismiss the heirs and their pleadings for lack of standing because they no longer had a financial interest in the estate. The trial court granted the motion, and the heirs appealed.

The court of appeals held that because Texas Estate Code Section 22.018 defines "interested person" in the disjunctive; one is an interested person if they are an "heir, devisee, spouse, [or] creditor" or one who has a "property right in" or a "claim against" the estate being administered. The court held that a party does not have to have a financial interest in the estate to have standing:

> Accordingly, if one is not an heir, devisee, spouse, or creditor, then one must have a property right in or a claim against the estate to be an interested person. However, an interested person does not have to be both "(1) an heir, devisee, spouse, or creditor and (2) a person with a property right in or claim against the estate." Therefore, as long as the Heirs meet the statutory definition of "heir" under Section 22.015, they are "interested persons" under Section 22.018(1), even if they do not have a pecuniary interest in the estate.

Id. The court also held that the heirs did not lose standing by enforcing their rights and obtaining assets from the estate:

> It is undisputed that the Heirs satisfied the statutory definition of heir at the time the temporary administrator conveyed them property interests from the estate. Just as accepting benefits under a will does not bar the devisee from pursuing other estate-related rights he has as a devisee, the

> Heirs' acceptance of property interests from the estate does not bar them from exercising their other rights as heirs, such as seeking to be named administrators and objecting to LaStarza's application for the same. Therefore, the Heirs have standing to pursue their application, objections, and other motions.

Id. The court reversed the trial court's order and held that the heirs had standing.

M. Executor or Administrator May Not Need To Post A Bond To Supersede A Judgment

In *Wheatley v. Farley*, a trial court entered an order awarding relief to both parties, and both parties appealed. No. 08-18-00106-CV, 2019 Tex. App. LEXIS 4626 (Tex. App.—El Paso June 5, 2019, no pet. history). One party was a dependent administrator, and the trial court ruled that he did not have to post a supersedeas bond to stay execution of the judgment. The court of appeals affirmed this ruling:

> Section 351.002 provides that an appeal bond is not required if an appeal is taken by an executor or administrator, unless the appeal personally concerns the executor or administrator. Tex. Estates Code Ann. § 351.002(a), (b). Wheatley argues that an "appeal bond" is not the same as a "supersedeas bond," and therefore, Section 351.002 does not operate to excuse Farley from the requirement that he post a supersedeas bond to suspend the judgment pending appeal. We agree with Wheatley that an appeal bond and a supersedeas bond are two different types of bonds and they serve different functions. Nevertheless, as seen in the Supreme Court's decision in *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 480-82 (Tex. 1964), the exemption of executors and administrators from the requirement that they give security for costs on appeal is significant in determining whether they are required to post a supersedeas bond.
>
> ….
>
> We recognize that Section 351.002 refers to "appeal bond" rather than the more general term "bond" that appeared in the predecessor statute, but it was well understood that Article 2276 concerned the requirement that the appellant give security for costs on appeal by filing an appeal bond. We hold that when an executor or administrator of an estate appeals, he or she is not required to post a supersedeas bond unless the appeal personally concerns the executor or administrator. The Probate Court's order does not expressly state whether the appeal personally concerns Farley, but the record reflects that Farley is a court-appointed administrator who has no personal interest in the estate. Consequently, Farley is not required to post a supersedeas bond to suspend the judgment and his filing of a notice of appeal operated to suspend the judgment.

Id. (citing *In re Shore*, 106 S.W.3d 817, 821 (Tex. App.—Texarkana 2003, orig. proceeding) and *Vineyard v. Irvin*, 855 S.W.2d 208, 212 (Tex. App.—Corpus Christi-Edinburg 1993, orig. proceeding)).

N. Court Concludes There Was A Fact Question As To Whether A Hand-Written Document Was A Will

In *In re Estate of Silverman*, a trial court granted a will contestant's summary judgment and denied a handwritten document's admission to probate as the last will of the decedent. No. 14-18-00256-CV, 2019 Tex. App. LEXIS 4579 (Tex. App.—Houston [14th Dist.] June 4, 2019, no pet. history). The proponent argued that the document could be testamentary in character as it appointed the decedent's office manager as an executor. The proponent appealed. The court of appeals first discussed a court's duty to admit a document to probate:

> A court's first duty in a proceeding to admit a writing offered for probate is to determine whether the writing is testamentary in character. If the document is not of testamentary character it is not a will and cannot be admitted to probate. We must ascertain the testator's intent from the language used within the four corners of the instrument offered for probate. It is essential that the maker shall have intended to express his testamentary wishes in the particular document offered for probate.
>
> The requisite testamentary intent does not depend upon the maker's realization that he is making a will, or upon his designation of the instrument as a will, but rather upon his intention to create a revocable disposition of his property to take effect after his death. Generally, to be testamentary in character, a writing must possess certain essential characteristics. The writing must be revocable during the maker's lifetime. The writing must be ineffectual as a transfer of any rights or interest before death. Further, courts often state that the writing must operate to transfer, convey, or dispose of the testator's property upon death.

Id. The court also discussed admitting a handwritten document to probate. The court stated that it would not ordinarily construe a purported will before its admission to probate. "On occasion, however, courts have construed purported wills before admitting them to probate. For example, it may be necessary or appropriate to construe a writing offered for probate to decide whether it is testamentary. Additionally, courts have construed disputed language in a purported will before its admission to probate when an interested party seeks a declaratory judgment, as the Contestants have done here." *Id*.

The court then held that it construed the handwritten document at issue as naming an executor but was ambiguous as to whether it transferred or devised any property. The contestants argued that the will gave the executor rights and powers of an executor but that person had been devised no ownership rights to any property. The executor argued that the phrase "Karen Grenrood . . . has all legal rights to my estate in the case of my untimely or timely death" is an effective devise of all property. *Id*. The court of appeals concluded that both sides' interpretations were reasonable: “But whether the handwritten document does or does not dispose of Silverman's property is a matter for the factfinder to decide. If the document disposes of property then it may be admitted to probate, presuming other testamentary characteristics exist.” *Id*. The court also held that the document should have been admitted to probate because it named an executor. The court concluded: “In sum, we hold that the probate court erred by denying the handwritten document admission to probate on the ground that it lacks testamentary intent because it does not transfer or dispose of property. We reach this conclusion for two reasons: (1) the document is ambiguous whether it disposes of property; and (2) presuming it does not dispose of property, it names or appoints an executor, as the parties agree.” *Id*.

IV. Fiduciary Duties In Business Relations

A. Court Rules On Lost Profits, Lost Good Will, Disgorgement, and Forfeiture Remedies Against A Former Employee For Breach of Fiduciary Duty

In *Samuel D. Orbison & Am. Piping Inspection v. Ma-Tex Rope Co.*, a jury found that a former employee breached fiduciary duties by working for a competitor while being employed by the plaintiff. No. 06-17-00112-CV, 2018 Tex. App. LEXIS 4381 (Tex. App.—Texarkana June 15, 2018, pet. denied). The jury awarded lost profits, lost good will, and the court awarded other disgorgement and forfeiture relief. The defendant appealed.

The court of appeals first reversed the award of $2,000 in lost profits because there not sufficient evidence to show how such an award was calculated. The court stated:

> Matthews testified that Ma-Tex had lost profits of $2,321.00 based on the total amount API charged Halliburton Pinnacle and Arklatex. He provided no explanation of how these lost profits were determined, and Ma-Tex points to no other evidence in the record that provided an explanation of how the lost profits were determined.… [H]is testimony … does not provide this Court with the objective facts, figures, or data from which the amount of lost profits were calculated, nor the method he used to calculate them. Consequently, the evidence is legally insufficient to support the finding of $2,321.00 in lost profits.

Id. The court also reversed the award of damages due to lost good will because the evidence was simply too conclusory:

> Matthews merely testified that the damage to Ma-Tex's good will would be $10,000.00 a month for twelve months, totaling $120,000.00. Matthews never testified how he determined these estimates. Ma-Tex does not point

> to any testimony, and we have found none, that provides any objective facts, figures, or data in support of his opinion. Consequently, we find the evidence is legally insufficient to support the trial court's finding of $120,000.00 in good will damages.

Id. The court then turned to the disgorgement damages and affirmed. The court discussed the concept of an employee breaching fiduciary duties:

> Generally, the term fiduciary "applies to any person who occupies a position of peculiar confidence towards another" and "contemplates fair dealing and good faith." It is well established in Texas that an employee may be in a fiduciary relationship with his or her employer. An employee may not, without breaching his fiduciary duties, "(1) appropriate the company's trade secrets, (2) solicit the former employer's customers while still working for his employer, (3) solicit the departure of other employees while still working for his employer; or (4) carry away confidential information." In an unchallenged conclusion of law, which is supported by the evidence, the trial court found Orbison breached his fiduciary duties in each of these ways.

Id. The court then discussed the legal standards for forfeiture/disgorgement relief:

> When the court finds a breach of fiduciary duty, it may fashion an appropriate equitable remedy, including forfeiture of fees and disgorgement of any profit made at the expense of the employer. As the Texas Supreme Court noted, when an agent breaches his fiduciary duty, he is entitled to no compensation for conduct related to the breach, and if his breach is willful, "he is not entitled to compensation even for properly performed services." The main purpose of these equitable remedies "is not to compensate an injured principal," but rather "to protect relationships of trust by discouraging agents' disloyalty." Thus, a court "may disgorge all ill-gotten profits from a fiduciary when a fiduciary . . . usurps an opportunity properly belonging to a principal, or competes with a principal." It may also require the fiduciary to forfeit any compensation for his work paid by the principal.

Id. Regarding the application of these standards to the fact, the court sustained the trial court’s award of a forfeiture of the compensation that the defendant was paid by the plaintiff and also a disgorgement of the compensation paid by the new employer to the defendant:

> Since the trial court found that Orbison breached his fiduciary duties to Ma-Tex, it had discretion to impose appropriate equitable remedies for the breach. Here, it elected to require forfeiture of a portion of the compensation paid by Ma-Tex to Orbison during the period of time that Orbison was assisting API to set up its recertification shop and was

> soliciting two of Ma-Tex's employee's to work for API. In addition, the trial court required disgorgement of an amount equal to the compensation paid by API to Orbison during the time that Orbison was actively competing with Ma-Tex by using Ma-Tex's confidential information to solicit its customers. Under Swinnea and the cases cited therein, we see no essential distinction between forfeiting a fee paid to an attorney or trustee who breaches his fiduciary duty and forfeiting the salary paid to an employee who does the same. In each instance the breaching fiduciary received compensation from the principal while breaching his trust. Neither do we see an essential distinction between disgorging a fee paid to, or the profit made by, an agent who usurps his principal's business opportunity and disgorging an amount equal to the salary paid to a former employee by his new employer when the former employee uses confidential information and trade secrets to solicit the customers of his former employer. In each instance, the breaching fiduciary profited by, or received compensation for, breaching the trust of his principal. The same principles apply to each of these circumstances, and the remedies of forfeiture and disgorgement are "necessary to prevent such abuses of trust." Consequently, we find that, under the circumstances of this case, Orbison was subject to the forfeiture of his salary paid by Ma-Tex and to the disgorgement of the salary paid to him by API while he was actively using Ma-Tex's confidential information to solicit its customers.

Id.

B. Court Holds That Attorney Did Not Have An Attorney-Client Relationship With A Company's Directors And Shareholders

In *Pennington v. Fields*, the majority of shareholders of a closely held business forced the buy-out of the minority shareholder and litigation ensued. No. 05-17-00321-CV, 2018 Tex. App. LEXIS 6601 (Tex. App.—Dallas August 21, 2018, no pet.). Later, the minority shareholder sued the majority shareholder's attorney and alleged that he committed legal malpractice by, among other things, negligently advising the majority to engage in oppression and breaches of fiduciary duties and that he failed to advise the minority shareholder to protect his interests against the misconduct of the majority. The attorney filed a motion for summary judgment, alleging that he owed the minority shareholder no fiduciary duty because he never represented him, which the trial court granted. The plaintiff appealed.

Regarding the existence of the attorney-client relationship, the court of appeals stated:

> The existence of a duty is an element of a legal malpractice claim. The attorney—client relationship is a contractual relationship that arises from a lawyer's agreement to render professional services to a client. The agreement may sometimes be implied from the parties' conduct. But

> whether an agreement is express or implied, there must be evidence that both parties intended to create an attorney—client relationship. One party's subjective belief is insufficient to raise a question of fact to defeat summary judgment.

Id. (internal citations omitted). The plaintiff cited to two engagement letters between the company and the attorney, which referenced doing legal services as required the board of directors, of which the plaintiff was one at the time. The court of appeals held:

> These two agreements do not raise a fact issue regarding the existence of an attorney—client relationship between Pennington and Collins. Both agreements are between Advantage and Collins. A corporation is a legal entity separate and apart from the people who compose it, making it distinct from its stockholders, officers, and directors. Thus, rendering legal services to a corporation does not by itself create privity between the attorney and the corporation's officers, directors, or shareholders. We disagree with Pennington's argument that Collins was "clearly engaged to represent Advantage's shareholders," including Pennington. Pennington was not named in nor did he sign the agreement. The agreement was clearly between Collins and Advantage. Evidence of an agreement between Collins and Advantage is no evidence of an attorney—client relationship between Collins and one of Advantage's directors or shareholders.

Id.

