



# Fiduciary Litigation Update 2023-2024

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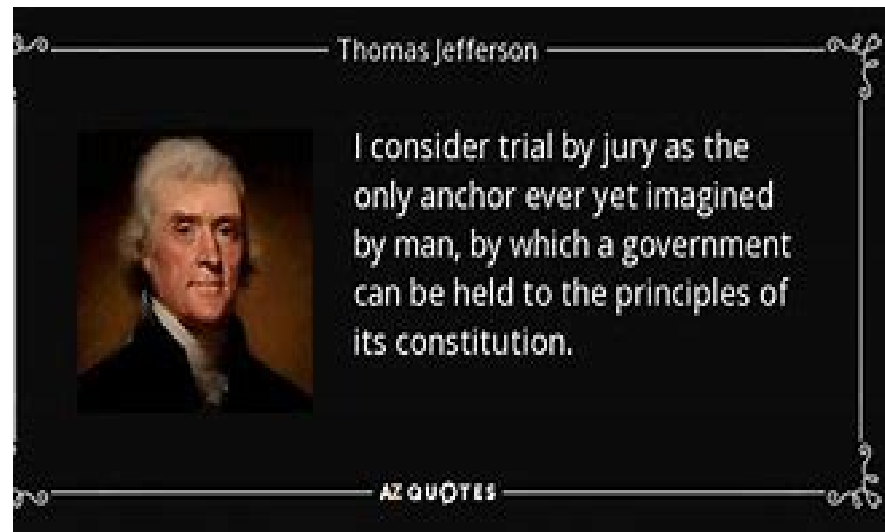
# Blogs

- The author reviews and reports on new cases regularly at his blog: Fiduciary Litigator ([www.fiduciarylitigator.com](http://www.fiduciarylitigator.com))
- “The Intersection of Texas Courts and The Fiduciary Field.”
- You can sign up for email alerts!
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# Introduction

- The fiduciary field in Texas is a constantly changing area.
- Over time, statutes change, and Texas courts interpret those statutes, the common law, and parties' documents differently.
- This presentation is intended to give an update on the law in Texas that impacts the fiduciary field from a period of mid-2023 through 2024.

# Jury Trial Rights



# Jury Trial Rights

- In *In re Poe Trust*, there were three co-trustees of a trust, and the trust required them to act jointly. No. 20-0179, 2022 Tex. LEXIS 548 (Tex. June 17, 2022).
- The co-trustees could not agree on trust decisions, and one of the trustees filed suit to modify the trust to appoint additional trustees, to remove the unanimity requirement, and other trust modification requests.
- The trial court granted the relief after it denied one co-trustee's demand for a jury trial.
- The court of appeals reversed the trial court's order, holding that co-trustee had a right to a jury trial on underlying fact issues (settlor's intent, etc.).

# Jury Trial Rights

- The Texas Supreme Court reversed and held that Section 112.054 does not grant a right to a jury trial in the statute.
- The Court then reversed and remanded to the court of appeals for a determination of whether the co-trustee had a right to a jury trial based on the Texas Constitution.
- On remand the court of appeals held that the defendant co-trustee did not have a constitutional right to a jury trial. *In re Poe Trust*, No. 08-18-00074-CV, 2023 Tex. App. LEXIS 5598 (Tex. App.—El Paso July 28, 2023, pet. filed).



# Jury Trial Rights

- The court held that the Bill of Rights jury trial right did not apply.
- The court then turned to the Judiciary Article, which provides: “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...”
- The court held that the "cause" was narrowly construed and should include only "ordinary" causes of action, also referred to as "personal" actions, in which a plaintiff is seeking a personal judgment against a defendant based on the defendant's breach of a duty or other wrongdoing.
- The court held that a plaintiff must be asserting some "personal right" for which he may obtain a remedy or enforceable judgment against the defendant.

