Texas Fiduciary Litigation Update: 2015-2016

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I. Introduction[1]

The fiduciary field in Texas is a constantly changing area. Over time, statutes change, and Texas courts interpret those statutes, the common law, and parties' documents differently. This paper is intended to give an update on the law in Texas that impacts the fiduciary field from a period of mid-2015 to mid-2016. The authors have a blog, the Texas Fiduciary Litigator (txfiduciarylitigator.com), wherein they regularly report on fiduciary issues in Texas.

II. Claims Against Trusts/Estates

A. Court Dissolves Temporary Injunction That Prevented Actions by Trustee, But Affirms Appointment of Temporary Co-Receivers Over Trust Assets

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

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

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

The court of appeals reversed in part and dissolved the temporary injunction, but affirmed the appointment of the temporary co-receivers. As to the injunction, the court of appeals held that the injunction order was not sufficiently specific and therefore violated the Texas Rules of Civil Procedure. The trial court's order merely stated in conclusory fashion that if not granted beneficiary "would be irreparably harmed," but did not identify any injury that the beneficiary would suffer in the absence of an injunction. The court considered an addendum attached to the court's injunction order, which did include a statement that the trustee's actions could result in issues for Lone Star Capital Bank and its other depositors; however, the addendum did not identify how the beneficiary herself would suffer harm in the absence of an injunction.

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

Interesting Note: The trustee in the case is Tom Benson, owner of the New Orleans Saints, the New Orleans Pelicans, and numerous car dealerships. The dispute with his daughter and grandchildren made national news after he announced that he was taking away future control of his assets from them and transferring them to his current (and third) wife. They in turn sued him, claiming he was not competent. News agencies reported that Benson's current wife was manipulating him, including a claim that she was feeding him mainly candy, ice cream soda, and red wine. He issued a statement saying he was perfectly capable of handling his own affairs and vowed to fight the lawsuit.

The court of appeals's holding that the requirements of equity need not be satisfied for receivership applications under section 114.008 of the Texas Trust Code appears to be an issue of first impression. In another recent case involving a receivership appointment over trust assets, *Elliott v. Weatherman*, the court recognized the Texas Trust Code as providing separate authority for receivership appointments but held that even if a specific statutory provision authorized a receivership, "a trial court should not appoint a receiver if another remedy exists at law or in equity that is adequate and complete." 396 S.W.3d 224, 228 (Tex. App.—Austin 2013, no pet.) (holding trial court abused its discretion in appointing a receiver over the property and citing cases not involving receiverships over trust property).

The court's dissolution of the injunction based on the beneficiary's failure to show how she, specifically, had been harmed seems suspect. Under the Texas Trust Code, a beneficiary has standing to bring an action concerning the trust. *See* TEX. PROP. CODE ANN. §§ 115.001, 115.011. The Trust Code expressly allows for actions "to remedy a breach of trust that has occurred *or might occur….*" *Id.* § 114.008(a). The Trust Code provisions do not require that the beneficiary himself or herself suffered harm. Practically speaking, the most obvious harm a beneficiary can suffer is when harm occurs, or – to borrow the language from the Trust Code – "might occur" to the trust property. Here, there was some evidence supporting the trial court's finding of harm in the evidence of the effect on Lone Star Capital Bank, which the trust owned a 97% interest in.

B. Court Reversed Transfer Of Residence To Revocable Trust Due To Pre-Marital Agreement

In *In the Estate of Loftis*, a husband and wife entered into a pre-marital agreement. No. 07-14-00135-CV, 2015 Tex. App. LEXIS 10940 (Tex. App.—Amarillo October 23, 2015, no pet.). After their marriage, they lived in a residence that was the husband's separate property. He then executed a will, created a revocable trust, and transferred the residence into the trust. The wife was the initial trustee. Later, the husband filed for divorce and removed the wife as trustee. The husband died before the divorce became final. The executor/trustee sued the wife for return of the residence and other assets, and the wife counterclaimed seeking to retain those assets. The trial court granted summary judgment for the wife, holding that the agreement granted the wife a right to the residence and holding that the trustee had to convey the residence to her. The executor/trustee appealed.

The executor/trustee argued that the house was no longer in the estate at the time of the husband's death, and that the pre-marital agreement provided that upon the filing of a divorce petition that the residence would remain the husband's separate property. Another provision of the agreement stated that husband would provide that the wife would receive the residence and its contents after his death if they were not divorced. The court held for the wife, and concluded that the pre-marital agreement did control the disposition of the residence as the marriage ended by death and not by divorce.

The executor/trustee also argued that another provision of the agreement provided that either party could manage that party's separate property, including without limitation, the power to convey separate property "without taking into consideration any rights or interests of the other party." He argued that this provision allowed the husband to transfer the residence, his separate property, to the trust during the marriage. The court disagreed and held that this provision had to be read in conjunction with the other provisions of the agreement.

Finally, the court sustained the executor/trustee's issue that the trial court should not have ordered the trustee to convey the residence because the wife never raised a claim challenging the initial conveyance and seeking to void it. The court held that the record did not support that remedy at this time and remanded for further proceedings.

Interesting Note: The court of appeals correctly reversed the trial court's order requiring the trustee to convey the title of the residence to the wife. The wife's claim would be against the estate for breach of the pre-marital agreement, which would be limited to monetary damages as the estate no longer owned the residence. A separate legal entity, the trust, owned the residence. The wife did not plead any claim that would void the initial conveyance. Interestingly, any equity claim for that type of relief may be difficult to sustain as the wife was the trustee when the residence was initially transferred to the trust, knew of the transfer, and apparently did not object to same.

C. Court Held That A Beneficiary Could Not Usurp A Trustee's Right To Direct Litigation And Did Not Have Standing To Sue The Trustee On Behalf Of The Trust

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." 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." 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." 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." 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.

The court then addressed whether mandamus relief was appropriate. Mandamus may be available upon a showing that (1) the trial court clearly abused its discretion by failing to correctly apply the law and (2) the benefits and detriments of mandamus render appeal inadequate. The court already held that the trial court abused its discretion in not granting the special exception. The court also held that there was an important substantive right involved, which was the right of a trustee to determine whether the trust will pursue litigation. Mandamus relief was appropriate regarding the beneficiary's claims against the oil and gas operator as those claims could not be cured by an amendment.

However, the court held that mandamus relief was not appropriate regarding the beneficiary's claims against the trustee. The court held that the beneficiary improperly sued the trustee on behalf of the trust because only the trustee can do that. Unlike the beneficiary's claims against the operator, however, this pleading defect can be cured by amendment. The court held that the Texas Trust Code provides a mechanism by which a beneficiary may sue a trustee. So, the beneficiary could sue the trustee on her own behalf regarding the trustee's decision to not sue the operator.

The trustee's request that the court of appeals order the trial court to dismiss the claims against the trustee because there was no likelihood of liability went to the merits of the beneficiary's claims rather than her standing to bring them. The court concluded that allowing the beneficiary to proceed with her claims on her own behalf does not interfere with the trustee's authority to control litigation on behalf of the trust. And to the extent the beneficiary's claims against the trustee lacked merit, the trustee had an adequate remedy in the trial court and by appeal (summary judgment, trial, etc.).

Interesting Note: Beneficiaries often complain about a trustee's refusal to bring claims. This case addresses two important issues: what control does the trustee have to bring those claims and what liability does the trustee have regarding its decision. The court correctly determined that, absent extreme circumstances, a trustee should be the sole party in control of the trust's claims. However, the court also noted that the trustee may be liable to the beneficiaries for this

decision if it is done with an abuse of discretion. Certainly, there are many factors that go into whether a trustee should or should not bring a claim. For example, the Restatement (Second) of Trusts Section 177 comment c provides that "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." A trustee should document its file regarding the factors that it considered in making its decision to file a claim or not file a claim. Also, seeking the advice of counsel, and following that advice, can be a factor that supports a trustee's decision.

D. Court Affirmed Government Seizure Of Trust Asset

In *3607 Tampico Dr. v. State*, the government brought a forfeiture proceeding under Texas Code of Criminal Procedure Article 59.02(a) for a house owned by a trust. No. 11-13-00306-CV, 2015 Tex. App. LEXIS 13056 (Tex. App.—Eastland December 31, 2015, pet. filed). The house was held in a spendthrift trust for a son, and the mother was the trustee. The trustee allowed the beneficiary to live in the house while the trust paid for the house and all expenses related to it. The beneficiary operated a heroin operation out of the house, and was charged and sentenced to federal prison for that crime. The state authorities then filed a notice of seizure and intent to forfeit the house. The trial court forfeited the property after a bench trial.

Chapter 59 of the Texas Code of Criminal Procedure governs proceedings to forfeit contraband. Property that is contraband is subject to forfeiture and seizure by the State. "Contraband" is property of any nature, including real property that is used in the commission of the crimes referenced in Article 59.01(2). Possession of a controlled substance with intent to deliver is one of those crimes. The court of appeals held that the state had the burden to prove that the property was used in the commission of a crime referenced in Article 59.01(2) and that probable cause existed for seizing the property. After reviewing the evidence, the court held that it supported a reasonable belief that there was a substantial connection between the property and delivery of heroin and that probable cause existed for seizing the property.

The court rejected an argument that the state could not seize the property because the perpetrator did not own the property. Rather, the court held that ownership was not an element of the claim. Further, the court held that "a beneficiary of a valid trust is the owner of the equitable or beneficial title to the trust property and is considered the 'real' owner of trust property."

Finally, the court reviewed the trustee's "innocent owner" defense under Chapter 59. The trustee's burden was to prove that the trust acquired an ownership interest in the real property before a lis pendens was filed and that the trust did not know or should not reasonably have known, at or before the time of acquiring

the ownership interest, of the acts giving rise to the forfeiture or that the acts were likely to occur. The trustee testified that she did not know that the beneficiary was distributing heroin at the property. The court of appeals, however, affirmed the trial court's judgment citing that, at the time the trust purchased the property, the trustee knew that the beneficiary had previously pleaded guilty to possession with intent to distribute nine pounds of marijuana. The court also cited to the following facts: the trust paid all expenses of the house, the beneficiary had a roommate at times, the beneficiary had brittle diabetes, and that the beneficiary never had any employment. The court concluded: "The trust acquired an ownership interest in the Tampico Drive property before a lis pendens was filed. However, we believe that the evidence fails to conclusively show that Ruth, as trustee, did not know or should not reasonably have known, prior to the time that the trust acquired the property, that it was likely that the property would be used for illegal purposes."

Interesting Note: This is a very concerning case for trustees. A trustee may risk trust assets by allowing a beneficiary to live in or otherwise use trust assets when the trustee knows that the beneficiary once committed a crime. But a basic function of a trust is to care for beneficiaries and provide them maintenance (a place to live). Also, beneficiaries can sometimes be bad people or people who make serious mistakes. When this scenario exists, a trustee may have to be extra vigilant to ensure that the beneficiary is not using trust property while committing a crime. Otherwise, the trustee may breach duties to maintain trust assets.

E. Court Granted Summary Judgment For A Trustee On A Fiduciary Breach Claim Arising From Conflict-Of-Interest and Diversification Issues

In *Adams v. Regions Bank*, beneficiaries sued a trustee for multiple claims, including breach of fiduciary duty, arising from the trustee's seizure of collateral owned by the trust. 2016 U.S. Dist. LEXIS 1027 (S.D. Miss. January 6, 2016). Adams, the primary beneficiary, borrowed $3 million from the bank before it was trustee and signed an agreement pledging the bank's stock as collateral. Later, the stock was transferred into a testamentary trust created by Adams' father for her benefit. Later still, the bank became the trustee of that trust. When Adams defaulted on the loan, the bank/trustee proceeded to seize the stock it held in the trust. Adams and her children sued the bank for breaching its fiduciary duty in having a conflict of interest and in failing to diversify the trust's assets. The bank/trustee filed a motion for summary judgment, which the district court granted.

The court first addressed whether Adams' children had standing to pursue their claims. The trust document provided that Adams was the primary beneficiary, and that she had a power of appointment such that she could completely cut her children out of the trust. Adams' children offered no evidence from which the court could find that they had a present right to the remainder of the trust upon

Adams' death, and the court found that they failed to make a sufficient showing that they had standing.

The court next addressed Adams' claims, which included the trustee's failure to: (1) comply with the terms of the spendthrift trust; (2) protect trust assets from creditors, including the trustee; (3) assure no self-dealing at Adams' expense; (4) avoid an inherent conflict of interest; (5) decline the trustee relationship due to a conflict of interest; (6) follow the trustee's internal controls; (7) protect trust assets, especially as the trustee's stock was declining in value; (8) adopt and follow a suitable investment strategy; (9) properly manage trust assets; (10) act in the best interest of the beneficiaries; and (11) comply with statutory obligations.

Regarding the non-diversification claims, the court granted the trustee's motion for summary judgment due to a limitations defense. Mississippi has a three-year statute of limitations for breach of fiduciary duty claims. The injuries unrelated to diversification stemmed from the trustee's position as the successor trustee over a spendthrift trust that would later hold the trustee's own stock. That relationship was established no later than April 2009. So the question the court had to answer was whether Adams had met her burden of showing that she did not know, and could not have reasonably discovered, these injuries in the time that passed from April 2009 to August 7, 2011, the date the statutory window closed. The court noted that Adams signed many of the documents that set up the conflict of interest situation and participated in litigation to clarify some of those transactions. The court held that she did have sufficient information to timely file suit, and that her breach of fiduciary duty claim regarding the non-diversification facts was barred by limitations.

Adams' diversification claim was that the trustee should have sold its own stock and invested in other, better assets. Adams' father's will stated that the trustee was "vested with the … additional power . . . To retain, with no obligation to sell, any property coming into their hands as Trustees under the terms of this instrument, including stock in AmSouth Bancorp. [now the bank], whether or not the same would be treated as legal for the investment of trust funds and regardless of any lack of diversification or risk, without being liable to any person for such retention unless otherwise specifically provided herein . . . ." The will also stated that Adams had the power to order the trustee to sell any assets, but that the power had to be exercised in writing. Adams later signed a retention agreement with the trustee that provided that the trustee could keep the stock in the trust until Adams provided written notice that it should be sold. Even though Adams stated that she told the trustee to sell the stock, she had no evidence that such a directive was done in writing. Adams argued that the retention agreement was void because the trust was a spendthrift trust and she was the beneficiary. The court held that "while the spendthrift provision may have prevented Adams from using trust assets to secure loans, it did not bar her from exercising her authority to direct the trustee to sell assets-the subject matter of the Retention Agreement." The court held that the will and retention agreement both allowed

the trustee to retain the stock and not diversify until Adams gave written notice to sell the stock. As that was never done, the court held that the trustee did not breach its fiduciary duty in keeping the stock in the trust.

The court rejected other claims arising from the trustee's seizure of the stock. Adams argued that the bank/trustee was in wrongful possession of the stock because of its "inherent conflict of interest" and because "Regions the trustee failed to protect the beneficiaries from Regions the creditor." The court held that the bank/trustee had a legal right to do so under the loan documents and under a prior judicial proceeding in which Adams participated and that Adams was estopped to argue that the seizure was inappropriate.

Interesting Note: There are a lot of interesting facts and legal issues in this case. The standing issue was important because the court disposed of most of Adams' claims on the limitations defense as she knew of the conflict issue in time to file her suit in the limitations period. The trustee may not have had similar facts to support limitations as against Adams' children, who may have been able to timely raise their claims. Under Texas law, there is some doubt regarding the court's standing holding. Texas Property Code 115.011 provides that any interested person may bring an action under Section 115.001. *See* Tex. Prop. Code Ann. § 115.011. Section 115.001 provides that a district court has jurisdiction over proceedings to appoint or remove a trustee, determine the duties and liabilities of a trustee, make determinations of fact affecting the administration or distribution of a trust, and determine a question arising from the administration or distribution of a trust, require an accounting by a trustee, review trustee fees, and settle interim or final accounts. *Id*. at § 115.001. "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." *Id*. at § 111.004(7). "Beneficiary" means "a person for whose benefit property is held in trust, regardless of the nature of the interest." *Id*. at § 111.004(2). Section 111.004(6) defines "interest" as "any interest, whether legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible." *Id*. at § 111.004(6). Accordingly, under Texas law, Adams' children may have had standing, and limitations may not have barred their claims if they did not know about any of the facts that supported the fiduciary breach claims. *See, e.g., Elliott v. Green,* No. 05-94-01019-CV, 1995 Tex. App. LEXIS 3607, *11 1995 WL 437206, *4 (Tex. App.—Dallas 1995, no pet.) (not designated for publication) (remaindermen of a trust "had an interest in ensuring that the trustee committed no acts outside the Trust terms which would damage the Trust property" and had standing to assert a breach of fiduciary duty claim). Further, even if Adams' claims were barred by limitations, in Texas she would still be able to assert a claim to remove the trustee as there are no limitations for such a claim. *See Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009).

F. Court Affirms Holding That A Trust Owns Stock That Was Issued To The Trustee In His Individual Capacity

In *Dutcher v. Dutcher-Phipps Crane & Rigging, Inc*., a trust owned twenty percent of a family limited partnership that in turn owned a family business. No. 08-15-00202-CV, 2016 Tex. App. LEXIS 3809 (Tex. App.—El Paso April 13, 2016, no pet. history). The family business was converted from a C Corp to an S Corp. Because a partnership cannot own stock in a S Corp, this required the family limited partnership to transfer shares of the S Corp stock to its partners. The family limited partnership issued shares to the trustee in his individual name, not in his capacity as trustee. After the trustee died, the trustee's wife alleged that the shares went to her under the residuary clause in his will, and that the trust did not own the shares. The trial court found that the trust did own the shares, and the widow appealed.

The court of appeals affirmed, holding that a stock certificate "is not synonymous with actual ownership of the shares represented by the certificate; it is merely some evidence of ownership." *Id*. Rather, the court cited a previous opinion on the test for proving the ownership of stock:

> As between transferor and transferee, it seems to be the rule that transfer of title may take place though there is no delivery of the certificates themselves, nor endorsement of them, nor transfer of them on the books of the corporation, and even though the sale be by parol. In each case the inquiry is whether the minds of transferor and transferee met, whether there was an intention that the stock should then and there be vested in the transferee, and whether there were acts in the nature of a symbolical delivery of the property. In this latter connection it is to be remembered that the certificates of stock are not in themselves property, but are only evidence of the interest of the stockholder in the corporation. It is possible under some circumstances for one to own stock in a corporation though no certificate has been issued to him or endorsed or delivered to him, and likewise it is possible under some circumstances for title to the stock to pass without delivery of the certificate of stock or without written assignment of it.

Thus, the court held that establishing ownership depends on the evidence presented, including the nature of the parties, the nature of their relationship, and their representations to each other. The court then reviewed the facts and determined that the trustee intended to transfer the stock to himself as trustee, not in his individual capacity. The court concluded that "The only capacity in which Paul was a partner in Dutcher FLP was in his capacity as Trustee of The Paul K. Dutcher Living Trust Three and Trustee of The Paul K. Dutcher Living Trust One. Therefore, we can only conclude that, despite the issuance of the stock certificate to Paul, individually, Dutcher FLP and Dutcher-Phipps intended

the 400 shares in dispute to vest in Paul, as trustee." The court also affirmed the trial court's judgment on a claim of mutual mistake.

G. Court Determines Litigants Were Not "Interested Persons" Under Trust Code and Had No Standing to Set Aside Order Appointing Successor Trustee

In *Gonzalez v. De Leon*, two sisters (Josefina and Delfina), as part of a family estate plan, transferred certain real property to a limited partnership, formed other limited partnerships to manage and develop the property, and formed a limited liability company to act as general partner of the limited partnerships. No. 04-14-00751-CV, 2015 Tex. App. LEXIS 8940 (Tex. App.—San Antonio Aug. 26, 2015, pet. filed). Josefina and Delfina also established an irrevocable family trust which owned 90% of the limited partnership interests in the limited partnerships, and named themselves co-trustees of the family trust. Guerra (Josefina's daughter) and her two children were the sole beneficiaries of the family trust. When Delfina died, her will named three individuals – Zaffirini, Arredondo, and Chapa – as co-executors of her estate and as co-trustees of a trust that contained the remainder of her estate. Around the same time, Zaffirini, Arredondo, and Chapa also became Josefina's attorneys-in-fact under a power of attorney because Josefina was incapacitated. Zaffirini, Arredondo, and Chapa had complete control over the LLC, and therefore the limited partnerships.

After the two named successor trustees named in the family trust resigned or refused to serve, Guerra filed suit in district court to have a successor trustee appointed. In March 2012, the district court rendered judgment appointing De Leon as successor trustee of the family trust. Two years later, petitioners (Zaffirini, Arredondo, and Chapa in their capacities and/or on behalf of (i) attorneys-in-fact for Josefina, (ii) co-executors of Delfina's estate, (iii) co-trustees of Delfina's remainder-estate trust, (iv) the limited partnerships, and (v) the LLC) filed a bill of review seeking to set aside the 2012 judgment appointing De Leon as trustee of the Family Trust. The trial court granted De Leon's and Guerra's plea to the jurisdiction, finding that the petitioners did not have standing to pursue a bill of review. The court of appeals affirmed on the jurisdictional ground.

The court first examined the definition of an "interested person" under section 111.004(7) of the Trust Code. Section 115.011 of the Trust Code limits a person's ability to bring an action related to a trust – only an "interested person" may bring such an action, which is defined as a "trustee, beneficiary, or any other person having an interest or claim against the trust or any person who is affected by the administration of the trust." Tex. Prop. Code Ann. § 111.004(7).