The plaintiff then contended that there was an implied agreement for legal representation. The court stated:

> Although an attorney—client relationship may be implied from the actions of the parties, the parties must manifest an intention to create an attorney—client relationship. Whether there was a meeting of the minds must be based on an objective standard, examining what the parties did and said and not their alleged subjective states of mind… Both sides discuss the case of *MacFarlane v. Nelson* from the Third Court of Appeals. In that case, the court of appeals noted that when a lawyer represents a small entity with extensive common ownership and management, difficulties can arise in determining the existence of an attorney—client relationship. *MacFarlane v. Nelson*, No. 03-04-00488-CV, 2005 Tex. App. LEXIS 7681, 2005 WL 2240949, at *4 (Tex. App.—Austin Sept. 15, 2005, pet. denied) (mem. op.). The opinion listed several factors to consider in determining whether a lawyer for the entity also represents an individual owner: (1) whether the lawyer affirmatively assumed the duty of individual representation; (2) whether the owner had independent representation; (3) whether the lawyer previously represented the owner on a personal basis; (4) and whether the evidence demonstrates the

> owner's reliance on or expectations of the lawyer's separate representation. *Id*. An attorney—client relationship is not created with the individual owner simply because the owner discusses matters with the lawyer that are relevant to both the owner's and the entity's interests. *Id*.

Id. The plaintiff asserted that those factors weighed in favor of a finding that an attorney—client relationship existed, but the court disagreed:

> Pennington met Collins on the day he was removed as Advantage's president. Thus, Collins had not previously represented Pennington. Although Pennington did not have independent representation at that time, he retained his own legal counsel shortly after the June 27 meeting. Pennington asserts he believed Collins was "advising him and representing his interests" because Collins represented to Pennington that Pennington's interests were not adverse to Fields's and Phillips's. He contends Collins admitted he was representing all three directors. To demonstrate this, he relies on Collins's deposition testimony. In his deposition, Collins was asked if he thought he was helping Pennington. Collins stated he was trying to "find a solution for all of the parties to work together" and if it worked out, it would have helped Pennington. His goal was to help his clients, who were Fields and Phillips and later Advantage. Pennington's summary judgment evidence does not show that Collins affirmatively assumed a duty to represent Pennington individually. Evidence Pennington had a subjective belief that Collins was representing him is insufficient. Whether there was a meeting of the minds about representation must be based on an objective standard, and there is no objective evidence Collins intended to create an attorney—client relationship with Pennington. An attorney—client relationship was not created between Collins and Pennington simply because Collins discussed matters with Pennington that were relevant to both Pennington's and Advantage's interests.

Id. The court held that the evidence did not raise a fact issue regarding the existence of an attorney—client relationship and affirmed the summary judgment motions.

Interesting Note: This case raises an important issue for attorneys who represent closely held businesses and the owners and operators of those businesses. The parties should be careful to properly document who the client is and the scope of the representation. Otherwise, there may be confusion as to whom the attorney owes fiduciary duties.

Certainly, an attorney can represent more than one party; in fact, that is very common. For example, a law firm may represent a shareholder and the company in an asset sale transaction. More commonly, a law firm may represent both spouses in the sale of real property, the leasing of minerals, or in estate planning. *See, e.g., Estate of Arlitt v. Paterson*, 995 S.W.2d 713, 720–721 (Tex. App.—San Antonio 1999, pet. denied) (an attorney may represent a couple as joint estate planning clients, in which case the attorney will owe a duty to both clients). So, a reasonably prudent attorney should identify who he or she represents and clarify that he or she does not represent a party when the attorney first communicates with a party regarding a legal matter. *See* Tex. R. Disc. C. 4.03 ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."). Though not dispositive, a "trier of fact may consider the construction of a relevant rule of professional conduct that is designed for the protection of persons in the claimant's position as evidence of the standard of care and breach of the standard." William V. Dorsaneo, TEXAS LITIGATION GUIDE, § 322.02 (CITING RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 52, Comment f).

The downside to an attorney is that an attorney may inadvertently create an attorney-client relationship and be held to fiduciary duties that are not anticipated. To have an attorney-client relationship, there does not have to be a formal agreement. "While it is generally a relationship created by contract, an attorney-client relationship can be implied based on the conduct of the parties." *Sotello v. Stewart,* 281 S.W.3d 76, 80-81 (Tex. App.—El Paso 2008, pet. denied) (citing *Sutton v. Estate of McCormick*, 47 S.W.3d 179, 182 (Tex. App.—Corpus Christi 2001, no pet.) and *Mellon Service Co. v. Touche Ross & Co.,* 17 S.W.3d 432, 437 (Tex. App.—Houston [1st Dist.] 2000, no pet.)). "The attorney-client relationship may be implied if the parties by their conduct manifest an intent to create such a relationship." *Daves v. Commission For Lawyer Discipline*, 952 S.W.2d 573, 577 (Tex. App.—Amarillo 1997, pet. denied). For the relationship to be established, "the parties must explicitly or by their conduct manifest an intention to create it. To determine whether there was a meeting of the minds, we use an objective standard examining what the parties said and did and do not look at their subjective states of mind." *Roberts v. Healey*, 991 S.W.2d 873, 880 (Tex. App.--Houston [14th Dist.] 1999, pet. denied). "More specifically, an attorney-client relationship can be implied from the attorney's gratuitous rendition of professional services." *Sotello v. Stewart*, 281 S.W.3d at 80-81 (citing *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied)).

It should also be noted that an attorney may be liable for not informing a party that it is not representing the party. *Querner v. Rindfuss*, 966 S.W.2d 661, 667-68 (Tex. App.—San Antonio 1998, writ denied) (recognizing that an attorney's advice may give rise to an informal fiduciary duty even when no formal attorney-client relationship is formed). The *Querner* court stated:

> Although an attorney hired by an executor generally represents the executor and not the beneficiary, an attorney for an executor may undertake to perform legal services as attorney for one or more beneficiaries. An attorney-client relationship may develop between the attorney retained by the executor and the beneficiaries either expressly or impliedly. Even absent an attorney-client relationship, an attorney may be held negligent for failing to advise a party that he is not representing the party. 'If circumstances lead a party to believe that they are represented by an attorney,' the attorney may be held liable for such a failure to advise.

Id.; see also Vinson & Elkins v. Moran, 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, pet. denied); *Burnap v. Linnartz*, 914 S.W.2d 142, 148 (Tex. App.—San Antonio 1995, writ denied).

So, to avoid confusion, the attorney should always have a written engagement letter that expressly identifies the client or clients, the attorney is not representing any other party not expressly mentioned, the scope of the engagement, and when the engagement will be terminated. Further, if appropriate, the attorney should follow up and orally tell those that he or she is not representing, but with whom the attorney often communicates, that he or she is not representing them and is only representing his or her client(s). Further, individuals should also seek clarification and ask an attorney who the attorney represents and whether the individual should retain his or her own attorney. Everyone should strive to be on the same page regarding who is the attorney and who is the client.

C. Court Held That Equitable-Forfeiture Claims Arising From A General Partner's Compensation Should Be Remanded For Consideration By Court

In *Cruz v. Ghani*, a limited partner sued a general partner over breach of fiduciary duty claims arising from, among other allegations, that the general partner should not have compensated himself from the business in addition to regular distributions. No. 05-17-00566-CV, 2018 Tex. App. LEXIS 10318 (Tex. App. Dallas, Dec. 13, 2018, pet. filed). The jury found that the general partner failed to comply with his fiduciary duties with respect to the payments made to himself, but awarded $0 in damages. The trial court did not award damages on this claim, and the limited partner appealed and argued the trial court should have entered judgment ordering disgorgement of the compensation.

The court of appeals first discussed the equitable remedies of disgorgement and forfeiture:

> Courts may fashion equitable remedies such as disgorgement and forfeiture to remedy a breach of a fiduciary duty. Disgorgement is an equitable forfeiture of benefits wrongfully obtained. A party may be required to forfeit benefits when a person rendering services to another in a relationship of trust breaches that trust… A claimant need not prove

> actual damages to succeed on a claim for forfeiture because they address different wrongs. In addition to serving as a deterrent, forfeiture can serve as restitution to a principal who did not receive the benefit of the bargain due to his agent's breach of fiduciary duty. However, forfeiture is not justified in every instance in which a fiduciary violates a legal duty because some violations are inadvertent or do not significantly harm the principal.
>
> Whether forfeiture should be imposed must be determined by the trial court based on the equity of the circumstances. However, certain matters may present fact issues for the jury to decide, such as whether or when the alleged misconduct occurred, the fiduciary's mental state and culpability, the value of the fiduciary's services, and the existence and amount of harm to the principal. Once the factual disputes have been resolved, the trial court must determine: (1) whether the fiduciary's conduct was a "clear and serious" breach of duty to the principal; (2) whether any monetary sum should be forfeited; and (3) if so, what the amount should be.

Id. at *68-71. The court noted that the jury found a breach of fiduciary duty, and that the limited partner sought "disgorgement/fee forfeiture" in his pleadings and argued for same at the hearing on a motion for judgment notwithstanding the verdict, but that the record did not show whether the trial court considered an equitable forfeiture award. The court held: "Because Cruz requested the remedy and it was timely brought to the trial court's attention, we conclude the request for equitable relief should be remanded to the trial court for consideration of the factors described by the Texas Supreme Court in *ERI Consulting Engineers, Inc. v. Swinnea,* 318 S.W.3d 867, 875 (Tex. 2010)." *Id*.

D. Court Holds That A Bank's Employees Cannot Conspire To Breach Fiduciary Duties And That The Bank Did Not Owe Fiduciary Duties To A Depositor

In *Herring v. Am. Paper & Janitorial Prods.*, the plaintiff was a subcontractor who provided janitorial services for a bank and was also a depositor of the bank. No. H-17-3474, 2018 U.S. Dist. LEXIS 215765 (S.D. Tex. December 24, 2018). After the plaintiff's representatives were found stealing food after a party, the plaintiff's contract was terminated. Later, one of the plaintiff's employees was hired by another company, who was hired to clean the bank's premises. The plaintiff sued the bank and the main contracting party for various claims. Specifically, the plaintiff sued the bank for breach of fiduciary duty and conspiracy due to the bank's employees discussing terminating the plaintiff. The federal district court granted the bank's summary judgment motion on these claims:

> Herring claims that, because multiple Bank employees were involved in terminating the contract with Paper, it was a conspiracy. This, however, is not a conspiracy. No matter how much conversation and coordination may

> occur among people within one side of a deal or between several sides, it is not a basis for a legal claim. One cannot conspire about one's own business interests and relationships. Collusion is only illegal if its acknowledged purpose is itself illegal and two people agree. A company cannot conspire with itself. The Bank employees are all members of the Bank, so there could be no conspiracy even if supporting facts existed.
>
> The Bank could not have breached a fiduciary duty to Herring because it owed him none. Herring claims that the Bank owed him a fiduciary duty because Envirotech had a company account at the Bank. This argument too is misguided. In Texas, a depositor-bank relationship is a debtor-creditor relationship, not a fiduciary. While Envirotech had a company account at the Bank, the Bank owed no fiduciary duties on the account. Further, the Bank did not act on the depository account; it took action on its contract with Paper, which happened to involve Envirotech.
>
> *Id*.

E. Federal District Court Held That A Shareholder Of A Company Did Not Owe Fiduciary Duties To The Company Regarding A Transfer Of Stock Even Though He Was Also An Officer

In *Liberty Bankers Life Ins. Co. v. Lenhard*, a company sued its former chief executive officer and shareholder for breaching fiduciary duties and fraudulent statements regarding an agreement to transfer his stock in the company. No. 3:16-CV-2417-N, 2019 U.S. Dist. LEXIS 19390 (N.D. Tex. February 6, 2019). The defendant filed a motion to dismiss the plaintiff's claims. Regarding the breach-of-fiduciary-duty claim, the court held that under Texas law, the plaintiff had to first show that the defendant owed a fiduciary duty. The court held that the plaintiff did not establish that the defendant owed a fiduciary duty because he was only acting in his capacity as shareholder in the transaction and not as an officer:

> Continental has not established a fiduciary duty existed at the time of sale. While it claims Lenhard owed a formal fiduciary duty because he was owner and CEO of Continental, he was not acting as CEO when he decided to sell the company. Rather, he was acting as a shareholder, and shareholders do not have the same special automatic fiduciary status corporate officers hold under Texas law. *In re Harwood*, 637 F.3d 615, 620 (5th Cir. 2011). In addition, there is no evidence that Continental relied on Lenhard for the sort of moral, financial, or personal support that is required to establish an informal fiduciary duty under Texas law. *Assoc. Indem. Corp. v. CAT Contracting, Inc.,* 964 S.W.2d 276, 288 (Tex. 1998). Indeed, this was purely an arms-length transaction between Lenhard and Liberty for Lenhard's shares in the company. That Continental representatives may have particularly trusted Lenhard's representations because of their previous relationship does not in itself mean he owed a

> fiduciary duty upon the sale. *See Meyer*, 167 S.W.3d. at 331. Accordingly, the Court dismisses Continental's breach of fiduciary duty claim.

Id. at 10-11. The court dismissed the breach-of-fiduciary-duty claim.

Interesting Note: This court correctly analyzed the fiduciary-duty issue in the complex scenario of a defendant wearing multiple hats. Often the same party acts in different capacities, one or more of those being a fiduciary relationship. A plaintiff may want all of the defendant's actions considered in the context of the fiduciary relationship. However, the defendant is entitled to have his or her actions judged depending on the hat that he or she is wearing in relation to the actions. For example, it is common for a trustee to also have a position in a company that is owned in whole or in part by the trust. The trustee's actions regarding the company are not necessarily judged by the trustee's fiduciary duties as trustee. The trustee's job as a stockholder is to attend stockholder meetings, vote as an owner, and if necessary, raise shareholder derivative actions. That is pretty much it, and only those actions are judged by a trustee's fiduciary duty of loyalty, care, etc. The trustee's job as an operator of the business is judged, like any other business executive, under the business judgment rule, and the beneficiary of the trust may not have standing to complain about those particular actions. So, in fiduciary litigation, it is very important to fully understand what capacities a defendant is acting in and judge his or her conduct by the correct capacity and standard related to same.

