The More The Merrier? Issues Arising From Co-Trustees Administering Trusts

DAVID F. JOHNSON
Winstead PC
300 Throckmorton, Suite 1700
Fort Worth, Texas 76102
817-420-8223

DAVID FOWLER JOHNSON
DFJOHNSON@WINSTEAD.COM
www.txfiduciarylitigator.com
Managing Shareholder of Winstead PC's Fort Worth Office
300 Throckmorton, Suite 1700
Fort Worth, Texas 76102
(817) 420-8223

David maintains an active trial and appellate practice for the financial services industry. David is the primary author of the Texas Fiduciary Litigator blog (txfiduciarylitigator.com), which reports on legal cases and issues impacting the fiduciary field in Texas. David has specialized in trust and estate disputes including: trust modification/clarification, trustee resignation/removal, breach of fiduciary duty and related claims, accountings, will contests, mental competency issues, and undue influence. David's recent trial experience includes:

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

Represented trustees regarding claims of mismanagement of assets;

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

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

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

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

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

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

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

David is one of twenty attorneys in the state (of the 84,000 licensed) that has the triple Board Certification in Civil Trial Law, Civil Appellate, and Personal Injury Trial Law by the Texas Board of Legal Specialization. Additionally, David 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 (El Paso, 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.

I. INTRODUCTION

Settlors can draft a trust to have one trustee that has the sole authority and power to administer the trust. However, settlors can, and often do, require or allow a trust to be administered by co-trustees. Co-trustees generally have equal rights to administer the trust and should administer the trust in all respects together as a unit. There are certain advantages and drawbacks to using a co-trustee structure to administer a trust. Further, there are a number of permutations that can be used to effectuate a co-trustee management structure.

The co-trustees can be any potential combination. One potential combination is a settlor and a corporate trustee acting as co-trustees. The settlor intends for the corporate trustee to take lead on investing and accounting functions, but the settlor is involved in big picture issues and distributions. Further, co-settlors (e.g., husband and wife) can create a trust with themselves as co-trustees so that they can have equal say in how the trust is administered. Further, a settlor may want a corporate trustee and a family friend to be co-trustees. The thought, once again, is that the corporate trustee takes the lead on investing and accounting functions, but the family friend knows the family dynamics, the settlor's intent, and is involved in big picture issues such as distributions. There is no limit to the combinations of co-trustees or the purposes of same.

When a trust is administered by co-trustees, many issues can arise. This paper is intended to address some of the more common issues so that settlors and potential trustees can evaluate the ramifications of co-trustee administration.

II. ADVANTAGES AND DISADVANTAGES OF APPOINTING CO-TRUSTEES

There are many reasons why a settlor may want to consider co-trustees. For example, when there is only one individual trustee, he or she will always need to be available to participate in the administration of the trust. That can create problems because an individual trustee has a life of their own and may be ill, on travel, having personal or business problems, or have other problems that distracts a trustee's attention from trust administration. When there are co-trustees, usually one will be available to administer the trust at all times with the consent of the other.

The age old adage "two heads are better than one," may apply to trust administration. Co-trustees can combine their skills and knowledge to best serve the trust. They also can serve as sounding boards for each other.

Co-trustees can act as a policing mechanism. If one co-trustee disagrees with an action by another co-trustee, he, she or it has the authority to object in writing to that action and, if necessary, to file suit to protect the trust's and beneficiaries' interests. One commentator provides:

> It may be appropriate to appoint co-trustees if the trustor wishes to avoid the appearance of favoring one of several beneficiaries by naming that beneficiary as the sole trustee. The appointment of co-trustees may also be appropriate if the beneficiaries are to have adverse interests in the trust property and the trustor wishes to subject all decisions regarding the

> property to the joint assent of the co-trustees. Co-trustees may serve a useful function if a sole trustee would be left holding powers that result in taxation of trust income to a trustee, or inclusion of the trust property in the trustee's gross estate for estate tax purposes. This result can be avoided, or at least mitigated, if the trustee's powers can be exercised only with the consent of an independent or "adverse party" trustee.

1 TEXAS ESTATE PLANNING, § 30.04. Another commentator provides:

> Often co-trustees are named by the settlor, who may include one or more individuals and a corporate fiduciary. Frequently the named individual trustee is the settlor's spouse. Such a combination may satisfy the spouse or other family member who wishes direct participation and yet will secure the special skills and continuity of the corporate fiduciary in the administration of the trust. The details of investment, recordkeeping and other administrative matters are normally handled by the corporate trustee; the spouse or other individual trustee can be helpful in making various discretionary determinations, such as payment of trust income and principal.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, SELECTION OF A TRUSTEE, § 121.

There are, of course, drawbacks to naming co-trustees. Co-trustees can be compensated more than a single trustee, so they are often more expensive. Co-trustees may disagree on an action, deadlock sets in, and then nothing happens. If co-trustees retain counsel to sue each other, it will become expensive, create delay, and may result in unintended individuals managing the trust. A co-trustee can potentially become liable for another co-trustee's actions, so there is risk involved to being a co-trustee and some corporate or individual fiduciaries may not accept the position due to that risk. One commentator provides:

> Selecting two co-trustees with equal power to control and manage the trust invites the possibility that their inability to agree will frustrate the trust purposes. If the trustor decides on three or more co-trustees, then a majority of them may exercise any power conferred by the trust instrument, unless the trust instrument provides otherwise. On the other hand, if there are only three, the death, resignation or removal of one of them creates the same potential for stalemate as would be the case if only two were appointed initially. It may be possible, however, to avoid an impasse in the administration of the trust by including special provisions in the trust instrument respecting decisions by co-trustees. For example, the instrument may provide that a majority of the co-trustees will have the power to take action on behalf of the trust.

> Alternatively, the instrument may give a third party the power to direct the co-trustees with respect to any matter about which the co-trustees themselves are unable to reach a decision.

1 TEXAS ESTATE PLANNING, § 30.04. Another commentator provides:

> [T]he use of multiple trustees can present problems. Unless a statute or the trust instrument provides otherwise, all trustees must agree, since unanimity among trustees is normally required. Furthermore, unless a statute or the trust instrument provides otherwise, each trustee may be liable for any loss arising from action taken by a majority of the trustees. Usually these problems can be anticipated by appropriate provisions in the trust instrument to the effect that a majority vote of the trustees is to control and that a trustee is not to be liable if he specifically dissents from the decision of the majority. Delegation of trustee powers may be authorized, but nevertheless the trustee may not be relieved of liability for actions taken pursuant to the delegation.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, SELECTION OF A TRUSTEE, § 121.

Accordingly, there are many advantages and disadvantages to having a co-trustee management structure for a trust. A settlor should consider these factors in deciding whether to utilize a co-trustee structure. Further, a settlor who wishes to use a co-trustee structure should consider ways to limit the disadvantages via proper drafting of the trust document.

III. FORMATION OF THE TRUST

In Texas, as elsewhere, a settlor cannot create a trust with himself or herself as both the sole trustee and sole beneficiary. Where there is a complete unity of title, there is no trust. The Texas Property Code provides:

> If a settlor transfers both the legal title and all equitable interests in property to the same person or retains both the legal title and all equitable interests in property in himself as both the sole trustee and the sole beneficiary, a trust is not created and the transferee holds the property as his own… a trust terminates if the legal title to the trust property and all equitable interests in the trust become united in one person.

Tex. Prop. Code §112.034. *Faulkner v. Kornman,* No. 10-00301, 2015 Bankr. LEXIS 3595 (Bankr. S.D. Tex. Oct. 23, 2015).

So, one way to avoid the merger doctrine and to create a valid trust is to appoint a co-trustee. As one commentator states:

> Where multiple beneficiaries and trustees are authorized, there is some authority for the position that no trust may be validly created where the same persons are both beneficiaries and trustees.

However, generally speaking, a trust instrument may name two or more trustees and make the same persons the exclusive beneficiaries of the trust. In this regard, where, under the terms of the trust, neither trustee can transfer the trust property without the concurrence of the other trustee, neither is the sole beneficiary, and there is no merger of the legal and equitable titles in the property to them. The theory behind the rule that an intended trust is validly created although the trust instrument names the same persons both trustees and beneficiaries is that the necessary separation of the legal and equitable interests exists and that there is not automatically a merger of them even though the beneficiaries are also trustees; in such a case, each of the beneficiaries has an equitable interest of the same kind that they would have if a third person had been named as trustee, and there exists no good reason for defeating the intention of the settlor. Also, there is no merger of the legal and equitable interests as will render the trust invalid where no one of the trustees is free to deal alone with his or her own equitable interest, any action taken by the trustees must be unanimous, and complete authority passes to the surviving trustees in case of the death of any trustee.

76 AM. JUR. 2D, TRUSTS, §211. So, one advantage of a co-trustee management structure is that it may defeat the merger doctrine and allow a trust to be properly formed.

IV. WHO CAN BE A CO-TRUSTEE AND CO-TRUSTEE SUCCESSION ISSUES

A. *De Jure* Co-Trustees

1. Who Can Be A Co-Trustee

The first place to look to determine who can be a co-trustee is the trust document. If the trust document states who can be a co-trustee, the trust document should generally control. If the parties wish to select a co-trustee that differs from the terms of the trust document, the parties should seek court intervention by modifying the trust. *See* Tex. Prop. Code 112.054.

If the trust document does not limit who can be a co-trustee, then the Texas Trust Code has a general provision dealing with who can qualify as a co-trustee. Section 112.008 states:

> (a) The trustee must have the legal capacity to take, hold, and transfer the trust property. If the trustee is a corporation, it must have the power to act as a trustee in this state.
>
> (b) Except as provided by Section 112.034, the fact that the person named as trustee is also a beneficiary does not disqualify the person from acting as trustee if he is otherwise qualified.
>
> (c) The settlor of a trust may be the trustee of the trust.

Tex. Prop. Code § 112.008. Under this provision, a trust settlor or beneficiary can be a co-trustee. *Sharma v. Routh*, 302 S.W.3d 355 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (beneficiary could be trustee); *Evans v. Abbott*, No. 03-02-00719-CV, 2003 Tex. App. LEXIS 8243 (Tex. App.—Austin Sept. 25, 2003) (beneficiary could be trustee of trust). The Restatement provides: "There can be a trust in which one of the beneficiaries is also one of the trustees. The trustees hold the legal title to the trust property as joint tenants, and the beneficiaries, including the beneficiary who is also a trustee, have equitable interests the extent of which is determined by the terms of the trust." RESTATEMENT (SECOND) OF TRUSTS, §99, 115. [1]

When the trustee is a corporation, it must have the power to act as a trustee in Texas. *See* Tex. Fin. C. § 151.001, et seq.; Tex. Est. C. §§ 505.001–505.006 (foreign corporate fiduciaries).

When a beneficiary is a co-trustee, that situation creates obvious conflicts of interest. Regarding the trustee who is also a beneficiary, the Restatement provides:

> In many modern trust situations, the trustee (or one or more co-trustees) will be a life beneficiary or perhaps a remainder beneficiary. In a case of this type, there will inevitably be some conflicts of interest that are approved (see § 78, Comment c(2)), implicitly at least, either by the settlor (§ 37, Comment f(1)) or through an appointment process that is authorized by the terms of the trust or a statute (§ 34, Comments c and c(1)) or that is influenced (in the case of judicial appointment) by the trust provisions (§ 34, Comment f(1)). In these circumstances there is, on the one hand, some inference of a preference for or confidence in the trustee-beneficiary but, on the other hand, a general recognition that a trustee-beneficiary's conduct is to be closely scrutinized for abuse, including abuse by less than appropriate regard for the duty of impartiality.

RESTATEMENT (THIRD) OF TRUSTS, § 79(b)(1). Further, the Restatement provides:

> The common situation in which one or more of a trust's beneficiaries are selected or authorized by the settlor to serve as trustee or co-trustee inevitably presents an array of conflicts between the trustee's interests as a beneficiary and the interests

[1]Texas Courts routinely look to the Restatement of Trusts for guidance. *See, e.g., Westerfeld v. Huckaby*, 474 S.W.2d 189 (Tex.1971); *Messer v. Johnson*, 422 S.W.2d 908 (Tex. 1968); *Mason v. Mason*, 366 S.W.2d 552, 554–55 (Tex. 1963); *Lee v. Rogers Agency*, 517 S.W.3d 137, 160–61 (Tex. App.—Texarkana 2016, pet. denied); *Woodham v. Wallace*, No. 05-11-01121-CV, 2013 Tex. App. LEXIS 50 (Tex. App.—Dallas January 2, 2013, no pet.); *Wolfe v. Devon Energy Prod. Co. LP*, 382 S.W.3d 434, 446 (Tex. App.—Waco 2012, pet. denied); *Longoria v. Lasater*, 292 S.W.3d 156, 168 (Tex. App.—San Antonio 2009, pet. denied).

> of other beneficiaries; the problems presented by these (usually) implicitly authorized conflicts are most appropriately dealt with as questions of impartiality under § 79 (even if the settlor's designation of the beneficiary-trustee may, as a matter of interpretation, suggest a "tilt" in favor of the beneficiary-trustee in the balancing of divergent interests; see id. Comment b(1) and more generally id., Comments b and c).

Id. at §78(c)(2). Accordingly, where the settlors expressly provide for a beneficiary being a co-trustee, there is a presumption that the settlors approved of the conflict situation and impliedly favored the beneficiary/co-trustee. Those presumptions, however, may not apply where the settlors did not expressly designate the beneficiary as a potential co-trustee and the beneficiary is appointed to that position in some other fashion (i.e., court appointment).

2. Co-Trustee Succession Issues

Co-trustees may have to deal with the resignation, incapacity, or death of another co-trustee. Succession issues can create delay and cause disagreements. One commentator provides:

> When the terms of the trust name multiple trustees, one of whom fails to qualify or ceases to act, it depends on the circumstances whether a new trustee should be appointed to fill the vacancy, or whether the remaining trustee or trustees may continue to administer the trust. It if appears that the settlor intended that the number of trustees should remain constant, a new co-trustee will be appointed. So also, if it appears that filling the vacancy would be conducive to proper administration of the trust, a new trustee will be appointed although the trust instrument does not expressly so require. Generally, however, there is no reason to appoint a successor the remaining trustee or trustees simply continue to administer the trust. When the terms of the trust empower the surviving trustees to fil a vacancy, it depends on the terms of the trust whether they must do so.

SCOTT AND ASCHER ON TRUSTS, THE TRUSTEE, §11.11.1.

If a person or entity named as a co-trustee does not accept the trustee position, or if the person or entity is dead, no longer exists, or does not have capacity to act as a trustee, then the person or entity named as the alternate trustee or designated or selected in the manner prescribed in the terms of the trust may accept the co-trustee position. Tex. Prop. Code § 112.009(c). If a co-trustee is not named or there is no alternate co-trustee designated or selected, the parties must seek a court appointment. *Id.*

If a person or entity named in the trust refuses to accept the appointment, then he, she, or it incurs no liability with respect to the trust. Tex. Prop. Code § 112.009(b). A person or entity named as a co-trustee has no obligation to accept the position. Once the person or entity named as trustee accepts the

co-trustee position, he, she, or it incurs liability with respect to the trust. If the person or entity named as co-trustee exercises power or performs duties under the trust, he, she, or it is presumed to have accepted the trust. Tex. Prop. Code § 112.009(a). The Texas Property Trust Code states:

> The signature of the person named as trustee on the writing evidencing the trust or on a separate written acceptance is conclusive evidence that the person accepted the trust. A person named as trustee who exercises power or performs duties under the trust is presumed to have accepted the trust, except that a person named as trustee may engage in the following conduct without accepting the trust: (1) acting to preserve the trust property if, within a reasonable time after acting, the person gives notice of the rejection of the trust to: (A) the settlor; or (B) if the settlor is deceased or incapacitated, all beneficiaries then entitled to receive trust distributions from the trust; and (2) inspecting or investigating trust property for any purpose, including determining the potential liability of the trust under environmental or other law.

Tex. Prop. Code § 112.009(a).

A co-trustee may resign in accordance with the terms of the trust instrument, or a co-trustee may petition a court for permission to resign as trustee. Tex. Prop. Code § 113.081. The court may accept a co-trustee's resignation and discharge the co-trustee from the trust on the terms and conditions necessary to protect the rights of other interested persons. *Id*. A co-trustee must strictly follow the trust document in effectuating a resignation. If the co-trustee does not do so and does not obtain a court order allowing the resignation, then the co-trustee is still the co-trustee. *Gamboa v. Gamboa*, 383 S.W.3d 263, 2012 Tex. App. LEXIS 7371 (Tex. App.—San Antonio Aug. 31, 2012, no pet.).

A beneficiary may remove a trustee in accordance with the terms of a trust. Tex. Prop. Code § 113.082(a). A beneficiary must follow the terms of the trust in terminating a co-trustee's service. *Waldron v. Susan R. Winking Trust*, No. 12-18-00026-CV, 2019 Tex. App. LEXIS 5867 (Tex. App.—Tyler July 10, 2019, no pet.). The failure to follow the terms of the trust means that the beneficiary's attempt is void and of no effect. *Id*.

Additionally, on the petition of an interested person, a court may, in its discretion, remove a co-trustee and deny part or all of the co-trustee's compensation if:

> (1) the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust; (2) the trustee becomes incapacitated or insolvent; (3) the trustee fails to make an accounting that is required by law or by the terms of the trust; or (4) the court finds other cause for removal.

Tex. Prop. Code § 113.082(a). Further, a "beneficiary, co-trustee, or successor trustee

may treat a violation resulting in removal as a breach of trust." *Id*. For example, three co-trustees presented clear and specific evidence of a prima facie case that the fourth co-trustee's hostility was impeding his performance as a co-trustee and the performance of the trust such that their suit to remove the fourth co-trustee was allowed to continue. *Ramirez v. Rodriguez*, No. 04-19-00618-CV, 2020 Tex. App. LEXIS 1340 (Tex. App.—San Antonio Feb. 19, 2020, no pet.). *See also In re Estate of Bryant*, No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131 (Tex. App.—Amarillo Mar. 11, 2020, no pet.) (removal of trustee due to hostility to beneficiary); *Conte v. Ditta*, 312 S.W.3d 951 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (affirmed removal of trustee); *Dildine v. Bonham*, No. 03-07-00631-CV, 2009 Tex. App. LEXIS 1752 (Tex. App.—Austin Mar. 12, 2009, no pet.) (affirmed removal of co-trustees). An action to remove a co-trustee, regardless of the underlying grounds on which it is brought, is not subject to a limitations analysis. *Ditta v. Conte*, 298 S.W.3d 187 (Tex. 2009).

The Texas Trust Code also provides as follows regarding the appointment of a successor trustee. On the death, resignation, incapacity, or removal of a co- trustee, a successor co-trustee shall be selected according to the method, if any, prescribed in the trust instrument. Tex. Prop. Code § 113.083. A trial court should select a successor co-trustee in conformance with the intent of the settlor, and abuses its discretion in failing to do so. *Conte v. Ditta*, 312 S.W.3d 951 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

If for any reason a successor is not selected under the terms of the trust instrument, a court may and on petition of any interested person shall appoint a successor in whom the trust shall vest. Tex. Prop. Code § 113.083. Accordingly, if a trust document allows a co-trustee to resign and for the trust administration to continue without the need for a successor co-trustee, then the co-trustee can resign and nothing further needs to be done. In that circumstance, the remaining co-trustees or trustee simply continues administering the trust. If, however, the trust requires that the resigning co-trustee be replaced, then the resigning co-trustee has continuing duties to administer the trust until its replacement is duly appointed.

As the Restatement provides:

> [W]hen several persons are designated as trustees and one of them dies, declines to serve or resigns, is removed, or is or becomes incapable of acting as trustee, the remaining trustee or trustees ordinarily are entitled to administer the trust, with a replacement trustee being required only if the settlor manifested an intention (or it is conducive to the proper administration or purposes of the trust) that the number of trustees should be maintained, see § 34, Comment d, and § 85, Comment e. Also see § 34, Comment e, on the authority of courts to appoint additional trustees to promote better administration of a trust even when there is no vacancy.

RESTATEMENT (THIRD) OF TRUSTS, § 81.

Another commentator provides:

> If a trust instrument appoints two or more trustees, and if

> one or more of the trustees die, resign, or are removed, the surviving trustee or trustees have the right to manage and administer the trust and to exercise trustee powers. A co-trustee must continue to act together with other co-trustees until he or she is relieved in accordance with the terms of the trust or by operation of law. A simple abandonment by one co-trustee will not vest all of the co-trustees' power in the remaining trustee or co-trustees.

4 Texas Probate, Estate and Trust Administration § 84.21.

Another commentator provides:

> Generally, surviving co-trustees can exercise trust powers without filling the vacancy created by the death, removal, or resignation of one co-trustee. The Uniform Trust Code concurs in this position, providing that if a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust. Thus, for instance, a surviving testamentary trustee or trustees have the power to receive from the executor assets belonging to the trust, regardless of any duty to apply for the appointment of co-trustees necessary or advisable to carry out the intention of the testator.

76 AM. JUR. 2D, TRUSTS, § 324.

A successor co-trustee is liable for a breach of trust of a predecessor "only if he knows or should know of a situation constituting a breach of trust committed by the predecessor and the successor trustee: (1) improperly permits it to continue; (2) fails to make a reasonable effort to compel the predecessor trustee to deliver the trust property; or (3) fails to make a reasonable effort to compel a redress of a breach of trust committed by the predecessor trustee." Tex. Prop. Code § 114.002. A trust document may relieve a successor co-trustee of an obligation to raise claims against prior co-trustees. *Benge v. Roberts*, No. 03-19-00719-CV, 2020 Tex. App. LEXIS 6335 (Tex. App.—Austin August 12, 2020, no pet. history).

Upon termination of a trust, the co-trustees have a reasonable period of time to wind up the trust: "If an event of termination occurs, the trustee may continue to exercise the powers of the trustee for the reasonable period of time required to wind up the affairs of the trust and to make distribution of its assets to the appropriate beneficiaries. The continued exercise of the trustee's powers after an event of termination does not affect the vested rights of beneficiaries of the trust." Tex. Prop. Code § 112.052; *Kellner v. Kellner*, 419 S.W.3d 541 (Tex. App.—San Antonio Nov. 13, 2013, no pet.) (the termination of the trust did not affect the trustees' authority to continue to exercise their powers to wind up affairs and make a distribution of trust assets). One court has held that co-trustees retain only the powers necessary to wind up the affairs of the trust or to distribute the trust property in accordance with the terms of the trust and the trustees had no authority to partition the trust property prior to distributing it in accordance with the trust document. *Sorrel v. Sorrel*, 1 S.W.3d 867 (Tex. App.—Corpus Christi Aug. 31, 1999, no pet.).

B. *De Facto* Co-Trustees

Sometimes, a party acts as a co-trustee, but has not been officially appointed in that position or fails to follow the proper procedure in the appointment. In that circumstance, the party is a *de facto* co-trustee and owes fiduciary duties. "An 'officer de jure' is one who is in all respects legally appointed [or elected] and qualified to exercise the office; one who is clothed with the full legal right and title to the office; in other words, one who has been legally elected or appointed to an office and who has qualified himself [or herself] to exercise the duties thereof according to the mode prescribed by law." *Brown v. Anderson*, 210 Ark. 970, 198 S.W.2d 188, 190 (Ark. 1946). An individual may become a de facto co-trustee by acting as same even though not officially named, appointed, or accepted as a trustee. *Daniel v. Bailey*, 466 P.2d 647 (Ok. Sup. Ct. 1979); *see also Rivera v. City of Laredo*, 948 S.W.2d 787, 794 (Tex. App.—San Antonio 1997, writ denied); *Forwood v City of Taylor*, 208 S.W.2d 670, 673 (Tex. Civ. App.—Austin 1948, no writ).

What is unclear is whether a person acting as a trustee (a de facto trustee), but who has not properly been placed in that position, is entitled to compensation in equity. For example, the Washington Court of Appeals adopted this standard:

> Although no Washington court has recognized the authority of a de facto trustee in a trust proceeding, the Oregon Court of Appeals recently adopted the de facto trustee concept in a similar setting. In that case, a person believing herself to be trustee appointed a successor trustee, but the trial court later invalidated the appointing trustee's status as trustee, thereby removing her authority to appoint a successor. The appellate court adopted the rule from *In re Bankers Trust*, 403 F.2d 16, 20 (7th Cir. 1968), that a person is a de facto trustee where the person (1) assumed the office of trustee under a color of right or title and (2) exercised the duties of the office. A person assumes the position of trustee under color of right or title where the person asserts "an authority that was derived from an election or appointment, no matter how irregular the election or appointment might be." A de facto trustee's good faith actions are binding on third persons. Because the purported successor trustee . . . acted as trustee and assumed its office through an appointment it reasonably believed to be effective, it was a de facto trustee and was entitled to compensation for its services. Other jurisdictions have also used the de facto trustee concept. *See, e.g., Creel v. Martin*, 454 So.2d 1350 (Ala. 1984); *In re Estate of Dakin*, 58 Misc.2d 736, 296 N.Y.S.2d 742 (1968); *In re Trust of Daniel*, 1970 OK 34, 466 P.2d 647 (Okla. 1970). . . . Because the concept of a de facto trustee is consistent with Washington law, we adopt it here.

> [Here, the appointed trustee] assumed the office of trustee under color of right when the dissolution court appointed it trustee. And [the appointed trustee] acted as the trustee, marshalling [sic] and protecting the Trust's assets. [The appointed trustee] reasonably believed it was the trustee and acted in good faith. The irregularity in the dissolution court's appointment did not invalidate [the appointed trustee's] de facto trustee status.

In re Irrevocable Trust of McKean, 144 Wn. App. 333, 183 P.3d 317, 321-22 (Wash. App. 2008) (internal footnotes and some internal citations omitted). Two elements must be met before a purported trustee can be deemed a de facto trustee: (1) the office or position must be assumed under color of right or title, and (2) the one claiming de facto status must exercise the duties of the office. *See In re Bankers Trust*, 403 F.2d at 20; *see also Haynes v. Transamerica Corp*., 2018 U.S. Dist. LEXIS 8465 (D. Colo. Jan. 18, 2018). Accordingly, at least in some jurisdictions, it would appear that if someone acted in good faith, under color of right or title, and actually did work, then it may be entitled to some compensation as a de facto trustee even if it was not the de jure trustee.

In Texas, in *Alpert v. Riley*, the court of appeals held that the purported trustee did not properly accept that position under the trust document and was never properly acting as a trustee. 274 S.W.3d 277 (Tex. App.—Houston [1st Dist.] 2008, no pet.). It then later held that because the individual was not the de jure trustee, he was not entitled to any compensation. *Id*. However, the court did not discuss the authority or concepts set out above.

V. CO-TRUSTEES' FIDUCIARY DUTIES

A. Each Co-Trustee Owes Fiduciary Duties

The common law provides that each co-trustee owes the same fiduciary duties to the beneficiaries. Texas Property Code 113.051 provides: "The trustee shall administer the trust in good faith according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust the trustee shall perform all of the duties imposed on trustees by the common law." Tex. Prop. Code § 113.051. The term "trustee" means "the person holding the property in trust, including an original, *additional*, or successor trustee, whether or not the person is appointed or confirmed by a court." Tex. Prop. Code § 111.004(18) (emphasis added). So, each co-trustee or additional trustee have common law duties.

Texas Trust Code Section 117.007 provides that a trustee has sole-interest standard of loyalty: "A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries." *Id*. at § 117.007. To uphold its duty of loyalty, a co-trustee must meet a sole interest standard and handle trust property solely for the benefit of the beneficiaries. *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 898 (Tex. App.—Texarkana 1987, no writ).