Initially, the court recognized that there was "very little case law interpreting the meaning of the phrase 'interested person.'" The court examined each one of the claimed capacities and held that none of the petitioners had shown that they were an "interested person" for purposes of the statute. Under the family trust agreement, neither Josefina nor Delfina managed any aspects of the family trust;

thus, they were not affected by the administration of the family trust. Further, Delfina's trust that consisted of the remainder of her estate was a separate entity from and unrelated to the family trust. Third, the LLC was controlled by Zaffirini, Arredondo, and Chapa and was not affected by the family trust, much less the trust's administration. Fourth, in the various limited partnerships, the limited partners were passive and did not have a right to participate in the control of the business – only the LLC, as general partner, had that right. The court also highlighted the phrase "administration of a trust" under section 113.051 and held that although the limited partnerships might be affected by the actions of their limited partners, it did not necessarily follow that the limited partnerships were affected by the "administration" of the family trust.

Finally, the court also rejected petitioners' argument that they had standing because the 2012 order appointing De Leon as successor trustee had ordered them to take certain action (i.e., deliver documents). In Texas, a party has standing to file a petition for bill of review if he/she was a party to the prior judgment or had a then existing interest or right which was prejudiced thereby. The court held that petitioners were not "ordered to take action" merely because the judgment required them to provide financial information regarding trust assets to the newly appointed successor trustee.

III. Claims By Trusts/Estates

A. An Estate Had No Breach of Contract Claim Against A Bank Arising From A Joint Account Where The Estate Was Not Damaged

In *Bank of America, N.A. v. Eisenhauer*, a husband and wife set up a certificate of deposit account with a bank where the account was a survivorship account and also had payable on death beneficiaries. 474 S.W.3d 264 (Tex. 2015). So, after one spouse died, all of the funds would belong to the other spouse. When the second spouse died, any funds remaining in the account would go to the named beneficiaries. The bank paid proceeds from the account after the husband's death to the beneficiaries but before his wife's death. The wife later died, and her estate sued the bank for breaching the account agreement in making the early distribution. The jury returned a verdict for the bank, but the trial court directed verdict for the estate. The court of appeals affirmed the trial court's judgment.

The Texas Supreme Court held that whether the funds stayed in the account until the surviving spouse died or were distributed before then, the estate received exactly the same from the account: nothing. The Court reversed the lower courts and rendered judgment on the jury's verdict holding that there was no evidence of any damages.

Interesting Note: The Court noted that there was no evidence that the wife ever attempted to withdraw any funds from the account after her husband's death.

Funds in an account belong to the person that deposited them. After the husband died, all of the funds belonged to the wife due to the survivorship language. Accordingly, the wife could have withdrawn all of the funds in the account at any point up to her death. If she had, and the funds were not present, then she or her estate could have been be harmed by the bank's error in distributing the funds early. But, funds in a survivorship account pass non-probate. So, because those funds do not go into an estate, an estate generally has no standing to assert claims based thereon. Because the estate had no evidence of any attempt to withdraw the funds and because it otherwise did not have any claim to the funds, it was not harmed by the bank's unintentional breach of the account agreement.

B. Estate Did Not Own Real Estate Because Court Affirmed Finding Of Inter Vivos Oral Gift Of Real Estate

In the *Estate of Wright*, the court of appeals affirmed a trial court's finding of an oral gift of real estate. No. 14-14-00401-CV, 2015 Tex. App. LEXIS 12644 (Tex. App.—Houston [14th Dist.] December 15, 2015, pet. denied). Stroman had assisted Wright for a long period of time. In the early 1990s, Wright purchased a house and rented it to Stroman. After two years of paying rent, Wright allegedly stated that it was enough and that the house was Stroman's. Stroman then made improvements to the house. Later, Wright drafted a will leaving the house to Stroman. Subsequently, after a new friend (Tautenhahn) assisted Wright, a new will was drafted leaving everything to Tautenhahn and another person. After Wright's death, Tautenhahn was appointed the executor of the estate. The parties litigated whether the most recent will was valid and also whether Wright had consummated an oral gift of the house to Stroman in the 1990s. The trial court found that the recent will was valid, but also found that Wright had made a binding oral gift and then awarded Stroman attorney's fees for offering a prior will for probate.

The majority of court of appeals panel affirmed. The court first addressed whether the Dead Man's Rule applied, such that evidence of Wright's alleged statements to Stroman could be used to defend the trial court's finding of an oral gift. The court held that Tautehahn did not object to all of the offered statements and that the unobjected to evidence was sufficient to waive the impact of the Dead Man's Rule.

The court then addressed the oral gift claim. The court held that, generally, a conveyance of real property must be in writing and subscribed and delivered by the conveyor or his agent. The general rule, however, does not apply to a parol gift of real estate in equity. "To establish a valid parol gift of real estate in equity, a party must show: (1) a gift in praesenti, that is, a present gift; (2) possession under the gift by the donee with the donor's consent; and (3) permanent and valuable improvements by the donee with the donor's consent or other facts demonstrating that the donee would be defrauded if the gift were not enforced." *Id*. Further, to be a present gift, the donor must, at the time he makes it, intend an immediate divestiture of the rights of ownership out of himself and a

consequent immediate vesting of such rights in the donee.

The court of appeals held that the evidence of Wright's intent to give the house to Stroman in the 1990s was sufficient to establish an oral gift: "the language Wright allegedly used, indicating the house was Stroman's, as well as his actions in discontinuing offsets from Stroman's paychecks, are clearly suggestive of an intention to bestow a present gift." *Id*. at *17. The court rejected an argument that there was no present intent to make a gift because Wright's prior will provided that Stroman would receive the house. The evidence supported "the finding that Wright intended to make a present gift to Stroman of equitable title to 105 Sweeney Street despite apparently also indicating that he would make provision in his will for the legal title in the property to be put in Stroman's name." *Id*. at * 18.

A dissenting justice would have reversed the trial court's finding of a valid oral gift. She found dispositive that Wright had mentioned the future gift of the house to Stroman in the will: "Wright's intention to include the Sweeney Street property in his will negates the intention to make an inter vivos gift of that property. Because a will is without legal effect until the time of the testator's death, a statement that a testator intends to bequeath property in a will evinces only an intention to make the gift in the future. A gift by will is a future gift, not a present gift." *Id*. at *34.

C. Court Affirmed Holding That Trust Owned Real Estate And Was Entitled To Attorney's Fees

In *Courtade v. Estrada*, Estrada created an inter vivos irrevocable trust and deeded real estate into the trust. No. 02-14-00295-CV, 2016 Tex. App. LEXIS 3072 (Tex. App.—Fort Worth March 24, 2016, no pet. history). Two days later, Estrada attempted to deed the same property to a daughter. After Estrada died, the trustee of her trust and her daughter sued each other regarding the real property and other issues. The trial court entered summary judgment for the trustee, holding that the trust owned the real estate.

The court of appeals affirmed that decision. The court held that "It is axiomatic that a grantor cannot convey to a grantee a greater or better title than he holds." *Id*. at *11. The court held:

> The issue decided by summary judgment concerned the title to the rental properties and the validity of the deeds to Estrada-Davis executed on August 8, 2012. Appellee presented uncontroverted evidence that the rental properties were transferred to the Trust by deeds executed on August 6, 2012. While there is also evidence that Gloria attempted to transfer the rental properties to Estrada-Davis on August 8, 2012, such evidence does not raise a fact issue concerning the title to the rental properties because Gloria did not own the rental properties on August 8, 2012. Although the

> transcripts reflect that Gloria possibly later changed her mind concerning the rental properties, "the deed was already done"-title to the properties had been transferred to the Trust on August 6, 2012.

The daughter also filed a counterclaim against her siblings alleging fraud and undue influence; she alleged that her siblings made certain misrepresentations to Estrada immediately prior to the signing of the trust agreement and that they unduly influenced her to sign the agreement. The trial court dismissed these claims on the basis that the daughter did not have standing to assert them. The court of appeals affirmed, holding that Estrada's estate would have sole standing to assert those claims and not her daughter.

The daughter also alleged that the trust was invalid because Estrada had revoked it. The trial court and court of appeals disagreed for two reasons. First, the document that had the revocation language did not expressly mention the trust, and therefore it was not operative as to the trust. Second, the trust stated: "[t]his Trust may not be amended, modified or revoked without the written consent and agreement of the Trustee." As the trustee did not consent in writing to the revocation of the trust, any alleged revocation by the settlor was not effective.

Finally, the daughter challenged the trial court's award of fees for the trustee. One of the grounds for fees alleged by the trustee was that section 114.031 of the property code provides that a beneficiary is liable for loss to the trust if the beneficiary "misappropriated or otherwise wrongfully dealt with the trust property." *Id* (citing Tex. Prop. Code Ann. § 114.031). The court of appeals held that the trial court could have found that the daughter misappropriated trust property by living in the trust's real property without permission and without paying any rent and by directing other tenants to send rent checks to her. The court concluded: "The trial court was therefore within its discretion to offset those attorney's fees against Estrada-Davis's interest in the Trust."

Interesting Note: To avoid the standing issue, the daughter could have pled a tortious interference with inheritance claim against her siblings. That claim would have allowed for a damage remedy. Also, the daughter could have alleged that the executor of Estrada's estate refused to assert the fraud and undue influence claims, and when that is pled, there is precedent that would allow a beneficiary of an estate to bring estate claims. Though very recent precedent previously cited on this blog may limit that standing exception. If the daughter could successfully challenge the creation of the trust and the deeds, those documents would be void, and potentially, the second deeds may have been effective.

D. Court Reverses New Trial Order After A Jury Verdict On A Trust Dispute

In *In re Jones*, there was a jury trial on the issue of whether a revocable trust was revoked such that the trustee, Jones, or the settlor's executor, Coyle, had the right to the trust assets. No. 05-16-0081-CV, 2016 Tex. App. LEXIS 6047 (Tex. App.—Dallas June 7, 2016, original proceeding). After rendering judgment in favor of Jones, the trial court granted Coyle's motion for new trial, stating that (i) the evidence was insufficient to support the jury's findings, and (ii) Jones introduced legally insufficient evidence of certain specific facts essential to her recovery. Jones filed a petition for writ of mandamus with the court of appeals challenging the new trial order.

The court of appeals granted the mandamus. The court stated the law regarding challenging orders granting new trials, thusly:

> A new trial order must satisfy two "facial requirements." *In re Bent*, No. 14-1006, 2016 WL 1267580, at *1 (Tex. Apr. 1, 2016) (orig. proceeding). One, the order must state a legally appropriate reason for the new trial. *Id*. Two, the stated reason must be specific enough to indicate that the trial court did not simply parrot a pro forma template but rather derived the articulated reasons from the case's particular facts and circumstances. Id. The order must satisfy both requirements, or it is an abuse of discretion correctable by mandamus. *See In re United Scaffolding, Inc*., 377 S.W.3d 685, 688-89 (Tex. 2012) (orig. proceeding).

The first reason for the new trial order stated that "there is insufficient evidence" to support both of the jury's findings and gave no further explanation. Citing to the Texas Supreme Court, the court held that "[t]he order must indicate that the trial judge considered the specific facts and circumstances of the case at hand and explain how the evidence (or lack of evidence) undermines the jury's findings." The court held that this reason was not sufficiently specific to support a new trial.

The trial court's second reason was similarly defective. The court reasoned that a new trial was warranted because Jones introduced no evidence of certain specific facts essential to her recovery. The court concluded that it had to grant a new trial to avoid granting Coyle a judgment notwithstanding the verdict. The court held: "Although this reason is specific, it is not a legally appropriate reason for ordering a new trial after a jury trial. The defendant's remedy when a claimant has introduced legally insufficient evidence of an essential element of its claim is generally a take-nothing judgment." Accordingly, the court granted mandamus relief and ordered the trial court to vacate its new trial order.

IV. Existence of Fiduciary Duties

A. Court Held That Plaintiff Stated A Claim Against Bank's Employees For Individual Liability Based On Alleged Fiduciary Breaches

In *Medve v. JPMorgan Chase Bank, N.A.*, a plaintiff sued a bank and three of its employees for breaches of fiduciary duties arising from fiduciary accounts. No. H-15-2277, 2016 U.S. Dist. LEXIS 11961 (S.D. Tex. February 2, 2016). The bank removed the case to federal court based on diversity jurisdiction: the plaintiff was a Texas resident and the bank was a resident of Ohio. The plaintiff filed a motion for remand, asserting that there was not complete diversity as he had sued three of the bank's employees, who also lived in Texas, as defendants. The bank asserted that the employees were fraudulently joined, and therefore, did not count for diversity purposes. The court stated that: "If the pleading reveals a reasonable basis of recovery on one cause of action against one in-state defendant, the court must remand the entire suit to state court." *Id*.

The district court reviewed whether the plaintiff pled a reasonable basis for recovery as against the bank's employees. The bank argued that "there is no basis in the law for finding that an employee of a trustee is directly liable for breach of trust." However, the court agreed with the plaintiff that there are three separate legal bases under Texas law for imposing liability on an employee who carries out the fiduciary functions of an entity: "(1) first, the employee owes a fiduciary duty directly as a subagent carrying out the employer's fiduciary functions, (2) second, the employee is liable if he 'participates' in the employer's breach of fiduciary duty, which the employee necessarily does if he is the one carrying out the breaches, and (3) third, the employee is personally liable for any tort he commits in the course of his employment, and breach of fiduciary duty is of course a tort." *Id*. (citing *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185 (Tex. 2007); *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 375 (Tex. 1984); *Searle-Taylor Mach. Co. v. Brown Oil Tools,Inc*., 512 S.W.2d 335, 338 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.)).

The court held that the plaintiff had sufficiently pled claims against the bank's employees. The court noted that the plaintiff clearly sued the employees in their individual capacities. The plaintiff pled that the employees acted as investment advisors and placed the bank's interests above his interests. The plaintiff pled a list of nearly twenty specific acts of wrongdoing that the employees committed in connection with their rendition of financial and investment services, including using a fee schedule that favored investments in bank's mutual funds over third party investments that had better rates of return. The court held that there was a reasonable basis of recovery for the plaintiff's claims against the employees and remanded the case back to state court.

Interesting Note: This case involves an employee's potential personal liability for breach of fiduciary duty. In Texas, in addition to employer liability, an

agent/employee is liable for any torts that he or she commits. Breach of fiduciary duty is a tort. Therefore, plaintiffs who plead claims against financial institutions for breach of fiduciary duty can potentially also plead the same claims against the institutions' employees who participated in the breach. Plaintiffs do not normally do this because the financial institution has sufficient assets to cover the claims and adding individuals will only complicate the case and make it more expensive and time-consuming. However, where there is a grudge against the employee or where there is a concern about the ability to collect on a judgment, this may be an attractive route for plaintiffs.

This case also involved breach of fiduciary duties as against investment advisors. Individuals or firms that receive compensation for managing portfolios of securities and/or giving advice on investing in securities such as stocks, bonds, mutual funds, or exchange traded funds are deemed to be investment advisers. All investment advisors (whether registered or not) are subject to Section 206 of the Advisers Act, which makes it unlawful for an adviser to engage in fraudulent, deceptive or manipulative conduct. In addition to those specific prohibitions, the U.S. Supreme Court has also held that Section 206 also imposes a fiduciary duty on investment advisors by operation of law. *SEC v. Capital Gains Research Bureau, Inc*., 375 U.S. 180 (1963). As a fiduciary, RIAs have the following general duties: duty of loyalty, duty of disclosure, duty to act with competence, and a duty to avoid self–dealing. The SEC has indicated that an RIA should meet the following obligations: 1) Advice: a duty to have a reasonable, independent basis for its investment advice; 2) Best Execution: a duty to obtain the best execution for clients' securities transactions where the advisor is in a position to direct brokerage transactions; 3) Suitability: a duty to ensure that its investment advice is suitable to the client's objectives, needs, and circumstances; 4) Personal activities: a duty to refrain from effecting personal securities transactions inconsistent with client interests; 5) Disclosure: a duty to disclose all material facts to clients, including conflicts of interest; and 6) Loyalty: a duty to be loyal to a client. Two very common issues that arise for RIAs are conflicts of interest and suitability issues.

Section 202(a)(11)(C) of the Investment Advisers Act of 1940 omits from the definition of an Investment Adviser "any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor." Therefore, broker/dealers do not normally owe fiduciary duties. If, however, the broker/dealer gives investing advice, he or she may open himself or herself up to a breach of duty claim. However, this duty would not necessarily be the same duty as the one owed by an RIA. In fact, the SEC has recommended having a uniform fiduciary standard for RIAs and broker/dealers who give investing advice.

B. Court Affirmed Trial Court's Finding That A Girlfriend Did Not Owe Fiduciary Duties To A Husband In the Context Of An Extramarital Affair

In *Markl v. Leake*, a husband started a long-time extramarital relationship with his girlfriend in 2004. No. 05-15-00455-CV, 2015 Tex. App. LEXIS 11261 (Tex. App.—Dallas November 2, 2015, no pet.). The husband gave her money, placed her on the payroll of his business, provided her a credit card, and maintained her vehicle and real property. The husband invested approximately $35,000 in his girlfriend's real properties. The relationship ended when the girlfriend caused the husband to be indicted for four felony charges related to an "altercation" and obtained a protective order prohibiting his entry upon her real property. The husband and wife then sued the girlfriend for breach of fiduciary duty and other tort claims arising from the benefits bestowed upon her during the relationship. They sought a temporary injunction to prevent the girlfriend from disposing of the two parcels of real property in which they purportedly invested money. The trial court denied the injunction, and the husband and wife appealed.

The court of appeals held that there are two types of fiduciary relationships: formal fiduciary relationships that arise as a matter of law, such as partnerships and principal-agent relationships, and informal fiduciary relationships or "confidential relationships" that may arise from moral, social, domestic, or personal relationships. The court also held that a fiduciary relationship is an extraordinary one and will not be created lightly. The test for an informal fiduciary relationship is: "A person is justified in placing confidence in the belief that another will act in his or her best interest only where he or she is accustomed to being guided by the judgment or advice of the other party, and there exists a long association in a business relationship, as well as a personal friendship."

The court first addressed whether the girlfriend owed an informal fiduciary duty to the wife. The court noted that it had located no authority recognizing a fiduciary relationship between the wife of a husband involved in an extramarital affair and the woman with whom the husband was carrying on that affair. The court affirmed the trial court's finding that the girlfriend did not owe any such duty to the wife.

The court then addressed whether the girlfriend owed an informal fiduciary duty to the husband. The court held that while a marital relationship is a fiduciary one, that the relationship of girlfriend and boyfriend, without more, is generally not a fiduciary relationship. Once again, the court could not find any authority declaring the existence of a fiduciary relationship based on an extramarital affair. The husband argued that the following evidenced a fiduciary relationship between them: his longstanding romantic and sexual relationship with the girlfriend and the sums he expended on her behalf, coupled with her executing a will declaring him as the beneficiary and their mutual life insurance policies naming the other as a beneficiary. The court held that the trial court had discretion to find that no fiduciary relationship existed via the girlfriend's testimony that they were simply

girlfriend and boyfriend, a dating relationship substantively different from a marital union. The court held that the husband's expenditures merely demonstrated donative gifting of labor and sums of money to a girlfriend and did not create any fiduciary duties on her part. The court affirmed the trial court's denial of the requested injunction because the evidence supported the trial court's finding of no fiduciary duty.

Interesting Note: Informal fiduciary relationships are difficult to sustain in Texas. There generally has to be evidence that the plaintiff relied upon the defendant's advice and counsel regarding business or financial matters. There needs to be evidence to justify a plaintiff subjectively believing that the defendant will place the plaintiff's interests above the defendant's own interests. However, depending on the facts of the case, there are instances where Texas courts have sustained an informal fiduciary duty with less evidence. This case makes clear that sexual relationships do not, in and of themselves, create fiduciary relationships.

C. Court Affirmed Finding That No Joint Venture Existed

In *Stutz Rd. Ltd. P'ship v. Weekley Homes, L.P.*, plaintiffs sued a defendant for breach of fiduciary duty based on duties owed pursuant to a joint venture. No. 05-12-01752-CV, 2015 Tex. App. LEXIS 11440 (Tex. App.—Dallas November 4, 2015, no pet.). The trial court granted the defendant a no-evidence motion for summary judgment, holding that there was no joint venture. The court of appeals held that parties in a joint venture owe a fiduciary duty to one another. Further, a joint venture has four elements: (1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise. The court of appeals affirmed the trial court's decision because there was "no evidence that Stutz Road and White agreed to share in any losses incurred under the Residential Development Agreement or that they had any right of control or management under the Residential Development Agreement." Because the parties were not in a joint venture, the defendant did not owe fiduciary duties to the plaintiffs.

D. Court Affirmed Judgment On Breach Of Fiduciary Duty Claim Because Plaintiff Swore In Bankruptcy Filings That He Did Not Have Any Interest In Disputed Properties

In *Archer v. Allison*, a plaintiff sued his daughter and her husband for breaching fiduciary duties and other related causes of action related to their work in certain businesses. No. 07-14-003130CV, 2015 Tex. App. LEXIS 12361 (Tex. App.—Amarillo December 3, 2015, pet. denied). The plaintiff represented to a United States Bankruptcy Court in 2002 that he had no interest in the properties at issue. The defendants filed motions for summary judgment based on judicial estoppel, which the trial court granted.

Judicial estoppel is a common law principle that applies when a party contradicts his sworn statement in prior litigation. The affirmative defense is established through proof that 1) the positions were clearly inconsistent, 2) the court in the prior proceeding accepted the position, and 3) the prior position was asserted intentionally rather than inadvertently. The court explained: "Simply put, Archer previously represented in a legal proceeding that he claimed no interest in various of properties he now attempts to recoup." *Id.* The court of appeals affirmed.