F. Orders Denying Arbitration Are Immediately Appealable But Parties Must Wait Until After Arbitration to Appeal Orders Granting Arbitration

In *Fletcher v. Edward Jones Trust Co.*, a party sued a trust company for inappropriately distributing funds from an account, and the trial court granted the trust company's motion to compel the dispute to arbitration. No. 11-19-00017-CV, 2019 Tex. App. LEXIS 1280 (Tex. App.—Eastland February 21, 2019, no pet.). The plaintiff attempted to appeal the order granting the motion to compel arbitration. The court of appeals requested briefing from the parties regarding whether the court had jurisdiction over the appeal. The court noted that there was a statute that allowed interlocutory appeals from orders that deny arbitration, not from orders that compel arbitration. Tex. Civ. Prac. & Rem. Code Ann. § 171.098; *Chambers v. O'Quinn*, 242 S.W.3d 30, 31 (Tex. 2007). The court noted that the plaintiff filed a response that cited several cases involving mandamus proceedings, rather than direct appeals. The court held that it did not have jurisdiction over an appeal:

> Unless specifically authorized by statute, appeals may be taken only from final judgments. Section 171.098 authorizes an interlocutory appeal from an order "denying an application to compel arbitration" and an order "granting an application to stay arbitration." The order from which Appellant attempts to appeal is not a final judgment, nor is it an order

> staying arbitration or denying an application to compel arbitration. An interlocutory appeal from an order granting a motion to compel arbitration is not authorized. Because an interlocutory appeal is not authorized in this case and because a final, appealable order has not been entered, we lack jurisdiction and must dismiss this appeal.

Id.

Interesting Note: This case highlights the complete inequity involved in appellate courts' review of orders on motions to compel arbitration. An order denying a motion to compel arbitration can be appealed immediately, but an order granting same cannot. Apparently, the cost and expense of participating in a needless trial is unfair to a party seeking arbitration, but the cost and expense of participating in a needless arbitration is not unfair to a party fighting arbitration. The potential of a loss of contractual rights outweighs the loss of constitutional rights. This issue has been resolved by the Texas Legislature in the jurisdictional statutes that it passed.

There is an alternative method to seek appellate review of a trial court's order granting arbitration: mandamus relief. Where a trial court abuses its discretion in ruling on a matter and an appeal is inadequate, a court of appeals should grant mandamus relief. Potentially, a court of appeals could grant mandamus relief to reverse a trial court's order granting arbitration. But even where a trial court clearly abuses its discretion in granting a motion to compel arbitration, the Texas Supreme Court generally would deny mandamus relief: "In the context of orders compelling arbitration, even if a petitioner can meet the first requirement, mandamus is generally unavailable because it can rarely meet the second. If a trial court compels arbitration when the parties have not agreed to it, that error can unquestionably be reviewed by final appeal." *In re Gulf Expl., LLC*, 289 S.W.3d 836, 842 (Tex. 2009) (orig. proceeding). *See also In re Vantage Drilling Int'l*, 555 S.W.3d 629 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding) (appellate court denied a request for mandamus relief of a trial court's order compelling arbitration because the petitioner had adequate remedy by appeal). Therefore, in most cases, mandamus relief will also not be available.

Because of the statutes at play, the Texas Supreme Court could not hold that an appellate court has jurisdiction over an appeal from an order granting arbitration, but it certainly could hold that an appellate court could grant mandamus relief. Indeed, the Texas Supreme Court formerly held that an appellate court could grant mandamus relief to correct a trial court's error in denying arbitration, denying a motion to dismiss due to a forum-selection clause, or denying the impact of a contractual jury-waiver clause. It is not clear why the Texas Supreme Court is so ready to assist defendants in enforcing litigation-altering contractual clauses, but is so reluctant to support a plaintiff's constitutional rights, such as due process, due course, and the right to a jury trial.

G. Federal District Court Refuses To Dismiss Aiding And Abetting Breach Of Fiduciary Duty Claim Against A Law Firm

In *Milligan v. Salamone*, the Greenberg Taurig law firm represented the bankrupt company when it sued a president and board member. No. 1:18-CV-327-RP, 2019 U.S. Dist. LEXIS 41009 (W.D. Tex. March 14, 2019). Greenberg drafted an agreement that would cancel the president's employment contract, release him from his non-competition and non-solicitation obligations, and promise to pay him any accrued obligations (the "Cancellation Agreement"). A bankruptcy trustee later asserted claims against Greenberg for (1) breach of fiduciary duty, (2) aiding and abetting breaches of fiduciary duty, and (3) malpractice and negligence arising from its preparation of the Cancellation Agreement. Greenberg filed a motion to dismiss, which the bankruptcy court granted, and the trustee appealed to the district court.

The district court affirmed the dismissal of the direct breach of fiduciary duty claims because, although the trustee alleged a conflict of interest, there were no allegations that Greenberg represented the company and the president in his individual capacity at the same time. The court affirmed the dismissal of the professional negligence claim because the trustee did not allege sufficient allegations of proximate cause.

The court then turned to the aiding and abetting breach of fiduciary duty allegations. The district court reversed the bankruptcy court's dismissal of that claim. Regarding the legal basis for an aiding and abetting claim, the court stated:

> The Texas Supreme Court "has not expressly decided whether Texas recognizes a cause of action for aiding and abetting." However, Texas appellate courts have repeatedly held that "a party who knowingly participates in another's breach of fiduciary duty may be liable for the breach as a joint tortfeasor." "To establish a claim for knowing participation in a breach of fiduciary duty, a plaintiff must assert: (1) the existence of a fiduciary relationship; (2) that the third party knew of the fiduciary relationship; and (3) that the third party was aware that it was participating in the breach of that fiduciary relationship." It is the final requirement—Greenberg's knowledge that it was participating in a breach of fiduciary duty—that is before the Court now.

Id.

The trustee alleged that the president and the other board member created the Cancellation Agreement to allow them to compete with, and thereby destroy, the company. The court held that: "To have known that it was participating in Halder and Salamone's breach of fiduciary duty, Greenberg would have to have known that their actions were fraudulent, taken in bad faith, or constituted self-dealing." *Id*. The trustee alleged that Greenberg aligned with the president and board member during the board-control fight and drafted the agreement on its own initiative when it became clear that the company would not renew the president's contract. The bankruptcy court determined from these allegations that Greenberg did not plausibly know enough to participate in the directors' breaches of duty. The district court disagreed:

> Milligan has still plausibly alleged Greenberg's knowledge that the agreement was a violation of Salamone and Halder's fiduciary duties. Taking Milligan's other allegations as true, a factfinder could infer that Greenberg knew the Cancellation Agreement was not in Westech's interest, and therefore that in drafting the agreement, Greenberg was helping Halder self-deal on his way out of the company. As the Bankruptcy Court found, Greenberg could plausibly have known that Westech was not in breach of its obligations to Halder under Halder's employment contract, and that therefore the company would have owed Halder substantially less money if it had simply not renewed his contract. Greenberg would then have known that Westech was receiving nothing in exchange for releasing Halder from his restrictive covenants. Considered in context—the control battle, Salamone and Halder's alignment on the board, Halder's imminent contract expiration—a factfinder could infer that Greenberg knew that the Cancellation Agreement was a sweetheart deal for Halder. That Greenberg allegedly drafted the agreement on its own accord suggests that it was conscious of the reasons behind the agreement's structure. Greenberg's motion to dismiss Milligan's aiding-and-abetting claim—perhaps better characterized as a knowing-participation claim under Texas law—is therefore denied. The Bankruptcy Court's order is vacated as it pertains to that claim.

Id.

H. Fifth Circuit Affirmed Judgment For Breach Of Fiduciary Duty As Against A Company's Former Officer

In *Ebert v. Dejoria (In re Latitude Sols., Inc.*), a bankruptcy trustee sued a company's former officers for breach of fiduciary duty. No. 18-10382, 2019 U.S. App. LEXIS 13060 (5th Cir. April 30, 2019). The trustee asserted that LSI was a sham company set up to fail from the outset, and a vehicle for the officers to participate in a securities-fraud scheme known as "pump-and-dump," while the officers claimed LSI was legitimately founded to develop and commercialize technology capable of remediating contaminated water. LSI was a publicly traded company that began operating in 2009 and developed patented technology for treatment of wastewater in the oil and gas industry. LSI was a speculative venture that eventually filed for bankruptcy in November 2012. After a jury trial, the jury found that an officer, Cowan, breached his fiduciary duties to the company, and awarded damages. Cowan appealed.

The Fifth Circuit held that the trustee had to prove: 1) that a fiduciary relationship existed; 2) that Cohen breached his fiduciary duty to LSI; and 3) that Cohen's breach resulted in injury to LSI or benefitted him. The first element was not in dispute, and Cohen's fiduciary duty required a duty of loyalty and duty of care to LSI.

The trustee's case began by alleging an elaborate pump-and-dump scheme of LSI's stock and wide scale fraud, but by the time the case was submitted to the jury, her argument was based entirely on alleged improper conduct related to the Jabil contract. The court quoted from the trustee:

> [T]he fraud, the improper conduct, was entering into the Jabil contract in May 2011. That's what inevitably caused this company to collapse, that's what caused the damages, and that was the impetus of why or purpose of this fraudulent scheme was to enter into that Jabil contract, make a big splash, make it seem like this was a legitimate business when it had no hope for survival.

Id.

The court noted the following evidence to support the trustee's claim:

> Cohen took on Appel as an advisor and spoke to him daily; Cohen sent Appel non-public information, including lists of shareholders and stock sales on a weekly basis; Cohen dealt personally with Jabil; prior to the Jabil contract, Cohen had not told anyone at Jabil about Appel's conviction for securities fraud manipulation; LSI had no idea whether the machinery from the Jabil contract would work; LSI had no business plan, or leads to monetize the equipment from the contract, but Cohen and Appel drafted LSI press releases together to generate good news and publicize it; and while still a director, Cohen sold his stock in LSI for $400,000 because he "needed to have some money in the bank."

Id. The court noted that the officer contended that his conduct was protected by the business judgment rule:

> In Texas, the "rule . . . protects corporate officers and directors, who owe fiduciary duties to [a] corporation[] from liability for acts that are within the honest exercise of their business judgment and decision." Sneed v. Webre, 465 S.W.3d 169, 173 (Tex. 2015) (citation omitted). Negligent, unwise, inexpedient, or imprudent actions are protected so long as "the actions [are] 'within the exercise of their discretion and judgment in the development or prosecution of the enterprise in which their interests are involved.'" Id. at 178 (quoting Cates v. Sparkman, 73 Tex. 619, 11 S.W. 846, 849 (Tex. 1889)) (footnote omitted). The jury charge, however, instructed the jury on both what is required to show a breach of fiduciary duty, along with the parameters of the business judgment rule. Given

> Cohen's actions, a reasonable jury could weigh the evidence, consider the business judgment rule, but conclude that Cohen breached his fiduciary duty to LSI.

Id. The court then disagreed with an argument that the trustee had to have expert testimony regarding the alleged pump-and-dump securities fraud scheme. The court also found that there was sufficient evidence to support the jury's damages findings. "Considering the jury found Cohen liable for a breach of fiduciary duty based on an alleged pump-and-dump scheme and improperly propping up LSI by entering the Jabil contract for nefarious purposes, there is legally sufficient evidence for a reasonable jury to award $400,000 in damages." *Id*.

I. Court Affirms Judgment Against Beneficiary/Limited Partner Against Partnership Based On Aiding And Abetting Breach Of Fiduciary Duty Claim Against Partnership For Distributions To Trusts/Limited Partners

In *Marshall v. Ribosome L.P.*, a beneficiary of a trust sued a limited partnership of which the trust was a partner. No. 01-18-00108-CV, 2019 Tex. App. LEXIS 3787 (Tex. App.—Houston [1st Dist.] May 9, 2019, no pet. history). The beneficiary asserted that the limited partnership aided and abetted a breach of fiduciary duty by making distributions to the trustee, when the trustee was refusing to make distributions of income to the beneficiary. The trial court granted summary judgment for the partnership, and the beneficiary appealed.

The court of appeals held that an aiding and abetting breach of fiduciary duty claim rests on an underlying breach of such a duty. The beneficiary claimed that the trustee had breached her fiduciary duty by failing to make distributions to him of trust income. The court rejected that theory because the trustee had broad discretion to make distributions:

> Under the Trusts' language, however, the Trustee has absolute, unfettered discretion over the decision to accumulate or distribute the Trust income. *See, e.g., Caldwell v. River Oaks Tr. Co.*, No. 01-94-00273-CV, 1996 Tex. App. LEXIS 1798, 1996 WL 227520, at *12 (Tex. App.—Houston [1st Dist.] May 2, 1996, writ denied) (mem. op.) ("A power is considered discretionary if the trustee may decide whether or not to exercise it."). In her "sole discretion," the Trustee "may accumulate or distribute income accruing for the benefit of the beneficiaries," and "determin[e] the time or frequency of any distributions" as well as "the manner, time, circumstances, and conditions of the exercise of any right, power or authority vested in the Trustee."
>
> Preston claims that his breach of fiduciary duty claim is supported by evidence that Elaine acted unfairly, suggesting that she knew he had come to depend on the distributions and that she had treated his brother differently under the separate trusts that benefit him. Preston labels this

> perceived unfairness as “bad faith”; however, a decision to accumulate interest—which the plain language of the Trusts expressly allows—and the differences in treatment between the beneficiaries of different trusts does not raise a fact issue showing a breach of fiduciary duty. Neither of the Trusts contains language limiting the trustee’s discretionary authority, such as by declaring a purpose to provide living expenses or requiring the distributions to Preston to be equal to those made to Pierce, Jr. under the trusts that benefit him. *See, e.g., Doherty v. JPMorgan Chase Bank, N.A.*, No. 01-08-00682-CV, 2010 Tex. App. LEXIS 2185, 2010 WL 1053053, at * (Tex. App.—Houston [1st Dist.] Mar. 11, 2010, no pet.) (mem. op.) (holding that trustee erred in denying funds for modification of bathroom in daughter’s home where beneficiary had moved after suffering stroke that left her physically impaired; trust required disbursement of funds on beneficiary’s request to provide for her “comfort, health, support, or maintenance”). None of the circumstances raises a fact issue as to whether Elaine abused the broad discretionary authority conferred by the Trusts.