# Jury Trial Rights

- The court held that a trust-modification proceeding lacks the attributes of an ordinary cause of action—it is not brought by a plaintiff seeking a judgment against a defendant, but instead is brought in the interest of the beneficiary and will not result in an enforceable judgment against any of the interested parties.
- The Texas Supreme Court in August of 2024 denied petition.
- Three justices of the nine issued a concurrence, stating that they determined that there was no fact issue for a jury, but would have reversed the court of appeals's analysis on the term cause.
- “Instead, it should have followed the middle path charted by our cases (hodgepodge though they may be), proceeding to examine whether there is a "special reason" of the kind we have held sufficient to deny a jury trial even though this adversary equitable action otherwise falls within the broad meaning of "cause" in the Judiciary Article guarantee.”

# July Trial Rights

- In *In re Est. of Ellard*, a court ratified an executor signing a contingency fee agreement that was over 35% under section 351.152 of the Estates Code. No. 05-22-01149-CV, 2024 Tex. App. LEXIS 483 (Tex. App.—Dallas January 25, 2024, no pet.).
- The estate beneficiary contested that agreement and requested a jury trial.
- The court of appeals held:
  - A court handling a dependent administration exercises control over the personal representative and estate that is at least as extensive as the control it has over a receiver and receivership property, and the court also exercises substantial control over certain aspects of an independent administration, including various aspects set forth in chapter 351.
  - It is readily apparent that the statute requiring court approval for a contingent interest in property that exceeds a one-third interest in the property is a proceeding that does not have any of the attributes of a cause for which a Judicial Article jury-trial right exists. In this proceeding, there is no plaintiff seeking a right of recovery or a judgment against a defendant who has committed some wrong. It is an administrative matter.”

# Jury Trial Rights

- In *White v. White*, a trial court removed a trustee due to a jury finding that he had breached his fiduciary duties regarding the management of a ranch. 704 S.W.3d 250 (Tex. App.—El Paso 2024, no pet.).
- The trustee appealed due to charge error.
- The court of appeals reversed the breach finding due to the trial court placing the burden of proof on the trustee to prove that he did not breach his duties for non-self-dealing claims.
- The court stated: “[A]lthough a party is entitled to a jury trial on a tort claim for breach of fiduciary duty, there is no right to a jury trial on an equitable claim to remove a trustee or to modify a trust.”
- The court held, however, that the parties submitted these equitable claims to the jury and that the relief should be reversed for the same reasons.

# Jurisdiction for Trust Disputes



# Jurisdiction for Trust Disputes

- When there are trust disputes, finding a forum or jurisdiction to determine those disputes can be a very important factor in resolving them.
- One issue that can be confounding is filing suit in a jurisdiction and a trustee or beneficiary objecting the jurisdiction's personal jurisdiction.
- The Model Trust Code has a provision that expressly discusses personal jurisdiction in trust disputes.

# Jurisdiction for Trust Disputes

- Uniform Trust Code Section 202 is entitled: “Jurisdiction Over Trustee And Beneficiary.”
  - (a) By accepting the trusteeship of a trust having its principal place of administration in this State or by moving the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.
  - (b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.
  - (c) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

# Jurisdiction for Trust Disputes

- The comments to the Uniform Trust Code Provision state:
  - The jurisdiction conferred over the trustee and beneficiaries by this section does not preclude jurisdiction by courts elsewhere on some other basis. Furthermore, the fact that the courts in a new State acquire jurisdiction under this section following a change in a trust's principal place of administration does not necessarily mean that the courts of the former principal place of administration lose jurisdiction, particularly as to matters involving events occurring prior to the transfer.
  - The jurisdiction conferred by this section is limited. Pursuant to subsection (b), until a distribution is made, jurisdiction over a beneficiary is limited to the beneficiary's interests in the trust. Personal jurisdiction over a beneficiary is conferred only upon the making of a distribution. Subsection (b) also gives the court jurisdiction over other recipients of distributions. This would include individuals who receive distributions in the mistaken belief they are beneficiaries.



