JOINT ACCOUNT LITIGATION IN TEXAS

DAVID F. JOHNSON
Winstead PC
dfjohnson@winstead.com
www.txfiduciarylitigator.com
300 Throckmorton Street, Suite 1700
Fort Worth, TX 76102
817-420-8223

DAVID FOWLER JOHNSON
DFJOHNSON@WINSTEAD.COM

Managing Shareholder of Winstead PC's Fort Worth Office
300 Throckmorton Street, Suite 1700
Fort Worth, Texas 76102
(817) 420-8223

David maintains an active trial and appellate practice for the financial services industry. David's financial institution experience includes (but is not limited to): account litigation, breach of contract, special servicer litigation, foreclosure litigation, lender liability, receivership and injunction remedies upon default, non-recourse and other real estate lending, class action, RICO actions, usury, various tort causes of action, breach of fiduciary duty claims, and preference and other related claims.

David has also specialized in trust and estate disputes including: trustee resignation/removal, breach of fiduciary duty and related claims, accountings, trust modification/clarification, will contests, mental competency issues, and undue influence. David is the author of a blog that regularly reports on fiduciary issues in Texas: www.txfiduciarylitigator.com.

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

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

David has published over twenty (20) law review articles on various litigation topics. David's articles have been cited as authority by federal courts, the Texas Supreme Court (three times), the Texas courts of appeals located in Waco, Texarkana, Tyler, Beaumont, and Houston, and cited by McDonald and Carlson in their Texas Civil Practice treatise and William V. Dorsaneo in the Texas Litigation Guide and in the Baylor Law Review, South Texas Law Review, and the Tennessee Law Review. David has presented and/or prepared written materials for over seventy-five (75) continuing legal education courses.

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I. INTRODUCTION[1]

This article is meant to be a practical guide for attorneys who must deal with issues concerning joint account litigation in Texas. That may entail litigation regarding whether an account has rights of survivorship ("JTROS"), who owns the funds in an account, the failure to properly create an account, paying fraudulent requests for funds, and taking action in a retirement account. This paper attempts to address these and other issues that arise from litigating accounts in Texas.

II. REASONS TO CREATE JOINT ACCOUNTS

Parties often enter into joint banking accounts. There are a number of very valid reasons for doing so. For example, a person may want to allow another access to their money to assist with paying bills and caring for the original owner of the funds. Several persons may want to jointly save for a goal, such as a vacation home, automobile, education, etc. Persons may want to jointly deposit money to ensure that minimum balance requirements are met, and may allow individuals to qualify more easily for features like waived maintenance fees, higher interest rates, and rewards.

Having a joint account can allow both individuals to see how the money is being spent so that they can more easily budget together as a couple and this may lessen the temptation to spend on discretionary items or make purchases in secret. Having two individual accounts allow each individual to spend in secret.

The main danger, of course, is that a signatory on the account can withdraw money without the knowledge or consent of the other signatories. So, one person can spend money that is owned by another.

III. CREATION OF BANK ACCOUNTS

A bank account, including a joint account, is created when the customer and the bank execute an account agreement. The Texas Finance Code provides that a deposit contract between a bank and an account holder "is considered a contract in writing for all purposes and may be evidenced by one or more agreements, deposit tickets, signature cards, or notices as provided by [Finance Code] Section 34.302, or by other documentation as provided by law." Tex. Fin. Code Ann. § 34.301(a). Section 34.302(a) provides that a bank and an account holder may amend the deposit contract "by agreement or as permitted by Subsection (b) or other law." *Id*. § 34.302(a) (Vernon 2013). Section 34.302(b) allows a bank to amend a deposit contract by mailing a written notice of the amendment, including the text of the amendment and the effective date, to the account holder. *Id*. § 34.302(b).

IV. CUSTOMERS' AND BANKS' RIGHTS REGARDING ACCOUNTS

Article 4 of the Uniform Commercial Code ("UCC"), found in Texas Business and Commerce Code Chapter 4, establishes the rights and duties between banks and their customers regarding deposits and collections. *Am. Airlines Emps. Fed. Credit Union v. Martin*, 29 S.W.3d 86, 91 (Tex. 2000); see Tex. Bus. & Com. Code Ann. §§ 4.101-.504. For example, under this

[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.

statutory scheme, a bank is liable to its customer if it charges the customer's account for an item that is not properly payable from that account, such as items with an unauthorized signature. *Martin*, 29 S.W.3d at 91; *see* Tex. Bus. & Com. Code Ann. § 4.401(a) ("A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and the bank.").

V. OWNERSHIP OF FUNDS IN A JOINT ACCOUNT

Disputes can arise between parties to an account regarding the right to withdraw money from the account. Initially, either party to a joint account has the authority to withdraw or encumber the account. Tex. Est. Code §113.251 (Tex. Prob. Code Ann. §442); *In re Marriage of McNelly*, No. 14-13-00281-CV, 2014 Tex. App. LEXIS 5193, 2014 WL 2039855 (Tex. App.—Houston [14th Dist.] May 15, 2014, pet. denied); *McConathy v. McConathy*, No. 05-95-01036-CV, 1997 Tex. App. LEXIS 1592 (Tex. App.—Dallas April 1, 1997, no writ) (not design. for pub.); *Fain v. Texas Commerce Bank N.A.*, No. 05-95-01085, 1996 Tex. App. LEXIS 5860 (Tex. App.—Dallas December 4, 1996, writ denied). *But see Miller v. Unger*, No. 03-10-00795-CV, 2011 Tex. App. LEXIS 6125 (Tex. App.—Austin August 4, 2011, no pet.) (payable on death beneficiary has no right to withdraw funds from CD). Therefore, a third party can rely on the fact that a party to an account has authority to dispose of the funds. *Fain*, 1996 Tex. App. LEXIS 5860. But, that does not answer the question: between the parties to the account, who owns the funds?

Joint accounts are considered "multiple-party accounts." Tex. Est. Code §113.004 (Tex. Prob. Code Ann. § 436(5). A "party" to such an account is defined as "a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account." *Id*. at Tex. Est. Code §113.002 (Tex. Prob. Code Ann. §436(7)). "During the lifetime of all parties to a joint account, the account belongs to the parties in proportion to the net contributions by each party to the sums on deposit unless there is clear and convincing evidence of a different intent." *Id*.; *see Bechem v. Reliant Energy Retail Servs., LLC*, No. 14-13-00729-CV, 2014 Tex. App. LEXIS August 5, 2014 (Tex. App.—Houston [14th Dist.] August 5, 2014, no pet.). A party's net contribution is "the sum of all deposits made to that account by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance."

Section 113.101 explains that the pertinent statutes concern only the beneficial ownership of such accounts and have no bearing on the right of withdrawal:

> The provisions of this subchapter and Subchapters B and D that relate to beneficial ownership between parties, or between parties and P.O.D. payees or beneficiaries of multiple-party accounts: (1) are relevant only to controversies between those persons and those persons' creditors and other successors; and (2) do not affect the withdrawal power of those persons under the terms of an account contract.

Tex. Est. Code §113.101 (Tex. Prob. Code Ann. §437).

For example, in *Nipp v. Broumley*, the case involved whether an estate or the son of the decedent owned funds that were in CDs that the son withdrew days before the decedent's death. 285 S.W.3d 552 (Tex. App.—Waco 2009, no pet.). Walterine Broumley purchased three CDs. They were payable to her or Terry Broumley, her son. Eight days before her death, Terry cashed in all three CDs, worth about $76,000. Walterine Broumley's daughter, Nipp, learned about the existence of the CDs while caring for her mother. After Nipp discovered that the CDs were not listed on the estate's inventory, she filed suit seeking a declaration that the CDs were property of the estate and an order requiring Terry to reimburse the estate for their value. The trial court ruled for Terry after a bench trial. Nipp appealed.

The court of appeals began its analysis by discussing the rules for ownership over the money in accounts. After citing various Probate Code and UCC provisions, the court of appeals noted that it was undisputed that Mrs. Broumley was the sole source of the funds in the CDs, and therefore, she retained beneficial ownership of these funds at the time of the withdrawal unless Terry Broumley could prove that she gifted these funds to him.

The elements for a gift are: (1) the donor's intent to make a gift; (2) delivery of the property; and (3) acceptance of the property. Donative intent must exist at the time of the transfer, not at the time of a subsequent event. Terry Broumley's burden was to prove a gift by clear and convincing evidence. The requisite donative intent is established by, among other things, evidence that the donor intended an immediate and unconditional divestiture of his or her ownership interests and an immediate and unconditional vesting of such interests in the donee.

The evidence showed that Terry testified that there were several instances over the years when his mother discussed with him her intent that he have the funds from the CDs to use as he needed or as he pleased. The last time that they had such a conversation was an unspecified time before the bad days of her illness, when she started receiving hospice care. Terry admitted that during this same time period, his mother retained the authority to cash the CDs herself. In fact, she kept the CDs in a lock box in her house where they remained until Terry retrieved them and cashed them at the bank.

The court determined that this was not sufficient evidence to support a gift. First, the evidence established that days or weeks passed between the date of Terry's last conversation with his mother about the CDs and the date he cashed them. And second, his mother retained control over the funds until the date Terry withdrew them. Thus, the court concluded that no reasonable factfinder could have formed a firm belief or conviction that an immediate and unconditional divestiture of his mother's ownership occurred on the occasion of their last conversation regarding her intentions about the CDs. Therefore, the court reversed the trial court's judgment awarding the funds to Terry and rendered that the funds from the CDs were the property of the estate.

Assertions of gifts often arise in the context of a joint account. *See Castelnuovo v. Faieta*, No. 11-12-00085-CV, 2014 Tex. App. LEXIS 9250 (Tex. App.—Eastland August 21, 2014, no pet.) (transfer from joint account was wife's separate property because husband had no evidence of any intent to give gift of half of funds to him).

In *Oadra v. Stegall*, the second party to a trust account asserted that the first party intended to gift the funds in the account. 871 S.W.2d 882 (Tex. App.—Houston [14th Dist.] 1994, no pet.). The jury returned a verdict that there was no gift. The court of appeals affirmed. The court emphasized that to have a gift there has to be some immediate divestiture of rights of ownership and a release of dominion and control. *Id*. at 890. The court pointed to the following evidence in the record to support the jury's answer: the first party funded the entire account, was a trustee on the account, did not remove his name from the account, and continued to exercise exclusive control over the account. *Id*. Indeed, simply adding someone to a joint account is not sufficient to prove donative intent to create a gift of the funds in the account. *McNair v. Deal*, No. 13-05-264-CV, 206 Tex. App. LEXIS 10274 (Tex. App.—Corpus Christi November 30, 2006, pet. denied); *McConathy v. McConathy*, 1997 Tex. App. LEXIS 1592. Regarding trust accounts, the death of one party to the trust account does not create survivorship rights in the remaining trustee absent language that expressly so provides. *Stegall v. Oadra*, 868 S.W.2d 290 (Tex. 1993).

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. *See id*.

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

It should be noted that an estate may use funds in a joint account where estate assets are not sufficient to pay expenses. Tex. Est. Code Ann. §113.251-.252 (Tex. Prob. Code Ann. §442); *Estate of Preston*, 346 S.W.3d 137 (Tex. App.—Fort Worth 2011); *In re Harden*, 2004 Tex. App. LEXIS 6413 (Tex. App.—Fort Worth July 15 2004, original proceeding).

VI. <u>VALID SURVIVORSHIP ACCOUNTS</u>

The payment of account funds to the beneficiary of survivorship account is considered a nontestamentary transfer. Tex. Est. Code Ann. § 111.052(b); Tex. Est. Code Ann. § 113.158; *In the Estate of Perez Muzza*, 446 S.W.3d 415, 424 (Tex. App.—San Antonio 2014, pet. denied). Proceeds from a nontestamentary transfer pass outside of probate proceedings, and the personal representative of the decedent's estate generally has no authority with respect to them. *Bank of Am., N.A. v. Eisenhauer*, 474 S.W.3d 264, 265 (Tex. 2015); *Irwin v. Irwin*, 307 S.W.3d 383, 385 (Tex. App.—San Antonio 2009, pet. denied). Additionally, no rights to the proceeds accrue to those who would take under the decedent's will or through the laws of intestacy. *Id*. So, whether an account has survivorship effect is very important regarding who owns those funds after the original owner's death.

A. Background Regarding Survivorship Accounts

Parties can own property in either joint tenancy or in tenancy in common. *Holmes v. Beatty*, 290 S.W.3d 852, 857-58 (Tex. 2009). A joint tenancy carries rights of survivorship, whereas tenancy in common does not. *See id*. Joint tenancy is a "[f]orm of ownership where two or more individuals hold shares as joint tenants with right of survivorship. When one tenant dies, the entire tenancy remains to the surviving tenants." *Id*. (citing Sec. Transfer Assoc., Guidelines of the Securities Transfer Association AV-1 (Oct. 2005)). "[A] joint tenancy cannot be held without rights of survivorship; such a joint agreement would be a tenancy in common." *Id*.

However, "the right of survivorship as an essential legal incident of joint ownership has not been favored in this country and consequently has been abolished in most American jurisdictions." *Stauffer v. Henderson*, 801 S.W.2d 858, 860 (Tex. 1990). Texas eliminated automatic survivorship in 1848. *Id.* "Elimination of the right of survivorship as a necessary, legally imposed element of joint estates does not prohibit joint owners from agreeing that each will take the other's interest in the property at the other's death." *Id*.

The parties to a joint account at a bank may make a valid and enforceable written agreement that funds deposited by either of them will belong to the survivor. *Id*. at 862-63. But, regarding joint bank accounts, there has historically been "considerable confusion" regarding the effect of particular agreements. *Id*. at 860. As the Texas Supreme Court described:

> This confusion is due in part to the very different reasons parties have for opening joint accounts. It is not at all unusual for a person to deposit his or her funds into an account upon which another person is authorized to draw merely for the convenience of the depositor. The owner of the money intends only to facilitate disbursement of the funds for his or her own purposes, not to transfer title to the co-signator on the account. It is no less common for a depositor of funds into a joint account to intend that at some point in time, at the depositor's death if not before, those funds will become the property of the co-signator. Thus, both common experience, as well as the express language of section 46, prohibit an inference from the mere creation of a joint account that the parties intend for ownership of the funds to pass automatically upon the death of one of them.

Id. at 861.

The Texas Estates Code provides that if two or more persons hold an interest in property jointly and one joint owner dies before severance, the interest of the decedent in the joint estate: (1) does not survive to the remaining owner or owners, and (2) passes by will or intestacy from the decedent as if the decedent's interest had been severed. Tex. Est. Code Ann. §101.002. Notwithstanding this provision, the Code goes on to provide that two or more persons who hold an interest in property jointly may agree in writing that the interest of a joint owner who dies survives to the surviving joint owner or owners. *Id.* at §111.001(a). But, this may not be inferred from the mere fact that property is held in joint ownership. *Id.* at §111.001(b).

B. Texas Estates Code Provides Requirements For The Creation Of Survivorship Accounts

To assist with the confusion regarding joint accounts, the Texas Legislature enacted a statute that dictated the type of language that was required to create survivorship rights. Tex. Prob. Code Ann. § 439. In 1979, the Legislature added chapter XI entitled "Nontestamentary Transfers" to the Probate Code. *Id*.

It should be noted that the Texas Probate Code was repealed as of January 1, 2014. Those provisions were recodified in the Texas Estates Code. The Texas Estates Code was not intended to make any substantive changes to the Probate Code. Tex. Est. Code §21.001(a). References in this article will be to both the Probate Code and the Estates Code.

There are three types of accounts included in the Estates Code: joint accounts, P.O.D. accounts, and trust accounts. Tex. Est. Code Ann. § 113.004 (Tex. Prob. Code Ann. § 436(5)); *Stogner v. Richeson*, 52 S.W.3d 903 (Tex. App.—Fort Worth 2001, pet. denied). A financial institution is authorized to enter into a multiple-party account to the same extent that it may enter into single-party accounts. Tex. Est. Code Ann. § 113.005.

"'Joint account' means an account payable on request to one or more of two or more parties, regardless of whether there is a right of survivorship." Tex. Est. Code Ann. § 113.004(2) (Tex. Prob. Code Ann. § 436(4)). Certificates of deposit (CDs) are accounts and can be joint accounts for purposes of the Estates Code where they are payable on request to one or more of two or more parties. *Bandy v. First State Bank*, 1992 Tex. LEXIS 37 (Tex. 1992), *opinion withdrawn by, substituted opinion at* 835 S.W.2d 609 (Tex. 1992).

"'P.O.D. account' means an account payable on request to (A) one person during the person's lifetime and, on the person's death, to one or more P.O.D. payees, or (B) to one or more persons during their lifetimes and, on the death of all of them, to one or more P.O.D. payees." Tex. Est. Code Ann. § 113.004(4) (Tex. Prob. Code Ann. § 436(10)); *In the Estate of Perez Muzza*, 446 S.W.3d 415, 424 (Tex. App.—San Antonio 2014, pet. denied); *Punts v. Wilson*, 137 S.W.3d 889 (Tex. App.—Texarkana 2004, no pet.). The POD beneficiary has no right to withdraw the funds while the owner is still alive. *Bank of Am., N.A. v. Eisenhauer*, 474 S.W.3d 264, 265 (Tex. 2015).

A "Trust account" means:

> [A]n account in the name of one or more parties as trustee for one or more beneficiaries in which the relationship is established by the form of the account and the deposit agreement with the financial institution and in which there is no subject of the trust other than the sums on deposit in the account. The deposit agreement is not required to address payment to the beneficiary. The term does not include (A) a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or (B) a fiduciary account arising

> from a fiduciary relationship, such as attorney-client.

Tex. Est. Code Ann. § 113.004(5) (Tex. Prob. Code Ann. § 436(14)); *Stogner v. Richeson*, 52 S.W.3d at 903; *Cweren v. Danziger*, 923 S.W.2d 641, 644 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Isbell v. Williams*, 705 S.W.2d 252, 255 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.); *Otto v. Klement*, 656 S.W.2d 678, 682 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

There is also a convenience account that does not provide for any survivorship effect. Tex. Est. Code Ann. § 113.004(1) (Tex. Prob. Code Ann. § 438A), § 113.105. A convenience signer does not own the account and has no right of survivorship, but she may draw upon it for the benefit of a depositor. *Id*. §§ 113.105, 113.154; *Bechem v. Reliant Energy Retail Servs., L.L.C.*, 441 S.W.3d 839, n. 1 (Tex. App.—Houston [14th Dist.] 2014, no pet.). A party to a convenience account is not considered to have made a gift of the deposit, or any additional deposits or accruals to the deposits, to a convenience signer. Tex. Est. Code Ann. § 113.105(b). Any additions to the account by anyone other than a party, and accruals to the addition, are considered to have been made by a party. *Id*. at § 113.105(c).

The Estates Code provides the exclusive means for creating a right of survivorship in joint, P.O.D., and trust accounts in Texas. *Kirkpatrick v. Cusick*, No. 13-13-00149-CV, 2013 Tex. App. LEXIS 15435 (Tex. App.—Corpus Christi December 19, 2013, pet. denied). This includes checking accounts, savings accounts, certificates of deposit, share accounts, and other like arrangements. Tex. Est. Code Ann. § 113.001(1) (Tex. Prob. Code Ann. §§ 436(l), 450). Regarding joint accounts, the Texas Estates Code states:

> (a) Sums remaining on deposit on the death of a party to a joint account belong to the surviving party or parties against the estate of the deceased party if the interest of the deceased party is made to survive to the surviving party or parties by a written agreement signed by the party who dies.
>
> (b) Notwithstanding any other law, an agreement is sufficient under this section to confer an absolute right of survivorship on parties to a joint account if the agreement contains a statement substantially similar to the following: "On the death of one party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate."
>
> (c) A survivorship agreement may not be inferred from the mere fact that the account is a joint account or that the account is designated as JT TEN, Joint Tenancy, or joint, or with other similar language.
>
> (d) If there are two or more surviving parties to a joint account that is subject to a right of survivorship agreement:

> (1) during the parties' lifetimes respective ownerships are in proportion to the parties' previous ownership interests under Sections 113.102, 113.103, and 113.104, as applicable, augmented by an equal share for each survivor of any interest a deceased party owned in the account immediately before that party's death; and
>
> (2) the right of survivorship continues between the surviving parties if a written agreement signed by a party who dies provides for that continuation.

Tex. Est. Code Ann. § 113.151 (Tex. Prob. Code Ann. § 439(a)).

Regarding P.O.D. accounts, the Texas Estates Code provides:

> (a) If the account is a P.O.D. account and there is a written agreement signed by the original payee or payees, on the death of the original payee or on the death of the survivor of two or more original payees, any sums remaining on deposit belong to:
>
> (1) the P.O.D. payee or payees if surviving; or
>
> (2) the survivor of the P.O.D. payees if one or more P.O.D. payees die before the original payee.
>
> (b) If two or more P.O.D. payees survive, no right of survivorship exists between the surviving P.O.D. payees unless the terms of the account or deposit agreement expressly provide for survivorship between those payees.

Tex. Est. Code Ann. § 113.152 (Tex. Prob. Code Ann. § 439(b)).

Regarding Trust Accounts, the Texas Estates Code provides:

> (a) If the account is a trust account and there is a written agreement signed by the trustee or trustees, on death of the trustee or the survivor of two or more trustees, any sums remaining on deposit belong to:
>
> (1) the person or persons named as beneficiaries, if surviving; or
>
> (2) the survivor of the persons named as beneficiaries if one or more beneficiaries die before the trustee.
>
> (b) If two or more beneficiaries survive, no right of survivorship exists between the surviving beneficiaries unless the terms of the account or deposit agreement expressly provide for survivorship between those beneficiaries.

Tex. Est. Code Ann. § 113.153 (Tex. Prob. Code Ann. § 439(c)).

"Transfers resulting from the application of Sections 113.151, 113.152, 113.153, and 113.155 are effective by reason of the account contracts involved and this chapter and are not to be considered testamentary transfers or subject to the testamentary provisions of this title." Tex. Est. Code Ann. § 113.158 (Tex. Prob. Code Ann. § 441); *In re Ernst*, 2011 Tex. App. LEXIS 182 (Tex. App.—San Antonio January 12, 2011, no pet.).

C. Statutory Requirements For Creating Survivorship Accounts

Whether an agreement adequately describes the "survival" language is often an area of litigation. Statutory requirements for the creation of a right of survivorship for an account are that there be (1) a written agreement, (2) signed by the decedent, (3) which makes his interest "survive" to the other party. *Kennemer v. Fort Worth Community Credit Union*, 335 S.W.3d 843, 846 (Tex. App.—El Paso 2011, pet. denied). The effectiveness of the survivorship language is judged from the account agreement in place at the time of the death of a party. Tex. Est. Code Ann. § 113.156 (Tex. Prob. Code Ann. § 440).

Although there must be a written agreement, the bank does not have to retain a copy of the agreement. *Cweren v. Danziger*, 923 S. W.2d at 644. A copy of an account agreement held by a customer or his or her attorney is still effective. *Id*. Similarly, a party does not have to retain all of the account agreement for it to be effective. *Allen v. Wachtendorf*, 962 S.W.2d 279, 282 (Tex. App.—Corpus Christi 1998, pet. denied) (bank's electronic version of second page of signature card was sufficient to prove survivorship account even where party did not retain a copy of same).