E. Employers Generally Do Not Owe Fiduciary Duties To Employees

In *Espinosa v. Aaron's Rents, Inc.*, a former employee sued his former employer for defamation and other torts related to the defendant reporting the plaintiff to the police for alleged theft. No. 01-14-00843-CV, 2016 Tex. App. LEXIS 423 (Tex. App.—Houston [1st Dist.] January 14, 2016, no pet.). One of the claims that the plaintiff asserted was that the defendant breached a fiduciary duty owed to the plaintiff, who used to be a manager for the defendant. The trial court granted the defendant a summary judgment on all of the plaintiff's claims. The court of appeals affirmed. Regarding the breach of fiduciary duty claim, the court held that the defendant did not owe the plaintiff a fiduciary duty as a matter of law. The court cited to a prior opinion: *Beverick v. Koch Power, Inc*., 186 SW.3d 145,153 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). The *Beverick* court held that "Texas does not recognize a fiduciary duty or a duty of good faith and fair dealing owed by an employer to an employee." *Id*. (citing *City of Midland v. O'Bryant*, 18 S.W.3d 209, 216 (Tex. 2000) (holding that there is no duty of good faith and fair dealing in the employment context)).

Interesting Note: Even though courts have held that employers do not owe fiduciary duties to employees, courts have also held that employees may owe limited fiduciary duties to employers. The term "fiduciary" generally applies "to any person who occupies a position of peculiar confidence towards another," refers to "integrity and fidelity," and contemplates "fair dealing and good faith." *Kinzbach Tool Co. v. Corbett-Wallace Corp*., 138 Tex. 565, 571, 160 S.W.2d 509, 512 (1942). In addressing the scope of a fiduciary duty in the context of an agency relationship, the Texas Supreme Court has observed:

> The agreement to act on behalf of the principal causes the agent to be a fiduciary, that is, a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking. Among the agent's fiduciary duties to the principal is the duty to account for profits arising out of the employment, the duty not to act as, or on account of, an adverse party without the principal's consent, the duty not to compete with the principal on his own account or for another in matters relating to the subject matter of the agency, and the duty to deal fairly with the principal in all transactions between them.

Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 200 (Tex. 2002) (quoting RESTATEMENT (SECOND) OF AGENCY § 13, cmt. a (1958)). "[W]hen a fiduciary relationship of agency exists between employee and employer, the employee has a duty to act primarily for the benefit of the employer in matters connected with his agency." *Abetter Trucking Co. v. Arizpe,* 113 S.W.3d 503, 510 (Tex. App.—Houston [1st Dist.] 2003, no pet.). The Texas Supreme Court has recognized that fiduciary employees owe duties of loyalty to their employers and, if a fiduciary employee "takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received." *Kinzbach Tool Co.*, 138 Tex. 565, 160 S.W.2d at 514. But an employer's right to demand and receive loyalty from a fiduciary employee must be tempered by society's interest in encouraging competition. *See Johnson,* 73 S.W.3d at 201. Thus, in general, an at-will employee may plan to compete with his employer and take certain steps toward that goal without disclosing his plans to the employer, but he may not "appropriate his employer's trade secrets," "solicit his employer's customers while still working for his employer," "carry away certain information, such as lists of customers," or "act for his future interests at the expense of his employer by using the employer's funds or employees for personal gain or by a course of conduct designed to hurt the employer." *Id*. at 202; *see also Abetter*, 113 S.W.3d at 510.

F. Court Dismisses Fiduciary Claim Between Mortgagor and Mortgagee

In *Fornesa v. HSBC Bank USA, N.A*., plaintiff sought a damage award against a defendant mortgagor for compensatory and punitive damages, based on alleged predatory lending practices. 2016 Bankr. LEXIS 2011 (S.D. Tex. May 13, 2016). Plaintiff asserted that the defendant breached fiduciary duties in refinancing one or more notes executed by the plaintiff. Plaintiff asserted that defendant filled in fictitious figures on plaintiff's loan application, and refinanced his note twice within one year, in order to charge unreasonable interest rates and fees. The defendant filed a motion to dismiss for failure to state a claim upon which relief can be granted.

The court held that: "In order to prevail on a cause of action for breach of fiduciary duty under Texas law, a plaintiff must plead and prove that a fiduciary relationship exists, that the defendant breached the duty, and that the breach caused damages to the plaintiff." The court also concluded that: "Texas law does not recognize a fiduciary duty between a mortgagor and mortgagee." *Id*. (citing *Priester v. JP Morgan Chase Bank, N.A.*, 708 F.3d 667 (5th Cir. 2013) and *FDIC v. Coleman*, 795 S.W.2d 706 (Tex. 1990)). The court granted the motion to dismiss, holding that the plaintiff did not state a claim upon which relief could be granted.

Interesting Note: Borrowers often claim that lenders breach fiduciary duties. This is a common lender liability claim. But the relationship between a bank and its customers does not create a special or fiduciary relationship. *See Bosch v. Frost Nat'l Bank,* No. 01-14-00191-CV, 2015 Tex. App. LEXIS 7481, *13 (Tex. App.—Houston [1st Dist.] July 21, 2015, no pet.); *Crutcher v. Continental Nat'l Bank*, 884 S.W.2d 884 (Tex. App.—El Paso 1994, writ denied); *Manufacturers Hanover Trust Co. v. Kingston Investors Corp.*, 819 S.W.2d 607, 610 (Tex. App.—Houston [1st Dist.] 1991, no writ); *Victoria Bank & Trust Co. v. Brady*, 779 S.W.2d 893, 902 (Tex. App.—Corpus Christi 1989), *aff'd in part, rev'd on other grounds*, 811 S.W.2d 931 (Tex. 1991). For example, in *Johnson v. Bank of America, N.A.*, the court held that a bank, who had many various relationships with a customer, did not have a special relationship with the customer, stating: "The record supports that the relationship between Johnson and BOA can be described a number of different ways: borrower and lender, bank and customer, mortgagor and mortgagee, mortgagor and mortgage servicer, and escrow agent and escrow account holder. These types of relationships are not, as a matter of law, fiduciary or otherwise special." No. 09-12-00477-CV, 2014 Tex. App. LEXIS 11900 (Tex. App.—Beaumont October 30, 2014, no pet.).

Because of the general, no-fiduciary duty rule between lender and borrower, borrowers often allege that these duties arise because of an informal, confidential relationship. Such an informal relationship may arise from "a moral, social, domestic or purely personal relationship of trust and confidence.'" *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005). However, such a relationship is not created lightly, and "not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship." *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176-77 (Tex. 1997). To avoid dismissal on a breach of fiduciary duty claim, a plaintiff is required to allege in his petition specific facts showing a fiduciary or special relationship existed between a bank and its customer. *Berry v. First Nat'l Bank of Olney*, 894 S.W.2d 558, 560 (Tex. App.—Fort Worth 1995, no writ) (court dismissed fiduciary claim where plaintiff's statement that he trusted lender did not transform their business relationship into a fiduciary relationship). For example, in *Farah v. Mafrige & Kormanik, P.C.*, the court dismissed a claim of a special relationship between lender and borrower even though the plaintiff alleged that its lenders forced the election of a new chief executive officer, installed directors loyal to the banks, and interfered with the company's corporate governance:

> Admittedly, the record indicates a long-standing relationship between Farah and the First City entities that extended beyond a normal debtor-creditor relationship. However, the fact a business

> relationship has been cordial and of long duration is not by itself evidence of a confidential relationship. The fact one businessman trusts another and relies upon another to perform a contract does not rise to a confidential relationship. Subjective trust is not enough to transform arms-length dealing into a fiduciary relationship.

927 S.W.2d 663, 675 (Tex. App.—Houston [1st Dist.] 1996, no writ). So, even long-standing relationships and protestations of trust do not create a confidential relationship between a bank and its customer. The test for a special relationship is whether the plaintiff has objectively reasonable expectations that the defendant will act in the plaintiff's best interest and above the interests of the defendant. *In the Estate of Abernethy,* 390 S.W.3d 431 (Tex. App.—El Paso May 30, 2012, no pet.). The mere fact that one party subjectively trusts another party does not alone indicate that confidence is placed in another in a sense demanded by fiduciary relationships because something apart from the transaction between the parties is required. *Id*. Rather, a fiduciary relationship may arise if the dealings between the parties have continued for such a period of time and a party is objectively justified in relying on another to act in his best interest. *Id*. A party is justified in placing confidence in the belief that another party will act in his or her best interest only where he or she is accustomed to being guided by the judgment or advice of the other party in legal, financial, and accounting matters, and there exists a long association in a business relationship as well as personal friendship. *Id*. To "impose such a relationship in a business transaction, there must be a fiduciary relationship before, and apart from, the agreement made the basis of the suit." *Chambers v. First United Bank & Trust Co.*, No. 02-11000047-CV, 2012 Tex. App. LEXIS 3561 (Tex. App.—Fort Worth May 3, 2012, no pet.) (citing *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 675 (Tex. 1998)).

Finally, some Texas courts have also categorized certain relationships as "special relationships" that give rise to a tort duty of good faith and fair dealing. *Chambers v. First United Bank & Trust Co.*, 2012 Tex. App. LEXIS 3561 at *10. However, "Although a fiduciary duty encompasses at the very minimum a duty of good faith and fair dealing, the converse is not true. The duty of good faith and fair dealing merely requires the parties to 'deal fairly' with one another and does not encompass the often more onerous burden that requires a party to place the interest of the other party before his own, often attributed to a fiduciary duty." *Id*. (citing *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp*., 823 S.W.2d 591, 593-94 (Tex. 1992), *superseded by statute on other grounds as stated in Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 225-26 (Tex. 2002)). Courts generally state that a special relationship has only been found between a borrower and a lender when there are extraneous facts and conduct such as excessive lender control over, or influence in, the borrower's business activities. *Id*. (citing *Davis v. West*, 317 S.W.3d 301, 312 (Tex. App.—Houston [1st Dist.]

2009, no pet.)). Yet, the author has not found a case in the past twenty years where the extraneous facts were so bad that it created a special relationship between the lender and the borrower.

G. Court Affirms Finding Of Informal Fiduciary Relationship Between Step-Mother and Step-Son Based On Decision To Not Resuscitate Father

In *Shearer v. Shearer*, Corrine and John were married from 1990 until 2008. No. 12-14-00302-CV, 2016 Tex. App. LEXIS 5685 (Tex. App.—Tyler May 27, 2016, no pet. history). John became ill in 2009 and was admitted to a hospital where Corrine accompanied him as a friend. At a second hospital, Corrine told the staff that she was still married to John and made several decisions for his treatment. David, John's son, visited John in the hospital, and David recalled that he and Corrine decided the family would monitor John's condition and make a decision later as a family regarding a proposed "Do Not Resuscitate" order ("DNR"). Without consulting David, Corrine executed the DNR the following morning, and the hospital withdrew all life-sustaining care. John died two days later. Corrine never informed David of her decisions, even though they spoke on the telephone during those days. David did not learn of his father's death until after he died.

Even though David believed Corrine made the correct decision concerning the DNR, he sued her for breach of fiduciary duty and intentional infliction of emotional distress concerning Corrine's nondisclosure of her decisions that deprived David of the chance to see his father prior to his death, and her decision to spread his ashes in a manner different from what he believed his father desired. The jury awarded David $35,000.00 for past mental anguish for Corrine's breach of fiduciary duty, $1,500.00 for past mental anguish arising from Corrine's intentional infliction of emotional distress, and $10,000.00 in exemplary damages. Corrine appealed.

The court of appeals first reviewed the law regarding informal fiduciary relationships. The court held that they are not created lightly, and that fiduciary relationships juxtapose trust and dependence on one side with dominance and influence on the other. The problem is one of equity, and the circumstances giving rise to the confidential relationship are not subject to hard and fast lines. A confidential relationship exists where a special confidence is reposed in another who in equity and good conscience is bound to act in good faith and with due regard to the interest of the one reposing confidence. Factors to consider include whether the plaintiff justifiably relied on the defendant for support, the plaintiff's physical and mental condition, and evidence of the plaintiff's trust. Subjective trust, alone, is not sufficient, and the trust must be justifiable. There must be additional circumstances, or a relationship that induces the trusting party to relax the care and vigilance that he would ordinarily exercise for his own protection. A court should examine whether, because of a close or special relationship, the plaintiff is in fact accustomed to being guided by the judgment or advice of the other. Another factor is the length and depth of the parties' relationship, although

a long personal relationship alone is insufficient to create a fiduciary relationship. For example, a familial relationship, while considered a factor, does not by itself establish a fiduciary relationship.

The court of appeals looked at the facts and held that, viewing the evidence in the light most favorable to the verdict, David and Corrine were not close prior to John's illness, but banded together during the family crisis. Corrine gained control by informing the hospital staff in Houston that she was John's wife. Corrine regularly communicated with David concerning his father's condition during the course of his illness. The court held that a rational jury could believe that she earned David's trust during this time. David and Corrine developed a pattern of communication in which Corrine gave David almost daily updates on John's condition. Corrine was aware of David's personal issues, including the shooting accident and his wife's cancer diagnosis, during this same time. Corrine admitted that she knew David relied on her to relay updates on John's condition. The court concluded that "there were peculiar circumstances inducing David to relax the care and vigilance that he would ordinarily exercise for his own protection. Thus, the jury could rationally have concluded that Corrine acquired influence over David and abused it, and that David's confidence had been reposed and betrayed… Because the issue is one of equity, under these unique facts, a reasonable jury could have concluded that the relationship developed sufficiently during the relevant time period to justify David's reliance on Corrine." The court of appeals affirmed the jury's finding of a breach of fiduciary duty. The court also affirmed the intentional infliction of emotional distress finding.

H. Court Holds That An Officer Of A General Partner Does Not Individually Owe Fiduciary Duties To The Partnership

In *Rainier Income Fund I v. Gans*, two limited partnerships sued an individual, who was the president of the general partner of the partnerships and co-owner of the only other limited partner, for breaching fiduciary duties allegedly owed to the limited partnerships. No. 05-15-00460-CV, 2016 Tex. App. LEXIS 6042 (Tex. App.—Dallas June 7, 2016, no pet. history). The plaintiffs claimed that he breached fiduciary duties to them by not declaring the partnerships dissolved and liquidated. The trial court held that the defendant did not owe any fiduciary duties.

The court of appeals held that there are two types of fiduciary relationships—formal and informal. "Formal fiduciary relationships arise as a matter of law and include the relationships between partners, among others." The court noted that informal relationships arise from "a moral, social, domestic or purely personal relationship of trust and confidence, generally called a confidential relationship." The court held that to impose such a relationship in a business transaction, the relationship must exist prior to, and apart from, the agreement made the basis of the suit. The court held that there was no evidence of a formal fiduciary relationship:

> Gans is not a partner in the partnership; he is an officer of the general partner. Although appellants cite several cases involving partners who owe duties, appellants do not cite any case for the proposition that an officer of the general partner of a partnership owes a fiduciary duty to the partnership. Instead, they argue Gans "cannot be distinguished from the entities he controls." Appellants did not, however, allege that the corporate identity of Star Creek, the general partner, should be disregarded. Appellants have not shown a formal fiduciary relationship.

Id. The court also held that the plaintiffs did not prove that the individual defendant had an informal fiduciary relationship because they did not direct the court to any evidence to show a prior relationship between the parties existed.

Interesting Note: Recently, a federal district court held that employees of fiduciaries may have individual liability for their actions. *Medve v. JPMorgan Chase Bank, N.A.*, No. H-15-2277, 2016 U.S. Dist. LEXIS 11961 (S.D. Tex. February 2, 2016). That court noted that there are three separate legal bases under Texas law for imposing liability on an employee who carries out the fiduciary functions of an entity: "(1) first, the employee owes a fiduciary duty directly as a subagent carrying out the employer's fiduciary functions, (2) second, the employee is liable if he 'participates' in the employer's breach of fiduciary duty, which the employee necessarily does if he is the one carrying out the breaches, and (3) third, the employee is personally liable for any tort he commits in the course of his employment, and breach of fiduciary duty is of course a tort." *Id*. (citing *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185 (Tex. 2007); *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 375 (Tex. 1984); *Searle-Taylor Mach. Co. v. Brown Oil Tools,Inc*., 512 S.W.2d 335, 338 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.)).These issues were not raised in the Gans case, and the court in that case did not address these other potential arguments.

I. Court Reverses Trial Court And Holds That Escrow Agent Owed Fiduciary Duties

In *Alpha Omega Chi v. Min*, an asset purchase buyer sued an escrow agent for breach of fiduciary duty when the agent released funds without verifying that there were no outstanding tax obligations. No. 05-15-00124-CV, 2016 Tex. App. LEXIS 6457 (Tex. App.—Dallas June 16, 2016, no pet. history). The trial court held a bench trial and found for the defendant, and the plaintiff appealed.

The court of appeals reversed. The court held that the "elements of a breach-of-fiduciary-duty claim are: (1) a fiduciary relationship existed between the plaintiff and defendant; (2) the defendant breached its fiduciary duty to the plaintiff; and (3) the defendant's breach resulted in injury to the plaintiff or benefit to the defendant." The court then held that "[a]n escrow agent owes fiduciary duties to both the buyers and the sellers of the property, including the duty of loyalty, the

duty to make full disclosure, and the duty to exercise a high degree of care to conserve the money placed in escrow and pay it only to those persons entitled to receive it." After determining that the evidence proved that the defendant was an escrow agent, the court held that the trial court erred in holding that the defendant did not owe fiduciary duties. Thereafter, the court reviewed the parties' agreement and held that it did not limit the defendant's common-law fiduciary duties (even if it theoretically could do so).

The court also held that the trial court's error was harmful. The court held that an error is harmful, and therefore reversible, if the error "(i) probably caused the rendition of an improper judgment, or (ii) probably prevented the appellant from properly presenting the case to the court of appeals." The court held that:

> It follows from finding 11 that the trial court evaluated the issues of breach, causation, and damages under the erroneous assumption that appellees did not owe any fiduciary duties to Alpha. But appellees did owe Alpha fiduciary duties—the duty of loyalty, the duty to make full disclosure, and the duty to exercise a high degree of care to conserve the money placed in escrow and pay it only to the persons entitled to receive it… Had the trial court applied the proper fiduciary standards of conduct to the trial evidence, it could have reached the conclusion that appellees breached those heightened duties. In particular, the trial court could have concluded that appellees' failure to call the Texas Comptroller to see if any unpaid taxes were outstanding was a breach of the duty to exercise a high degree of care to conserve the money placed in escrow.

Therefore, the court reversed and remanded to the trial court to re-evaluate its findings in light of the fact that the defendant did owe fiduciary duties.

V. Will Contest And Will Construction Issues

A. Court Reverses Finding Of Undue Influence In A Will Contest

In *In re Estate of Kam*, an elderly man executed a new will to omit any gift to one son after the man discovered that his life insurance had been altered to name his son as the sole beneficiary. No. 08-14-00016-CV, 2016 Tex. App. LEXIS 2070 (Tex. App.—El Paso February 29, 2016, no pet.). The son was also the executor of the man's wife's estate, and there were claims that he did not act appropriately in that position. After the man died, one of his daughters filed the new will for probate. The son challenged the will, claiming that it was not properly executed and that it was the product of undue influence by the daughter. After a bench trial, the trial court denied the application to probate the will and also found that the daughter did not act in good faith and rejected her request for attorney's fees.

The court of appeals first reviewed whether the new will was properly executed. The daughter, as the party offering the will for probate, had the burden to

establish that the will was: (1) in writing; (2) signed by: (A) the testator in person; or (B) another person on behalf of the testator: (i) in the testator's presence; and (ii) under the testator's direction; and (3) attested by two or more credible witnesses who are at least 14 years of age and who subscribe their names to the will in their own handwriting in the testator's presence. The will was not self-proved, so there had to be at least one witness to swear to these facts in open court. The court reviewed the testimony of the notary public and the two signing witnesses. The court held that the witnesses did not have to know the will's contents, and that they only had to know facts to prove proper execution. The court held: "So long as at least two non-inheriting witnesses attest to the signature, and so long as at least one testifies, the non-self-proving will meets the statutory formalities." Moreover, the court held that "The statute does not require the attesting witnesses to see the testator sign the will, so long as 'they can attest, from direct or circumstantial facts, that the testator in fact executed the document that they are signing.'" The court reversed the trial court's decision to the extent that it rested on the formalities of the will because the "uncontradicted testimony of two witnesses—one of whom who was totally and completely disconnected from the family conflict—conclusively establishes only one reasonable inference: that the formalities and solemnities necessary to execute the will were fulfilled."

The court then turned to the undue influence holding. The court held that the son had the burden to establish that the new will was the product of undue influence by the daughter. The court held that to establish undue influence, a contestant must show: (1) the existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and (3) the execution of a testament which the maker thereof would not have executed but for such influence. The court discussed the factors that courts consider in reviewing these three elements. The court held that there was some evidence to support the fact that the daughter exerted some influence over the man's decision-making process and that but for her efforts the new will would likely not have come into existence. But the court held that there was no evidence of the second element. The court held that evidence that the man was in a weakened mental state was not any evidence that influence existed. Further, the will itself was not evidence of any undue influence. The court held that the fact that a testator chose to distribute his estate among a number of children or relatives making one bequest larger than another, or the fact that he chose to exclude certain children from a will while providing for others was not in and of itself evidence of undue influence. Further, a person of sound mind has the right to dispose of his or her property in the manner he or she wishes. The court noted that this "principle holds regardless of whether a testator of sound mind's perceptions about the disinherited heir's actions or motivations at the time the testator signs the disinheriting instrument are true or not."

Accordingly, the court held that there was no evidence to support the trial court's finding of undue influence and rendered that the new will should have been

admitted to probate. The court finally held that as the daughter prevailed in admitting the will that she acted in good faith and deserved an award of attorney's fees.