The Restatement discusses the duties owed by co-trustees. Restatement (Third) of Trusts § 81. It provides: "When a trust has multiple trustees, the fiduciary duties of trustees stated in this Chapter, except as modified by the terms of the trust, apply to each of the trustees." *Id*.

The Restatement provides that the trust document may alter the delegation of duties among co-trustees:

> The duties of multiple trustees, as discussed in this Section, may be reduced, modified, or specially allocated by the terms of the trust.
>
> …
>
> Thus, trust provisions may and often should allocate roles and responsibilities among the trustees, or relieve one or more of the trustees of duties to participate in particular aspects of the trust's administration. A settlor may even designate, or provide for the appointment of, a "special trustee" to handle only one or more specified functions or types of decisions (e.g., the exercise of tax-sensitive powers of distribution, when the general trustee or trustees are beneficiaries of those powers), with the special trustee having no authority in or responsibility for other aspects of the trust's administration. The settlor's limiting of a trustee's functions or allocation of functions among the trustees usually, either explicitly or as a matter of interpretation, has the effect of relieving the trustee(s) to whom a function is not allocated of any affirmative duty to remain informed or to participate in deliberations about matters within that function. Similarly, exculpatory provisions (§ 96) may be designed to apply selectively.
>
> Even in matters for which a trustee is relieved of responsibility, however, if the trustee knows that a co-trustee is committing or attempting to commit a breach of trust, the trustee has a duty to take reasonable steps to prevent the fiduciary misconduct. See Comments d and e. Furthermore, absent clear provision in the trust to the contrary, even in the absence of any duty to intervene or grounds for suspicion, a trustee is entitled to request and receive reasonable information regarding an aspect of trust administration in which the trustee is not required to participate.
>
> The terms of a trust may provide that the decision of a particular trustee to take action in certain matters shall prevail for purposes of breaking a deadlock, or even by overriding a position of the other trustees although they may constitute a majority. Essentially, a provision of this type merely authorizes action upon the decision of one (or possibly more) of the trustees in the event of disagreement but does not relieve the others of their normal duties and rights

> of informed participation in the trustees' deliberations and decision making. More generally, on the duties and liabilities of minority or dissenting trustees, see Comments d and e.

Restatement (Third) of Trusts § 81. Accordingly, absent delegation, each co-trustee owes same coextensive fiduciary duties as the other co-trustees.

B. Co-Trustees Should Exercise Their Duties Jointly

Co-trustees each owe fiduciary duties, but they should exercise their duties jointly, as a unit. So, one co-trustee should not take any action without the consent of the other co-trustees. *Shellberg v. Shellberg*, 459 S.W.2d 465, 470 (Civ. App.—Fort Worth 1970, ref. n.r.e.) ("The trust instrument conveyed the property to two trustees and provided that their powers were joint; the management, control and operation of the trust was to be by the joint action of the two trustees."). For example, if a trust calls for two co-trustees, it cannot operate with just one. *Id*.

One commentator provides:

> The powers of trustees of a private trust, whether they are imperative or discretionary, personal or attached to the office, are held jointly, in the absence of statute or contrary direction in the trust instrument. The trustees are regarded as a unit. They are joint tenants of realty in the usual case. They hold their powers as a group so that their authority can be exercised only by the action of all the trustees. "When the administration of a trust is vested in co-trustees, they all form but one collective trustee."
>
> …
>
> If one trustee attempts to exercise a joint power, or unjustifiably refuses to join with his co-trustees in exercising such a power, the court will often remove him. However, the court may decree that he act in a specified way and thus secure the affirmative use of the power. The powers of co-trustees are deemed to be joint and exercisable only by united action because courts believe such was the intent of the settlor. One who appoints several trustees to manage a trust is deemed to express a desire to have the benefit of the wisdom and skill of all in every act of importance under the trust. Since the rule is one based on the settlor's intent, a provision in the instrument varying the usual result is obviously valid. A settlor may give a majority or any other fraction of the whole group power to do a given act, for example, to sell land or to make investments. The majority so empowered must act in the interests of all the beneficiaries or be subject to control of the court at the instance of the minority.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, TRUSTEE'S POWERS IN GENERAL, § 554. *See also id*. at § 744 ("In the absence

of provision otherwise made by court order, statute or settlor, the powers of the trustee are joint and must be exercised as a group. The power to make a contract of sale and a deed of trust property, therefore, must be employed by the trustees acting together.").

Another commentator provides: "Generally, when the administration of a trust is vested in co-trustees, they all form one collective trustee and must exercise jointly all those powers that call for their discretion and judgment unless the trust instrument provides otherwise." 76 AM. JUR. 2D, TRUSTS, §321.

For example, in *Conte v. Conte*, the court of appeals affirmed a trial court's order denying a co-trustee's request for reimbursement for attorney's fees expended in connection with a declaratory judgment action brought by another co-trustee. 56 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The court noted that the trust expressly provided that "any decision acted upon shall require unanimous support by all co-trustees then serving," and "[c]learly, Joseph Jr.'s decision to employ counsel to defend against his co-trustee's declaratory judgment action was not the subject of unanimous support by all co-trustees." *Id*. Thus, he was not entitled to reimbursement from the trust for his attorneys' fees, despite the trust's provision that "[e]very trustee shall be reimbursed from the trust for the reasonable costs and expenses incurred in connection with such trustee's duties." *Id*. In a footnote, the court also noted that the other co-trustee had paid for her attorneys from the trust without the consent of the other co-trustee and noted that this was an issue that the successor trustee or beneficiary could raise in a later proceeding. *Id*. *See also Stone v. King*, No. 13-98-022-CV,2000 Tex. App. LEXIS 8070, 2000 WL 35729200 (Tex. App.—Corpus Christi 2000, pet. denied) (co-trustee had no authority to pay funds to a third party without the consent of a co-trustee or to pay his attorneys for the defense of claims).

For further example, in *In re Troy S. Poe Trust*, co-trustees could not agree on actions or work jointly and one co-trustee filed suit to modify the trust to allow the appointment of other co-trustees to break deadlocks. 591 S.W.3d 168 (Tex. App.—El Paso August 28, 2019, pet. filed). After the trial court granted the modification, the court of appeals reversed because the losing co-trustee was denied a jury trial on underlying issues of the settlor's intent. *Id*.

Therefore, absent delegation, co-trustees must jointly exercise any power or act together. If there are two co-trustees and they have equal rights, they must agree on all decisions. For example, they must agree on investments, distributions, principal and interest issues, loans, termination, and also disclosures. One aspect that is rarely considered is the act of communicating with beneficiaries. For routine matters, co-trustees can delegate the disclosure of matters to one co-trustee. For example, a corporate trustee may prepare and send trust statements to beneficiaries without expressly obtaining the consent of the co-trustee every time the statement is prepared. A course of conduct can apply. However, for any non-routine communication, the co-trustees should confer and agree on what is being communicated and when. It is not usual for one co-trustee to communicate with a beneficiary due to some special relationship that they have. The co-trustee may disclose perceived wrongs that the other co-trustee is doing. That should not be done where the other co-trustee has not consented to it. Though well intentioned, the communicating co-trustee does not have the authority or power to singularly exercise the trustee's role. If the co-trustee believes that the other co-trustee is doing something

wrong, and will not agree to disclose it to the beneficiaries, the co-trustee should seek judicial intervention.

C. Trust Limitations On Duties

A trust can limit the co-trustees' duties. The first place to look for any trust question is the trust document. Generally, the trust document governs and should be followed. Tex. Prop. Code § 111.0035(b); 113.001. "The trustee shall administer the trust in good faith according to its terms and the Texas Trust Code." *Tolar v. Tolar*, No. 12-14-00228-CV, 2015 Tex. App. LEXIS 5119 (Tex. App.—Tyler May 20, 2015, no pet.).

It is common for settlors to execute trust documents that contain exculpatory clauses. An exculpatory clause is one that forgives the co-trustees for some action or inaction. Generally, these types of clauses are enforceable in Texas and can effectively limit a co-trustee's duty. *Dolan v. Dolan*, No. 01-07-00694-CV, 2009 Tex. App. LEXIS 4487 (Tex. App.—Houston [1st Dist.] June 18, 2009, pet. denied). For example, in *Goughnour v. Patterson*, a court of appeals affirmed a summary judgment for a trustee arising from a beneficiary's claim that the trustee breached fiduciary duties by investing trust assets in a self-interested transaction. No. 12-17-00234-CV, 2019 Tex. App. LEXIS 1665 (Tex. App.—Tyler March 5, 2019, pet. denied). Among several defenses, the court held that the trustee proved that an exculpatory clause applied because the trustee did not act with gross negligence. *Id*.

In Texas, exculpatory clauses are strictly construed, and a trustee is relieved of liability only to the extent to which it is clearly provided that it will be excused. *Jewett v. Capital Nat. Bank of Austin*, 618 S.W.2d 109, 112 (Tex. App.—Waco 1981, writ ref'd n.r.e.); *Martin v. Martin*, 363 S.W.3d 221, 230 (Tex. App.—Texarkana 2012, pet. dism'd by agr.). *See also Price v. Johnston*, 638 S.W.2d 1, 4 (Tex. App.—Corpus Christi 1982, no writ) ("When a derogation of the [Texas Trust] Act hangs in the balance, a trust instrument should be strictly construed in favor of the beneficiaries"). For example, a court held that a clause that relieved a trustee from liability for "any honest mistake in judgment" did not forgive the trustee's acts of self-dealing. *Burnett v. First Nat. Bank of Waco*, 567 S.W.2d 873, 876 (Civ. App.—Tyler 1978, ref. n.r.e.).

There are also important statutory limitations on the effectiveness of exculpatory clauses. Texas Property Code Section 111.0035 provides that the terms of a trust may not limit a trustee's duty to respond to a demand for an accounting or to act in good faith. Tex. Prop. Code Ann. § 111.035(b)(4). Additionally, the Texas Trust Code Section 114.007(a) provides that an exculpatory clause is unenforceable to the extent that it relieves a trustee of liability for breaches done with bad faith, intent, or with reckless indifference to the interests of a beneficiary or for any profit derived by the trustee from a breach of trust. Tex. Prop. Code Ann. § 114.007(a). Therefore, a trust document may relieve co-trustees from liability for negligent acts that do not result in a trustee deriving a profit from its breach.

There are two primary types of clauses that are discussed in this article. The first is an exculpatory clause that relieves a trustee from liability for breaching a duty. This type of clause is typically more general in nature. "[A]n exculpatory clause is '[a] contractual provision relieving a party from any liability resulting from a negligent or wrongful act.'" Holland A. Sullivan, Jr., *The Grizzle Bear: Lingering Exculpatory Clause Problems Posed By Texas Commerce Bank, N.A. v. Grizzle*, 56 BAYLOR L. REV. 253, 256 (2004)

(hereinafter "Grizzle Bear"). "A trustee's breach may give rise to liability, and the exculpatory clause purports to excuse the trustee from that liability." *Id*. This type of clause may state: "The trustee is not liable for any loss to the trust that arises from the trustee's actions or inactions unless done in bad faith or with reckless disregard."

The second is a type of clause that relieves a trustee from a particular duty or directs the trustee to do something that might ordinarily be a breach of duty. It is a more specific type of clause. For example, such a clause may state: "The trustee is relieved of the duty to investigate the actions of any prior trustee and has no duty to bring any claim against any prior trustee."

Section 114.007(c) deals with the second type of clause and deals with specific duties and actions. Section 114.007(c) provides:

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

Id. at § 114.007(c). This states that a settlor can relieve a trustee from a specific duty or to allow a trustee to do or not do some action otherwise restricted by law. There are no express restrictions regarding bad faith, intentionally, or with reckless indifference to the beneficiary's interests *or* where the co-trustees acted with or without negligence where the trustee derived a profit.

However, Section 114.007(c) does provide that it applies "except as provided in Section 111.035…" Tex. Prop. Code § 114.007(c). Section 111.035

> (b) The terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit: … (2) the applicability of Section 114.007 to an exculpation term of a trust; … (4) a trustee's duty: … (B) to act in good faith and in accordance with the purposes of the trust . . .

Tex. Prop. Code Arm. § 111.0035. Importantly, this provision states, in part, that a trust term may not limit a trustee's "duty to act in good faith and in accordance with the purposes of the trust." Tex. Prop. Code § 111.0035(b)(4)(B); *Martin v. Martin*, 363 S.W.3d 221, 2012 Tex. App. LEXIS 2146 (Tex. App.—Texarkana Mar. 20, 2012, no pet.) (even though a trust provision allowed the trustee to have conflicts of interest, the provision was not enforceable as a jury found that the trustee did not act in good faith). There is no statutory exception to this duty of good faith. The duty to act in good faith appears to apply at all times to every provision of a trust agreement.

Section 114.007(c) expressly discusses two types of powers clauses: those that eliminate a duty that generally exists and those that allow a trustee to do some act that ordinarily it cannot do. The first type of powers clause (eliminating a duty), would seemingly be enforceable even if the trustee failed to take

some act in bad faith. A trustee cannot breach a duty, even in bad faith, that the trustee does not owe. For example, if a trust states that the trustee has no duty to investigate or raise claims against a prior trustee, can a trustee be liable for failing to do so in bad faith? What if the trustee knows that the prior trustee stole assets from the trust, is a friend or relative of the prior trustee, and intentionally refuses to sue the prior trustee for breaching fiduciary duties? In this circumstance, can a beneficiary hold the trustee liable despite the trust clause to the contrary?

As described in more detail below, at least one court has held that trustees can rely on a broad powers clause relieving them of the duty to sue prior trustees even where they a conflict of interest. *Benge v. Roberts*, No. 03-19-00719-CV, 2020 Tex. App. LEXIS 6335 (Tex. App.—Austin August 12, 2020, no pet. history). The court disagreed with the beneficiary's argument that the trustees could be held liable for proceeding while they had a conflict of interest, i.e., acting in bad faith or with intent:

> Benge contends that cause exists for the co-trustees' removal because they have "actual conflicts of interest" due to their participation in the Consolidated Matter, rendering them incapable of "impartially evaluat[ing]" whether to "continue to fight" Benge in the appeal of the Consolidated Matter and incur attorney's fees, depleting the Trust. She contends that removal of the co-trustees because of their conflict of interest is a distinct claim from one alleging that they have liability for Missi's alleged breaches of fiduciary duty and, therefore, is not subject to the exculpatory clause.
>
> We reject this argument because it directly conflicts with the broad language in the exculpatory clause relieving the co-trustees from any "duty, responsibility, [or] obligation" for the "acts, defaults, or omissions" of Missi. While ordinarily a successor trustee has the duty to "make a reasonable effort to compel a redress" of any breaches by a predecessor, see Tex. Prop. Code § 114.002(3)—which presumably would include impartially evaluating whether to "fight" Benge in the appeal of the Consolidated Matter—the exculpatory clause in the Trust relieves the co-trustees of that duty, as permitted by the Trust Code. *See id*. §§ 111.0035(b), 114.007(c). The co-trustees cannot as a matter of law have a conflict of interest due to allegedly lacking the ability to be "impartial" about deciding whether or how to redress Missi's alleged breaches when they have no duty to redress such breaches in the first instance.

Id.

The other type of powers clause is the type that allows a trustee to do something that it ordinarily cannot do. For example, a trust may allow a trustee to purchase property from the trust. The trustee ordinarily cannot

enter into a self-dealing transaction with the trust, but this type of provision would allow a trustee to do so. However, the trustee would have to do so in good faith. So, if the trustee paid only half the market value for the property, or it did the transaction via a loan and provided a below market interest rate or with under secured collateral, then the trustee may not be in good faith and may not be able to take advantage of the powers clause.

D. Co-Trustees Of Revocable Trusts Have Limited Duties

Co-trustees of revocable trusts have limited duties. The general rule is that: "[T]he duties of a trustee of a revocable trust are owed exclusively to the settlor . . . the rights of non-settlor beneficiaries are generally subject to the control of the settlor. Thus, as a general rule, the trustee cannot be held to account by other beneficiaries for its administration of a revocable trust during the settlor's lifetime." *In re Estate of Little*, No. 05-18-00704-CV, 2019 Tex. App. LEXIS 7355 (Tex. App.—Dallas August 20, 2019, pet. denied).

For example, in *In re Estate of Little*, a settlor of a revocable trust withdrew trust assets and deposited them into an account with rights of survivorship with one child as the beneficiary. No. 05-18-00704-CV, 2019 Tex. App. LEXIS 7355 (Tex. App.—Dallas August 20, 2019, pet. denied). His other children, who were beneficiaries of the revocable trust, sued the non-settlor co-trustee for allowing that to happen. The trial court granted summary judgment for the co-trustee, and the beneficiaries appealed. The court reviewed the co-trustee's duties:

> Furthermore, Dan, as co-trustee of a revocable trust, owed his fiduciary duty to Father while Father was alive… Dan was co-trustee of the Trust during Father's lifetime and ceased being a trustee when Father died. There is no evidence that he misappropriated or did anything with Trust property during his tenure as trustee. The uncontroverted evidence is that, while a co-trustee, Dan also made no decisions about the expenditure of funds from the survivorship account, nor did he claim entitlement to any funds in that account. Instead, he helped Father pay his living expenses from the survivorship account as Father directed. It was not until Father died and Dan was no longer a trustee that he claimed the $216,000 in the account for which he was the named the surviving party. Sums remaining in a survivorship account after the death of one of the parties belong to the surviving party.

Id. Accordingly, the court of appeals affirmed the summary judgment for the co-trustee.

In *Moon v. Lesikar*, the court of appeals affirmed the dismissal of a case brought by a co-trustee against the settlor/co-trustee based on the removal of assets from the trust. 230 S.W.3d 800 (Tex. App.—Houston [14th Dist.] July 10, 2007, pet. denied). The court held that the co-trustee had no standing to challenge the settlor's removal of the assets. The court cited the following precedent from other jurisdictions. *In re Malasky*, 290 A.D.2d 631, 736 N.Y.S.2d 151, 152 (N.Y. App. Div. 2002); *Hoescher v. Sandage*, 462 N.W.2d 289, 291 (Iowa Ct. App. 1990).

VI. TRUST MANAGEMENT BY CO-TRUSTEES

A. Decisions By Co-Trustees

Co-trustees are obligated to manage the trust together. At common-law, the co-trustees had to act with unanimity: "The traditional rule, in the case of private trusts, was that if there were two or more trustees, all had to concur in the exercise of their powers." SCOTT AND ASCHER ON TRUSTS, WHEN POWERS ARE EXERCISABLE BY SEVERAL TRUSTEES, § 18.3. The Texas Trust Code provides that, in the absence of trust direction, co-trustees generally act by majority decision. Tex. Prop. Code § 113.085(a); *Berry v. Berry*, no. 13-18-00169-CV, 2020 Tex. App. LEXIS 1884 (Tex. App.—Corpus Christi March 5, 2020, no pet.). See also RESTATEMENT (THIRD) OF TRUSTS, § 39.

For example, *Duncan v. O'Shea*, the court affirmed a trial court's ruling that a trust could sell real estate where the majority of co-trustees voted for that action and over the objection of a dissenting co-trustee. No. 07-19-00085-CV, 2020 Tex. App. LEXIS 6564 (Tex. App.—Amarillo August 17, 2020, no pet.). The court held that the trustees had the power to make the sell, but that there was still an issue as to whether the action was a breach of duty. *Id*. The court stated:

> It merely declares that under applicable law and the terms of the Marital Trust, if Appellees, being a majority of the co-trustees, decide to sell a piece of real property held in the Marital Trust, then they may do so without her agreement. Appellees also note that if an actual sale violated the terms of the trust instrument or otherwise breached a fiduciary duty, Appellant would have a claim at that time. According to Appellees, the underlying proceeding is merely a declaration of their right to act without the agreement of Appellant in order to give assurance to any title insurance underwriters or potential buyer that she will not, as she has in the past, be able to interfere in the sale of that real property. Because the details of a future sale are not fact issues precluding the particular declaratory judgment sought, Appellant has not raised a genuine issue of material fact precluding summary judgment in this matter.

Id.

In another case, the court held that a co-trustee did not have authority to sue a third party on behalf of the trust where he was in the minority. *Berry v. Berry*, no. 13-18-00169-CV, 2020 Tex. App. LEXIS 1884 (Tex. App.—Corpus Christi March 5, 2020, no pet.). His remedy was to sue his co-trustees. *Id*. Further, in *Ward v. Stanford*, the court of appeals held that a trust would not have accelerated a note where two of the three trustees voted against that action. 443 S.W.3d 334 (Tex. App.—Dallas 2014, pet. denied).

There are circumstance when less than a majority of co-trustees can act for the trust. If a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust. Tex. Prop. Code § 113.085(b). If a co-trustee is unavailable to participate and prompt action is necessary to achieve the efficient administration or purposes of the

trust or to avoid injury to the trust property or a beneficiary, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust. *Id*. § 113.085(d). Otherwise, an act by less than a majority of the co-trustees (absent trust document approval) is not valid, may result in liability to the improperly acting co-trustee, and may be voided depending on the innocence of the third party.

B. Right And Duty To Manage Trust

The Texas Trust Code provides that a co-trustee has a duty to participate in the performance of a trustee's function. Tex. Prop. Code § 113.085(c). So, generally, a co-trustee must participate in the management of a trust. *Id*. There are two exceptions to a co-trustee's duty to participate, which are if the co-trustee:

> (1) is unavailable to perform the function because of absence, illness, suspension under this code or other law, disqualification, if any, under this code, disqualification under other law, or other temporary incapacity; or
>
> (2) has delegated the performance of the function to another trustee in accordance with the terms of the trust or applicable law, has communicated the delegation to all other co-trustees, and has filed the delegation in the records of the trust.

Tex. Prop. Code § 113.085(c). If a co-trustee is unavailable to participate and prompt action is necessary to achieve the efficient administration or purposes of the trust or to avoid injury to the trust property or a beneficiary, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust. *Id*. § 113.085(d).

The Restatement (Third) of Trusts provides: "If a trust has more than one trustee, except as otherwise provided by the terms of the trust, each trustee has a duty and the right to participate in the administration of the trust." RESTATEMENT (THIRD) OF TRUSTS, § 81. Furthermore, "each co-trustee has a duty, and also the right, of active, prudent participation in the performance of all aspects of the trust's administration. Implicit in this requirement of prudent participation is a duty of reasonable cooperation among the trustees." *Id*. cmt. c.

The Restatement goes on to explain a co-trustee's right to participate:

> The duty of a trustee to administer the trust applies to the trustees of trusts that have two or more trustees. Thus, except as otherwise provided by the terms of the trust, each co-trustee has a duty, and also the right, of active, prudent participation in the performance of all aspects of the trust's administration. Implicit in this requirement of prudent participation is a duty of reasonable cooperation among the trustees.
>
> In hiring counsel for the trustees in their fiduciary capacity, the selection is ordinarily made by majority vote of the co-trustees (§ 39), with all of the trustees entitled to participate in meetings and other aspects of

the counseling process and to have access to communications from the trustees' counsel. If separate counsel is reasonably needed to aid a trustee in the performance of a fiduciary duty, as may be necessary under Subsection (2), appropriate attorney fees are payable or reimbursable from the trust estate.

The duty to participate in the trust's administration does not prevent, as a means of participation, prudent delegation by the co-trustees to one or more agents in accordance with § 80. Nor does it preclude proper delegation by a co-trustee to the other co-trustee(s) in accordance with Comment c(1).

The trustee's duty to participate in administering the trust does not require an equal level of effort or activity by each co-trustee, as recognized in the variability of their "reasonable" compensation (§ 38, Comment i). Accordingly, the duty of participation by each of the co-trustees does not prevent them from deciding (short of constituting delegation) to allow one or more of the co-trustees to carry more of the burden in regard to various matters, for example, by initiating, analyzing, reporting, and making recommendations for reasonably informed action by all of the trustees. It does, however, normally prevent the trustees from "dividing" the trusteeship or its functions in a manner that is not authorized by the terms of the trust. Cf. Comment c(1).

If and to the extent a co-trustee is unavailable to participate prudently in the performance of a trusteeship function because of absence, illness, or other temporary incapacity, or because of disqualification under other law, the co-trustee is excused from participation. If prudence calls for action to be taken in these circumstances, the remaining co-trustee(s) can properly act for the trust.

In the case of a trust with two co-trustees, joint action or the concurrence of both trustees is required to exercise powers of the trusteeship. See § 39. Also, in trusts having three or more trustees, the terms of the trust or applicable law (rejecting the majority-control rule of § 39) may require action or concurrence by all of the trustees to exercise certain or all of the trustees' powers. If a situation arises in which prudence requires that the trustees reach a decision and they are unwilling or unable to do so, the trustees have a

> duty to apply to an appropriate court for instructions. See § 71.

Id.

Indeed, there is a duty to participate in the administration of the trust, and if the co-trustee refuses to participate, then a court may remove that co-trustee. In Texas, a court may remove a trustee:

> (a) A trustee may be removed in accordance with the terms of the trust instrument, or, on the petition of an interested person and after hearing, a court may, in its discretion, remove a trustee and deny part or all of the trustee's compensation if: (1) the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust; (2) the trustee becomes incapacitated or insolvent; (3) the trustee fails to make an accounting that is required by law or by the terms of the trust; or (4) *the court finds other cause for removal*.

Tex. Prop. Code § 113.082. Certainly, a co-trustee refusing to participate in the trust's administration could be "other cause" for removal. *Id*.

Additionally, it is common for trusts to provide that if a trustee "ceases" to act, that he, she, or it can be replaced by a successor trustee via terms of the trust. If a co-trustee has a duty to act, and refuses to do so, he, she, or it may create an argument that he, she, or it ceased to be the trustee and can be replaced.

One commentator states: "Where there are several trustees it is the duty of each of them, unless it is otherwise provided by the terms of the trusts, to participate in the administration of the trust. . . . It is improper for one of the trustees to leave to the others the control over the administration of the trust. A trustee who remains inactive is guilty of a breach of trust. . . ." SCOTT ON TRUSTS, § 184.

Another commentator states: "Where there are several trustees, each is under a duty to participate fully in the administration of the trust." 76 AM. JUR. 2D, TRUSTS, §321. It goes on to state:

> Where there are several trustees, each is under a duty to participate fully in the administration of the trust, and each trustee is required to exercise reasonable care to prevent a co-trustee from committing a breach of trust. Thus, a co-trustee does not escape liability for a breach of fiduciary duty by failing to participate in the administration of the trust. Simple, passive negligence of a trustee can give rise to liability for the breach of a co-trustee.

76 AM. JUR.2D, TRUSTS, § 344. *See also* 76 AM. JUR.2D, TRUSTS, § 366.

Another commentator provides:

> The liabilities of an inactive trustee should be determined by the application of the broad principles of equity: (a)

trustees are joint tenants; (b) the trust powers in private trusts are jointly held and must be exercised by unanimous action, in the absence of a statute or express provision to the contrary; (c) the trustee is required to use the care which an ordinarily prudent man would use in the conduct of his own affairs; and (d) the trustee may not delegate the exercise of discretionary powers, but may delegate to agents the performance of minor duties or mere mechanical acts. These rules are well settled and fundamental. They should govern the inactive member of a co-trusteeship, as well as all other trustees.

When tested by these standards, the problem arises by a trustee who remains inactive after notice of past specific breach of trust or a threatened breach by his co-trustee, seems simple. To fail to act to repair a past wrong or prevent a threatened injury is to fail to use care of a reasonably prudent man…

[T]he case of the passive trustee who fails to inspect or supervise the administration of the trustee by his active colleague seems easy of solution. In the first place, to allow the co-trustee exclusive control of investments, the keeping of accounts, and expenditures from trust funds, is a delegation of discretionary duties. If the inactive trustee supervises the acts of his co-trustee, he becomes active and he may be said to make the acts of the co-trustee his own acts and to use his own discretion in the administration of the trust. But where there is no inspection, and the inactive trustee knows that discretionary duties must performed, he is assuredly authorizing the active co-trustee to exercise such discretion and ought to be regarded as committing a breach of trust, Secondly, judged by the measure of care of the ordinarily prudent man, the inactive trustee is guilty of a breach in failing to supervise. No man of common business ability would entrust a stock of goods, for example, to an agent for month or years without an accounting or inspection, even if there were no reason for suspicion.