In 1993, the Texas Legislature enacted a provision entitled "Uniform Single-Party or Multiple-Party Account Form," to provide acceptable forms of survivorship language. Tex. Est. Code Ann. § 113.052 (Tex. Prob. Code Ann. § 439A); *Kennemer*, 335 S.W.3d at 846; *In re Estate of Dellinger*, 224 S.W.3d 434, 438 (Tex. App.—Dallas 2007, no pet.). Although it provides form language to establish particular types of accounts, it also states that a financial institution may vary the format of the form and "make disclosures in the account agreement or in any other form which adequately discloses the information provided in this subsection." Tex. Est. Code Ann. § 113.053 (Tex. Prob. Code Ann. § 439A(c)). This provision is a "supplement to section 439(a), adding alternative acceptable forms of survivorship language." *Allen v. Wachtendorf*, 962 S.W.2d at 283.

D. *Stauffer v. Henderson*: Party Cannot Use Parol Or Extraneous Evidence To Create Survivorship Account

The issue of adequate "survival" language comes up when the parties diverge from the statutorily approved forms. The leading case interpreting survivorship accounts is the Texas Supreme Court's opinion in *Stauffer v. Henderson*, 801 S.W.2d 858 (Tex.1990). In that case, the Court held that language on a signature card did not create rights of survivorship. *Id.* The Court noted that the legislature had made a written agreement necessary to create a right of survivorship in a joint account and that it had undertaken to specify language that will meet its requirement. *Id.* The Court said: "First, section 439 provides the exclusive means for creating a right of survivorship in joint accounts.... Second, the necessity of a written agreement signed by the decedent to create a right of survivorship in a joint account is emphatic...." *Id.* at 862-63. If the agreement is unambiguous and complete, parol evidence is inadmissible to establish the intent of the parties. *Id*. at 863-64. The Court held that under Probate Code Section 439(a), concerning survivorship rights between non-spouses, parties could only establish survivorship using the statute's language (or language "substantially" similar to it), and a court could not consider other evidence to ascertain the parties' intent. *Stauffer*, 801 S.W.2d at 863-65.

Regarding the use of extraneous evidence of intent, the Court stated:

> Section 439(a) makes a written agreement determinative of the existence of a right of survivorship in a joint account. If such agreement is complete and unambiguous, then parol evidence is inadmissible, as with written agreements generally, to vary, add to or contradict its terms. Furthermore, no presumption can be created to contradict the agreement or to supply a term wholly missing from its provisions. Any such presumption would violate both the parol evidence rule by necessitating admission of extrinsic evidence to rebut the presumption, and the express prohibition of section 439(a) against inferring a right of survivorship from the mere creation of a joint account. Thus, if the terms of an agreement pertaining to a joint account are clear, the parties may not introduce extrinsic evidence of the parties' intent. Section 439(a) effectively overrules prior case law to the contrary.

Id. at 863-64. *See also See Kirkpatrick v. Cusick*, 2013 Tex. App. LEXIS 15435, *13-14; *Clark v. Wells Fargo Bank, N.A.*, 2008 Tex. App. LEXIS 2211 (Tex. App.—Houston [1st Dist.] Mar. 27, 2008, no pet.) ("Claimants cannot use extrinsic evidence in an attempt to get around the four corners of the … CDs."). *But see In re Estate of Graffagnino*, 2002 Tex. App. LEXIS 6930, at *5 (Tex. App.—Beaumont Sept. 26, 2002, pet. denied) (court of appeals affirmed trial court's determination that account with appropriate survivorship language was estate property due to parol evidence by beneficiary); *Richardson v. Laney*, 911 S.W.2d 489 (Tex. App.—Texarkana 1995, no writ) (without discussing *Stauffer* or Section 439(a), court affirmed a jury finding that father did not intend to gift funds in JTROS accounts to children listed on account agreements).

At least one court has interpreted the *Henderson* opinion as abrogating all basic contract principles such that only the statute controls the interpretation of a survivorship agreement relating to a joint account. *Shaw v. Shaw*, 835 S.W.2d 232, 234 (Tex. App.—Waco 1992, writ denied) (citing Philip M. Green, Note, *Extrinsic Evidence Is Not Admissible To Determine Parties' Intent Regarding Right Of Survivorship On Joint Bank Accounts: Stauffer v. Henderson, 801 S.W.2d 858 (Tex. 1990)*, 22 TEX. TECH L. REV. 1237, 1251 (1991)). The court held that the language of an account agreement either does or does not create a right of survivorship as a matter of law, and that a determination of ambiguity is not allowed. *Id*.

Accordingly, under that theory, oral statements by bank representatives or others that an account had rights of survivorship are not admissible. *Estate of Brown*, No. 04-11-00541-CV, 2012 Tex. App. LEXIS 5087 (Tex. App.—San Antonio June 27, 2012, pet. denied) (affidavit of bank representative that 0% beneficiary designation was a computer glitch was properly excluded); *Nipp v. Broumley*, 285 S.W.3d 552 (Tex. App.—Waco 2009, no pet.); *Punts v. Wilson*, 137 S.W.3d 889, 893 (Tex. App.—Texarkana 2004, no pet.) (parol evidence is inadmissible to vary, add to, or contradict an account agreement's terms); *Kitchen v. Sawyer*, 814 S.W.2d 798, 801 (Tex. App.—Dallas 1991, writ denied) (holding that extrinsic evidence from bank officer that all the bank's joint accounts were required to be JTROS could not be used to prove intent where signature card did not have box for JTROS marked).

Another court has held that normal rules of contract construction apply to account agreements. *Evans v. First Nat'l Bank*, 946 S.W.2d 367 (Tex. App.—Houston [14th Dist.] 1997, writ denied). That court noted that "the Texas Supreme Court did not address in *Stauffer* the reciprocal question of whether extrinsic evidence may be introduced when the joint account agreement is ambiguous." *Id*. at 375 (citing Robert N. Virden, *The Final(?) Word on Joint Tenancy with Right of Survivorship Accounts*, 55 TEX. B.J. 24, 26 (1992)). The court held:

> [A]greements relating to joint accounts are to be interpreted according to contract rules generally. Where no ambiguity exists, parol evidence is improper. Extrinsic evidence is permissible, however, to explain an ambiguity where the signature card or other agreement is unclear as to some aspect of the parties' agreement, other than their intent to create a survivorship account.

Id. The court then limited its holding to situations where the intent to create a survivorship account is clear and unambiguous, but what funds are subject to the survivorship agreement is ambiguous: "We hold that extrinsic evidence may be considered, however, to determine which CDs are subject to the survivorship agreement. Our holding in this case is limited to circumstances such as these where a party has expressed a clear intent to create a survivorship account, but additional evidence is required to determine what funds are properly subject to the survivorship agreement." *Id*. (citing *In re Estate of Gibson*, 893 S.W.2d 749, 753 (Tex. App.—Texarkana 1995, no writ) (holding that a signature card created a survivorship account and remanding for a determination of which funds in the account were after-acquired separate property not subject to a joint will and could pass by nontestamentary transfer to joint tenants)). After reviewing extrinsic evidence, the court determined that there was a fact issue on whether certain CDs were covered by the survivorship agreement. *Id.*

Similarly, in *Cummings v. Cummings*, the court of appeals reversed a summary judgment based on a signature card not containing sufficient language to create survivorship status. 923 S.W.2d 132 (Tex. App.—San Antonio 1996, writ denied). The court held that the signature card was ambiguous where it indicated that it was an "individual" account but also listed a person for payable on death status. *Id*. The court did not address whether an account agreement could be ambiguous for the purposes of survivorship status and seemingly made a distinction between joint accounts with rights of survivorship and payable on death accounts that were created before the amendment to Section 439(a) and 239(b). *Id*.

In *Stogner v. Richeson*, the court of appeals held that an account agreement was ambiguous as to whether it was a trust account and affirmed a jury's verdict that the party setting up the account intended it to be a trust account. 52 S.W.3d 903 (Tex. App.—Fort Worth 2001, pet. denied). The court noted that:

> N.E. did not check the printed box on the agreement specifically providing that the account was a trust account. Nor did N.E. specifically designate Ritcheson as the beneficiary in the box provided on the form. Instead, N.E. checked the "OTHER" box and typed in "TRUST."
>
> …
>
> [T]he trial court determined that an ambiguity existed in the language of the deposit agreement. Neither party argues on appeal that the language was unambiguous. Therefore, a question of fact exists as to the interpretation of the agreement's true meaning.
>
> Here, the face of the deposit agreement was entitled: "N E STOGNER IN TRUST FOR BETTIE RICHESON." N.E. also provided in the deposit agreement's account ownership section that the account was established as a "TRUST." Campbell testified that, at the time N.E. established his CD, the bank used the "OTHER" category on the depository agreement to allow customers to be insured by FDIC insurance. However, on cross-examination, Campbell conceded that it was possible that typing "TRUST" in the "OTHER" category could be used to form true trusts aside from the FDIC insurance. Campbell also testified that there was nothing magical about the bank's deposit agreement form in setting up trust accounts and there were a lot of forms a customer could use to set up a trust account.

Id. at 906-07. Based on this evidence, the court affirmed the judgment finding it was a trust account.

E. Interpretation Of Bank Agreements

Under Texas Estates Code Section 113.151-113.153, a survivorship agreement will not be inferred from the mere fact that the account is a joint account. Tex. Est. Code Ann. § 113.151-.153 (Tex. Prob. Code Ann. § 439); *Ephran v. Frazier*, 840 S.W.2d 81 (Tex. App.—Corpus Christi 1992, no writ); *Otto v. Klement*, 656 S.W.2d 678 (Tex. App.—Amarillo 1983, writ ref'd n.r.e). The agreement established must show the clear and unequivocal intent of the parties to create a joint account with rights of survivorship. *Estate of Wilson*, 213 S.W.3d 491 (Tex. App.—Tyler 2006, pet. denied).

An account signature card, being a type of contract, must be "read, considered, and construed in its entirety in keeping with the general principles of contract interpretation." *Allen v. Wachtendorf*, 962 S.W.2d 279, 282 (Tex. App.—Corpus Christi 1998, pet. denied). *See also Kennemer*, 335 S.W.3d at 846; *Estate of Dellinger*, 224 S.W.3d 434 (Tex. App.—Dallas 2007, no pet.); *Whitney Nat'l Bank v. Baker*, 122 S.W.3d 204, 208 (Tex. App.—Houston [1st Dist.] 2003, no pet.). When construing a contract, courts must strive to give effect to the written expression of the parties' intent. *In the Estate of Wilson*, 213 S.W.3d 491 (Tex. App.—Tyler 2006, pet. denied) (citing *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995)). To do so, they must read all parts of a contract together. *Id*. Courts must be particularly wary of isolating from its surroundings or considering apart from other provisions a single phrase, sentence, or section of a contract. *Id*.

In *Allen v. Wachtendorf*, the court scrutinized an account signature card on which a box was checked for a "Multiple-Party Account-With Survivorship." 962 S.W.2d at 283. The definition for this term was provided on a second page. *Id*. at 282. The court reasoned that a contract must be "read, considered, and construed in its entirety" in accordance with general principles of contract construction. *Id*. Accordingly, the court held the combined language from the two pages of the account signature card established a joint account including a right of survivorship. *Id*.

In *Kennemer*, the court determined that appropriate rights of survivorship language in an application for membership card was sufficient to create survivorship rights in every account created under that agreement. 335 S.W.3d at 846. *See also Armstrong v. Roberts*, 211 S.W.3d 867, 872-73 (Tex. App.—El Paso 2006, pet. denied) (the nature of a joint account with survivorship rights was explained on the back of the signature card as an account owned by more than one individual and that upon an individual's death, all the money in the account passes to the survivor(s)); *McNeme v. Estate of Hart*, 860 S.W.2d 536, 539 (Tex. App.—El Paso 1993, no writ) (language in the account expressing that sums shall be owned jointly with rights of survivorship established ownership of the funds in the survivor); *Shaw v. Shaw*, 835 S.W.2d 232, 235 (Tex. App.—Waco 1992, writ denied) (the example given by Section 439(a) need not be followed exactly, but must be "substantially" followed to create a joint account with rights of survivorship).

In *Punts v. Wilson*, the court held that the account was a valid P.O.D. account. 137 S.W.3d 889 (Tex. App.—Texarkana 2004, no pet.). The payee initialed beneath the language of the bank agreement that designated the ownership of the account as P.O.D. and signed the member application and agreement at the bottom. *Id*. The box that designated the account as "SINGLE-PARTY ACCOUNT WITH 'P.O.D.' (Payable on Death) DESIGNATION" was checked, and a person was listed as the P.O.D. beneficiary. *Id*. Later language in the agreement also described P.O.D. accounts with the statutorily required language. *Id*. The court concluded that "[t]his agreement created a valid P.O.D. account with Wilson as the beneficiary. As the P.O.D. beneficiary, any sums remaining on deposit at Kelly's death belonged to Wilson and were not part of Kelly's estate." *Id*.

In *Ivey v. Steele*, the signature card signed by decedent specified that upon the death of one of the parties the account was owned by the survivor. 857 S.W.2d 749, 751 (Tex. App.—Houston [14th Dist.] 1993, no writ). The court of appeals held that this language was sufficient to create a right of survivorship. The court rejected the argument that an account agreement had to use the "operative words" that the account "vests in and belongs to" the surviving party "as his or her separate property and estate." *Id*. The statute does not create any magic words. *Id*.

In *Dawson v. Lowrey*, the account application/signature card included nine choices whereby the creator of the account could specify the particular type of account to be created, and the customer selected "SINGLE PARTY ACCOUNT WITH 'P.O.D.' (Payable on Death) DESIGNATION" by placing an "x" in the box next to this account designation. No. 06-13-00107, 2014 Tex. App. LEXIS 8136 (Tex. App.—Texarkana July 29, 2014, no pet.). The new account application/signature card also included a notice that the type of account selected may determine how property passes on the death of the account holder. The names of the four account beneficiaries were specifically named and listed on the card. The court held that this was sufficient to create a survivorship account:

> The selection of a P.O.D. account with a listing of account beneficiaries, together with the referenced notice, indicates Pat's intent to create an account with a right of survivorship in the listed account beneficiaries. Further, this information, together with the notice language utilized on the new account application/signature card, adequately discloses the information provided in Section 439A of the Probate Code. Accordingly, the trial court erred in impliedly finding that the language utilized to set up the P.O.D. account did not comply with the provisions of Section 439A of the Texas Probate Code.

Id. at *18.

Moreover, when the signature card incorporates a deposit agreement, that agreement is also a part of the deposit contract between the parties. Tex. Fin. Code § 34.301(a); *In the Estate of Wilson*, 213 S.W.3d 491 (Tex. App.—Tyler 2006, pet. denied). "[I]t is uniformly held that an unsigned paper may be incorporated by reference in the paper signed by the person sought to be charged." *McNeme v. Estate of Hart*, 860 S.W.2d 536, 541 (Tex. App.—El Paso 1993, no writ) (citing *Owen v. Hendricks*, 433 S.W.2d 164, 166 (Tex. 1968)). Therefore, if an account signature card references and incorporates another document, that document must also be reviewed to determine whether appropriate rights of survivorship language exist. *In re Estate of Dellinger*, 224 S.W.3d 434 (Tex. App.—Dallas 2007, no pet.); *In the Estate of Wilson*, 213 S.W.3d 491, 494 (Tex. App.—Tyler 2006, pet. denied); *Herring v. Johnson*, No. 14-03-00266-CV, 2004 Tex. App. LEXIS 2087 (Tex. App.—Houston [14th Dist.] Mar. 4, 2004, pet. denied).

In *Estate of Dellinger*, the court found that an account signature card and an account agreement, incorporated into the signature card, created rights of survivorship. 224 S.W.3d at 439-40. The agreement stated that unless otherwise provided, joint accounts would be with rights of survivorship and then defined what that meant. *Id*. The court rejected that the payee's omission of a payable on death beneficiary meant that he did not want survivorship effect. *Id.* The court reasoned that a joint account with rights of survivorship and a payable on death designation were different issues in the account agreement, and therefore the lack of a payable on death beneficiary did not indicate that the account was to not have survivorship effect. *Id.*

A decedent need not make a declarative sentence describing the survivorship intention. *In the Estate of Wilson*, 213 S.W.3d at 494. Rather, a joint account with rights of survivorship can be established by placing an "X" in the box next to that statement on the signature card. *Id.* In *Estate of Wilson*, the account agreement defined what right of survivorship meant, and stated "[r]ight of survivorship means that when a co-owner dies, the balance in the account belongs to the surviving co-owner(s), subject to our right to charge the account for any amount the deceased co-owner or a surviving co-owner owes us." *Id*. The court held that that statement expanded upon what the payee meant when he put the "X" in the box with "Joint with Right of Survivorship." *Id*.

Moreover, in *Banks v. Browning*, the court held that a party does not need to prove when the "X" was placed on the agreement or that the signer knew and intended that the "X" create a survivorship account – indeed, that would be impermissible extrinsic evidence. 873 S.W.2d 763, 765 (Tex. App.—Fort Worth 1994, writ denied).

However, the decedent must affirmatively place an "X" by the appropriate survivorship option. *In re Estate of Graffagnino*, 2002 Tex. App. LEXIS 6930, at *5 (Tex. App.—Beaumont Sept. 26, 2002, pet. denied). For example, in one case on the back of the signature card there were three boxes for the account holder to check to indicate whether the account was to be single party, multiple party with survivorship, or multiple party without survivorship. *Id*. None of the boxes were checked. Rather, a signature appeared on one line, to the right of the boxes, to the right of the box marked "Multiple Party with Survivorship." *Id*. The court held that the decedent "may or may not have intended to designate the account as a joint account with right of survivorship." *Id*. "On its face the card is not a clear written contract establishing the right of survivorship, as required by section 439(a) of the Probate Code." *Id*. The court also held that placing an "X" above a box for survivorship option was not sufficient to create a survivorship account. *See id.*

Moreover, a bank's sua sponte decision to amend its account agreement years after the account has been created may clarify that that account does have right of survivorship effect. In *Mims – Brown v. Brown*, a mother was the executrix of father's estate and distributed real property to the son. 428 S.W.3d 366 (Tex. App.—Dallas, March 31, 2014, no pet.). The son sold the property and deposited the proceeds into an account called "JTWROS" with the mother as co-applicant in 2003. The account agreement had no language describing what JTWROS was but stated that the bank could amend the agreement in the future without notice. In 2007, the bank amended the agreement to have an adequate legal description for "JTWROS." In 2008, the son died, and the mother received the proceeds from the account. The son's wife sued the mother for the funds, and the court held that the bank's amendment and addition of adequate "JTWROS" language was effective.

Court also held that former Probate Code section 440, which held that a JTWROS form may be altered by written order given by a party to the banks and that the order must be signed by the party and received by the bank during the party's lifetime, did not apply because the son and mother were not trying to change the account.

F. Decedent (Payee) Must Sign The Account Agreement

The statute requires that the original payee or payees sign the account agreement. Tex. Est. Code Ann. § 113.151-.153 (Tex. Prob. Code Ann. § 439(b)); *Armstrong v. Roberts*, 211 S.W.3d 867 (Tex. App.—El Paso 2006, pet. denied). Where a decedent fails to sign the required deposit agreement, the decedent never creates an account that passes the funds outside of probate and to other parties to the account. *Parker v. JPMorgan Chase Bank*, 95 S.W.3d 428, (Tex. App.—Houston 1st Dist. 2002, no pet.).

For example, in *Parker*, the court granted a summary judgment holding that the estate owned the proceeds of accounts that were presumed to be P.O.D. accounts where the signature cards did not evidence the decedent's signature. 95 S.W.3d at 428. The court stated:

> Parker argues that the trial court erred in granting the motion for summary judgment because Chase failed to establish that the "defendant [Chase] did not sign the certificates of deposit as a matter of law." Parker concludes that, because "an action was taken by Ms. Eva Lee Burrell to establish a P.O.D. account, . . . the Defendant established the accounts."
>
> Chase argues that a P.O.D. account was never created because the decedent failed to sign the required P.O.D. agreement. We agree. . . .
>
> Chase presented summary judgment proof that decedent did not sign any agreement and, thus, did not fulfill the statutory requirements necessary to create a P.O.D. account. The summary judgment evidence, thus, disproves as a matter of law at least one element of Parker's cause of action. As a result, the burden shifted to Parker to present evidence creating a fact issue.
>
> To support her argument, Parker reasserts Chase's original claim that decedent created a P.O.D. account. Parker argues that, "Based upon the pleadings of the defendants, the plaintiffs could only assume that there was a valid 'P.O.D.' account." Further, Parker notes that "Upon establishing the account and subsequent death of Ms. Burrell [decedent], Defendants [Chase] made judicial assertions that the P.O.D. accounts were established and they were mistakenly closed."
>
> The intent of the decedent must be determined from the agreement, and extrinsic evidence may not be offered to prove intent. Therefore, in making our decision, we do not consider Parker's arguments that she could "only assume that there was a

> valid 'P.O.D.' account," and that Chase "made judicial assertions that the P.O.D. accounts were established and they were mistakenly closed." Parker's argument, thus, must be restricted to the information contained within the P.O.D. agreement itself. . . . After indulging every reasonable inference in favor of Parker, we hold that she has not met her burden to present evidence creating a fact issue about whether a P.O.D. account was created.

Id. at 431-32.

Even if the decedent signs the signature card, if she does not sign in a space provided next to the survivorship option, the account will not be a survivorship account. *Herring v. Johnson*, No. 14-03-00266-CV, 2004 Tex. App. LEXIS 2087 (Tex. App.—Houston [14th Dist.] Mar. 4, 2004, pet. denied). "Not only does the signature card require a signature to create a joint account with right of survivorship, but both Sections 439(a) and 439A require a signature or initials by the deceased party to create a right of survivorship." *Id.*

However, a party does not need to sign a new account agreement every time an account is renewed. *In re Estate of Patterson*, No. 11-03-00070-CV, 2003 Tex. App. LEXIS 8480 (Tex. App.—Eastland Oct. 2, 2003, no pet.). One court held that the original account agreements concerning CDs were valid as to renewed CDs. *Id*. The court stated: "Nothing in the record suggests that a new signature card would be required upon renewal of the certificates of deposit, nor can we find any statute or precedent imposing any such requirement." *Id*. at *2-3.

Historically, the original payee must sign the agreement, and a party with the original payee's power of attorney cannot create a survivorship account or designate beneficiaries. *Armstrong v. Roberts*, 211 S.W.3d at 870-71. See below regarding a more in depth discussion of a party's ability to sign an account agreement using a power of attorney document.

One court has held that a party does need to create a new account agreement if a new party to the account is added. *Rogers v. Shelton*, 832 S.W.2d 709 (Tex. App.—Eastland 1992, writ denied). In *Rogers*, a couple entered into a valid joint account with rights of survivorship. *Id*. Six years later, their son's name was typed onto the signature card and the son signed the card. *Id*. The court held that the son was not a valid party to the account and the survivorship language was not operative as to him. *Id.*

Further, where there is sufficient evidence to prove that an account had been renamed or renumbered, the original account agreement will be sufficient to create survivorship effect. *Estate of Dillard*, 98 S.W.3d 386, 396-97 (Tex. App.—Amarillo 2003, pet. denied).

What constitutes a signature is not all that strict. Tex. Bus. & Com. Code Ann. § 1.201(39). In one case, the court held that the account agreement was "signed" where the party simply initialed the signature card. *McNeme v. The Estate of Anna Mae Hart*, 860 S.W.2d 536 (Tex. App.—El Paso 1993, no writ).