Id. The court also noted that there was no evidence of loss or injury to the beneficiary or the trusts or of benefit to the trustee resulting from the decision to accumulate the income instead of distributing it. The court stated: “Preston claims that the withholding of Trust income “causes [him] damages equal to the distributions that were wrongly withheld.” *Id*. But the Trusts do not give Preston any right to override the Trustee’s decisions about how to handle the trust income. And, as he remains the beneficial owner of the interest income accumulated in the Trusts, he is not entitled to a damages award that would amount to a double recovery.” *Id.*

The beneficiary claimed that the partnership aided and abetted the trustee’s decision to accumulate the trust income by making distributions to the trustees, as their legal owners, rather than directly to him, as the trusts’ beneficiary. The court first discussed the concept of such a claim:

> The Texas Supreme Court observed that, if it were to recognize a cause of action for aiding and abetting tortious conduct, “[c]ourts should look to the nature of the wrongful act, kind and amount of assistance, relation to the actor, defendant’s presence while the wrongful act was committed, and defendant’s state of mind.” *First U. Pentecostal*, 514 S.W.3d at 225 (citing *Juhl v. Airington*, 936 S.W.2d 640, 644-45 (Tex. 1996)). Such a claim’s purpose would be “to deter antisocial or dangerous behavior.” *Juhl,* 936 S.W.2d at 644; *see also W. Fork Advisors, LLC v. SunGard Consulting Servs., LLC*, 437 S.W.3d 917, 921 (Tex. App.—Dallas 2014, pet. denied) (aiding and abetting claim requires actor, with unlawful intent, to give substantial assistance and encouragement to wrongdoer in tortious act).

Id. The court then rejected the beneficiary’s claim under the facts of this case:

> Here, the allegedly wrongful conduct—Ribosome's distribution of proceeds to the Trusts, as limited partners, rather than to Preston, their beneficiary—is required by Ribosome's partnership agreement. Ribosome generally distributes profits to its limited partners according to the terms of its partnership agreement. It cannot deviate from those terms without direction from its general partner and the limited partner that is legally entitled to receive the share of profits. When the Trustee expressly revoked any authorization that may previously have existed for Ribosome to distribute the proceeds it owed to the Trusts directly to the Trusts' beneficiary, Ribosome lost any authority to distribute the Trusts' profits directly to Preston. No evidence shows that Ribosome gave the Trustee substantial assistance and encouragement to revoke that authorization, or that Ribosome could have acted differently had it believed the Trustee acted wrongfully by doing so. Because Ribosome's distribution of profits in compliance with its partnership agreement does not constitute conduct in furtherance of a breach of fiduciary duty, the trial court properly granted summary judgment on Preston's aiding and abetting claim.

Id.

Finally, the court rejected the beneficiary's accounting claim against the partnership. The court acknowledged that the beneficiary was a limited partner in his individual capacity. However, the court held that a limited partner does not generally have a right to an accounting against a partnership:

> An accounting is available when (1) the parties have a contractual or fiduciary relationship; (2) the facts and accounts are "so complex [that] adequate relief may not be obtained at law"; and (3) standard discovery procedures cannot provide adequate relief at law. *T.F.W. Mgmt. v. Westwood Shores Prop. Owners Ass'n*, 79 S.W.3d 712, 717-18 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). In its summary-judgment motion, Ribosome argued that its partnership agreement identified any rights Preston had as to Ribosome, Ribosome had provided him with all the financial information that he was entitled to under the partnership agreement, and the agreement did not entitle Preston to a common-law accounting. Ribosome's partnership agreement identifies the rights and duties of the limited partners and their duties in relation to the partnership. With respect to financial information, the partnership agreement gives the limited partner the right to inspect Ribosome's books and records at reasonable times. It does not, however, include any additional right to an accounting, and Preston does not identify any other source that gives him that right. *See* Tex. Bus. Orgs. Code § 153.105 (explaining that rights of limited partners may be created only by certificate of formation, partnership agreement, other statutory provisions, or other limited partnership provisions). Preston further argues that Ribosome owes him a fiduciary duty to provide an accounting because of his limited partner status. He cites no authority for this argument and the Business

> Organizations Code makes clear any fiduciary powers or liabilities belong not to the limited partnership, but to its general partner. *See id*. § 153.152. Because the partnership agreement does not require Ribosome to comply with a limited partner's demand for an accounting and Ribosome does not owe Preston an independent duty that would give rise to a right to an accounting, the trial court did not err in granting summary judgment on this claim.

Id. The court affirmed the summary judgment regarding the accounting claim.

J. Federal District Court Holds That A Former Director Of Nonprofit Did Not Have Standing To Sue For The Board's Breach Of Fiduciary Duty And That Employers Do Not Owe Fiduciary Duties To Employees

In *Garcia v. Communities in Schools of Brazoria County*, a director sued a nonprofit's board for breach of fiduciary duty arising from his removal. 2019 U.S. Dist. LEXIS 97017 (S. D. Tex. June 10, 2019). The board alleged that he did not have standing to bring such a claim, and the district court agreed:

> Garcia lacks standing to bring a derivative claim for the Joint Venture Board's alleged breach of fiduciary duty or ultra vires acts. Under Texas law, a shareholder of a for-profit corporation may bring a derivative suit under the Business Organizations Code. *Tran v. Hoang*, 481 S.W.3d 313, 316 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (citing Tex. Bus. Orgs. Code §§ 21.551-21.563). However, "[n]o parallel provision confers this status upon the members of a nonprofit who are not otherwise authorized to sue by the organization itself." *Id.* Garcia's former executive director position does not give him standing to assert these claims.

Id. (citing *Swain v. Wiley College*, 74 S.W.3d 143 (Tex. App.—Texarkana 2002, no pet.)). The court also held that the director failed to state a claim for breach of a fiduciary duty owed to him as an employee because Texas law does not recognize a fiduciary duty or a duty of good faith and fair dealing owed by an employer to an employee. *Id*. (citing *Beverick v. Koch Power, Inc*., 186 S.W.3d 145, 153 (Tex. App.—Houston [1st Dist.] 1997, pet. denied) and *City of Midland v. O'Bryant*, 18 S.W.3d 209, 216 (Tex. 2000)).

V. Potpourri Issues

A. Court Affirms Judgment That Power-Of-Attorney Holder Converted Funds By Withdrawing Them From A Joint Account

In *Fletcher v. Whitaker*, a brother withdrew $25,000 from a joint bank account while the owner of the funds (decedent) was still alive. No. 02-17-00138-CV, 2018 Tex. App. LEXIS 8329 (Tex. App.—Fort Worth October 11, 2018, no pet.). The parties to the joint account were the decedent and his sister in law. The brother was the decedent's agent under a power-of-attorney document and had the authority to do banking transactions. That relationship also meant that the brother owed fiduciary duties to the decedent. The decedent's sister in law sued the brother for conversion of the funds he withdrew from the account. The trial court determined in a bench trial that the brother wrongfully exercised dominion and control over the money to the exclusion of, or inconsistent with, the sister in law's rights. The brother appealed.

The court of appeals first discussed a conversion claim, which is the wrongful exercise of dominion and control over another's property in denial of or inconsistent with one's rights. The court mentioned that money is subject to conversion only when it can be identified as a specific chattel but not if it is an indebtedness that can be discharged by the payment of money. "To qualify as a specific chattel, the money must be (1) delivered for safekeeping, (2) intended to be kept segregated, (3) substantially in the form in which it is received or in an intact fund, and (4) not the subject of a title claim by its keeper." *Id*. The brother, however, apparently did not raise an issue about whether the sister in law could assert a conversion claim due to the fact that she was only seeking money.

Rather, the brother contended that the evidence was insufficient to show that he unlawfully and without authorization assumed or exercised control over the sister in law's property to the exclusion of, or inconsistent with, her rights as owner. He argued that the sister in law did not own the funds because the decedent was the sole source of them and the withdrawal was legal and authorized because the power of attorney allowed the brother to undertake banking transactions.

A bank employee testified that the sister in law was a joint owner and that each joint owner on the account had "full rights to access" the funds. The court concluded that this was some evidence that the sister in law had the right to possess the joint account's funds. Regarding whether the brother unlawfully and without authorization assumed and exercised control over the funds to the exclusion of, or inconsistent with, the sister in law's rights, the court noted that the brother admitted that when he withdrew the money, he knew (1) that the account was a joint account with right of survivorship, (2) that the sister in law had full access to the account, and (3) that she would own the funds when the decedent died. The brother further admitted that he used the power of attorney to withdraw the money to ensure that the sister in law did not get the money and that he deposited the check into his own checking account. There was no evidence that the brother had used the funds for the decedent's care. The brother did not dispute that he breached a fiduciary duty by withdrawing the money and using it for his benefit. The court of appeals affirmed the trial court's judgment and held the trial court could have reasonably concluded that when the brother withdrew the money from the joint account, the brother was not acting in the decedent's interests but was using the power of attorney to wrongfully exercise dominion and control over the money to the exclusion of, or inconsistent with, the sister in law's rights.

Interesting Note: The court of appeals's opinion affirming the trial court's judgment was based on the assumption that a party to a joint account had the authority to possess the funds in the account. This is only partially true. It is true that either party to a joint account has the authority to withdraw or encumber the account. Tex. Est. Code §113.251; *In re Marriage of McNelly*, No. 14-13-00281-CV, 2014 Tex. App. LEXIS 5193, 2014 WL 2039855 (Tex. App.—Houston [14th Dist.] May 15, 2014, pet. denied); *McConathy v. McConathy*, No. 05-95-01036-CV, 1997 Tex. App. LEXIS 1592 (Tex. App.—Dallas April 1, 1997, no writ) (not design. for pub.); *Fain v. Texas Commerce Bank N.A.*, No. 05-95-01085, 1996 Tex. App. LEXIS 5860 (Tex. App.—Dallas December 4, 1996, writ denied). Therefore, a third party can rely on the fact that a party to an account has authority to dispose of the funds. *Fain*, 1996 Tex. App. LEXIS 5860. But, that does not answer the question: between the parties to the account, who owns the funds?

Joint accounts are considered "multiple-party accounts." Tex. Est. Code §113.004. A "party" to such an account is defined as "a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account." *Id*. at Tex. Est. Code §113.002. "During the lifetime of all parties to a joint account, the account belongs to the parties in proportion to the net contributions by each party to the sums on deposit unless there is clear and convincing evidence of a different intent." *Id.; see Bechem v. Reliant Energy Retail Servs., LLC,* No. 14-13-00729-CV, 2014 Tex. App. LEXIS August 5, 2014 (Tex. App.—Houston [14th Dist.] August 5, 2014, no pet.). A party's net contribution is "the sum of all deposits made to that account by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance." *Id*.

For example, in *Nipp v. Broumley*, the case involved whether an estate or the son of the decedent owned funds that were in CDs that the son withdrew days before the decedent's death. 285 S.W.3d 552 (Tex. App.—Waco 2009, no pet.). Walterine Broumley purchased three CDs. They were payable to her or Terry Broumley, her son. Eight days before her death, Terry cashed in all three CDs, worth about $76,000. Walterine Broumley's daughter, Nipp, learned about the existence of the CDs while caring for her mother. After Nipp discovered that the CDs were not listed on the estate's inventory, she filed suit seeking a declaration that the CDs were property of the estate and an order requiring Terry to reimburse the estate for their value. The trial court ruled for Terry after a bench trial. Nipp appealed. The court of appeals began its analysis by discussing the rules for ownership over the money in accounts. After citing various Probate Code and UCC provisions, the court of appeals noted that it was undisputed that Mrs. Broumley was the sole source of the funds in the CDs, and therefore, she retained beneficial ownership of these funds at the time of the withdrawal unless Terry Broumley could prove that she gifted these funds to him. The court determined that there was not sufficient evidence to support a gift: the mother retained control over the funds until the date Terry withdrew them. Thus, the court concluded that no reasonable factfinder could have formed a firm belief or conviction that an immediate and unconditional divestiture of his mother's ownership occurred on the occasion of their last conversation regarding her intentions about the CDs. Therefore, the court reversed the trial court's judgment awarding the funds to Terry and rendered that the funds from the CDs were the property of the estate.

Indeed, a party withdraws money from a joint account without permission from the true owner, then that party may be criminally charged and convicted of theft. *See Gurrola v. State*, No. 08-01-00107-CR, 2003 Tex. App. LEXIS 8913 (Tex. App.—El Paso October 16, 2003, pet. ref'd) (court affirmed niece's conviction for felony theft from withdrawing aunt's funds from joint account).