Cases where there has been mere passivity, as a result of which the co-trustee has obtained exclusive possession, or where the affirmative act of the inactive trustee has caused such exclusive possession, seem identical in principle. The result is the same in both cases. Nonfeasance where there is a duty to act ought to be regarded as the equivalent of misfeasance. A trustee who accepts a trust impliedly agrees to assume his full

> share of control and responsibility. Since the trust title and the trust powers are joint, it is the duty of each trustee to assist in reducing the property to joint possession where it may be jointly controlled.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, § 591.

Moreover, the Uniform Trust Code provides that a trustee may be removed if "lack of cooperation among co-trustees substantially impairs the administration of the trust." U.T.C. § 706(b)(2). The associated comment states:

> The lack of cooperation among trustees justifying removal under subsection (b)(2) need not involve a breach of trust. The key factor is whether the administration of the trust is significantly impaired by the trustees' failure to agree. Removal is particularly appropriate if the naming of an even number of trustees, combined with their failure to agree, has resulted in deadlock requiring court resolution. The court may remove one or more or all of the trustees. . . . [R]emoval might be justified if a communications breakdown is caused by the trustee or appears to be incurable.

Id. cmt. Further, the failure of a co-trustee to cooperate with its co-trustees is grounds to remove the co-trustee. RESTATEMENT (THIRD) OF TRUSTS, § 37(e) (The following are illustrative, but not exhaustive, of possible grounds for a court to remove a trustee: … unreasonable or corrupt failure to cooperate with a co-trustee.").

C. Ratification of Co-Trustee's Invalid Actions

As stated earlier, co-trustees should act in unison or by a majority vote depending on the number of co-trustees or the terms of the trust. However, a single co-trustee's action, which was originally invalid, can later become effective by a co-trustee's ratification. The Restatement provides:

> An action taken by one trustee with the consent of the other trustee(s) is valid. When a trustee has acted without the others' consent, they can ratify the action. Thus, a contract to sell trust property signed by one of two trustees with the knowledge and acquiescence of the other is valid. If the other trustee did not know of the contract when it was signed but later learned of it and failed to object within a reasonable time, this would be an effective ratification."

RESTATEMENT (THIRD) OF TRUSTS, § 39(b).

Another commentator provides:

> Where a single trustee seeks to exercise a joint power, the invalidity of his action may be cured by later *ratification or acquiescence* by the nonacting trustees or by court order. A beneficiary may estop himself from objecting to the binding character of an attempt by one of several

> trustees to exercise a joint power, as where the beneficiary consents to the act in advance or accepts the benefits of the act after it has been accomplished.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, TRUSTEE'S POWERS IN GENERAL, § 554 (emphasis in original). *See also In re Estate of Farley*, 717 N.Y.S. 500, 186 Misc.2d 355 (Sur. Ct. 2000) (co-trustee ratified corporate co-trustee's course of conduct by being aware of conduct and agreeing to same); *W.A.K. ex rel. Karo v. Wachovia Bank, N.A.*, 712 F. Supp. 2d 476, 485 (E.D. Va. 2010); *Wyman v. Wyman*, 208 Mont. 57, 676 P.2d 181, 184-85 (Mont. 1984); *Gleason v. Elbthal Realty Trust*, 122 N.H. 411, 445 A.2d 1104, 1105 (N.H. 1982); *Deviney v. Lynch*, 372 Pa. 570, 94 A.2d 578, 581 (Pa. 1953). A co-trustee cannot, however, effectively ratify an act that is in breach of the trust agreement or otherwise in breach of fiduciary duties. *In re Estate of Foiles*, 338 P.3d 1098, 1101, 2014 COA 104, 2014 COA 104 (Colo. App. 2014); *Mark Twain Kansas City Bank v. Kroh Bros. Dev. Co.*, 250 Kan. 754, 863 P.2d 355, 362 (Kan. 1992).

VII. CO-TRUSTEES' DUTY TO COOPERATE

Co-trustees have a duty to cooperate and work together in a respectful way. At common law, "co-trustees owe to each other, as well as to the beneficiaries . . ., the duty and obligation to so conduct themselves as to foster a spirit of mutual trust, confidence, and cooperation to the extent possible." *Ball v. Mills*, 376 So.2d 1174, 1182 (Fla. App. 1979). One commentator states: "Co-trustees owe to each other, as well as to the beneficiaries of the trust, the duty and obligation to so conduct themselves as to foster a spirit of mutual trust, confidence, and cooperation to the extent possible; at the same time, the trustees should maintain an attitude of vigilant concern for the proper administration or protection of the trust business and affairs." 76 AM. JUR. 2D, TRUSTS, §321.

Another commentator provides:

> [W]here there are several trustees and the relations among the trustees are such that they cannot cooperate in the affairs of the trust, all or none of them may be removed. In deciding such cases the court has regard only for what will be most beneficial to the interests of the beneficiaries. If it is shown that there is no danger of loss or mismanagement, or if the court prefers a different solution to the disagreement, or if the beneficiaries prefer to retain all of the trustees, removal may be denied.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, GROUNDS FOR REMOVAL, § 527.

While the ill will or hostility of a trustee is generally insufficient cause to remove the trustee, it becomes so if it is determined that the "hostility, ill will, or other factors have affected the trustee so that he cannot properly serve in his capacity." *Akin v. Dahl*, 661 S.W.2d 911, 913-14 (Tex. 1983); *Lee v. Lee*, 47 S.W.3d 767, 792 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). In other words, if the evidence illustrates that the hostility "does or will affect" the trustee's performance of his duties, then cause exists for his removal. *Id*. Hostility is not limited only to situations wherein the trustee's performance is affected and also

includes those wherein it impedes the proper performance of the trust, especially if the trustee made the subject matter of the suit is at fault. *Bergman v. Bergman-Davison-Webster Charitable Trust*, No. 07-02-0460-CV, 2004 Tex. App. LEXIS 1 (Tex. App.—Amarillo Jan. 2, 2004, no pet.) (citing RESTATEMENT (THIRD) OF THE LAW OF TRUSTS, § 37, comment e(1) (2003); A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 107, p. 111 (4th ed. 1987)).

If a co-trustee refuses to cooperate and is hostile such that it impacts the administration of the trust, a court may remove that co-trustee. For example, in *Ramirez v. Rodriguez*, three co-trustees sued a fourth trustee to have him removed due to his hostile actions: he "has engaged in a pattern of creating hostility and friction that impedes and/or affects the operations of the trust." No. 04-19-00618-CV, 2020 Tex. App. LEXIS 1340 (Tex. App.—San Antonio Feb. 19, 2020, no pet.). The defendant filed a motion to dismiss the suit, and the court of appeals affirmed the denial of the dismissal. The court stated:

> Sonia, Victor, and Javier sought to have Santiago removed as a co-trustee under section 113.082(a)(4) of the Texas Trust Code, which allows a trial court to remove a trustee based on a finding of "other cause for removal." "Ill will or hostility between a trustee and the beneficiaries of the trust, is, standing alone, insufficient grounds for removal of the trustee from office." However, a trustee will be removed if his hostility or ill will affects his performance. Furthermore, "[p]reservation of the trust and assurance that its purpose be served is of paramount importance in the law." Id. For this reason, hostility that impedes the proper performance of the trust is grounds for removal, "especially if the trustee made the subject matter of the suit is at fault." Removal actions prevent a trustee "from engaging in further behavior that could potentially harm the trust." "Any prior breaches or conflicts on the part of the trustee indicate that the trustee could repeat her behavior and harm the trust in the future." "At the very least, such prior conduct might lead a court to conclude that the special relationship of trust and confidence remains compromised."

Id. (internal citations omitted). The court concluded that the plaintiffs raised sufficient allegations to support a claim:

> As previously noted, a trustee can be removed if his hostility or ill will affect his performance or the proper performance of the trust. We hold Sonia, Victor, and Javier presented clear and specific evidence of a prima face case that Santiago's hostility was impeding his performance as a co-trustee and the performance of the Trust. Accordingly, Sonia, Victor, and Javier satisfied their burden of proof, and the motion to dismiss was properly denied.

Id. *See also Dildine v. Bonham*, No. 03-07-00631-CV, 2009 Tex. App. LEXIS 1752 (Tex. App.—Austin Mar. 12, 2009, no pet.) (affirmed removal of co-trustees who refused to set trustee meeting because it would allegedly be a waste of time).

In another case, a court affirmed the removal of a co-trustee and found probative evidence to conclude that the co-trustee caused hostility and friction and affected or impeded the operation of the trust. *Bergman v. Bergman-Davison-Webster Charitable Trust*, No. 07-02-0460-CV, 2004 Tex. App. LEXIS 1 (Tex. App.—Amarillo Jan. 2, 2004, no pet.). The evidence included that the co-trustee taped meetings despite majority disapproval, thus chilling conversation, he sought to use his position to further his son's interests, he made false statements in an affidavit in order to secure a restraining order on a sale of trust property, he used profanity and intimidation during the meetings, and he threatened his fellow trustees with suit. *Id*. The court held:

> We recognize that the office of trustee carries with it fiduciary duties. So too do we understand that trustees are entitled to opinions independent from the other trustees and must voice them when they believe something is wrong. Yet, that does not entitle the dissenting individual to become so hostile or violent that the effective operation of the trust is impeded. Persistence and persuasion are the characteristics to be invoked to correct perceived error. Litigation may also be an alternative. But, violence, hostility, profanity, or intimidation are not, especially when they impede trust purposes.

Id. at n. 2.

VIII. DELEGATION OF DUTIES

A. Delegation By Co-Trustee

At common law, a co-trustee could not delegate the administration of the trust to a single trustee. 76 AM. JUR. 2D, TRUSTS, §322.

> A co-trustee cannot delegate the administration of a trust to a single trustee. Nor may a trustee delegate the exercise of discretion to a joint or co-trustee. The Uniform Trust Code provides that a trustee may not delegate to a co-trustee the performance of a function the settlor reasonably expected the trustees to perform jointly, and unless a delegation was irrevocable, a trustee may revoke a delegation previously made. Generally, one trustee who delegates to another the administration of a trust breaches the duties of a trustee. The duty of a trustee not to abandon the exercise of powers to co-trustees is owed to the beneficiaries of the trust and not to persons dealing with the co-trustee.

Id.

However, the Texas Trust Code provides that a co-trustee may delegate to another the performance of a function unless the settlor specifically directs that the co-trustees

jointly perform the function. Tex. Prop. Code § 113.085(e). "Unless a co-trustee's delegation under this subsection is irrevocable, the co-trustee making the delegation may revoke the delegation." *Id*. So, a co-trustee can opt out of participation in a management decision if the co-trustee is unavailable. Further, a co-trustee may delegate a function to a co-trustee, which may generally be revoked. The statute does not state that any particular function cannot be delegated.

Further, the Uniform Prudent Investor Act provides that a trustee can delegate certain investment and management functions as follows:

> (a) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in: (1) selecting an agent; (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
>
> (b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
>
> (c) A trustee who complies with the requirements of Subsection (a) is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated, unless: (1) the agent is an affiliate of the trustee; or (2) under the terms of the delegation: (A) the trustee or a beneficiary of the trust is required to arbitrate disputes with the agent; or (B) the period for bringing an action by the trustee or a beneficiary of the trust with respect to an agent's actions is shortened from that which is applicable to trustees under the law of this state.
>
> (d) By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

Tex. Prop. Code § 117.011. *See also Aubrey v. Aubrey*, 523 S.W.3d 299, 314 (Tex. App.—Dallas 2017, no pet.) (plaintiff could not raise claim that trustee did not personally perform certain functions where statute allowed delegation).

The Restatement provides:

> The general duty of each co-trustee to participate in performing the functions of the trusteeship does not prevent delegation on a prudent basis between or among themselves with respect to essentially ministerial matters, such as the custody of trust property

and the implementation of decisions that have been made by proper vote of the co-trustees. (A trustee may also expressly delegate responsibilities and authority to the remaining co-trustee(s) in anticipation of the trustee's unavailability due to circumstances of the type described above in Comment c, involving relief from responsibility during illness or absence.)

Delegation is also permissible in circumstances in which it would be unreasonable to expect the co-trustee personally to perform the function(s) in question. (Compare the earlier standard for delegation generally, as stated in Restatement Second, Trusts § 171.)

Furthermore, delegation to a co-trustee may be desirable and appropriate in circumstances in which adherence to the general rule of Comment c would not be practical and prudent because of cost or inefficiency, or even because delegation would be consistent with the settlor's expectations in designating, or providing for appointment of, that co-trustee. For example, delegation of investment authority is generally authorized by implication when a settlor designates his or her surviving spouse to serve as co-trustee with a skilled professional trustee (or provides that the co-trustee position should always be filled by one of the settlor's children, to serve with the professional trustee) when the settlor was aware that the spouse (or children) had neither skill nor interest in investment or relevant financial matters.

A trustee's delegation to the other trustee(s) is revocable and does not relieve the other trustee(s) of the duty to provide information to the delegating trustee, on request or in the event of significant, unanticipated circumstances or changes of investment policy.

…

Note further that co-trustees cannot, ordinarily at least, hire and fire one another, and also that a "dividing" of functions among fiduciary peers invites the evolution of territorial prerogatives and unhealthy forms of reciprocity.

RESTATEMENT (THIRD) OF TRUSTS, § 81.

However, delegation is limited to actions that the settlor would have contemplated being performed by one trustee. Under Uniform Trust Code § 703(e): "A trustee may not delegate to a co-trustee the performance of a function the settlor reasonably expected the trustees to perform

jointly. . . .” UTC § 703(e). The Uniform Code goes on to state:

> Rationale. The comments to UTC § 703 explain: “Co-trustees are appointed for a variety of reasons. Having multiple decision-makers serves as a safeguard against eccentricity or misconduct. Co-trustees are often appointed to gain advantage of differing skills, perhaps a financial institution for its permanence and professional skills, and a family member to maintain a personal connection with the beneficiaries. On other occasions, co-trustees are appointed to make certain that all family lines are represented in the trust’s management. . . .
>
> “Subsection (e) addresses the extent to which a trustee may delegate the performance of functions to a co-trustee. The standard differs from the standard for delegation to an agent as provided in Section 807 because the two situations are different . . . . Subsection (e) is premised on the assumption that the settlor selected co-trustees for a specific reason and that this reason ought to control the scope of a permitted delegation to a co-trustee. Subsection (e) prohibits a trustee from delegating to another trustee functions the settlor reasonably expected the trustees to perform jointly. The exact extent to which a trustee may delegate functions to another trustee in a particular case will vary depending on the reasons the settlor decided to appoint the co-trustees. The better practice is [for a settlor] to address the division of functions in the terms of the trust. . . .”

Id.

B. Direction/Delegation By Settlor/Trustor

If a trust instrument grants any person, including the trustor, an advisory or investment committee, or one or more co-trustees, authority to direct the making or retention of an investment or to perform any other act of management or administration of the trust to the exclusion of the other co-trustees, the excluded co-trustees are not liable for a loss resulting from the exercise of that authority. Tex. Prop. Code § 114.0031. The Texas Property Code provides:

> If the terms of a trust give a person the authority to direct, consent to, or disapprove a trustee’s actual or proposed investment decisions, distribution decisions, or other decisions, the person is an advisor…
>
> A trustee who acts in accordance with the direction of an advisor, as prescribed by the trust terms, is not liable, except in cases of willful misconduct on the part of the trustee so directed,

for any loss resulting directly or indirectly from that act.

If the trust terms provide that a trustee must make decisions with the consent of an advisor, the trustee is not liable, except in cases of willful misconduct or gross negligence on the part of the trustee, for any loss resulting directly or indirectly from any act taken or not taken as a result of the advisor's failure to provide the required consent after having been requested to do so by the trustee.

If the trust terms provide that a trustee must act in accordance with the direction of an advisor with respect to investment decisions, distribution decisions, or other decisions of the trustee, the trustee does not, except to the extent the trust terms provide otherwise, have the duty to: (1) monitor the conduct of the advisor; (2) provide advice to the advisor or consult with the advisor; or (3) communicate with or warn or apprise any beneficiary or third party concerning instances in which the trustee would or might have exercised the trustee's own discretion in a manner different from the manner directed by the advisor.

Absent clear and convincing evidence to the contrary, the actions of a trustee pertaining to matters within the scope of the advisor's authority, such as confirming that the advisor's directions have been carried out and recording and reporting actions taken at the advisor's direction, are presumed to be administrative actions taken by the trustee solely to allow the trustee to perform those duties assigned to the trustee under the trust terms, and such administrative actions are not considered to constitute an undertaking by the trustee to monitor the advisor or otherwise participate in actions within the scope of the advisor's authority.

Tex. Prop. Code § 114.0031.

IX. CO-TRUSTEES HAVE A DUTY TO DISCLOSE TO ONE ANOTHER

Co-trustees have a duty to disclose to each other. A trustee also has a duty of full disclosure of all material facts known to it that might affect the beneficiaries' rights. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). Further, a trustee has a duty of candor. *Welder v. Green*, 985 S.W.2d 170, 175 (Tex. App—Corpus Christi 1998, pet. denied). Regardless of the circumstances, the law provides that beneficiaries are entitled to rely on a trustee to fully disclose all relevant information. *See generally Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 788 (1938). In fact, a trustee has a duty to account to the beneficiaries for all trust transactions, including transactions, profits, and mistakes.

Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996); *see also Montgomery*, 669 S.W.2d at 313. A trustee's fiduciary duty even includes the disclosure of any matters that could possibly influence the fiduciary to act in a manner prejudicial to the principal. *Western Reserve Life Assur. Co. v. Graben*, 233 S.W.3d 360, 374 (Tex. App.—Fort Worth 2007, no pet.). The duty to disclose reflects the information a trustee is duty-bound to maintain, as he or she is required to keep records of trust property and his or her actions. *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

The duty to disclose includes a co-trustee. A trustee, "particularly one empowered to exercise greater control, or having greater knowledge of trust affairs" is under a duty "to inform each co-trustee of all material facts relative to the administration of the trust that have come to his attention." G. Bogert, TRUSTS & TRUSTEES § 584, at 40 (Supp. rev. 2d ed. 1992). *See also Pennsylvania Co. v. Wilmington Trust Co.*, 40 Del. Ch. 567, 186 A.2d 751 (Del Ch. 1962) (co-trustee has duty to keep fellow trustees informed regarding facts which would affect the price at which to sell trust property). Even though a majority of trustees are authorized to act for all trustees, each trustee is entitled to access to trust records and to information regarding the administration of the trust, including investment decisions. *See* Bogert, TRUSTS & TRUSTEES § 584, at 40. By refusing to provide a co-trustee with trust information, or a meaningful opportunity to review this information, "a co-trustee commits a breach of trust for which he may be removed as a trustee." *Id*.

X. CO-TRUSTEES CAN SEEK AN ACCOUNTING

A co-trustee can seek an accounting from the other co-trustee. Texas Property Code Section 113.151 provides what is required for to request an accounting. It provides: "A beneficiary by written demand may request the trustee to deliver to each beneficiary of the trust a written statement of accounts covering all transactions since the last accounting or since the creation of the trust, whichever is later." Tex. Prop. Code § 113.151. "'Beneficiary' means a person for whose benefit property is held in trust, regardless of the nature of the interest." *Id*. at § 114.004 (2). In fact, the right to an accounting is a wide-ranging right. Any interested person may file suit to compel a trustee to account to that person. Tex. Prop. Code § 113.151. An interested person means a trustee, beneficiary, any other person with an interest in or claim against the trust, or anyone affected by the administration of the trust. *Id*. at § 111.004(7). *See, e.g., Faulkner v. Bost*, 137 S.W.3d 254 (Tex. App.—Tyler 2004, no pet.) (Daughter was an interested person with standing to request an accounting of Trust A, even though she was not a trustee or beneficiary, because she served as Trustee of Trust B, which held an assigned interest in Trust A). "'Trustee' means the person holding the property in trust, including an original, *additional*, or successor trustee, whether or not the person is appointed or confirmed by a court." *Id.* at § 114.004. So, in Section 113.151 when it states that a person sends a demand for an accounting to the trustee, it includes "additional trustee." *Id*. So, the Texas Legislature has provided a broad right to request and demand an accounting from a trustee.

Texas Property Code Section 113.151 provides: "If the trustee fails or refuses to deliver the statement on or before the 90th

day after the date the trustee receives the demand or after a longer period ordered by a court, any beneficiary of the trust may file suit to compel the trustee to deliver the statement to all beneficiaries of the trust." Tex. Prop. Code § 113.151(a). Section 113.151 of the Texas Property Code provides: "If a beneficiary is successful in the suit to compel a statement under this section, the court may, in its discretion, award all or part of the costs of court and all the suing beneficiary's fees and costs against the trustee in the trustee's individual capacity or in the trustee's capacity as trustee." Tex. Prop. Code § 113.151.

If a trustee declines to provide an accounting in response to the statutory request, the trustee will likely breach its fiduciary duties as a co-trustee. *Uzzell v. Roe*, No. 03-06-00402-CV, 2009 Tex. App. LEXIS 5239, at *11–12 (Tex. App.—Austin July 8, 2009). The *Uzzell* court stated:

> Counsel for Roe further testified that Uzzell, though asked repeatedly, failed and refused to provide an account of the trust transactions as required by statute. See Tex. Prop. Code Ann. § 113.151 (West 2007). This constituted a breach of Uzzell's fiduciary duty to Roe to fully disclose all material facts about the trust. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1995).

Id.

XI. CO-TRUSTEES' COMPENSATION

When a trust document is silent as to compensation for trustees, the statutory compensation scheme afforded by section 114.061 of the Texas Property Code applies. Tex. Prop. Code § 114.061(a); *see also Bigbee v. Castleberry*, 2008 Tex. App. LEXIS 364, 2008 WL 152382 at *2 n. 1 (Tex. App.—Corpus Christi 2008, no pet.*); Nacol v. McNutt*, 797 S.W.2d 153, 155 (Tex. App.—Houston [14th Dist.] 1990, writ denied) ("[A] trustee is, after all, presumptively entitled to reasonable compensation for her services."). Unless the trust does not allow compensation or only limited compensation, a trustee's payment of reasonable compensation to itself is not a breach of fiduciary duty. Tex. Prop. Code § 114.061; *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882 (Tex. App.—Texarkana 1987, no writ).

Section 114.061 provides, in pertinent part: "(a) Unless the terms of the trust provide otherwise and except as provided in Subsection (b) of this section, the trustee is entitled to reasonable compensation from the trust for acting as trustee. (b) If the trustee commits a breach of trust, the court may in its discretion deny him all or part of his compensation." Tex. Prop. Code § 114.061(a). *See also* UTC § 708(a) (providing for reasonable compensation). The statute does not define the term "reasonable compensation."

Where there are multiple trustees, the combined compensation must be reasonable. In this regard, the Restatement provides:

> When there are two or more co-trustees, compensation that is fixed by statute or trust provision ordinarily is to be divided among them in accordance with the relative value of their services. Where the rule of reasonable compensation applies, see generally Comment c, and especially Comment c(1). In

> the aggregate, the reasonable fees for multiple trustees may be higher than for a single trustee, because the normal duty of each trustee to participate in all aspects of administration (see § 81, and cf. § 80) can be expected not only to result in some duplication of effort but also to contribute to the quality of administration. And see Comment c(1) on factors (time, skill, etc.) relevant to establishing the compensation of each of the co-trustees.

RESTATEMENT (THIRD) OF TRUSTS, § 38.

One commentator states:

> In the absence of statute that specifically addresses the method of apportionment, two or more trustees of the same trust are compensated according to the amount of services each has rendered, the whole sum paid the group usually amounting to what would have been paid a single trustee for like work. The single commission is not divided among them in proportion to the number of trustees, but on a quantum meruit basis.

Bogert, TRUSTS AND ESTATES, § 978.

Another commentator provides:

> The general rule that the compensation of a trustee when not definitely fixed by the trust instrument or by statute must be reasonable for the services rendered is applicable in the case of co-trustees. Under some circumstances, co-trustees are allowed full compensation for each of them rather than a single full compensation to be divided among them. The division of compensation by trustees among themselves, where the total is a reasonable allowance, will not be interfered with by the court, although in some circumstances, it may be advisable for the court to fix their relative shares.
>
> Co-trustees rendering similar services generally are entitled to equal compensation or commissions, but where a trust instrument requires of some co-trustees services not required of others, differences in compensation are deemed proper. The allocation of compensation between those who participate in the management of the trust may be a matter to be decided by them on the basis of the services rendered by each. A trustee may be required to obtain the authorization of the co-trustee before being compensated from the trust account, particularly where the language of the trust instrument permits the trustees to jointly authorize compensation. The trial court may not rely on protracted arguments and disputes

> among the co-trustees as a basis for requiring the co-trustees to waive their contractual rights to compensation.

76 AM. JUR.2D, TRUSTS, § 577.

The Texas Banker's Association ("TBA") has form policies for bank trust departments. The TBA's policy for dividing compensation with a co-fiduciary states: "Except under unusual circumstances, it is the policy of the trust department to request the same allowance or make the same charge for serving as co-fiduciary as for sole fiduciary. This policy is based on experiences with co-fiduciary appointments which have revealed that work and responsibility do not diminish with the addition of a co-fiduciary." TBA Policies, New Business, Section C, Policy No. 10. So, the TBA takes the reasonable position that where a co-trustee does the work of a sole trustee, it should be compensated as such.

In the context of co-trustees, there is normally one trustee that does the majority of the work administering the trust (managing financial investments; managing real estate, oil and gas, closely held business and other investments, retaining vendors, attorneys, accountants; paying expenses; paying taxes; determining distributions; etc.). That trustee should be paid more than another co-trustee that simply monitors the activities and participates in big-picture and distribution decisions. The co-trustees should discuss what fair total compensation is for the services that they both provide. Finally, it is not unfair for co-trustee compensation to be higher than sole-trustee compensation, and a settlor should be aware of that when he or she executes a trust document providing for that number of trust administrators.

It should be noted that one court has held that where a purported trustee is appointed in violation of the Texas Trust Code and the trust instruments, the de facto trustee lacks authority to hold that status and is not entitled to recover compensation for trustee services. *Alpert v. Riley*, 274 S.W.3d 277 (Tex. App.—Houston [1st Dist.] 2008, no pet.). An earlier section of this paper discusses this concept in more detail.

XII. DEADLOCKED CO-TRUSTEES

One issue that is especially troubling in a co-trustee management structure for a trust is a disagreement between co-trustees such that no trust action can proceed: deadlock. Settlors can plan around deadlock situations by giving one co-trustee the right to break deadlocks on certain issues. It is not uncommon for a settlor to list certain powers that an individual co-trustee will have the power to control and a list of certain powers that a corporate co-trustee will have the power to control. Alternatively, a settlor may allow a third party (maybe a trust protector) the ability to break deadlocks. However, if a settlor does not plan ahead and have solutions in the trust document for deadlock situations, then the co-trustees can disagree on important decisions with no direction on how to resolve the disagreement. There are many harms that can befall a trust and its beneficiaries in this deadlock situation: a beneficiary without needed distributions, lengthy delay, litigation expense, damage to assets, and hostility and irreparable damage to relationships.