# Jurisdiction for Trust Disputes

- In *Hooten v. Collins*, a dispute arose between the trustee of a trust administered in Texas and a beneficiary who resided overseas regarding the distribution of trust assets, which primarily consisted of real estate in Texas. No. 08-23-00327-CV, 2024 Tex. App. LEXIS 6805 (Tex. App.—El Paso September 16, 2024, no pet.).
- The trustee filed suit for instructions in Texas regarding approval of a distribution plan and discharge relief.
- The beneficiary shortly thereafter filed suit in California.
- The beneficiary then objected to the Texas court's jurisdiction based on an alleged lack of personal jurisdiction.
- After discovery, the trial court held a hearing and denied the objection, and the beneficiary appealed.

# Jurisdiction for Trust Disputes

- Because there are no statutes in Texas discussing personal jurisdiction for trust disputes, the trustee alleged that the trial court had in rem jurisdiction or quasi in rem jurisdiction and regular personal jurisdiction over the beneficiary.
- The court of appeals noted the United States Supreme Court's definition:
  - If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated "in personam" and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem."

# Jurisdiction for Trust Disputes

- The court also discussed quasi in rem jurisdiction:
  - A quasi in rem proceeding is an action between parties where the object is to reach and dispose of property owned by them or of some interest therein. While an in rem action affects the interests of all persons in the world in the thing, a quasi in rem action affects only the interests of particular persons in the thing

# Jurisdiction for Trust Disputes

- The court held that even under in rem jurisdiction, that the trial court has to have in personam jurisdiction over a defendant:
  - Several Texas courts have resolved challenges to personal jurisdiction in trust litigation where the trust res included Texas real property; each conducted a thorough minimum-contacts tests analyzing the defendant's contacts with the state. Similarly, we must determine whether Texas has personal jurisdiction over Robert based on a detailed analysis of his alleged forum contacts and the relationship between those Texas contacts and the litigation.

# Jurisdiction for Trust Disputes

- The court held that the trial court had jurisdiction over the beneficiary due to his contacts with Texas:
  - Which brings us to Robert's core argument: as a passive trust beneficiary, he cannot be deemed to have contacts in a jurisdiction where the trust happens to own property. Owning an equitable interest in the trust property alone is insufficient to confer jurisdiction when an interested person assumes only a passive role in the trust's administration.
  - Yet when interested parties take an active role in the trust's affairs with the knowledge that their actions will create continuing obligations towards Texas residents, those parties are subject to personal jurisdiction in Texas... Here, Marsha's evidence is legally sufficient to show that Robert assumed an active role in managing the trust's assets.

# Jurisdiction for Trust Disputes

- So, at this point, a trustee of a Texas Trust may not be able to get jurisdiction for trust disputes in Texas if there are beneficiaries who do not take an active role in trust management in another state?
- So, does the trustee have to sue in the beneficiary's state? Have to ask that state's judiciary to use Texas law?
- Potentially, a Texas court can appoint a guardian ad litem or attorney ad litem to represent absent beneficiaries.
- Legislature needs to address this important issue.

# Modification of Trusts



# Modification of Trusts

- In *Crossley v. Crossley*, a plaintiff filed suit requesting that the court determine whether he or his sister was the trustee, and in the alternative, he sought termination, modification, or reformation of the trusts. No. 08-23-00104-CV, 2024 Tex. App. LEXIS 3323 (Tex. App.—El Paso May 14, 2024, no pet.).
- The court of appeals first made a rather surprising holding regarding Texas Trust Code Section 115.001 “does not itself provide for a cause of action” and construed “his claim as one for declaratory judgment.”
- The brother was the original trustee, and the sister argued that she was the successor trustee because she signed acceptance documents.
- The court of appeals reversed the sister on this issue, holding that she never forwarded the acceptance document as required by the trust.



# Modification of Trusts

- The court affirmed the judgment for the sister on the plaintiff's claim to terminate the trusts because the purposes of the trusts had not been fulfilled:
  - It is these terms [of the trusts], and no external sources, from which we must derive the purposes of the Garry Trusts. Those purposes then are to make distributions to Garry, people or entities he may appoint, or his descendants. These purposes have not been fulfilled and it is necessary for the Garry Trusts to continue to achieve their purposes. Therefore, Karen met her burden and disproved two predicate grounds to terminate or modify a trust, § 112.054(a)(1) and (a)(5)(A), and summary judgment on those bases was properly granted.
- Brother also sought to modify or reform the trusts to name him as trustee or to remove sister's absolute discretion to make distributions.
- He claimed that these were administrative, nondispositive terms and that sister's failure to make distributions or withdraw the trusts from the partnership impaired the administration of the trust.