G. Absent Appropriate Language, An Account Will Not Have Survivorship Effect

Unless an account is a joint account with right of survivorship, a pay-on-death account, or a trust account, "the death of any party to [the] account … has no effect on beneficial ownership of the account, other than to transfer the rights of the deceased party as part of the deceased party's estate." Tex. Est. Code Ann. § 113.155 (Tex. Prob. Code Ann. § 439(d)). Accordingly, at a depositor's death, his or her account passes to his or her estate unless another party establishes the account is one of the types encompassed by sections 113.151-.153. *Id.* Absent the appropriate language, the funds in an account will not transfer to the surviving member of the account, but will transfer to the original owner's estate. *See, e.g., Stauffer v. Henderson*, 801 S.W.2d 858 (Tex. 1990); *Koonce v. First Vict. Nat'l Bank*, 2011 Tex. App. LEXIS 7198 (Tex. App.—Corpus Christi Aug. 31 2011, no pet.); *Malone v. Malone*, No. 10-04-00011-CV, 2005 Tex. App. LEXIS 4254 (Tex. App.—Waco June 1, 2005, pet. denied) (the words, "'or' with right of survivorship" in a signature card was insufficient); *In re Estate of Graffagnino*, 2002 Tex. App. LEXIS 6930, at *5 (Tex. App.—Beaumont Sept. 26, 2002, pet. denied); *Banks v. Browning*, 873 S.W.2d 763, 765 (Tex. App.—Fort Worth 1994, writ denied); *Mbank Corpus Christi, N.A. v. Shiner*, 840 S.W.2d 724, 1992 Tex. App. LEXIS 2651 (Tex. App.—Corpus Christi 1992, no writ); *Ephran v. Frazier*, 840 S.W.2d 81, 83 (Tex. App.—Corpus Christi 1992, no writ); *Shaw v. Shaw*, 835 S.W.2d 232 (Tex. App.—Waco 1992, writ denied) (a bank signature card that used the language "Joint with Survivorship," was insufficient to create an ownership interest); *Kitchen v. Sawyer*, 814 S.W.2d 798 (Tex. App.—Dallas 1991, writ denied); *Martinez v. Martinez*, 805 S.W.2d 873 (Tex. App.—San Antonio 1991, no writ).

In *Hare v. Longstreet*, a decedent had added his son to his account shortly before his death. 531 S.W.3d 922 (Tex. App.—Tyler November 2018, no pet.). The court described the agreement as follows:

> The only evidence purporting to create a survivorship account is the signature card. On it, in a section labeled "OWNERSHIP OF ACCOUNT — CONSUMER," the account holder is directed to place his initials next to the account selected. This instruction is followed by a notice that "THE TYPE OF ACCOUNT YOU SELECT MAY DETERMINE HOW PROPERTY PASSES ON YOUR DEATH. YOUR WILL MAY NOT CONTROL THE DISPOSITION OF FUNDS HELD IN SOME OF THE FOLLOWING ACCOUNTS." Nine options are presented, each with a box next to it to be marked to indicate the choice. The box next to "MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP" is marked with an X, and the initials LDH and LWH are on the blank next to that box. The card is signed by all three account holders.

The court held that this was not sufficient evidence to support a finding of survivorship effect:

> Here, the signature card is the only evidence presented in support of the existence of a right of survivorship. Although the card includes a notice provision warning that the type of account chosen may affect how property passes upon the death of an account holder, the notice is incomplete. *See* Tex. Est. Code Ann. § 113.052. The signature card indicates an attempt to create a right of survivorship. However, no document was produced in evidence stating that the ownership interest of a deceased joint owner will belong to the surviving parties upon his death. Without such explanatory language, the agreement, whether in the form of a signature card or a different format, fails to confer a right of survivorship upon the surviving party. *Ivey*, 857 S.W.2d at 751. Hare did not meet his burden to prove that the joint account holders created a right of survivorship in compliance with the Texas Estates Code.

Id.

One court held that where the agreement merely stated that an account was a "Joint Account with Right of Survivorship," that language alone did not substantially comply with Section 439(a) (now Section 133.151) and was insufficient to establish rights of survivorship. *Ivey v. Steele*, 857 S.W.2d 749, 751 (Tex. App.—Houston [14th Dist.] 1993, no writ).

In *Pressler v. Lytle State Bank*, a party attempted to prove that funds in a joint account belonged to her instead of the estate of the deceased joint owner due to right of survivorship language on the signature card. 982 S.W.2d 561 (Tex. App.—San Antonio 1998, no pet.). The signature card had the survivorship language marked with an "X" on the card, but there was no evidence that the deceased owner marked the "X". *Id*. A jury held that the funds were the property of the estate, and the other owner appealed. *Id*. The court of appeals affirmed the judgment awarding the funds to the estate.

In *Norman v. Finley*, the court held that where there was no signature card for an alleged survivorship account, the funds therein belonged to the estate despite after-the-fact research showing that the account was set up as a survivorship account:

> Kimberly contends that the only evidence presented regarding ownership was Kimberly's testimony that based on her research, the account was a joint account with right of survivorship. Because no contrary evidence was presented, Kimberly asserts that the probate court could not disregard her testimony. The appellees counter that the probate court was free to disregard Kimberly's testimony based on her failure to produce the written joint account agreement.
>
> Section 439 of the Texas Probate Code governs the right of survivorship in accounts. Section 439 provides that sums remaining on deposit will belong to the

> surviving party against the estate only if the interest of the decedent is made to survive to the surviving party by a written agreement. Accordingly, "for proving a right of survivorship in a joint account ... the Legislature has determined that ... a written agreement signed by the decedent is required." Because Kimberly failed to introduce a written agreement signed by Theresa into evidence, she failed to establish a right of survivorship in the account.

No. 04-01-00394-CV, 2002 Tex. App. LEXIS 1646 (Tex. App.—San Antonio March 6, 2002, no pet.) (not. design. pub.) (internal citation omitted).

H. Method To Revoke Or Amend Survivorship Accounts

Once a survivorship agreement is in place, the only means of revoking it is through a subsequent written agreement or a disposition of the assets covered by the agreement. *Holmes v. Beatty*, 290 S.W.3d 852, 861-62 (Tex. 2009). *See also* Tex. Prob. Code Ann. § 455 (revocation of agreement to create survivorship rights in community property); *Asafi v. Rauscher*, No. 14-10-00606-CV, 2011 Tex. App. LEXIS 7424, *13 (Tex. App.—Houston [14th Dist.] Sept. 13, 2011, pet. denied). Moreover, Section 113.156 and 113.157 state:

> Sections 113.151, 113.152, 113.153, and 113.155 as to rights of survivorship are determined by the form of the account at the death of a party.
>
> Notwithstanding any other provision of the law, the form of an account may be altered by written order given by a party to the financial institution to change the form of the account or to stop or vary payment under the terms of the account. The order or request must be signed by a party, received by the financial institution during the party's lifetime, and not countermanded by another written order of the same party during the party's lifetime.

Tex. Est. Code Ann. § 113.156-.157 (Tex. Prob. Code Ann. §440); *Rogers v. Shelton*, 832 S.W.2d 709 (Tex. App.—Eastland 1992, no writ) (survivorship effect did not apply to a party later added to account where neither of the original parties to the account, prior to their deaths, had ever given the bank a written order changing the form of the account to include the heir).

In *Mims – Brown v. Brown*, a mother was the executrix of a father's estate and distributed real property to their son. 428 S.W.3d 366 (Tex. App.—Dallas 2014, no pet.). The son sold the property and deposited the proceeds into an account called "JTWROS" with the mother as co-applicant in 2003. The account agreement had no language describing what JTWROS was but stated that the bank could amend the agreement in the future without notice. In 2007, the bank amended the agreement to have an adequate legal description for "JTWROS." In 2008, the son died, and the mother received the proceeds from the account.

The son's wife sued the mother for the funds, and the court held that the bank's amendment and addition of adequate "JTWROS" language was effective. Court also held that Probate Code section 440 did not apply because the son and mother were not trying to change the account. Section 440 states that a JTWROS form may be altered by written order given by a party to the banks and that the order must be signed by the party and received by the bank during the party's lifetime.

The son's wife also alleged that the mother breached fiduciary duties as she was the executrix and the son was a beneficiary. The court held that the mother did not breach a fiduciary duty by entering into the account agreement with the son. The court held that after the land was distributed to the son, it was no longer a part of the estate. When the mother signed the account agreement and received the proceeds, neither "occurred in the context of" the administration of the estate. *Id*. The court found no law that would continue the fiduciary's obligation with regard to estate property years after it was distributed and after it had changed to a non-probate asset. *Id*.

VII. JOINT ACCOUNTS BETWEEN SPOUSES

Texas has not always allowed spouses to create rights of survivorship in community property. In *Hilley v. Hilley*, the Texas Supreme court held that it was unconstitutional for spouses to hold community property with rights of survivorship. 342 S.W.2d 565, 568 (Tex. 1961). *See also Allard v. Frech*, 754 S.W.2d 111, 115 (Tex. 1988) ("This holding is based on a firmly rooted principle of community property law which requires the actual partition of community property before a valid joint tenancy with the right of survivorship can be created."); *Maples v. Nimitz*, 615 S.W.2d 690, 695 (Tex. 1981) (same); *Williams v. McKnight*, 402 S.W.2d 505, 508 (Tex. 1966) (any statutory attempt to grant survivorship rights in community property would be unconstitutional). The only way for a couple to create survivorship rights was to partition their community property into separate property and then execute survivorship agreements for that separate property. *Williams*, 402 S.W.2d at 508. This process came to be known among practitioners as the "Texas Two-Step." *See, e.g.,* Robert N. Virden, *Joint Tenancy with Right of Survivorship & Community Property with Right of Survivorship*, 53 TEX. B.J. 1179, 1179 (1990).

In 1987, Texas approved a constitutional amendment authorizing rights of survivorship in community property. *Holmes v. Beatty*, 290 S.W.3d 852, 855 (Tex. 2009). The amendment provided that "spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse." *Id*. (citing TEX. CONST. art. XVI, § 15). Two years later, the Legislature amended the Probate Code to reflect this change. *See id*. This new section governs "[a]greements between spouses regarding rights of survivorship in community property." Tex. Prob. Code § 46(b).

Texas Estates Code section 112.051 states: "At any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse." Tex. Est. Code § 112.051 (Tex. Prob. Code § 451). Section 112.052 provides the formalities of effectuating section 112.051:

> (a) A community property survivorship agreement must be in writing and signed by both spouses.

> (b) A written agreement signed by both spouses is sufficient to create a right of survivorship in the community property described in the agreement if the agreement includes any of the following phrases:
>
> (1) "with right of survivorship";
>
> (2) "will become the property of the survivor";
>
> (3) "will vest in and belong to the surviving spouse"; or
>
> (4) "shall pass to the surviving spouse."
>
> (c) Notwithstanding Subsection (b), a community property survivorship agreement that otherwise meets the requirements of this chapter is effective without including any of the phrases listed in that subsection.
>
> (d) A survivorship agreement may not be inferred from the mere fact that the account is a joint account or that the account is designated as JT TEN, Joint Tenancy, or joint, or with other similar language.

Tex. Est. Code § 112.052. An agreement under this provision is enforceable without an adjudication. *Id*. at 112.053.

The purpose of the amendment and accompanying legislation "was to provide '[a] simple means . . . by which both spouses by a written instrument can provide that the survivor of them may be entitled to all or any designated portion of their community property without the necessity of making a will for that purpose.'" *Holmes*, 290 S.W.3d at 856. "[M]any banks and savings and loans associations have often failed to provide forms by which their customers can create effective joint tenancies out of community property," and the amendment addressed these concerns by removing the constitutional hurdles to creating rights of survivorship in community property. *Id*.

After the amendment, spouses' attempts to create joint accounts with rights of survivorship were enforced. *Haas v. Voight*, 940 S.W.2d 198 (Tex. App.—San Antonio 1996, writ denied). However, nonspouses can still not create a joint account with rights of survivorship over community funds. *Id*. To do so, the property must first be partitioned or gifted and thus transitioned into separate property. *Id*. So, for example, a father and son cannot create a survivorship account based out of community funds owned by the father and mother. *Id.*

In *Holmes v. Beatty*, there was a dispute regarding whether certain accounts with spouses listed on them had survivorship effect. 290 S.W.3d 852 (Tex. 2009). The court of appeals had held that the strict parol evidence rule set forth in *Stauffer v. Henderson* would apply to this dispute: "if we must look outside the written instrument to determine that a term used therein means 'right of survivorship,' the parties have not expressed their intent within the written instrument." *Id.*

The Texas Supreme Court disagreed. *Id*. at 858. It held that section 439(a) required that a survivorship agreement between non-spouses use either the statute's language or a substitute that is "in substantially the [same] form." *Id*.

Therefore, the Court noted that section 452 is less restrictive, presumably because agreements between spouses are less vulnerable to fraud. *Id*. The Court also stated that "the constitutional amendment permitting survivorship agreements in community property was intended to facilitate the creation of such agreements … and the Legislature's use of less confining language comports with that goal." *Id*. The Court found that a "Joint (WROS)" designation on an account was sufficient to create rights of survivorship in community property. *Id*. Because the agreements' survivorship language conferred survivorship rights in the securities certificates until the decedents' disposed of them, the certificates passed to the surviving spouse pursuant to those rights. *Id*.

In *Phillips v. Ivy*, there was a dispute between a daughter and a surviving spouse regarding funds from eleven CDs. No. 10-02-00266-CV, 2004 Tex. App. LEXIS 7539 (Tex. App.—Waco Aug. 18 2004, pet. denied). The jury found that eleven CDs had rights of survivorship effect and that the funds should go to the surviving spouse. *Id.* On appeal, the surviving spouse pointed to no evidence, documentary or otherwise, that suggested any agreement connected to the eleven CDs was signed by the deceased spouse. *Id.* Given those facts, the appellate court concluded that the jury could not reasonably have formed a firm belief or conviction that any of the eleven CDs were joint tenancies with rights of survivorship. *Id.* The court of appeals held for the daughter.

So, property owned by spouses as joint tenants with a right of survivorship is a nontestamentary asset and is governed by chapter 112 of the Estates Code concerning nontestamentary transfers. *Rowsey v. Matetich*, No. 03-08-00727-CV, 2010 Tex. App. LEXIS 6532, at *23 (Tex. App.—Austin Aug. 12, 2010, no pet.). And, the standard for proving right of survivorship for those accounts is much less strict than for accounts involving non-spouses. *Willy v. Winkler*, No. 01-10-00115-CV, 2010 Tex. App. LEXIS 10118, n.3 (Tex. App.—Houston [1st Dist.] Dec. 23, 2010, no pet.).

The statute does provide that both spouses have to sign the account agreement. Where only one spouse signs the agreement, a court will not give the account survivorship effect. *Phillips v. Ivy*, No. 10-02-00266-CV, 2004 Tex. App. LEXIS 7539 (Tex. App.—Waco August 18, 2004, pet denied).

Further, a community property survivorship agreement may be revoked in accordance with the terms of the agreement. Tex. Est. Code § 112.054(a). If the agreement is silent on revocation, then the statute allows the parties to revoke it by an instrument signed by both spouses or signed by one spouse and delivered to the other spouse. Tex. Est. Code § 112.054(b).

After the death of a spouse, the surviving spouse or the decedent's estate's representative may apply to a court for an order stating that the community property survivorship agreement satisfies the requirements of the statute and is effective to create a right of survivorship in community property. *Id*. at 112.101. The application must be filed in the county of proper venue for administration of the decedent's estate. *Id*. And the agreement must be filed with the application. *Id*. The statute specifies the methods of proving the spouses' signatures and the proof required by the court. *Id*. at 112.102-.103. If the court is satisfied that the requisite proof has been made, the court shall enter an order adjudging the agreement valid, which may be used as evidence in court. *Id*. at 112.104.

VIII. BURDEN OF PROVING ENFORCABLE SURVIVORSHIP ACCOUNTS

Funds in an account that were owned by a decedent are presumed to be assets of the decedent's estate, and a party asserting a right to funds from an account has the burden to prove otherwise by producing a valid and enforceable agreement. *Pressler v. Lytle State Bank,* 982 S.W.2d 561 (Tex. App.—San Antonio 1998, no pet.) (citing *Union City Transfer v. Adams*, 248 S.W.2d 256, 260 (Tex. Civ. App.—Fort Worth 1952, writ ref'd n.r.e.)). The burden is by a preponderance of the evidence. In *Pressler*, the court stated:

> Pressler concedes J.D. Weaver owned the funds in Account 508845 before his death. Accordingly, at Weaver's death, if there were no evidence the account was a joint account with a right of survivorship, the funds in the account would pass to his estate. As a result, a party who claims to own an account as the survivor of a joint account with right of survivorship bears the burden of proving her claim. Pressler was therefore correctly made to bear the burden of proving the facts necessary to establish her ownership of the account.
>
> In short, Pressler was no more entitled to a presumption that Account 508845 was a joint account with a right of survivorship because she was in possession of the funds than was Mary K. Stauffer, who also withdrew funds shortly after her co-signatory's death. Regardless of who possessed the funds, they belonged to the Estate of J.D. Weaver unless Pressler introduced a valid written agreement creating a joint account with right of survivorship. Pressler was thus properly made to bear the burden of proving the validity of the agreement by which she contended she owned the account.

Id. at 264-65.

Lost documents provide a wrinkle to the burden of proof. One court held that to prove the contents of a lost bank agreement, the plaintiff has the burden to establish same by clear and convincing evidence: "When a written, signed contract is lost or destroyed such that the party seeking to prove or enforce the agreement is unable to produce the written agreement in court, the existence and terms of the written contract may be shown by *clear and convincing* parol evidence." *Bank of America, N.A. v. Haag*, 37 S.W.3d 55, 58 (Tex. App.—San Antonio 2000, no writ).

In *Phillips v. Ivy*, the court of appeals questioned whether the clear and convincing standard should apply to an agreement that does not involve real property. No. 10-02-00266-CV, 2004 Tex. App. LEXIS 7539, at *5-6 (Tex. App.—Waco Aug. 18 2004, pet. denied). Because the parties submitting the issue of the lost account documents in the charge based on a clear and convincing evidence standard, the court applied that standard. The court set forth that standard as follows:

> [B]ecause the burden of proof at trial was clear and convincing evidence, on appeal we apply a higher standard of legal sufficiency review than is ordinarily employed in civil cases. In reviewing the evidence for legal sufficiency, we must determine "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction" that each account had a right of survivorship provision. We must review all the evidence in the light most favorable to the finding and judgment. This means that we must assume that the factfinder resolved any disputed facts in favor of its finding if a reasonable factfinder could have done so. We must also disregard all evidence that a reasonable factfinder could have disbelieved. We must consider, however, undisputed evidence even if it does not support the finding.

Id. (internal citation omitted).

IX. PROVING CONTENTS OF LOST BANK AGREEMENTS

The rule excluding extrinsic evidence to prove the survivorship effect of a bank agreement may not apply where the agreement is a lost document. In *Bank of America, N.A. v. Haag*, a depositor created a trust account for his son's education, but the signature card was lost. 37 S.W.3d 55, 58 (Tex. App.—San Antonio 2000, no writ). Later, his son withdrew all of the money in the account without the depositor's permission. The depositor testified that he signed a signature card and testified to its contents, i.e., he was the only one on the signature card and that his son was not allowed to withdraw the money. The trial court awarded judgment to the depositor and against the bank. The bank appealed and argued that its statements and after-the-fact documents proved that the account allowed the son to withdraw funds from the account. The court of appeals, however, dismissed this argument:

> Bank of America seeks to rely on the account statements that commenced in 1990 as an unambiguous written agreement which the parol evidence rule prohibits from being contradicted or varied by extrinsic evidence. However, the account statements do not evidence the creation of the account, but simply record the information that was transferred to Bank of America's system from University Savings' system. The account statements are not the operative legal document that created the account.

Id. at 58. The court of appeals approved the trial court's admission of Haag's parol testimony because there was evidence that a signature card existed at one time but was lost. The court stated: "When a written, signed contract is lost or destroyed such that the party seeking to prove or enforce the agreement is unable to produce the written agreement in court, the existence and terms of the written contract may be shown by clear and convincing parol evidence." *Id.* (citing *EP Operating Co. v. MJC Energy Co.*, 883 S.W.2d 263, 267 n.1 (Tex. App.—

Corpus Christi 1994, writ denied); *Chakur v. Zena*, 233 S.W.2d 200, 202 (Tex. Civ. App.—San Antonio 1950, no writ); Mark K. Glasser & Keith A. Rowley, *On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657, 734-35 (1997)). The court concluded: "Because the written contractual documents evidencing the creation of Haag's account were not introduced into evidence, the trial court did not err in admitting Haag's testimony regarding the terms of the account." *Id.* Based on the testimony of the plaintiff, the court affirmed the jury's verdict that a trust account had been created and that the beneficiary had no right to withdraw the funds as the only person that may withdraw money from a trust account is the person claiming to be the trustee unless that person dies. *See id*. (citing Tex. Fin. Code Ann. § 65.106(a)). *See also Armstrong v. Roberts*, 211 S.W.3d 867 (Tex. App.—El Paso 2006, pet. denied) (testimony of bank's representative regarding contents of missing second page of account agreement was sufficient to support trial court's finding that account had survivorship effect).

In *Phillips v. Ivy*, the bank destroyed the CD after a spouse cashed it after the death of the other spouse. No. 10-02-00266-CV, 2004 Tex. App. LEXIS 7539 (Tex. App.—Waco Aug. 18 2004, pet. denied). At trial, the surviving spouse was allowed to admit an "exemplar" CD of the type used during the relevant time. *Id*. at *10-11. But, the court of appeals ultimately ruled for the estate because there was no evidence, documentary or testimonial, that the deceased spouse ever signed the original agreement. *Id.* *See also In re Estate of Berger*, 174 S.W.3d 845, 846 (Tex. App.—Waco 2005, no pet.) (parol evidence admissible to prove contents of a trust agreement). Even though the surviving spouse testified that all of the CDs were joint with rights of survivorship, her testimony was conclusory in that she did not testify that she had knowledge of all of the required elements for survivorship effect. *Id*. (Grey, J., concurring).

In *A.G. Edwards & Sons Inc. v. Breyer*, the Texas Supreme Court upheld the trial court's and the court of appeals' holding that allowed the plaintiff to introduce extrinsic evidence that proved the existence of a missing account agreement to establish the defendant bank breached a contract. 235 S.W.3d 704, 708 (Tex. 2007). The Texas Supreme Court allowed extrinsic evidence to prove a breach of contract claim when defendant bank was responsible for losing the agreement. *Id*. at 709.

X. BANKS' RIGHTS AND DEFENSES

A. Banks' Ability To Offset Funds In Joint Accounts

Texas Estate Code section 113.210 provides:

> (a) Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, if a party to a multiple-party account is indebted to a financial institution, the financial institution has a right to set-off against the account in which the party has, or had immediately before the party's death, a present right of withdrawal.
>
> (b) The amount of the account subject to set-off under this section is that proportion to which the

> debtor is, or was immediately before the debtor's death, beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.

Tex. Est. Code Ann. §113.210 (Tex. Prob. Code Ann. §449).

Banks have a right to offset and apply a depositor's general deposit to an indebtedness the depositor owes the bank on another account. *Bandy v. First State Bank*, 835 S.W.2d 609 (Tex. 1992); *First Nat'l Bank v. Winkler*, 139 Tex. 131, 161 S.W.2d 1053, 1056 (1942); *Security State Bank & Trust Co. v. Texas Bank & Trust Co*., 466 S.W.2d 590, 592 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.). Accordingly, a bank can offset a debt by applying funds in a joint account.