Unfortunately, the Texas Trust Code does not provide an easy solution to deadlocked co-trustees. In the absence of trust direction, co-trustees generally act by majority decision. Tex. Prop. Code § 113.085(a). The Texas Trust Code does not explain what happens when there is a deadlock between

an even number of co-trustees. So, what happens when the trust does not provide any direction on resolving a co-trustee deadlock?

Where the co-trustees are deadlocked, one or both of the co-trustees can seek court intervention and direction. The Texas Declaratory Judgments Act provides broadly that: "A person interested as or through … a trustee … may have a declaration of rights or legal relations in respect to the trust or estate: … (2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; (3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings..." Tex. Civ. Prac. & Rem. Code Section 37.005. Moreover, the Texas Trust Code provides that a court has jurisdiction "over all proceedings by or against a trustee and all proceedings concerning trusts, including proceedings to: (1) construe a trust instrument; (2) determine the law applicable to a trust instrument; … (4) determine the powers, responsibilities, duties, and liability of a trustee; … (6) make determinations of fact affecting the administration, distribution, or duration of a trust; (7) determine a question arising in the administration or distribution of a trust; (8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle…" Tex. Prop. Code Ann. § 115.001. Accordingly, co-trustees can seek court instruction where they are deadlocked on an important decision. This remedy, however, has its drawbacks in that it is expensive and also there is necessary delay involved in filing suit, joining in proper or necessary parties, presenting the issue to the court, and obtaining a final ruling.

If a co-trustee takes an especially unreasonable position that creates deadlock, potentially a court may remove the co-trustee. There is a duty to participate in the administration of the trust and to cooperate with co-trustees. If a co-trustee refuses to participate or reasonably cooperate, then a court may remove that trustee. The Texas Trust Code provides that a court may remove a trustee:

> (a) A trustee may be removed in accordance with the terms of the trust instrument, or, on the petition of an interested person and after hearing, a court may, in its discretion, remove a trustee and deny part or all of the trustee's compensation if: (1) the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust; (2) the trustee becomes incapacitated or insolvent; (3) the trustee fails to make an accounting that is required by law or by the terms of the trust; or (4) *the court finds other cause for removal*.

Tex. Prop. Code § 113.082. Certainly, a co-trustee refusing to participate in the trust's administration in good faith which results in deadlocked situation could be "other cause" for removal. *Id.*

Moreover, where co-trustees are so deadlocked on many issues, and that situation is harming the trust, then one or more of the co-trustees may be able to seek a receivership for the trust. The Texas Trust Code expressly provides for a receivership as a remedy for a breach of trust that has

occurred or may occur: "(a) To remedy a breach of trust that has occurred or might occur, the court may: … (5) *appoint a receiver to take possession of the trust property and administer the trust*." Tex. Prop. Code § 114.008 (emphasis added); *Estate of Benson*, No. 04-15-00087-CV, 2015 Tex. App. LEXIS 9477 (Tex. App.—San Antonio Sept. 9, 2015, pet. dism. by agr.) (the court of appeals rejected the trustee's challenges to the appointment of temporary co-receivers as the trial court had some evidence that there was a breach of trust to support its decision to appoint co-receivers, relying on the evidence presented at the temporary injunction hearing and held, that under the statute, a movant need not prove the elements of equity; thus, the beneficiary in this case was not required to produce evidence of irreparable harm or lack of another remedy); *Carroll v. Carroll*, 464 S.W.2d 440 (Tex. Civ. App.—Amarillo 1971, writ dism'd) (affirming receivership in estate case where property was in jeopardy and family had dissention).

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

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

Id.

That same statute also provides that a court can order a trustee to take certain actions, suspend a trustee, issue injunctive relief and also "order any other appropriate relief." Tex. Prop. Code § 114.008 (emphasis added). The statute provides:

> To remedy a breach of trust that has occurred or might occur, the court may: (1) compel the trustee to perform the trustee's duty or duties; (2) enjoin the trustee from committing a breach of trust; … (6) suspend the trustee; (7) remove the trustee as provided under Section 113.082; … or (10) order any other appropriate relief.

Tex. Prop. Code § 114.008. This very broad statute would provide almost limitless

authority to a court to break a deadlock that is harming a trust and that originates in a current or potential breach of trust. The limitation is the imagination of the court or the parties. Accordingly, where a deadlock situation causes irreparable harm to the trust or a beneficiary, potentially, a trial court can order one or more co-trustees to take certain action, suspend one or more co-trustees (thereby breaking a deadlock), appointing additional temporary trustees so that there is not an even number of co-trustees, and the court can also potentially appoint a temporary trustee to act essentially as a receiver. All of these potential remedies (like a temporary injunction or receiver) can be done early in a case where there is threatened harm to the trust or a beneficiary.

Courts from other jurisdictions hold that a co-trustee has standing to file suit to seek instructions from a court and/or the removal of the co-trustees and the appointment of successor trustees. *In re Jackson*, 2017 PA Super 350, 174 A.3d 14 (Pa. Super. 2017); *In re Trust of Marta*, No. 20210-NC, 2003 Del. Ch. LEXIS 87 (C. Ch. Del. August 14, 2003); *Stuart v. Continental Illinois National Bank & Trust Co. of Chicago*, 68 Ill. 2d 502, 369 N.E.2d 1262, 12 Ill. Dec. 248 (Ill. 1977). For example, in *In re Trust of Marta*, the court resolved a deadlock, but warned as follows:

> This case has presented a question of what a court should do when two co-trustees are deadlocked over matters committed to their mere discretion in the absence of an abuse of discretion or other compelling circumstances. The general answer to that question has been provided by the General Assembly: under 12 Del. C. § 3407, "[a] trustee may be removed by the Court of Chancery on its own initiative or on petition of a trustor, co-trustee, or beneficiary if . . . (2) [a] lack of cooperation among co-trustees substantially impairs the administration of the trust." DeMichiel and DiFonzo are, from the evidence including, specifically, their testimony and demeanor at trial, not capable of, or not interested in, cooperating with each other. Their inability to cooperate is, as should be evident from this letter opinion, "substantially impairing the administration of the trust." Thus, under ordinary circumstances, the better remedy would likely have been to remove them as co-trustees and to appoint new trustees.

No. 20210-NC, 2003 Del. Ch. LEXIS 87 (C. Ch. Del. August 14, 2003).

While acknowledging that a co-trustee can seek court assistance in a deadlock situation, one court held that one co-trustee did not breach duties to diversify where the co-trustees were deadlocked on the issue:

> [T]here is no provision within the Trust Agreement that would have provided a means for breaking this deadlock between the equally divided co-trustees. Ms. Stein's father, as settlor, certainly knew that in designating an even number of trustees, a deadlock or tie vote was a distinct possibility. Not only

> did he provide no mechanism to break such a tie vote, but he also expressly included a proviso that certain actions could only be taken by a majority vote. The trust instrument read as a whole, therefore, clearly evidences the settlor's intent to allow no action to occur in tie vote or deadlock situations. Thus, the settlor's intent was to condition affirmative action of the trustees on a 3 to 1 or unanimous vote. In addition, the individual and corporate trustees were given an equal standing with each other.

Trust of Rosenfeld, No. 040148, 2004 Phila. Ct. Com. Pl. LEXIS 130 (May 19, 2004).

In *In re Mark K. Eggebrecht Irrevocable Trust*, the Montana Supreme Court affirmed a trial court's order modifying a trust at the request of one co-trustee to remove both deadlocked co-trustees so that a sole corporate trustee could be appointed to properly administer the trust. 4 P.3d 1207, 300 Mont. 409 (2000). The court held that the trust's purpose had been frustrated by one co-trustee who refused to make distributions for the beneficiaries' medical and school expenses.

The Restatement (Second) of Trusts provides that a co-trustee may have to sue to obtain judicial directions where a discretionary power should be exercised but other co-trustees will not allow such to happen:

> Where there are several trustees, action by all of them is necessary to the exercise of powers conferred upon them. If the circumstances are such that it is the duty of the trustees to exercise a power conferred upon them, and one of them refuses to concur in the exercise of the power, the other trustees are not justified in merely acquiescing in the non-exercise of the power. In such a case it is their duty to apply to the court for instructions.

RESTATEMENT (SECOND) OF TRUSTS, § 184. Further, it provides:

> If there are two or more trustees, action by all of them is necessary to the exercise of the powers conferred upon them as trustees. If one of them refuses to concur in the exercise of a power, the others cannot exercise the power. In such a case, however, if it appears to be for the best interest of the trust that there should be an exercise of the power, the court may on the application of a co-trustee or beneficiary direct its exercise. The court may remove a trustee who unreasonably refuses to concur in the exercise of a power if such removal would be for the best interest of the trust.

RESTATEMENT (SECOND) OF TRUSTS, § 194. It further provides:

> Where there are several trustees, action by all of them is necessary to the exercise of powers conferred upon them. See § 194. If the circumstances are such that it

> is the duty of the trustees to exercise a power conferred upon them, and one of them refuses to concur in the exercise of the power, the other trustees are not justified in merely acquiescing in the non-exercise of the power. See § 185. In such a case it is their duty to apply to the court for instructions.

RESTATEMENT (SECOND) OF TRUSTS, § 184.

The Restatement (Third) of Trusts, provides: "If multiple trustees are deadlocked with regard to the exercise of a power, on application of a co-trustee or beneficiary a proper court may direct exercise of the power or take other action to break the deadlock." RESTATEMENT (THIRD) OF TRUSTS, § 39(e). Furthermore, it provides that the trust document may resolve deadlocks:

> The terms of a trust may provide that the powers of multiple trustees are to be exercised in a manner that differs from that prescribed by the rule of this Section. Thus, for example, a trust provision may require that all of the trust's three trustees concur in exercising powers or a particular power, or may provide that the decision of a particular trustee prevails in the event two trustees are deadlocked with regard to certain matters.

RESTATEMENT (THIRD) OF TRUSTS, § 39(f)

One Texas commentator provides:

When there are multiple trustees, a trustee has the right to manage and administer the trust through majority rule. A trust instrument that provides for co-trustees may specify the number of co-trustees required to exercise any or all of the powers granted to them. Power that is vested in three or more trustees may be exercised by a majority of the trustees, unless the trust instrument provides otherwise…

This means that no trustee has the right to veto the will of the majority of the trustees unless the trust instrument so specifies. However, every trustee has certain limited rights, regardless of the actions of the majority. Every trustee may take steps to avoid personal liability for actions taken by the majority of trustees. In addition, when litigation is involved, every trustee has the right to take an appeal when the appeal is taken to protect the estate.

Majority rule rights mean nothing when there are only two trustees, or when there is an even number of trustee who are deadlocked on an issue of management or administration of the trust. In the case of a trust with two trustees, joint action is necessary to administer a trust. *Shellberg v. Shellberg*, 459 S.W.2d 465, 470 (Civ.

App.—Fort Worth 1970, ref. n.r.e.).

4 TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION § 84.21. The commentator goes on to state:

> There is no rule in the Trust Code for the resolution of a difference of opinion between two co-trustees or for a deadlock situation involving an even number of trustees. Nonetheless, it seems clear that, in all cases, one trustee will be liable for the acts of the other trustee or trustees if he or she withdraws his or her opposition and permits the act to go forward. At common law, co-trustees were considered sureties for each other, guaranteeing faithful performance to the beneficiaries. If one trustee simply acts without the consent of the remaining trustees, and the co-trustees are held jointly and severally liable to the beneficiary for the acts of one of them, the co-trustees who were not equally at fault may be entitled to indemnity from the defaulting co-trustee.

4 TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION § 84.08.

Another commentator provides:

> The traditional rule, in the case of private trusts, was that if there were two or more trustees, all had to concur in the exercise of their powers… The unanimity rule continues to apply, however, in a variety of circumstances, either because there are only two trustees or because applicable law or the terms of the trust impose it. Likewise there will be situations in which an even number of trustees are equally divided. It thus remains necessary to consider how to resolve instances of trustee impasse. When the exercise of a power is discretionary and the dissenting trustees are guilty of no abuse of discretion in refusing to concur, the court will not ordinarily direct the dissenters to concur. But when one or more trustees refuse to concur in the exercise of a power, and the refusal is in violation of duty, either because the exercise of the power is not discretionary or because the circumstances are such that it would be an abuse of discretion not to exercise it, such as when the failure to exercise the power would result in harm to the trust estate, the court can direct the dissenters to join with the others in exercising the power. In such a case, the other trustees or the beneficiaries can apply to the court for directions. Alternatively, a trustee's unreasonable refusal to join the exercise of a power may be grounds for removal. Occasionally, when the trustees' failure to agree has become injurious to the trust,

> the court has taken upon itself the execution of the trust.

SCOTT AND ASCHER ON TRUSTS, WHEN POWERS ARE EXERCISABLE BY SEVERAL TRUSTEES, § 18.3.

XIII. CO-TRUSTEES CAN BE LIABLE FOR EACH OTHER'S CONDUCT

A. Texas Statute Regarding Liability For Co-Trustee's Actions

Co-trustees can be liable for the acts of their co-trustees. The Texas Property Code states:

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

Tex. Prop. Code § 114.006. Under this provision a co-trustee has a duty to prevent its co-trustee from committing a serious breach of trust and/or compel a co-trustee to redress such a breach. *In re Cousins*, 551 S.W.3d 913, n.2 (Tex. App.—Tyler 2018, orig. proceeding). One court cited this provision as an example of a trustee being held personally liable for actions taken as a trustee. *Crownover v. Crownover*, No. DR:15-CV-132-AM-CW 2018 U.S. Dist. LEXIS 237669 (W.D. Tex. March 30, 2018).

Even if a co-trustee attempts to delegate authority to a co-trustee, the delegating co-trustee may still be liable for failing to prevent its co-trustee from a serious breach of fiduciary duty. A co-trustee who does not agree with a decision should participate in the decision, document that it voted against the decision, document that it notified the co-trustee of its dissent, and if the transaction is a serious breach of fiduciary duty, bring suit against the co-trustee to prevent the breach. Obviously, judging what is a serious breach of trust versus a non-serious breach of trust is in the eye of the beholder. A dissenting trustee likely does not want to leave it to a judge or jury to determine whether a breach is serious or not. If there is any suspected breach of trust, a dissenting trustee will want to prevent it or compel a co-trustee to redress it.

Where a co-trustee is the settlor of a revocable trust, however, his or her co-trustee may not be liable for the settlor's actions. In *In re Estate of Little*, a settlor of a revocable trust withdrew trust assets and deposited them into an account with rights of survivorship with one child as the beneficiary. No. 05-18-00704-CV, 2019 Tex. App. LEXIS 7355 (Tex. App.—Dallas August 20, 2019, pet. denied). His other children, who were beneficiaries of the revocable trust, sued the non-settlor co-trustee for allowing that to happen. The trial court granted summary judgment for the co-trustee, and the beneficiaries appealed. The court of appeals first held that the beneficiaries had standing to bring their

claims. The court then turned the co-trustee's duties:

> Furthermore, Dan, as co-trustee of a revocable trust, owed his fiduciary duty to Father while Father was alive. The general rule is that: "[T]he duties of a trustee of a revocable trust are owed exclusively to the settlor . . . the rights of non-settlor beneficiaries are generally subject to the control of the settlor. Thus, as a general rule, the trustee cannot be held to account by other beneficiaries for its administration of a revocable trust during the settlor's lifetime."
>
> Dan was co-trustee of the Trust during Father's lifetime and ceased being a trustee when Father died. There is no evidence that he misappropriated or did anything with Trust property during his tenure as trustee. The uncontroverted evidence is that, while a co-trustee, Dan also made no decisions about the expenditure of funds from the survivorship account, nor did he claim entitlement to any funds in that account. Instead, he helped Father pay his living expenses from the survivorship account as Father directed. It was not until Father died and Dan was no longer a trustee that he claimed the $216,000 in the account for which he was the named the surviving party. Sums remaining in a survivorship account after the death of one of the parties belong to the surviving party.

Id. Accordingly, the court of appeals affirmed the summary judgment for the co-trustee.

B. Commentators' Views

One Texas commentator stated:

> [I]t seems clear that, in all cases, one trustee will be liable for the acts of the other trustee or trustees if he or she withdraws his or her opposition and permits the act to go forward. At common law, co-trustees were considered sureties for each other, guaranteeing faithful performance to the beneficiaries. If one trustee simply acts without the consent of the remaining trustees, and the co-trustees are held jointly and severally liable to the beneficiary for the acts of one of them, the co-trustees who were not equally at fault may be entitled to indemnity from the defaulting co-trustee.

4 TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION § 84.08.

The Restatement (3rd) of Trusts provides as follows regarding co-trustee liability:

> A trustee is not liable for a breach of trust committed by a co-trustee, unless the trustee: (i) participated or acquiesced in the breach of

> trust or was involved in concealing it; (ii) improperly delegated administration of the trust to the co-trustee; or (iii) enabled the co-trustee to commit the breach of trust by failing to exercise reasonable care, including by failing to make reasonable effort to enjoin or otherwise prevent the breach of trust. Furthermore, a trustee may be liable for neglecting to take reasonable steps seeking to obtain redress for the breach of trust. That it might be "reasonable" for a trustee to decide not to bring suit to redress a breach of trust, see § 76, Comment d.
>
> A trustee who opposed an action taken upon decision by a majority of the trustees, and who made that opposition known to a co-trustee but thereafter reasonably joined in the action in order to avoid obstructing its execution, is not liable for the action unless the dissenting trustee was aware that the action was a breach of trust.
>
> When several trustees are liable for a breach of trust, either as a breach committed by them jointly or on another of the above grounds, they are jointly and severally liable. On the right of a trustee to contribution or indemnity from co-trustee(s), see Chapter 19.

RESTATEMENT (THIRD) OF TRUSTS, § 81.

Another commentator provides:

> Generally, a trustee is responsible only for its own acts or omissions and is not liable to the beneficiary for a breach of trust committed by a co-trustee. Therefore, a trustee is not responsible for acts or misconduct of a co-trustee: in which the first trustee has not joined, to which the first trustee does not consent, which the first trustee has not aided or made possible by his or her own neglect. On the other hand, a trustee is liable to the beneficiary if the trustee: (1) participates in a breach of trust committed by a co-trustee; (2) improperly delegates the administration of the trust to a co-trustee; (3) approves or acquiesces in or conceals a breach of trust committed by a co-trustee; (4) fails to exercise reasonable care in the administration of the trust which has enabled a co-trustee to commit a breach of trust; or (5) neglects to take proper steps to compel a co-trustee to redress a breach of trust. In other words, a trustee is responsible for the wrongful acts of a co-trustee to which he or she consented or which, by his or her negligence, enabled the co-trustee to commit but for no others.

76 AM. JUR.2D, TRUSTS, § 343.

C. Right to Contribution

Though an innocent co-trustee may be liable to beneficiaries for the wrong-doing co-trustee's conduct, the innocent co-trustee may be entitled to contribution from the wrong-doing co-trustee. The Restatement of Trust provides:

> (1) Except as otherwise provided in this Section, if two or more trustees are liable for a breach of trust, they are jointly and severally liable, with contribution rights and obligations between or among them reflecting their respective degrees of fault.
>
> (2) A trustee who committed a breach in bad faith is not entitled to contribution unless the trustee or trustees from whom contribution is sought also acted in bad faith.
>
> (3) A trustee who benefited personally from the breach is not entitled to contribution to the extent of that benefit.

RESTATEMENT (THIRD) OF TRUSTS, § 102.

The Restatement explains as follows:

> Substantially equally at fault. If the trustees are substantially equally at fault, each is entitled to equal contribution from the other(s). Thus, if two co-trustees participate in a breach of trust and are substantially equally at fault, one who makes good the breach is entitled to be reimbursed by the other for one-half of the liability. If three co-trustees participate in a breach of trust and are substantially equally at fault, one who makes good the breach is entitled to reimbursement from each of the others for one-third (thereby achieving a total contribution of two-thirds) of the liability.
>
> Fault so disproportionate as to prevent contribution. If the fault between or among trustees is sufficiently disproportionate, a trustee who is significantly more at fault is not entitled to contribution, and the trustee(s) significantly less at fault are entitled to a full indemnity.
>
> Whether the fault is sufficiently disproportionate to prevent contribution (or merit indemnity) depends on the facts and circumstances. Among the factors to be considered are the following: (1) Did one trustee mislead the other(s) into joining in the breach? (2) Did one trustee commit the breach intentionally (on the distinction between intentional and bad-faith breaches, see Comment d), while the other(s) did so by simple negligence? (3) Did one trustee, having greater experience or expertise, essentially control the actions of the other(s), such as where a trustee without business

experience regularly relied on the judgment of the experienced trustee? (4) Did one trustee act essentially alone while the joint and several liability of the other(s) resulted merely from a failure to exercise reasonable care to prevent the breach or from improper delegation or monitoring? See generally § 81 and id., Comments b-e.

…

Fault neither substantially equal nor so disproportionate as to prevent contribution. If the fault of the trustees who are liable for a breach of trust is not substantially equal (Comment b(1)), but not so disproportionate as to prevent contribution (Comment b(2)), the trustees' contribution obligations are proportionate to their respective degrees of fault. Thus, if two trustees participate in a breach of trust and the one who has made good the breach is determined to be 75 percent at fault (considering factors generally similar to those described in Comment b(2)), that trustee is entitled to contribution from the other for 25 percent of the liability.

…

Trustee acting in bad faith. A trustee who commits a breach of trust in bad faith is generally not entitled to contribution from another trustee who participated in the breach. There is an exception to this general rule, however. If a trustee from whom contribution is sought also acted in bad faith, contribution is required, with contribution rights and liabilities determined in accordance with Subsection (1). A bad-faith trustee may not hide behind another's unclean hands.

For purposes of Subsection (2) and this Comment, bad faith includes fraud, embezzlement, and other misconduct involving a dishonest motive or conscious disregard for the interests of the beneficiaries or the purposes of the trust. Intentional participation in a known breach of trust, however, does not necessarily entail bad faith. Thus, if trustees join in what they know to be a breach of trust, even one involving self-dealing, they do not act in bad faith if their objective is to advance the interests of the beneficiaries.

Benefit received by trustee. A trustee who receives a benefit from a breach of trust is not entitled to contribution from the other trustee(s) to the extent of the benefit received. The other(s) are entitled to exoneration to the same extent.

Id.

XIV. THIRD PARTIES RELYING ON CO-TRUSTEE'S AUTHORITY

A co-trustee can enter into transactions that exceeds his or her authority. One issue that arises is whether the third party, on the opposite side of that transaction, can be held liable. A person who deals with a co-trustee may not be liable even though the co-trustee is exceeding his or her authority. The Texas Property Code provides:

> (a) A person who deals with a trustee in good faith and for fair value actually received by the trust is not liable to the trustee or the beneficiaries of the trust if the trustee has exceeded the trustee's authority in dealing with the person.
>
> (b) A person other than a beneficiary is not required to inquire into the extent of the trustee's powers or the propriety of the exercise of those powers if the person: (1) deals with the trustee in good faith; and (2) obtains: (A) a certification of trust described by Section 114.086; or (B) a copy of the trust instrument.
>
> (c) A person who in good faith delivers money or other assets to a trustee is not required to ensure the proper application of the money or other assets.

Tex. Prop. Code § 114.081.

Further, the Texas Property Code provides that a third party who receives a certification of trust may have certain statutory protections:

> (f) A person who acts in reliance on a certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for the action and may assume without inquiry the existence of the facts contained in the certification.
>
> (g) If a person has actual knowledge that the trustee is acting outside the scope of the trust, and the actual knowledge was acquired by the person before the person entered into the transaction with the trustee or made a binding commitment to enter into the transaction, the transaction is not enforceable against the trust.
>
> (h) A person who in good faith enters into a transaction relying on a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification are correct. This section does not create an implication that a person is liable for acting in reliance on a certification of trust that fails to contain all the information required by Subsection (a). A person's failure to demand a certification of trust does not: (1) affect the protection provided to the person by Section 114.081; or (2) create

> an inference as to whether the person has acted in good faith.

Id. at 114.086(f)-(h).

For example, in *Rice v. Malouf*, a co-trustee, acting alone without the knowledge of his co-trustee, caused $1.6 million dollars to be transferred by wire from a trust bank account to the recipient's personal account. No. 07-11-00441-CV, 2013 Tex. App. LEXIS 8373 (Tex. App.—Amarillo July 8, 2013, pet. denied). After the bad-acting co-trustee died, the other co-trustees filed suit against the recipient for a constructive trust and sought the return of the money. The court noted that Section 284 of the Restatement of Trusts states that when a trustee in breach of trust transfers trust property to a person who takes it for value and without knowledge of a breach of trust, the latter holds the interest free of the trust and is under no liability to the beneficiary. *Id*. Generally, a transfer by a trustee in breach of trust in consideration of the extinguishment of a pre-existing debt or other obligation is not a transfer "for value." However, there is an exception that states that a transfer by the trustee for the extinguishment of a pre-existing debt or other obligation is "for value" if the trust property transferred is money.

The court of appeals affirmed the jury's verdict that the transfer was "for value." The co-trustee who transferred the money had an entity that owed $1.7 million to the recipient's businesses. The court held: "we find the evidence permitted reasonable and fair-minded jurors to believe the $1.6 million wired by [the trustee] to [the recipient's] personal bank account was in partial extinguishment of the preexisting obligation due the [recipient's] entities from [the trustee's entity]." *Id*. The court held that the recipient of the funds was allowed to keep those funds.

So, depending on the intent and consideration for a transaction, a third party may be able to keep trust property that was improperly transferred from a co-trustee. This places additional pressure on co-trustees to be vigilant regarding the policing of his or her co-trustees' actions. If there are two individual co-trustees, they should have dual signature requirements for transfers of trust assets. Otherwise, an innocent co-trustee will certainly be a target of a claim by a beneficiary where the innocent co-trustee allowed the bad co-trustee to perpetrate an improper transaction that harmed the trust.

XV. A CO-TRUSTEE MAY HAVE TO SUE ITS CO-TRUSTEE

A. Texas Statutory Provisions

The Texas Property Code allows a co-trustee to sue another co-trustee for breach of fiduciary duty, to seek removal the co-trustee, and to seek forfeiture of compensation. Texas Property Code Section 113.082 provides:

> (a) A trustee may be removed in accordance with the terms of the trust instrument, or, on the petition of an interested person and after hearing, a court may, in its discretion, remove a trustee and deny part or all of the trustee's compensation if: (1) the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust; (2) the trustee becomes incapacitated or

> insolvent; (3) the trustee fails to make an accounting that is required by law or by the terms of the trust; or (4) the court finds other cause for removal.
>
> (b) A beneficiary, co-trustee, or successor trustee may treat a violation resulting in removal as a breach of trust.

Tex. Prop. Code § 113.082. *See also Ramirez v. Rodriguez*, No. 04-19-00618-CV, 2020 Tex. App. LEXIS 1340 (Tex. App.—San Antonio February 19, 2020, no pet.); *Aubrey v. Aubrey*, 523 S.W.3d 299 (Tex. App.—Dallas 2017, no pet.). The term "interested person" means "*a trustee*, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust. Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding." Tex. Prop. Code § 111.004(18) (emphasis added). The term "Trustee" means "the person holding the property in trust, including an original, *additional*, or successor *trustee*, whether or not the person is appointed or confirmed by a court." Tex. Prop. Code § 111.004(18) (emphasis added). So, "additional" trustees are interested persons and may invoke a court's jurisdiction under this statute.

For example, in *Ramirez v. Rodriguez*, the court held that three co-trustees could sue to remove the fourth co-trustee due to hostility between the co-trustees. No. 04-19-00618-CV, 2020 Tex. App. LEXIS 1340 (Tex. App.—San Antonio February 19, 2020, no pet.). A co-trustee may appeal from a decree of distribution of trust assets, even if the other co-trustees refuse to join the appeal, if the appeal is taken to protect the trust estate. *Commercial National Bank in Nacogdoches v. Hayter*, 473 S.W.2d 561, 567 (Tex. Civ. App.—Tyler 1971, ref. n.r.e.).