# Modification of Trusts

- The court stated:
  - [Brother] relies on this language from the statute: "a court may order that the trustee be changed" . . . "if" . . . "modification of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or impairment of the trust's administration[.]“
  - Black's Law defines "administrative" to mean "Of, relating to, or involving the work of managing a company or organization, executive." But the word "administrative" is tied by a comma to the word "nondispositive" which means these are coordinate adjectives that modify the same noun. Any trust "term" must be both administrative and nondispositive for § 112.054(a)(3) to apply.
  - We find no dictionary definition for "nondispositive" but "dispositive" means "Being a deciding factor; (of a fact or factor) bringing about a final determination" and "of relating to, or effecting the disposition of property by will or deed." Adding "non" before the word dispositive would have it mean the opposite—not being a deciding factor or not effecting the disposition of property. And that is where Gary's theory of replacing the trustee under § 112.054(a)(3) stumbles.

# Modification of Trusts

- The court continued:
  - Under the terms of the trust as written, the trustee has complete discretion to make distributions or not. The trustee is accorded broad powers, including to (1) take possession of trust property; (2) invest trust assets; (3) sell, lease or exchange trust property; (4) borrow on behalf of the trust; (5) administer mineral interest; (6) obtain, continue, and operate a business; (7) merge this trust with another trust; (8) employ professionals to assist the trustee; and (9) even change the jurisdiction under which the trust is administered.
  - With such complete discretion and authority vested with the trustee, we agree with Karen that the identity of the trustee is a dispositive term of this trust. Who gets to exercise the broad discretion and powers under this trust might in fact be its most determinative term.
  - Accordingly, Gary's theory under § 112.054(a)(3) fails because that provision can only apply to a "administrative [and] nondispositive" terms.

# Remedies For Trust Breach



# Remedies For Trust Breach

- In *In re Trust A & Trust C*, a beneficiary sued a trustee for breach of fiduciary duty and sought a constructive trust over assets that were transferred out of the trust. 690 S.W.3d 80 (Tex. 2024).
- After the trial court granted that relief, the court of appeals reversed, holding that other parties, who possessed the assets, were indispensable and not parties to the suit.
- The parties appealed to the Texas Supreme Court.

# Remedies For Trust Breach

- The Court first addressed whether the trial court had jurisdiction despite the missing parties:
  - Rule 39 addresses whether the court has "authority" to proceed in the person's absence. But the rule was designed "to avoid questions of jurisdiction," and 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." This is not such a "rare" case. No one disputes that the probate court had jurisdiction to resolve the dispute between Glenna and Mark. Assuming Weston and Lane should have been joined under Rule 39(a), it was incumbent on the probate court to decide whether to dismiss the case or proceed without them, as it in fact decided to do.

# Remedies For Trust Breach

- The Court held that the trial court did not err in finding that the trustee breached her fiduciary duty by transferring assets as a sole trustee when she had to cooperate with her co-trustee.
- The Court, however, disagreed that the trial court had the ability to order the restoration of the assets to the trust:
  - "[C]oercive relief" is improper when it "becomes impossible." Because Weston and Lane were not parties to the suit, the probate court could not require them to transfer the shares back to Glenna's Trust or to the Sub-Trusts. But their absence did not empower the probate court to order Glenna to perform an act she has no power or ability to perform.
  - If Glenna had not sold the shares and her trust still owned them, the Property Code would allow Mark to choose between a damages award or an order requiring Glenna to restore the shares to the Sub-Trusts. But because Glenna sold the shares to Weston and Lane, Mark's only available relief against Glenna is a money judgment ordering her to pay the proceeds of that sale or the value of the shares.
- The Court held that even if the shares are not reassigned to the trusts, depending on the valuation issue, damages could be awarded.