B. Court Addresses Common-Disaster Provision In Will

In *Stephens v. Beard*, a husband shot his wife, who died immediately, and then shot himself. He died hours later in the hospital. No. 12-13-00160-CV, 2014 Tex. App. LEXIS 3895 (Tex. App.—Tyler April 10, 2014), *rev'd*, No. 14-0406, 2016 Tex. LEXIS 219 (Tex. March 18, 2016). Their wills provided for nine cash bequests if they died in a common disaster or under circumstances making it impossible to determine who died first. The executrix claimed that the nine specific bequests were not triggered because she could tell who died first and it was not a common disaster. The court of appeals, disagreed, holding that it was a common disaster: "the shots were fired in one episode, which is a common disaster in spite of the fact that [husband] did not successfully kill himself immediately." *Id*.

The Texas Supreme Court reversed the court of appeals. *Stephens*, 2016 Tex. LEXIS 219. The Court stated the following regarding construing a will:

> In construing a will, our focus is on the testator's intent, which is "ascertained by looking to the provisions of the instrument as a whole, as set forth within the four corners of the instrument." Thus, "[t]he court should focus not on 'what the [testator] intended to write, but the meaning of the words [he] actually used.'" Such words, "whether technical or popular," are construed "in their plain and usual sense, unless a clear intention to use them in another sense" is present in the instrument. Generally, "[t]he will should be construed so as to give effect to every part of it, if the language is reasonably susceptible of that construction."

Id. at * 3. Citing Black's Law Dictionary, the Court defined the phrase "common disaster" as "[a]n event that causes two or more persons [with related property interests] . . . to die at very nearly the same time, with no way of determining the order of their deaths." *Id*. *3-4. The Court held that the court of appeals erred in crafting its own definition by separately defining the words "common" and "disaster" and combining their separate definitions, which excluded the requirement that it be impossible to determine who died first. The Court noted that the "common disaster" provision is used to ensure orderly distribution when the order of death is uncertain, and absent language establishing a contrary intent, the order of death must be uncertain for the provision to become effective. The Court concluded that: "the Beards intended to use 'common disaster' according to its settled legal meaning. Because Vencie died nearly two hours after Melba, their deaths did not trigger the common-disaster provisions in their wills." As such, the nine cash bequests were not triggered, and those assets remained in the estate to be distributed to others.

C. Court Holds That Will Did Not Revoke Inter Vivos Trust

In *Gordon v. Gordon*, a man and his wife executed a revocable trust agreement and began to fund the trust. No. 11-14-00086-CV, 2016 Tex. App. LEXIS 3357 (Tex. App.—Eastland March 31, 2016, no pet. history). The couple later executed a joint will that their son had prepared. The joint will had a provision that stated that: "This Will shall override any prior allocations described in trust documents or financial documents such as annuities and certificates of deposit." But the couple never transferred any property out of the trust and into their own names. After the couple's death, the executor of the estate filed the joint will and the trustee of the trust had a dispute as to whether the couple's property should have been in the trust or in the estate. The dispute centered on whether the testators meant to revoke the trust in their joint will. The trial court entered summary judgment for the trustee, and the executor appealed.

The court of appeals first set forth the standards for construing a will:

> When we construe a will, we focus on the testator's intent. We ascertain the testator's intent when we look at the language of the entire will as it is contained in the four corners of the will. The court focuses not on what the testator intended to write, but on the meaning of the words actually used. We must presume the testator placed nothing superfluous or meaningless in his will and intended every word to have a meaning and to play a part in the disposition of the property. In this light, courts must not redraft wills to vary or add provisions "under the guise of construction of the language of the will" in order to reach a presumed intent.… "If this intent can be ascertained from the language of the will, then any particular paragraph, clause or sentence, which, if considered alone, might indicate a contrary intention, must yield to the intention manifested by the whole instrument." And when the dominant purpose of the testator is first stated, the remaining parts of the will should be construed in harmony with that statement, if possible.

The court analyzed the will and noted that the clause before the one at issue stated "It is our intention to dispose of" and that such phrasing, when placed in a will, necessarily indicates a future disposition of property, one conditioned on the death of the testator. The court also noted that the couple declared in the first paragraph of the joint will that they "hereby expressly revoke all our former Wills and Codicils previously made and declare this to be our Last Will and Testament." The court noted that this language indicated a present intent to make a joint will and revoke all other wills as of the date of execution. The joint will later had a contingent trust provision. The court held that if the couple had a present intent to revoke the intervivos trust that they would not have had the contingency provision.

The court concluded: "When we read the entire will, especially the sections on property to be disposed of and future bequests that would occur after Patrick's death, we conclude that the clause at issue is one that is testamentary in nature. We hold that the trial court did not err when it held that the clause, '[t]his Will shall override any prior allocations described in trust documents,' was testamentary and did not result in a revocation of the Trust." Accordingly, the trust retained the assets.

D. Court Determines that "Will" Was Not a Valid Will or a Valid Gift Deed and that Decedent Later Lacked Mental Capacity to Deed the Property

In *Lemus v. Aguilar*, relatives fought over ownership of a decedent's home. No. 04-14-00609-CV, 2016 Tex. App. LEXIS 2685 (Tex. App.—San Antonio Mar. 16, 2016, no pet. h.). Elvira, the deceased, lived in her home for over 20 years with her boyfriend, Garza. Elvira and Garza were named managing conservators of her daughter Annette's three children. In March 2005, Elvira and Garza signed a document titled "Will from Johnny Montoya Garza and Elvira G. Aguilar." The "will" stated that "we agree that the house be evenly divided by [Annette's children] and that nothing be done without the authorization of [Annette's children]." The document was handwritten by Garza and signed by both Garza and Elvira. In late 2005, Elvira started showing signs of dementia and was diagnosed with Alzheimer's disease. By November 2008, Elvira's condition had deteriorated – she required constant care and eventually had to be placed in a nursing home. In January 2009, Irma, Elvira's other daughter, came to visit and took Elvira from the nursing home to sign a "warranty deed" that conveyed the home to Irma and her husband. Elvira died in July 2011, and six months later, Garza filed a trespass to try title suit, which Annette's children joined. Following a bench trial, the trial court determined that the March 2005 "will" was a gift deed that validly transferred title to the residence to Annette's children, subject to a life estate to Garza, and further found that Elvira lacked mental capacity to execute the warranty deed in January 2009.

The court of appeals reversed in part and affirmed in part. The court first held that the March 2005 will was neither a valid will nor a valid gift deed. It was not a valid will under section 251.051 of the Estates Code because it was not attested to by two witnesses. Moreover, it was a not a valid holographic will because it was handwritten by Garza, not Elvira. Section 251.052 of the Estates Code applies to handwritten wills and requires that it be "handwritten entirely by the testator." *Id.* (citing Tex. Estates Code Ann. § 251.052). The court next examined the requirements for a valid gift deed. In addition to the requirements that a deed be in writing and signed by the conveyor under section 5.021 of the Texas Property Code, a gift deed of real property also requires the document set forth: (1) the intent of the grantor, (2) the delivery of the property to the grantee, and (3) the gift to be accepted by the grantee. *Id.* at *9-10. The key issue was the intent of Elvira as the donor when the deed was executed. The court held that the March 2005 "will" was not a valid gift deed because it lacked a "present

donative intent" by Elvira to provide an immediate and unconditional divestment of her interests. Accordingly, the March 2005 will was not a will or a gift deed and was not operative in any regard.

The court affirmed the trial court's findings that Elvira lacked mental capacity to transfer the property to Irma under the January 2009 warranty deed. The law presumes that a person possesses the requisite mental capacity at the time of executing a conveyance deed. Courts will consider circumstantial evidence concerning capacity prior to or subsequent to the time of the conveyance, evaluating: (1) the conduct of the party in question, (2) circumstances tending to produce a particular mental condition, and (3) prior or subsequent existence of a mental condition from which a party's capacity or incapacity at the time in question may be inferred. The court stated that the record was replete with evidence from medical records and numerous witnesses that Elvira suffered from advanced Alzheimer's disease and could not understand the nature or the effect of transferring ownership of the property. *Id.* at *14-15. The court remanded for further findings on whether an award of fees to Garza and Annette's children would be equitable and just under Declaratory Judgments Act. *Id.* at *20-21.

Interesting Note: The court did not identify the applicable standard for capacity to execute a deed. However, the authors note that historically courts have held that less mental capacity is required to enable a testator to make a will than for him to make a contract or deed. *See, e.g., Burk v. Mata*, 529 S.W.2d 591 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.); *Smith v. Welch*, 285 S.W.2d 823 (Tex. Civ. App.—Texarkana 1955, writ ref'd n.r.e.); *Rudersdorf v. Bowers*, 112 S.W.2d 784 (Tex. Civ. App.—Galveston 1938, writ dism'd). One recent case held that the legal standards for determining the existence of mental capacity for the purposes of executing a will or deed are substantially the same as the standards for mental capacity to execute a contract. *In the Estate of Minton*, No. 13-12-00026-CV, 2014 Tex. App. LEXIS 1061 (Tex. App.—Corpus Christi, January 30, 2014, pet. denied) (the court of appeals affirmed a jury's finding that the decedent did not have mental competence to execute a POD agreement with the bank naming a non-family member as a beneficiary); *see also Bach v. Hudson*, 596 S.W.2d 673 (Tex. Civ. App.—Corpus Christi 1980, no writ). Mental capacity, or lack thereof, may be shown by circumstantial evidence, including: (1) a person's outward conduct, manifesting an inward and causing condition; (2) any pre-existing external circumstances tending to produce a special mental condition; and (3) the prior or subsequent existence of a mental condition from which a person's mental capacity (or incapacity) at the time in question may be inferred. *Rodriguez v. Garcia*, 519 S.W.2d 908, 911 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

The effect of the court of appeals' opinion is that title to the home was not solely transferred to Annette's children. The property left in her estate would presumably be divided under the laws of intestacy. This case is a perfect example of why individuals should retain attorneys for even simple estate planning needs. The individuals intended to leave their house to their

grandchildren, but that intent was not fulfilled due to their failure to follow basic legal requirements.

E. Court Concludes Spouses' Joint Will Was a Contractual Will and Imposes Constructive Trust to Enforce Terms of Joint Will

In *Estate of Pursley*, a husband and wife (Harold Sr. and Mildred) with three children executed a joint will in 1975 that provided the survivor would take the entire estate "to be used, occupied, enjoyed, conveyed and expended by and during the life of such survivor, as such survivor shall desire and that upon the death of such survivor, any of such estate then remaining shall go to and vest in any child or children of this marriage." No. 13-14-00667-CV, 2015 2015 Tex. App. LEXIS 11985 (Tex. App.—San Antonio Nov. 24, 2015, pet. denied). Harold, Sr. died in 1980, and Mildred probated the 1975 will. In 2007, Mildred executed a new will expressly revoking the 1975 will, and in 2010, Mildred amended the 2007 will with a codicil. The effect of the 2007 will and 2010 codicil was to dispose of the remainder estate to only two of the three Pursley children. After Mildred died in 2011, one of the children (Rocky) filed an application to probate her 2007 will and 2010 codicil. The other two children (Rocky's brothers) filed an opposition to the application, arguing that Mildred's later will and codicil were executed in breach of the 1975 will, which was a contractual will. The trial court granted summary judgment in favor of Rocky's brothers and imposed a constructive trust on the estate in favor of the terms of the 1975 will. The court of appeals affirmed.

A joint will becomes contractual when it is executed pursuant to an agreement between the testators to dispose of their property in a particular manner, each in consideration of the other. To determine if a joint will is contractual, the primary factor to consider is whether the will, as a whole, sets forth "a comprehensive plan for disposing of the whole estate of either or both" of the testators. A joint will constitutes a contractual will if it meets the following two-prong test: (1) the gift to the survivor is not absolute and unconditional, even though it may initially appear to be so; and (2) the balance remaining from the estate of the first to die and the estate of the last to die is treated as a single estate and jointly disposed of by both testators in the secondary dispositive provisions of the will.

The court first determined that the 1975 will provided for a disposition of property to the survivor that was neither unconditional nor absolute. The language in the will that upon the death of either spouse the surviving spouse would take the estate "during the life of such survivor" created a life estate. The court then determined that the 1975 will treated the balance remaining from the estate of the first to die and the estate of the last to die as a single estate which was jointly disposed of by both testators – i.e., "to any child or children of this marriage."

Rocky argued that via 1975 will's language providing the remainder of the estate "shall go to and vest in any child or children of this marriage," Harold, Sr. and Mildred chose not to determine what child or children would receive what share

of the remaining property. Rather, he argued that the 1975 will intended to give the survivor the option of devising the property to one or more of the children. The court rejected this argument and held that the 1975 will provided for a disposition, by class gift, of the remaining estate after the survivor of the two spouses passed away. At the time the will was drafted, Texas courts routinely construed the phrase "child or children" as a class designation.

The court thus concluded that the 1975 will was a contractual will that unambiguously set forth a comprehensive plan for disposing of the entire estate, while providing both for the disposition of the property upon the death of the first to die and the disposition of the property remaining at the death of the survivor. As Mildred's later will and codicil circumvented the terms of the 1975 will, the court affirmed the trial court's constructive trust enforcing the terms of the 1975 will.

Interesting Note: Texas Estates Code section 254.004 requires that a joint will expressly recite that a contract exists. See Tex. Estates Code Ann. § 254.004 (formerly codified as Tex. Prob. Code § 59A). In the *Estate of Pursley* case, that section was not applicable because the 1975 will was executed prior to the statute's effective date of September 1, 1979. Additionally, it was important to the court that the will was drafted by an attorney – with the attorney's use of technical terms to carry out the intentions of the testator, it could "be assumed that such terms used in the will were used correctly and intentionally."

F. Court Reverses Decision On The Fair Market Value Of A Residence Due To The Surviving Spouse's Interest

In *Estate of Sloan*, a wife died leaving her home, and her husband was the executor of her estate. No. 02-15-00198-CV, 2016 Tex. App. LEXIS 6465 (Tex. App.—Fort Worth June 16, 2016, no pet. history). The wife's will left all of her assets to three trusts, but provided that her husband could buy assets for fair market value. The husband traded rental properties for the wife's home for half of its value (asserting that she only owned have due to community property rules). After the husband died and this transaction came to light, the trustee sued his estate for breach of fiduciary duty, claiming that the property was the wife's separate property and that the husband underpaid for the house by only paying for half. The husband's estate argued that even if the property was the wife's separate property, the consideration was fair considering the fact that the husband's homestead right decreased the value of the home. The trial court ruled for the trustee, and the husband's estate appealed.

The court of appeals reversed the trial court's judgment. The court noted that a "property's fair market value is what a willing buyer would pay a willing seller, neither acting under any compulsion." "In the willing seller-willing buyer test of market value it is frequently said that all factors should be considered which would reasonably be given weight in negotiations between a seller and a buyer." Texas Constitution article XVI, section 52 provides that a surviving spouse may

occupy the homestead during the spouse's lifetime without it being partitioned to the heirs of the deceased spouse until the survivor's death. Because this probate homestead right belongs to a surviving spouse regardless of its community or separate property character, its characterization by the decedent is irrelevant. The homestead right therefore "reduc[es]" underlying ownership rights "in a homestead property to something akin to remainder interests and vest[s] in each spouse an interest akin to an undivided life estate in the property." The court of appeals concluded that "as a matter of both logic and law," the husband's surviving homestead right, which entitled him to live in the property for the rest of his life and made the interest held by the wife's estate akin to a vested remainder that would entitle a buyer to possession only upon the husband's death, necessarily affected what such a buyer would pay a willing seller for the property and therefore reduced the property's market value. Because the parties stipulated that if the husband's interest decreased the value of the property, his estate would not owe anything, the court of appeals reversed and rendered for his estate.

The court then addressed the trustee's argument that the husband violated his fiduciary duties by self-dealing when he, individually, purchased property from himself as executor of the estate. The trustee alleged that the husband had a duty of full disclosure, a duty of fair dealing, a duty of acting as a prudent man, and a duty of loyalty to the beneficiaries of the estate and the trusts. The court disagreed, holding: "In light of our holding above that Hollis's homestead right decreased the fair market value of the estate's interest in the property, of the trial court's uncontested finding that Hollis was entitled to $25,000 in community reimbursement when he bought the property, and of the explicit authorization in Barbara's will for Hollis to purchase assets from her estate at fair market value, we cannot conclude that Hollis violated fiduciary duties when buying the Winton Terrace Property."

G. Court Reverses A Probate Order Requiring An Executor To Distribute Real Property Free Of Any Liens

In *In re Estate of Heider*, a probate court ordered that an executor should distribute real property to a beneficiary free of liens. No. 05-14-00436-CV, 2016 Tex. App. LEXIS 5978 (Tex. App.—Dallas June 6, 2016, no pet. history). The will devised the tract of land to the testator's son, stating "I give, devise and bequeath . . . the section of land in Farmersville east of existing North-South fence line (if not sold); to my son Daniel Gary O'Brien." This tract was collateral for a $81,000 loan.

The court of appeals noted that Section 255.301 of the Estates Code states the following: "Except as provided by Section 255.302, a specific devise passes to the devisee subject to each debt secured by the property that exists on the date of the testator's death, and the devisee is not entitled to exoneration from the testator's estate for payment of the debt." Section 255.302 provides: "A specific devise does not pass to the devisee subject to a debt described by Section

255.301 if the will in which the devise is made specifically states that the devise passes without being subject to the debt. A general provision in the will stating that debts are to be paid is not a specific statement for purposes of this section." The court of appeals held that the will did not "specifically state" that the bequest to the son was to be free of the lien. Therefore, the court reversed the probate court's order and required the distribution of the real property to be with the lien and the debt.

VI. Potpourri Issues

A. Court Affirmed Summary Judgment For Defendant/Attorney Regarding A Breach Of Fiduciary Duty Claim Arising From A Conflict of Interest

In *Macias v. Gomez*, a client sued his attorney for breach of fiduciary duty arising from the attorney's trust later suing the client. No. 13-14-00017-CV, 2015 Tex. App. LEXIS 12967 (Tex. App.—Corpus Christi December 29, 2015, no pet.). The client paid the attorney by transferring a one percent interest in a business to the attorney's trust. The client then learned that the attorney may have to engage in conduct that negatively affected the other owners of the business. The attorney then withdrew from representing the client, and the client signed a waiver-of-conflict-of-interest document that stated:

> As per our discussion, I have been explained by your firm that you will continue with your representation of [my fellow Border Furniture business owners] in this matter and I have agreed to waive any conflict of interest that may exist with you and your firm in the matter including but not limited to any conflict that might arise if you or your clients file suit against me or any of my entities.

After the client signed the waiver, the attorney's trust sued the client alleging claims of breach of contract, fraud, and breach of fiduciary duty in relation to the business. The client then sued the attorney for breach of fiduciary duty in a separate proceeding. The trial court entered summary judgment for the defendant/attorney.

On appeal the client first claimed that the waiver was not enforceable because it was not acquired prior to the attorney representing the client. The client claimed that if the attorney knew prior to representing the client that a conflict of interest existed, then the attorney breached his fiduciary duty by representing the client without disclosing the conflict or obtaining the waiver. The court affirmed the summary judgment on this issue because no evidence created a fact issue that the attorney knew of the conflict before beginning the representation.

The client also argued that the attorney breached a fiduciary duty by acquiring the waiver under a false pretense, i.e., the attorney allegedly told the client, prior to signing the waiver, that he would not sue him or represent anyone in a suit

against him. The court rejected this argument, however, because the waiver expressly stated that the attorney may sue the client in the future. The court of appeals affirmed the summary judgment for the attorney.

B. Court Affirmed Judgment That A Deed By A Trustee Without Specifying The Trustee's Capacity Transferred Trust Property

In *West 17th Res. LLC v. Pawelek*, children of a grantor sued the grantees, alleging that the grantor did not convey a trust's ownership interest in the property because the grantor did not indicate her capacity as a trustee in the deed. No. 04-14-00668-CV, 2015 Tex. App. LEXIS 12901 (Tex. App.—San Antonio December 23, 2015, pet. filed). The trustee signed the deed, conveying "all" of certain defined property, but the trustee simply signed her name without designating whether she was signing "individually" or "as trustee." The grantees argued that the trustee transferred both her 1/6 individual interest and the trust's 1/10 interest when she, along with the other members of the family, conveyed "all" of the subject property.

The court of appeals ruled for the grantees. It held that grantors "have cited no authority and we have found none that a grantor's failure to specify her capacity either "individually" or "as trustee" nullifies a deed's purported conveyance of property that the grantor holds in trust. The court held that the trustee did not intend to reserve the trust's 1/10 interest via her signature. The court held that the plain language of the deed conveyed all of the family's and trust's interest in the property.

C. Another Court Holds That Texas Has Not Recognized A Tortious Interference With Inheritance Claim

In *Anderson v. Archer*, the trial court's judgment awarded the plaintiffs $2.5 million in damages based on a tortious interference with inheritance claim. No. 03-13-00790-CV, 2016 Tex. App. LEXIS 2165 (Tex. App.—Austin March 2, 2016, no pet. history). The defendants appealed and argued that Texas law does not recognize such a claim. The court of appeals agreed with the appellants. The court first analyzed prior cases from that court and determined that it had never adopted such a claim. It then analyzed cases from the Texas Supreme Court and determined that that court had never adopted such a claim.

Moreover, the court cited with agreement to a recent opinion from the Amarillo court of appeals that held that Texas has not adopted a tortious interference with inheritance claim: *Jackson Walker, LLP v. Kinsel*, No. 07-13-00130-CV, 2015 WL 2085220, at *3 (Tex. App.—Amarillo April 10, 2015, pet. filed). The court in *Anderson* stated:

> In short, we agree with the Amarillo Court of Appeals that "neither this Court, the courts in *Valdez, Clark*, and *Russell*, nor the trial court below can legitimately recognize, in the first instance, a cause

> of action for tortiously interfering with one's inheritance." We also agree with the Amarillo court's assessment that neither the Legislature nor Texas Supreme Court has done so, or at least not yet. Absent legislative or supreme court recognition of the existence of a cause of action, we, as an intermediate appellate court, will not be the first to do so.