So, regarding a bank's liability to the account owners, it has the right to rely on a joint account holder's right to withdraw money from the account. However, as between the parties to a joint account, those parties own the funds in the account according to their contributions to the account. So, if party A to a joint account withdraws funds that were deposited by Party B, without the Party B's consent, Party A commits theft. In the case above, it was undisputed that the decedent contributed the funds in the account. While he was alive, the sister in law did not have a right to withdraw those funds for her own benefit without the consent of the decedent. So, there is a good argument that the trial court erred in finding that the brother converted funds owned by the decedent as against the sister in law. The claim of conversion would properly belong to the decedent's estate because, at the time of the conversion, the decedent was the sole party who had right to possess his money.

Alternatively, this is a perfect example of why Texas needs a tortious interference with inheritance claim. The brother tortiously interfered with the sister in law's right to obtain the decedent's funds once the decedent died. Unfortunately, the Texas Supreme Court ruled that Texas does not recognize such a claim in any circumstance even if that leaves people who are damaged by others with no remedy.

B. Court Held That A Power Of Attorney Agent Had Authority To Sue On Behalf Of The Principal And Affirmed A Finding That A Mineral Deed Was Procured By Fraud And Undue Influence

In *Cortes v. Wendl*, an elderly woman signed a deed conveying her mineral rights to two individuals. No. 06-17-00121-CV, 2018 Tex. App. LEXIS 4457 (Tex. App.—Texarkana June 20, 2018, no pet.). When the woman's nurse and friend learned of the transaction, she obtained a power of attorney and filed a lawsuit on the woman's behalf, claiming that the mineral deed was executed as a result of duress, coercion, and undue influence, and that no consideration was paid for the conveyance. The defendants alleged that the plaintiff had no capacity to sue. The court of appeals affirmed the trial court's implied finding that the plaintiff had capacity:

> "A power of attorney is a written instrument by which one person, the principal, appoints another person, the attorney-in-fact, as agent and confers on the attorney-in-fact the authority to perform certain specified acts on behalf of the principal." An agent has express authority to take all actions designated by the principal. An agent has implied authority "to do whatever is necessary and proper to carry out the agent's express powers." Wendl introduced the durable power of attorney executed by Hardy as an exhibit, without objection. The power of attorney explicitly granted Wendl: "[a]uthority to initiate a claim and litigation, if necessary; negotiate; make decisions; and pursue the legal claim [Hardy] may have against Johnny Coutts, Charles [Randy] Hardy, and/or Isabel Cortes, or anyone else involved, and to pursue those claims or litigation as she sees fit for [Hardy] and/or [Hardy's] estate. [Wendl] is further given specific authority to negotiate and make all decisions on [Hardy's] behalf including accepting or rejecting offers of settlement, contracting for and payment of attorney's fees, and costs." The record supports the trial court's implied finding that Wendl, in her capacity as agent and attorney-in-fact for Hardy, had the capacity to bring the lawsuit on Hardy's behalf.

Id.

The court then analyzed whether there was sufficient evidence to establish that the deed was procured by undue influence. "In deciding whether there was undue influence in executing a deed, the court considers three factors: (1) the existence and exertion of an influence; (2) whether the influence operated to subvert or overpower the grantors' minds when they executed the deed; and (3) whether the grantors would not have executed the deed but for the influence." The court stated:

> [A]lthough undue influence implies the existence of sufficient mental capacity to execute a deed if not hindered by another's overriding influence, "weakness of mind and body, whether produced by infirmities of age or by disease or otherwise, may be considered as a material circumstance in determining whether or not a person was in the condition to be susceptible to undue influence." Further, a beneficiary's voluntary participation in the preparation or signing of a deed can be one of the considerations used to determine if there was undue influence, as can an unnatural disposition of property by the grantor, Long.
>
> Cortes and Fernandes visited Hardy monthly to deliver the note payment on the property previously owned by Hardy. During these visits, they continually complained to Hardy that the property was no good without the minerals and that they wanted to purchase the minerals. These continual complaints and entreaties caused the elderly Hardy to feel pressured, frightened, and nervous. They were making her a "nervous wreck." They often met with Hardy one-on-one in her room at the assisted living facility and made these complaints to her privately. This frightened Hardy, and

> she began to lock the door to her room during the day, as she thought Cortes and Fernandes might hurt her. Hardy testified to these things and further testified that, when she failed to relent, Cortes and Fernandes told her that the IRS was going to come after her if she did not sell the minerals. Hardy was told that she needed to sign over her mineral rights to Cortes so that she would not be in trouble. Hardy testified that she felt that she had to do something because the IRS was coming after her. Threats about the IRS caused Hardy to become so nervous that she was shaking, and she thought she was going to have seizures, as she did after her husband passed away. The evidence further suggests that Hardy was essentially tricked into going alone with Cortes to the title company in Longview to sign the mineral deed. Hardy testified that she was not paid anything for her mineral rights, and she was not aware that the deed provided that Cortes was entitled to all past royalties not yet cashed out—to include the royalty payment from Sabine Oil & Gas Corporation. Hardy's testimony alone is evidence of the existence and exertion of Cortes' and Fernandes' influence.
>
> ….
>
> Jimmy Don Reedy, who executed the 2010 agreement with Hardy and Randy to excavate topsoil from the property, testified that he removed less than ten fourteen-yard loads of topsoil from the property. According to Reedy, the removal of that quantity of topsoil is not enough to cause any kind of damage to the land. The topsoil was not removed over a five-year period. Instead, Reedy testified that it was removed fairly near the time of the agreement. In 2010, Fernandes asked Reedy to leave the property, and he did so. According to Reedy, if Cortes told Hardy that the land was no good because the topsoil had been removed, that would be false.

Id. The court of appeals affirmed the trial court's rescinding the mineral deed after finding that the evidence was legally and factually sufficient to support the trial court's implied findings.

C. Texas Supreme Court Held Bank Was Not Liable For Fraudulent Withdrawals From An Account Due To UCC 4.406

In *Compass Bank v. Calleja-Ahedo*, an identity thief drained the plaintiff's bank account through a series of fraudulent transactions in 2012 and 2013, and the plaintiff sued his bank to recover the stolen funds. No. 17-0065, 2018 Tex. LEXIS 1314 (Tex. December 21, 2018). The trial court granted summary judgment for the bank under Section 4.406 of the Business and Commerce Code. The court of appeals reversed and rendered judgment for the plaintiff. 508 S.W.3d 791 (Tex. App.—Houston [1st Dist.] 2016, reversed). The bank appealed to the Texas Supreme Court.

The Court acknowledged that a bank can be liable to its account holder for losses incurred when an imposter takes over the account. *Id*. (citing *Am. Airlines Emps. Fed. Credit Union v. Martin*, 29 S.W.3d 86, 95 (Tex. 2000)). However, Section 4.406 provides an exception to this liability and describes consequences that follow when a bank "sends or makes available to a customer" a monthly bank statement showing account transactions. The plaintiff argued, and the court of appeals held, that the statements sent to the imposter were not sent "to a customer" as contemplated by subsection 4.406(a), and therefore, it did not apply. The imposter had contacted the bank and had the statements sent to a different address.

The Texas Supreme Court noted that Section 4.406 applies when the bank sends or makes available a statement to the customer. The statements were made available:

> As in the Lenk cases, our conclusion in this case that the Bank made the statements available to Calleja is dictated by the particular circumstances present here. Calleja stopped receiving bank statements a year and a half before he reported a problem. He does not dispute that he could have called the Bank at the 1-800 number provided on his previous statements to ask why the statements stopped arriving. He does not dispute that he could have requested copies of any of the statements by phone, or that he could have obtained copies by visiting any bank branch. He also does not dispute that he could have received copies of the statements or their equivalent by setting up online banking, which the Bank offered for free. Finally, he does not dispute that he failed for over a year to ascertain whether his brother continued to receive mailed statements. Having every reason to notice the paper statements were no longer coming and having several avenues of inquiry available to him, he made no effort to monitor his account until many months after the imposter drained it.
>
> …
>
> When a bank customer waits more than one year after a statement has been made available to report an unauthorized signature reflected on the statement, subsection 4.406(f) protects banks from liability "[w]ithout regard to care or lack of care of either the customer or the bank." … Applying subsection 4.406(f) to Calleja's claims, the bulk of the transactions he challenges were listed on his bank statements more than one year before he discovered and reported the transactions. Subsection 4.406(f) bars his claims against the Bank regarding these unauthorized withdrawals.

Id. However, the Court held that Subsection 4.406(f) did not bar claims for unauthorized charges that occurred less than one year before statements reflecting the charges were made available: "some small transactions were recorded in statements made available to Calleja less than one year before he notified the Bank of the fraud. Subsection 4.406(f) does not apply to this small percentage of Calleja's losses." *Id*.

The Court then held that recovery of these remaining amounts was nevertheless barred by subsection 4.406(d)(2), which provides that, after an initial unauthorized withdrawal, subsequent withdrawals "by the same wrongdoer" cannot be recovered from the bank if "the customer had been afforded a reasonable period of time, not exceeding 30 days, in which to examine the item or statement of account and notify the bank." *Id*. Because the same imposter drained the funds, the bank could not be liable for the newer charges under subsection 4.406(d)(2). The Court held that the trial court correctly concluded that section 4.406 bars the plaintiff's claims. The Court reversed for the bank, but remanded to the court of appeals, the issue of whether the trial court should not have awarded attorney fees to the Bank as that was not decided by the court of appeals in the earlier opinion.

D. Court Holds That There Was Insufficient Evidence To Establish That Account Beneficiary Designations Were Executed As A Result Of Undue Influence

In *Fielding v. Tullos*, an administrator of a decedent's estate brought claims against the decedent's housekeeper for undue influence and other related claims arising from the execution of new account beneficiary designations for certain accounts holding around $1.7 million dollars. No. 09-17-00203-CV, 2018 Tex. App. LEXIS 7136 (Tex. App.—Beaumont August 30, 2018, no pet.). The defendant filed a motion for summary judgment, which the trial court granted. The plaintiff appealed. The court of appeals first discussed the general concept of undue influence:

> The party contesting a will or payable-on-death provision or beneficiary designation based on a claim of undue influence bears the burden of proving undue influence. Undue influence is a form of fraud, and the term describes the wrongful use of influence, such as through force, intimidation, duress, or deception, to cause the execution of a will that is contrary to the testator's desire for the distribution of his or her property after death. In an undue influence claim, the evidence must show not only the presence of the opportunity to influence, but also that improper influence was exerted on the decedent at the time the beneficiary designation or will was made. Simply because the beneficiary had a close relationship with the decedent or otherwise was present for the execution of an instrument, it does not establish proof of undue influence. A person may request or entreat another person to create a favorable dispositive instrument, but unless the entreaties are shown to be so excessive as to subvert the maker's will, they do not constitute undue influence that invalidates the will. The contestant must prove the existence and exertion of an influence that subverted or overpowered the testator's mind when the testator executed the document so that the testator executed the

document in a manner that he otherwise would not have executed but for such influence.

….

In Texas, the rules guiding a determination of the existence of undue influence apply substantially alike to wills, deeds, and other instruments. To set aside an instrument based on undue influence, the party claiming undue influence must prove (1) the existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the property owner at the time the instrument was executed; and (3) the execution of an instrument that the property owner would not have executed but for such influence.

To satisfy the first element, the party contesting an instrument must show that an undue influence existed and was exerted. The contesting party focuses on facts showing the opportunities for the exertion of the alleged influence, the circumstances of the drafting and execution of the instrument, the existence of a fraudulent motive, and whether the person executing the instrument was habitually under the control of another. The exertion of influence, however, cannot be inferred from opportunity alone, such as might result from taking care of the property owner or seeing to his needs. There must be proof showing both that the influence existed and that it was exerted.

To satisfy the second element, the contesting party must show that the exertion of the influence subverted or overpowered the mind of the property owner at the time he signed the instrument. The focus of this element is on the property owner's state of mind and evidence relating to his ability to resist or susceptibility to the influence of another, such as mental or physical infirmity. But evidence that a property owner was susceptible to influence or incapable of resisting it does not prove that his free will was in fact overcome when the instrument or act of the owner was made. Likewise, a close relationship or the fact the other party was a caretaker would not be sufficient to show undue influence. Influence is "undue" when the property owner's volition is destroyed and the resulting instrument expresses the wishes of the one exerting the influence. Undue influence may include force, intimidation, duress, persistent requests or demands, or deceit.

To meet the third element, the contesting party must show that the property owner would not have executed the challenged instrument but for the undue influence. In general, this element focuses on whether the instrument makes an unnatural disposition of property. A disposition may be unnatural, for example, if it excludes a property owner's natural heirs or favors one heir at the expense of others who ordinarily would receive equal treatment. Even so, the disinheritance of close relatives or loved

> ones is not necessarily unnatural. A property owner's preference for one beneficiary over others may be unnatural if the record does not disclose a reasonable basis for the preference or contains proof that calls the preference into question or discredits it.

Id. The plaintiff contended that there was either a formal or informal fiduciary relationship between the decedent and the defendant such that there was a presumption of undue influence that shifted the burden of proof onto the defendant to prove she did not engage in undue influence. The court of appeals discussed the shifting burdens associated with this presumption:

> Fielding had the burden of establishing that a fiduciary relationship existed between Tullos and Charles. Once a contestant presents evidence of a fiduciary relationship, a presumption of undue influence may arise and the other party then bears the burden to come forward with evidence to rebut the presumption. Such a rebuttable presumption shifts the burden of producing evidence to the party against which it operates. Once evidence contradicting the presumption has been offered, the presumption is extinguished. The case then proceeds as if no presumption ever existed…. Assuming without deciding that Tullos owed Charles a fiduciary duty, it would not shift the ultimate burden of proof in the case to Tullos, but it would invoke the application of a rebuttable presumption. Tullos could rebut the presumption by coming forward with evidence showing the fairness of the transaction. If Tullos's summary judgment evidence contradicted the presumption, the presumption was extinguished. Plaintiff retained the ultimate burden of proof on her claims.