Trust accounts add an additional wrinkle to this analysis. A bank cannot offset a debt owned by one person by funds in an account owned by another. *Soto v. First Gilbraltar Bank*, 868 S.W.2d 400 (Tex. App.—San Antonio 1993, writ ref'd). Texas courts have held that where the trust account is a revocable tentative trust, then the creditor can reach the funds in the account. *Id*. at 402. Even if a settlor intends for a trust account to be a final disposition of property, it is the account agreement that controls. *Id*. at 403-04. If the account agreement states that the trust is a tentative trust where the settlor has the power to withdraw the funds, the bank can use those trust funds to offset other debts owed by the settlor. *Id.*

It should be noted that a bank also has a statutory right to charge "properly payable" items against an existing account, even if the charge will create an overdraft. Tex. Bus. & Com. Code Ann. § 4.401(a). An item is deemed "properly payable" if "it is authorized by the customer and is in accordance with any agreement between the customer and the bank." *Id*. Further, a bank retains the right to set-off all or part of an unpaid advance, such as an overdraft, without notice, so long as that right has been previously communicated to the customer by the bank. Tex. Fin. Code Ann. § 34.307(a); *Corpus Christi Toyota Ltd. v. Falfurrias State Bank*, No. 13-99-183-CV, 2000 Tex. App. LEXIS 4821 (Tex. App.—Corpus Christi June 20, 2000, no pet.) (not design. for publication).

B. <u>Safe Harbor Provision Protecting A Financial Institution For Paying Funds In Accounts</u>

A financial institution has a statutory protection from account holders' claims arising from the bank paying a party to the account. A financial institution may enter into a multiple party account to the same extent as it may enter into a single-party account. Tex. Est. Code Ann. §113.005 (Tex. Prob. Code Ann. §444). A financial institution may not be required to inquire, for purposes of establishing net contributions, about (1) the source of funds received for deposit to a multiple-party account or (2) the proposed application of an amount withdrawn from a multiple-party account. Tex. Est. Code Ann. §113.003(b) (Tex. Prob. Code Ann. §444). A multiple-party account may be paid, on request, to any one or more of the parties. Tex. Est. Code Ann. §113.202 (Tex. Prob. Code Ann. §444).

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. Regarding, joint accounts, the code provides:

> (a) Subject to Subsection (b), amounts in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded.
>
> (b) Payment may not be made to the personal representative or heir of a deceased party unless:
>
> (1) proofs of death are presented to the financial institution showing that the deceased party was the last surviving party; or
>
> (2) there is no right of survivorship under Sections 113.151, 113.152, 113.153, and 113.155.

Tex. Est. Code Ann. §113.203; *In re Marriage of McNelly*, No. 14-13-00281-CV, 2014 Tex. App. LEXIS 5193 (Tex. App.—Houston [14th Dist.] May 15, 2014, pet. denied). Regarding P.O.D. accounts, the code provides:

> (a) A P.O.D. account may be paid, on request, to any original payee of the account.
>
> (b) Payment may be made, on request, to the P.O.D. payee or to the personal representative or heirs of a deceased P.O.D. payee on the presentation to the financial institution of proof of death showing that the P.O.D. payee survived each person named as an original payee.
>
> (c) Payment may be made to the personal representative or heirs of a deceased original payee if proof of death is presented to the financial institution showing that the deceased original payee was the survivor of each other person named on the account as an original payee or a P.O.D. payee.

Tex. Est. Code Ann. §113.204. Regarding trust accounts, the code provides:

> (a) A trust account may be paid, on request, to any trustee.
>
> (b) Unless a financial institution has received written notice that a beneficiary has a vested interest not dependent on the beneficiary's surviving the trustee, payment may be made to the personal representative or heirs of a deceased trustee if proof of death is presented to the financial institution showing that the deceased trustee was the survivor of each other person named on the account as a trustee or beneficiary.
>
> (c) Payment may be made, on request, to a beneficiary if proof of death is presented to the financial institution showing that the beneficiary or beneficiaries survived all persons named as trustees.

Tex. Est. Code Ann. §113.205

Moreover, "[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. Section 113.209 states:

> (a) Payment made in accordance with Section 113.202, 113.203, 113.204, 113.205, or 113.207 discharges the financial institution from all claims for those amounts paid regardless of whether the payment is consistent with the beneficial ownership of the account between parties, P.O.D. payees, or beneficiaries, or their successors.
>
> (b) The protection provided by Subsection (a) does not extend to payments made after a financial institution receives, from any party able to request present payment, written notice to the effect that withdrawals in accordance with the terms of the account should not be permitted. Unless the notice is withdrawn by the person giving the notice, the successor of a deceased party must concur in a demand for withdrawal for the financial institution to be protected under Subsection (a).
>
> (c) No notice, other than the notice described by Subsection (b) or any other information shown to have been available to a financial institution affects the institution's right to the protection provided by Subsection (a).
>
> (d) The protection provided by Subsection (a) does not affect the rights of parties in disputes between the parties or the parties' successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts.

Tex. Est. Code Ann. §113.209. Therefore, a financial institution cannot be liable for paying funds in an account to a party on the account. *In re Marriage of McNelly*, No. 14-13-00281-CV, 2014 Tex. App. LEXIS 5193 (Tex. App.—Houston [14th Dist.] May 15, 2014, pet. denied).

For example, once again, in *Nipp v. Broumley*, the court of appeals noted that the defendant, as a party to the account, had a right to withdraw all of the money in the CDs he held with his mother and that the bank could not be held liable for allowing him to do so even though the son did not have any beneficial ownership in those funds. 285 S.W.3d at 552. The estate's only claims were against the defendant, not the bank. *Id. See also Bandy v. First State Bank*, 835 S.W.2d 609, 615-16 (Tex. 1992) (holding bank is not liable for paying funds to one of named holders of a joint account, even after executor of other named holder's estate demanded payment); *Clark v. Wells Fargo Bank, N.A.*, No. 01-08-00887–CV, 2010 Tex. App. LEXIS 4376, at *12-13 (Tex. App.—Houston [1st Dist.] June 10, 2010, no pet.); *MBank Corpus Christi, N.A. v. Shiner*, 840 S.W.2d 724, 727 (Tex. App.—Corpus Christi 1992, no writ) ("Thus, between competing interests in a joint account, the bank is fully discharged from liability when it pays the other party on the account, unless one of the parties gives written notice to the bank that no payment should be made").

C. Statute Of Repose In Texas Business & Commerce Code section 4.406

Once again, Article 4 of the Uniform Commercial Code ("UCC"), found in Texas Business and Commerce Code Chapter 4, establishes the rights and duties between banks and their customers regarding deposits and collections. *Am. Airlines Emps. Fed. Credit Union v. Martin*, 29 S.W.3d 86, 91 (Tex. 2000); *see* Tex. Bus. & Com. Code Ann. §§ 4.101-.504 (Vernon 2002 & Supp. 2015). Under this statutory scheme, a bank is liable to its customer if it charges the customer's account for an item that is not properly payable from that account, such as items with an unauthorized signature. *Martin*, 29 S.W.3d at 91; *see* Tex. Bus. & Com. Code Ann. § 4.401(a) ("A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and the bank.").

Section 4.406 addresses a customer's duty to discover and report unauthorized signatures. *See Schiro v. Tex. Cmty. Bank, N.A.*, 68 S.W.3d 55, 57 (Tex. App.—Dallas 2001, no pet.) ("Bank customers have a duty to discover and report unauthorized signatures on their accounts."). A financial institution may assert the statute of repose in Texas Business & Commerce Code section 4.406 as a defense. That section, adopted from the UCC, allocates the risks from unauthorized transactions in a customer's bank account. *American Airlines Employees Federal Credit Union v. Martin,* 29 S.W.3d 86, 91 (Tex. 2000); *Compass Bank v. Nacim*, 459 S.W.3d 95, (Tex. App.—El Paso 2015, no pet). A bank can only charge against a customer's account "an item that is properly payable." Tex. Bus. & Com. Code Ann. § 4.401(a). An item is properly payable only if it is "authorized by the customer" consistent with the terms of the party's banking agreement. *Id*. But because a bank can process thousands of transactions a day, the UCC had to devise a system to handle those questionable transactions where a customer may not have actually authorized a payment. *Martin*, 29 S.W.3d at 92. The UCC's answer to this problem is premised on the concept that the customer is in the best position to know which transactions were authorized, and which were not. *Id*. Using this concept, Section 4.406 details both the customer's and the bank's duties.

Section 4.406(a) requires a bank that sends or makes available account statements to the customer to "either return or make available to the customer the items paid or provide information in the statement of account sufficient to allow the customer reasonably to identify the items paid." Tex. Bus. & Com. Code Ann. § 4.406(a). The Uniform Commercial Code defines "sends" as "to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed." *Id*. § 1.201(b)(36)(A).

The Code does not define "makes available." *Calleja-Ahedo v. Compass Bank*, 508 S.W.3d 791 (Tex. App.—Houston [14th Dist.] 2016, pet. filed). If a bank sends or makes available account statements, "the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized . . . because a purported signature by or on behalf of the customer was not authorized." *Id*. § 4.406(c).

The account statement must show any "items paid." Tex. Bus. & Com. Code Ann. § 4.406(a); *Compass Bank v. Nacim*, 459 S.W.3d 95, 107 (Tex. App.—El Paso 2015, no pet.). The account statement can either return the actual items paid or otherwise provide "sufficient information" to allow the customer to reasonably identify them. Tex. Bus. & Com. Code Ann. § 4.406(a). The bank provides sufficient information if it gives the customer an image of the item paid. *Id*. at cmt.1. A statement also provides sufficient information "if the item is described by item number, amount, and date of payment." *Id*. at § 4.406(a). When the bank does not actually return the items paid, it must provide a means for the customer to contact the bank to get a legible copy of the item.

If a bank sends or makes available a statement of account, "the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized." Tex. Bus. & Comm. Code §4.406(c). Further, "If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts." *Id*. If the customer fails to comply with these duties, then the customer is precluded from asserting against the bank that 1) the customer's signature or any alteration on the item if the bank also proves that it suffered a loss by reason of the failure, and 2) the customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding 30 days, in which to examine the item or statement of account and notify the bank. *Id*. at §4.406(d).

A bank's defense both under Section 4.406(d)(1) and (2) has three potential limitations. *Compass Bank v. Nacim*, 459 S.W.3d 95, 107 (Tex. App.—El Paso 2015, no pet.). First, neither defense applies if the bank does not comply with Section 4.406(a) and send or make available a statement with either the paid items, or information sufficient to allow the customer to identify those items. *Id*. at cmt.1. Second, neither of the exclusions apply if the customer shows that the item was not paid in good faith. Tex. Bus. & Com. Code Ann. § 4.406(e). Third, if the customer can show the bank "failed to exercise ordinary care in paying the item and that the failure contributed to loss" then the loss is handled as a comparative negligence issue with each party being responsible for their proportionate share of the loss. *Id.*

For example, in *Calleja-Ahedo v. Compass Bank*, the bank forwarded account statements to an imposter. 508 S.W.3d 791 (Tex. App.—Houston [14th Dist.] 2016, pet. filed). The court held that Section 4.406 did not apply because the bank never sent the statements to its customer. *Id*.

However, without regard to the lack of care of the customer or bank, a customer who does not within one year after the statement or items are made available to the customer discover and report the matter, the customer is precluded from asserting against the bank the matter. *Id.* at §4.406(f); *Federal Deposit Ins. Corp. v. Lenk*, 361 S.W.3d 602, 609 (Tex. 2012). The length of time during which a customer can bring to a bank's attention a questionable transaction can be shortened by agreement. In *American Airlines Employees Federal Credit Union v. Martin*, the court upheld a credit union customer agreement which shortened the one year repose period in Section 4.406(f) to sixty days. *Martin*, 29 S.W.3d at 97; *Coffey v. Bank of Am.*, No. 09-12-00113-CV, 2013 Tex. App. LEXIS 604 (Tex. App.—Beaumont January 24, 2013, no pet.); *Schiro v. Tex. Cmty. Bank, N.A.*, 68 S.W.3d 55, 57-58 (Tex. App.—Dallas 2001, no pet.) (affirming summary judgment for bank when account holder failed to give timely notice under section 4.406 or the deposit agreement that shortened the time period to 60-days).

For example, in *Jefferson State Bank v. Lenk*, Marcus died in March of 2000 with over $22,000 in his account at Jefferson State Bank. 323 S.W.3d 146 (Tex. 2010). The following month, Spillman presented the Bank with fraudulent letters of administration purporting to appoint him as administrator of Marcus' estate. The Bank, relying on those fraudulent letters, gave Spillman access to the Marcus account, and over the next several months, Spillman withdrew most of the account balance. In September of 2003, the probate court appointed Lenk as administrator for Marcus' estate. Lenk was aware of Spillman's fraud on the estate at the time of her appointment. In June of 2005, Lenk sent the Bank a demand letter for payment of the amounts allegedly withdrawn by Spillman. The Bank refused to pay, and Lenk sued to recover the funds. Among other defenses, the Bank asserted that Lenk failed to timely notify the Bank of the unauthorized transactions as required by Section 4.406 of the Business and Commerce Code.

Once again, the Business and Commerce Code precludes a customer "from asserting against the bank [an] unauthorized signature" if the customer does not timely "discover and report the customer's unauthorized signature" after the bank "sends or makes available to a customer a statement of account." Tex. Bus. & Com. Code Ann. § 4.406(a), (f). Both parties ultimately moved for summary judgment, and the trial court granted the Bank's motion and denied Lenk's motion. The court of appeals reversed, holding that the Bank's account statements were insufficient to fulfill the Bank's Section 4.406 duty. The issue in this case was whether the Bank satisfied its initial burden to send or make available the statements.

The Texas Supreme Court held that in the context of a deceased customer "(1) the Bank satisfies its burden by retaining account statements for retrieval by the estate administrator, and (2) the repose period begins to run once an administrator is appointed." *Id*. The Court held that because Lenk was appointed in September 2003 but did not demand payment from the Bank until June 2005, Section 4.406 precludes the administrator from asserting Spillman's unauthorized signatures against the Bank. The Court agreed with the Bank that it made the statements available by retaining them for the estate representative. Furthermore, the Bank had no duty to forward those to the then administrator because the Bank was unaware of the administrator's existence. Accordingly, the Court decided that in the event of a customer's death, banks can satisfy their Section 4.406 burden by retaining statements at the bank, but the customer's burden to report unauthorized signatures does not arise until the estate representative is appointed:

> To be sure, this rule requires administrators to act swiftly in handling the estate's banking records. But as mentioned above, administrators have a duty to take control of the estate's property. We also acknowledge that administrators may be unaware of the decedent's bank accounts, especially when the decedent has left little personal information or maintained poor banking records. A statute's focus on certainty and predictability trumps this concern, especially considering that the administrator's appointment could come many years after the customer's death, as happened here. With living customers, the statute sets a one-year repose period, which can be contractually shortened by agreement, as happened here. Our holding, which benefits customers by delaying the start of the repose period, has the effect of extending the bank's potential liability well beyond one year. We see no reason to extend it even further by delaying the start of the repose period until the administrator becomes aware of the account.

Id. Accordingly, the Texas Supreme Court rendered judgment in favor of the Bank.

Similarly, in *Coffey v. Bank of Am.*, an executrix attempted to sue a bank for unauthorized transactions. No. 09-12-00113-CV, 2013 Tex. App. LEXIS 604 (Tex. App.—Beaumont January 24, 2013, no pet.). The account agreement has shortened the repose period to sixty days. The executrix filed suit within sixty days of being appointed, but more than 60 days from the date that the decedent and the POD beneficiary received the account statements. The court of appeals held that Section 4.406 barred the plaintiff's claims. *Id. See also Lone Star Nat'l Bank v. Martinez*, No. 13-09-162-CV, 2010 Tex. App. LEXIS 2113 (Tex. App.—Corpus Christi March 25, 2010, no pet.) (Section 4.406 barred plaintiff's claims); *In re Estate of Berry*, 280 S.W.3d 478 (Tex. App.—Dallas 2009, no pet.) (same); *Panhandle Packing & Gasket, Inc. v. First United Bank*, No. 07-05-0426-CV, 2007 Tex. App. LEXIS 7358 (Tex. App.—Amarillo, no pet.) (same); *Okonkwo v. Wash. Mut. Bank, F.A.*, No. 14-05-00925-CV, 2007 Tex. App. LEXIS 1979 (Tex. App.—Houston [14th Dist.] March 15, 2007, no pet.) (same).

There may be an issue whether lack of good faith is a defense to the repose provision of Section 4.406. *Lone Star Nat'l Bank v. Martinez*, No. 13-09-162-CV, 2010 Tex. App. LEXIS 2113 (Tex. App.—Corpus Christi March 25, 2010, no pet.). Section 4.406(d) is not a defense to the bank by the express provisions of section 4.406(e) if the bank does not pay in good faith. *See id.* (citing Section 4.406(e)). However, the defense set forth in section 4.406(f) (the repose provision) does not contain similar language. *See id*. (citing Section 4.406(f)). It states that the defense is without regard to the bank's care or lack of care, but is silent with regard to the bank's failure to act in good faith. *Id*. (citing Section 4.406(f)). The Texas Supreme Court stated that that under section 4.406: "To assert a claim against the bank based on an unauthorized signature (*absent any allegation that the bank did not act in good faith*), a customer must comply with the duty to discover and report within one year." *Id*. (citing *Martin*, 29 S.W.3d at 95). However, in *Panhandle Packing & Gasket, Inc. v. First United Bank*, the court held in a footnote that lack of good faith is not a defense to Section 4.406(f). No. 07-05-0426-CV, 2007 Tex. App. LEXIS 7358, n. 2 (Tex. App.—Amarillo, no pet.).

If lack of good faith is a defense to the repose period in Section 4.406(e), then the burden to prove lack of good faith should be on the bank customer. *See id*. (citing Section 4.406(e) and *Canfield v. Bank One*, 51 S.W.3d 828, 837 (Tex. App.—Texarkana 2001, pet. denied)). The test for good faith is the actual belief of the party, not the reasonableness of that belief. *Id*. Good faith, however, is presumed, and the customer bears the burden of proving the contrary. *Id*. Because the burden of proof is on the customer, it is a defense to the preclusive effect of the defenses set forth in section 4.406. The good faith inquiry should be based on the knowledge of the tellers cashing the checks. *Id*.

Ordinary care is defined in the business and commerce code as "observance of reasonable commercial standards." Tex. Bus. & Com. Code 3.103(a)(9). Good faith is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing." *Id*. 1.201 (b)(20). The comment to the code suggests that "fair dealing" is concerned with the fairness of conduct rather than the care with which an act was performed. Tex. Bus. & Com. Code Ann. 3.103 cmt. 5. Failure to exercise ordinary care in conducting a transaction is an entirely different concept than failure to deal fairly in conducting the transaction. *Id*. Bad faith "is not negligence in that it requires a state of mind that affirmatively acts with furtive design or ill will." *Canfield*, 51 S.W.3d at 837.

Under the laws of this state, the UCC regulates a bank's handling of deposits and collections for its customers. Tex. Bus. & Com. Code Ann. §§ 4.101-.504; *Am. Dream Team, Inc. v. Citizens State Bank*, 481 S.W.3d 725 (Tex. App.—Tyler 2015, pet. denied). The relationship may also be governed in part by agreements between the bank and its customer. *Id*. (citing *Contractors Source, Inc. v. Amegy Bank Nat'l Ass'n*, 462 S.W.3d 128, 133 (Tex. App.—Houston [1st Dist.] 2015, no pet.)). The UCC, in these relationships, contains a comprehensive and carefully considered allocation of responsibility among parties to banking relationships. *Id*. Where the UCC applies, common law rules regarding breach of contract do not apply. *Id*. Further, when the UCC applies, common law claims that conflict with the UCC are precluded. *Id*.; *Contractor's Source, Inc. v. Amegy Bank, N.A.*, 462 S.W.3d 128 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Plano Lincoln Mercury, Inc. v. Roberts*, 167 S.W.3d 616, 624 (Tex. App.—Dallas 2005, no pet.); *Moody Nat'l Bank v. Tex. City Dev. Ltd. Co.*, 46 S.W.3d 373, 378 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *Aquila Sw. Pipeline, Inc. v. Harmony Exploration, Inc.*, 48 S.W.3d 225, 235 (Tex. App.—San Antonio 2001, pet. denied).

The Texas Supreme Court noted that one of the purposes of the UCC is to "facilitate[] financial transactions, benefitting both consumers and financial institutions, by allocating responsibility among the parties according to whoever is best able to prevent a loss." *Am. Airlines Emps. Fed. Credit Union v. Martin*, 29 S.W.3d 86, 92 (Tex. 2000). The Court reasoned:

> Because the customer is more familiar with his own signature, and should know whether or not he authorized

> a particular withdrawal or check, he can prevent further unauthorized activity better than a financial institution, which may process thousands of transactions in a single day. Section 4.406 acknowledges that the customer is best situated to detect unauthorized transactions on his own account by placing the burden on the customer to exercise reasonable care to discover and report such transactions. The customer's duty to exercise this care is triggered when the bank satisfies its burden to provide sufficient information to the customer. As a result, if the bank provides sufficient information, the customer bears the loss when he fails to detect and notify the bank about unauthorized transactions.

Id. The court further stated that the burden on the customer includes "the risk of nonreceipt of account statements" and that the customer's duty to detect and report unauthorized actions "is triggered when the bank meets its burden to provide the customer with enough information that the customer can detect that the unauthorized transaction has occurred." *Id*. at 94.

When Section 4.406 applies to a situation, it supplants any inconsistent common law duties. *Bryan v. Citizens Nat'l Bank*, 628 S.W.2d 761, 764 (Tex. 1982); *Signal Oil & Gas Co. v. Universal Oil Products.*, 572 S.W.2d 320, 330 (Tex. 1978); *Miller-Rogaska, Inc. v. Bank One Texas, N.A.*, 931 S.W.2d 655, 662 (Tex. App.—Dallas 1996, no writ). The statute retains common law principles of law and equity, "[u]nless displaced by the particular provisions of this title . . . ." Tex. Bus. & Com. Code Ann. § 1.103 (b). If the comprehensive system of reciprocal duties under Section 4.406 applies, they displace any existing common law treatment of the issues. *Compass Bank v. Nacim*, 459 S.W.3d 95, 107 (Tex. App.—El Paso 2015, no pet.).

D. Commercially Reasonable Security Procedure Defense

It is not uncommon for a bank to transfer funds from an account based on an account holders' apparent instructions where the instructions were fraudulent and sent by an unauthorized third party. In this circumstance, who is responsible for the lost funds?

The default rule is that financial institutions are liable for unauthorized funds transfers. However, financial institutions can raise an affirmative defense that it followed a commercially reasonable security procedure, and accepted the payment order in good faith. Tex. Bus. & Com. Code §4A.202. This provision states:

> (a) A payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law of agency.
>
> (b) If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order

received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.

(c) Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if:(1) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for the customer; and

(2) the customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer.

(d) The term “sender” in this chapter includes the customer in whose name a payment order is issued if the order is the authorized order of the customer under Subsection (a) or it is effective as the order of the customer under Subsection (b).

(e) This section applies to amendments and cancellations of payment orders to the same extent it applies to payment orders.

(f) Except as provided in this section and in Section 4A.203(a)(1), the rights and obligations arising under this section or Section 4A.203 may not be varied by agreement.

Tex. Bus. & Com. Code §4A.202.

When this affirmative defense is established, the burden shifts to the customer who will be liable for the loss unless the customer can prove that the loss was not caused by any person who was ever entrusted with duties related to the payment orders or the security procedure; and the person who obtained access to make the unauthorized payment order did not gain access from a source controlled by the customer. *Id*. §4A.203. Section 4A.203 provides:

> (a) If an accepted payment order is not, under Section 4A.202(a), an authorized order of a customer identified as sender, but is effective as an order of the customer pursuant to Section 4A.202(b), the following rules apply: (1) By express written agreement, the receiving bank may limit the extent to which it is entitled to enforce or retain payment of the payment order.
>
> (2) The receiving bank is not entitled to enforce or retain payment of the payment order if the customer proves that the order was not caused, directly or indirectly, by a person:(A) entrusted at any time with duties to act for the customer with respect to payment orders or the security procedure; or
>
> (B) who obtained access to transmitting facilities of the customer or who obtained, from a source controlled by the customer and without authority of the receiving bank, information facilitating breach of the security procedure, regardless of how the information was obtained or whether the customer was at fault. Information includes any access device, computer software, or the like.
>
> (b) This section applies to amendments of payment orders to the same extent it applies to payment orders.