Id. The court also rejected an argument that a tortious interference with inheritance claim is merely a subset of the tort of tortious interference with a contract or prospective contractual or business relationship. It held that it was a separate claim that had not yet been recognized. The court therefore reversed the award for the plaintiff.

D. Court Holds That Order Allowing A Successor Trustee And Reinstating A Prior Trustee Is Appealable

In *In re Tipps*, an elderly woman's son became trustee of a trust due to her incompetency, and the son and his brother went to a mediation concerning a guardianship proceeding and other issues. No. 05-14-01495-CV, 2016 Tex. App. LEXIS 4014 (Tex. App.—Dallas April 15, 2016, no pet. history). The parties agreed that a corporate trustee would be a successor trustee, and the court entered an order approving of same. Later, disputes arose, and the successor corporate trustee filed a motion to resign and to reappoint the son as a successor trustee. After a hearing, the trial court granted the motion, and the brother appealed.

The first issue the court of appeals addressed was its jurisdiction to review the order. The son argued that no statute makes the order a final judgment or grants the court of appeals jurisdiction to review the order and that the trial court's order failed to dispose of the brother's claim for reimbursement of ongoing expenses related to his visits to his mother's nursing home and the repair of her car. The court stated:

> Generally, appeals may be taken only from final judgments. Probate proceedings are an exception to the "one final judgment" rule; in such cases, "multiple judgments final for purposes of appeal can be rendered on certain discrete issues." Not every interlocutory order in a probate case is appealable, however, and determining whether an otherwise interlocutory probate order is final enough to qualify for appeal has proved difficult.

Id. The court then considered whether any statute granted an immediate right of appeal from the discharge of a successor trustee and the reinstatement of a trustee. The court noted that "Section 51.014(a)(1) of the Texas Civil Practice & Remedies Code allows for interlocutory appeal from an order that 'appoints a receiver or trustee.' However, appellate courts have consistently held the statute does not apply to orders appointing successor trustees." *Id*. The court agreed,

and turned to whether the order in this case was final enough to qualify for appeal.

The court looked at the brother's claims for reimbursement and held that:

> Steven's remaining requests that were not addressed by the trial court do not raise any issue on which he could have filed a separate claim. We also note that no legal authority provides Steven with the right of such reimbursement as a person authorized pursuant to a medical power of attorney, nor does the medical power of attorney Doris executed, although Steven references the common law right of quantum meruit in his appellate brief. Under these circumstances, we conclude no remaining parties or issues remain to be disposed of by the trial court's orders.

Id. The court then turned to the merits of the brother's claims, and disagreed with the brother. The court affirmed the order in all things.

E. Court Affirmed Fiduciary Duty Jury Instruction In Claim Against Bank

In *Garrett v. First State Bank Central Texas*, John established an account with a bank and later added Garrett, who was assisting John with paying bills. No. 10-14-00344-CV, 2016 Tex. App. LEXIS 4765 (Tex. App.—Waco May 5, 2016, no pet. history). John and Garrett went into the bank to sign the account documents, and Garrett testified that they wanted to create a joint account with rights of survivorship. But when they left the bank, the account documents did not establish a rights of survivorship account. The bank realized that the account would not accomplish John's stated purpose, so it later altered the card by using white-out to delete the X on the Single Party Account Without Right of Survivorship blank, and she then placed an X on the Multiple-Party Account With Right of Survivorship blank.

After John's death, his estate and Garrett both claimed a right to the funds in the account. The bank filed an interpleader action, the estate and Garrett both raised claims to the funds, and Garrett claimed that the bank breached fiduciary duties. The trial court entered summary judgment for the estate, holding that the account was not with rights of survivorship. Garrett's claim against the bank then went to a jury, and the jury found that the bank did not owe a fiduciary duty to Garrett. Garrett appealed and argued that an instruction in the jury charge was incorrect and should result in a new trial. The instruction stated: "A person is justified in placing confidence in the belief that another party will act in his or her best interest only where she is accustomed to being guided by the judgment or advice of the other party, *and there exists a long association in a business relationship, as well as personal friendship*." *Id*. Garrett objected to the emphasized part of the instruction and argued that it was an incorrect statement of the law.

The court of appeals affirmed the jury's finding, holding that the instruction was a correct statement of the law. The court held that an "informal relationship may give rise to a fiduciary duty where one person trusts in and relies on another, whether the relation is a moral, social, domestic, or purely a personal one. But not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship." *Id*. The court also held that "while a fiduciary or confidential relationship may arise from the circumstances of a particular case, to impose such a relationship in a business transaction, the relationship must exist prior to, and apart from, the agreement made the basis of the suit." *Id*. The court held that the existence of an informal fiduciary relationship depends on the circumstances of each case, but those circumstances must include a relationship that existed before and apart from the agreement made the basis of the suit, and there must be "a long association in a business relationship, as well as personal friendship." *Id*.

Interesting Note: There has been some interesting case law over the past ten years regarding claims against banks for failing to property set up a survivorship account. In *A.G. Edwards & Sons Inc. v. Maria Alicia Beyer*, the Texas Supreme Court held that a customer can potentially raise a claim against a financial institution for failing to create a JTROS account. 235 S.W.3d 704 (Tex. 2007). The plaintiff was a daughter of a man who attempted to transfer the funds in a previous account into a new JTROS account with A.G. Edwards ("Bank"). *Id*. The Bank lost the documentation and before new documents could be signed, the father fell into a coma and later died. The daughter sued the Bank for conversion, negligence, fraud, breach of contract, and breach of fiduciary duty. The jury found for the daughter and awarded her damages and attorney's fees, and the Bank appealed. The Texas Supreme Court held: "[The Bank's] failure to take sufficient steps to create the JTWROS account necessary to establish [the daughter's] right of survivorship is a breach of a separate duty owed to [the daughter]." *Id*. The Court did not specify what "duty" it was referring to, but allowed extrinsic evidence of the bank's failure to create the account. The Court found that the evidence was sufficient to establish that the Bank had promised to create a JTROS account but failed to do so.

There have been several courts of appeals who have applied the *A.G. Edwards* opinion. In *Clark v. Wells Fargo Bank, N.A*., the court of appeals held that a bank did not tortiously interfere with inheritance rights or act with negligence with respect to CDs. No. 01-08-00887–CV, 2010 Tex. App. LEXIS 4376 (Tex. App.—Houston [1st District] June 10, 2010, no pet.). The bank informed an owner of CDs that the CDs were not fully covered by FDIC insurance, and she then purchased six new fully insured CDs that were set up in her name only and did not have any right of survivorship language on the account agreements as the previous ones had on them. The plaintiffs, individuals previously listed on the old CDs, filed claims for tortious interference with inheritance rights and negligence against the defendant bank. The trial court granted the defendant bank a summary judgment. The court acknowledged that a claimant can have a tortious interference with an inheritance claim: "[o]ne who by fraud, duress or other

tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." *Id*. at *14. The court held that in order to have this cause of action the claimant must present some evidence that he or she would in fact inherit or receive the property at issue but for the interference. The court held that the plaintiffs did not provide any evidence that they actually had an interest in the new CDs such that they could sustain a cause of action for tortious interference. The court also held that the claimants provided no evidence that Wells Fargo acted with intentional tortious conduct. The court therefore sustained the summary judgment on the tortious interference with inheritance claim. Regarding the plaintiffs' negligence claim, the court held that the plaintiffs did not establish that the bank owed them a duty. The court distinguished *A.G. Edwards* by noting that the father and daughter both sought to open a joint account and both signed the account agreement with right of survivorship.

In *Koonce v. First Victoria Nat'l Bank*, the court of appeals reversed a summary judgment in part and found that there was a fact issue as to whether a bank breached a contractual duty to set up a POD account. No. 13-10-00282-CV, 2011 Tex. App. LEXIS 7198 (Tex. App.—Corpus Christi, August 31, 2011, no pet.). Robert Koonce opened a certificate of deposit account at the bank, and approximately two years later instructed the bank to change the CD to a POD account and to designate his son as the beneficiary. Two years later, Robert died, and after litigation, the court held that the funds belonged to Robert's estate. The son then sued the bank, alleging that the bank breached its contract with Robert and with the son as third party beneficiary by failing to change the CD to a POD account. He also alleged that the bank was negligent and violated the DTPA. The trial court granted the bank's motion for summary judgment on all of the son's claims. Regarding the breach of contract claim, the court concluded that the bank failed to negate the breach element as a matter of law and that a fact issue existed on this element. The court affirmed the summary judgment on the negligence claim because "If the defendant's conduct . . . would give rise to liability only because it breaches a party's agreement, the plaintiff's claim ordinarily sounds only in contract." *Id*. More specifically, "In the absence of a duty to act apart from the promise made," mere nonfeasance under a contract creates liability only for breach of contract. *Id*.

The *A.G. Edwards* opinion is a dangerous precedent for financial institutions. Although the Texas Supreme Court did not clarify what "duty" the bank breached, a fair reading of *A.G. Edwards* would only support a potential breach of contract claim by a customer. The courts of appeals applying *A.G. Edwards* would agree with that conclusion. The end result of *A.G. Edwards* is that customers will now raise their claims arising out of alleged survivorship accounts against banks instead of other family members and will couch those claims in terms of the banks breaching agreements to create survivorship accounts. However, because the language in *A.G. Edwards* is somewhat ambiguous, plaintiffs may attempt to open the door to other tort-based claims, such as negligence and breach of

fiduciary duty. If that were allowed, it would be an expansion of existing law. Banks doing business in Texas should make every effort to properly handle survivorship account documents. Further, banks should revisit their account agreements so that defensive contractual and tort-based clauses may be implemented, such as no-prior representations clauses, arbitration clauses, damage waivers, etc.

F. Court Affirms Order Denying Attorney's Fees To Executor/Attorney

In *In re Estate of Williams*, attorney Don Ford was appointed an administrator of an estate and hired himself as an attorney for the estate. No. 05-15-00392-CV, 2016 Tex. App. LEXIS 5990 (Tex. App.—Dallas June 6, 2016, no pet. history). Later, the trial court denied some of his requested attorney's fees, and he appealed.

The court of appeals affirmed. The court first held that the order awarding some, but not all, of the fees requested was a final order and that the appellate court had jurisdiction. The court then reviewed the merits of the dispute. The court held that an attorney, as an administrator of an estate, may also perform the legal work and be compensated for his reasonable attorney's fees.

Estate Code Section 352.051 provides that on proof satisfactory to the court, a personal representative of an estate is entitled to reasonable attorney's fees necessarily incurred in connection with the proceedings and management of the estate. The court held that this provision entrusts attorney's fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirement that the fees be incurred in connection with the proceedings and management of the estate.

The court concluded that the trial court did not abuse its discretion in setting the amount of fees as it did. "For example, the record before this Court shows that some of the compensation sought by the Law Firm was for activities that were administrative in nature, rather than legal. Among other administrative activities, the Law Firm's itemized billing statements include entries for traveling to a bank to set up an Estate bank account, obtaining access to online banking records, coordinating checks and receipts for each creditor, a telephone call to previous counsel to pick up checks, telephone calls with the heirs, preparing annual accounts, and communications with real estate agents concerning the general status of properties. Under these circumstances, the probate court was entitled to conclude the Law Firm had charged the Estate for attorney time when the activity reported had no actual legal significance, and to exclude those charges from the fee award. The court affirmed the trial court's award.

VII. Damages Issues

A. Court Holds that Disgorgement Award for Breach of Fiduciary Duty Was Neither Punitive Nor Excessive and that Exemplary Damages Were Reasonably Proportioned to Damages

In *Swinnea v. ERI Consulting Engineers, Inc.*, Snodgrass and Swinnea owned equal interests in ERI, a small consulting company that managed asbestos abatement projects, for approximately ten years. 481 S.W.3d 747 (Tex. App.—Tyler 2016, no pet.). In August 2001, Snodgrass and ERI purchased Swinnea's interest in ERI for $497,500, after which Swinnea was to remain an ERI employee and not compete with ERI for six years. Prior to that time, Snodgrass and Swinnea had also been equal partners in Malmeba, which owned the building where ERI maintained its offices. As part of the buyout in August 2001, Snodgrass transferred his ownership interest in Malmeba, and ERI entered into a lease agreement for six years. Unbeknownst to Snodgrass, a month before the buyout, Swinnea's wife and the wife of another ERI employee created a new company called Air Quality Associates, which they used to bid on ERI administered asbestos abatement contracts despite having no prior experience in the asbestos abatement field. Swinnea did not disclose the existence of Air Quality Associates during the ERI buyout negotiations. After the buyout, Swinnea's revenue production decreased by 30%-50%. Swinnea subsequently learned of Snodgrass's involvement when one of ERI's biggest clients informed him and then stopped bidding on ERI's projects. The following year, in 2002, Swinnea's wife started a new abatement contracting company, Brady Environmental, Inc., which they told Snodgrass they would use for cleaning homes and air duct. Instead, Brady Environmental began performing asbestos abatement and competed with ERI. Swinnea continued to be employed by ERI, but the evidence showed he encouraged ERI's clients to use his company instead of ERI. ERI terminated Swinnea in June 2004. ERI and Snodgrass sued Swinnea and Brady Environmental for breach of fiduciary duty, breach of contract, and other related causes of action. After a bench trial, the trial court found for Snodgrass and ERI on the claims for statutory fraud, common law fraud, breach of the non-compete clause, and breach of fiduciary duty. It rendered judgment for ERI and Snodgrass for combined damages of $1,020,700 and $1 million in exemplary damages.

In the first appeal of that judgment, the court of appeals reversed and rendered judgment that ERI and Snodgrass take nothing. *Swinnea v. ERI Consulting Eng'rs, Inc.*, 236 S.W.3d 825 (Tex. App.—Tyler 2007), *rev'd*, 318 S.W.3d 867 (Tex. 2010). The Texas Supreme Court, however, reversed the court of appeals and remanded for consideration of the factors set forth in the Restatement (Second) of Trusts as to equitable forfeiture. *ERI Consulting Eng'rs, Inc. v.* Swinnea, 318 S.W.3d 867 (Tex. 2010). On remand, the court of appeals determined that the statutory cap on exemplary damages did not apply because the conduct fell within one of the exception to the cap, violations of the Texas Penal Code. *Swinnea v. ERI Consulting Eng'rs, Inc.*, 364 S.W.3d 421 (Tex.

App.—Tyler 2012, pet. denied). The court suggested a remittitur of a portion of the award for lost profits but otherwise affirmed the trial court's judgment. *Id.* The case was then remanded to the trial court for review of the forfeiture award as discussed in the Supreme Court's opinion.

The trial court entered judgment similar to the original judgment, awarding ERI and Snodgrass actual damages in the amount of $178,601, disgorgement in the amount of $720,700, and exemplary damages of $1 million. Swinnea appealed to the court of appeals, which affirmed that judgment. The court first rejected Swinnea's argument that the disgorgement award was punitive, recognizing that while forfeiture of contractual consideration may have a punitive effect, that is not the focus of the remedy, which is to protect relationships of trust by discouraging agents' disloyalty. 2016 Tex. App. LEXIS 1339 at *7-8. The court held that actual damages are not a prerequisite to disgorgement of contractual consideration; thus, it is not punitive. Awards of equitable disgorgement and exemplary damages are not duplicative. Additionally, mutual restitution (which would require ERI and Snodgrass to return the consideration they received in the August 2011 buyout) was not applicable because Snodgrass and ERI were not seeking rescission of the contract; rather, the remedy of disgorgement was in response to Swinnea's breach of fiduciary duty. Finally, as to one specific component of the award, the court held that the rental payments from ERI to Malmeba after the August 2001 buyout were properly disgorged. In short, the court held the trial court did not abuse its discretion in determining the remedy or amount of the disgorgement. *Id.* at *13.

The court next held that the exemplary damages award was not excessive. The court detailed the trial court's findings regarding Swinnea's breach of fiduciary duty and then applied the factors set forth in *Alamo Nat'l Bank v. Kraus*: (1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer, (4) the situation and sensibilities of the parties concerned, and (5) the extent to which such conduct offends a public sense of justice and propriety. 616 S.W.2d 908, 910 (Tex. 1981). The court stated that:

> The nature of the wrong was the premeditated, intentional violation of Swinnea's fiduciary duty owed to his longtime business partner. The character of the conduct involved dishonesty and deceit. His wrongful conduct was committed over a long period of time, in bad faith, with malice, aimed at destroying ERI and Snodgrass. The parties were fiduciaries who had been in business together for about a decade. Swinnea possessed proprietary information regarding ERI and had a longstanding confidential relationship with Snodgrass. Swinnea's culpability was significant and his conduct was highly offensive to a public sense of justice and propriety. While a considerable amount of the harm done was economic, here, there was also a considerable amount of damage done to the relationship of trust between Swinnea and ERI and Snodgrass.

Id. at *18. Swinnea's argument that the "punitive" award was excessive was improperly based on an assumption that the amounts ordered disgorged were included in the "punitive" award, which the court had previously rejected. Thus, rather than evaluating a "punitive" award of $1,720,700 (exemplary damages plus amount of disgorgement), the court compared the $1 million exemplary damages in proportion to the combined compensatory awards of $899,301 (actual damages award plus disgorgement), which was well within constitutional parameters and not excessive. *Id.* at *13-21.

Finally, the court affirmed the trial court's award of attorney's fees to ERI and Snodgrass. Swinnea failed to preserve that complaint, and even if preserved that the award was proper because Snodgrass and ERI's allegations included causes of action for statutory fraud and breach of contract, for which attorney's fees were recoverable. *Id.* at *21-22.

B. Court Reversed Forfeiture Damages Because They Were Not Linked To Fiduciary Breach

In *Ramin' Corp. v. Wills*, an employer sued a former employee for breach of fiduciary duty and other claims based on the employee competing with the employer while she was an employee. No. 09-14-11168-CV, 2015 Tex. App. LEXIS 10612 (Tex. App.—Beaumont October 15, 2015, no pet.). The trial court found that the employee did breach her fiduciary duty, but held that the employer sustained no damages. The trial court also found for the employee on several of her counterclaims. Both parties appealed.

The court of appeals acknowledged that an employee does not owe an absolute duty of loyalty to her employer, and that absent an agreement to the contrary, an at-will employee may plan to compete with her employer, may take active steps to do so while still employed, may secretly join with other employees in a plan to compete with the employer, and has no general duty to disclose such plans. However, the at-will employee may not act for his future interests at the expense of his employer or engage in a course of conduct designed to hurt his employer.

One of the employer's arguments was that the trial court erred in not awarding a forfeiture or disgorgement of profits. The court of appeals first held that a party must plead for forfeiture or disgorgement relief and held that the employer had adequately done so. The court then addressed the merits of the argument. It held that under the equitable remedy of disgorgement, a person who renders service to another in a relationship of trust may be denied compensation for her service if she breaches that trust. The court further stated that the objective of the remedy is to return to the principal the value of what the principal paid because the principal did not receive the trust or loyalty from the other party. Disgorgement also involves a fiduciary turning over any improper profit that the fiduciary earned arising from a breach. The party seeking forfeiture and equitable disgorgement need not prove any damages as a result of the breach of fiduciary duty.

The court explained that a trial court has discretion in awarding disgorgement or forfeiture and may consider several factors, including (1) whether the agent acted in good faith; (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 or related only to a part of the principal's interest; (4) whether the breach of trust by the agent occasioned any loss to the principal and whether such loss has been satisfied by the agent, and (5) whether the services of the agent were of value to the principal. A court may also consider evidence of the fiduciary's salary, profits, or other income during the time the breach occurred.

The court affirmed the employer not receiving any disgorgement or forfeiture damages. The court held that there was evidence that the employee was not enriched by her activities: "we conclude that there is an absence of evidence to establish that Wills' breach of her fiduciary duty was directly connected to her recovery of overtime, or that Ramin incurred any loss resulting from Wills' breach, and there is no evidence that Wills' services she performed for Ramin during the overtime hours were of no value to Ramin."

Interesting Note: This case is important for disgorgement and forfeiture cases in that it requires some causal link between the acts of fiduciary breach and the forfeiture and/or disgorgement. Before a plaintiff is entitled to an award of a forfeiture or disgorgement, it should have to establish some causal link between the act of fiduciary breach and benefit to the fiduciary that is being ordered to be disgorged. Otherwise, the remedy would be merely punitive..

C. Court Caps Exemplary Damages Award Where Plaintiff Did Not Plead or Prove A Misapplication Of Fiduciary Property Capbusting Offense

In *Davis v. White*, a lawyer sued his former partner over the application of a receivable. No. 02-13-00191-CV, 2016 Tex. App. LEXIS 3075 (Tex. App.—Fort Worth March 24, 2016, no pet. history). A jury awarded the plaintiff over $300,000 in actual damages and $2.8 million in exemplary damages. The trial court awarded the plaintiff his actual damages, but applied the exemplary damages cap, and limited that award to around $550,000. The plaintiff appealed, arguing that the cap should not have been applied because he pleaded and proved that the defendant's actions fell within the "misapplication of fiduciary property" exception to the cap listed in Texas Civil Practice and Remedies Code section 41.008(c)(10). The court of appeals disagreed, holding that the plaintiff did not plead facts in support of the capbuster "in relation to his punitive damages claim." The plaintiff also argued that he would have pled the capbuster and would have introduced proof of a violation of Penal Code section 32.45 if the defendant had pled the punitive damages cap. Following Texas Supreme Court precedent, the court of appeals held that the defendant did not need to plead the cap to be entitled to its application. Moreover, the court of appeals held that in light of the plaintiff's concession that he did not plead and prove the capbuster,

the trial court did not err in applying the cap and reducing the jury's exemplary damages award.