Id.

The court of appeals held that the evidence supported the trial court's granting of summary judgment for the defendant:

> Both Hargroder and Ridley testified that they observed Charles to be in control of his finances and accounts. By contrast, the heirs could not provide any personal knowledge of Tullos's alleged undue influence over Charles. Although an opportunity for influence may have existed because of the close relationship between Tullos and Charles and because of the degree of care provided by Tullos, opportunity alone is not sufficient to prove undue influence without evidence of exertion of influence. The record gives no indication of force, intimidation, duress, persistent requests or demands, or deceit by Tullos. Consequently, the trial court would not have erred in concluding that summary judgment evidence offered by Tullos rebutted any presumption of undue influence.
>
> There also was no evidence that Charles would not have designated Tullos as his beneficiary but for the alleged undue influence. Hargroder testified that Charles wished to designate Tullos as his beneficiary in

> recognition of the care she had provided, and Ridley testified that Charles assured him that he wished to designate Tullos as the beneficiary. The heirs testified that they had little contact with Charles and provided little care for him, including a lack of involvement with Charles during Hurricanes Rita and Ike. As a result, we cannot say that material issues of fact exist on Plaintiff's claims for undue influence. Even assuming without deciding that a fiduciary relationship existed between Charles and Tullos, and after considering the evidence in the light most favorable to the nonmovant, we conclude that Tullos was entitled to a summary judgment on the undue influence claim. Tullos established the fairness of the designations and rebutted any presumption of undue influence.

Id. The court of appeals affirmed the trial court's judgment for the defendant.

E. Texas Supreme Court Holds That A Limitation-Of-Liability Clause Applied To Eliminate A Punitive Damage Claim Where A Fraud Plaintiff Wanted To Enforce The Contract But Refused To Address If The Holding Would Similarly Apply To Breach of Fiduciary Duty Claim

In *Bombardier Aero. Corp. v. Spep Aircraft Holdings*, a plaintiff who had purchased an aircraft sued the defendant for fraud associated with representations regarding whether the aircraft was new or used. No. 17-0578, 2019 Tex. LEXIS 101 (Tex. February 1, 2019). The purchase agreement stated: "Flexjet will not be liable to either customer for any indirect, special, consequential damages or punitive damages arising out of any lack or loss of use of any aircraft, equipment, spare parts, maintenance, repair or services rendered or delivered under this purchase agreement." *Id*. The plaintiff later found that parts of the aircraft were used, and sued for breach of contract and fraud. The jury found for the plaintiff and awarded actual damages and punitive damages. The court of appeals affirmed.

The Texas Supreme Court reversed the award of punitive damages. The Court held that because the plaintiff did not seek to rescind the purchase agreement, and instead sought damages while enforcing the purchasing agreement, that the plaintiff could not evade the reach of the limitation of liability clause:

> As the plaintiffs point out, we have held that "fraud vitiates whatever it touches." … We have never held, however, that fraud vitiates a limitation-of-liability clause. We must respect and enforce terms of a contract that parties have freely and voluntarily entered. And the plaintiffs "cannot both have [the] contract and defeat it too." Rather than seeking rescission of the agreements based on Bombardier's fraudulent conduct, the plaintiffs have tried to enforce the agreements, seeking an award of actual damages, while at the same time seeking to strike the limitation-of-liability clauses to receive an exemplary damages award. … Bombardier and the purchasing parties—sophisticated entities represented by attorneys in an

> arms-length transaction—bargained for the limitation-of-liability clauses to bar punitive damages. In balancing the competing interests between protecting parties from "unintentionally waiving a claim for fraud" and "the ability of parties to fully and finally resolve disputes between them," we believe parties can bargain to limit exemplary damages. See id. We note that the purchasing parties did not waive a claim for fraud; they only waived the ability to recover punitive damages for any fraud. As such, the valid limitation-of-liability clauses must stand.

Id.

The plaintiff could have, but did not assert a breach of fiduciary duty claim because the parties' agreement gave the defendant power of attorney to inspect and accept the plane. "An agreement creating a power of attorney creates a fiduciary relationship." *Id*. The Court noted that the fiduciary may be punished for breaching these duties by an award of exemplary damages. The Court stated: "Because there is no breach of fiduciary duty claim and the plaintiffs did not seek exemplary damages on that basis, we decline to decide whether a breach of fiduciary duty for fraudulent conduct would affect the validity of a limitation-of-liability clause." *Id*. The Court cited to its previous opinion in *E.R.I. Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 870 (Tex. 2010), and noted that it allowed "forfeiture as an equitable remedy for breach of fiduciary duty in addition to actual damages for fraud and breach of contract, but declining to evaluate the award in light of rules applicable to punitive damages." This reference is important because in *Swinnea*, the Court held that a trial court had broad discretion to award disgorgement damages (including contractual consideration) as a remedy for a breach of fiduciary duty. So, the Court left the door open to a scenario where a contract is enforced, actual damages awarded for breach of fiduciary duty, and an award of punitive damages despite the existence of a limitation-of-liability clause. The author assumes that the theory would be that a trial court could decide to not enforce a limitation-of-liability clause in equity (as a disgorgement of contractual consideration) while still otherwise enforcing a contract.

F. Texas Supreme Court Holds That Conspiracy Theories Have The Same Statute Of Limitations As Their Underlying Torts

Joint liability for breach of fiduciary duty claims is a rather confusing area of law in Texas. Texas courts have discussed three different theories that allow for joint liability: knowing participation in breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and conspiracy.

There is a claim for knowing participation in Texas. *See Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942). The general elements for a knowing-participation claim are: 1) the existence of a fiduciary relationship; 2) the third party knew of the fiduciary relationship; and 3) the third party was aware it was participating in the breach of that fiduciary relationship. *Meadows v. Harford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007).

There may be a recognized aiding-and-abetting breach-of-fiduciary-duty claim in Texas. The Texas Supreme Court has stated that it has not expressly adopted a claim for aiding and abetting outside the context of a fraud claim. *Ernst & Young v. Pacific Mut. Life Ins. Co.,* 51 S.W.3d 573, 583 n. 7 (Tex. 2001); *West Fork Advisors v. Sungard Consulting,* 437 S.W.3d 917 (Tex. App.—Dallas 2014, no pet.). The Texas Supreme Court has specifically stated that it has not yet adopted this type of claim. *First United Pentecostal Church of Beaumont v. Parker,* 514 S.W.3d 214 (Tex. 2017). Notwithstanding, Texas courts have found such an action to exist. *See Hendricks v. Thornton*, 973 S.W.2d 348 (Tex. App.—Beaumont 1998, pet. denied); *Floyd v. Hefner*, 556 F.Supp.2d 617 (S.D. Tex. 2008). One court identified the elements for aiding and abetting as the defendant must act with unlawful intent and give substantial assistance and encouragement to a wrongdoer in a tortious act. *West Fork Advisors*, 437 S.W.3d at 921.

There is also a recognized civil conspiracy claim in Texas. An action for civil conspiracy has five elements: (1) a combination of two or more persons; (2) the persons seek to accomplish an object or course of action; (3) the persons reach a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts are taken in pursuance of the object or course of action; and (5) damages occur as a proximate result. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017).

There is not any particularly compelling guidance on whether these three claims are the same or different. And if they are different, what differences are there regarding the elements of each claim? For a great discussion of these forms of joint liability for breach of fiduciary duty, please see E. Link Beck, Joint and Several Liability, STATE BAR OF TEXAS, 10TH ANNUAL FIDUCIARY LITIGATION COURSE (2015).

There was confusion as to whether a finding of conspiracy or aiding and abetting or knowing participation automatically imposes joint liability on all defendants for all damages. Most of the cases seem to indicate that a separate damage finding is necessary for each defendant because the conspiracy may not proximately cause the same damages as the original bad act. *See THPD, Inc. v. Continental Imports, Inc.,* 260 S.W.3d 593 (Tex. App.—Austin 2008, no pet.); *Bunton v. Bentley*, 176 SW.3d 1 (Tex. App.—Tyler 1999), *aff'd in part, rev'd in part on other grounds,* 914 S.W.3d 561 (Tex. 2002); *Belz v. Belz*, 667 S.W.2d 240 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). The Texas Supreme Court held that the conspiracy defendant's actions must cause the damages awarded against it, and a plaintiff cannot solely rely on just the original bad actor's conduct. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d at 214. So, there should be a finding of causation and damages for each conspiracy defendant (unless the evidence proves as a matter of law that all conspiracy defendants were involved from the very beginning as to all underlying torts). *Id*.

The Texas Supreme Court has now decided that the statute of limitations for a conspiracy claim is the same as the underlying tort. *Agar Corp. v. Electro Circuits Int'l,* No 17-0630, 2019 Tex. LEXIS 351 (Tex. April 5, 2019). In *Agar*, the plaintiff asserted claims for tortious interference, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud, fraud by non-disclosure, misappropriation of trade secrets, violations of the Texas Theft Liability Act, conversion, and civil conspiracy. *Id*. The defendant alleges that the conspiracy claim was barred by the two-year statute of limitation, and the court of appeals agreed with that argument.

The Court noted that the statutes of limitations vary from claim to claim as determined by the Legislature. *Id*. (citing Tex. Civ. Prac. & Rem. Code §§ 16.002-.051). "For example, a two-year limitations period applies to suits for trespass and conversion, whereas a four-year limitations period applies to suits for fraud or breach of fiduciary duty." *Id*. (citing Tex. Civ. Prac. & Rem. Code §§ 16.003(a), .004(a)(4), (5). For claims not expressly identified by the Legislature, a residual limitations period of four years is provided. *Id*. (citing § 16.051). The Court stated that the statutes of limitations do not mention civil conspiracy by name. The court then stated that rather than apply the four-year residual limitations period, "the courts of appeals that have considered the issue have held civil conspiracy falls under the two-year statute of limitations applied to suits for trespass in section 16.003 of the Civil Practices and Remedies Code." *Id*.

The Court then addressed whether conspiracy was its own independent tort or whether it was merely a vicarious liability theory:

> When used as a theory of vicarious liability, civil conspiracy is part of the factual situation that permits a remedy against co-conspirators. Without it, there would be no grounds for recovery against co-conspirators who did not commit the underlying unlawful act. So it is not inconsistent to say civil conspiracy is a vicarious liability theory while also recognizing that it is a kind of cause of action.

Id. (internal citations omitted). The Court held that civil conspiracy is not an independent tort. It also held that it does not have its own statute of limitations and is tied to the limitations of the tort underlying the conspiracy claim:

> In fact, assigning civil conspiracy its own fixed limitations period conflicts with its nature as a derivative tort. Civil conspiracy requires an underlying tort that has caused damages. The cause of action for the underlying tort typically accrues as soon as the tort causes those damages. A fixed limitations period of two years for civil conspiracy that differs from that of its underlying tort can produce bizarre consequences.
>
> ….

> Agar's seventh amended petition alleges Electro engaged in a civil conspiracy to commit several underlying torts including, among others, conversion, misappropriation of trade secrets, and fraud. These underlying claims are governed by separate two-, three- and four-year statutes of limitations respectively. The civil conspiracy claims are likewise governed respectively by those statutes. Agar's civil conspiracy claims may only proceed if they are based on an underlying tort that is itself not barred by limitations.

Id. (internal citations omitted).

Regarding accrual of the conspiracy theory's limitations period, the Court held that "most civil conspiracy claims should accrue when the underlying tort causes harm to the plaintiff, that is, at the same time as the tort claim against the primary tortfeasor." *Id*. Moreover, "If conspirators conspire about different underlying torts over the course of a conspiracy, then claims based thereon accrue separately according to when each tort and injury occur. A conspiracy claim based on an earlier underlying tort does not re-accrue when the co-conspirators agree to commit a second tort or make another overt act." *Id*.

The Court then reversed the summary judgment for the defendant and remanded because some of the plaintiff's conspiracy claims were derivative of claims that had a four-year limitations period and were not barred.

The Court has moved away from a one-size-fits-all approach to conspiracy. A plaintiff must establish that a conspiracy defendant caused particular damages after it joined the conspiracy. Further, a conspiracy defendant is only liable for damages associated with the underlying tort to which his conduct is tied. In other words, if a defendant conspired to defraud, but not tortiously interfere, then it will only be liable for the fraud damages and not the tortious interference damages. Now the Court holds that a conspiracy theory's limitations period and accrual is tied to the underlying tort's or torts' limitations period. Each underlying tort may have a different limitations period and may accrue at different times, which may require different fact findings as to accrual or discovery if the discovery rule has been asserted.

What is not known is how this recent clarity on conspiracy claims applies to knowing-participation or aiding-and-abetting breach of fiduciary duty claims. Are they separate claims that have their own limitations period? If so, what are the limitations periods? Or, are they derivative claims that rely solely on the four-year limitations period of the underlying breach of fiduciary duty claim?

The end result is that jury instructions in cases involving these types of claims will be very complicated and involved. Causation, damages, and limitations may require multiple questions. A party should consider whether it would be wise to hire an attorney with appellate experience in this area to assist.