In addition to common-law damage claims, a co-trustee can seek the following statutory remedies for breach of trust:

> (a) To remedy a breach of trust that has occurred or might occur, the court may: (1) compel the trustee to perform the trustee's duty or duties; (2) enjoin the trustee from committing a breach of trust; (3) compel the trustee to redress a breach of trust, including compelling the trustee to pay money or to restore property; (4) order a trustee to account; (5) appoint a receiver to take possession of the trust property and administer the trust; (6) suspend the trustee; (7) remove the trustee as provided under Section 113.082; (8) reduce or deny compensation to the trustee; (9) subject to Subsection (b), void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property of which the trustee wrongfully disposed and recover the property or the proceeds from the property; or (10) order any other appropriate relief.

Tex. Prop. Code § 114.008.

B. Commentators' Views

A dissenting trustee may maintain a suit or appeal to challenge a decision by the majority. 4 TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION § 82.05. "It is clear . . . that where there are several trustees one of them may maintain an action against the others to enforce the trust or to compel the redress of a breach of trust." IVA William R. Fratcher, Scott on Trusts, § 391 (4th ed. 1989). *See also Stuart v. Continental Illinois Nat'l Bank and Trust Co.*, 68 Ill. 2d 502, 369 N.E.2d 1262, 12 Ill. Dec. 248 (Ill. 1977) (authorizing attorney's fees to be paid out of trust in suit between co-trustees); *Myers v. Burns*, No., 94-C-927, 1995 U.S. Dist. LEXIS 6468 (N.D. Ill. May 12, 1995). "It is the duty of each [co-trustee] to use reasonable care to prevent the others from committing a breach of trust; if one of the trustees commits a breach of trust, it is the duty of the others to compel him to redress it." SCOTT ON TRUSTS, at § 184.

The Restatement of Trusts provides:

> When a trust has multiple trustees, each trustee ordinarily (cf. Comment b) has a duty to exercise reasonable care to prevent a co-trustee from committing a breach of trust. Thus, for example, it is a breach of trust for a trustee knowingly to allow a co-trustee to commit a breach of trust. And, if a breach occurs, the trustee must take reasonable steps seeking to compel the co-trustee to redress the breach of trust.
>
> If a trustee needs independent counsel to fulfill these duties, reasonable attorney fees may be paid or reimbursed from the trust. See § 88, Comment d.
>
> A trustee is not precluded from maintaining a suit for redress by the fact that the trustee participated in the breach of trust, because the suit is on behalf of the trust and its beneficiaries.

RESTATEMENT (THIRD) OF TRUSTS, §81.

The fact that a co-trustee may have participated in some aspect of the wrongful conduct does not preclude it from raising claims. RESTATEMENT (THIRD) OF TRUSTS § 81(d) ("A trustee is not precluded from maintaining a suit for redress by the fact that the trustee participated in the breach of trust, because the suit is on behalf of the trust and its beneficiaries).

The Uniform Trust Code states in relevant part: "Each trustee shall exercise reasonable care to: (1) prevent a co-trustee from committing a serious breach of trust; and (2) compel a co-trustee to redress a serious breach of trust." U.T.C. § 703. A comment observes:

> By permitting the trustees to act by a majority, this section contemplates that there may be a trustee or trustees who might dissent. Trustees who dissent from the acts of a co-trustee are in general protected from liability. Subsection (f) protects trustees who refused to join in the action. Subsection (h) protects a dissenting trustee who joined the action at the

> direction of the majority such as to satisfy a demand of the other side to a transaction, if the trustee expressed the dissent to a co-trustee at or before the time of the action in question. However, the protections provided by subsections (f) and (h) no longer apply if the action constitutes a serious breach of trust. In that event, subsection (g) may impose liability against a dissenting trustee for failing to take reasonable steps to rectify the improper conduct. The responsibility to take action against a breaching co-trustee codifies the substance of Sections 184 and 224 of the Restatement (Second) of Trusts (1959)."

U.T.C. § 703, cmt.

C. Costs of Litigation

1. Texas Statutes

When a co-trustee has to sue its co-trustee, one issue that always arises is whether either or both co-trustees can pay their attorneys from the trust either after the litigation or during the litigation. The first place to look for any power is the trust document itself. Generally, the trust document governs and should be followed. Tex. Prop. Code §111.0035(b). "The trustee shall administer the trust in good faith according to its terms and the Texas Trust Code." *Tolar v. Tolar*, No. 12-14-00228-CV, 2015 Tex. App. LEXIS 5119 (Tex. App.—Tyler May 20, 2015, no pet.). "The powers conferred upon the trustee in the trust instrument must be strictly followed." *Id*. Accordingly, if a trust document provides instructions on the retention and compensation of attorneys, those instructions should generally be followed.

The Texas Property Code has several provisions that impact a trustee's power to compensate attorneys. To the extent the trust instrument is silent, the provisions of the Trust Code govern. Tex. Prop. Code Ann. § 113.001; *Conte v. Conte*, 56 S.W.3d 830, 832 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

Texas Trust Code Section 113.018, which is titled "Employment and Appointment of Agents" provides: "A trustee may employ attorneys, accountants, agents, including investment agents, and brokers reasonably necessary in the administration of the trust estate." Tex. Prop. Code § 113.018. One would think that from a fair reading of this statute that if a trustee has the power to retain an attorney, the trustee has the power to pay for the attorney. Indeed, few attorneys will perform their services for free for a trust. But one court has held that "Section 113.018 of the Texas Property Code…authorizes a trustee to employ an attorney, but it does not address the conditions for reimbursement of attorney's fees from the trust estate." *Conte v. Conte*, 56 S.W.3d at 834.

Note that this provision has an important limitation: "reasonably necessary in the administration of the trust estate." Tex. Prop. Code § 113.018. So, if a court or jury later finds that it was not "reasonably necessary in the administration of the trust estate" for the trustee to retain an attorney, the trustee may be found in violation of the statute and may be in breach of fiduciary duties. One example of such an occasion may be when a trustee has breached his fiduciary duty and a co-trustee has sued the trustee for that breach. A judge or jury may find that a trustee who is defending against a

correct breach of fiduciary duty claim did not retain an attorney who was "reasonably necessary" for "the administration of the trust estate." Of course, the parties may not know until the end of the litigation whether the trustee breached a fiduciary duty and whether the trustee had the right to retain an attorney under this provision.

In a different provision, the Texas legislature specifically recognizes the trustee's right to reimbursement from trust funds:

> (a) A trustee may discharge or reimburse himself from trust principal or income or partly from both for: (1) advances made for the convenience, benefit, or protection of the trust or its property; (2) expenses incurred while administering or protecting the trust or because of the trustee's holding or owning any of the trust property; … (b) The trustee has a lien against trust property to secure reimbursement under Subsection (a).

Tex. Prop. Code § 114.063. Note that the statute provides reimbursement for "expenses incurred while administering or protecting the trust, ***or*** because of the trustee's holding or owning any of the property." Tex. Prop. Code § 114.063 (a)(2)(emph. added). Moreover, the use of the disjunctive "or" makes it clear that a trustee's right to reimbursement from trust funds for expenses arises where the trustee is administering or protecting the trust or because the trustee is holding or owning any trust property. A trustee has a statutory lien against trust property to ensure the trustee is reimbursed for expenses incurred. *Id*. § 114.063(b).

This provision has important limitations that reimbursement is only allowed where the retention of the agent was for "the convenience, benefit, or protection of the trust or its property" or where it was for "administering or protecting the trust or because of the trustee's holding or owning any of the trust property." Tex. Prop. Code § 114.063. Once again, a judge or jury may find that reimbursement for a trustee retaining counsel to defend against a correct breach of fiduciary duty claim does not comply with these limitations.

Section 114.063 does not expressly contain a requirement that the reimbursement be for expenses that are "reasonable and necessary" or "equitable and just." *Id*. at § 114.063. So, this statute does not appear to require a trustee to prove at the time of reimbursement that the attorney's fees and litigation expenses are reasonable and necessary or equitable and just.

Section 114.064 provides that, "[i]n any proceeding under this code, the Court may make such award of costs and *reasonable and necessary* attorney's fees as may seem *equitable and just*." Tex. Prop. Code § 114.064; *Hachar v. Hachar*, 153 S.W.3d 138, 142 (Tex. App.—San Antonio 2004, no pet.). This provision is clearly applicable to litigation situations as it applies "in any proceeding" under the Texas Trust Code.

The Texas Property Code does not provide any clear guidance as to how Sections 114.063 and 114.064 work together. One theory is that a trustee has the right to reimburse itself for any attorney's compensation immediately under Section 114.063. That is true even where a trustee has retained an attorney to defend breach of

fiduciary and related claims. Then, at the end of any litigation, a court may make an award of necessary and reasonable attorney's fees that it deems equitable and just and may require the trustee to pay back fees that the trust paid earlier in the litigation.

Another potential theory is that Section 114.063 deals with non-litigation or non-breach of fiduciary duty matters. Certainly, a trustee has the right to hire counsel to draft a deed, negotiate an oil and gas lease, etc. and to pay the attorney and to seek reimbursement for same. Section 114.064 deals with retaining attorneys in litigation. That section expressly uses the terms "proceedings under this code" and "award," which seem to imply the payment of fees in the course of litigation. Under this theory, a trustee would only be entitled to have a trust pay for litigation fees upon a court order after findings of necessariness, reasonableness, equitableness, and justness.

Yet another theory is that Section 114.063 deals with the retention of attorneys by trustees as between the trust and the trustee. Section 114.064 deals with an award of fees in trust-related litigation. So, a court can award necessary and reasonable fees to a plaintiff or defendant depending on multiple equitable factors, but that provision does not impact a trustee's private right to reimbursement from a trust for retaining counsel. Later, if the plaintiff is a beneficiary, and the defendant is the trustee, a court can award the plaintiff fees against the trustee, individually, and make the trustee or its counsel disgorge any fees paid by the trust based on a finding of breach of fiduciary duty.

There are some additional Texas Property Code provisions that are more general in nature, but that support a trustee's power to compensate attorneys. The statutes provide that a trustee may exercise any power necessary to carry out the purpose of the trust, except to the extent that the terms of the trust conflict with a provision of the Code or expressly limit the trustee's power. Tex. Prop. Code Ann. §§ 113.001-.002. Further, a trustee must manage the property "as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust," and must "exercise reasonable care, skill, and caution" in doing so. Tex. Prop. Code Ann. § 117.004.

2. Common Law

Unless limited by the trust document or statute, a trustee has the powers recognized by the common law. The Restatement provides:

> A trustee is not limited to incurring expenses that are necessary or essential, but may incur expenses that, in the exercise of fiduciary judgment are reasonable and appropriate in carrying out the purposes of the trust, serving the interests of the beneficiaries, and generally performing the functions and responsibilities of the trusteeship.

Restatement (Third) of Trusts § 88 cmt. b. The trustee can properly incur expenses appropriate for the collection and protection of trust assets. *Id*. The trustee has a duty to exercise such care and skill as a person of ordinary prudence would exercise in incurring the expense. *Id*. The trustee can properly incur reasonable expenses in employing lawyers. *Id*. The trustee's right to indemnification "applies even if the trustee is unsuccessful in the dispute, as long as the

trustee's conduct was not imprudent or otherwise in violation of a fiduciary duty." *Id*. cmt. d.

However, "if expenses that are improper have been paid from the trust estate, the trustee ordinarily has a duty to restore the amount of the improper payment(s) to the trust; if improper expenses have been paid from the trustee's personal funds, the trustee ordinarily is not entitled to reimbursement for those expenditures." *Id*. at cmt. a. "The trustee cannot properly incur expenses, however, in employing agents or others to do acts if the employment would involve a violation of the trustee's duties as defined either by law or by the terms of the trust." *Id*. at cmt. c. The Uniform Prudent Investor Act § 7 states: "In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the trust assets, the purposes of the trust, and the skills of the trustee." UPIA § 7. The comment to that section aptly begins: "Wasting beneficiaries' money is imprudent." *Id*. cmt.

The Texas Supreme Court discussed a trustee's ability to hire and pay professionals during the administration of a trust in *Corpus Christi Bank & Trust v. Roberts*, 597 S.W.2d 752, 753-54 (Tex. 1980). In this case, a trustee hired a real-estate manager to manage and rent an apartment complex. *Id*. at 753. The trustee paid the real-estate manager from trust assets. *Id*. The trust beneficiaries challenged the fees paid to the manager. *Id*. The Texas Supreme Court analyzed Article 742b-25 of the Texas Trust Act, the predecessor to Trust Code Section 113.018. *Id*. at 754. Article 7425b-25 provided that a trustee was authorized to "employ attorneys, accountants, agents, and brokers reasonably necessary in the administration of the trust estate." *Id*. The trust instrument in the case provided that the trustee had a duty to rent or lease trust. *Id*. The Texas Supreme Court held that the trustee had the authority to hire and pay the real-estate manager pursuant to that duty. According to the Court, "under the Texas Trust Act and the terms of the trust agreement the Trustee was granted authority to hire such agents as he determined, in his discretion, were reasonably necessary for the management and control of the rental properties." *Id*. The Court reversed the lower court's decision that had ordered the deceased trustee's estate to reimburse the trust for the fees paid to the real-estate manager. *Id*. at 755.

It seems reasonably clear that a trustee can retain and compensate attorneys for routine trust administration issues, such as preparing deeds, negotiating oil and gas leases, filing suit to construe a trust or collect rent or royalties, etc. *See Clement v. Merchants National Bank*, 493 So.2d 1350 (Ala. 1986); *Wells Fargo Bank v. Superior Court*, 24 Cal.4th 201, 990 P.2d 591, 91 Cal. Rptr.2d 716 (2000); *Wilbank v. Gray*, 795 So.2d 541 (Miss. App. 2001); *Estate of Dern Family Trust*, 279 Mont. 138, 928 P.2d 123 (1996); *Matter of Estate of Matsis*, 280 App. Div. 2d 480, 720 N.Y.S.2d 179 (2001); *First National Bank v. Stricklin*, 347 P.2d 652 (Okla. 1959); *Masters v. Bissett*, 101 Or.App. 163, 790 P.2d 16 (1990). These payments can be made immediately, subject to a beneficiary or successor trustee or co-trustee later challenging the payment as being a breach of fiduciary duty. For example, if a trustee compensates an attorney for unnecessary work or for rates that are not reasonable, then some party may later allege that the trustee breached its fiduciary duties in making those payments from trust property. But that does not impact a trustee's power to make the payment at the outset.

This analysis, however, does not necessarily apply to co-trustees suing each other for breaching duties. The Restatement provides:

> More complicated issues are presented by costs incurred by trustees in controversies, or in anticipation of possible litigation, involving allegations of breach of trust and thus exposing the trustee personally to risks such as surcharge or removal. To the extent the trustee is successful in defending against charges of misconduct, the trustee is normally entitled to indemnification for reasonable attorneys' fees and other costs; to the extent the trustee is found to have committed a breach of trust, indemnification is ordinarily unavailable. Ultimately, however, the matter of the trustee's indemnification is within the discretion of the trial court, subject to appeal for abuse of that discretion.

RESTATEMENT (THIRD) OF TRUSTS § 88, at cmt. d.

There is no question that at the end of the litigation, a court can award fees from the trust or from a trustee, individually, as it deems equitable and just. Tex. Prop. Code 114.064. *See, e.g., In re Trusteeship of Williams*, 591 N.W.2d 743, 748-749 (Minn. App. 1999) ("The determination of whether attorney fees [of trustees] will be chargeable to the trust is in the sound discretion of the district court. A trustee is entitled to reasonable attorney fees incurred in good faith in defending its administration of the trust, in defending a proceeding for the benefit of the trust, and in defending a beneficiary's challenge to the trust's administration. However, where a trustee has acted in bad faith or has been guilty of fraud or inexcusable neglect that has caused loss to the estate, the trustee may be denied attorney fees."); *Atwood v. Atwood*, 25 P.3d 936, 952 (Okla. Civ. App. 2001). Courts have awarded trustees the costs of their successful defenses. *See, e.g., In re Couch Trust*, 723 A.2d 376 (Del. Ch. 1998); *Estate of Beach*, 15 Cal.3d 623, 125 Cal.Rptr. 570, 542 P.2d 994 (1975); *Estate of Ber-thot*, 312 Mont. 366, 380, 59 P.3d 1080, 1089 (2002); *Jessup v. Smith*, 223 N.Y. 203, 207, 119 N.E. 403, 404 (1918); *In re Francis E. McGillick Foundation*, 537 Pa. 194, 642 A.2d 467 (1994) *Stepp v. Foster*, 259 Va. 210, 524 S.E.2d 866 (2000).

Of course, the converse is also true; courts have denied trustees the right to recover fees from trusts where they have been unsuccessful in the litigation. *See, e.g., Citizens & Southern National Bank v. Haskins*, 254 Ga. 131, 327 S.E.2d 192 (1985); *In re Drake's Will*, 195 Minn. 464, 263 N.W. 439 (1935); *Baker Boyer National Bank v. Garver*, 43 Wash.App. 673, 719 P.2d 583 (1986); *Marshall v. First National Bank*, 97 P.3d 830 (Alaska 2004). For example, in *Benge v. Roberts*, a beneficiary sued co-trustees for not raising claims against a prior trustee based on earlier litigation between the beneficiary and the prior trustee. No. 03-19-00719-CV, 2020 Tex. App. LEXIS 6335 (Tex. App.—Austin August 12, 2020, no pet. history). The beneficiary argued that the co-trustees were breaching duties by incurring attorneys' fees in an appeal of the underlying suit between the beneficiary and the prior trustee. The court held that if the beneficiary "is successful on appeal, the cause is remanded, and Benge is ultimately successful after a

trial on the merits (and any further appeal), the Trust would not be responsible for the co-trustees' legal fees. *See DuPont v. Southern Nat'l Bank*, 575 F. Supp. 849, 864 (S.D. Tex. 1983) (noting that under Texas law, trustee is not entitled to reimbursement for expenses related to litigation resulting from fault of trustee), aff'd in part and vacated and remanded in part, 771 F.2d 874 (5th Cir. 1985)"). So, whether a trustee is entitled to reimbursement from the trust for prosecuting or defending a breach of fiduciary duty claim is largely dependent on the outcome of the claim.

3. Payment of Expenses in the Interim

One important issue is whether co-trustees can pay for attorneys from the trust in the interim, before a final judgment, where they are suing each other for breaching duties. The first issue is whether the co-trustees have authority to pay their attorneys from the trust. Whether a trust requires unanimous consent or a majority vote, if the required vote does allow one or the other co-trustees to retain counsel, then they cannot do so absent court intervention. If one co-trustee has access to the trust assets, it should not use those assets to pay for an attorney absent appropriate approvals.

For example, in *Conte v. Conte*, the court of appeals affirmed a trial court's order denying a co-trustee's request for reimbursement for attorney's fees expended in connection with a declaratory judgment action brought by another co-trustee. 56 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The court noted that the trust expressly provided that "any decision acted upon shall require unanimous support by all co-trustees then serving," and "[c]learly, Joseph Jr.'s decision to employ counsel to defend against his co-trustee's declaratory judgment action was not the subject of unanimous support by all co-trustees." *Id*. Thus, he was not entitled to reimbursement from the trust for his attorneys' fees, despite the trust's provision that "[e]very trustee shall be reimbursed from the trust for the reasonable costs and expenses incurred in connection with such trustee's duties." *Id*. In a footnote, the court also noted that the other co-trustee had paid for her attorneys from the trust without the consent of the other co-trustee and noted that this was an issue that the successor trustee or beneficiary could raise in a later proceeding. *Id*.

The second issue is whether the co-trustees *should* use trust assets to pay for attorneys. There is authority that a co-trustee bringing the claim (policing its co-trustee) should have access to trust assets to pay for that activity. IA WALTER L. NOSSAMAN & JOSEPH L. WYATT, JR., TRUST ADMINISTRATION AND TAXATION, §§ 32.007 (2d rev. ed. 2004) ("a trustee suing co-trustees for their breach of trust may be allowed attorneys' fees for his efforts."). The Restatement provides:

> In hiring counsel for the trustees in their fiduciary capacity, the selection is ordinarily made by majority vote of the co-trustees (§ 39), with all of the trustees entitled to participate in meetings and other aspects of the counseling process and to have access to communications from the trustees' counsel. If separate counsel is reasonably needed to aid a trustee in the performance of a fiduciary duty, as may be necessary under Subsection (2), appropriate attorney fees are

> payable or reimbursable from the trust estate…
>
> [Subsection (2)]. When a trust has multiple trustees, each trustee ordinarily (cf. Comment b) has a duty to exercise reasonable care to prevent a co-trustee from committing a breach of trust. Thus, for example, it is a breach of trust for a trustee knowingly to allow a co-trustee to commit a breach of trust. And, if a breach occurs, the trustee must take reasonable steps seeking to compel the co-trustee to redress the breach of trust. *If a trustee needs independent counsel to fulfill these duties, reasonable attorney fees may be paid or reimbursed from the trust.*

RESTATEMENT (THIRD) OF TRUSTS § 81(d). By stating that the reasonable attorney's fees may be paid or reimbursed from the trust, this states that the plaintiff co-trustee may have the trust pay for the fees upfront or may reimburse the co-trustee later.

There is also authority that a co-trustee defending against a breach of duty claim should not have access to trust assets to pay for its defense until a court determines that it did not violate a duty. "Where a trustee is found to have committed a breach of trust, the trustee is not entitled to attorney's fees for defending the suit..." *duPont v. S. Nat'l Bank*, 575 F. Supp. 849, 864 (S.D. Tex. 1983), *aff'd in part, rev'd in part on other grounds*, 771 F.2d 874 (5th Cir. 1985); *see also Alpert v. Riley*, No. H-04-CV-3774, 2011 U.S. Dist. LEXIS 84582, 2011 WL 3325884 (S.D. Tex. Aug. 2, 2011); *Moody Found, v. Estate of Moody*, No. 03-99-0034-CV, 1999 Tex. App. LEXIS 8597, at *11 (Tex. App. —Austin Nov. 18, 1999, pet. denied) (not designated for publication) ("A trustee is not entitled to reimbursement for expenses that do not confer a benefit upon the trust estate, such as expenses related to litigation resulting from the fault of the trustee." (citing 3 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, SCOTT ON TRUSTS § 188.6, at 70 (4th ed. 1988)).

For example, in *Stone v. King*, the court of appeals affirmed a finding that a trustee breached his fiduciary duties in converting trust property to pay for his attorneys' fees. No. 13-98-022-CV, 2000 Tex. App. LEXIS 8070, 2000 WL 35729200, at *8 (Tex. App.—Corpus Christi Nov. 30, 2000, pet. denied). The court of appeals held:

> Under Texas law, a trustee may charge the trust for attorney's fees that the trustee, acting reasonably and in good faith, incurs defending charges of breach of trust. A trustee is not entitled to reimbursement for expenses that do not confer a benefit upon the trust estate, such as those expenses related to litigation resulting from the fault of the trustee. We have concluded that Stone breached his fiduciary duties by failing to distribute trust funds after being directed to do so by King's attorney and by adding D'Unger as a signatory to the trust account. Thus, the trial court could reasonably have concluded that the litigation seeking to remove Stone as trustee resulted from Stone's

> improper actions, that Stone did not act reasonably and in good faith in incurring the attorney's fees, and was, therefore, not entitled to charge the trust for the fees. Viewed in the light most favorable to the trial court's judgment, we hold the evidence is legally and factually sufficient to support the conclusion that Stone breached his fiduciary duties by converting $ 37,000 in trust funds for his own use.

Id.

Commentators have stated that a trustee cannot rely on Section 114.063 to authorize the payment of attorney fees arising from the defense of a breach of fiduciary duty claim. *See Joyce C. Moore, Recovering Attorney Fees In Probate And Trust Litigation, State Bar of Texas, Advanced Estate Planning and Probate Course*, June 7, 2017. *See also* Mary C. Burdette, Enforcing Beneficiaries' Rights, COLLIN COUNTY PROBATE BAR, March 11, 2011.

In *In re Nunu*, an estate beneficiary sued the executrix to have her removed due to alleged breaches of fiduciary duty and also sought to have the court refuse to pay her attorneys in representing her in a removal action and/or sought to have those fees forfeited. No. 14-16-00394-CV, 2017 Tex. App. LEXIS 10306 (Tex. App.—Houston [14th Dist.] November 2, 2017, pet. denied). Texas Estates Code section 404.0037 provides: "[a]n independent executor who defends an action for the independent executor's removal in good faith, whether successful or not, shall be allowed out of the estate the independent executor's necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings." *Id*. (citing Tex. Est. Code Ann. § 404.0037(a)). The executrix used estate funds to pay at least some of the attorneys' fees incurred in her defense in this suit. The beneficiary challenged the payment of the attorneys' fees.

The court of appeals discussed Texas Estate's Code Section 404.0037, which states that if an independent executor defends a removal action in good faith that the reasonable and necessary attorney's fees for the defense "shall be allowed out of the estate." *Id*. (citing Tex. Est. Code Ann. § 404.037(a)). The court noted that good faith is an issue on which the independent executor bears the burden of proof. The court held:

> "[A]n executor acts in good faith when he or she subjectively believes his or her defense is viable, if that belief is reasonable in light of existing law." Good faith is established as a matter of law if reasonable minds could not differ in concluding from the undisputed facts that the person in question acted in good faith. Because it is an incontrovertible fact that Paul nonsuited his removal action against Nancy with prejudice, whether Nancy defended the action in good faith is a question of law. As a matter of law, "a dismissal or nonsuit with prejudice is 'tantamount to a judgment on the merits.'" Moreover, a party who voluntarily nonsuits his claims generally cannot obtain reversal of the order on appeal. And where, as here, the party seeking the

> executor's removal voluntarily and unilaterally nonsuits all such claims with prejudice on the third day of a jury trial, reasonable minds could not differ in concluding that the executor's "efforts cause[d] [her] opponents to yield the playing the field." Thus, when Paul irreversibly conceded his claim for Nancy's removal, the viability and reasonableness of Nancy's defense were established as a matter of law. Although Paul points out that the trial court made no finding that Nancy resisted her removal in good faith, a finding is unnecessary if a matter is established as a matter of law. Paul now attempts to resurrect the same grounds on which he sought Nancy's removal as grounds for challenging Nancy's good faith in defending the action; in essence, he contends that Nancy could not have resisted her removal in good faith because Paul would have prevailed on the merits. Those arguments must fail because his voluntary nonsuit of his removal claims with prejudice constitutes a judgment against him on the merits, and he does not (and cannot) challenge that portion of the judgment on appeal.

Id. The court held that the executrix had no authority to pay her attorneys from estate funds in the interim and before the court allowed such an award after the removal issue was resolved:

> There is no such order in the record, and the trial court could not properly have approved payments made before the removal action had been decided.... Although Nancy appears to have assumed that she could pay her legal fees without first obtaining findings that the fees were both necessary and reasonable, the statute does not authorize such a procedure."

Id. The court sustained the beneficiary's issue in part and remanded to the trial court the determination of the amount to be paid from the estate for the executrix's "necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings." *Id*. *See also Klein v. Klein*, 641 S.W.2d 387, 387 (Tex. App.—Dallas 1982, no writ) (dismissing an executor's claims for attorneys' fees and expenses as premature because the removal action was still pending).

So, Texas authority would require a finding of good faith and, likely, a successful defense of the underlying breach claim before a trustee is entitled to reimburse itself for attorney's fees incurred in defending a claim.