Interesting Note: Misapplication of fiduciary property or property of a financial institution is a charge that has been in existence in Texas for over forty years. Tex. Penal Code Ann. § 32.45. A person commits the offense of misapplication of fiduciary property by intentionally, knowingly, or recklessly misapplying property he holds as a fiduciary in a manner that involves substantial risk of loss to the owner of the property. *Id*. at § 32.45(b). Plaintiffs in civil litigation involving fiduciaries often seek punitive or exemplary damages. One important protection for defendants is the statutory cap on the amount of exemplary damages. The Texas Civil Practice and Remedies Code permits exemplary damages of up to the greater of: (1) (a) two times the amount of economic damages; plus (b) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or (2) $200,000. Tex. Civ. Prac. & Rem. Code Ann. § 41.008(b). As shown above, this cap need not be affirmatively pleaded as it applies automatically and does not require proof of additional facts. *Zorrilla v. Aypco Constr., II, LLC*, 469 S.W.3d 143 (Tex. 2015).

These limits do not apply to claims supporting misapplication of fiduciary property or theft of a third degree felony level if "the conduct was committed knowingly or intentionally." Tex. Civ. Prac. & Rem. Code Ann. § 41.008(c)(10). Accordingly, if a defendant is found liable for one of these crimes with the required knowledge or intent, it cannot take advantage of the statutory exemplary damages caps. It is important to note that even though a defendant does not have to plead the cap, a plaintiff must plead and prove "the defendant intentionally or knowingly engaged in felonious conduct under criminal statutes expressly excluded from the cap under section 41.008(c)." *Zorrilla*, 469 S.W.3d at 157. The Texas Pattern Jury Charge has a form question that a plaintiff can use to submit this capbusting question to the jury.

In the end, as the *Davis* case illustrates, it is very important for a plaintiff who wants to bust the exemplary damages cap to: (1) plead a capbusting provision in relation to its punitive damages claim, (2) introduce evidence regarding the capbusting offense, (3) request a question on the capbusting provision in the charge, and (4) secure findings that support its application. If all of these things are done, a trial court should apply the capbuster and award a jury's full finding of exemplary damages.

VIII. Exculpatory Clauses In Trust Documents Are "Somewhat" Enforceable In Texas

It is common for settlors to execute trust documents that contain exculpatory clauses. An exculpatory clause is one that forgives the trustee for some action or inaction. For example, a common exculpatory clause may state "The trustee may rely upon the written opinion of any attorney" or "The trustee shall be saved harmless from any liability for any action he or she may take, or for the failure of

such trustee to take any action, if done in good faith and without gross negligence." Generally, these types of clauses can be enforceable in Texas and can limit a trustee's duty. *See Dolan v. Dolan*, No. 01-07-00694-CV, 2009 Tex. App. LEXIS 4487 (Tex. App.—Houston [1st Dist.] June 18, 2009, pet. denied). In Texas, exculpatory clauses are strictly construed, and a person is relieved of liability only to the extent to which it is clearly provided that he shall be excused. *See 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.).

In *Texas Commerce Bank v. Grizzle*, the Texas Supreme Court held that public policy as expressed by the legislature in the Trust Code allowed relieving a corporate trustee from liability for self-dealing except for what was specified in sections 113.052 and 113.053. 96 S.W.3d 240, 249 (Tex. 2002). In *Grizzle*, a case involving alleged self-dealing by the trustee, the Court held that "the trust Code authorizes a settlor to exonerate a corporate trustee from almost all liability for self-dealing," such as misapplying or mishandling trust funds, including failing to promptly reinvest trust monies. *Id*. at 250; *see also Clifton v. Hopkins*, 107 S.W.3d 755 (Tex. App.—Waco 2003, no pet.).

In response to *Grizzle*, the Texas Legislature amended the Texas Property Code, and it now limits a settlor's ability to exculpate a trustee. 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, Texas Property Code section 114.007 provides: "(a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that the term relieves a trustee of liability for: (1) a breach of trust committed: (A) in bad faith; (B) intentionally; or (C) with reckless indifference to the interest of a beneficiary; or (2) any profit derived by the trustee from a breach of trust." Tex. Prop. Code Ann. §114.007.

In *Martin v. Martin*, the court of appeals discussed the new statutory provisions and their impact on *Grizzle* and found that an exculpatory clause in the trust document at issue was not enforceable. 363 S.W.3d 221 (Tex. App.—Texarkana 2012, pet. denied). In *Martin*, a company was jointly managed for over twenty years by Ruben Martin and Scott Martin. They each created an irrevocable trust for the health, education, and welfare of their children and grandchildren. The brothers were the trustees of each other's trust. Thereafter, a power struggle over the control of the company arose between Ruben and Scott.

Ruben's children filed a lawsuit to remove Scott as the trustee of their trust and alleged breaches of fiduciary duty. Ultimately, the jury found for Ruben's children and ordered over a million dollars in damages to each of them as against Scott. Scott appealed and argued that he had no fiduciary duty of loyalty based on a provision of the trust releasing Scott of fiduciary duties except those imposed by a statute.

The court of appeals held that under the common law, a trustee has the fiduciary duties to hold and manage the property for the benefit of the beneficiaries and owes a trust beneficiary an unwavering duty of good faith, fair dealing, loyalty, and fidelity over the trust affairs and its corpus. Scott argued that the trust document excused him from the obligation to perform such duties.

The court of appeals held that the general rule from the Texas Trust Code is that the terms of the trust prevail over any provision of the code subject to a few statutory exceptions not applicable to the case. The trust document granted the trustee the right to operate to the same extent and manner as if he were a disinterested person. Further, it recognized that no principle or rule relating to "self-dealing or divided loyalty shall be applied to any act of the trustee but that the trustee shall be held to the same standard of liability" as in transactions with disinterested persons.

The court held that Scott would be accountable for fiduciary responsibility only if the Texas Trust Code expressly prohibited the exculpation clause contained in the trust. Scott argued that pursuant to the Texas Supreme Court's *Grizzle* opinion, that the trust agreement waived all fiduciary duties. The court of appeals disagreed and found Scott's argument ignored the statutory changes that had occurred after *Grizzle* was decided.

The court noted that in response to *Grizzle* the Texas Legislature repealed section 113.059, added section 111.0035, and added section 114.007. Section 111.0035(b) provides as follows:

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

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

TEX. PROP. CODE ANN. § 111.0035.

Section 114.007 provides:

> (a) a term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that the term relieves a trustee for liability:
>
> (1) a breach of trust committed: (A) in bad faith; (B) intentionally; or (C) with reckless indifference to the interest of the beneficiary; or
>
> (2) any profit derived by the trustee from a breach of trust.

Id. at § 114.007.

The court of appeals held that Scott owed Ruben's children the fiduciary duties which, pursuant to section 111.0035 and section 114.007, cannot be waived. The statutory changes modified the holding of *Grizzle*.

Scott also argued that the duty to act in good faith and in accordance with the purposes of the trust of section 111.0035(b)(4)(B) only applied in the context of a demand for an accounting. The court of appeals disagreed and found that the two subsections are separate and distinct duties and also found that "in accordance with the purposes of the trust" was a separate duty from the duty of good faith.

Scott also argued that another provision of the trust document required reversal: "no individual trustee shall be liable for negligence or error of judgment, but shall be liable only for such trustee's willful misconduct or personal dishonesty." The court held that section 114.007 prohibits liability from being waived if the breach was committed in bad faith, intentionally, or with reckless indifference to the interest of the beneficiaries. The court noted that the jury found that the breach was committed in "an absence of good faith, intentionally or with reckless indifference to the interest of the beneficiaries." The court found that section 114.007 would prohibit any waiver of liability.

The court of appeals held that the exculpatory clauses at issue did not excuse Scott from his actions, and that there was sufficient evidence to support the jury's liability finding that Scott had breached his fiduciary duties.

IX. Fiduciaries And Beneficiaries Should Be Aware Of Criminal Statutes

There are several criminal statutes that implicate fiduciary activities in Texas that are not well-known: misappropriation of fiduciary property and financial exploitation of the elderly. Though these may be similar in some ways to a theft charge, they are different criminal charges. *Rhinehardt v. State*, No. 08-01-

00335-CR, 2003 Tex. App. LEXIS 6223 (Tex. App.—El Paso July 17, 2003, no pet.).

A. Misapplication Of Fiduciary Property

Misapplication of fiduciary property or property of a financial institution is a charge that has been in existence in Texas for over forty years. Tex. Penal Code Ann. § 32.45. A person commits the offense of misapplication of fiduciary property by intentionally, knowingly, or recklessly misapplying property he holds as a fiduciary in a manner that involves substantial risk of loss to the owner of the property. *Id*. at § 32.45(b). "Substantial risk of loss" means a real possibility of loss; the possibility need not rise to the level of a substantial certainty, but the risk of loss does have to be at least more likely than not. *Coleman v. State*, 131 S.W.3d 303 (Tex. App.—Corpus Christi 2004, pet. ref'd).

The statute defines "Fiduciary" to include: "(A) a trustee, guardian, administrator, executor, conservator, and receiver; (B) an attorney in fact or agent appointed under a durable power of attorney as provided by Chapter XII, Texas Probate Code; (C) any other person acting in a fiduciary capacity, but not a commercial bailee unless the commercial bailee is a party in a motor fuel sales agreement with a distributor or supplier, as those terms are defined by Section 162.001, Tax Code; and (D) an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary." *Id*. at § 32.45(a)(1).

The phrase "acting in a fiduciary capacity" is not defined in the code, but the Texas Court of Criminal Appeals has construed the undefined phrase according to its plain meaning and normal usage to apply to anyone acting in a fiduciary capacity of trust. *Coplin v. State*, 585 S.W.2d 734, 735 (Tex. Crim. App. 1979). Based on the plain and ordinary meaning of the word "fiduciary" as "holding, held, or founded in trust or confidence," one court has held that a person acts in a fiduciary capacity within the context of section 32.45 "when the business which he transacts, or the money or property which he handles, is not his or for his own benefit, but for the benefit of another person as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part." *Gonzalez v. State*, 954 S.W.2d 98, 103 (Tex. App.—San Antonio 1997, no pet.); *see also Konkel v. Otwell*, 65 S.W.3d 183 (Tex. App.—Eastland 2001, no pet.). Moreover, evidence that a defendant aided another person in misapplying trust property sufficed, under the law of parties as set forth in Texas Penal Code sections 7.01(a), 7.02(a)(2), to convict a defendant of misapplication of fiduciary property although the defendant did not personally handle the misapplied funds. *Head v. State*, 299 S.W.3d 414 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd).

An offense under this statute ranges from a Class C misdemeanor if the property is less than $100 to a first degree felony if the property misapplied is over $300,000. Tex. Penal Code Ann. § 32.45(c). Moreover, the punishment is increased to the next higher category if it is shown that the offense was

committed against an elderly individual. *Id*. at § 32.45(d). For example, a court affirmed a sentence of 23 years for a conviction of this crime, and held that such was no cruel and unusual punishment. *See Holt v. State*, NO. 12-12-00337-CR, 2013 Tex. App. LEXIS 8393 (Tex. App.—Tyler July 10 2013, no pet.).

This criminal charge arises in the context of trustees misapplying trust property. *Bowen v. State*, 374 S.W.3d 427 (Tex. Crim. App. 2012); *Kaufman v. State,* No. 13-06-00653-CR, 2008 Tex. App. LEXIS 3880 (Tex. App.—Corpus Christi May 29, 2008, pet. dism.). It also arises in joint bank accounts situations and the use of funds therein. *Bailey v. State*, No. 03-02-00622-CR, 2003 Tex. App. LEXIS 10140 (Tex. App.—Austin Dec. 4, 2003, pet. ref'd). It also arises when a power of attorney holder makes gifts to himself or herself. *Natho v. State*, No. 03-11-00498-CR, 2014 Tex. App. LEXIS 1427 (Tex. App.—Austin Feb. 6 2014, pet. ref'd); *Tyler v. State*, 137 S.W.3d 261, 2004 Tex. App. LEXIS 3446 (Tex. App.—Houston [1st Dist.] 2004, no pet.). This can also apply in business contexts, where a business partner improperly diverts funds for personal use. *Bender v. State*, No. 03-09-00652-CR, 2011 Tex. App. LEXIS 3096 (Tex. App.—Austin Apr. 19 2011, no pet.); *Martinez v. State*, No. 05-02-01839-CR, 2003 Tex. App. LEXIS 9963 (Tex. App.—Dallas Nov. 21, 2003, pet. ref'd). Attorneys can be charged for misapplying clients' funds. *Sabel v. State*, No. 04-00-00469-CR, 2001 Tex. App. LEXIS 6493 (Tex. App.—San Antonio Sept. 26, 2001, no pet.). It also arises where a defendant misapplies royalty owners' money contrary to a gas lease agreement. *Coleman v. State*, 131 S.W.3d 303, 2004 Tex. App. LEXIS 2093 (Tex. App.—Corpus Christi 2004, pet. ref'd). It also arises in the abuse of guardianship relationships. *Latham v. State*, No. 14-04-00248-CR, No. 14-04-00249-CR, No. 14-04-00250-CR, 2005 Tex. App. LEXIS 6560 (Tex. App.—Houston [14th Dist.] Aug. 18, 2005, no pet.). Of course, the charge can apply in many other instances as well.

B. Financial Exploitation Of The Elderly

Financial exploitation of the elderly is a criminal offense in Texas that has been in the statutes since 2011. Tex. Penal Code Ann. § 32.53. "A person commits an offense if the person intentionally, knowingly, or recklessly causes the exploitation of a child, elderly individual, or disabled individual." *Id*. at § 32.53(b). "Exploitation" means the illegal or improper use of a child, elderly individual, or disabled individual or of the resources of a child, elderly individual, or disabled individual for monetary or personal benefit, profit, or gain. *Id*. at § 32.53(a)(2). A "child" means a person 14 years of age or younger, and an "elderly individual" means a person 65 years of age or older. *Id*. at § 22.04(c). A "disabled individual" means a person: (A) with one or more of the following: (i) autism spectrum disorder, as defined by Section 1355.001, Insurance Code; (ii) developmental disability, as defined by Section 112.042, Human Resources Code; (iii) intellectual disability, as defined by Section 591.003, Health and Safety Code; (iv) severe emotional disturbance, as defined by Section 261.001, Family Code; or (v) traumatic brain injury, as defined by Section 92.001, Health and Safety Code; or (B) who otherwise by reason of age or physical or mental

disease, defect, or injury is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self. *Id.* This offense is a felony of the third degree. *Id*. at § 32.53(c).

C. Criminal Statutes Do Not Create Civil Liability

Even though plaintiffs may desire to cite these criminal statutes in civil cases, they do not create civil causes of action. "The Texas Penal Code does not create private causes of action," and as a result, criminal code "allegations fail to state a viable claim for relief." *Spurlock v. Johnson*, 94 S.W.3d 655, 658 (Tex. App.—San Antonio 2002, no pet.); *see also Macias v. Tex. Dep't of Crim. Justice Parole Div*., No. 03-07-00033-CV, 2007 Tex. App. LEXIS 6798 (Tex. App.—Austin August 21, 2007, no pet.). Other states have adopted express civil causes of action for the exploitation of the elderly or other vulnerable persons. *See, e.g.,* Ariz. Rev. Stat. § 46-456, et. seq.; CA Welf. & Inst. Code § 15610-1561-.65; Fla. Ann. Stat. § 415.102(8)(a)(1) and (2); (8)(b). In Texas, there are no such statutory or common law claims for exploitation of vulnerable persons. However, there is a common law claim for breach of fiduciary duty, and the same conduct that may justify a criminal charge may also support a valid breach of fiduciary duty claim. *Compare Natho v. State*, No. 03-11-00498-CR, 2014 Tex. App. LEXIS 1427 (Tex. App.—Austin Feb. 6 2014, pet. ref'd) (criminal charge affirmed) *with Natho v. Shelton*, No. 03-11-00661-CV, 2014 Tex. App. LEXIS 5842 (Tex. App.—Austin May 30, 2014, no pet.) (affirming civil judgment in part based on same acts of fiduciary breach). Moreover, there are civil claims for conversion, tortious interference with inheritance, fraud, breach of contract, money had and received, undue influence, mental incompetence, etc. that may provide the appropriate relief.

D. Criminal Statutes May Impact Exemplary Damages Awards

Plaintiffs in civil litigation often seek punitive or exemplary damages. "Exemplary damages" means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor noneconomic damages. "Exemplary damages" includes punitive damages. Tex. Civ. Prac. & Rem. Code Ann. § 41.001(5). A jury may only award exemplary damages if the claimant proves, by clear and convincing evidence, that the harm resulted from: (1) fraud; (2) malice; or (3) gross negligence. *Id*. at § 41.003(a).

Under Texas case law, exemplary damages may be proper in breach of fiduciary duty cases where the plaintiff can prove by clear and convincing evidence that the action arose by actual fraud, malice, or gross negligence. *Murphy v. Canion*, 797 S.W.2d 944, 949 (Tex. App.—Houston [14th Dist.] 1990, no pet.); *see also Lesikar v. Rappeport*, 33 S.W.3d 282, 311 (Tex. App.—Texarkana 2000, pet. denied); *Natho v. Shelton*, No. 03-11-00661-CV, 2014 Tex. App. LEXIS 5842, 2014 WL 2522051, at *2 (Tex. App.—Austin May 30, 2014, no. pet.).

One important protection for defendants is the statutory cap on the amount of exemplary damages. The Texas Civil Practice and Remedies Code permits exemplary damages of up to the greater of: (1) (a) two times the amount of economic damages; plus (b) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or (2) $200,000. Tex. Civ. Prac. & Rem. Code Ann. § 41.008(b). This cap need not be affirmatively pleaded as it applies automatically and does not require proof of additional facts. *Zorrilla v. Aypco Constr., II, LLC*, 469 S.W.3d 143 (Tex. 2015).

These limits do not apply to claims supporting misapplication of fiduciary property or theft of a third degree felony level. Tex. Civ. Prac. & Rem. Code Ann. § 41.008(c)(10). *Natho v. Shelton*, 2014 Tex. App. LEXIS 5842 at n. 4. The statute states that the caps "do not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if … the conduct was committed knowingly or intentionally…." *Id*. Accordingly, if a defendant is found liable for one of these crimes with the required knowledge or intent, it cannot take advantage of the statutory exemplary damages caps.

A plaintiff must prove its entitlement to an exception to the exemplary damages cap. The Texas Pattern Jury Charge has the following as a proposed jury question that a plaintiff can seek to submit to the jury:

> QUESTION _____
>
> Did Don Davis intentionally misapply [identify property defendant held as a fiduciary, e.g., 300 shares of ABC Corporation common stock] in a manner that involved substantial risk of loss to Paul Payne [and was the value of the property $1,500 or greater]?
>
> "Misapply" means a person deals with property [or money] contrary to an agreement under which the person holds the property [or money].
>
> "Substantial risk of loss" means it is more likely than not that loss will occur. A person acts with intent with respect to the nature of his conduct or to a result of his conduct when it is the conscious objective or desire to engage in the conduct or cause the result.
>
> Answer "Yes" or "No."
>
> Answer: _____

This question presumes that a fiduciary relationship exists. If the existence of such a fiduciary relationship is disputed, the court should submit a preliminary question, and the question set out above should be made conditional on a "Yes" answer to the preliminary question. Further, the statute authorizes elimination of the limitation on exemplary damages awards if the conduct described in the applicable Texas Penal Code section was committed either knowingly or intentionally. If knowing instead of intentional conduct is alleged, the Texas Pattern Jury Charge suggests the following definition: "A person acts knowingly with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result."

"A plaintiff can avoid the cap by pleading and proving the defendant intentionally or knowingly engaged in felonious conduct under criminal statutes expressly excluded from the cap under section 41.008(c)." *Zorrilla*, 469 S.W.3d at 157. In a civil case, a plaintiff must prove by clear and convincing evidence the elements of exemplary damages. Tex. Civ. Prac. & Rem. Code Ann. § 41.003(b). "'Clear and convincing' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Id*. § 41.001(2).

However, the state has to prove the elements of a crime by the beyond-a-reasonable-doubt standard. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071, 25 L. Ed. 2d 368 (1970); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Marin v. IESI TX Corp.*, 317 S.W.3d 314, 330 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (holding evidence legally sufficient to support finding beyond reasonable doubt that defendant misapplied fiduciary property by depositing funds tendered for payment to one company's account into another company's account that she also controlled). A finding of liability in a civil case should not have any collateral estoppel or res judicata effect in a subsequent criminal trial as the burdens of proof are different. *Osborne v. Coldwell Banker United Realtors*, No. 01-01-00463-CV, 2002 Tex. App. LEXIS 4930 (Tex. App.—Houston [1st Dist.] July 11, 2002, no pet.) (citing *State v. Benavidez*, 365 S.W.2d 638, 640 (Tex. 1963)). If the criminal trial is first, and the jury does not find the defendant guilty, that also does not have collateral estoppel effect in a subsequent civil proceeding as the burden of proof is lighter in the civil case. *See Ex Parte Watkins*, 73 S.W.3d 24, n. 16 (Tex. Crim. App. 2002) (citing *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235, 34 L. Ed. 2d 438, 93 S. Ct. 489 (1972) (noting that the difference between the burden of proof in criminal and civil trials prevents application of collateral estoppel in subsequent civil trial after acquittal on specific fact in criminal case with "beyond a reasonable doubt" standard)).