G. Texas Supreme Court Holds That A Fraud-By-Nondisclosure Claim Can Apply Outside Of A Fiduciary Or Confidential Relationship

In *Bombardier Aero. Corp. v. Spep Aircraft Holdings*, a plaintiff who had purchased an aircraft sued the defendant for fraud associated with representations regarding whether the aircraft was new or used. No. 17-0578, 2019 Tex. LEXIS 101 (Tex. February 1, 2019). The plaintiff later found that parts of the aircraft were used, and sued for breach of contract and fraud. The jury found for the plaintiff and awarded actual damages and punitive damages. The court of appeals affirmed.

The Texas Supreme Court affirmed the fraud finding and actual damages award, though it reversed the punitive damages award due to limitation-of-liability clause. The Court first discussed a fraud by non-disclosure claim:

> Fraud by non-disclosure, a subcategory of fraud, occurs when a party has a duty to disclose certain information and fails to disclose it. To establish fraud by non-disclosure, the plaintiff must show: (1) the defendant deliberately failed to disclose material facts; (2) the defendant had a duty to disclose such facts to the plaintiff; (3) the plaintiff was ignorant of the facts and did not have an equal opportunity to discover them; (4) the defendant intended the plaintiff to act or refrain from acting based on the nondisclosure; and (5) the plaintiff relied on the non-disclosure, which resulted in injury. In general, there is no duty to disclose without evidence of a confidential or fiduciary relationship. A fiduciary duty arises "as a matter of law in certain formal relationships, including attorney-client, partnership, and trustee relationships." Id. (citations omitted). A confidential relationship is one in which the "parties have dealt with each other in such a manner for a long period of time that one party is justified in expecting the other to act in its best interest." An informal relationship giving rise to a duty may also be formed from "a moral, social, domestic or purely personal relationship of trust and confidence."

Id. The Court then described when such a claim could arise outside of a fiduciary or confidential relationship: "There may also be a duty to disclose when the defendant: (1) discovered new information that made its earlier representation untrue or misleading; (2) made a partial disclosure that created a false impression; or (3) voluntarily disclosed some information, creating a duty to disclose the whole truth." Id. Accordingly, the Texas Supreme has not held that a party may have a duty to discuss information outside of a confidential relationship based on certain circumstances.

Oddly, the Court made this pronouncement where the defendant did not challenge the fraud finding and where the Court did not ultimately hold whether the defendant had a duty to disclose or not. This holding is simply dicta. Dictum is an observation or remark made concerning some rule, principle, or application of law suggested in a particular case, which observation or remark is not necessary to the determination of the case. BLACK'S LAW DICTIONARY 409 5th ed. (1979). Dictum is not binding as precedent under stare decisis. *Lester v. First American Bank, Bryan Texas,* 866 S.W.2d 361, 363 (Tex. App.—Waco 1993, writ denied). There is an exception to the precedential value of dictum depending on how it is classified, obiter dictum or judicial dictum. *See Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 773 (Tex. 1973). Judicial dictum, a statement by the supreme court made very deliberately after mature consideration and for future guidance in the conduct of litigation, is "at least persuasive and should be followed unless found to be erroneous." *Id*.

Interesting Note. This is a very significant holding because the Texas Supreme Court had never previously held that a party owed a duty to disclose outside of a confidential or fiduciary relationship. Generally, a duty to disclose arises only in confidential or fiduciary relationships. *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998). Whether a duty to disclose exists is a question of law. *Bradford v. Vento,* 48 S.W.3d 749, 755 (Tex. 2001); *In re Int'l Profit Assocs.*, 274 S.W.3d 672, 678 (Tex. 2009). In *Bradford*, the Texas Supreme Court examined Texas law with regard to the duty to disclose in arm's-length transactions. *Id*. The Texas Supreme Court noted that some courts required disclosure when a party makes a partial statement that is misleading and that the Restatement (Second) of Torts section 551 recognized a general duty to disclose facts in a commercial setting, but the Court clarified that "We have never adopted section 551." *Bradford,* 48 S.W.3d at 755. Some courts held that Bradford confirmed that under Texas law, "a duty to disclose arises only where a fiduciary or confidential relationship exists." *Imperial Premium Finance, Inc. v. Khoury,* 129 F.3d 347, 352 (5th Cir. 1997) (emphasis added); *accord Coburn Supply, Co., Inc. v. Kohler Co.*, 342 F.3d 372, 378 (5th Cir. 2003) (holding under Texas law that, as a matter of law, an at-will, non-exclusive distributor relationship is not the kind of confidential or fiduciary relationship that would give rise to duty to disclose negotiations with another distributor or plans to terminate the distributor relationship); *Bay Colony, Ltd. v. Trendmaker, Inc.,* 121 F.3d 998, 1004 (5th Cir. 1997) ("Texas law recognizes a duty to disclose only where a fiduciary or confidential relationship exists.") (emphasis added). *See also In re Longoria*, 470 S.W.3d 616, 632 (Tex. App.—Houston [14th Dist.] July 16, 2015, original proceeding) ("No duty of disclosure arises without evidence of a confidential relationship."); *Bazan v. Muñoz,* 444 S.W.3d 110, 117-18 (Tex. App.—San Antonio 2014, no pet.) (noting "[g]enerally, no duty of disclosure arises without evidence of a confidential or fiduciary relationship").

For example, in *Bay Colony, Ltd. v. Trendmaker, Inc.*, for example, the Fifth Circuit applying Texas law held there was no confidential or fiduciary relationship between the parties that would give rise to a duty to disclose. 121 F.3d 998, 1004 (5th Cir. 1997). In that case, Trendmaker and Bay Colony had entered into an arms-length transaction for the sale of the commercial reserves and the later modifications of real estate notes. The Fifth Circuit stated that the "fact that parties have entered into a contract does not create a confidential relationship."

Id. (citing *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992) (emphasis added)). The court concluded that under Texas law the contract did not constitute the type of special relationship necessary to create a duty to disclose. *Id*.(citing *Lee v. Wal-Mart Stores, Inc.*, 34 F.3d 285, 290 n. 5 (5th Cir. 1994) (the fact that people have had prior dealing with each other ... does not establish a confidential relationship)).

Admittedly, there are intermediate courts of appeals that have held that a duty to disclose may arise in arms-length transactions where: (1) one voluntarily discloses partial information, but fails to disclose the whole truth; (2) one makes a representation and fails to disclose new information that makes the earlier representation misleading or untrue; and (3) where one makes a partial disclosure and conveys a false impression. But, importantly, a trial court or intermediate court of appeals cannot adopt a common-law cause of action that has not been expressly adopted by either the Texas Legislature or the Texas Supreme Court. *Jackson Walker, LLP v. Kinsel,* 518 S.W.3d 1 (Tex. App.—Amarillo April 10, 2015) (no tortious interference with inheritance claim in Texas because the Texas Supreme Court or Texas Legislature had not adopted such a claim), *aff'd*, 526 S.W.3d 411 (Tex. 2017). The Texas Supreme Court has recently succinctly stated that absent legislative enactment, "the question of whether the tort should exist under Texas law is ours to answer." *Jackson Walker, LLP,* 526 S.W.3d at 434.

The duty to disclose based on new information derives from the Restatement (Second) of Torts, Section 551. *Bradford,* 48 S.W.3d at 755. This section expressly limits the expanded duty of disclosure to apply only "before the transaction is consummated." RESTATEMENT (SECOND) OF TORTS, § 551. Thus, claims that are based on alleged nondisclosures made after the consummation of a transaction fall outside of Section 551's scope. *Purina Co. v. McKendrick,* 850 S.W.2d 629, 633-34 (Tex. App.—San Antonio 1993, writ denied); *Susanoil, Inc. v. Cont'l Oil Co*., 519 S.W.2d 230, 236 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (affirming fraud finding when a party failed to disclose information "before closing the transaction."). Otherwise, a company's employees would have a duty to disclose their employer's breach of contract to third parties every time the employer breaches a contract. Texas law does not support such a broad duty of disclosure. *See Oliver v. Rogers*, 976 S.W.2d 792 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (holding that a contracting party has no duty to disclose changed circumstances that occur after a contract is formed). The Texas Supreme Court did not discuss this important limitation in it dicta in the Bombardier case.

It must be noted that motions for rehearing and a new amicus brief raising this issue was filed in the Bombardier case. The Texas Supreme Court may change its opinion.

H. Federal Court Holds That Trust Beneficiaries' Claims Against A Brokerage Firm Should Not Be Compelled To Arbitration

In *Freeman v. Fid. Brokerage Servs., LLC*, the mother of the plaintiffs executed a living trust agreement. No 3:18-CV-0947-G, 2019 U.S. Dist. LEXIS 34694 (N.D. Tex. March 5, 2019). Upon her death, the trust agreement directed that the trust assets were to be divided and allocated into trusts for the benefit of her husband if he was still living and for the benefit of the plaintiffs. Upon the death of the husband, his trust would terminate and all remaining assets of that trust would be distributed to the plaintiffs' trust. The mother died, and the husband proceeded to manage the assets and affairs of both trusts alone, without a co-trustee, in direct violation of the terms and requirements of the trust agreement. The husband then transferred the assets of the trusts to trust accounts managed by Fidelity. The plaintiffs assert that at all times the trust assets in Fidelity's possession were subject to trust restrictions and fiduciary obligations under the trust agreement. Fidelity received a hard copy of the trust agreement and thus knew of the co-trustee requirement to manage the assets and accounts of the trusts.

Following the husband's death, the plaintiffs discovered that he had "withdrawn, transferred, disbursed and depleted the assets of the trust accounts maintained at Fidelity, without the required involvement of a co-trustee, in violation of the terms and conditions of the Trust Agreement, and in breach of Crisler's fiduciary duties" with Fidelity's knowledge, participation, and support. *Id*. The plaintiffs asserted that although Fidelity knew the terms of the trust, including the co-trustee requirement, Fidelity ignored those terms and "never took any measures to see that the trust assets in Fidelity's custody and possession were administered properly and protected from depletion by a single, self-interested trustee." *Id*. The plaintiffs sued Fidelity for breach of fiduciary duty and knowing participation in breach of fiduciary duty, and Fidelity removed the case to federal court. Fidelity then filed a motion to compel the case to arbitration under an arbitration clause contained in account agreements signed by the husband when he opened the accounts.

The federal district court described the grounds for compelling a case to arbitration:

> The Fifth Circuit applies six theories under which a court may compel a nonsignatory to arbitration: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; (5) estoppel; and (6) third-party beneficiary…The Fifth Circuit has described these two types of equitable estoppel as follows.

Id. Fidelity contended that "[t]his case presents an uncommon twist on typical doctrines of equitable estoppel like 'direct benefits' and 'intertwined claims' estoppel" and thus the Customer Agreement's arbitration clause binds the Freemans as nonsignatory plaintiffs to arbitrate their claims. The plaintiffs, on the other hand, insist their case "simply calls for application of ordinary principles of contract law" independent of the agreements between Fidelity and the trust, and equitable estoppel is thereby inapplicable. The court first rejected the first type of estoppel:

> The "intertwined claims" theory governs motions to compel arbitration when a signatory-plaintiff brings an action against a nonsignatory-defendant asserting claims dependent on a contract that includes an arbitration agreement that the defendant did not sign. It does not govern the present case, where a signatory-defendant seeks to compel arbitration with a nonsignatory-plaintiff.

Id. The court then rejected the second type of estoppel:

> The "direct benefits" theory of equitable estoppel "prevents a nonsignatory from knowingly exploiting an agreement containing the arbitration clause." That is, "a nonsignatory cannot sue under an agreement while at the same time avoiding its arbitration clause." This theory is inapplicable here because the Receiver does not seek to enforce the various contracts containing the arbitration agreements; rather, he seeks to unwind them and reclaim the benefits fraudulently distributed to the defendants under the contracts.

Id. The court concluded:

> There is no evidence that the Freemans sought to derive direct benefits from or knowingly exploited the Customer Agreement, embraced the Customer Agreement as nonsignatories but now attempt to repudiate the arbitration clause, or that they brought suit against Fidelity premised on an agreement which includes or is intertwined with an arbitration clause. Here, the Freemans seek to reclaim the monies alleged to have been fraudulently disbursed to Crisler. Moreover, pursuant to the terms of the Trust Agreement, the trust assets were to be managed by co-trustees. Nowhere in the Trust Agreement does it state that the signature of co-trustee Crisler was sufficient to bind the trusts. Nevertheless, Fidelity permitted Crisler, acting alone and also in the capacity as a primary beneficiary, to sign the Fidelity Application, to open the Fidelity account, and to deplete the trust assets. Fidelity cannot now compel the Freemans, as nonsignatories to the Fidelity Application and Customer Agreement, to arbitrate. In short, there exists no valid and enforceable arbitration agreement between the parties in this case. The court therefore need not consider whether there are any external legal constraints on arbitration.

Id. The court denied the motion to compel arbitration.

I. Texas Supreme Court Holds That Contractual Clauses That Waive The Statute Of Limitations May Be Enforceable

In *Godoy v. Wells Fargo Bank, N.A*., a bank sued a guarantor to recover on a deficiency following a foreclosure sale. No. 18-0071, 2019 Tex. LEXIS 443 (Tex. May 10, 2019). The defendant guarantor alleged that any such claim was barred by the two-year statute of limitations. The lender argued that the guarantor waived the statute-of-limitations defense had been waived by provisions in the loan documents. The guarantor argued that a statute-of-limitations defense can only be waived if the language in the waiver is specific and for a defined period of time, and claimed that the waiver was indefinite and void as against public policy because it allowed the lender to bring suit at any time in the future. The lender argued that, by signing a broad waiver of all defenses, a party can waive all statute-of-limitations defenses indefinitely.