Some authority, however, seems to suggest that a trustee has the ability to pay for attorneys from the trust in the interim. In *In the Guardianship of Hollis*, a special needs trust's trustee used $67,000 to build a pool on the beneficiary's parent's property. No. 14-13-00659-CV, 2014 Tex. App. LEXIS 12038 (Tex. App.—Houston [14th Dist.] November 4, 2014, no pet.). The trial court ordered show cause hearings to determine the appropriateness of the expense. The trustee then spent $23,000 in attorney's fees

to defend itself in the show cause hearings. Court removed the trustee because it sought reimbursement from trust funds for defending is actions. The trustee appealed the order removing it. The court of appeals reversed. It held that one ground for removal is being guilty of gross misconduct or mismanagement, which the court noted meant more than ordinary misconduct and implied serious and willful wrongdoing. The appellate court reversed the removal, stating that the trustee had the right to reimburse itself for reasonable costs and expenses in connection with administering or protecting the trust. *Id*. The court cited to *Grey v. First Nat'l Bank*, 393 F.2d 371 (5th Cir. 1968) (stating that a trustee may charge his trust for attorney's fees that the trustee, acting reasonably and in good faith, incurs in defending a charge of breach of trust). *See also Dupont v. Southern Nat'l Bank of Houston*, 771 F.2d 874, 882 (5th Cir. 1985)).

There is very little authority in Texas that is directly on point on whether a trustee is entitled to compensate attorneys from a trust in defending claims of breach of fiduciary duty in the interim, i.e., before the end of the litigation.

The most relevant case in Texas is *In re Cousins*, where a co-trustee filed a mandamus proceeding to challenge a trial court's order denying his motion to pay his attorney's fees from the trust. No. 12-18-00104-CV, 2018 Tex. App. LEXIS 3930 (Tex. App.—Tyler May 31, 2018, original proceeding). The co-trustee sued the other co-trustee for a number of causes of action related to alleged breaches of fiduciary duty. The plaintiff filed a motion for court ordered payment of his legal fees and litigation expenses from the trust based on Texas Property Code Section 114.063. At the hearing, the plaintiff argued that the statute and the trust agreement authorized reimbursement for his attorney's fees: "We're not asking you to award us attorney fees we're asking for access to the trust to pay our ongoing legal expenses." *Id*. He incurred fees totaled just over $650,000 and argued that "[i]t's not our burden today when seeking interim attorney's fees to do any proof to show what's reasonable and necessary at this stage in the game." *Id*. The trial court denied the request, and the plaintiff filed a petition for writ of mandamus seeking an order from the court of appeals to order the trial court to grant the motion.

The plaintiff argued that the trial court's order denied him "this statutory right to ongoing reimbursement." *Id*. The court of appeals stated:

> Section 114.063 provides, in pertinent part, that a trustee may discharge or reimburse himself from trust principal or income or partly from both for expenses incurred while administering or protecting the trust or because of the trustee's holding or owning any of the trust property. Tex. Prop. Code Ann. § 114.063(a)(2) (West 2014). The trustee has a lien against trust property to secure reimbursement. *Id*. § 114.063(b). In any proceeding under the Texas Trust Code, "the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." *Id*. § 114.064(a) (West 2014).

Id. According to the plaintiff, Section 114.063 applied to reimbursement during

the lawsuit and Section 114.064, but not Section 114.063, applies at the end of the litigation. He argued that absent mandamus review, Section 114.063's application evaded appellate review and he would be forced to pursue litigation with his personal funds, which was "particularly egregious here when the trial court has already found a breach of fiduciary duty and thus validated some of [his] claims." *Id*.

Without ruling on the underlying merits of the argument, the court of appeals disagreed that mandamus relief was appropriate. The court stated:

> According to Cousins, "[p]roceeding forward with the litigation without mandamus relief jeopardizes Cousins's ability to diligently pursue his breach-of-fiduciary-duty lawsuit against [James], as Cousins is obligated by statute to do." However, the denial of Cousins' motion does not deprive him of a reasonable opportunity to develop the merits of his case, such that the proceedings would be a waste of judicial resources. An example of one such case arises "when a trial court imposes discovery sanctions which have the effect of precluding a decision on the merits of a party's claims—such as by striking pleadings, dismissing an action, or rendering default judgment—a party's remedy by eventual appeal is inadequate, unless the sanctions are imposed simultaneously with the rendition of a final, appealable judgment." *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992).

Id. The court of appeals held that the trial court's denial of the motion is not the type of ruling that has the effect of precluding a decision on the merits. "Cousins may still pursue his claims against James, including a claim for reimbursement under Section 114.063, and the eventual outcome has not been pre-determined by Respondent's ruling." *Id*. The court also held that mandamus review was not so essential to give needed and helpful direction regarding Section 114.063 that would otherwise prove elusive in an appeal from a final judgment. The court stated:

> Section 114.063 was added in 1983 and amended in 1993, and few appellate courts have cited to or substantially analyzed that section. See Act of May 27, 1983, 68th Leg., R.S., ch. 567, art. 2, § 2, 1983 Tex. Gen. Laws 3269, 3376; see also Act of May 28, 1993, 73rd Leg., R.S., ch. 846, § 31, 1993 Tex. Gen. Laws. 3337, 3350. Additionally, the Texas Trust Code expressly authorizes a court to "make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." Tex. Prop. Code Ann. § 114.064(a). We see no reason why a trial court's authority to award costs and attorney's fees would not encompass claims to reimbursement under Section 114.063. Thus, although Cousins' petition may present a question of

> first impression, we cannot conclude that the petition involves a legal issue that is likely to recur such that mandamus review, as opposed to a direct appeal from a final judgment, is necessary. Should Cousins find the verdict on his reimbursement claim to be unsatisfactory, he may appeal from the final judgment on that claim and nothing prevents him from relying on Section 114.063 in a direct appeal.

Id.

The plaintiff also argued that making him utilize personal funds to pursue litigation made the proceeding more costly and inconvenient. The court held that this fact, standing alone, did not warrant mandamus review. "This is particularly true given that, as previously discussed, the denial does not preclude Cousins from presenting a claim for reimbursement at trial and, consequently, Respondent's failure to grant the motion does not result in an irreversible waste of resources." *Id*. The court of appeals denied the petition for writ of mandamus, concluding that an ordinary appeal of the order denying the motion served as a plain, adequate, and complete remedy.

In *American National Bank v. Biggs*, the court considered a trustee's reimbursement request for attorney's fees under equitable grounds. 274 S.W.2d 209 (Tex. Civ. App.—Beaumont 1962, no writ). The court held that such a payment would depend on the circumstances, including the trustee's good faith and reasonableness of his actions:

> There are some incidental matters yet to be discussed, but it is our conclusion, which we will announce at this point, that under the facts concerning the actions of the trustees Leon Mitchell and Vick Mitchell, that is, their good faith, the reasonableness of their actions, their reliance on advice of counsel, their attempt at performance of a duty, and the ambiguity of the will as the source of their actions, the trial court, on the basis of equitable considerations, was authorized … to charge this fee to the entire trust estate, remaindermen as well as life tenants, that is, to the principal of the estate.

Id. at 222. This case would seem to indicate that a trial court would need to make this type of fact-specific determination before a trustee is entitled to reimbursement for attorney's fees.

Courts from other jurisdictions would support the position that a trial court should make some finding of good faith defense before a trustee can pay for attorneys from the trust for defending breach claims. *People Ex Rel Harris v. Shine*, 224 Cal. Rptr.3d. 380 (2017) (the trustee petitioned for advance fees from the trust for defense of a petition for removal, subject to repayment if the trustee was ultimately found not entitled to indemnity); .*Kemp v. Kemp,* 337 Ga. App. 627, 632,788 S.E.2d 517, (2016) (an appellate court reversed a trial court's award of attorney's fees to a beneficiary in the interim against a trustee even though the trustee admitted to breaches of fiduciary

duty at the hearing); *In re Louise V. Steinhoefel Trust*, 22 Neb. App. 293, 854 N.W.2d 792 (2014) (court reversed interim award of fees to a trustee); *Ball v. Mills*, 376 So.2d 1174 (Fla. Dist. Ct. App. 1979) (an appellate court reversed an order by a trial court allowing a trustee attorney's fees from a trust in the interim).

For example, in *Wells Fargo Bank v. Superior Court*, the court held "[A] trustee has a right to charge the trust for the cost of successfully defending against [suits] by beneficiaries. The better practice may be for a trustee to seek reimbursement after any litigation with beneficiaries concludes, initially retaining counsel with personal funds." 22 Cal.4th 201, 213, 990 P.2d 591, 599, 91 Cal.Rptr.2d 716, 725 (2000).

In *Salmon v. Old National Bank*, the court examined a request for injunctive relief that mirrors the one brought by plaintiff and held that "a claim against a trustee for mismanagement raises the question of the trustee's personal liability" and fees incurred in such a case are not for the benefit of the trust. No. 4:08CV-116-M, 2010 WL 1463196, at *2 (W.D. Ky. Apr. 8, 2010) (granting injunction against trustee's paying attorneys' fees from estate prior to judicial order allowing same). Additionally, the court noted that "courts generally do not allow the trustee to charge attorney's fees against the trust estate before they have successfully defended those claims." *Id.* (citing Snook, 909 F.2d at 486). The court went so far as to state that "The better practice may be for a trustee to seek reimbursement after any litigation with beneficiaries concludes, initially retaining separate counsel with personal funds." *Salmon*, 2010 WL 1463196 at *2 (quoting *Wells Fargo Bank v. Superior Court*, 990 P.2d 716, 725 n.4 (Cal. 2000)). The court in *Sierra v. Williamson* agreed, stating that:

> [T]he Court cannot determine whether Defendants will be successful in defending this action. Nor is the Court in a position to determine whether Defendants' litigation expenses are reasonable. Therefore, the Court believes that the proper procedure is to allow Defendants to seek reimbursement from the Trust after the conclusion of this case, assuming Defendants are successful and their expenses reasonable. As a final matter, Defendants argue that not allowing a trustee to pay attorney's fees from the trust corpus would discourage or prevent otherwise qualified persons or entities from undertaking such a role. Judge McKinley briefly addressed this argument in Salmon. Noting that there is a disincentive for beneficiaries to file suit against trustees because all litigation expenses may be paid out of the trust property, Judge McKinley held that "the need to protect beneficiaries from self-interested trustees outweighs the innocent trustee's need for immediate payment of its attorney's fees.

Sierra v. Williamson, 784 F. Supp. 2d 774, 776-78 (W.D. Ky. 2011) (quoting *Salmon*, 2010 WL 1463196 at *4); see also *Kerns v. Beam*, No. 3:15-CV-212-DJH-DW, 2018 WL 2449206, at *13 (W.D. Ky. May 31, 2018) ("Trustees may not use trust funds to pay attorney fees incurred in defending a breach-of-fiduciary-duty claim; instead,

trustees must wait and seek reimbursement from the trust at the conclusion of the case if they are successful.").

Self-help, i.e., paying fees before a trial court awards same, has led to serious results. In *In re Baylis*, the court held: "The probate court found that although the trust had no obligation to defend Baylis on the fraud charges brought against him personally or to indemnify him, Baylis caused fees for his defense to be paid by the Trust. . . . [P] Baylis's actions were in violation of his duty of loyalty. . . . [P] Given Baylis's active role in creating the conflict ..., he should have requested permission from the probate court before he used trust assets to defend himself against the personal aspects of the … law suit. He did not do so. Instead, he proceeded to use trust assets to defend himself, an extremely reckless thing to do in light of his duty of loyalty. [P] Given this combination of fiduciary breach … and the self-dealing to defend against it, we find that Baylis's actions here constitute defalcation under 11 U.S.C. § 523(a)(4). Thus, … the judgment debt relating to these actions is non-dischargeable." 313 F.3d 9, 22 (1st Cir. 2002).

Accordingly, there is not clear precedent in Texas at this time on whether a trustee can pay its attorney's fees in the interim regarding a breach of fiduciary duty claim. There is precedent going both ways on the issue, but the precedent from other jurisdictions would not allow such a payment from the trust until the final resolution of the underlying breach of fiduciary duty claim.

XVI. BENEFICIARIES' CONSENT AND RELEASE TO CO-TRUSTEES' ACTIONS

Co-trustees and beneficiaries can enter into private agreements that provide protection for a trustee. A trustee and beneficiary may want to enter into a release agreement. A release is a contractual clause that states that one party is relieving the other party from liability associated with certain conduct. For a revocable trust, a settlor may revoke, modify, or amend the trust at any time before the settlor's death or incapacity. Tex. Prop. Code § 112.051. Accordingly, in a revocable trust situation, a settlor may modify or amend a trust to specifically release co-trustees from almost any duty or conduct. *See Puhl v. U.S. Bank, N.A.*, 34 N.E.3d 530 (Ohio Ct. App. 2015) (court held that in a revocable trust, during her lifetime, the settlor had the authority to instruct the trustee to retain stocks, and the trustee had the duty to follow those instructions regardless of the risk presented by the nondiversification).

The Texas Trust Code expressly states that beneficiaries can release co-trustees. A beneficiary who has full capacity and acting on full information may relieve co-trustees from any duty, responsibility, restriction, or liability that would otherwise be imposed by the Texas Trust Code. Tex. Prop. Code Ann. § 114.005. To be effective, this release must be in writing and delivered to the co-trustees. *Id*. The co-trustees should be careful to properly word the release or else certain conduct may be outside of the scope of the release. *See, e.g., Estate of Wolf*, 2016 NYLJ LEXIS 2965 (July 19, 2016) (release did not protect trustee from diversification claim that arose after the effective dates for the release).

Further, writings between the co-trustees and beneficiary, including releases, consents, or other agreements relating to the co-trustees' duties, powers, responsibilities, restrictions, or liabilities, can be final and binding on the beneficiary if they are in writing, signed by the beneficiary, and the beneficiary has legal capacity and full

knowledge of the relevant facts. Tex. Prop. Code § 114.032. Minors are bound if a parent signs, there are no conflicts between the minor and the parent, and there is no guardian for the minor. *Id*.

Once again, both of the Texas Trust Code provisions set forth above require that the beneficiary act "on full information" and full knowledge of the relevant facts. Tex. Prop. Code §§ 114.005, 114.032. This is important because releases can be voided on grounds of fraud, like any other contract. *Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990). So, fiduciaries should be very careful to provide full disclosures to beneficiaries before execution of a release regarding all material facts concerning the released matter. The trustee should offer to provide access to its books and records and require the beneficiary to confirm that they had access to that information. *See Le Tulle v. McDonald*, 444 S.W.2d 794 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.) (court reversed summary judgment based on release of trustee where disclosure was not adequate).

The Texas Trust Code allows for advance judicial approval. Tex. Prop. Code § 115.001. The Texas Civil Practice and Remedies Code allows a court to declare the rights or legal relations regarding a trust and to direct co-trustees to do or abstain from doing particular acts or to determine any question arising from the administration of a trust. Tex. Civ. Prac. & Rem. Code Ann. § 37.005. For example, in *Cogdell v. Fort Worth Nat'l Bank*, the trustee settled claims and sought judicial approval of the settlement agreement. 544 S.W.2d 825, 829 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.). The court of appeals noted that the trustee sought court approval of a settlement agreement that released claims against trustee, because of potential conflict of interest, and holding that approval of settlement was a question for the court. *Id.*

XVII. TRUST LITIGATION

A. Right to Control Litigation

There are occasions when co-trustees have to sue third parties or are sued by third parties. The co-trustees should act together in retaining counsel and in participating in the litigation. Alternatively, one co-trustee can delegate to the other co-trustee the authority to manage the litigation.

A trust is not a legal entity and cannot sue or be sued. *Ray Malooly Trust v. Juhl*, 186 S.W.3d 568 (Tex. 2006). The correct party is the trustee of the trust. *Id*. However, a trustee can waive that capacity issue by not timely raising it. *Id*.

In pursuing or defending litigation, co-trustees normally have discretion Texas Trust Code section 113.051 provides: "The trustee shall administer the trust in good faith according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of his subtitle, in administering the trust the trustee shall perform all the duties imposed on trustees by the common law." Tex. Prop. Code § 113.051. So, the statute expressly instructs parties to look to the common law regarding a trustee's duties. A trustee has the duty to administer the trust with the skill and prudence which an ordinary, capable, and careful person would use in the conduct of his or her own affairs: "The trustee has a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law." Restatement (Third) of Trusts § 76. Moreover, "In administering the trust, the trustee's responsibilities include performance of the following functions: … collecting and protecting trust property." *Id.*

"The duty of protecting the trust estate includes taking reasonable steps to enforce or realize on other claims held by the trust and to defend actions that may result in a loss to the trust estate. Reasonable steps may include taking an appeal to a higher court, compromise or arbitration of claims by or against the trust, or even abandoning a valid claim or not resisting an unenforceable claim if the costs and risk of litigation make such a decision reasonable under all the circumstances." Restatement (Third) of Trusts § 76 cmt. (d). "It is not the duty of the trustee to bring an action to enforce a claim which is a part of the trust property if it is reasonable not to bring such an action, owing to the probable expense involved in the action or to the probability that the action would be unsuccessful or that if successful the claim would be uncollectible owing to the insolvency of the defendant or otherwise." Restatement (Second) of Trusts § 177 cmt. c.

Generally, a trustee has discretion to control whether to file claims. Trust documents often specify that the trustee has the power to file or defend claims. One such provision stated: "[T]rustee is authorized to prosecute or defend . . . any claim of or against the Trustee, the Trust or the Trust Estate, to waive or release rights of any kind and to pay or satisfy any debt, tax or claim upon any evidence by it deemed sufficient, without the joinder or consent of any Unitholder." *In re XTO Energy Inc.*, 471 S.W.3d 126 (Tex. App.—Dallas 2015, original proceeding). A trust document's provisions regarding any duty or power control over those set forth in the Texas Trust Code. Tex. Prop. Code §113.001, 113.051. *See Myrick v. Moody Nat'l Bank*, 336 S.W.3d 795, 801 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (terms of trust instrument may limit or expand trustee powers supplied by the Trust Code). A trustee has a duty to follow the terms of the trust. *Tolar v. Tolar*, No. 12-14-00228-CV, 2015 Tex. App. LEXIS 5119 (Tex. App.—Tyler May 20, 2015, no pet.).

However, trust documents rarely, if ever, require a trustee to bring claims. Thus, under the Texas Property Code and the terms of the trust, a trustee is normally authorized, but not required, to pursue litigation. When can a beneficiary sue on behalf of a trust where the trustee refuses to do so?

Texas courts have historically held that a trust beneficiary may enforce a cause of action that the trustee has against a third party "if the trustee cannot or will not do so." *See, e.g,. In re Estate of Webb*, 266 S.W.3d 544, 552 (Tex. App.—Fort Worth 2008, pet. denied); *Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 874 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

If the trustee's action in not bringing a claim is wrongful, the beneficiary may have multiple different options in vindicating the trust's interests, including suing the trustee for breach of fiduciary duty and seeking an order from a court to require a trustee to comply with its duties.

One issue is if the trustee's action is not wrongful, does the beneficiary have the right to sue on behalf of the trust?

The Texas Property Code provides that a trustee has the power to compromise, contest, arbitrate, or settle claims of or against the trust estate. Tex. Prop. Code Ann. § 113.019. It does not provide a beneficiary with a similar right. In *In re XTO Energy Inc.*, a beneficiary, on behalf of the trust, sued an oil and gas operator for allegedly not paying sufficient funds to the trust and also sued the trustee for refusing to bring that claim. 471 S.W.3d 126 (Tex. App.—Dallas 2015, original proceeding).

The trustee filed a special exception, requesting that the trial court dismiss the beneficiary's claims as she did not have standing and failed to plead sufficient facts that would allow her to usurp the trustee's authority to determine what legal actions to pursue on behalf of the trust. After the trial court denied the special exceptions, the trustee and operator filed a mandamus action.

The court of appeals first addressed a trustee's authority to control litigation. The court noted that under the Texas Trust Code section 113.019, a trustee is generally authorized to compromise, contest, arbitrate, or settle claims affecting the trust property. Further, the terms of a trust document may limit or expand trustee powers supplied by the trust code. The trust document in this case provided that the trustee was "authorized to prosecute or defend . . . any claim of or against the Trustee, the Trust or the Trust Estate, to waive or release rights of any kind and to pay or satisfy any debt, tax or claim upon any evidence by it deemed sufficient, without the joinder or consent of any Unitholder." *Id*. The court held that this granted the trustee discretion to determine the course of litigation "upon any evidence by it deemed sufficient" and was exceedingly broad.

The court then discussed prior cases that generally held that a trust beneficiary may enforce a cause of action that the trustee has against a third party "if the trustee cannot or will not do so." *Id*. The court countered that: "Despite this broad language, a beneficiary may not bring a cause of action on behalf of the trust merely because the trustee has declined to do so. To allow such an action would render the trustee's authority to manage litigation on behalf of the trust illusory." *Id*. The court found no Texas cases addressing the right of a beneficiary to enforce a cause of action against a third party that the trustee considered and concluded was not in the best interests of the trust to pursue. The court concluded: "Allowing a beneficiary to bring suit on behalf of a trust when the trustee has declined to do so amounts to the type of substitution of judgment that this rule was designed to prevent. Accordingly, the court should not allow such a suit to proceed unless the beneficiary pleads and proves that the trustee's refusal to pursue litigation constitutes fraud, misconduct, or a clear abuse of discretion." *Id*. The court reviewed the underlying claim and held that the trustee's decision, which was based on advice of counsel, was not the result of fraud, misconduct, or a clear abuse of discretion. *See also American Bank, N.A. v. Moorehead Oil & Gas, Inc*., No-13-17-00641-CV, 2018 Tex. App. LEXIS 9703 (Tex. App—Corpus Christi November 29, 2018, no pet.).

There is one statutory exception where beneficiaries can stop a trustee from bringing a claim. Texas Trust Code section 113.028 provides that a trustee may not assert a claim against a party that is not a beneficiary if the beneficiaries provide written notice to the trustee of their opposition to the trustee's asserting a claim. Tex. Prop. Code Ann. § 113.028(a). A trustee is not liable for failing to prosecute such a claim if it is prohibited from doing so by the beneficiaries. Tex. Prop. Code Ann. § 113.028(c). For example, in *Alpert v. Riley*, the court of appeals held that the trustee had no authority to continue prosecuting claims against the settlor after the beneficiaries gave written notice. 274 S.W.3d 277 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). If a trustee initiates a proceeding in contravention of Section 113.028 or continues such proceeding after receiving notice, then the trustee acts without authority and will be personally liable for

any attorney's fees incurred by counsel in that proceeding. *Id*.

B. Attorney-Client Privilege

Confidential communications between client and counsel made to facilitate legal services are generally insulated from disclosure. *See* Tex. R. Evid. 503(b); *In XL re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49 (Tex. 2012) (orig. proceeding). A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client: (A) between the client or the client's representative and the client's lawyer or the lawyer's representative; (B) between the client's lawyer and the lawyer's representative; (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action; (D) between the client's representatives or between the client and the client's representative; or (E) among lawyers and their representatives representing the same client. Tex. R. Evid. 503(b)(1).

This rule "promotes free discourse between attorney and client, which advances the effective administration of justice." *XL Specialty Ins. Co*., 373 S.W.3d at 49; *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex. 1993). Texas allows a trustee to retain counsel and to maintain attorney-client privilege as against the trust's beneficiaries. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996).

In *DeShazo*, a beneficiary argued that communications between the trustee and his counsel should be disclosed to the beneficiaries because the trustee had a general duty to disclose. *Id*. The Texas Supreme Court disagreed:

> The communications between Ringer and Huie made confidentially and for the purpose of facilitating legal services are protected. The attorney-client privilege serves the same important purpose in the trustee-attorney relationship as it does in other attorney-client relationships. A trustee must be able to consult freely with his or her attorney to obtain the best possible legal guidance. Without the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second-guessing the trustee's actions. Alternatively, trustees might feel compelled to blindly follow counsel's advice, ignoring their own judgment and experience.

Id.; see also Poth v. Small, Craig & Werkenthin, L.L.P., 967 S.W.2d 511, 515 (Tex. App.—Austin 1998, pet. denied).

Rule 503(b) protects not only confidential communications between the lawyer and client, but also the discourse among their representatives. Tex. R. Evid. 511(1). For example, in *In re Segner*, a trustee hired a consultant to assist in the management of a trust, including supervising employees and assisting with attorneys. 441 S.W.3d 409 (Tex. App.—Dallas 2013, orig. proceeding). In litigation, the trustee designated the

consultant as an expert and disclosed his file and everything that was provided to him, reviewed by, prepared by, or prepared for him "in anticipation of his expert testimony." *Id.* The opposing party sought production of much broader information from the consultant, which the trial court granted. The court of appeals granted mandamus relief because the information was protected by the attorney-client privilege. *Id*. The court focused on the consultant's testimony, that he "sent and reviewed confidential communications with the trust's attorneys for the purposes of effectuating legal representation for the trust." *Id*.

Further, co-trustees can jointly retain counsel and can jointly assert attorney-client privilege. The "joint client" or "co-client" doctrine applies in Texas "[w]hen the same attorney simultaneously represents two or more clients on the same matter." *Specialty Ins. Co.*, 373 S.W.3d at 50. "Joint representation is permitted when all clients consent and there is no substantial risk that the lawyer's representation of one client would be materially adversely affected by the lawyer's duties to the other." *Id*. (citing 2 Restatement (Third) of the Law Governing Lawyers § 128 (2000)). "'Where [an] attorney acts as counsel for two parties, communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients.'" *Id*. (quoting *In re JDN Real Estate-McKinney L.P.*, 211 S.W.3d 907, 922 (Tex. App.—Dallas 2006, [mand. denied])). When more than one person seeks consultation with an attorney on a matter of common interest, the parties and the attorney may reasonably presume the parties are seeking representation of a common matter. *In re JDN Real Estate—McKinney L.P.*, 211 S.W.3d 907, 922 (Tex. App.—Dallas 2006, pet. denied);

So, when co-trustees jointly retain counsel, their communications with their attorney are privileged as against third parties, such as beneficiaries. However, if the co-trustees themselves have a dispute, then there is no privilege and the communication between the attorney and either one of the co-trustees is open to discovery by the other co-trustee. Tex. R. Evid. 503(d)(5) (noting that communications made by two or more clients to a lawyer retained in common are not privileged "when offered in an action between or among any of the clients"). Texas Rule of Evidence 503(d)(5) provides that the following is an exception to the privilege: "If the communication: (A) is offered in an action between clients who retained or consulted a lawyer in common; (B) was made by any of the clients to the lawyer; and (C) is relevant to a matter of common interest between the clients." Tex. R. Evid. 503(d)(5).

For example, *In re Alexander*, a beneficiary filed suit against the trustee based on multiple allegations of breach of fiduciary duty, including an allegation that the trustee attempted to transfer the trustee position to successors in violation of the trust's terms. No. 14-18-00466-CV, 2019 Tex. App. LEXIS 6474 (Tex. App.—Houston [14th Dist.] July 30, 2019, original proc.). The beneficiary filed a motion to compel trust documents and emails regarding same that were drafted by an attorney, but which were never executed. After the trial court granted the motion to compel, the trustee filed a petition for writ of mandamus, challenging the order on the basis of the attorney-client privilege and attorney work product.