Interestingly, the crime of financial exploitation of the elderly is not an exception to the exemplary damages cap. Perhaps this is due to the fact that the Texas

Legislature created the criminal charge in 2011 and it was not on the books at the time that the Legislature created the exemplary damages statute. In any event, at least one court has considered this criminal charge in determining whether exemplary damages awarded was reasonably proportioned to the actual damages. *Natho v. Shelton*, 2014 Tex. App. LEXIS 5842 at *8. The court held:

> We conclude that the trial court's award of $20,000 in punitive damages is reasonably proportioned to actual damages in the amount of $33,096.11, considering the following applicable factors: (1) the nature of the defendant's wrongdoing (the unauthorized appropriation for Natho's personal benefit of appellee's personal and real property, including family heirlooms); (2) the character of the defendant's conduct (effectuated under the apparent authority of a power of attorney with respect to an elderly and infirm woman); (3) the degree of the defendant's culpability (despite his testimony at an earlier temporary-injunction hearing that he relied on the advice of financial advisers in spending appellee's money to qualify her for Medicaid, Natho refused to answer questions at trial on the ground of protecting himself against self-incrimination with respect to concurrent criminal proceedings against him for the same conduct); (4) the situation and sensibilities of the parties concerned (Natho was the ex-grandson-in-law of appellee, who was elderly, infirm, and living in a nursing home); and (5) the extent to which such conduct offends a public sense of justice and propriety (the legislature has deemed the "improper use" of the resources of an elderly individual especially reprehensible, making it a third-degree felony, see Tex. Penal Code § 32.53).

Id. Accordingly, even though the crime of financial exploitation of the elderly is not an exception to the exemplary damages cap, it may still be relevant in a civil proceeding.

E. Courts Can Award Restitution In A Criminal Case

Even if a party cannot assert a civil claim under a criminal statute, a criminal court has discretion to award a victim restitution as against the criminal defendant. *Jones v. State*, 2012 Tex. App. LEXIS 10549 (Tex. App.—Corpus Christi Dec. 20 2012, pet. ref'd). "Restitution was intended to 'adequately compensate the victim of the offense' in the course of punishing the criminal offender." *Cabla v. State*, 6 S.W.3d 543, 545 (Tex. Crim. App. 1999) (quoting Tex. Code Crim. Proc. Ann. art. 42.12 § 9(a)). A sentencing court may order a defendant to make restitution to any victim of the offense. Tex. Code Crim. Proc. Ann. art. 42.037(a). "[T]he amount of a restitution order is limited to only the losses or expenses that the victim or victims proved they suffered as a result of the offense for which the defendant was convicted." *Cabla*, 6 S.W.3d at 546. "An abuse of discretion by the trial court in setting the amount of restitution will implicate due-process considerations." *Campbell v. State*, 5 S.W.3d 693, 696

(Tex. Crim. App. 1999). Due process places four limitations on the restitution a trial court may order. First, "[t]he amount of restitution must be just, and it must have a factual basis within the loss of the victim." *Id*. Second, "[a] trial court may not order restitution for an offense for which the defendant is not criminally responsible." *Id*. at 697. Third, "a trial court may not order restitution to any but the victim or victims of the offense with which the offender is charged." *Id*. Fourth, a trial court may not, "without the agreement of the defendant, order restitution to other victims unless their losses have been adjudicated." *Id*. The standard of proof for determining restitution is a preponderance of evidence. Tex. Code Crim. Proc. Ann. art. 42.037(k). The burden of proving the amount of loss sustained by the victim is on the prosecution. *Id*. The restitution ordered must be "just" and must be supported by sufficient factual evidence in the record.

Because the request for restitution creates more work for prosecutors and is often seen as civil in nature, prosecutors are reluctant to request this form of relief.

X. Breach of Fiduciary Duty Judgment May Be Dischargeable In Bankruptcy

It is not uncommon for a successful plaintiff in a breach of fiduciary duty case to have their collection efforts thwarted by a defendant filing for bankruptcy. The issue is whether the state court judgment is dischargeable in bankruptcy. "[T]he issue of nondischargeability [is] a matter of federal law governed by the terms of the Bankruptcy Code." *Grogan v. Garner*, 498 U.S. 279, 284 (1991). In such a proceeding, the plaintiffs must "establish by a preponderance of the evidence that [their] claim is not dischargeable." *Id*. at 287. "Intertwined with this burden is the basic principle of bankruptcy that exceptions to discharge must be strictly construed against a creditor and liberally construed in favor of a debtor so that the debtor may be afforded a fresh start." *In re Hudson*, 107 F.3d 355, 356 (5th Cir. 1997). At the same time, the Bankruptcy Code "limits the opportunity for a completely unencumbered new beginning to the honest but unfortunate debtor." *Grogan*, 498 U.S. at 287

Section 523(a)(4) of the Federal Bankruptcy Code provides that an individual cannot obtain a bankruptcy discharge from a debt “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” 11 U.S.C. §523(a)(4). A defalcation must involve either (i) moral turpitude, bad faith, or other immoral conduct, or (ii) in lieu of these, an intentional wrong, which includes not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent, such as where the fiduciary consciously disregards, or is willfully blind to, a substantial and unjustifiable risk that his conduct will turn out to violate a fiduciary duty. *Bullock v. BankChampaign, N.A*., 133 S.Ct. 1754, 1759, 185 L.Ed.2d 922 (2013). That risk "must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves

a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." *Id*. at 1760.

In an adversary proceeding under § 523(a)(4), a bankruptcy court may apply collateral estoppel "to preclude relitigation of state court findings that are relevant to dischargeability." *Whitaker v. Moroney Farms Homeowners' Ass'n (In re Whitaker),* No. 15-40926, 2016 U.S. App. LEXIS 5018 (5th Cir. March 18, 2016). To have preclusive effect: 1) "the facts sought to be litigated in the second action" must have been "fully and fairly litigated in the prior action," 2) those facts must have been "essential to the judgment in the first action," and 3) the parties (in the second action) must have been "cast as adversaries in the first action." *Id*. (quoting *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984)). Where the state court judgment has sufficient findings of fact that support a finding of defalcation, a bankruptcy court may apply collateral estoppel and deny the discharge of the debt. *Id*. ("The state court concluded that Whitaker breached his fiduciary duties to the HOA when he: 1) 'knowingly incur[ed] attorney's fees and litigation and settlement expenses on behalf of the [HOA] to oppose a homeowner's proper request for association documents,' 2) 'knowingly sought and received money from the [HOA] for reimbursement of personal expenses,' and 3) 'knowingly sought and received money as a personal benefit from a third party contractor that was performing work paid for by the [HOA].'").

However, where the state court judgment does not have sufficient findings of fact to support defalcation, a bankruptcy could may grant discharge. A bankruptcy court presented with a state court judgment as evidence in support of a Section 523 exception may inquire into the true nature of the debt in order to make a dischargeability determination. *Brown v. Felsen,* 442 U.S. 127, 138 (1979).

In the recent case of *Smith v. Saden*, a plaintiff obtained a judgment against a defendant, which included a disgorgement award based on a breach of fiduciary duty. No. 10-35051, 2016 Bankr. LEXIS 877 (S.D. Tex. Bankr. March 7, 2016). The defendant filed for bankruptcy, and the plaintiff sought to have the judgment not discharged due to Section 523 (a)(2), (a)(4), and (a)(6). The plaintiff filed a motion for summary judgment. The bankruptcy court noted that regarding the breach of fiduciary duty claim, the plaintiff failed to plead or submit a jury question on whether the defendant committed acts of fraud, defalcation, and embezzlement. Because collateral estoppel could not apply, the court had to determine whether there was a fact question in the adversary proceeding regarding those issues. The court concluded:

> Without the benefit of Smith's pleading fraud or defalcation and obtaining a jury finding to that end, the Court declines to make such a determination at this stage. A material issue of fact exists as to whether the debt Saden owes Smith was obtained through actual fraud or fraud or defalcation while serving in a fiduciary capacity. Accordingly, Smith's motion is denied as to the trial court's award for equitable disgorgement and the interest thereon.

The court then noted that the plaintiff needed to request a trial on whether any amounts should be excepted from discharge due to the breach of fiduciary duty disgorgement.

So, it is important for a plaintiff who is suing a fiduciary who may file for bankruptcy to plead and seek express findings for fraud, defalcation while acting in a fiduciary capacity, embezzlement, or larceny so that the plaintiff can later take advantage of a breach of fiduciary duty liability finding and a damage, disgorgement, or forfeiture award. Otherwise, the bankruptcy court may discharge the debt or make the plaintiff retry the issues.

XI. Use of Company Policies To Establish The Violation of A Fiduciary Duty

A. Introduction

Plaintiffs often seek discovery on a financial institution's policies and procedures with an eye towards using that evidence against the institution. If a financial institution's representative or representatives did not live up to the policies and procedures, a plaintiff may argue that the institution did not live up to its fiduciary duty or the appropriate standard of care.

There is a very good argument against allowing this type of argument and admitting this type of evidence. Policies and procedures benefit the institution, the representative, the beneficiary or customer, and society in general. If financial institutions are reluctant to implement policies because they fear those policies being used against them, everyone will lose. Without policies to encourage representatives to do better, there may be worse service and performance.

Moreover, a fact finder should not judge an institution's performance by its policies. Institutions may want to not only comply with the law and industry standards but exceed them. So, an institution's policies and legal requirements are not necessarily the same, and one does not necessarily evidence the other. *See Grassie v. Roswell Hosp. Corp*., 150 N.M. 283 (N.M. Ct. App. 2010) ("The Agreement is evidence of a standard the Hospital set for itself. But a failure to follow it may or may not be negligent when viewed in the context of the entire screening process actually undertaken.").

To supplant an objective standard with a defendant's internal rule would create "perverse incentive[s]." *Briggs v. Wash. Metro. Area Transit Auth.*, 481 F.3d 839, 848 (D.C. Cir. 2004). Some companies, faced with potential liability for breaches of internal policies, might abandon all internal rules or edit their "operating procedures in such a manner as to impose minimal duties." *Id*. Meanwhile, businesses that "strive for excellence" and adopt internal rules and bylaws "exceed[ing] the prevailing standard" would be "unfairly penalize[d]." *Titchnell v. United States*, 681 F.2d 165, 173 (3d Cir. 1982). The more carefully the employer

"regulate[d] the conduct of his employees," the "more subject he [would] be to liability." *Longacre v. Yonkers Ft. Co.*, 236 N.Y. 119, 124 (1923).

B. Texas Courts Hold That Policies Do Not Evidence The Standard Of Care

In Texas, it is clear that a company's policies do not evidence the standard of care. In *FFE Transportation Services, Inc. v. Fulgham,* the Texas Supreme Court held that internal policies and procedures do not set the standard of care:

> [Defendant's] self-imposed policy with regard to inspection of its trailers, taken alone, does not establish the standard of care that a reasonably prudent operator would follow. As a Texas court of appeals explained, a company's internal policies "alone do not determine the governing standard of care." *Fenley v. Hospice in the Pines,* 4 S.W.3d 476, 481 (Tex. App.—Beaumont 1999, pet. denied). A federal court of appeals has also held that a defendant's internal policies do not, taken alone, establish the applicable standard of care. In *Titchnell v. United States*, 681 F.2d 165, 173 (3d Cir.1982), the court stated:
>
> > [I]f a health care facility, in striving to provide optimum care, promulgates guidelines for its own operations which exceed the prevailing standard, it is possible that care rendered at that facility by an individual practitioner on a given occasion may deviate from and fall below the facility's own standard yet exceed the recognized standard of care of the medical profession at the time. A facility's efforts to provide the best care possible should not result in liability because the care provided a patient falls below the facility's usual degree of care, if the care provided nonetheless exceeds the standard of care required of the medical profession at the time. Such a result would unfairly penalize health care providers who strive for excellence in the delivery of health care and benefit those who choose to set their own standard of care no higher than that found as a norm in the same or similar localities at the time.

154 S.W.3d 84, 92-93 (Tex. 2006). In *Fulgham*, the Court determined that evidence of a company's policies did not constitute any evidence of the standard of care. *Id*.

Another example is *Wal-Mart Stores, Inc. v. Wright*, in which the company manual established a policy of mopping up spills within a set period of time. 774 N.E.2d 891,894-95 (Ind. 2002). The Indiana Supreme Court held that the manual containing internal policies, practices, and rules represents the defendant company's "subjective view of the standard of care" and therefore could not form

the basis of a jury instruction on the objective duty of care mandated by law. *Id*. The court explained, "[r]ules and policies in the [Wal-Mart] Manual may have been established for any number of reasons having nothing to do with safety and ordinary care, including a desire to appear more clean and neat to attract customers, or a concern that spills may contaminate merchandise." *Id*. *See also Branham v. Loews Orpheum Cinemas, Inc*., 31 A.D.3d 319,323,819 N.Y.S.2d 250, 255 (N.Y.A.D. 2006) (theater's policy to check aisles every 15-20 minutes for obstructions or other impediments to movie-goers' enjoyment of the film imposed a higher duty of care than is required under the law and patron who tripped over a child sitting in the aisle could not state a claim based on alleged violation of the policy).

A company's policies are irrelevant where they contradict a legal duty and impose more strenuous standards. *Espalin v. Children's Med. Ctr*., 27 S.W.3d 675 (Tex. App.—Dallas 2000, no pet) (hospital's policy regarding informed consent did not preclude summary judgment where doctors, and not hospitals, owed a duty to provide informed consent).

Further, in Texas, a company's internal policies or procedures will not create a negligence duty where none otherwise exists. *Cleveland Reg'l Med. Ctr., L.P. v. Celtic Props., L.C.,* 323 S.W.3d 322 (Tex. App.—Beaumont 2010, pet. denied); *Houston Cab Co. v. Fields*, 249 S.W.3d 741, 747-48 (Tex. App.—Beaumont 2008, no pet.) (violation of independent contractor hiring policy does not show negligent entrustment); *Owens v. Comerica Bank*, 229 S.W.3d 544, 547 (Tex. App.—Dallas 2007, no pet.) ("The Texas Supreme Court has refused to create a standard of care or duty based upon internal policies, and the failure to follow such policies does not give rise to a cause of action in favor of customers or others."); *Entex, A Div. of Noram Energy Corp. v. Gonzalez*, 94 S.W.3d 1, 10 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *Rocha v. Faltys*, 69 S.W.3d 315, 324 (Tex. App.—Austin 2002, no pet.) (fraternity policy did not create legal duty); *Espalin v. Children's Med. Ctr*., 27 S.W.3d 675 (Tex. App.—Dallas 2000, no pet); *Fenley v. Hospice in the Pines*, 4 S.W.3d 476, 481 (Tex. App.—Beaumont 1999, pet. denied); *Jacobs-Cathey Co. v. Cockrum*, 947 S.W.2d 288, 291-92 (Tex. App.—Waco 1997, writ denied); *Estate of Catlin v. Gen. Motors Corp.*, 936 S.W.2d 447, 451 (Tex. App.—Houston [14th Dist.] 1996, no writ); *Williford Energy Co. v. Submergible Cable Servs., Inc*., 895 S.W.2d 379, 386-87 (Tex. App.—Amarillo 1994, no writ).

For example, in *Cox v. City of Fort Worth*, the plaintiff alleged that the defendant hospital breached a duty by failing to follow its own internal policies. 762 F.Supp.2d 926 (N.D. Tex. 2010). Plaintiffs specifically claimed that the defendant allegedly failed to exercise reasonable care in implementing and enforcing its policy concerning limitations on the number of visitors each emergency-room patient was allowed, and that it particularly failed to exercise reasonable care in communicating that information to plaintiffs prior to the decedent's arrival at the hospital. The court rejected this claim, holding: "Plaintiffs' negligence claim, grounded on Texas Health's alleged negligent implementation of its internal

policies, thus cannot pass the first hurdle: it fails to allege a legal duty. Having alleged no duty outside of the implementation of Texas Health's own internal policies, plaintiffs' negligence claim fails." *Id*. at 941.

Importantly, internal policies adopted by financial institutions do not create a duty toward customers. In *Texas Southwestern Med. Supply v. Texas Commerce Bank—Dallas, N.A*., a plaintiff asserted that a bank breached a duty of care by not following its own internal procedures and allowing a representative to endorse checks. No. 05-93-00001-CV, 1994 Tex. App. LEXIS 3747 (Tex. App.—Dallas June 2, 1994, no writ) (not designated for publication). The court held that the policies did not impact the bank's statutory duty: "TCB's teller procedures could not impose a legal requirement for endorsements on bearer instruments or checks payable to TCB when the code does not require it." *Id*. at *10. Also, in *Guerra v. Regions Bank*, a party sued a bank for negligence in the bank's opening of a joint account under his name and the name of another. 188 S.W.3d 744 (Tex. App.—Tyler 2006, no pet.). The plaintiff argued that "the risk, foreseeability, and likelihood of his injuries could have been 'guarded against' if Regions had followed its own banking procedures." *Id*. at 747. The court of appeals disagreed, stating: "A bank's internal policies do not determine a standard of care or duty." *Id*. *see also Owens v. Comerica Bank*, 229 SW.3d 544 (Tex. App.—Dallas 2007, no pet.) (industry customs, like internal policies, do not create duties).

Further, in *Ebenhoh v. Production Credit Ass'n of Southeast Minnesota*, the plaintiffs were farmers on whom the defendant credit association foreclosed. 426 N.W.2d 490,491 (Minn. Ct. App. 1988). The farmers sued on the grounds that the association violated its own policies and standards for making sound operating loans. *Id*. Distinguishing the internal policies from legislatively enacted statutes and regulations, the court rejected the plaintiffs' claim, flatly holding that internal policies create no such standard of care. *Id*. *See also AmSouth Bank v. Tice*, 923 So.2d 1060, 1067 (Ala. 2005) (Under Florida law, employee manual guidelines for tellers with respect to handling of checks were insufficient to establish any duty of care running from bank to customer separate and distinct from duty of care created under Florida's version of Uniform Commercial Code.).

C. Are Internal Policies Discoverable?

A fiduciary may want to fight the discovery and production of its internal policies and procedures. In Texas, discovery is permitted of any unprivileged information that is relevant to the subject of the lawsuit, including inadmissible evidence, so long as the request is reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. P. 192.3(a); *In Re American Optical Corp.*, 988 S.W.2d 711, 713 (Tex 1998). Information is relevant if it tends to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the information. Tex. R. Evid. 401; *R. K. v. Ramirez*, 887 S.W.2d 836, 842 (Tex. 1994). As the Texas Supreme Court stated:

> The ultimate purpose of discovery is to seek the truth, so disputes may be decided by what the facts reveal, not by what facts are concealed. For this reason, discovery is not limited to information that will be admissible at trial. To increase the likelihood that all relevant evidence will be disclosed and brought before the trier of fact, the law circumscribes a significantly larger class of discoverable evidence to include anything reasonably calculated to lead to the discovery of material evidence.

Janpole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984) (internal citation omitted), *overruled on other grounds*, *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992).

A fiduciary that is faced with a request for its internal policies and procedures may file a motion for protection and seek protection from a court from the request for information. Conversely, the fidicuary may simply object, and wait for the requesting party to file a motion to compel. Tex. R. Civ. P. 215.1(b), 215.2.

The main issue will be whether the policies and procedures are relevant or will lead to the discovery of admissible evidence. Of course, the issue of admissibility is different from the issue of whether certain evidence will lead to the discovery of other evidence. *Damgaard v. Avera Health*, 108 F.Supp.3d 689 (D.C. Minn. June 3, 2015). Even if a court were to allow discovery into policies and procedures, that does not mean that that evidence will necessarily be admitted at trial. *Id.* ("Judge Mayeron opined only that the policies were discoverable, and discoverability and admissibility, of course, are entirely separate issues, with the former far broader than the latter.").

In any event, many cases have held that policies are not relevant to the pleaded claims and should not be discovered. In one case, a plaintiff alleged conflict-of-interest allegations and wanted to see the defendant's policies on ethical walls for separating its investment banking and analyst divisions. *Xpedior Credit Trust v. Credit Suisse First Boston (USA), Inc*., 309 F.Supp. 459, 464-65 S.D. N.Y. 2003). The court held that these policies were not relevant because they would not indicate if an actual conflict of interest actually arose and denied a motion to compel:

> Xpedior has failed to articulate a basis upon which to conclude that this information is relevant to its claims. Even supposing that Xpedior's damages theory is correct, DLJ's Chinese Wall policy is in no way probative of actual conflicts of interest. If the policy strictly separates DLJ's analyst and investment banking divisions, that says nothing about whether anyone adhered to the policy. Given that this lawsuit does not present allegations of analyst conflicts, that Xpedior admits that analyst reports are only "one avenue" for valuing the issuers, … and that the Chinese Wall policies themselves are of limited use, these documents are simply not

> relevant. Accordingly, CSFB is not required to produce these policies.

Id. (internal citation omitted).

In a case dealing with a medical malpractice claim, a court denied a motion to compel the production of protocols and policies because they would not likely lead to the discovery of admissible evidence. *Hurdle v. Oceana Urgent Care*, 49 Va. Cir. 328, 1999 Va. Cir. LEXIS 333 (Va. Cir. Ct. July 15, 1999). The court stated:

> The standard of care in medical malpractice actions is established by statute, not by the private rules of a particular hospital. The plaintiff claims it is premature to decide this, citing cases allowing a custom or usage of a trade as evidence of the duty owed. Assuming, without deciding, that a breach of a custom or usage of the medical profession could be evidence of negligence in a medical malpractice action, it does not follow that the policies of a single hospital are likely to prove the custom and usage of the entire profession. Trade and professional organizations are legion in this country. They would likely be better sources of such information.

Id.

In *Jones v. Bank of Am., N.A*., a plaintiff sued a lender for alleged improper servicing of a home mortgage loan. No. 3:14-cv-11531, 2015 U.S. Dist. LEXIS 52214 (D.C. W.V. April 21, 2015). The district court denied the plaintiff's motion to compel the production of policies and procedures where they were not relevant to the claims asserted:

> BANA objects to producing internal guidelines, policies, and procedures based on their lack of relevancy. Plaintiffs have requested policies, procedures, and guidelines pertaining to the Escalation Management Program, loss mitigation, provision of settlement agreements, and audits of loss mitigation. Plaintiffs argue that the requests are limited in scope and relate to topics that are central to the case. Furthermore, they will show whether BANA complied with its own policies and whether it acted in good faith, or alternatively, acted unconscionably. However, the causes of action in Plaintiffs' complaint are well-defined and unrelated to BANA's policies, procedures, and guidelines. Plaintiffs' breach of contract claim will depend upon the terms of the contract, and the unconscionability claims are based upon specific contacts BANA allegedly had with Plaintiffs. Neither Plaintiffs, nor BANA, argue that BANA relies on any policy, procedure, or guideline as a defense.