Tex. Bus. & Com. Code §4A.203.

The financial institution is in the best position when the customer expressly agrees to a specific security procedure; the financial institution follows that procedure; and the procedure follows the guidelines of the Federal Financial Institutions Examination Council ("FFIEC") and consists of a multifactor authentication for the financial institution's online banking customers.

In Texas, the most recent decision discussing these provisions held for the financial institution. In *All Am. Siding & Windows, Inc. v. Bank of Am., N.A.*, the court determined the financial institution was entitled to summary judgment as a matter of law because it had established its affirmative defense of following an agreed commercially reasonable security procedure. 367 S.W.3d 490 (Tex. App. Texarkana 2012, pet. denied). The court found that the financial institution established the defense through the contracts entered into between the financial institution and the customer; application of section 4A.202; and the addition of an affidavit indicating the financial institution "follow[ed] the guidelines of the [FFIEC] and requires multifactor authentication for its online banking customers." *Id.*

In analyzing the contracts the Court specifically noted the following provisions as relevant:

* Treasury Services Terms and Conditions stated:

> Each time you use a Service, you represent and warrant that, in view of your requirements, the Security Procedure is a satisfactory method of verifying the authenticity of Entries and Reversal/Deletion Requests. You agree we may act on any Entries or Reversal/Deletion Requests after we have verified its authenticity through use of the Security Procedure.

* Authorization and Agreement for Treasury Services:

> The Client has received and reviewed Bank of America's Treasury Services Terms and Conditions Booklet…and the Client agrees to adhere to the Booklet and any applicable User Documentation provided by Bank of America.

* The Treasury Services Terms and Conditions:

> You have sole responsibility for determining the level of security you require and assessing the suitability of the security procedures for these Services. We have no duty to investigate the authenticity of any application, instruction or other communication you provide us using an Electronic Trade Service. Also, we have no liability to you for acting upon any application, amendment or other communication purportedly transmitted by you, even if such application, amendment or message:
>
> • Contains inaccurate or erroneous information.
>
> • Constitutes unauthorized or fraudulent use of an Electronic Trade Service.
>
> • Includes instructions to pay money or otherwise debit or credit any account.
>
> • Relates to the disposition of any money, securities, or documents…
>
> We are authorized, but not obliged, to rely upon and act in accordance with any application, instruction, consent or other communication by fax or other electronic transmission (including without limitation any transmission by use of our Software or the Internet) received by us purporting to be a communication on your behalf without inquiry on our part as to the source of the transmission or the identity of the person purporting to send such communication…
>
> We are liable to you only for actual damages incurred as a direct result of our failure to

> exercise reasonable care in providing a Service.
>
> In no event will we be liable for any indirect…loss or damage… even if advised of the possibility of such loss…
>
> We will not be responsible for the acts or omissions of…any other person…

The agreement stated it could not be changed by oral agreement. It provided:

> NOTICE OF FINAL AGREEMENT. THIS WRITTEN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.
>
> We have no obligation to cancel or amend any Entry after we have received it. If you send us a Reversal/Deletion Request and we are able to verify the authenticity of the Reversal/Deletion Request using the Security Procedure, we will make a reasonable effort to act on your Reversal/Deletion request. We will not be liable to you if such Reversal/Deletion Request is not effected. You agree to indemnify us in connection with any such Reversal/Deletion Request as provided by UCC 4A.

* Deposit Agreement and Disclosures:

> From time to time, originators that you authorize may send automated clearing house (ACH) credits or debits for your account. For each ACH transaction, you agree that the transaction is subject to the National Automated Clearing House Association (NACHA) Operating Rules and any local ACH operating rules then in effect…
>
> Your role is extremely important in the prevention of wrongful use of your account. If you find that your records and ours disagree or if you suspect any problem or unauthorized activity on your account…call us immediately…We may require written confirmation of your claim, including an affidavit signed by you on a form acceptable to us…
>
> You agree that we have a reasonable period of time to investigate the facts and circumstances surrounding any claimed loss and that we have no obligation to provisionally credit your account. Our maximum liability is the lesser of your actual damages proved or the amount of the missing deposit or the forgery, alteration or other

> unauthorized withdrawal, reduced in all cases by the amount of the loss that could have been avoided by your use of ordinary care…
>
> [W]e may receive ACH debits to your account from senders you previously authorized to debit your account. You may ask us to stop payment on a future ACH debit to your account if the item has not already been paid…
>
> The ACH stop payment takes effect within three business days.

It was uncontroverted that the fraudulent transactions were completed through use of a company ID and password and were confirmed through the digital certificate. There was also evidence that this method was the security procedure in place for AAS and EagleOne for ACH transactions.

E. Employer's Responsibility For Employee's Conduct

Business and Commerce Code section 3.405 is entitled "Employer's Responsibility for Fraudulent Indorsement by Employee." Section 3.405 provides:

> For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person.

Tex. Bus. & Com. Code Ann. § 3.405(b). Section 3.405(a)(3) specifically defines "responsibility with respect to instruments" as

> authority (i) to sign or indorse instruments on behalf of the employer, (ii) to process instruments received by the employer for bookkeeping purposes, for deposit to an account, or for other disposition, (iii) to prepare or process instruments for issue in the name of the employer, (iv) to supply information determining the names or addresses of payees of instruments to be issued in the name of the employer, (v) to control the disposition of instruments to be issued in the name of the employer, or (vi) to act otherwise with respect to instruments in a responsible capacity.

Id. § 3.405(a)(3); *see also Calleja-Ahedo v. Compass Bank*, 508 S.W.3d 791 (Tex. App.—Houston [14th Dist.] 2016, pet. filed); *Duong v. Bank One, N.A.*, 169 S.W.3d 246, 250 (Tex. App.—Fort Worth 2005, no pet.) ("Section 3.405 adopts a system of comparative negligence between an employer who grants an employee responsibility with respect to an instrument and a bank. The initial risk of loss in this situation is on the employer 'based on the belief that the employer is in a far better position to avoid the loss by care in choosing employees, in supervising them, and in adopting other measures to prevent forged indorsements on instruments payable to the employer or fraud in the issuance of instruments in the name of the employer.").

F. Customer Not Using Reasonable Care

Business and Commerce Code section 3.406 provides:

> A person whose failure to exercise ordinary care substantially contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection.

Tex. Bus. & Com. Code Ann. § 3.406(a). "Section 3.406 precludes the depositor from asserting wrongful payment against the bank if the depositor's negligence substantially contributed to the alteration or forgery of the check as long as the bank paid the instrument in good faith and in accordance with the reasonable commercial standards of the payor's business." *McDowell v. Dallas Teachers Credit Union*, 772 S.W.2d 183, 192 (Tex. App.—Dallas 1989, no writ); *see also Calleja-Ahedo v. Compass Bank*, 508 S.W.3d 791 (Tex. App.—Houston [14th Dist.] 2016, pet. filed) (section did not apply where customer acted reasonably); *Bank of Tex. v. VR Elec., Inc.*, 276 S.W.3d 671, 680 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (stating that court had to determine "whether the Bank proved that VR failed to exercise ordinary care that substantially contributed to the alteration of the check").

The key inquiry under section 3.406 is whether an account holder's negligence "substantially contributes to an alteration of an instrument or to the making of a forged signature." Tex. Bus. & Com. Code Ann. § 3.406(a); *Calleja-Ahedo v. Compass Bank*, 508 S.W.3d 791 (Tex. App.—Houston [14th Dist.] 2016, pet. filed).

XI. USE OF POWER OF ATTORNEY RIGHTS

A. Introduction

Many disputes concerning joint accounts arise in the context of a party using a power of attorney document to execute a transaction. Historically, in Texas, financial institutions and others did not have to accept a power of attorney document. If an agent wanted to conduct a transaction, the financial institution could demand alternative power of attorney forms, that the principal conduct it, or simply refuse to do it.

The Texas Legislature has recently instituted broad changes to the Texas Estates Code's Texas Durable Power of Attorney Act regarding durable power of attorney provisions. The Real Estate, Probate, and Trust Law (REPTL) Section of the State Bar of Texas supported HB 1974 because that section wanted to plan around expensive guardianships by the use of durable power of attorney documents. Those planners were frustrated by financial institutions not accepting those documents. Accordingly, one aspect of the new statutory provisions is to make sure that financial institutions and others accept power of attorney documents. The provisions also potentially allow broad additional powers to designated agents;

powers that would even allow the agents to benefit themselves from the principal's assets. The legislative history provides:

> The Real Estate, Probate, and Trust Law Section of the State Bar of Texas (REPTL) proposes H.B. 1974, which provides several changes to the Texas Durable Power of Attorney Act intended to ensure that validly-executed durable powers of attorney (DPOA) can be used more effectively in Texas, in furtherance of the legislative goal of reducing the need for guardianship proceedings, and to provide additional powers to the designated agents. DPOAs are vital for planning for the possibility of incapacity, and are specifically included as an alternative to guardianship under the Estates Code. But many Texas citizens have been unable to effectively use DPOAs due to their rejection for arbitrary or unexplained reasons. H.B. 1974 makes DPOAs more readily available.
>
> Overview: H.B. 1974 makes important changes to the statute by: providing for reasonable acceptance of DPOAs in a timely fashion so that guardianship can be avoided; eliminating risk to persons who accept DPOAs by allowing them to rely on an agent's certification that the DPOA is valid for the purpose it is being presented or an opinion of the agent's counsel who is hired at the principal's expense; giving the person who is asked to accept the DPOA numerous valid reasons to reject, some of which cannot be challenged by the principal or agent; and providing a mechanism to have a court decide any disputes. This bill does not require someone to automatically accept a DPOA and does not shift liability to those who do accept a DPOA. Rather, it provides new liability protection to those who accept a DPOA without knowledge that it was invalid and includes new procedures to properly reject a DPOA. Similar provisions have been enacted in 30 other states without issue.

B. <u>Persons Now Generally Required To Accept Power Of Attorney Documents (With Limited Exceptions)</u>

Historically, in Texas, persons were not required to accept power of attorney documents. They could reject them for any reason and did not have any obligation to explain why they were not accepting them. That has now changed. Section 751.201 of the Texas Estates Code provides:

> [A] person who is presented with and asked to accept a durable power of attorney by an agent with authority to act under the power of attorney shall: (1) accept the power of attorney; or (2) before accepting the power of attorney: (A) request an agent's certification under

> Section 751.203 or an opinion of counsel under Section 751.204 not later than the 10th business day after the date the power of attorney is presented, except as provided by Subsection (c); or (B) if applicable, request an English translation under Section 751.205 not later than the fifth business day after the date the power of attorney is presented, except as provided by Subsection (c).

Tex. Est. Code Ann. § 751.201(a).

A person who requests: "(1) an agent's certification must accept the durable power of attorney not later than the seventh business day after the date the person receives the requested certification; and (2) an opinion of counsel must accept the durable power of attorney not later than the seventh business day after the date the person receives the requested opinion." *Id.* at § 751.201(b).

The statute does provide that the parties can agree to extend the periods provided above. *Id.* at § 751.201(c). Therefore, the principal or agent presenting a durable power of attorney for acceptance and the person may agree to extend a time period prescribed above. No format for the agreement or time period during which the agreement may be entered into is specified, but it is prudent that the agreement be in writing, dated, and signed by both parties before the end of the original ten business-day period.

Importantly, a person is not required to accept a power of attorney if the agent does not provide a requested certification, opinion of counsel, or English translation. *Id.* at § 751.201(e).

A durable power of attorney is considered accepted on the first day the person agrees to act at the agent's discretion under the power of attorney. Tex. Est. Code Ann. § 751.208. Therefore, persons should implement procedures that will avoid an unintentional acceptance of the power of attorney before a decision has been made to accept or reject it.

C. <u>Grounds For Refusing Acceptance</u>

A person is not required to accept a power of attorney if: the person would not otherwise be required to enter into a transaction with the principal; the transaction would violate another law or a request from law enforcement; the person filed a SAR regarding the principal or agent or the principal or agent has prior criminal activity; the person has a negative business history with the agent; the person knows that the principal has revoked the agent's authority; the agent refused to provide a certification, opinion, or translation; the person believes in good faith that a certification, opinion, or translation is incorrect or deficient; the person believes in good faith that the agent does not have authority to conduct the transaction; the person has knowledge that a judicial proceeding has been instigated regarding the power of attorney document or has been completed with negative results for the document; the person receives conflicting instructions from co-agents; the person has knowledge that a complaint has been raised to the proper authorities that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting with or on behalf of the agent; or the law that would apply to the power of attorney document does not require the person to accept the document.

The statute provides:

(1) the person would not otherwise be required to engage in a transaction with the principal under the same circumstances, including a circumstance in which the agent seeks to: (A) establish a customer relationship with the person under the power of attorney when the principal is not already a customer of the person or expand an existing customer relationship with the person under the power of attorney; or (B) acquire a product or service under the power of attorney that the person does not offer;

(2) the person's engaging in the transaction with the agent or with the principal under the same circumstances would be inconsistent with: (A) another law of this state or a federal statute, rule, or regulation; (B) a request from a law enforcement agency; or (C) a policy adopted by the person in good faith that is necessary to comply with another law of this state or a federal statute, rule, regulation, regulatory directive, guidance, or executive order applicable to the person;

(3) the person would not engage in a similar transaction with the agent because the person or an affiliate[2] of the person: (A) has filed a suspicious activity report as described by 31 U.S.C. Section 5318(g) with respect to the principal or agent; (B) believes in good faith that the principal or agent has a prior criminal history involving financial crimes; or (C) has had a previous, unsatisfactory business relationship with the agent due to or resulting in: (i) material loss to the person; (ii) financial mismanagement by the agent; (iii) litigation between the person and the agent alleging substantial damages; or (iv) multiple nuisance lawsuits filed by the agent;

(4) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before an agent's exercise of authority under the power of attorney;

(5) the agent refuses to comply with a request for a certification, opinion of counsel, or translation under Section 751.201 or, if the agent complies with one or more of those requests, the requestor in good faith is unable to determine the validity of the power of attorney or the agent's authority to act under the

[2] "Affiliate" means "a business entity that directly or indirectly controls, is controlled by, or is under common control with another business entity." Tex. Est. Code § 751.002(2).

power of attorney because the certification, opinion, or translation is incorrect, incomplete, unclear, limited, qualified, or otherwise deficient in a manner that makes the certification, opinion, or translation ineffective for its intended purpose, as determined in good faith by the requestor;

(6) regardless of whether an agent's certification, opinion of counsel, or translation has been requested or received by the person under this subchapter, the person believes in good faith that: (A) the power of attorney is not valid; (B) the agent does not have the authority to act as attempted; or (C) the performance of the requested act would violate the terms of: (i) a business entity's governing documents; or (ii) an agreement affecting a business entity, including how the entity's business is conducted;

(7) the person commenced, or has actual knowledge that another person commenced, a judicial proceeding to construe the power of attorney or review the agent's conduct and that proceeding is pending;

(8) the person commenced, or has actual knowledge that another person commenced, a judicial proceeding for which a final determination was made that found: (A) the power of attorney invalid with respect to a purpose for which the power of attorney is being presented for acceptance; or (B) the agent lacked the authority to act in the same manner in which the agent is attempting to act under the power of attorney;

(9) the person makes, has made, or has actual knowledge that another person has made a report to a law enforcement agency or other federal or state agency, including the Department of Family and Protective Services, stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting with or on behalf of the agent;

(10) the person receives conflicting instructions or communications with regard to a matter from co-agents acting under the same power of attorney or from agents acting under different powers of attorney signed by the same principal or another adult acting for the principal as authorized by Section 751.0021, provided that the person may refuse to accept the power of attorney only with respect to that matter; or

(11) the person is not required to accept the durable power of attorney by the law of the jurisdiction that applies

> in determining the power of attorney's meaning and effect, or the powers conferred under the durable power of attorney that the agent is attempting to exercise are not included within the scope of activities to which the law of that jurisdiction applies.

Id. at § 751.206.

D. Power To Conduct Banking Transactions

The Estate Code provision discussing an agent's power to conduct banking transactions states:

> The language conferring authority with respect to banking and other financial institution transactions in a statutory durable power of attorney empowers the attorney in fact or agent to:
>
> (1) continue, modify, or terminate an account or other banking arrangement made by or on behalf of the principal;
>
> (2) establish, modify, or terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the attorney in fact or agent;
>
> (3) rent a safe deposit box or space in a vault;
>
> (4) contract to procure other services available from a financial institution as the attorney in fact or agent considers desirable;
>
> (5) withdraw by check, order, or otherwise money or property of the principal deposited with or left in the custody of a financial institution;
>
> (6) receive bank statements, vouchers, notices, or similar documents from a financial institution and act with respect to those documents;
>
> (7) enter a safe deposit box or vault and withdraw from or add to its contents;
>
> (8) borrow money at an interest rate agreeable to the attorney in fact or agent and pledge as security the principal's property as necessary to borrow, pay, renew, or extend the time of payment of a debt of the principal;
>
> (9) make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, bills of exchange, checks, drafts, or other negotiable or nonnegotiable paper of the principal, or payable to the principal or the principal's order to receive the cash or other proceeds of those transactions, to accept a draft drawn by a person on the principal, and to pay the principal when due;

(10) receive for the principal and act on a sight draft, warehouse receipt, or other negotiable or nonnegotiable instrument;

(11) apply for and receive letters of credit, credit cards, and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit; and

(12) consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

Id. at 752.106.

E. Ability To Change Beneficiary Designations

If the principal provides for such power in the power of attorney document, the agent may create or change rights of survivorship or beneficiary designations.

1. Power To Create Or Modify Survivorship And Beneficiary Rights

Section 751.031 provides that if the principal grants the following authority in the power of attorney document, the agent may: "(1) create, amend, revoke, or terminate an inter vivos trust; (2) make a gift; (3) create or change rights of survivorship; (4) create or change a beneficiary designation; or (5) delegate authority granted under the power of attorney." Tex. Est. Code Ann. 751.031(b). The provision does limit this right: an agent who is not "an ancestor, spouse, or descendant of the principal may not exercise authority under the power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise." *Id*. at §751.031(c). However, that limitation is, itself, limited by the following clause: "[u]nless the durable power of attorney otherwise provides." *Id*. So, if the power of attorney document expressly allows the agent to name himself or herself as a beneficiary, the agent can do so. If the agent is the principal's ancestor, spouse, or descendant, then the agent can name himself or herself as a beneficiary.

Unless the power of attorney otherwise provides, and agent can:

(1) create or change a beneficiary designation under an account, contract, or another arrangement that authorizes the principal to designate a beneficiary, including an insurance or annuity contract, a qualified or nonqualified retirement plan, including a retirement plan as defined by Section 752.113, an employment agreement, including a deferred compensation agreement, and a residency agreement;

(2) enter into or change a P.O.D. account or trust account under Chapter 113; or

(3) create or change a nontestamentary payment or transfer under Chapter 111.

Id. at § 751.033.

Under Section 752.108(b) and Sections 752.113(b) and (c), unless the principal has granted the authority to create or change a beneficiary designation expressly as required by Section 751.031(b)(4), an agent may be named a beneficiary of an insurance contract, an extension, renewal, or substitute for the contract, or a retirement plan only to the extent the agent was named as a beneficiary by the principal before executing the power of attorney. *Id*. at §§ 752.108(b), 752.113(b), (c). "If an agent is granted authority under Section 751.031(b)(4) and the durable power of attorney grants the authority to the agent described in Section 752.108 or 752.113, then, unless the power of attorney otherwise provides, the authority of the agent to designate the agent as a beneficiary is not subject to the limitations prescribed by Sections 752.108(b) and 752.113(c)." *Id*. at §751.033. "If an agent is not granted authority under Section 751.031(b)(4) but the durable power of attorney grants the authority to the agent described in Section 752.108 or 752.113, then, unless the power of attorney otherwise provides and notwithstanding Section 751.031, the agent's authority to designate the agent as a beneficiary is subject to the limitations prescribed by Sections 752.108(b) and 752.113(c)." *Id*. at § 751.033(c).

So, in other words, if the power of attorney document expressly allows the agent to name himself or herself as a beneficiary of a retirement or insurance contract, he or she can do so even if he or she was not previously named a beneficiary. If the power of attorney document does not expressly allow the agent to name himself or herself, but there is a general power to enter into retirement and insurance transactions, then the agent can name himself or herself as a beneficiary only if he or she was previously so named by the principal.

2. Agent's Gifting Powers

Unless the durable power of attorney otherwise provides, a general grant of authority to make a gift only authorizes the agent to:

> (1) make outright to, or for the benefit of, a person a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed: (A) the annual dollar limits of the federal gift tax exclusion under Section 2503(b), Internal Revenue Code of 1986, regardless of whether the federal gift tax exclusion applies to the gift; or (B) if the principal's spouse agrees to consent to a split gift as provided by Section 2513, Internal Revenue Code of 1986, twice the annual federal gift tax exclusion limit; and
>
> (2) consent, as provided by Section 2513, Internal Revenue Code of 1986, to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual federal gift tax exclusions for both spouses.

Id. at §751.032.

The agent may make a gift only as the agent determines is consistent with the principal's objectives if the agent actually knows those objectives. *Id*. If the agent does not know the principal's objectives, the agent may make a gift of the principal's property "only as the agent determines is consistent with the principal's best interest based on all relevant factors, including the factors listed in Section 751.122 and the principal's personal history of making or joining in making gifts." *Id*.

3. Duty To Preserve Principal's Estate Plan

The statute provides that the agent should take into account the principal's estate plan in making decisions:

> An agent shall preserve to the extent reasonably possible the principal's estate plan to the extent the agent has actual knowledge of the plan if preserving the plan is consistent with the principal's best interest based on all relevant factors, including: (1) the value and nature of the principal's property; (2) the principal's foreseeable obligations and need for maintenance; (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and (4) eligibility for a benefit, a program, or assistance under a statute or regulation.

Id. at 751.122.

4. Concern With New Provisions Broadening Agent's Authority

It is not uncommon for an agent to take advantage of the power that he or she has regarding the principal's assets. The agent may start taking assets for his or her own benefit, use the principal's assets as collateral for a loan to the agent, receive assets for the agent's own benefit that should be deposited into the principal's accounts, create new accounts or change account signature cards that create an ownership interest in the agent, etc.

The new provisions of the Estates Code allow a principal to allow an agent to name himself or herself as the beneficiary of accounts, insurance products, and retirement accounts. The author has grave concerns about the way that vulnerable persons sign power of attorney documents. Principals often have diminished capacity at the time that power of attorney documents are executed. Attorneys, who are often retained by the agent, may not adequately explain all of the provisions of the power of attorney document. An agent may not even retain an attorney and may simply create such a document (from the statutory form) and have the principal sign it without any explanation.

Principals routinely use beneficiary designations as a form of estate planning. So, the principal may execute a will and omit a person or decrease a devise to that person if the principal has otherwise already provided for that person via a beneficiary designation. If a power of attorney document is signed with broad powers that the principal does not really understand, the agent may completely change the principal's estate planning by changing beneficiary designation. If the power of attorney document allows the agent to name himself or herself, then the agent can take property that should go to someone else and give it to himself or herself. In any event, the agent can redirect assets from the person the principal originally intended to have those assets and give them to someone else. There is no need for these results. In the author's opinion, the ability of an agent to effectuate transactions for the principal's benefit should not include the ability to change beneficiary designations that only impact who gets the assets once the principal is deceased. Should an agent be able to execute a new will for the principal and name himself or herself as the beneficiary of the estate or name someone else? Of course not. Yet, that is essentially what the statute allows regarding non-probate assets.