Regarding waivers of a statute of limitations defense, the Texas Supreme Court held:

> In *Simpson v. McDonald*, we stated: "It appears to be well settled that an agreement in advance to waive or not plead the statutes of limitation is void as against public policy." Since *Simpson* was decided, courts of appeals have built upon its holding to require that a waiver of a statute of limitations is void unless the waiver is "specific and for a reasonable time." Indeed, the requirement that in order to be enforceable the statute-of-limitations waiver must be "specific" and "only for a reasonable time" was already understood to be part of the law at the time *Simpson* was decided.… Blanket pre-dispute waivers of all statutes of limitation are unenforceable, but waivers of a particular limitations period for a defined and reasonable amount of time may be enforced.

Id. The Court ruled that the clause in the case was sufficiently specific and was for a reasonable time and ruled for the lender.

Interesting Note: Fiduciaries are often in the position of a lender. For example, a trustee may make a loan to a beneficiary of a trust. Sometimes the trustee has to collect on that debt when the borrower defaults, and that fight can revolve around the statute of limitations. Indeed, a trustee never wants to sue its beneficiary for any reason, and delay is often present in these circumstances. For example, recently, a court of appeals held that the statute of limitations did not apply to bar a trustee's claim on a promissory note under the facts of that case. *DeRoeck v. DHM Ventures, LLC*, NO. 03-15-00713-CV, 2019 Tex. App. LEXIS 4721 (Tex. App.—Austin June 7, 2019, no pet. history). The *Godoy* opinion arms a trustee with one more tool. A trustee can have the note, guaranty agreement, or other similar document expressly state that the borrower waives the defense of the statute of limitations for a certain period of time (negotiate notes have a six year statute of limitations in Texas, and potentially, a waiver clause could extent that to eight years).

VI. Texas Statutes Now Allow A Court To Modify Or Reform An Unambiguous Will

A. Introduction

Historically, Texas courts could not resort to extrinsic evidence to construe an unambiguous will. *San Antonio Area Foundation v. Lang*, 35 S.W.3d 636 (Tex. 2000). The Texas Supreme Court stated as follows:

> In construing a will, the court's focus is on the testatrix's intent. This intent must be ascertained from the language found within the four corners of the will. The court should focus not on "what the testatrix intended to write, but the meaning of the words she actually used." In this light, courts must not redraft wills to vary or add provisions "under the guise of construction of the language of the will" to reach a presumed intent. Determining a testatrix's intent from the four corners of a will requires a careful examination of the words used. If the will is unambiguous, a court should not go beyond specific terms in search of the testatrix's intent.

Id. at 639 (internal citations omitted). *See also Stephens v. Beard*, 485 S.W.3d 914, 916 (Tex. 2016); *Hysaw v. Dawkins*, 483 S.W.3d 1 (Tex. 2016). In 2015, the Texas Legislature created several provisions that allow a court to look at extrinsic evidence to modify the otherwise unambiguous terms of a will upon certain circumstances. Tex. Est. Code § 255.451.

B. Texas Estate Code Provision Allowing Modification and Reformation Of A Will

The Texas Estates Code allows a personal representative to petition a court to modify or reform a will on one of three different grounds:

> (a) On the petition of a personal representative, a court may order that the terms of the will be modified or reformed, that the personal representative be directed or permitted to perform acts that are not authorized or that are prohibited by the terms of the will, or that the personal representative be prohibited from performing acts that are required by the terms of the will, if: (1) modification of administrative, nondispositive terms of the will is necessary or appropriate to prevent waste or impairment of the estate's administration; (2) the order is necessary or appropriate to achieve the testator's tax objectives or to qualify a distributee for government benefits and is not contrary to the testator's intent; or (3) the order is necessary to correct a scrivener's error in the terms of the will, even if unambiguous, to conform with the testator's intent.
>
> (b) An order described in Subsection (a)(3) may be issued only if the testator's intent is established by clear and convincing evidence.

Tex. Est. Code § 255.451. The statute limits who can seek to modify a will. Texas Estates Code § 22.031 defines "'personal representative' to include (1) an executor and independent executor; (2) an administrator, independent administrator, and temporary administrator; and (3) a successor to an executor or administrator." Tex. Est. Code § 22.031. So, this requires that a personal representative bring a claim to modify a will—a beneficiary is not allowed to do so. This is an important limitation as a personal representative may be less inclined to seek a modification or reformation that favors some beneficiaries over others due to its fiduciary duties, whereas a beneficiary, who owes no fiduciary duties, would be more inclined to do so.

The statute only allows a court to modify or reform a will or to allow a personal representative to act contrary to the plain language of the will for three limited reasons. First, allowing the modification "is necessary or appropriate to prevent waste or impairment of the estate's administration." *Id*. This provision would require the personal representative to present evidence that by following the express terms of the will that there would be a waste of estate assets or would impair the estate's administration. Second, allowing the modification will "is necessary or appropriate to achieve the testator's tax objectives or to qualify a distributee for government benefits and is not contrary to the testator's intent." *Id*.

Third, allowing the modification "is necessary to correct a scrivener's error in the terms of the will, even if unambiguous, to conform with the testator's intent." This provision would allow a personal representative to offer evidence that, despite what the will unambiguously provides, that the testator really wanted something different. This is the most controversial basis to modify a will because presumably a testator reads and understands the will that he or she executes. It is presumed that he or she understands the plain meaning of the words in the will. It is assumed that if a testator states his or her intentions before executing a will that he or she changed his or her mind when they executed a will that has a contrary meaning. The statute does not define the term scrivener's error. Under a commonly understood understanding of "scrivener's error," this statutory basis appears to be narrow: "A scrivener's error is an error resulting from a minor mistake or inadvertence, especially in writing." *Packard Transport, Inc. v. Dunkerly*, No. 14-09-00652- CV, 2010 Tex. App. LEXIS 4984 at *12 (Tex. App.—Houston [14th Dist.] July 1, 2010, no pet.) (mem. op.) (citing Black's Law Dictionary 582 (8th ed. 2004)).

A scrivener's error does not include a mistake of law or fact by the testator. If the testator meant what was written, even if based on false information, then there was not a scrivener's error. It should be noted that one ground for undue influence in Texas is fraud and deceit. So, if a beneficiary misrepresents a legal or factual matter upon which the testator relied in executing a will, a trial court may refuse to admit the will to probate.

C. Burden of Proof To Establish A Scrivener's Error

One important limitation is that a scrivener's error must be proven by clear and convincing evidence, and not merely by a preponderance of the evidence. In the vast majority of situations in civil law, the preponderance of the evidence standard applies. Under a preponderance of the evidence burden, the fact finder must decide if the plaintiff's allegations meet the legal standard of the preponderance of the evidence meaning that they are "more likely true than not." Essentially, the fact finder must be convinced that it is at least 51% likely that the plaintiff's allegations are correct. The fact that the Texas Legislature has refused to use the commonly-used preponderance of the evidence standard is very significant. "[N]o doctrine is more firmly established than that issues of fact are resolved from a preponderance of the evidence." *Ellis Cnty. State Bank v. Keever*, 888 S.W.2d 790, 792 (Tex. 1994) (quoting *Sanders v. Harder*, 148 Tex. 593, 227 S.W.2d 206, 209 (1950)). "Only in extraordinary circumstances, such as when we have been mandated to impose a more onerous burden, has this Court abandoned the well-established preponderance of the evidence standard." *Id*. Clear and convincing evidence is "proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009). This is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings. *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979). While the proof must weigh heavier than merely the greater weight of the credible evidence, there is no requirement that the evidence be unequivocal or undisputed. *Id*. So, trial courts should not grant modification or reformation relief where it is a close call; a party seeking that relief has a heavy burden to establish that a ground for the relief is established by firm and credible evidence that substantially outweighs counter evidence.

D. Recent Texas Property Code Provision Allowing Reformation of A Trust

It should be noted that in 2017, the Texas Legislature added Texas Property Code Section to similarly permit reformation of a trust:

> On the petition of a trustee or a beneficiary, a court may order that the terms of the trust be reformed if: (1) reformation of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or impairment of the trust's administration; (2) reformation is necessary or appropriate to achieve the settlor's tax objectives or to qualify a distributee for governmental benefits and is not contrary to the settlor's intentions; or (3) reformation is necessary to correct a scrivener's error in the governing document, even if unambiguous, to conform the terms to the settlor's intent.

Tex. Prop. Code §112.054(b). Subsections (e) and (f) also provide: "(e) An order described by Subsection (b-1)(3) may be issued only if the settlor's intent is established by clear and convincing evidence. (f) Subsection (b-1) is not intended to state the exclusive basis for reformation of trusts, and the bases for reformation of trusts in equity or common law are not affected by this section.

E. Overarching Purpose Is To Conform Will To True Intention of Testator

The Estate's Code also provides: "The court shall exercise the court's discretion to order a modification or reformation under this subchapter in the manner that conforms as nearly as possible to the probable intent of the testator." Tex. Est. Code § 255.452. This provision enforces the traditional concept that a testator's intent should control. In exercising its ability to modify or reform a will, this statute provides that the court should do so to conform to the probable intent of the testator. This provision makes complete sense regarding the third ground for modifying a trust: scrivener's error. It makes less sense regarding the first two grounds: modification of administrative, nondispositive terms to prevent waste or impairment of the estate's administration or to achieve the testator's tax objectives or to qualify a distributee for government benefits.

F. Modification or Reformation May Be Retroactive

The trial court can reform a will so that it has retroactive effect. *Id*. at § 255.453. This may be very important for tax reasons and also to protect a personal representative who had not acted in conformance with the express terms of a will. If the modification or reformation has retroactive effect, then the personal representative did act in conformity with the modified or reformed will, and did not breach an duty, even though he, she or it did not act in conformity with the express terms of the will.

G. Potential Liability Of Personal Representative For Bringing Or Failing To Bring Action To Modify or Reform A Will

The statute provides for a protection for a personal representative who does not act to modify or reform a will. Section 255.455 provides:

> (a) This subchapter does not create or imply a duty for a personal representative to: (1) petition a court for modification or reformation of a will, to be directed or permitted to perform acts that are not authorized or that are prohibited by the terms of the will, or to be prohibited from performing acts that are required by the terms of the will; (2) inform devisees about the availability of relief under this subchapter; or (3) review the will or other evidence to determine whether any action should be taken under this subchapter.
>
> (b) A personal representative is not liable for failing to file a petition under Section 255.451.

Tex. Est. Code § 255.455. So, a personal representative may not be sued by a beneficiary for failing to petition a court to modify or reform a will. Even if the personal representative knows that the testator wanted something different from what was expressly stated in his or her will, the personal representative does not have to try to correct the error and may follow the express terms of the will without fear that a beneficiary will be able to successfully sue the personal representative for breaching a duty. This provision will certainly make it more likely that personal representatives will not seek a modification or reformation.

Further, a personal representative may breach duties where he, she or it attempts to modify or reform a will. A personal representative owes the same fiduciary duties to estate beneficiaries as a trustee owes a trust beneficiary as a personal representative is essentially a trustee of the trust estate. A trustee owes a duty of loyalty to each beneficiary and owes a duty to treat beneficiaries fairly. One could certainly see a circumstance where the personal representative seeks a modification or reformation to favor one beneficiary over another or to protect itself from liability for taking actions that were not allowed by a will. Where no ground exists for such a modification or reformation, the personal representative would likely breach a fiduciary duty.

So, where a personal representative has no liability for failing to modify or reform a will, and may have liability for trying to do so, it is almost certain that no reasonable personal representative would seek to modify or reform a will unless every interested party agrees with that course of action.

H. Conclusion

This relatively new statute is controversial in Texas even though it is limited. One law student advocates for broadening the scope of the statute and allowing courts to modify wills in additional circumstances, including a mistake of law or fact or because there are changed circumstances. Brent Debnam, *Deadly Intentions: Posthumously Modifying Unambiguous Wills To Protect The Actual Intentions Of Texas's Testators*, 462 ESTATE PLANNING AND COMMUNITY PROPERTY LAW JOURNAL, 461 (2017). Others prefer the historical plain-meaning rule and the inability to modify or reform an unambiguous will. Once again, historically, Texas courts considered a will a unilateral instrument, and were concerned only with the intention of the testator as expressed in the will. *Gee v. Read*, 606 S.W.2d 677, 680 (Tex. 1980); *Stewart v. Selder*, 473 S.W.2d 3, 7 (Tex. 1971); *Guilliams v. Koonsman*, 154 Tex. 401, 279 S.W.2d 579, 581 (1955). Courts held that it was the sense in which the words were used by the testator that was the ultimate criterion to judge intent. A basic rule of will construction was that the words of a will should be given their plain and usual meaning unless it is clear from the will as a whole that the testator intended a different meaning. *Jensen v. Cunningham*, 596 S.W.2d 266, 271 (Tex. Civ. App.—Corpus Christi 1980, no writ). A will should not be construed to defeat the manifest purpose of the testator to have a reasonably prompt settlement and distribution of his or her estate or construed as to accomplish something the testator expressly forbade. *Brooker v.*

Brooker, 76 S.W.2d 180 (Tex. Civ. App.—Fort Worth 1934), *set aside on other grounds*, 130 Tex. 27, 106 S.W.2d 247 (1937); *Wisdom v. Wilson*, 59 Tex. Civ. App. 593, 127 S.W. 1128 (Tex. Civ. App.—1909, writ refused). Many dislike the concept of changing the plain meaning rule because this significant change risks eviscerating a testator's right to control his or her estate after death and also creates unnecessary hardships for clients, practitioners, and courts. There are no court opinions in Texas at this time construing the new statutes discussed above. Time will tell how courts in Texas will take to modifying or reforming an unambiguous will.

VII. Conclusion

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