The court stated that the trustee filed affidavits proving that the drafts and communications were prepared in the course of the attorney's representation of the trustees and were for legal advice. The court then discussed the concept of a trustee's

communications with its counsel being privileged:

> In *Huie*, the [Texas Supreme Court] considered whether the attorney-client privilege protects communications between a trustee and his or her attorney relating to the administration of a trust from discovery by a trust beneficiary. There, a trust beneficiary sued the trustee, alleging that he had mismanaged the trust, engaged in self-dealing, diverted business opportunities from the trust, and commingled and converted trust property. The beneficiary noticed the deposition of the trustee's attorney, who appeared but refused to answer questions about the management and business dealings of the trust. After an evidentiary hearing, the trial court held that the attorney-client privilege did not prevent the beneficiary from discovering the attorney's pre-lawsuit communications. The court in Huie observed that trustees "owe beneficiaries 'a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiaries'] rights.'" Furthermore, this duty exists independently of the rules of discovery and applies even if no litigious dispute exists between the trustee and beneficiaries. While the attorney-client privilege protects confidential communications between a client and the attorney made for the purpose of facilitating the rendition of professional legal services to the client, a person cannot cloak a material fact with the attorney-client privilege merely by communicating it to an attorney. The Huie court illustrated the point with the following hypothetical:
>
> Assume that a trustee who has misappropriated money from a trust confidentially reveals this fact to his or her attorney for the purpose of obtaining legal advice. The trustee, when asked at trial whether he or she misappropriated money, cannot claim the attorney-client privilege. The act of misappropriation is a material fact of which the trustee has knowledge independently of the communication. The trustee must therefore disclose the fact (assuming no other privilege applies), even though the trustee confidentially conveyed the fact to the attorney. However, because the attorney's only knowledge of the misappropriation is through the confidential communication, the attorney cannot be called on to reveal this information.
>
> Nonetheless, the court flatly rejected the beneficiary's argument that a trustee's duty

of disclosure extends to any and every communication between the trustee and his attorney. The court explained that (1) its holding did not affect the trustee's duty to disclose all material facts and to provide a trust accounting to the beneficiary, even as to information conveyed to the attorney; (2) the beneficiary could depose the attorney and question him about his handling of trust property and other factual matters involving the trust; and (3) the attorney-client privilege did not bar the attorney from testifying about factual matters involving the trust, so long as he was not called on to reveal confidential attorney-client communications.

Although a trustee owes a duty to a trust beneficiary, the trustee in Huie did not retain the attorney to represent the beneficiary but to represent himself in carrying out his fiduciary duties. Contrary to Preston's point, the Huie court recognized that communications between a trustee and the trustee's attorney made confidentially and for the purpose of facilitating legal services remain protected. The hypothetical in Huie involved the trustee's misappropriation of trust funds, which he revealed to his attorney for purpose of obtaining legal advice. The trustee's misappropriation was a material fact of which the trustee knew independent of the communication.

> In contrast to the circumstances in Huie, and as explained above, HHS and all the Co-Trustees had an attorney-client relationship at the relevant time, and any communications among HHS and their joint clients regarding the contents of the draft documents were made for the purpose of obtaining legal services from HHS, and the Co-Trustees' knowledge of the draft documents was not gained independent of receiving legal advice. Accepting Preston's view of the discoverability of the subject documents would strip the attorney-client privilege and joint-client doctrine of their core purpose and meaning. Therefore, relators had no duty under Huie to disclose the draft documents to Preston.

Id. The court also held that the trustee had not waived the privilege by testifying in a deposition about the drafts of the documents. The court held that the testimony was not specific enough to constitute a waiver. The court granted the petition and ordered the trial court to reverse its order compelling production of the documents and communications.

Where one co-trustee hires counsel, may the trustee produce attorney/client communications to its non-client co-trustee and maintain the privilege. Generally, there should be extreme caution applied in this circumstance outside of litigation.

Confidential communications to which the attorney-client privilege applies include those "by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party to a pending action and concerning a matter of common interest therein[.]" Tex. R. Evid. 503(b)(1)(C). This rule, often referred to as the "common interest" privilege, is an exception to the general rule that no attorney-client privilege attaches to communications that are made in the presence of or disclosed to a third party. *In re JDN Real Estate—McKinney L.P.*, 211 S.W.3d 907, 922-23 (Tex. App.—Dallas 2006, orig. proceeding [mandamus denied]). The Texas Supreme Court has addressed the "pending action" requirement of the rule and concluded that the "common interest" privilege is more accurately described as an "allied litigant" privilege. *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 52 (Tex. 2012) (orig. proceeding). This is because the privilege does not extend beyond litigation and it applies to any parties—not just the defendants—to a pending action. *Id*. "Because of the pending action requirement, no commonality of interest exists absent actual litigation." *Id*.

A trustee should be careful, however, of using advice of counsel as a defense to a claim. True, advice of counsel is a factor in evaluating a trustee's prudence. Restatement (Third) of Trusts § 77 cmt. b(2), c; *In re Estate of Boylan*, No. 02-14-00170-CV, 2015 Tex. App. LEXIS 1427 (Tex. App.—Fort Worth February 12, 2015, no pet.). But, if a trustee raises advice of counsel as a defense, then the trustee will likely waive its attorney-client communication privilege.

If a party introduces any significant part of an otherwise privileged matter, that party waives the privilege. Tex. R. Evid. 511. If a defendant voluntarily introduces its communications with counsel as a defense to claims, it cannot also seek to keep other aspects of the communications privileged. A Delaware court reviewed a similar fact pattern and found that the privilege was waived. *Mennen v. Wilmington Trust Co.*, 2013 Del. Ch. LEXIS 238, 2013 WL 5288900 (Del. Ch. Sept. 18, 2013). In *Mennen*, a trustee was sued for breach of fiduciary duty. *Mennen* at *3. One of the trustee's defenses was that he received bad legal advice from counsel. *Id*. at *5. The trustee attempted to block production of the alleged bad advice from counsel, citing attorney-client privilege. *Id*. The court was unpersuaded by the trustee's invocation of privilege, stating that "a party's decision to rely on advice of counsel as a defense in litigation is a conscious decision to inject privileged communications into the litigation." *Id*. at *18 (citing *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3rd Cir. 1995)).

The Texas Rules of Evidence and courts nationwide agree that when privileged communications are voluntarily introduced in litigation, they are no longer privileged. The Texas Supreme Court has declared that a party cannot use a privilege as a sword to promote or protect its own affirmative claims or further the relief it seeks. *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107 (Tex. 1985) (orig. proceeding). In fact, the Supreme Court would later expand upon the "offensive use" doctrine and acknowledge that a party has waived the assertion of a privilege if the court determines that:

> (1) the party asserting the privilege is seeking affirmative relief; (2) the privileged information sought is such that, if believed by the fact finder, in all probability it would be outcome

> determinative of the cause of action asserted; and (3) disclosure of the confidential information is the only means by which the aggrieved party may obtain the evidence.

Transamerican Natural Gas Corp. v. Flores, 870 S.W.2d 10, 11-12 (Tex. 1994) (orig. proceeding); *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993) (orig. proceeding). The Supreme Court has explained that with regard to the second prong, "[t]he confidential communication must go to the very heart of the affirmative relief sought." *Davis*, 856 S.W.2d at 163. "When a party uses a privilege as a sword rather than a shield, she waives the privilege." *Alford*, 137 S.W.3d at 921. Accordingly, co-trustees should be careful and weigh the risk and reward of injecting attorney-client communications into a dispute.

C. Jurisdictional Issues

The Texas Property Code describes the following jurisdiction of district courts regarding trust disputes:

> [A] district court has original and exclusive jurisdiction over all proceedings by or against a trustee and all proceedings concerning trusts, including proceedings to: (1) construe a trust instrument; (2) determine the law applicable to a trust instrument; (3) appoint or remove a trustee; (4) determine the powers, responsibilities, duties, and liability of a trustee; (5) ascertain beneficiaries; (6) make determinations of fact affecting the administration, distribution, or duration of a trust; (7) determine a question arising in the administration or distribution of a trust; (8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle; (9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and (10) surcharge a trustee.
>
> (a-1) The list of proceedings described by Subsection (a) over which a district court has exclusive and original jurisdiction is not exhaustive. A district court has exclusive and original jurisdiction over a proceeding by or against a trustee or a proceeding concerning a trust under Subsection (a) whether or not the proceeding is listed in Subsection (a).

Tex. Prop. Code § 115.001(a).

It also provides that a court may intervene in the administration of a trust to the extent that the court's jurisdiction is invoked by an interested person or as otherwise provided by law. *Id*. at § 115.001(c). The term "interested person" means "a trustee, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust. Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding." Tex. Prop. Code § 111.004(18). Accordingly, the Property

Code expressly states that a trustee is an interested person and may invoke a court's jurisdiction over the administration of a trust.

Co-trustees can also assert claims under the Texas Uniform Declaratory Judgment Act. *Murphy v. Am. Rice, Inc.*, No. 01-03-01357-CV, 2007 Tex. App. LEXIS 2031, at 34 (Tex. App.—Houston [1st Dist.] Mar. 9, 2007, no pet.) (a plaintiff asserting a breach of fiduciary duty claim may request declaratory relief in addition to other remedies). A declaratory judgment is a remedial measure that determines the rights of the parties and affords relief from uncertainty with respect to rights, status, and legal relations. *Ysasaga v. Nationwide Mut. Ins. Co.*, 279 S.W.3d 858, 863 (Tex. App.—Dallas 2009, pet. denied). Where the undisputed evidence shows a party's entitlement to declaratory relief, it is error for the trial court not to grant the relief requested. *Cont'l Homes of Tex., L.P. v. City of San Antonio*, 275 S.W.3d 9, 21 (Tex. App.—San Antonio 2008, pet. denied).

Section 37.004 provides:

> A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Tex. Civ. Prac. & Rem. Code § 37.004(a). Further, Section 37.005 provides:

> A person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, an infant, mentally incapacitated person, or insolvent may have a declaration of rights or legal relations in respect to the trust or estate: (1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; (2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; (3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or (4) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.

Tex. Civ. Prac. & Rem. Code § 37.005.

Any court of record in Texas can issue declaratory relief: "A court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. An action or proceeding is not open to objection

on the ground that a declaratory judgment or decree is prayed for." Tex. Civ. Prac. & Rem. Code § 37.003. Specifically, a district court has jurisdiction pursuant to Tex. Const. art. V, § 8; Tex. Gov't Code Ann. §§ 24.007, 24.008; and Tex. Civ. Prac. & Rem. Code § 37.003 (2008) over a declaratory judgment action. *Naddour v. Onewest Bank, FSB*, No. 10-12-00301-CV, 2013 Tex. App. LEXIS 14778 (Tex. App.—Waco Dec. 5, 2013, no pet.).

While Section 37.003 provides that a court has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed, a declaratory judgment action is available only if (1) a justiciable controversy exists and (2) the controversy can be resolved by court declaration. *Cont'l Cas. Co. v. Rivera*, 124 S.W.3d 705 (Tex. App.—Austin Nov. 6, 2003, no pet.).

Under these provisions a co-trustee has a right to seek declaratory relief from a district court. *Myrick v. Moody Nat'l Bank*, 336 S.W.3d 795 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (district court had jurisdiction to determine trustee's right to borrow funds); *Twyman v. Twyman*, No. 01-08-00904-CV, 2009 Tex. App. LEXIS 5552 (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet.) (court had jurisdiction to issue temporary injunction in declaratory judgment suit to prevent trustee from disbursing trust funds); *In re Estate of Hunt*, 908 S.W.2d 483, 1995 Tex. App. LEXIS 2603 (Tex. App.—San Antonio Aug. 23, 1995, reh'g denied) (Section 37.005 entitles an heir to receive a declaration of rights or legal relations in respect to a trust or an estate); *Commercial Nat'l Bank v. Hayter*, 473 S.W.2d 561 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.).

For example, in *Duncan v. O'Shea*, three co-trustees brought a declaratory judgment action against a fourth co-trustee, seeking a declaration that the sale of trust real property was valid over the objection of the fourth co-trustee. No. 07-19-00085-CV, 2020 Tex. App. LEXIS 6564 (Tex. App.—Amarillo August 17, 2020, no pet. history). The trial court granted the relief via summary judgment, and the fourth co-trustee appealed.

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

> Appellant's argument disregards the plain language of section 37.003 of the TUDJA which provides: "[a] court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." While Appellant argues that a declaratory judgment must terminate any and all controversies between the parties, such a conclusion is not required under the language of the TUDJA, nor has it been interpreted in such a way by any known case law, including Annetta South… So long as there is a justiciable controversy existing between the parties and the declaratory judgment will resolve that dispute, a declaratory judgment may be sought with respect to that dispute.

> That being said, a question of jurisdiction does arise "if there is pending, at the time of the commencement of the declaratory action, another action or proceeding to which the same persons are parties, in which are involved and may be adjudicated the same identical issues that are involved in the declaratory action." However, the "mere pendency of another action between the same parties, without more, is no basis for refusing declaratory relief." A declaratory judgment may not be refused because of the pendency of another suit if the controversy will not necessarily be determined in that suit. Where speedy relief is "necessary to the preservation of rights which otherwise may be impaired or lost, courts will entertain an action for a declaratory judgment as to questions which are determinable in a pending action or proceeding between the same parties."
>
> While we agree with Appellant that the suit in Maine involves the same parties and the same real property at issue here, the dispute between the parties here, i.e., the authority of a majority of co-trustees to act on behalf of the Marital Trust, will not be determined in the Maine suit. Therefore, we agree with Appellees that the trial court had the authority to grant declaratory relief in this matter.

Id. The fourth co-trustee argued that the district court did not have jurisdiction because it should have been in probate court. The court of appeals disagreed, and held that the Texas Property Code specifically provided for jurisdiction over trust disputes to district courts. *Id*. (citing Tex. Prop. Code Ann. § 115.001(a)).

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

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

Id.

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

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

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

> Appellees contend the declaratory relief sought is not some abstract question of law, but is, instead, a justiciable controversy existing between the parties. Appellees contend that, in situations like the present controversy, where multiple trustees serve concurrently, co-trustees may act by majority decision. Appellees' position is not contrary to either the terms of the Marital Trust or applicable statutory authority. Reviewing the trust and the applicable statutes, the trial court's judgment did not determine an abstract question of law, nor did it address a hypothetical injury only. Id. When this declaratory judgment becomes final, Appellees will be able to move forward with a sale of real property held in the Marital Trust, with the assurance that the agreement of all four co-trustees is not needed, so long as a majority of the co-trustees are in agreement. Under the facts of this case, we see nothing advisory about the trial court's declaratory judgment.

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

D. Venue

The Texas Property Code provides for venue for trust disputes arising under the Property Code and specifically provides for venue for trusts managed by multiple trustees. The Code provides:

> (b-1) If there are multiple trustees none of whom is a corporate trustee and the trustees maintain a principal office in this state, an action shall be brought in the county in which: (1) the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed; or (2) the trustees maintain the principal office.
>
> (b-2) If there are multiple trustees none of whom is a corporate trustee and the trustees do not maintain a principal office in this state, an action shall be brought in the county in which: (1) the situs of administration of the

trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed; or (2) any trustee resides or has resided at any time during the four-year period preceding the date the action is filed.

(c) If there are one or more corporate trustees, an action shall be brought in the county in which: (1) the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed; or (2) any corporate trustee maintains its principal office in this state.

(c-1) Notwithstanding Subsections (b), (b-1), (b-2), and (c), if the settlor is deceased and an administration of the settlor's estate is pending in this state, an action involving the interpretation and administration of an inter vivos trust created by the settlor or a testamentary trust created by the settlor's will may be brought: (1) in a county in which venue is proper under Subsection (b), (b-1), (b-2), or (c); or (2) in the county in which the administration of the settlor's estate is pending.

Tex. Prop. Code § 115.002 (b-1)-(c-1). The Code has the following definitions:

(f) For the purposes of this section:

(1) "Corporate trustee" means an entity organized as a financial institution or a corporation with the authority to act in a fiduciary capacity.

(2) "Principal office" means:

(A) if there are one or more corporate trustees, an office of a corporate trustee in this state where the decision makers for the corporate trustee within this state conduct the daily affairs of the corporate trustee; or

(B) if there are multiple trustees, none of which is a corporate trustee, an office in this state that is not maintained within the personal residence of any trustee, and in which one or more trustees conducts the daily affairs of the trustees.

(2-a) The mere presence of an agent or representative of a trustee does not establish a principal office as defined by Subdivision (2). The principal office of a corporate trustee or the principal office maintained by multiple noncorporate trustees may also be but is not necessarily the same as the situs of administration of the trust.

(3) "Situs of administration" means the location in this state where the trustee maintains the office that is

> primarily responsible for dealing with the settlor and beneficiaries of the trust. The situs of administration may also be but is not necessarily the same as the principal office of a corporate trustee or the principal office maintained by multiple noncorporate trustees.

Tex. Prop. Code § 115.002(f).

This venue statute is mandatory, and a trial court's refusal to comply with it may result in a successful mandamus proceeding. *In re Green*, 527 S.W.3d 277 (Tex. App.—El Paso Dec. 2, 2016, original proceeding); *In re Wheeler*, 441 S.W.3d 430 (Tex. App.—Waco 2014, original proceeding); *In re J.P. Morgan Chase Bank, N.A.*, 373 S.W.3d 615 (Tex. App.—San Antonio Apr. 11, 2012, original proceeding).

Further, the venue statute is now very broad and applies to "all proceedings by or against a trustee." As one court stated: "In 2007, section 115.001 was amended to provide that a district court has original and exclusive jurisdiction over not only all proceedings concerning a trust, but also "all proceedings by or against a trustee." *In re J.P. Morgan Chase Bank, N.A.*, 373 S.W.3d 615 (Tex. App.—San Antonio Apr. 11, 2012, original proceeding) (citing Act of May 24, 2005, 79th Leg., R.S., ch. 148, 2005 Tex. Gen. Laws 296 (amended 2007)). *But see In re J.P. Morgan Chase Bank, N.A.*, No. 13-11-00707-CV, 361 S.W.3d 703, 2011 Tex. App. LEXIS 9601, 2011 WL 6098696, at *3 (Tex. App.—Corpus Christi, Dec. 5, 2011, orig. proceeding) (applying the venue statute more narrowly and holding that section 115.001 was inapplicable because the suit did not involve an action relating to the trust itself or the operation of a trust).

Further, the Code provides that the parties may agree to transfer an action to any county: "Notwithstanding any other provision of this section, on agreement by all parties the court may transfer an action from a county of proper venue under this section to any other county." Tex. Prop. Code § 115.002(e).

The Code also provides for transfer of venue where there are more than one counties that have proper venue:

> (d) For just and reasonable cause, including the location of the records and the convenience of the parties and witnesses, the court may transfer an action from a county of proper venue under this section to another county of proper venue: (1) on motion of a defendant or joined party, filed concurrently with or before the filing of the answer or other initial responsive pleading, and served in accordance with law; or (2) on motion of an intervening party, filed not later than the 20th day after the court signs the order allowing the intervention, and served in accordance with law.

Tex. Prop. Code § 115.002 (b-1)-(c-1).

E. Necessary Parties

The Texas Property Code provides the following regarding necessary parties to a trust dispute under the Property Code:

> The only necessary parties to such an action are:

> (1) a beneficiary of the trust on whose act or obligation the action is predicated;
>
> (2) a beneficiary of the trust designated by name, other than a beneficiary whose interest has been distributed, extinguished, terminated, or paid;
>
> (3) a person who is actually receiving distributions from the trust estate at the time the action is filed; and
>
> (4) the trustee, if a trustee is serving at the time the action is filed.

Tex. Prop. Code § 115.011(b).

This section specifically states that a trustee is a necessary party if the trustee is serving at the time that the action is filed. *In re Estate of Moore*, 553 S.W.3d 533 (Tex. App.—El Paso Mar. 15, 2018, no pet.) ("A trustee is a necessary party to an action involving a trust or against a trustee, provided a trustee is serving at the time the action is filed."); *Estate of Webb*, 266 S.W.3d 544, 548 (Tex. App.—Fort Worth 2008, pet. denied) ("The Texas Trust Code provides that in an action by or against a trustee and in all proceedings concerning trusts, the trustee is a necessary party if a trustee is serving at the time the action is filed."); *Smith v. Plainview Hospital and Clinic Foundation,* 393 S.W.2d 424, 427 (Tex. Civ. App.—Amarillo 1965, writ dism'd). For example, in *In re Estate of Moore*, the court of appeals reversed a judgment via a restricted appeal where the record did not show that the trustee was served with process. *In re Estate of Moore*, 553 S.W.3d at 536.

The term "Trustee" means "the person holding the property in trust, including an original, additional, or successor trustee, whether or not the person is appointed or confirmed by a court." Tex. Prop. Code § 111.004(18). So, "additional" trustees are necessary parties to any trust proceeding under the Texas Property Code.

One older case provides that where several trustees hold property jointly, all are ordinarily necessary parties to an action concerning it unless separate authority is conferred by statute or the trust instrument. *Upham v. Boaz Well Service, Inc.*, 357 S.W.2d 411 (Tex. Civ. App.—Fort Worth 1962, no writ).

However, the failure to join necessary parties under this statutes does not necessarily mean that the court lacks jurisdiction to settle trust disputes before it. *Ernst v. Banker's Servs. Group,* No. 05-98-00496-CV, 2001 Tex. App. LEXIS 7076 (Tex. App.—Dallas Oct. 22, 2001, no pet.). The *Ernst* court stated:

> Rule 39 governs whether parties must be joined before a court may proceed with adjudication. *See* Tex. R. Civ. P. 39 (Joinder of Persons Needed for Just Adjudication). If the trial court determines that it is not feasible to join a party who should otherwise be joined, the court must proceed with an analysis under subsection (b) to determine "whether in equity and good conscience the action should proceed among the parties before it." Tex. R. Civ. P. 39(b). As the Texas Supreme Court has stated, "Under the provisions of our present Rule 39 it

> would be rare indeed if there were a person whose presence was so indispensable in the sense that his absence deprives the court of jurisdiction to adjudicate between the parties already joined." *Cooper v. Tex. Gulf Indus*., 513 S.W.2d 200, 204 (Tex. 1974). This is so because the concern under the current rule is "less that of the jurisdiction of a court to proceed and is more a question of whether the court ought to proceed with those who are present." *Id.*

Id. at *5-6.

Texas Rule of Civil Procedure 39(a) provides:

> (a) Persons to Be Joined If Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Tex. R. Civ. P. 39(a). Trial courts have broad discretion in deciding matters of joinder of parties. *Royalty Petroleum Corp. v. Dennis,* 160 Tex. 392, 332 S.W.2d 313, 317 (1960); *Longoria v. Exxon Mobil Corp*., 255 S.W.3d 174 (Tex. App.—San Antonio 2008, pet. denied); *Dahl v. Hartman*, 14 S.W.3d 434, 436 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). There is no precise formula for determining whether a particular person falls within the scope of Rule 39. *Cooper v. Tex. Gulf Indus. Inc*., 513 S.W.2d 200, 204 (Tex. 1974).

Under the Texas Uniform Declaratory Judgment Act, the statute provides: "When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party to the proceeding." Tex. Civ. Prac. & Rem. Code § 37.006. Under this provision a court may decide to not issue declaratory relief where all impacted parties are not named in the suit. *In re Nunu,* 542 S.W.3d 67 (Tex. App.—Houston [14th Dist.] 2017, pet denied); *In re Estate of Grant*, No. 11-03-00141-CV, 2004 Tex. App. LEXIS 8354 (Tex. App.—Eastland Sept. 16, 2004) (trial court did not err in dismissing a granddaughter's petition for declaratory relief because the granddaughter's children were necessary parties to the proceeding in that the children could have relitigated the matter as the declaration would have affected their interests, and the finality of the original judgment would have been undermined); *Montgomery County Auto Auction v. Century Sur. Co.,* 2008 U.S. Dist. LEXIS 35165 (S.D. Tex. Apr. 29, 2008). However, courts have held that this provision should be interpreted the same as Texas Rule of Civil Procedure 39, which allows the court to issue relief in some circumstances even where some affected parties are not named. *Stark v. Benckenstein*,

156 S.W.3d 112, 2004 Tex. App. LEXIS 11842 (Tex. App. Beaumont Dec. 30, 2004, no pet.); *Wilchester W. Concerned Homeowners LDEF, Inc. v. Wilchester W. Fund, Inc.*, No. 01-03-00436-CV, 2004 Tex. App. LEXIS 5417 (Tex. App.—Houston [1st Dist.] June 17, 2004), op. withdrawn, sub. op., 177 S.W.3d 552, 2005 Tex. App. LEXIS 6368 (Tex. App.—Houston [1st Dist.] Aug. 11, 2005).

The Attorney General of Texas is also a proper party for disputes concerning charitable trusts. "Charitable trust" means "a charitable entity, a trust the stated purpose of which is to benefit a charitable entity, or an inter vivos or testamentary gift to a charitable entity." Tex. Prop. Code § 123.001(2). The Texas Property Code states:

> For and on behalf of the interest of the general public of this state in charitable trusts, the attorney general is a proper party and may intervene in a proceeding involving a charitable trust. The attorney general may join and enter into a compromise, settlement agreement, contract, or judgment relating to a proceeding involving a charitable trust.

Tex. Prop. Code § 123.002. A party must provide notice to the Attorney General of such a suit: "Any party initiating a proceeding involving a charitable trust shall give notice of the proceeding to the attorney general by sending to the attorney general, by registered or certified mail, a true copy of the petition or other instrument initiating the proceeding involving a charitable trust within 30 days of the filing of such petition or other instrument, but no less than 25 days prior to a hearing in such a proceeding." *Id.* at § 123.003; *Moore v. Allen*, 544 S.W.2d 448 (Tex. Civ. App.—Waco 1976, no writ) (Failure to serve state attorney general in an action to construe a will that affected a charitable trust rendered the judgment void and unenforceable as state attorney general was a necessary party). "Proceeding involving a charitable trust" means:

> a suit or other judicial proceeding the object of which is to: (A) terminate a charitable trust or distribute its assets to other than charitable donees; (B) depart from the objects of the charitable trust stated in the instrument creating the trust, including a proceeding in which the doctrine of cy-pres is invoked; (C) construe, nullify, or impair the provisions of a testamentary or other instrument creating or affecting a charitable trust; (D) contest or set aside the probate of an alleged will under which money, property, or another thing of value is given for charitable purposes; (E) allow a charitable trust to contest or set aside the probate of an alleged will; (F) determine matters relating to the probate and administration of an estate involving a charitable trust; or (G) obtain a declaratory judgment involving a charitable trust.

Tex. Prop. Code § 123.001(3).

F. Attorney's Fees and Prejudgment Interest

In the context of recovering attorney's fees, Texas follows the American Rule, which provides that litigants may recover attorney's fees only if specifically provided for by statute or contract. *See Tony Gullo Motors I, L.P. v. Chapa,* 212 S.W.3d 299, 310-11 (Tex. 2006) ("Absent a contract or statute, trial courts do not have inherent authority to require a losing party to pay the prevailing party's fees.").

When a beneficiary sues a co-trustee, generally, the trust should not pay the beneficiary's attorneys' fees unless a court awards same. The Restatement provides:

> A trustee cannot properly pay costs incurred by a beneficiary in a judicial or other proceeding involving the administration of the trust or the beneficiary's interests in the trust, except pursuant to a court order. A court may, in the interest of justice, make an award of costs from the trust estate to a beneficiary for some or all of his or her attorney fees and other expenses. Ordinarily, however, awards of this type are limited to situations in which the beneficiary's participation in the proceeding is beneficial to the trust, usually either because of a recovery that benefits the trust's beneficiaries generally (rather than merely the beneficiary in question) or by clarifying a significant uncertainty in the terms of the trust.

RESTATEMENT (THIRD) OF TRUSTS, § 88 at cmt d. Of course, this provision does not address a support trust where a trustee has discretion to make distributions for the beneficiary's support and maintenance, which may include making distributions to the beneficiary for the beneficiary to retain and pay for counsel.