> Therefore, the undersigned agrees with BANA that the policies, procedures, and guidelines are not relevant.

Id.

Other courts allow the discovery of policies and procedures where there is an argument that such may be admissible or may lead to admissible evidence. In *Swenson v. Oxford Bank & Trust*, a beneficiary sued a bank for breach of fiduciary duty and sought actual and punitive damages. No. 03-C-336, 2004 U.S. Dist. LEXIS 1126 (N.D. Ill January 27, 2004). The plaintiff sought "All Trust Investment Committee minutes or other notes (unredacted), including but not limited to those involving the review and approval of the bank's investment policies and practices…" The court granted this request, stating: "The Trust Investment Committees's actions and communications regarding the management of the bank's IRA accounts are relevant. They may demonstrate whether Oxford knew or should have known that the stocks contained in Swenson's and in other customer's IRAs contained poor investments and whether Oxford knew or should have known the accounts managed by Carl Rudolph were under diversified." *Id*.

Confidentiality can also be a legitimate concern that can justify a court denying a motion to compel policies. *See, e.g., Huertas v. Beard,* No. 1:10-cv-10-SJM-SPB, 2012 U.S. Dist. LEXIS 105631 (W.D. Penn. July 30, 2012) (district court denied motion to compel defendant's policies where they were confidential and would not be probative of what events actually occurred). Moreover, some courts refuse a motion to compel on policies where a witness has already testified about same in a deposition. *See, e.g., Wiand v. Wells Fargo Bank, N.A*., No. 8:12-CV0557-T-27EAJ, 2013 U.S. Dist. LEXIS 189999 (M.D. Fla. June 10, 2013). Even where courts may allow some discovery, the discovery must be narrow and not overly broad. *See, e.g., Wiand v. Wells Fargo Bank, N.A*., 2013 U.S. Dist. LEXIS at 189999; *Cahaly v. Benistar Prop. Exch. Trust Co.*, 885 N.E.2d 800, n. 36 (Mass. S. Ct. 2008); *Wright v. Suntrust Bank*, No. 1:04-CV-2258-CC, 2006 U.S. Dist. LEXIS 57111 (N.D. Ga. July 21, 2006) (only policies relevant are those in year of loan).

D. Are Policies Admissible In Evidence?

Admissibility is determined by the reason(s) behind why the evidence is being offered. As stated above, there is a good argument that policies should not be admissible regarding what the standard of care is or what fiduciary duties are owed. Texas courts have affirmed trial courts' decisions to exclude evidence of defendants' policies. For example, in *G4 Trading v. Nationsbank of Texas, N.A.*, a plaintiff asserted that a bank wrongfully sent a wire transfer. 937 S.W.2d 137, (Tex. App.—Houston 1996, no writ). The trial court excluded evidence concerning the bank's procedures to authorize and amend wire transfer orders that would have required a signed form before a transfer could be executed. The court of appeals affirmed the trial court's decision because the jury instructions at

issue in the case did not require a signed form. The court held: "once the jury's inquiry was reduced to the narrow question recited in the charge, the excluded evidence of NationsBank's policies was irrelevant. Therefore, the trial court did not err in excluding it." *Id*. Furthermore, in *Gardena Mem. Hosp. v. Parashar*, a trial court excluded evidence concerning a hospital's policies, and the plaintiff challenged this ruling on appeal. No. 14-94-01024-CV, 1996 Tex. App. LEXIS 3851 *10-13 (Tex. App.—Houston [14th Dist.] August 29, 1996, writ denied) (not designated for publication). The court of appeals affirmed, holding that the evidence concerning current policies were not necessarily relevant regarding the policies in place at the time of the incident. *Id*. *But see Jo Ann Howard & Assocs., P.C. v. Cassity*, No. 4:09CV01252, 2015 U.S. Dist. LEXIS 10035 (D.C. Mo. January 29, 2015) (Under Missouri law, the court held that "Once Plaintiffs establish the standard of care, the guidelines, policies, procedures or rules of a defendant may be introduced to support negligent conduct.").

Texas courts have similarly also held that violations of industry standards or regulations do not create legal duties and are not admissible. *B-R Dredgin Co. v. Rodriguez*, 564 S.W.2d 693, 697 (Tex. 1978) (Corp of Engineers Safety Manual does not set standard of care and is inadmissible); *Pate v. Texline Feed Mills, Inc.*, 689 S.W.2d 238, 245-46 (Tex. App.—Amarillo 1985, no writ) (National Electric Safety Code does not set standard of care and is inadmissible). *See also Rexrode v. American Laundry Press Co.*, 674 F.2d 826 (10th Cir. 1982); *Mississippi Power & Light Co. v. Whitescarver*, 68 F.2d 928 (5th Cir. 1934).

However, there may be other potentially valid reasons that a plaintiff would want to admit evidence of a policy. For example, in *Seay v. Travelers Indem. Co*., in a summary judgment appeal, a court of appeals reviewed a manual drafted, printed, and issued by the insurer for its authorized inspectors, which required that code violations be brought to the attention of its insured when discovered. 730 S.W.2d 774, (Tex. App.—Dallas 1987, no writ). The issue was whether an insurance company had a duty because it inspected a boiler, and the manual's directive was not asserted as the source of the insurer's duty, but rather as evidence of the purpose behind the insurer's undertaking of the inspections. *Id*. at 778-79.

Additionally, another court has held that even if internal policies and procedures do not create the standard of care and do not create a negligence duty, they may still be admissible and may be considered by an expert who may opine on the standard of care and causation. *See Dana Corp. v. Microtherm, Inc.*, No. 13-05000281-CV, 2010 Tex. App. LEXIS 408 (Tex. App.—Corpus Christi January 21, 2010, pet. granted, vacated in part by agr.). That court held:

> Dana argues that Microtherm's causation case cannot rest on Dana's own reports and internal evaluations and policies to substitute for the needed expert testimony. However, the cases relied upon by Dana, *FFE Transportation Services, Inc. v. Fulgham* and *Fenely v. Hospice in the Pines*, do not support this proposition.

> They provide only that a company's self-imposed policies do not establish the standard of care and cannot be substituted as the industry's standard of care in determining a breach. In this case, Trillo did not use Dana's self-imposed policies, reports, and internal evaluations to establish the standard of care. She did not substitute Dana's quality control reports for the industry's standard. Trillo provided expert testimony on causation. She reviewed Dana's own reports on quality control and its internal evaluations and used information from the reports to provide support for her opinion on causation. Neither case relied upon by Dana addresses the application of internal reports, evaluations, and policies to a determination of causation. Neither case supports a conclusion that Microtherm's expert cannot consider Dana's 8-D correction report or the April quality control report in arriving at an opinion on causation. Whether or not corrective actions were taken at Dana's assembly plant pursuant to a company policy which did or did not exceed the existing standard of care, the evidence established there was contamination in the assembly of the thermistors, which according to Trillo, was a producing cause of the failure of the thermistor.

Id. at *35-36. *See also Flowers v. Torrence Memorial Hosp. Med. Ctr.*, (1994) 8 Cal.4th 992, 45; *Jutzi v. County of Los Angeles,* (1988) 196 Cal.App.3d 637; *In re Irrevocable Inter Vivos Trust*, 305 N.W.2d 755 (Minn. 1981) (expert testimony about another bank's investment policies was admitted to prove that trustee did not breach duty).

For further example, evidence of a habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. Tex. R. Evid. 406. However, "proof of custom will not be admitted to contradict a fact plainly proved by positive testimony, nor is evidence of the custom of individuals engaged in business in one locality relevant on the question of usage in another locality." TEX. JUR. EVIDENCE § 190. Also, "evidence of a custom is not admissible where it violates a rule of law." *Id*.

It should also be noted that Texas Rule of Evidence 403 (similar to Federal Rule 403) states: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Tex. R. Evid. 403. Courts are careful to differentiate between using internal rules as evidence and using them as standards of conduct. But this distinction may not be apparent to a lay jury, and the evidence may be confusing to them and unfairly prejudicial to the defendant.

It is important to note that evidence may be competent for one purpose, but not for another. When evidence that is admissible as to one purpose but not admissible as to another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. Tex. R. Evid. 105(a). Courts have routinely held that a trial court should instruct a jury on the limited purpose of policies and that such policies may not be used as evidence of the standard of care. *Therrien v. Target Corp*., 617 F.3d 1242, 1256 (10th Cir. 2010); *Wal-Mart Stores v. Wright*, 774 N.E.2d 891 (Ind. 2002) (internal rules "can be received into evidence with an express caution that they are merely evidentiary and not to serve as a legal standard"); *Mayo v. Publix Super Mkts., Inc.*, 686 So. 2d 801, 802 (Fla. Dist. Ct. App. 1997) ("a party's own internal rule does not itself fix the legal standard of care in a negligence action," and the party "is entitled to appropriate jury instructions to that effect"); *Clarke v. N.Y.C. Transit Auth*., 174 A.D.2d 268, 276 (N.Y. App. Div. 1992) ("prejudicial error" to admit "the internal rules, without limiting instructions"). But where a party fails to object or request such an instruction, the court's action in admitting the evidence without limitation shall not be a ground for complaint on appeal.

Company policies may or may not be admissible in litigation depending on the jurisdiction and the issue. In any event, they should not be admissible for the purpose of establishing the legal duty or the standard of care that a defendant owed a plaintiff.

XII. Slayer Rule in Texas

The Texas Constitution states that "[n]o conviction shall work corruption of blood, or forfeiture of estate." Tex. Const. Art. I § 21 (emphasis added). The Texas Estates Code also states as much. Tex. Est. Code Ann. § 201.58(a). To put this into context, the concept of "corruption of blood" and "forfeiture of estate" emanated from the English common-law, and the impact was that the convicted "lost all inheritable quality and could neither receive nor transmit any property or other rights by inheritance." *Ex parte Garland*, 71 U.S. 333, 387 (1866). So those in England who committed a capital crime could not inherent. The "Texas Supreme Court has interpreted [article I, section 21] to mean that unlike in England where a convict is deemed civilly dead and cannot inherit, Texas preserves the inheritance of a convicted felon from forfeiture through corruption of blood." *In re B.S.W.*, 87 S.W.3d 766, 770 (Tex. App.—Texarkana 2002, pet. denied). This was likely important to early Texans who may not have been the most savory of folks.

There are several exceptions to the general rule in Texas that criminals can inherent. First, a person cannot receive insurance benefits from those that they kill. Tex. Est. Code Ann. § 201.58(b) (proceeds of life insurance policy may not be paid to beneficiary who is convicted of wilfully causing death of insured); *see also Greer v. Franklin Life Insurance Co.*, 221 S.W.2d 857, 859 (Tex. 1949); *Murchison v. Murchison*, 203 S.W. 423 (Tex. Civ. App.—Beaumont 1918, no writ). The Estates Code states that if a beneficiary of a life insurance policy or

contract is convicted and sentenced as a principal or accomplice in wilfully bringing about the death of the insured, then the proceeds shall be paid in the manner provided by the Insurance Code. The Insurance Code states that "[a] beneficiary of a life insurance policy or contract forfeits the beneficiary's interest in the policy or contract if the beneficiary is a principal or an accomplice in wilfully bringing about the death of the insured." Tex. Ins. Code Ann. § 1103.151. Under the Insurance Code provision, courts have held that a beneficiary need not be convicted of murder to forfeit his or her interest in the policy; rather, a party seeking to establish that a beneficiary has forfeited his or her right to collect on the policy need only prove by a preponderance of the evidence that the beneficiary willfully brought about the death of the insured. *In the Estate of Stafford*, 244 S.W.3d 368 (Tex. App.—Beaumont 2007, no pet.); *see also Bean v. Alcorta*, 2015 U.S. Dist. LEXIS 88874 (W.D. Tex. July 9, 2015). This does not mean that the insurance company does not have to pay the proceeds, it just does not pay them to the murdering beneficiary. *Clifton v. Anthony*, 401 F. Supp. 2d 686, 689–692 (E.D. Tex. 2005) (when wife forfeited by murdering husband, proceeds went to daughter as nearest living relative under Insurance Code). To establish a forfeiture, a party must establish that the beneficiary had an intent to kill, as negligence and gross negligence are not sufficient. *Rumbaut v. Labagnara*, 791 S.W.2d 195, 198–199 (Tex. App.—Houston [14th Dist.] 1990, no writ). Moreover, if the killing was legally justified, i.e., self-defense, the beneficiary will not forfeit his or her right to the proceeds. *Republic-Vanguard Life Ins. v. Walters*, 728 S.W.2d 415, 421–422 (Tex. App.—Houston [1st Dist.] 1987, no writ).

Second, there is an equitable exception to the general rule that a criminal may inherit. This exception is based on the concept of an equitable constructive trust. A constructive trust is an equitable, court-created remedy designed to prevent unjust enrichment. *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70 (Tex. 2015). They have historically been applied to remedy or ameliorate harm arising from a wide variety of misfeasance. Id. A constructive trust is based upon the equitable principle that a person shall not be permitted to profit from his own wrong. *Pope v. Garrett*, 147 Tex. 18, 211 S.W.2d 559, 560 (1948). In equity, Texas courts have held that a husband or wife who murders his or her spouse may not inherit under the spouse's will as a beneficiary under a constructive trust theory. *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977). This exception has been justified thusly: “The trust is a creature of equity and does not contravene constitutional and statutory prohibitions against forfeiture because title to the property does actually pass to the killer. The trust operates to transfer the equitable title to the trust beneficiaries.” *Id.; Medford v. Medford*, 68 S.W.3d 242, 248-49 (Tex. App.—Fort Worth 2002, no pet.) ("When the legal title to property has been obtained through means that render it unconscionable for the holder of legal title to retain the beneficial interest, equity imposes a constructive trust on the property in favor of the one who is equitably entitled to the same."). In other words, a constructive trust leaves intact a murderer’s right to inherit legal title to property while denying the murderer the beneficial interest.

An heir must plead for the imposition of a constructive trust over the property to be inherited by the murderer. *Id.; see also Bounds v. Caudle*, 560 S.W.2d 925, 928 (Tex. 1977); see also 9 GERRY W. BEYER, TEXAS PRACTICE SERIES: TEXAS LAW OF WILLS § 7.8 (3d ed. 2015) ("A person asserting a constructive trust must strictly prove the elements of a constructive trust including the unconscionable conduct, the person in whose favor the constructive trust should be imposed, and the assets to be covered by the constructive trust. Mere proof of conduct justifying a constructive trust is insufficient."). Like the statutory Slayer Rule, a party seeking a constructive trust must show more than mere negligence on the party of the beneficiary. *Mitchell v. Akers*, 401 S.W.2d 907, 910 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.) ("[T]he Legislature [did not intend] in effect to disinherit an unfortunate heir, innocent of intent to kill, whose contributory negligence has been found to be a proximate cause of the death of a person toward whom he occupied the status of an heir.").

If those elements are established, a court may create a constructive trust for the assets that would have gone to the murderer and instead direct that they benefit other more-innocent beneficiaries. *See, e.g., Smithwick v. McClelland*, No. 04-99-00562-CV, 2000 Tex. App. LEXIS 552 (Tex. App.—San Antonio January 26, 2000, no pet.) ("The trial court's conclusion to impose a constructive trust over the estate assets to which appellant would otherwise be entitled but for his commission of the murders, is consistent with Texas authority."); *Ford v. Long*, 713 S.W.2d 798 (Tex. App.—Tyler 1986, writ ref'd) (real estate was held in constructive trust to prevent murdering husband from obtaining it under right of survivorship agreement); *Thompson v. Mayes*, 707 S.W.2d 951 (Tex. App.—Eastland 1986, no writ); *Greer v. Franklin Life Ins. Co*., 148 Tex. 166, 221 S.W.2d 857 (1957); *Parks v. Dumas*, 321 S.W.2d 653 (Tex. Civ. App.—Fort Worth 1959, no writ); *Pritchett v. Henry*, 287 S.W.2d 546, 550-51 (Tex. Civ. App.—Beaumont 1955, writ dism'd w.o.j.). It is important to note that the equitable trust would only be placed to stop a murderer from receiving a beneficial interest, and it cannot be used to deprive a murderer of property lawfully acquired by him or her. *Ragland v. Ragland*, 743 S.W.2d 758 (Tex. App.—Waco 1987, no writ). For example, in Ragland, the murdering wife was entitled to her community property half of funds in an employer profit sharing plan. *Id*. ("[T[he funds were community property and, for that reason, the court could apply a constructive trust only on the one-half interest which Lee Ann Ragland would have otherwise inherited from her husband under the laws of descent and distribution.").

There is also a relatively new statute that would seemingly allow a probate court to not allow a murderer to inherent under a will. In Estates Code section 201.062, a probate court may enter an order declaring that the parent of a child under 18 years of age may not inherit from the child if the court finds by clear and convincing evidence that the parent has been convicted or has been placed on community supervision for being criminally responsible for the death or serious injury to the child and that such conduct would constitute a violation of certain enumerated Penal Code statutes. Tex. Est. Code Ann. § 201.062(3). The Texas

Attorney General has offered the following opinion as to the constitutionality of this new statute: “To the extent that this provision authorizes a probate court to bar a person's inheritance from his child under circumstances within the Slayer's Rule or the constructive trust doctrine, it is consistent with Texas Constitution article I, section 21 as construed by the Texas courts. In our opinion, however, the courts would probably find Probate Code section 41(e)(3) violative of article I, section 21 when applied to bar a wrongdoer's inheritance under circumstances not within either of these two doctrines.” Atty. Gen. Op. No. GA-0632 (2008).

New Case Summary: In *Estate of Huffines*, the wife and husband opened a checking account and a savings account that were joint accounts with rights of survivorship. No. 02-15-00293-CV, 2016 Tex. App. LEXIS 4469 (Tex. App.—Fort Worth April 28, 2016, no pet. history). Both made deposits into the accounts. Three months later, the husband shot and killed the wife and then committed suicide. The wife’s estate claimed that the entire amount in the accounts should go to it because of the Slayer Rule and also because the money was allegedly the wife’s separate property. After an investigation, the bank disbursed half of money to the wife’s estate and held the other half pending some order from a court determining the rightful owner. The bank’s account agreement allowed it to freeze an account where there was a dispute as to the funds. The procedural facts are convoluted, to the say the least, but the wife’s estate brought claims against the bank for failing to disburse all of the money to it. The trial court eventually entered an order for the bank, and the wife’s estate appealed.

The court of appeals affirmed. The court first addressed the separate property issue, and held that the evidence showed that both the wife and husband made deposits, so there was a fact issue as to how much of money in the accounts was owned by both. The court then turned to the Slayer Rule argument. The court noted that Texas law generally provides that a husband or wife who murders his or her spouse may not inherit under the spouse's will as a beneficiary. The court also held that an heir must plead for the imposition of a constructive trust over the property to be inherited by the murderer. That was not done in this case. The court concluded that “[u]ntil the constructive-trust issue is proven and decided, the Estate's claim to the remaining $7,500 is not conclusive[,]” and the wife’s estate had no claim against the bank. Id. “In other words, the summary-judgment evidence shows that reasonable minds could differ on the appropriate disposition of the remaining funds in the joint accounts, justifying a conclusion that there is no genuine issue of material fact regarding the Estate's claims against Appellees for failure to release those funds in the absence of a court order.” *Id*.

Interesting Note: The husband in *Estate of Huffines* still owned his share of community property in the bank accounts. If a joint account is determined to not have survivorship language, then before a court can award the money in the account to an estate, the estate representative has to prove that the funds in the account were all the decedent's funds. *In re Estate of Graffagnino*, 2002 Tex. App. LEXIS 6930, at *5 (Tex. App.—Beaumont Sept. 26, 2002, pet. denied). Any

funds that were deposited by the beneficiary into a joint account without survivorship effect belongs to the beneficiary after a co-party's death. *Id*. So, in *Estate of Huffines*, the wife's estate did not have any claim to the husband's funds in the joint account. Rather, under any version of the Slayer Rule in Texas, the wife's estate would only be entitled to: 1) a finding that the husband's estate would not receive any insurance proceeds from her life insurance policy (which was not raised in this case), and 2) a claim for a constructive trust as to any of the wife's assets that would transfer to her husband at her death. That potentially could include funds in a joint account with rights of survivorship that originally belonged to the wife. But, once again, the wife's estate had to request a constructive trust and prove the elements for same. That claim should be against the husband's estate. The estate would not be entitled to a claim against the bank until that issue is resolved under the bank's account agreement.

Further, a multiple-party account may be paid, on request, to any one or more of the parties to the account. Tex. Est. Code Ann. §113.202. Moreover, the Estates Code has specific provisions allowing a financial institution to pay account parties for joint accounts, P.O.D. accounts, and trust accounts. "A financial institution that pays an amount from a joint account to a surviving party to that account in accordance with a written agreement under Section 113.151 is not liable to an heir, devisee, or beneficiary of the deceased party's estate." Tex. Est. Code Ann. §113.207. The Estates Code also expressly states that payment in accordance with these provisions discharges a financial institution from liability. Tex. Est. Code Ann. §113.209; *Clark v. Wells Fargo Bank, N.A.*, No. 01-08-00887–CV, 2010 Tex. App. LEXIS 4376 (Tex. App.—Houston [1st District] June 10, 2010, no pet.).

XIII. Conclusion

Due to the considerable wealth that is being transferred from one generation to the next, there will certainly be an increased level of litigation concerning that transfer. Claims of undue influence and mental incompetence will become more and more litigated in a variety of contexts. This paper was intended to provide an update of recent legal issues in this complex area.