# No-Contest Clauses





# No-Contest Clauses

- In *In re In the Estate of Wegenhoft*, an applicant filed an application to probate a will, which contained a no-contest clause. No. 14-23-00350-CV, 2024 Tex. App. LEXIS 5352 (Tex. App.—Houston [14th Dist.] July 30, 2024, no pet. history).
- Contestants filed their opposition to the will, asserting that the will was executed under undue influence.
- The applicant filed a motion alleging that his siblings violated the no-contest clause and also re-asserted these claims in an amended answer to his siblings' counterapplication.
- The contestants nonsuited their claims on the eve of trial.
- The trial court permitted the applicant's claims concerning enforcement of the no-contest clause to proceed to trial and ultimately rendered judgment in favor of the applicant after a jury trial.
- The contestants filed an appeal challenging the trial court's subject matter jurisdiction to enter judgment against them when they nonsuited their contest prior to trial.

# No-Contest Clauses

- The court of appeals reversed the trial court's judgment, holding that it did not have jurisdiction after the nonsuit.
- The applicant should have filed an affirmative claim on the no-contest clause:
  - We cannot agree that Carl's claims asserted in his motion or amended answer survived the nonsuit because his claims did not constitute an independent claim for affirmative relief. Put another way, the nonsuit rendered Carl's claims moot because his claims were dependent on his siblings' will contest and counterapplication. Without the contest or counterapplication, Carl could not possibly seek to enforce his claims... Contrary to Gibbons, Carl's application only requested probate of the 2013 Will and that he be appointed as executor. Carl has not cited (and research has not revealed) any Texas case in which a court retained jurisdiction after a nonsuit over claims asserted in an answer when the claims did not seek affirmative relief.

# No-Contest Clauses

- The Texas Legislature created a statute to protect parties' rights to freedom of speech and to petition the courts: the Texas Citizen's Participation Act (TCPA). See Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001-.011.
- Parties who move for dismissal under the TCPA invoke a three-step, burden-shifting process:
  - (1) the movants seeking dismissal must demonstrate that a legal action has been brought against them and that the action is based on or is in response to an exercise of a protected constitutional right;
  - (2) if the movants succeed, the burden then shifts to the party bringing the legal action to avoid dismissal by establishing by clear and specific evidence a prima facie case for each essential element of the claim in question; and
  - (3) if the nonmovant succeeds, the burden then shifts back to the movants to justify dismissal by establishing an affirmative defense or other ground on which they are entitled to judgment as a matter of law.

# No-Contest Clauses

- In *Malicoat v. Hughes*, trust beneficiaries sued a trustee for breach of fiduciary duty and sought injunctive relief and other relief. No. 02-23-00122-CV, 2023 Tex. App. LEXIS 7483 (Tex. App.—Fort Worth September 28, 2023, pet. denied).
- The trustee then gave notice that she was going to enforce a no contest clause in the trust, which was required by that particular clause. The parties then attended mediation and resolved the first suit.
- The trustee then filed a second suit seeking a declaration that the no contest clause was triggered by the first suit.
- The beneficiaries then filed a motion to dismiss under the TCPA, which was denied.
- The court of appeals reversed, and ordered the trial court to grant the motion to dismiss.

# No-Contest Clauses

- The court held that the defendant met the first burden:
- The court of appeals first held that the beneficiaries passed the first step in the TCPA analysis: “because Hughes alleges in the Second Lawsuit that Cass and Malicoat violated the in terrorem clause by filing and maintaining the First Lawsuit, Cass and Malicoat have established that Hughes's legal action is based on or is in response to their right to petition.”
- The court then turned to whether the trustee established by clear and specific evidence a prima facie case for each essential element of her declaratory judgment claim based on the no contest clause.
- The trustee argued that she established that the beneficiaries “violated the in terrorem clause in two ways: (1) ‘they unsuccessfully sought to challenge the appointment of [Hughes] as the Trustee of the Marital Trust by seeking her removal as Trustee,’ and (2) ‘they unsuccessfully sought to impair [Hughes's] exercise of powers expressly granted to [her] by the trust.’”