F. New Vulnerable Persons Statute Impacts Use of Power of Attorney Documents

If the person is a financial institution, broker, or financial advisor, it should create policies regarding the exploitation of vulnerable persons. The Texas Legislature recently created new statutes that require employees to report suspected financial exploitation, a person to assess that conduct and to report to a governmental agency, persons to institute policies for this reporting, and for persons to potentially put a hold on transactions where suspected financial exploitation is occurring. "Financial exploitation" means:

> (A) the wrongful or unauthorized taking, withholding, appropriation, or use of the money, assets, or other property or the identifying information of a person; or (B) an act or omission by a person, including through the use of a power of attorney on behalf of, or as the conservator or guardian of, another person, to: (i) obtain control, through deception, intimidation, fraud, or undue influence, over the other person's money, assets, or other property to deprive the other person of the ownership, use, benefit, or possession of the property; or (ii) convert the money, assets, or other property of the other person to deprive the other person of the ownership, use, benefit, or possession of the property.

Tex. Fin. Code Ann. § 280.001(3).

This statute expressly references the use of power of attorney documents. *Id*. Further, the Texas Estates Code § 751.206(9) dealing with valid reasons to refuse to accept power of attorney documents expressly references reports of financial exploitation. Tex. Est. Code § 751.206(9).

So, persons should evaluate who is benefiting from the transaction, and if there is evidence that the agent is benefiting, there should be an evaluation of whether a report of financial exploitation should be made.

G. Other Reporting Duties

The Texas Human Resources Code has a general provision that requires the reporting of the exploitation of elderly or disabled individuals. *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 89 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). Section 48.051 states: "a person having cause to believe that an elderly person, a person with a disability, or an individual receiving services from a provider as described by Subchapter F is in the state of abuse, neglect, or exploitation shall report the information required by Subsection (d) immediately to the department." Tex. Hum. Res. Code § 48.051. In the Texas Human Resources Code, the term "exploitation" means "the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with an elderly person or person with a disability that involves using, or attempting to use, the resources of the elderly person or person with a disability, including the person's social security number or other identifying information, for monetary or personal benefit, profit, or gain without the informed consent of the person." *Id*. at § 48.002. Importantly, the Texas Human Resources Code provides a criminal penalty for not reporting the exploitation: "[a] person commits an offense if the person has cause to believe that an elderly person or person with a disability has been abused, neglected, or exploited or is in the state of abuse, neglect, or exploitation and knowingly fails to report in accordance with this chapter." *Id*. at § 48.052. Generally, this offense is a Class A misdemeanor. *Id*. The Texas Human Resources Code has similar immunity defenses for making reports. *Id*. § 48.054.

Courts have held that the qualified immunity defense is an affirmative defense and that the defendant has the burden of showing that a defendant was not acting "in bad faith or with a malicious purpose"—i.e., in good faith—when he made his report of elder abuse. *Scarbrough v. Purser*, No. 03-13-00025-CV, 2016 Tex. App. LEXIS 13863 (Tex. App.—Austin December 30, 2016, pet. denied).

Texas Family Code Section 261.106 also provides that: "[a] person acting in good faith who reports or assists in the investigation of a report of alleged child abuse or neglect or who testifies or otherwise participates in a judicial proceeding arising from a report, petition, or investigation of alleged child abuse or neglect is immune from civil or criminal liability that might otherwise be incurred or imposed." Tex. Fam. Code Ann. § 261.106(a). Courts have held that this qualified defense is an affirmative defense that a defendant has the duty to raise and prove. *Miranda v. Byles*, 390 S.W.3d 543, 552 (Tex. App.—Houston [1st Dist.] 2012, pet. denied); *Howard v. White*, No. 05-01-01036-CV, 2002 Tex. App. LEXIS 4891, at *18-20 (Tex. App.—Dallas July 10, 2002, no pet.) (not designated for publication) (concluding that appellant was not entitled to statutory protection from defamation claims based on her report of child abuse because she failed to prove that her report was made in good faith).

Importantly, the new provisions provide that complying with those reporting obligations also satisfies the reporting obligations under the Texas Human Resources Code. So, there is no duty to make multiple reports.

H. <u>Recent Caselaw</u>

In *Transamerica Life Ins. Co. v. Quarm*, Thomas Quarm obtained a life insurance policy and designated his mother as his beneficiary and his brother, Nicholas, as the alternate beneficiary. No. EP-16-CV-295-KC, 2017 U.S. Dist. LEXIS 192192 (W.D. Tex. November 13, 2017). Quarm later purchased an annuity product with the same beneficiaries. When the mother died, Nicholas became the primary beneficiary. Thomas then signed a durable power of attorney naming his son, Christian, as his agent with the authority to act on his behalf. Among the powers delegated to Christian was the power to perform any act Thomas could do regarding "[i]nsurance and annuity transactions," which included the power to "modify . . . any [existing] annuity or [insurance] policy." *Id*. It also empowered Christian to "engage in any transaction he . . . deems in good faith to be in [the principal's] interest, no matter what the interest or benefit to [the] agent." *Id*. Christian sent the power of attorney and a beneficiary change form naming himself as the primary beneficiary and his sister, Sarah, the as the contingent beneficiary. The insurance company determined that this form changed the beneficiary designation for both the policy and the annuity. After Thomas died, Christian and Nicholas made competing claims to the benefits under the policy and the annuity. The insurance company filed an interpleader in federal court, and Christian and Nicholas filed competing claims for the proceeds and each filed motions for summary judgment.

The district court first analyzed whether Christian's action in naming himself was a self-interested transaction that was a breach of fiduciary duty. The court stated the law concerning self-interested transactions thusly:

> While an agent who benefits from a transaction carried out on behalf of his principal bears the burden of showing that the transaction was fair, he can meet that burden by showing that the transaction was authorized by the principal. The grant of a power of attorney creates an agency relationship, which is a fiduciary relationship as a matter of law. A fiduciary owes his principal a high duty of good faith, fair dealing, honest performance, and strict accountability. Multiple courts have noted that the fiduciary relationship does "no more than cast upon the profiting fiduciary the burden of showing the fairness of the transactions." The court in Vogt found it "worth repeating that fiduciary status does not prohibit the beneficiary from giving the fiduciary gifts or bequests; instead, it insures that the fiduciary will be prepared to prove the transaction was conducted with scrupulous fairness." One way to establish decisively that a transaction was fair to the principal is to show that the principal consented to it. Texas courts have recognized the significance of the principal's consent in determining whether a transaction by a profiting agent was fair or constituted self-dealing. "Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." Accordingly, "absent the principal's consent, an agent must refrain from using his position or the principal's property to gain a benefit for himself at the principal's expense."

Id. (internal citation omitted).

The court noted that the power-of-attorney document specifically authorized Christian to act for his own benefit: "My agent may buy any assets of mine or engage in any transaction he or she deems in good faith to be in my interest, no matter what the interest or benefit to my agent." *Id*. The court held that this language established that Christian was authorized to benefit from his use of the power of attorney and mentioned that Texas courts regularly look for such language in determining whether a profiting agent violated his fiduciary duty. The court held that Christian's beneficiary change did not breach his fiduciary duty or constitute self-dealing.

The court then analyzed whether Christian acted in good faith as required by the power-of-attorney document. The court held that Christian provided evidence establishing that he acted fairly and in good faith when he changed the beneficiary and Nicholas failed to present contrary evidence.

The court noted that because the proceeds only became available after Thomas's death, it is undisputed that Christian's change of beneficiary did not deprive Thomas of anything during his lifetime, reducing the potential for unfairness to Thomas. "Nevertheless, if Christian did not in good faith consider the change to be in the Decedent's interest, he acted unfairly and outside of the scope of the Power of Attorney, rendering the change invalid." *Id*. Christian provided evidence that he believed the change of beneficiary to be in Thomas's interest in that Thomas described his four-month stay to care for Thomas during his prolonged illness. Christian also stated that Thomas made it known that Thomas wished for Christian to be designated as the beneficiary. This was corroborated by Thomas's sister. The court stated: "This evidence, combined with the language in the Power of Attorney granting Christian the authority to benefit from transactions on Decedent's behalf, sufficiently establishes that Christian believed in good faith that it was in the Decedent's interest for Christian to be the designated beneficiary of the Policy and Annuity Contract." *Id*.

The court, however, held that even though it was not a breach of fiduciary duty, Christian could not be a beneficiary of the policy and annuity. The court held that Christian's use of the power of attorney was subject to the restrictions imposed by the Texas Estates Code. At the time that the power of attorney was executed, the Code provided that "The language conferring authority with respect to insurance and annuity transactions in a statutory durable power of attorney empowers the attorney in fact or agent to . . . change the beneficiary of an insurance contract or annuity." *Id*. (citing Tex. Est. Code Ann. § 752.108(a)(10)). The court noted that this power was strictly limited where the agent attempts to designate himself as beneficiary: "An attorney in fact or agent may be named a beneficiary of an insurance contract or an extension, renewal, or substitute for the contract only to the extent the attorney in fact or agent was named as a beneficiary under a contract procured by the principal before executing the power of attorney." *Id*. (citing Tex. Est. Code Ann. § 752.108 (b)). Further, "Unless the principal has granted the authority to create or change a beneficiary designation expressly . . . an agent may be named a beneficiary of an insurance contract . . . only to the extent the agent was named as a beneficiary by the principal." *Id*.

The court held that as Christian had not previously been named as beneficiary, he was not authorized to name himself beneficiary of the policy or annuity. However, the court noted that his designation of his sister Sarah as the contingent beneficiary was authorized by both the statute and the power of attorney: "Christian was therefore authorized to remove Nicholas as a beneficiary of the Policy and designate anyone but himself as a beneficiary in his place… Barker is the proper beneficiary of the Policy and is legally entitled to collect the remaining Policy funds." *Id*.

Finally, the court held that Nicholas's cross-claims for breaches of various fiduciary duties, conversion, trespass to chattels, violation of the Theft Liability Act, and tortious interference with inheritance failed because Nicholas did not have standing to assert them. The court held:

> To bring these claims, Nicholas must show that he has standing as the principal in a fiduciary relationship with Christian or demonstrate that he was deprived of a legitimate property interest. He can do neither. As the discussion above establishes, while

> Christian's designation of himself as beneficiary of the Policy was not authorized by statute, his actions did not constitute self-dealing or breach any duty he held as fiduciary. Furthermore, Christian was authorized by statute to designate Sarah as the contingent beneficiary of the Policy and the Annuity Contract. Accordingly, Christian acted lawfully in removing Nicholas as the beneficiary of the Policy and Annuity Contract, and Nicholas cannot recover against him for it.

Id. Therefore, the court held that neither Christian or Nicholas were entitled to the proceeds, Christian's sister was entitled to those funds.

Interesting Note: The court also held that "Texas courts apply the law that was in place at the time the power of attorney was executed rather than the current law." *Id*. (citing *Wise v. Mitchell*, 2016 WL 3398447, at *8 (Tex. App. 2016) (applying sections of Probate Code—now Estates Code—that were in place "at the time the Power of Attorney was executed"); *Cole v. McWillie*, 464 S.W.3d 896, 898 (Tex. App. 2015) (finding that power of attorney was not durable under the Probate Code that "was in effect at the time of the execution of the power of attorney"); *cf. Randall v. Kreiger*, 90 U.S. 137, 138-39, 23 L. Ed. 124 (1874) (holding that a power of attorney that was invalid at the time it was made was validated by a curative act only because the act was explicitly retroactive)). The court noted that in September 2017, the Texas Estates Code was amended to read, "Unless the principal has granted the authority to create or change a beneficiary designation expressly . . . an agent may be named a beneficiary of an insurance contract . . . only to the extent the agent was named as a beneficiary by the principal." Tex. Est. Code Ann. § 752.108(b). Accordingly, because the power of attorney was executed in October 2015, the court applied the 2015 statute and not the 2017 amendment.

XII. CLAIMS AGAINST BENEFICIARIES OF ACCOUNTS

A. Estate Representative May File Claims

Where there is a dispute regarding the withdrawal of funds in an account or the creation of the account itself, a representative of an estate has a statutory duty to raise claims on behalf of the estate. Texas Estate Code section 351.151 provides that personal representatives of an estate shall use ordinary diligence to collect all claims and debts due the estate and to recover possession of all property of the estate to which its owners have claim or title. Tex. Est. Code 351.151 (Tex. Prob. Code § 233(a)). Moreover, if the personal representative fails to do so, it can be liable to the estate for such failure. *Id*. Further, Texas Estate Code Section 351.054 states that suits for the recovery of personal property, debts, or damages and suits for title or possession of lands or for any right attached to or growing out of the same or for injury or damage done thereto may be instituted by executors or administrators appointed in this state. Tex. Est. Code 351.054 (Tex. Prob. Code § 233A). Indeed, the representative of a decedent's estate is the correct party to file claims on behalf of the estate. *Frazier v. Wynn*, 472 S.W.2d 750 (Tex. 1971) (holding that heir did not have standing to file claim of decedent where it was not shown that an administration was not necessary). *But see In re Estate of Graffagnino*, 2002 Tex. App. LEXIS 6930, at *5 (Tex. App.—Beaumont Sept. 26, 2002, pet. denied) (heirs had standing to file declaratory relief claims against account beneficiary regarding survivorship status of account).

Furthermore, the representative of an estate does not owe any duty to a person listed on a joint account as those funds pass outside of probate. *In re Ernst*, No. 04-10-00319-CV, 2011 Tex. App. LEXIS 182, at *4-5 (Tex. App.—San Antonio Jan. 12, 2011, no pet.). Rather, the representative owes fiduciary duties to the beneficiaries of the estate. *Wells Fargo Bank, N.A. v. Crocker*, No. 13-07-00732-CV, 2009 Tex. App. LEXIS 9791 (Tex. App.—Corpus Christi December 29, 2009, pet. denied). An executor owes the same fiduciary duties that are applicable to trustees. *See id*. (citing *Lesiker v. Rappeport*, 33 S.W.3d 282, 296 (Tex. App.—Texarkana 2000, pet. denied)). This includes the duty of full disclosure of all material facts known to it that may affect the beneficiary's rights. *See id*. A fiduciary also "owes its principal a high duty of good faith, fair dealing, honest performance, and strict accountability." *Punts v. Wilson*, 137 S.W.3d 889 (Tex. App.—Texarkana 2004, no pet.) (citing *Ludlow v. DeBerry*, 959 S.W.2d 265, 279 (Tex. App.—Houston [14th Dist.] 1997, no writ)).

In *Crocker*, the court of appeals affirmed a jury's finding that a corporate executor breached its fiduciary duty by failing to disclose to beneficiaries that there was a joint account with an issue regarding survivorship status. 2009 Tex. App. LEXIS 9791. Ultimately, the executor prevailed because the court held that the beneficiaries did not prove causation, that the account did not have survivorship status and that the estate had a right to the funds. *Id.*

But, an estate representative does not breach a duty to seek the return of funds in a valid survivorship account, as those funds pass outside of probate. *Punts v. Wilson*, 137 S.W.3d at 893.

B. <u>Representative May Not Obtain Non-Probate Funds Until Proper Determination Is Made</u>

Texas Estate Code section 113.251-.252 authorizes the use of multi-party account funds to pay debts, taxes, and expenses of administration under certain circumstances. Tex. Est. Code 113.251-.252 (Tex. Prob. Code Ann. § 442). Three of the circumstances that must exist are that (1) the assets of the estate must be insufficient to pay the debts, taxes, and expenses of administration; (2) the estate's personal representative must have received a written demand by a surviving spouse, a creditor, or one acting for a minor child of the decedent; and (3) a proceeding to assert the liability of a multi-party account to an estate must be commenced no later than two years following the death of the decedent. *Id.* Absent this showing, a trial court has no discretion to require a party to forward joint account funds to an estate's representative. *In re Harden*, No. 02-04-122-CV 2004 Tex. App. LEXIS 6413 (Tex. App.—Fort Worth July 15, 2004, no pet.).

Moreover, in *In re Harden*, the court of appeals held that a trial court abused its discretion in allowing an estate to fund the cost of obtaining medical records regarding the issue of whether the decedent was of sound mind to execute joint account agreements. *Id*. at *8-9. "We hold that the trial court abused its discretion by authorizing the Temporary Administrator to expend estate funds to obtain copies of Ellen's medical records to discharge a nonexistent fiduciary obligation concerning nonprobate assets." *Id.*

C. Breach Of Fiduciary Duty Claim

The representative of the estate may raise a breach of fiduciary duty claim against the party improperly creating a joint account with rights of survivorship or improperly withdrawing funds. *See, e.g., Porter v. Denas,* No. 2006 Tex. App. LEXIS 5259 (Tex. App. San Antonio June 21, 2006, pet. denied); *Hooks v. Hooks*, No. 2-03-263-CV, 2004 Tex. App. LEXIS 6679 (Tex. App.—Fort Worth July 22, 2004, pet. denied) (party liable for breach of fiduciary duty and exemplary damages for improperly using joint account); *Evans v. First Nat'l Bank*, 946 S.W.2d 367 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (fact issue on whether party breached fiduciary duty by being named survivorship beneficiary).

There are two types of fiduciary relationships in Texas: (1) a formal fiduciary relationship arising as a matter of law, such as between partners or an attorney and a client, and (2) an informal or confidential fiduciary relationship arising from a moral, social, domestic, or merely personal relationship where one person trusts in and relies upon another. *Crim Truck & Tractor v. Navistar Int'l Transp. Corp*., 823 S.W.2d 591, 594 (Tex. 1992). For example, a power of attorney creates an agency relationship, which is a fiduciary relationship as a matter of law. *Vogt v. Warnock*, 107 S.W.3d 778, 782 (Tex. App.—El Paso 2003, no. pet.); *Plummer v. Estate of Plummer,* 51 S.W.3d 840, 842 (Tex. App.—Texarkana 2001, pet. denied); *Sassen v. Tanglegrove Townhouse Condo. Ass'n,* 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied). A fiduciary owes her principal a high duty of good faith, fair dealing, honest performance, and strict accountability. *Sassen,* 877 S.W.2d at 492.

When the transaction is between the principal and the fiduciary, the fiduciary must show proof of good faith and that the transaction was fair, honest, and equitable. *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507-08, 23 Tex. Sup. Ct. J. 149 (Tex. 1980); *Miller v. Miller*, 700 S.W.2d 941, 946-47 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). A transaction is unfair if the fiduciary significantly benefits from it at the expense of the beneficiary, as viewed in the light of circumstances existing at the time of the transaction. *Miller*, 700 S.W.2d at 947; *Collins v. Smith*, 53 S.W.3d 832, 840 (Tex. App.—Houston [1st Dist.] 2001, no pet.). "The fiduciary must show proof of good faith and that the transaction was fair, honest, and equitable." *Collins*, 53 S.W.3d at 840.

This presumption of unfairness applies to account transactions. *See, e.g., Porter v. Denas*, 2006 Tex. App. LEXIS 5259 (the court of appeals affirmed a finding that two attorneys breached their fiduciary duty to their client by being listed as beneficiaries of a survivorship account.); *.Alford v. Marino*, No. 14-04-00912-CV, 2005 Tex. App. LEXIS 10162 (Tex. App.—Houston [14th Dist.] Dec. 8, 2005, no pet.) (requiring the fiduciary to rebut the presumption the withdrawals he made from the principal's account during her lifetime were unfair); *Evans v. First Nat'l Bank of Bellville*, 946 S.W.2d 367, 379-80 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (stating that the presumption may apply when ownership of the CDs is resolved); *Townes v. Townes*, 867 S.W.2d 414, 417-18 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (applying the presumption after the fiduciary, and also a signatory on the CDs owned by the decedent, made withdrawals before the decedent's death).

For example, in *Texas Bank and*

Trust Company v. *Moore*, the Texas Supreme Court found, as a matter of law, that a fiduciary relationship existed between a 96-year-old woman and a nephew who was helping handle her financial affairs and that the nephew breached the duties he owed to his aunt. 595 S.W.2d 502 (Tex. 1980). The Court described the facts as follows:

> At age 90, in January 1967, Mrs. Littell suffered a broken hip and was hospitalized until March 30, 1967. She was then admitted to a Convalescent Center where she remained, with the exception of an interruption for further hospitalization, until her death on July 12, 1972, at age 96. During this time she was seriously incapacitated with respect to control of her bodily functions; she suffered from impaired hearing and eyesight; and she reached a state of confusion. Moore handled her financial affairs during this period and progressively gained control of the funds in question: first, as her agent under a power of attorney in writing checks on her accounts; then by transfers to him as co-owner of her various accounts. Of specific concern in the posture of the case here, Moore was the beneficiary in the transfer by Mrs. Littell of two of her accounts to him, i. e., as joint tenants with rights of survivorship. He also took possession of her jewelry.

Id. at 505. The administrator of the decedent's estate filed suit for breach of fiduciary duty against the nephew, and the jury found that the decedent did not intend to make a gift to her nephew when she created the survivorship accounts. The jury awarded the funds formerly in the accounts to the estate and awarded the estate punitive damages.

The Texas Supreme Court affirmed this verdict. The Court stated that when the nephew accepted transfers from his aunt to him as joint tenant with rights of survivorship, he consented to have his conduct "measured by the standard of finer loyalties." *Id*. The Court stated that the defendant did not rebut the presumption of unfairness, and found that allowing him to retain the funds in the accounts would frustrate her intentions as expressed in her will:

> These testamentary dispositions of Mrs. Littell will be frustrated if Moore is not held to account for the funds of Mrs. Littell he took over after her death. These funds would constitute a part of the residuary estate of Mrs. Littell devised to other persons, the recovery of which is the stated purpose of the administrator of her estate in this suit.

Id. at 510. The Texas Supreme Court found that the administrator proved a breach of fiduciary duty as a matter of law and affirmed the trial court's judgment on behalf of the administrator recouping the proceeds from the accounts and awarding punitive damages. *See id*.

In *Jordan v. Lyles*, heirs accused a power of attorney of holder of breach of fiduciary duty because she transferred a significant portion of the principal's property into accounts that named her as a pay on death beneficiary or giving her survivorship rights. *Jordan v. Lyles*, 455 S.W.3d 785 (Tex. App—Tyler 2015, no pet.). The jury found for the heirs, but the trial court awarded the agent a judgment notwithstanding the verdict. *Id*. The court of appeals first noted that since the principal's estate was handled with a muniment of title, and there was no executor appointed, the heirs had standing to assert their claims. *Id*.

The agent argued that the transactions were fair to the principal, but was unable to prove that she specifically discussed the transactions with the principal and informed him of the material facts relating to them. *Id*. Because the agent failed to show that she had full disclosure, there was evidence that she breached her fiduciary duty. The court of appeals reversed and reinstated the jury verdict. *Id*.

In *Porter v. Denas*, the court of appeals affirmed a finding that two attorneys breached their fiduciary duty to their client by being listed as beneficiaries of a survivorship account. 2006 Tex. App. LEXIS 5259. The court described the facts as follows:

> In the judgment, the trial court stated that the Porters breached a fiduciary duty owed to Alice. The record shows that the Porters were named as the IRA beneficiaries on April 5, 1996. However, on this same day, a note was created which stated, "Change Beneficiaries to Stephanie and Steven Porter [on] all CD[s,] IRA…." The evidence suggested that this note was in Stephanie's handwriting, thus attesting to the Porters' knowledge that they were listed as the IRA beneficiaries. It was undisputed that Alice's intent was to leave nearly everything to James. After James divorced his first wife, Alice had her will changed to omit the trust and provide James with the estate outright. Despite Alice's changes to the will to reflect her intent, the Porters still remained as the IRA beneficiaries. An inventory and list of claims was created regarding Alice's assets which revealed that Alice's estate consisted of nearly $ 114,000, excluding the $ 54,000 IRA. However, added together, the IRA amounted to more than 32% of Alice's assets. Witnesses stated that after Alice's death, Stephanie said that the money in the IRA was not hers and even inquired about changing the IRA beneficiary from herself to James.
>
> As the fact finder, the trial court could have believed that the Porters' fiduciary duties included, within the scope of their relationship, advice regarding Alice's IRA. Additionally, the trial court could have determined that the Porters failed to deal fairly or in good conscience with Alice.