The Texas Property Code states: "In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." Tex. Prop. Code Ann. § 114.064. The granting or denying of attorney's fees to a trustee or beneficiary under section 114.064 is within the sound discretion of the trial court, and a reviewing court will not reverse the trial court's judgment absent a clear showing that the trial court abused its discretion by acting without reference to any guiding rules and principles. *Lee v. Lee*, 47 S.W.3d 767, 793-794 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Lyco Acquisition 1984 Ltd. P'ship v. First Nat'l Bank*, 860 S.W.2d 117, 121 (Tex. App.—Amarillo 1993, writ denied).

A plaintiff may be entitled to an award of attorney's fees regarding its declaratory judgment request: "In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." Tex. Civ. Prac. & Rem. Code § 37.009. This is not a "prevailing party" statute, and the court can award fees as it determines is equitable and just. *Hachar v. Hachar*, 153 S.W.3d 138, 2004 Tex. App. LEXIS 10477 (Tex. App.—San Antonio Nov. 24, 2004, no pet.). For example, in an action declaring that a decedent's adopted grandchildren were not beneficiaries of a trust, it was equitable and just under Section 37.009 to award fees from the trust to the adopted grandchildren. *In re Ellison Grandchildren Trust,* 261

S.W.3d 111 (Tex. App.—San Antonio 2008, no pet.).

A plaintiff may be entitled to an award of pre-judgment interest, but it is generally discretionary with the court. In *Phillips Petroleum Co. v. Stahl Petroleum Co.*, the Texas Supreme Court recognized two separate bases for the award of prejudgment interest: (1) an enabling statute; and (2) general principles of equity. 569 S.W.2d 480, 485 (Tex. 1978). Statutory prejudgment interest generally applies only to judgments in wrongful death, personal injury, property damage, and condemnation cases. Tex. Fin. Code Ann. §§ 304.102, 304.201 (Vernon Supp. 2004-05); *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 530 (Tex. 1998). There is no statutory authority for a recovery of prejudgment interest for a breach of fiduciary duty claim. *Robertson v. ADJ Partnership, Ltd.*, 204 S.W.3d 484, 496 (Tex. App.—Beaumont 2006, no pet.).

Under an equitable theory, if no statute requires pre-judgment interest to be awarded, a court has the discretion to award pre-judgment interest if it determines an award is appropriate based on the facts of the case. *See e.g., City of Port Isabel v. Shiba*, 976 S.W.2d 856, 860 (Tex. App.—Corpus Christi 1998, pet. denied) (where no statute controls, decision to award prejudgment interest left to discretion of trial court); *Larcon Petroleum, Inc. v. Autotronic Sys.*, 576 S.W.2d 873, 879 (Tex. App.—Houston [14th Dist.] 1979, no writ) (trial court may, but not is not required to, award pre-judgment interest under authority of statute or under equitable theory).

Courts have affirmed a trial court's decision to not award pre-judgment interest to a breach-of-fiduciary-duty plaintiff. *Critical Path Res., Inc. v. Huntsman Int'l, LLC*, NO. 09-17-00497-CV, 2020 Tex. App. LEXIS 2310 (Tex. App.—Beaumont March 19, 2020, no pet.); *Robertson*, 204 S.W.3d at 496; *Lee v. Lee*, 47 S.W.3d 767, 800 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

If a court awards prejudgment interest for a breach of fiduciary duty claim, the court should award a rate that is equal to the post-judgment interest rate that applies at the time of the judgment. Tex. Fin. Code Ann. § 304.103.

G. No-Contest Clause

A co-trustee may also be a beneficiary of a trust. If the co-trustee files suit against his or her co-trustee, could that trigger a no-contest clause? The Texas Property Code Section 112.038 provides:

> (a) A provision in a trust that would cause a forfeiture of or void an interest for bringing any court action, including contesting a trust, is enforceable unless in a court action determining whether the forfeiture clause should be enforced, the person who brought the action contrary to the forfeiture clause establishes by a preponderance of the evidence that: (1) just cause existed for bringing the action; and (2) the action was brought and maintained in good faith.
>
> (b) This section is not intended to and does not repeal any law, recognizing that forfeiture clauses generally will not be construed to prevent a beneficiary from seeking to

> compel a fiduciary to perform the fiduciary's duties, seeking redress against a fiduciary for a breach of the fiduciary's duties, or seeking a judicial construction of a will or trust.

Tex. Prop. Code § 112.038.

In *Ard v. Hudson*, a beneficiary sued testamentary trustees and executors for breach of fiduciary duty and also sought an accounting, temporary injunctive relief, and a receiver. No. 02-13-00198-CV, 2015 Tex. App. LEXIS 8727 (Tex. App.—Fort Worth August 20, 2015, pet. dism.). The trial court granted a summary judgment for the defendants on the basis of a no-contest clause. The court of appeals held that a breach of a forfeiture clause will be found only when the beneficiary's or devisee's actions fall clearly within the express terms of the clause. The court mentioned other precedent where challenging a fiduciary did not trigger a no-contest clause. The defendants agreed with that, but argued that the beneficiary's requests for temporary and permanent injunctive relief and her motions to suspend her brothers as co-trustees and to appoint a receiver triggered the clause. The court held: "[The] inherent right [to challenge a fiduciary] would be worthless absent the beneficiary's corresponding inherent right to seek protection during such an ongoing challenge of what is left of his or her share of the estate or trust assets, and any income thereon, that the testator or grantor, as the case may be, intended the beneficiary to have." *Id*. The defendants also argued that a condition precedent barred the beneficiary's claims: "Each benefit conferred herein is made on the condition precedent that the beneficiary shall accept and agree to all provisions of this Will." *Id*. The court rejected this argument, holding: "We construe the condition precedent language located within the forfeiture clause to be consistent with the forfeiture clause as a whole." The court reversed the summary judgment.

In *Conte v. Conte*, the court held that a no contest clause was not triggered by a co-trustee's claim to remove a co-trustee. 56 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

XVIII. COMPENSATION FORFEITURE

The basis of a fiduciary relationship is equity. *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502 (Tex. 1980). When a fiduciary breaches its fiduciary duties, a trial court has the right to award legal and equitable damages. It is common for a plaintiff to not have any legal or actual damages, but that does not prevent a trial court from being able to fashion an equitable remedy to protect the fiduciary relationship that has been violated. A trial court may order that the fiduciary forfeit compensation otherwise earned, disgorge improper gains and profits, or disgorge other consideration related to the breach of duty.[2] The Texas Supreme Court has upheld equitable remedies for breach of fiduciary duty. *Burrow v. Arce*, 997 S.W.2d 229, 237-45 (Tex. 1999) (upholding remedy of forfeiture upon attorney's breach of fiduciary duty).

Under the equitable remedy of forfeiture, a person who renders service to another in a relationship of trust may be denied compensation for her service if he breaches that trust. *Burrow*, 997 S.W.2d at 237. The objective of the remedy is to return to the

[2]The equitable relief of disgorgement and forfeiture only apply for breach of fiduciary or confidential relationships. *Double Diamond-Delaware, Inc. v. Alfonso,* No. 05-18-01063-CV, 2020 Tex. App. LEXIS 5848 (Tex. App.—Dallas July 27, 2020, no pet. history).

principal the value of what the principal paid because the principal did not receive the trust or loyalty from the other party. *Id*. at 237-38; *McCullough v. Scarbrough, Medlin & Assocs., Inc.*, 435 S.W.3d 871, 904 (Tex. App.—Dallas 2014, pet. denied). The party seeking forfeiture need not prove damages as a result of the breach of fiduciary duty. *Burrow*, 997 S.W.2d at 240; *Brock v. Brock*, No. 09-08-00474-CV, 2009 Tex. App. LEXIS 5444, at *5 (Tex. App.—Beaumont July 16, 2009, no pet.).

Citing to comment c to section 243 of the Restatement (Second) of Trusts, the Texas Supreme Court held:

> It is within the discretion of the court whether the trustee who has committed a breach of trust shall receive full compensation or whether his compensation shall be reduced or denied. In the exercise of the court's discretion the following factors are considered: (1) whether the trustee acted in good faith or not; (2) whether the breach of trust was intentional or negligent or without fault; (3) whether the breach of trust related to the management of the whole trust or related only to a part of the trust property; (4) whether or not the breach of trust occasioned any loss and whether if there has been a loss it has been made good by the trustee; (5) whether the trustee's services were of value to the trust.

Burrow, 997 S.W.2d at 243. A party may seek forfeiture as a remedy for breach of a fiduciary duty, provided the party includes a request for forfeiture in its pleadings. *Lee v. Lee*, 47 S.W.3d 767, 780-81 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Longaker v. Evans*, 32 S.W.3d 725, 733 n.2 (Tex. App.—San Antonio 2000, pet. withdrawn) (explaining that *Burrow v. Arce* did not apply where a party sought damages resulting from a fiduciary's misconduct and did not seek forfeiture).

It should be noted that a trustee may have to disgorge all profits improperly obtained from a relationship. Disgorgement of profits or benefits is an equitable remedy appropriate when a party has breached his fiduciary duty; its purpose is to protect relationships of trust by discouraging disloyalty. *See, e.g.*, *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010). Disgorgement of profits requires the fiduciary to yield to the beneficiary the profit or benefit gained during the time of the breach. *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 576-77 (Tex. 1963); *AZZ Inc. v. Morgan*, 462 S.W.3d 284 (Tex. App.—Fort Worth Apr. 9, 2015, no pet.) (To obtain disgorgement, "proof of the fiduciary's salary, profits, or other income during the time of his breach of fiduciary duty is required[.]"); *Swinnea v. ERI Consulting Eng'rs, Inc.*, 236 S.W.3d 825, 841 (Tex. App.—Tyler 2007), *rev'd on other grounds*, 318 S.W.3d 867 (Tex. 2010) ("[A] fiduciary must account for, and yield to the beneficiary, any profit he makes as a result of his breach of fiduciary duty[.]"); *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177, 187 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (same).

A plaintiff can also potentially seek the disgorgement of contractual consideration from a defendant. *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867 (Tex. 2010); *see also Haut v. Green Cafe Mgmt*., 376 S.W.3d 171, 183 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (affirmed a trial

court's disgorgement of the defendant's ownership interests in companies due to his breach of fiduciary duty).

XIX. DETERMINATION OF REMEDIES

One issue that arises is what fact finder determines the appropriateness or amount of a remedy. Is a plaintiff or defendant entitled to submit a requested remedy, or any aspect of it, to a jury or may a trial court alone determine the availability of the remedy?

If requested, a jury should determine the amount of damages at law that should be awarded to a plaintiff where there is a fact issue. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 367 (Tex. 2000); *Ogu v. C.I.A. Servs*., No. 01-07-00933-CV, 2009 Tex. App. LEXIS 78 (Tex. App.—Houston [1st Dist.] Jan. 8, 2009, no pet.). In Texas, a jury's verdict has a "special, significant sacredness and inviolability." *Crawford v. Standard Fire Ins. Co*., 779 S.W.2d 935, 941 (Tex. App.—Beaumont 1989, no writ). The Texas Constitution requires that the right to trial by jury remain inviolate. Tex. Const., art. I, § 15; *Crawford*, 779 S.W.2d at 941. Denial of the constitutional right to trial by jury amounts to an abuse of discretion for which a new trial is the only remedy. *McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995).

Of course, a party must appropriately request a jury and object to any failure to provide one. *See Lavizadeh v. Moghadam*, No. 05-18-00955-CV, 2019 Tex. App. LEXIS 10835 (Tex. App.—Dallas December 13, 2019, no pet.) (trustee waived right to jury trial where he agreed to summary proceeding before trial court); *Duenas v. Duenas*, No. 13-07-089-CV, 2007 Tex. App. LEXIS 5622 (Tex. App.—Corpus Christi July 12, 2007, no pet.) (Because a party did not timely object regarding his right to a jury trial, the matter was waived.). Further, where there is no fact issue, then a trial court does not err in refusing to submit an issue to a jury. *See Lavizadeh v. Moghadam*, No. 05-18-00955-CV, 2019 Tex. App. LEXIS 10835 (Tex. App.—Dallas December 13, 2019, no pet.) (trial court's refusal to give jury trial was not harmful error where there was no fact question); *Willms v. Americas Tire Co*., 190 S.W.3d 796 (Tex. App.—Dallas 2006, pet. denied) (the granting of summary judgment did not violate a constitutional right to a jury trial because no material issues of fact existed to submit to a jury.).

However, a court, in its equitable jurisdiction, should determine whether an equitable remedy should be granted. *See Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 428-29 (Tex. 2008) ("As with other equitable actions, a jury may have to settle disputed issues about what happened, but "the expediency, necessity, or propriety of equitable relief' is for the trial court …."). The Texas Supreme Court stated: "Although a litigant has the right to a trial by jury in an equitable action, only ultimate issues of fact are submitted for jury determination. The jury does not determine the expediency, necessity, or propriety of equitable relief. The determination of whether to grant an injunction based upon ultimate issues of fact found by the jury is for the trial court, exercising chancery powers, not the jury." *State v. Texas Pet. Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979); *Bostow v. Bank of Am*., No. 14-04-00256-CV, 2006 Tex. App. LEXIS 377 (Tex. App.—Houston [14th Dist.] Jan. 17, 2006, no pet.); *Shields v. State*, 27 S.W.3d 267, 272 (Tex. App.—Austin 2000, no pet.). The jury's findings on issues of fact are binding; however, equitable principles and the appropriate relief to be afforded by equity are only to be applied by the court itself. *Shields*, 27 S.W.3d at 272. Because the court alone

fashions equitable relief, it is not always confined to the literal findings of the jury in designing the injunction. *Id*.

For example, the Texas Supreme Court recently held: "A jury does not determine the expediency, necessity, or propriety of equitable relief such as disgorgement or constructive trust." *Energy Co. v. Huff Energy Fund LP*, 533 S.W.3d 866 (Tex. 2017) (citing *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999)). "Whether 'a constructive trust should be imposed must be determined by a court based on the equity of the circumstances.'" *Id*. "The scope and application of equitable relief such as a constructive trust 'within some limitations, is generally left to the discretion of the court imposing it.'" *Id*. (citing *Baker Botts, L.L.P. v. Cailloux*, 224 S.W.3d 723, 736 (Tex. App.—San Antonio 2007, pet. denied).

"If 'contested fact issues must be resolved before a court can determine the expediency, necessity, or propriety of equitable relief, a party is entitled to have a jury resolve the disputed fact issues.'" *Id*. (citing *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 596 (Tex. 2008). "But uncontroverted issues do not need to be submitted to a jury." *Id*. (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 815 (Tex. 2005)). *See also Wilz v. Flournoy*, 228 S.W.3d 674, 676-77 (Tex. 2007) (noting that in the underlying trial, the jury found that no personal funds were used to purchase the farm, which justified the award of a constructive trust on the farm.); *Paschal v. Great W. Drilling, Ltd.*, 215 S.W.3d 437, 445 (Tex. App.—Eastland 2006, pet. denied) ("The jury found that all of the premiums on the four policies were paid with funds that Alan stole from Great Western. Accordingly, the trial court imposed a constructive trust on all of the funds remaining in existence from the life insurance proceeds.").

So, if properly requested and preserved, a party is entitled to submit a fact issue on legal damages to a jury. However, if a party seeks an equitable remedy, the trial court normally has the sole right to resolve that request. If there is some underlying fact issue that must be resolved with regard to the equitable remedy, then that fact issue should be submitted to a jury. Parties should be very careful to evaluate all requested remedies before trial and determine what should be submitted to the court and what should be submitted to a jury. Otherwise, after trial, a court may determine that a party waived the right to a jury on a fact issue, and either refuse to award the remedy or grant the remedy and supporting findings may be found in support of a trial court's judgment. Tex. R. Civ. P. 279; *Bostow v. Bank of Am*., No. 14-04-00256-CV, 2006 Tex. App. LEXIS 377 (Tex. App.—Houston [14th Dist.] Jan. 17, 2006, no pet.) ("[T]he jury's finding as to Bostow's harassing conduct is a sufficient finding on the ultimate issues of fact to support the trial court's exercise of discretion in granting a permanent injunction. Thus, the Bank did not abandon its claim for injunctive relief by failing to submit fact questions to the jury that would support its entitlement to injunctive relief."). *See also Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993) (suggesting permanent injunction could be based on jury finding liability for invasion of privacy); *Memon v. Shaikh*, 401 S.W.3d 407, 423 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (holding jury's defamation finding supported permanent injunction).

For example, in *In re Troy S. Poe Trust*, trustees of a trust that was embroiled in litigation filed suit to modify the trust to increase the number of trustees and change the method for trustees to vote on issues. No. 08-18-00074-CV, 2019 Tex. App. LEXIS 7838 (Tex. App.—El Paso August 28, 2019, no pet.). After the trial court

granted the modification, a party to the proceeding appealed and argued that the trial court erred in refusing him a jury trial on initial issues of fact.

The court of appeals first looked at a party's general right to a jury trial in Texas:

> The Texas Constitution addresses the right to a jury trial in two distinct provisions. The first, found in the Bill of Rights, provides that the "right of trial by jury shall remain inviolate." But this provision has been held to "maintain a right to trial by jury for those actions, or analogous actions, tried by jury when the Constitution was adopted in 1876." And Richard has not shown that trust modifications were tried to a jury in 1876 or before. The Texas Constitution also contains another provision governing jury trials in its judiciary article: "In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature." This section is broader than the Section 15 right to jury in the sense that it does not depend on court practice in 1876 or before. It is narrower in the sense that it only applies to "causes." But the Texas Supreme Court views the term "causes" expansively, and that court has only restricted the right to jury trial in specific contexts where "some special reason" made jury trials unsuitable, such civil contempt proceedings, election contests, suits to remove a sheriff, and appeals in administrative proceedings. The Texas Constitution also gives the legislature authority to regulate jury trials to maintain their "purity and efficiency." In that regard, we look to the statutory framework to determine whether parties possess a right to a jury trial.

Id. (internal citation omitted). The court then analyzed whether the Texas Property Code waived a party's right to a jury trial regarding a claim to modify a trust:

> [T]he Trust Code provides that "[e]xcept as otherwise provided, all actions instituted under this subtitle are governed by the Texas Rules of Civil Procedure and the other statutes and rules that are applicable to civil actions generally." The Texas Constitution guarantees the right to trial by jury, subject to regulation by the legislature. Those regulations are largely found in the Rules of Civil Procedure and outline how one requests a jury. Compliance with those rules would thus give Richard a right to a jury trial. Bock

urges, however, that the specific statutory language of Section 112.054 precludes jury trials in trust modification proceedings. That Section provides in subsection (a) that the "court may order" modifications of a trust upon certain conditions, and in subsection (b) that the "court shall exercise its discretion" in framing those modifications. And certainly, where there is an apparent conflict between two statutory provisions, the statute dealing with the specific topic controls over the general. If there were a conflict between Section 112.054 that controls trust modification, and the more general Section 115.002 that generally provides for jury trials, the specific provision would control. But we are not convinced of an actual conflict. Section 112.054 vests the trial court with the duty of redrafting the trust terms if one of five predicates are met. The statute does not explicitly provide that it is the trial court who determines whether those predicates exist. The legislature certainly knows how to unambiguously restrict the right to a jury trial on a specific issue. We find no comparable limitations in Section 112.054.

Under Texas law, the right to a jury trial extends to disputed issues of fact in equitable, as well as legal proceedings. And as a general rule, "when contested fact issues must be resolved before equitable relief can be determined, a party is entitled to have that resolution made by a jury." "Once any such necessary factual disputes have been resolved, the weighing of all equitable considerations . . . and the ultimate decision of how much, if any, equitable relief should be awarded, must be determined by the trial court." The trial court, and not the jury, determines the "expediency, necessity, or propriety of equitable relief." Based on these general principles, Richard complains that the predicate question of whether there were changed circumstances, or the purpose of the trust had become impossible to fulfill, were for a jury to resolve.

Id. (internal citations omitted). The court of appeals agreed with the appellant and held that he had a right to a jury trial on those initial issues. The court reversed and remanded for further proceedings.

XX. THEORIES FOR JOINT AND SEVERAL LIABILITY

A plaintiff may assert that multiple defendants are liable for the fiduciary's conduct if the facts support joint liability. There is a conspiracy claim. The Texas Supreme Court held that 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*, 515 S.W.3d 214 (Tex. 2017). The Court explained:

> An actionable civil conspiracy requires specific intent to agree to accomplish something unlawful or to accomplish something lawful by unlawful means. This inherently requires a meeting of the minds on the object or course of action. Thus, an actionable civil conspiracy exists only as to those parties who are aware of the intended harm or proposed wrongful conduct at the outset of the combination or agreement.

Id.

The Texas Supreme Court also held that there is a claim for knowing participation in a breach of fiduciary duty. *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).

Depending on how the Texas Supreme Court rules in the future, 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.). Notwithstanding, Texas courts have found such an action to exist. *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. At least one court has held that Texas does not recognize an aiding and abetting claim. *Hampton v. Equity Trust Co*No. 03-19-00401-CV, 2020 Tex. App. LEXIS 5674 (Tex. App.—Austin July 23, 2020, no pet.).

There is not any particularly compelling guidance on whether these claims (knowing participation and aiding and abetting) are the same or different or whether they are recognized in Texas or not. And if they do exist and are different, what differences are there regarding the elements of each claim? The Texas Supreme Court still has much to explain related to this area of law.

The Texas Supreme Court does appear to clear up one important causation issue. 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. *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 Court has now 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*, 515 S.W.3d 214 (Tex. 2017). 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). 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).

XXI. DRAFTING CONSIDERATIONS

The comment to Uniform Trust Code advises that the use of co-trusteeship calls for "careful reflection," but adds: "Potential problems can be reduced by addressing division of responsibilities in the terms of the trust." U.T.C. § 703. The trust should explicitly state the authority and responsibility of the co-trustees.

It is important to know what and how much power and duty each co-trustee has over the management of the trust. Every trustee has the responsibility of abiding by the trust's instructions. Generally, a trust document's terms govern, and a trustee should follow them. Tex. Prop. Code Ann §§ 111.0035(b), 113.001; RESTATEMENT (THIRD) OF TRUSTS § 76(1) (2007) ("The trustee has a duty to administer the trust … in accordance with the terms of the trust . . . ."); RESTATEMENT (SECOND) OF TRUSTS § 164(a) (1959). The trustee shall administer the trust in good faith according to its terms and the Texas Trust Code. Tex. Prop. Code Ann. § 113.051. Moreover, a court may remove a trustee where "the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust…" Tex. Prop. Code Ann. § 113.082(a)(1).

"The trustee shall administer the trust in good faith according to its terms and the Texas Trust Code." *Tolar v. Tolar*, No. 12-14-00228-CV, 2015 Tex. App. LEXIS 5119 (Tex. App.—Tyler May 20, 2015, no pet.). "The powers conferred upon the trustee in the trust instrument must be strictly followed." *Id*. "The nature and extent of a trustee's duties and powers are primarily determined by the terms of the trust." RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. B; *Stewart v. Selder*, 473 S.W.2d 3 (Tex. 1971); *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, no writ). If the language of the trust instrument unambiguously expresses the intent of the settlor, the instrument itself confers the trustee's powers and neither the trustee nor the courts may alter those powers. *Jewett v. Capital National Bank of Austin*, 618 S.W.2d 109, 112 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.); *Corpus Christi National Bank v. Gerdes*, 551 S.W.2d 521, 523 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

A trust should contain specific provisions on the appointment, resignation, removal, and replacement of co-trustees. The settlor may want to provide for non-judicial methods for each of these various actions so that the co-trustees or beneficiaries do not have to go to court to approve a resignation or an appointment.

For example, a trust may provide:

> The settlor hereby constitutes and designates _____ and

> _____ to serve as initial co-trustees of all trusts created or continued hereunder.
>
> Any trustee shall have the right to resign by giving thirty (30) days written notice, in recordable form, to the settlor (if the settlor is still alive) or the majority of adult beneficiaries (if the settlor is not alive).
>
> In the event any trustee serving hereunder shall resign, be removed, cease or fail for any reason to serve as trustee, then the settlor (if the settlor is still alive) or the majority of adult beneficiaries (if the settlor is not alive) may appoint a successor trustee by written instrument to be maintained with the trust records.
>
> A majority of the adult beneficiaries of the trust may, at any time, with or without cause, and without action by any court, remove any trustee serving hereunder by delivering to the trustee being removed a written notice of such removal.

A trust should contain instructions for the co-trustees on the management of the trust. For example, a settlor may task a corporate co-trustee with the task of maintaining books and records:

> At all times when a corporate entity is serving as trustee or as a co-trustee, such corporate entity shall have the sole responsibility for maintaining books and records and for providing periodic reports as provided herein.

The settlor should provide for how the co-trustees will vote: unanimous, majority, etc. The settlor should provide for any special delegations of duties, such as one co-trustee having primary responsibility for investments and accounting and another for distributions. The settlor should provide for any deadlock breaking provisions.

Regarding the deadlock question, the trust can offer solutions such as: 1) a dominant co-trustee that has the final say regardless of disagreement; 2) decision by majority vote among the co-trustees (this does not work if there are only two trustees); 3) resorting a majority vote of the beneficiaries of the trust; or 4) resorting to a trust protector to break deadlocks. If the trust gives a method to break a deadlock, then the trust language will govern. Unfortunately, most trusts fail to address this issue.

For example, a trust provision may state:

> Except as may otherwise be specifically provided herein, co-trustees shall act by majority vote.

and/or

> If settlor is serving as a co-trustee and the trustees are unable to reach a majority decision on any matter hereunder, then such matter shall be decided solely by the settlor. With regard to any such matters decided solely by the settlor, the other co-trustees shall have no

> responsibility for such decisions. In addition, if a lineal descendant of the settlor is under the age of thirty-five (35) years of age and is serving as a co-trustee hereunder and the trustees are unable to reach a majority agreement on any matter hereunder, then such matter shall be decided solely by the co-trustee(s) other than such lineal descendant of the settlor. If a lineal descendant of the Settlor is over the age of thirty-five (35) years and is serving as co-trustee hereunder and the Trustees are unable to reach a majority decision on any matter hereunder, then such matter shall be decided solely by such lineal descendant of the settlor. With regard to any such matters decided solely by such lineal descendant of the settlor, the other co-trustee(s) shall have no responsibility for such decisions.

A settlor should state how the co-trustees should be compensated. Are they each entitled to what a single trustee would make? Are the entitled to compensation based on the duties that they primarily are responsible for? The settlor should be specific on the compensation terms and should consider the ramifications for same. For example, if the settlor wants an individual trustee to not make any compensation, there may eventually not be anyone willing to take on that role without compensation.

For example, a trust provision may state:

> Unless waived, the trustee(s) of each trust created or continued hereunder shall be entitled to reasonable fees commensurate with his, her or its duties and responsibilities, taking into account the value and nature of the trust estate of such trust and the time and work involved.
>
> or
>
> A corporate co-trustee is entitled to reasonable compensation based on the compensation charged by similarly situated national banking organizations for trustee services in the same location. An individual co-trustee is not entitle to any compensation [or] an individual co-trustee is entitled to one fourth the compensation of the corporate co-trustee.

Attorneys that draft trust documents may want to consider adding terms that expressly address a trustee having the right to retain counsel and compensate counsel. Specifically, a drafting attorney, who wants to include a trustee-friendly provision, may want to include an express statement that the trustee can compensate counsel in the interim (before any final resolution) from trust assets regarding any breach of fiduciary duty or related claims without the necessity of seeking court approval for same.

XXII. CONCLUSION

There are many reasons that a settlor may want co-trustees. When a settlor decides to use a co-trustee management structure, that

decision comes with certain advantages and drawbacks. The drawbacks can be mitigated to some extent by adding terms and instructions in the trust document. This paper was intended to provide guidance on co-trustee management and litigation in Texas.