# No-Contest Clauses

- Regarding the first argument, the court held that the beneficiaries were not seeking to challenge the trustee's appointment, but were seeking to remove the trustee, which did not contradict any term of the trust.
- Regarding the second argument, the court held that the trust's no contest clause gave a safe harbor period, that after the trustee sends notice, that the beneficiary can dismiss the offending action.
- The court held that even if the safe harbor provision was not triggered, the beneficiaries request for injunctive relief did not trigger the no contest clause:
  - We further note that Section 112.038(b) of the Texas Property Code provides that an in terrorem clause "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 Ann. § 112.038(b). More importantly, Section 114.008(a)(2) of the Texas Property Code expressly authorizes a trial court to "enjoin the trustee from committing a breach of trust" as a remedy to a breach of trust that has occurred or might occur. *Id.* § 114.008(a)(2). Thus, we conclude that Cass and Malicoat's requests for injunctive relief did not violate the in terrorem clause because the trial court was authorized to enjoin Hughes from committing a breach of trust.

# Arbitration



# Arbitration

- In *In re Est. of Moncrief*, certain parties alleged that the decedent was mentally incompetent, was unduly influence, and was defrauded into executing certain documents that contained arbitration clauses. No. 02-23-00021-CV AND No. 02-23-00058-CV, 2024 Tex. App. LEXIS 5528 (Tex. App—Fort Worth August 1, 2024, pet. denied).
- The trial court held that the capacity issues should be resolved by the trial court, and the arbitrations were stayed and the opposing parties were enjoined from pursuing the arbitrations.
- The court of appeals reversed, holding that those claims should be decided in arbitration.



# Arbitration

- The court of appeals discussed enforcement of arbitration clauses:
  - If the challenge is to the validity of a broader contract (container contract) but not to the arbitration provision contained within the container contract, then courts must enforce the arbitration agreement and require the arbitrator to decide the validity or scope of the arbitration agreement. However, if a party challenges the scope or validity of an arbitration provision within a container contract, courts generally resolve the issue of whether the parties agreed to arbitrate the controversies. An exception to this rule exists when parties to an agreement agree to arbitrate disputes in accordance with third-party arbitration rules that provide that the arbitrator has the power to determine the arbitrability of any claim. In such a case, the parties are considered to have "clearly and unmistakably" intended to delegate arbitrability issues to the arbitrator.
- The court held that the incapacity issues in the case were defensive issues to the entire contract, not just the arbitration clause, and that the arbitrators should determine those issues, not the trial court.
- The court addressed three different documents and held that the incorporation of AAA rules meant that the arbitrators should determine competence claims.

# Arbitration

- There was a dissenting justice, who would have held that the mental competence and undue influence claims should be determined by the trial court:
  - I would affirm the rulings of the statutory probate court in all respects because the mental incapacity of a contracting party is a contract formation defense, not a merits defense, and a question for adjudication by a court, not an issue of arbitrability for an arbitrator.
  - Moreover,... the testamentary capacity of the decedent, William Alvin "Tex" Moncrief, Jr., was the subject of litigation in the probate courts and no party has yet argued that "his testamentary capacity is meaningfully different from his capacity to contract during the same time frame." Because the majority's arbitrability holding deprives the statutory probate court of its exclusive jurisdiction to probate the last will and testament of the decedent—and thereby to adjudicate whether he lacked testamentary capacity or, alternatively, was subject to undue influence at the time of its execution—I would additionally hold that, as a matter of law, the questions of testamentary capacity and undue influence cannot be the subject of arbitration but must always be determined by a court with probate jurisdiction.

# Conclusion

- This presentation was intended to provide an update of recent legal issues in the complex area of fiduciary litigation.
- For more information, please visit [www.fiduciaryliterator.com](http://www.fiduciaryliterator.com) or [www.winteadbusinessdivorce.com](http://www.winteadbusinessdivorce.com)