Id. at *9-10.

However, every self-dealing transaction does not establish a breach of fiduciary duty as a matter of law. In *Plummer v. Estate of Plummer*, a daughter sued her brother and sister for withdrawing all of the money in a CD, owned by their mother, where the plaintiff was a survivorship beneficiary and depositing those funds in a checking account where the brother and sister were survivorship beneficiaries. 51 S.W.3d 840 (Tex. App.—Texarkana 2001, no writ). The brother and sister owed fiduciary duties to the mother due to having her power of attorney. The court described the issue of whether the brother and sister breached their duty to their mother: "whether … transferring this money to an account in which they had the right of survivorship used their advantage, the power of attorney, to gain benefit for themselves at the expense of their mother and thus place themselves in a position where their self-interest conflicted with their obligations as a fiduciary." *Id*. The jury found that there was no breach of fiduciary duty. The court of appeals affirmed, finding that there was evidence in the record to support that result. The evidence showed that the brother and sister had made the transfer to consolidate the mother's funds to assist in paying medical and nursing home bills. *See id*. *See also Campbell v. Campbell*, No. 03-07-00672-CV, 2010 Tex. App. LEXIS 4598 (Tex. App.—Austin June 18, 2010, no pet.) (summary judgment in favor of executor on breach of fiduciary duty claim against beneficiary was reversed); *Jackson v. Smith*, 53 S.W.3d 832, 841 (Tex. App.—Houston [1st Dist] 2001, no pet.).

Before a party can be liable for breach of fiduciary duty, the party must owe fiduciary duties.

In *Mims – Brown v. Brown*, a mother was the executrix of a father's estate and distributed real property to their son. 428 S.W.3d 366 (Tex. App.—Dallas 2014, no pet.). The son sold the property and deposited the proceeds into an account called "JTWROS" with the mother as co-applicant in 2003. The account agreement had no language describing what JTWROS was but stated that the bank could amend the agreement in the future without notice. In 2007, the bank amended the agreement to have an adequate legal description for "JTWROS." In 2008, the son died, and the mother received the proceeds from the account.

The son's wife sued the mother for the funds, and the court held that the bank's amendment and addition of adequate "JTWROS" language was effective. The son's wife also alleged that the mother breached fiduciary duties as she was the executrix and the son was a beneficiary. The court held that the mother did not breach a fiduciary duty by entering into the account agreement with the son. The court held that after the land was distributed to the son, it was no longer a part of the estate. When the mother signed the account agreement and received the proceeds, neither "occurred in the context of" the administration of the estate. The court found no law that would continue the fiduciary's obligation with regard to estate property years after it was distributed and after it had changed to a non-probate asset.

In *In the Estate of Abernethy*, Achor was a certified public accountant who met Abernethy in 1998 and prepared tax returns for Abernethy from then until Abernethy's death in 2008. 390 S.W.3d 431 (Tex. App.—El Paso May 30, 2012, no pet.). Not only did Abernethy and Achor enjoy a business relationship, they enjoyed a social one. Achor visited Abernethy in her home and sent her cards and notes, and likewise, Abernethy sent notes and cards to Achor, expressing Abernethy's gratitude to Achor for being her best friend and so intimately involved in her life.

Abernethy designated Achor as the beneficiary of an IRA and several joint multi party bank accounts with right of survivorship. After Abernethy's death, the funds in the bank accounts and IRA passed to Achor, who received approximately $1.2 million. The independent administrator of Abernethy's estate sued Achor, alleging that Achor's relationship with Abernethy created a fiduciary relationship between them and that Achor breached that duty when she became the beneficiary of Abernethy's accounts.

In the trial court, Achor moved for summary judgment, and the administrator responded attaching several exhibits, including depositions of witnesses and financial documents. After sustaining many objections to the adequacy of the response, the trial court granted Achor's motion for summary judgment, and the administrator appealed.

The court of appeals addressed whether Achor owed fiduciary duties to Abernethy. The court stated that the term "fiduciary" refers to a person owing a duty of integrity and fidelity, and it applies to any person who occupies a position of peculiar confidence towards another. According to the court, there are two types of fiduciary relationships: formal fiduciary relationships that arise as a matter of law, such as attorney client, partnership, trustee, and principal agent relationships, and informal fiduciary relationships or "confidential relationships" that may arise from moral, social, domestic, or personal relationships. *Id*.

The court stated that the accountant client relationship does not always involve a fiduciary duty. Whether a fiduciary duty exists in an informal relationship is to be determined from the actualities of the relationships between the persons involved. 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. Rather, a fiduciary relationship may arise if the dealings between the parties have continued for such a period of time and a party is justified in relying on another to act in his best interest. 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, and there exists a long association in a business relationship as well as personal friendship.

The court found that while it was fairly obvious that Achor and Abernethy had a close personal friendship, the administrator failed to produce summary judgment evidence that they had a fiduciary relationship, informal or otherwise. The administrator produced no evidence that Abernethy was accustomed to being guided by Achor's judgment and advice in legal, financial, and accounting matters. In the absence of any such evidence, the existence of a lengthy, cordial, and close relationship between Achor and Abernethy, standing alone, did not establish a confidential relationship arising to the level of a fiduciary relationship. The court acknowledged that the evidence that Abernethy designated Achor as a beneficiary of the IRA and established the joint accounts was sufficient to show that Abernethy placed some degree of subjective trust in Achor; however, that evidence did not show the level of trust and reliance necessary to establish the existence of a fiduciary relationship. The court of appeals affirmed the judgment in favor of Achor.

In *Morehead v. Gilmore,* the Gilmores named their daughter Patsy as executor of their will and as their attorney-in-fact. No. 01-02-00685-CV, 2003 Tex. App. LEXIS 3143 (Tex. App.—Houston [1st Dist.] 2003, no pet.). The Gilmores began transferring assets to Patsy, and they named Patsy as a joint tenant with right of survivorship on two certificate of deposit accounts. Patsy told her seven siblings that any of their parents' money that was available at their deaths would be split equally among the siblings. However, when the Gilmores died, Patsy kept all the funds in the accounts for herself. The court held:

> The evidence suggests that Mr. Gilmore and appellees relied on Patsy's assertions that she would assist Mr. and Mrs. Gilmore with their finances, and that the assets were to be managed by Patsy for the benefit of all of the children. We hold that, in this situation, where the evidence shows that, in a family setting, Patsy encouraged appellees to rely on her management of their parents' assets, and where there is evidence that appellees did rely on Patsy to manage the assets, there is some evidence of a fiduciary relationship.

Id. at *3.

In *Vogt v. Warnock*, Warnock named Vogt, a woman forty years his junior, as his attorney-in-fact; he later transferred several parcels of real property to her. 107 S.W.3d 778, 780 (Tex. App.—El Paso 2003, pet denied). After Warnock died, the executor of his estate sued Vogt, alleging several causes of action. *Id.* at 781. At trial, the estate dropped all of its claims except for the fiduciary duty claim, and it "stipulated that [Warnock] had done what he wanted to do in transferring property, and his competency and undue influence were no longer questions that would be submitted to the jury." *Id*. The trial court ruled as a matter of law that Vogt was Warnock's fiduciary, thereby shifting the burden of proof to Vogt to prove that the property transfers to her were fair. *Id.* The jury then found after trial that some of the transfers were unfair, and the trial court rendered judgment voiding those transfers. *Id*. On Vogt's appeal, the court of appeals affirmed the trial court's legal conclusion that Vogt was a fiduciary solely on the basis of the power of attorney, even though Vogt never actually performed any actions as Warnock's attorney-in-fact.

In *Punts v. Wilson*, J.W. Kelly named Hubert Wilson as pay-on-death beneficiary of several credit union accounts, as one of two residual beneficiaries of his will, and as the executor of his will. 137 S.W.3d 889, 890 (Tex. App.—Texarkana 2004, no pet.). When Kelly died, the other residual beneficiary of his estate, Edward Punts, sued Wilson, claiming that Wilson "breached his fiduciary duty to [Punts] as a beneficiary of the will by paying the [credit union] funds directly to him instead of depositing the funds into Kelly's estate, thereby depriving [Punts] of his fifty percent residual share." *Id*. at 890-91. The court of appeals concluded that Wilson "did not owe any fiduciary duty to Punts with regard to the funds in the Credit Union accounts, as they were not included in Kelly's estate." *Id*. at 892. The court further held that, although there was evidence that Kelly told Punts of his intent that Punts have half of the funds under the residual clause of his will, "extrinsic evidence may not be offered to prove intent" of a decedent where the terms of a survivorship account are "complete and unambiguous." *Id*. at 893.

D. <u>Mental Competence And Undue Influence</u>

An estate representative can assert that a decedent did not have the mental capacity to execute bank agreements creating survivorship effect or can allege that a third-party unduly influenced the decedent. *Dubree v. Blackwell*, 67 S.W.3d 286 (Tex. App.—Amarillo 2001, no pet.); *see also See Tomlinson v. Jones*, 677 S.W.2d 490 (Tex. 1984) (change of beneficiary of life insurance policies was a nullity where insured lacked capacity); *Cobb v. Justice*, 954 S.W.2d 162, 168 (Tex. App.—Waco 1997, pet. denied) (holding that former beneficiary may bring suit to contest a change of beneficiary on the basis that the change was accomplished as a result of undue influence exerted against the insured).

Absent proof and determination of mental competence, a person who signs a document is presumed to have read and understood the document. *Dubree v. Blackwell*, 67 S.W.3d at 286. Similarly, the law presumes that a person executing a contract or instrument had sufficient mental capacity at the time of its execution to understand his legal rights; therefore, the burden of proof rests on the person seeking to have the instrument set aside to show lack of mental capacity at the time of execution. *Decker v. Decker*, 192 S.W.3d 648, 652 (Tex. App.—Fort Worth 2006, no pet.). Elderly persons are not presumptively incompetent. *Dubree v. Blackwell*, 67 S.W.3d at 286 (citing *Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539, 545 (Tex. 1998)). A person may be incompetent at one time and competent at other times. *Id.*

In deciding whether undue influence resulted in execution of a document, three factors are to be considered: (1) the existence and exertion of an influence; (2) whether the influence operated to subvert or overpower the grantor's mind when the document was executed; (3) whether the grantor would not have executed the document but for the influence. *Id.* (citing *Dulak v. Dulak*, 513 S.W.2d 205, 209 (Tex. 1974)).

For example, in *Dubree*, the court of appeals affirmed a jury's determination that a decedent had mental competence when she created a survivorship account. *Id*. The court noted that no one testified regarding the decedent's mental competence at the time that she signed the account agreement. Though experts testified that the decedent had diminished capacity in general, they admitted that persons in that condition could have periods of lucidity. *Id.* at 290. There was also conflicting lay testimony regarding the decedent's mental competence and ability to handle her financial affairs. The court held that this was sufficient to support the jury's finding of competence. *Id.*

The court also affirmed the jury's finding that the decedent was not unduly influenced. *Id.* at 291. The evidence showed that the bank agreement was presented to the decedent by third parties, and there was no evidence of the decedent's mental incompetence at the time the agreement was signed. *Id.*

More recently, in *In the Estate of Minton*, 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. No. 13-12-00026-CV, 2014 Tex. App. LEXIS 1061 (Tex. App.—Corpus Christi, January 30, 2014, pet. denied). On December 2, 2010, Minton passed away, intestate, leaving a checking account and four C.D.s totaling $430,000. On March 25, prior to his death, Minton entered into POD contracts where he designated Garza, a retired law enforcement officer who had been friends with Minton since February 2007, as the beneficiary. After his death, the administrator of his estate and his heirs sued Garza for a declaration that the POD contract was void due to undue influence and mental incompetence. The court dismissed the undue influence claim due to a lack of evidence, and the mental competence claim went to a jury. The jury found that the decedent was not mentally competent.

Garza challenged the sufficiency of the evidence to support the jury's finding of mental incompetence. The court of appeals held that the burden of proof rests with the party seeking to set aside a contract for lack of mental capacity. It also 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.

The court held that to possess "mental capacity" to contract, the decedent, at the time of contracting, must have "appreciated the effect of what he was doing and understood the nature and consequences of his acts and the business he was transacting." *Id.* It also stated that 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." *Id.*

The court first dealt with an argument by Garza that evidence before or after the date that the POD agreement was signed was irrelevant. He argued that because there was evidence that the decedent was mentally competent on the day that he signed the POD agreement, that evidence from other time periods was not relevant. The court disagreed:

> Garza cites no case precluding the jury from considering or giving weight to evidence under any circumstance, much less solely because the party seeking to uphold the contract presents its own testimony of competence. Accordingly, we hold that the jury was entitled to consider evidence of Minton's mental capacity prior and subsequent to the execution of the P.O.D. contracts if the trial court could have considered it probative and relevant to his mental state on March 25, 2010.

Id. at *19. Consistently, the court later held that the trial court did not err in admitting the evidence of competence from time periods before and after the execution of the POD agreement.

The court then held that sufficient evidence supported the jury's determination that a decedent lacked mental capacity on the day he executed the POD agreement because in the month of, and the months before and after, he signed the POD agreement, the decedent refused medical treatment even though he was bed-ridden and needed it, spoke to people who were not there, sat for hours in his own feces and urine, and medical providers indicated he was confused and senile. This evidence came from medical records, care givers, former friends of the decedent, and a retained expert. The court held that the jury was entitled to infer that evidence of the decedent's irrationality and dementia in the months preceding and following the signing of the contracts was probative of his capacity to contract on the date at issue. There was contradicting evidence that showed that the decedent was competent on the day that he signed the agreement, including evidence by the beneficiary, two bank representatives, a care giver, and a retained expert. The court held that this evidence merely created a fact question that was resolved by the jury: "while Garza elicited testimony from witnesses who claimed Minton was competent on the date the contract was signed, it was the jury's responsibility to judge the credibility of the witnesses and determine the weight to be given their testimony." *Id*. at *21.

One interesting aspect of this case is the holding 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. Historically, however, courts have held that less mental capacity is required to enable a testator to make a will than for him to make a contract. *See, e.g., Burk v. Mata*, 529 S.W.2d 591 (Tex. Civ. App.—San Antonio1975, 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). *But see Bach v. Hudson*, 596 S.W.2d 673 (Tex. Civ. App.—Corpus Christi 1980, no writ).

E. <u>Constructive Trust</u>

A potential claim that a party may assert is that the defendant should hold account funds in a constructive trust for the plaintiff. This claim does not require that the defendant owe fiduciary duties to the plaintiff. In *Jackson Walker LLPO v. Kinsel*, Lesey and E.A. Kinsel owned a ranch, and when E.A. died, he divided his half between his children and Lesey. *Jackson Walker, LLPO v. Kinsel*, No. 07-13-00130-CV, 2015 Tex. App. LEXIS 3586 (Tex. App.—Amarillo April 10, 2015), aff'd in part, 2017 Tex. LEXIS 477 (Tex. May 26, 2017). Lesey owned sixty percent at that point. Lesey placed her interest into an intervivos trust, which provided that upon her death, her interests would pass to E.A.'s children. Lesey became frail and moved near a niece, Lindsey, and nephew, Oliver. Lindsey and Oliver referred Lesey to an attorney to assist in drafting a new will and trust amendments. The attorney informed E.A.'s children that Lesey needed to sell the ranch to pay for her care. At that time, Lesey had approximately $1.4 million in liquid assets and did not need to sell the ranch. Not knowing Lesey's condition, E.A.'s children agreed to sell, and the ranch was sold. Lesey's $3 million in cash went into her trust. Lindsey, as a residual beneficiary in the trust, would receive most of the money – not E.A.'s children. The attorney also effectuated amending the trust to grant Lindsey and Oliver greater rights, while advising them to withhold that information from E.A.'s children. E.A.'s children sued Lindsey, Oliver, and the attorney for tortious interference with inheritance rights and other tort claims. The jury returned a verdict for E.A.'s children.

The Texas Supreme Court granted the petition for review in *Jackson Walker, LLPO v. Kinsel*, No. 15-0403, 2017 Tex. LEXIS 477 (Tex. May 26, 2017). Regarding a constructive trust, the defendants had several arguments for why the trial court abused its discretion in creating a constructive trust in this case. *Id*. at *31-35. The Court disagreed and held that there does not have to be a breach of a fiduciary duty by the defendants owed to the plaintiffs. *Id*.

There was no duty owed by the defendants to the plaintiff. *Id*. Citing to an earlier opinion, the Court held: "It is true that we recently recognized that a 'breach of a special trust or fiduciary relationship or actual or constructive fraud' is 'generally' necessary to support a constructive trust. But in that same case we reaffirmed our statement in Pope that '[t]he specific instances in which equity impresses a constructive trust are numberless—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts.'" *Id*.

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

Accordingly, a plaintiff may potentially assert a constructive trust claim in conjunction with a mental incompetence or undue influence claim as against a defendant.

F. Standing Issues

Challenging the creation of an account or the change in beneficiary status can lead to interesting standing issues. In *In re Estate of Wallis*, Ronald Ray Wallis had designated Valerie Lewis as his attorney-in-fact and as the independent executrix of his estate. No. 12-07-00022-CV, 2010 Tex. App. LEXIS 3710, 2010 WL 1987514 (Tex. App.—Tyler May 19, 2010, no pet.). Wallis bequeathed his residuary estate to Lewis and designated her as the beneficiary of his 401(k) retirement plan and his life insurance policy (both held by him through his employer). *Id*. Wallis later executed a new will naming Richard Shomaker as his independent executor and bequeathing his entire estate to David Lomax. *Id*. At the same time, Wallis designated Lomax as the beneficiary of his retirement plan and his life insurance policy. *Id*. Against Wallis' specific instructions, someone with Wallis's employer informed Lewis of the changes in the beneficiaries of the retirement plan and the insurance policy. *Id*. Upon learning of these changes, Lewis used the powers granted her under the power of attorney and re-designated herself (without consulting Wallis) as the beneficiary of both the retirement plan and the life insurance policy. *Id*. On Wallis' death, Lomax and Shomaker sued Lewis, asserting that the change of beneficiary was outside the scope of authority granted by the power of attorney, constituted a breach of her fiduciary duty to Wallis, and resulted in Lewis' unjust enrichment. *Id*. The trial court declared the beneficiary designation forms Lewis signed void and ordered that a constructive trust be imposed on the funds from the retirement plan and the life insurance policy. *Id*.

On appeal, Lewis challenged Shomaker's and Lomax' standing to seek the imposition of a constructive trust, alleging that the fiduciary relationship that existed between her and Wallis did not "vest or somehow pass" from Wallis to Shomaker and Lomax. 2010 Tex. App. LEXIS 3710, [WL] at *2. In its application of common-law standing requirements to determine whether Shomaker and Lomax could sue for the imposition of a constructive trust, the court was "concerned with whether Shomaker and Lomax pleaded an injury that can be redressed through an equitable action for a constructive trust." *Id*.

In its analysis, the court recognized that the funds from Wallis' retirement plan and life insurance policy were nontestamentary, and there was no instrument relating to them which required probate proceedings to be prosecuted in order to take effect. *Id*. The court further took the position that "the beneficiary of a life insurance policy has at least an estate in anticipation sufficient to authorize the beneficiary to raise the issue of the decedent's mental capacity to change the designation." 2010 Tex. App. LEXIS 3710, [WL] at *3. Further, the court stated that "equity may entertain jurisdiction of a suit by an original beneficiary of a life insurance policy to set aside a decedent's change to another beneficiary on the ground of undue influence and to enjoin payment of the policy to the latter." *Id*. (citing *Tomlinson v. Jones*, 677 S.W.2d 490, 492-93 (Tex. 1984)). Because Shomaker, as the executor of the will, was a designated beneficiary of neither the retirement plan nor the life insurance policy, he had no legal claim to the funds. *Id*. Accordingly, Shomaker did not have standing to file a suit for imposition of a constructive trust. *Id*. In contrast, Lomax, as a beneficiary, "had at least an estate in anticipation" in the proceeds of the retirement plan and insurance policy. *Id*. The court determined that this "estate in anticipation" was sufficient to authorize Lomax, as the beneficiary designated by Wallis himself, to challenge the later beneficiary designation made by Lewis under the power of attorney granted to her by Wallis. *Id*. Finally, Lomax pleaded the type of injury that could be redressed through an action for a constructive trust because "[a] court of equity has jurisdiction to reach the property in the hands of a wrongdoer whenever legal title to property has been obtained through fraud, misrepresentations, concealments, or under similar circumstances that render it unconscionable for the holder of legal title to retain the interest." *Id*.

In *Dawson v. Lowrey*, the court expressly disagreed with the Wallis court. 441 S.W.3d 825 (Tex. App.—Texarkana July 29, 2014, no pet.). The court held: "We, therefore, decline to recognize, in this case, the existence of 'an estate in anticipation' in a P.O.D. bank account. Indeed, we find no Texas authority to support the proposition that a P.O.D. account beneficiary has 'an estate in anticipation' of the proceeds of that account." *Id*. The court concluded:

> In essence, Dawson claims that even though he is a stranger to the durable power of attorney, he is nevertheless legally entitled to question Lowrey's actions taken pursuant to that power. We find no persuasive authority for this position. The statute specifically addresses the right to demand an accounting and limits that right to the principal. If the Legislature wanted to expand this right, it could have easily done so. To hold that a stranger to a durable power of attorney has the right (and thus standing) to question the actions of the attorney-in-fact would result in an expansion of the law. The function of the courts is to interpret and apply the law as written by the Legislature. Because we find no legal basis for Dawson to question the actions of Lowrey in acting as the lawfully appointed attorney-in-fact for Pat, we conclude that Dawson lacks standing to sue for the imposition of a constructive trust.

Id. at *31-32 (internal citation omitted).

In *Kirkpatrick v. Cusick*, the court held that a daughter had standing to assert a breach of fiduciary duty claim for a brother-in-law having the mother name him as a joint tenant with right of survivorship on the two accounts. No. 13-13-00149-CV, 2013 Tex. App. LEXIS 15435 (Tex. App.—Corpus Christi December 19, 2013, pet. denied). The court also remanded for trial so that a jury could determine the merits of the daughter's claim.

G. Statute Of Limitations

Most claims regarding the proceeds from a joint account are raised by estate representatives. Section 16.003(a) of the Texas Civil Practice and Remedies Code provides that a suit for injuries caused to an estate or property of another must be brought within two years after the day the cause of action accrued. Tex. Civ. Prac. & Rem. Code § 16.003(a); *Washington v. Lackland Federal Credit Union*, No. 04-04-00416, 2004 Tex. App. LEXIS 10987 (Tex. App.—San Antonio December 8, 2004, no pet.) (statute of limitations barred representative's claim); *Estate of Lowrey*, No. 11-07-00033-CV, 2008 Tex. App. 9414 (Tex. App.—Eastland December 18, 2008, no pet.) (same). *But see Oadra v. Stegall*, 871 S.W.2d 882, 887 (Tex. App.—Houston [14th Dist.] 1994, no writ) (court stated that it was not necessary for an estate to file suit to claim what was, as a matter of law, its own property). Other individuals may have other statutes of limitations that apply depending upon the claims asserted.

In applying the statute of limitations, a cause of action accrues when facts come into existence that gives a claimant the right to seek a remedy in the courts. *Estate of Lowrey*, 2008 Tex. App. LEXIS 9414 at *4. Regarding appropriating the funds in CD, one court held that the estate representative's claim accrued when the defendant cashed the CDs. *Id.*

One court has held that the discovery rule did not apply where the plaintiff had access to bank records and could have discovered the withdrawal of the funds. *Urbanczyk v. Urbanczyk*, No. 07-07-0077-CV, 2009 Tex. App. LEXIS 587 (Tex. App.—Amarillo January 29, 2009, no pet.). For the same reason, the court also rejected a fraudulent concealment allegation. *See id*.

Similarly, in *Derouen v. Bryan*, between 2002 and 2004, a beneficiary's wife contacted the trustee and sought distributions of funds to her husband. No. 03-11-00421-CV, 2012 Tex. App. LEXIS 8635 (Tex. App.—Austin October 12, 2012, no pet.). The trustee granted those requests and forwarded thousands of dollars in that time period via checks made out to the beneficiary and mailed to the beneficiary's address. The beneficiary's wife deposited those checks into the beneficiary's personal account. In 2008, the beneficiary and his wife were going through divorce proceedings, and the beneficiary stated that he discovered that his wife had requested those funds from his trust, had received them, and had improperly spent them. The beneficiary sued the trustee for making improper distributions to a non-beneficiary, alleging breach of contract, breach of fiduciary duty, and negligence. The trustee filed a motion for summary judgment claiming that the beneficiary's claims were barred by the statute of limitations. The trial court granted the summary judgment, and the beneficiary appealed.

The court of appeals found that the claims for breach of fiduciary duty and breach of contract were subject to a four-year statute of limitations. The court held that a cause of action generally accrues when a wrongful act causes some legal injury, regardless of whether the plaintiff knows of the injury or if the resulting damages have yet to occur. The claims regarding the trust distributions accrued between 2002 and 2004. The beneficiary did not file suit until 2010. The beneficiary contended that the discovery rule tolled the accrual of his claims until 2008, when he first became aware of his wife's wrong doing. The court held that in order for the discovery rule to apply, the nature of the injury itself must be inherently undiscoverable and the injury must be objectively verifiable. The discovery rule tolls the statute of limitations such that it does not begin to run until the plaintiff knew, or should have known with the exercise of reasonable diligence, of facts giving rise to the cause of action.

The court assumed that the discovery rule applied and held that the beneficiary's claims still failed due to limitations. The court noted that the undisputed summary judgment evidence showed that the distribution checks were mailed to the beneficiary's home and that the funds were deposited into his personal bank account. While the beneficiary claimed he did not acquire actual knowledge about the distributions until 2008, if he had exercised reasonable diligence in handling his personal affairs, he would have discovered the distributions sooner. The court held that based upon the undisputed evidence, the beneficiary should have discovered his injury no later than 2004. Therefore, the court affirmed the summary judgment.

XIII. CLAIMS AGAINST FINANICIAL INSTITUTIONS

A. Breach Of Contract Claims

Often a bank will have notice that various parties are fighting over the funds in an account. In that circumstance, the bank may elect to freeze the account and not pay those funds to any party. It may also elect to interplead the funds into the registry of the court. When it elects to not pay those funds to a demanding party to the account, the demanding party may assert claims.

Whether a bank has breached a depository agreement is controlled by the language of the depository agreement. *See e.g., Rodriguez v. NBC Bank*, 5 S.W.3d 756, 764-65 (Tex. App.—San Antonio 1995, no pet.) (affirmed summary judgment for bank where depository agreement allowed bank to perform the challenged actions). For example, account agreements normally state that the bank has the right to withhold payment of funds from the accounts if it has oral or written notice of a claim against the accounts. The following is an example of such language:

> This booklet contains the rules and regulations governing consumer and business accounts at bank. By signing a services application or deposit account signature card, or by otherwise opening or maintaining an account with bank, you accept and agree to be bound by the terms and conditions of this deposit account agreement.
>
> **Adverse Claims**
>
> Upon receipt of oral or written notice from any party of a claim regarding the account, the bank may place a hold on the account and shall be relieved of any and all liability for its failure or refusal to honor any item

drawn on your account or any other withdrawal instruction.

Powers of Attorney

[T]he bank reserves the right to refuse to follow the instruction of an attorney-in-fact to designate the attorney-in-fact as a POD beneficiary to the account.

Legal Proceedings and Expenses

The bank may restrict the use of your account if the account is involved in any legal proceeding or, unless the laws of your state provide otherwise, if the bank reasonably deems such action necessary to avoid a loss. All expenses incurred by the bank as a result of any legal proceeding affecting your account including, but not limited to, court costs and attorney fees, may be charged against your account or billed to you separately.

After a bank learns of competing claims, it may put a hold on the disputed accounts, and in doing so, will not breach the contract.

B. Negligence

A plaintiff may assert a claim for negligence against a financial institution. The elements of a negligence cause of action are a duty, a breach of that duty, and damages proximately caused by the breach of that duty. *Doe v. Boys Clubs of Greater Dallas, Inc*., 907 S.W.2d 472, 477 (Tex. 1995). Whether a legal duty exists is a question of law. *TXI Operations, L.P. v. Perry*, 278 S.W.3d 763, 765 (Tex. 2009). A bank generally does not owe a duty to the public in general. *Guerra v. Regions Bank*, 188 S.W.3d 744, 747 (Tex. App.—Tyler 2006, no pet.).

Where the only duty between parties arises from a contract, a breach of this duty will ordinarily sound only in contract, not in tort. *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991). As a prerequisite to asserting a claim of negligence, there must be a violation of a duty imposed by law independent of any contract. *Id*.; *Southstar Corp. v. St. Paul Surplus Lines Ins. Co*., 42 S.W.3d 187, 193 (Tex. App.—Corpus Christi 2001, no pet.). For example, in *Ortega v. City Nat'l Bank*, the court held that the bank owed no tort duties to its customer because their relationship was controlled by their contract. 97 S.W.3d 765, (Tex. App.—Corpus Christi 2003, no pet.). The court also considered the fact that the plaintiff's damages flowed from their contract. *See id*. Similarly, in *Koonce v. First Victoria Nat'l Bank*, the court of appeals held 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.). The bank challenged the son's alternative negligence claim and asserted that there was no evidence that the bank owed any common-law negligence duty to the son. *See id*. The court of appeals stated: "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 court held that the son had identified no duty separate from the contract and had produced no evidence of any such duty. *See id*. The court of appeals affirmed the trial court's summary judgment on the son's negligence claim. *See id*.

In account litigation there were contracts between the bank and the customer. There is a good argument that the financial institution does not owe a tort duty of care, and that the customer has no negligence claim as his or her damages are all based out of the contract. However, this area of the law (contorts) is still unclear in Texas.

C. Tortious Interference With Inheritance

Historically, a beneficiary could assert a claim for tortious interference with inheritance because the bank "interfered" with her inheritance rights by failing to forward the funds to her. This tort cause of action has had little discussion in Texas courts and has not yet been approved by the Texas Supreme Court. The first court to recognize the tort was in *King v. Acker*, 725 S.W.2d 750, 754 (Tex. App.—Houston [1st Dist.] 1987, no writ). In *Acker*, the court of appeals cited the Restatement (Second) of Torts 774B, which provided: "One 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*.

More recently, several courts of appeals have held that Texas does not have a claim for intentional interference with inheritance. *Jackson Walker LLPO v. Kinsel*, No. 07-13-00130-CV, 2015 Tex. App. LEXIS 3586 (Tex. App.—Amarillo April 10, 2015), *aff'd in part*, 2017 Tex. LEXIS 477 (Tex. May 26, 2017). The Amarillo court of appeals first addressed the tortious interference with inheritance claim: "Someone 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*. The court noted that many Texas intermediate appellate courts recognized such a claim. The court reviewed several Fort Worth Court's opinions, where the case had been transferred from, to see if Fort Worth had recognized such a claim, and determined that Fort Worth had not directly done so. The court also noted that it and the Texas Supreme Court had not recognized the claim. The court held that it was solely the authority of the Texas Legislature or the Texas Supreme Court to create a new cause of action. Court rendered for the defendants refusing to recognize that new cause of action. *Id*.

The Texas Supreme Court issued an opinion in *Jackson Walker, LLPO v. Kinsel*, No. 15-0403, 2017 Tex. LEXIS 477 (Tex. May 26, 2017), where the court of appeals addressed the issue of whether a tortious interference with inheritance rights claim existed in Texas. The Court held that it would not decide that issue in Kinsel because the plaintiff had other adequate remedies.

Furthermore, 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, pet. granted). The defendants appealed and argued that Texas law does not recognize such a claim. The court of appeals agreed with the appellants. The court held that prior cases from that court and the Texas Supreme Court had never adopted such a claim:

> 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. The plaintiff sought review in the Texas Supreme Court, and the Court granted the petition for review. The Court's staff described the issue as: "The principal issue is whether Texas should recognize tortious interference with inheritance rights." It appears that the Court will address this important issue in the Anderson case.

In a similar claim, a party is not liable for tortious interference with contractual relations if the alleged interference was justified. *Friendswood Dev. v. McDade Co.*, 926 S.W.2d 280, 282-83 (Tex. 1996). The Texas Supreme Court held that justification is established as a matter of law when the defendant's acts, which the plaintiff claims constitute tortious interference, are merely done in the defendant's exercise of its own contractual rights, regardless of motive:

> [I]f the trial court finds as a matter of law that the defendant had a legal right to interfere with a contract, then the defendant has conclusively established the justification defense . . . and the motivation behind assertion of that right is irrelevant. Improper motives cannot transform lawful actions into actionable torts. "Whatever a man has a legal right to do, he may do with impunity, regardless of motive, and if in exercising his legal right to a legal way, damage results to another, no cause of action arises against him because of a bad motive in exercising the right."

Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 211 (Tex. 1996). *See also Fin. Review Servs. Inc. v. Prudential Ins. Co. of Am.*, 50 S.W.3d 495, 504 (Tex. App.—Houston [14th Dist.] 2000), *aff'd*, 29 S.W.3d 74 (Tex. 2000); *Abraham v. Ryland Mortg. Co.*, 995 S.W.2d 890, 895 (Tex. App.—El Paso 1999, no pet.).

It is unlikely that a beneficiary will be able to prove that the bank committed interference that constituted tortious conduct by failing to pay funds in an account where there is a dispute over the ownership of those funds. Where a bank acts pursuant to the parties' account agreement in withholding the funds after being advised that there were competing claims, the bank has a right to withhold payment and was justified in doing so.

Furthermore, a bank should be liable for tortious interference in filing a judicial proceeding (interpleader or declaratory judgment action). In *In re Estate of Valdez*, the court of appeals held that a party cannot assert a tortious interference with inheritance claim solely based on filing a will contest. 406 S.W.3d 228 (Tex. App.—San Antonio 2013, pet. denied). After a proponent filed an application to probate a will, a contestant filed a contest. The proponent then asserted a tortious interference with inheritance claim against the contestant. The trial court granted the contestant a summary judgment on that claim.

The court of appeals affirmed for the contestant. The court first discussed the claim of tortious interference with inheritance rights. "One 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*. The court held that in addition to the tortious conduct, "we have described the elements of this cause of action as the following: '(1) that an interference with one's property or property rights occurred; (2) such interference was intentional and caused damage; and (3) the interference was conducted with neither just cause nor legal excuse.'" *Id*. The court then cited to tortious interference with contract precedent that held that "[b]ringing suit to determine one's rights under a contract is a proper exercise of a legal right and cannot form the basis for a claim of tortious interference." *Id*.

The court cited to Texas Probate Code section 10C and held that the contestant could not be held liable because his act in filing the contest was allowed by the statute and was not tortious conduct:

> The language of the Texas Probate Code is clear that "[t]he filing or contesting in probate court of any pleading relating to a decedent's estate does not constitute tortious interference with inheritance of the estate." Thus, Robertson's mere filing of a will contest in this case did not constitute a tortious interference with inheritance of Martha Jane's estate. Valdez provides no authority to show how Robertson's alleged lack of standing would affect Robertson's statutory right under Texas Probate Code section 10C to file a will contest. Thus, Robertson's summary judgment evidence conclusively established that Valdez's cause of action for tortious interference failed as a matter of law. Because Valdez failed to raise a genuine issue of material fact as to the tortious nature of Robertson's actions, as a matter of law, the will contest cannot be considered a proper basis for Valdez's claim for tortious interference.

Id.

D. <u>Conversion</u>

A plaintiff may assert a claim for conversion against a financial institution. Conversion is the unauthorized and wrongful assumption and exercise of dominion and control over the personal property of another to the exclusion of, or inconsistent with, the owner's rights. *Waisath v. Lack's Stores, Inc.*, 474 S.W.2d

444, 447 (Tex. 1971); *Khorshid, Inc. v. Christian*, 257 S.W.3d 748, 758-59 (Tex. App.—Dallas 2008, no pet.). To establish a common law claim for conversion, a plaintiff must prove that: (1) the plaintiff owned or had possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner; (3) the plaintiff demanded return of the property; and (4) the defendant refused to return the property. *Khorshid, Inc*., 257 S.W.3d at 759.

There is no claim for a conversion of money where the money is not identifiable, specific chattels (e.g., collectible coins). *See Newsome v. Charter Bank Colonial*, 940 S.W.2d 157, 161-64 (Tex. App.—Houston [14th Dist.] 1996, writ denied). An action will lie for conversion of money when its identification is possible and there is an obligation to deliver the specific money in question or otherwise particularly treat specific money. *Autry v. Dearman*, 933 S.W.2d 182, 188 (Tex. App.—Houston [14th Dist.] 1996, writ denied). Ordinarily, a general deposit of money with a bank creates a creditor-debtor relationship between the depositor and the bank. Title to the money passes to the bank, subject to the depositor's demand for payment. *Mesquite State Bank v. Professional Investment Corporation*, 488 SW.2d 73, 75 (Tex. 1972); *City Nat. Bank of Bryan v. Gustavus*, 106 S.W.2d 262 (Tex. 1937); *Hodges v. Northern Trust Bank of Texas N.A*., 54 S.W.3d 518, 522 (Tex. App.—Eastland 2001, pet. denied); Newsome v. Charter Bank Colonial, 940 S.W.2d 157, 161 (Tex. App.—Houston [14th Dist.] 1996, writ denied). A suit for conversion will not lie where a debtor-creditor relationship is created by general deposit of money. *See Mauriceville Nat. Bank v. Zernial*, 892 S.W.2d 858, 860 (Tex. 1995); *Hodges v. Northern Trust Bank of Texas N.A*., 54 S.W.3d at 522 ("The designation of a deposit has great significance in an attempted action for conversion. Because a general deposit becomes the property of the bank, the depositor has no action for conversion when the bank wrongfully pays out the deposit."); *First National Bank of Bellaire v. Hubbs*, 566 S.W.2d 375, 377 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); *Collin County Savings & Loan v. Miller Lumber Co*., 653 S.W.2d 114 (Tex. App.—Dallas 1983); *Williams v. Stansbury*, 634 S.W.2d 924, 928 (Tex. App.—El Paso 1982, no writ); *Crenshaw v. Swenson*, 611 S.W.2d 886, 891 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.); *Graham v. Turner*, 472 S.W.2d 831, 839 (Tex. Civ. App.—Waco 1971, no writ); *Hull v. Freedman*, 383 S.W.2d 236, 238 (Tex. Civ. App.—Fort Worth 1964, writ ref'd n.r.e.); *Story v. Palmer*, 284 S.W. 331 (Tex. Civ. App.—El Paso 1926, no writ).

For example, in *Sam Texas v. Chase Securities of Texas, Inc*., the court held that a depository was not liable under a conversion theory to a plaintiff for failing to pay funds from an account:

> Although the testimony is conflicting as to what actually occurred on the day appellant requested liquidation of the account, it is undisputed that the account established at Chase Bank was for the purchase of mutual funds. The evidence shows the money was not required or intended to be kept segregated, nor was it deposited under a special agreement having the characteristics of a bailment

> contract or held in trust. Where no agreement requires money to be segregated or kept in a particular form, the requirements for "specific money" giving rise to a cause of action for conversion are not met. Therefore, no claim for conversion lies for the funds in the mutual account.

No. 14-00-01078-CV, 2002 Tex. App. LEXIS 194 (Tex. App.—Houston [14th Dist.] January 10, 2002, pet. denied) (not desig. for pub.).

A special deposit, on the other hand, remains the property of the depositor and is subject to an action for conversion. *Hodge v. N. Trust Bank of State*, 54 S.W.3d 518, 522 (Tex. App.—Eastland 2001, pet denied); *Houston National Bank v. Biber*, 613 S.W.2d 771, 774 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.). "Special deposit" creates a bailor-bailee relationship whereby the bank keeps or transmits identical property or funds entrusted to it. *Hodges v. Northern Trust Bank of Texas N.A.*, 54 S.W.3d at 522. The bank receives no title to money deposited for a special purpose but instead becomes responsible for the safekeeping, return, or disbursement of the money in question. *Citizens National Bank of Dallas v. Hill*, 505 S.W.2d 246, 248 (Tex. 1974); *Hodges v. Northern Trust Bank of Texas N.A.*, 54 S.W.3d at 522. An action for conversion of money will lie if the money is required and intended to be kept segregated and substantially in the form in which it was received or as an intact fund. *Estate of Townes v. Townes*, 867 S.W.2d 414, 419-20 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

A CD can be either a general or a special deposit, depending on the agreement between the bank and the depositor. *Hodge v. N. Trust Bank of State*, 54 S.W.3d at 522; *Texas Bank and Trust Co. v. Spur Security Bank*, 705 S.W.2d 349, 352 (Tex. App.—Amarillo 1986, no writ). A special deposit signifies a deposit accompanied by an agreement that the identical deposit will be returned or paid out for a specific purpose, and creates a bailee-bailor relationship between the bank and the depositor. *Texas Bank and Trust Co. v. Spur Security Bank*, 705 S.W.2d at 352 (citing *Hudnall v. Tyler Bank and Trust Company*, 458 S.W.2d 183, 186 (Tex. 1970)).

There is also an exception to the rule for general deposits when the bank has knowledge that a general deposit is held by the depositor in trust for a third party. In that case, the bank may not offset the trust funds against the depositor's individual debt, and the bank becomes liable for conversion if it does so. *National Indemnity Company v. Spring Branch State Bank*, 162 Tex. 521, 348 S.W.2d 528, 529 (Tex. 1961); *Hodge v. N. Trust Bank of State*, 54 S.W.3d at 522.

There is a statutory conversation claim. Section 3.420 describes the law of conversion applicable to "instruments" under the UCC:

> (a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by: (1)

> the issuer or acceptor of the instrument or (2) a payee or endorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a copayee.
>
> (b) In an action under subsection (a), the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument.
>
> (c) A representative, including a depositary bank, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out.

Tex. Bus. & Comm. Code Ann. §3.420.

One court has held that an estate has a claim for conversion under this provision where the decedent's nephew had a power of attorney and endorsed third party checks to the decedent and deposited them into his own account at the bank. *West v. Regions Bank*, No. W2010-020230COA-R3-CV, 2011 Tenn. App. LEXIS 403 (Tenn. Ct. App. July 26, 2011). The court stated:

> The Bank knew that Nephew was acting with a power of attorney, and had his POA on file. There is evidence in the record that the Bank knew that the checks made payable to Mr. West were "taken in . . . . transaction[s] known by the [Bank] to be for the personal benefit of" Nephew. If this is proven, under this statute, the Bank would be deemed to have notice of Nephew's breach of his fiduciary duty. This gives rise to an action for conversion under the UCC, pursuant to Section 47-3-420.

Id. However, in another case, an employer did not have a conversion claim where its accountant, who had general authority to sign checks, had signed the check. *Mid-Continent Specialists, Inc. v. Capital Homes, L.C.*, 106 P.3d 483 (Kan. S. Ct. 2005). Court held that Section 420 barred a drawer from suing for conversion. *Id*.

E. Breach Of Fiduciary Duty

A party to an account may attempt to raise a breach of fiduciary duty claim for the bank's refusal to forward funds in an account. The elements of breach of fiduciary duty are: the existence of a fiduciary relationship, and a breach of duty by the fiduciary that causes damages to the client or improper benefit to the fiduciary. *Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999); *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 429 (Tex. App.—Austin 2009, no pet.). Fiduciary relationships arise when a party occupies a position of confidence toward another. *Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.*, 715 S.W.2d 408, 416 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). A fiduciary relationship arises as a matter of law out of certain formal relationships, such as attorney-client, partners, and joint venturers. *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). Fiduciary relationships "may arise outside these usual situations when the dealings between the parties have continued for such a period of time that one party is justified in relying on the other to act in [its] best interest." *Blue Bell, Inc.*, 715 S.W.2d at 416. Generally, a lender has no fiduciary duty to its borrowers. *Bishop v. First Interstate Bank, N.A.*, 1996 Tex. App. LEXIS 4109 (Tex. App.—Houston [14th Dist.] Sept. 12, 1996); *Nautical Landings Marina, Inc. v. First Nat'l Bank*, 791 S.W.2d 293, 299 (Tex. App.—Corpus Christi 1990, writ denied); *Thomas v. First City*, 1992 Tex. App. LEXIS 1629 (Tex. App.—Houston [14th Dist.] June 18, 1992). Additionally, as a general rule, the relationship between a bank and its customers does not create a special or fiduciary relationship. *See Thigpen*, 363 S.W.2d at 247; *Bank One N.A. v. Stewart*, 967 S.W.2d 419 (Tex. App.—Houston [14th Dist.] 1999, pet denied); *Farah v. Mafrige & Kormanik, P.C.*, 927 S.W.2d 663, 675 (Tex. App.—Houston [1st Dist.] 1996, no writ); *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).

The only instances in which a court has found a special relationship between a borrower and lender have involved extraneous facts and conduct, such as excessive lender control over, or influence in, the borrower's business activities. *Greater S.W. Office Park, Ltd. v. Texas Commerce Nat'l Bank*, 786 S.W.2d 386, 391 (Tex. App.—Houston [1st Dist.] 1990, writ denied). Therefore, it would be highly unlikely that a customer could assert a breach of fiduciary duty claim against a bank for failing to pay funds in an account where there is a dispute regarding the ownership of those funds.

F. <u>Aiding And Abetting Breach Of Fiduciary Duty, Knowing Participation, Or Conspiracy</u>

When a party takes advantage of a vulnerable person, the party often does not make wise investments with the wrongfully obtained assets. In other words, when someone attempts to retrieve those assets for the vulnerable person or his or her estate, the defendant may be judgment proof. So, the plaintiff will often look to others who have deeper pockets and may be able to pay a judgment. There are several theories in Texas that allow a plaintiff to sue a third party for the exploiter's bad conduct.

When a third party knowingly participates in the breach of a fiduciary duty, the third party becomes a joint tortfeaser and is liable as such. *Kinzbach Tool Co. v. Corbett-Wallace Corp*., 138 Tex. 565, 160 S.W.2d 509, 513-14 (Tex. 1942); *Kaster v. Jenkins & Gilchrist, P.C.*, 231 S.W.3d 571, 580 (Tex. App.—Dallas 2007, no pet.); *Brewer & Pritchard, P.C. v. Johnson*, 7 S.W.3d 862, 867 (Tex. App.—Houston [1st Dist.] 1999), *aff'd on other grounds*, 73 S.W.3d 193 (2002). The elements are: (1) a breach of fiduciary duty by a third party, (2) the aider's knowledge of the fiduciary relationship between the fiduciary and the third party, and (3) the aider's awareness of his participation in the third party's breach of its duty. *Darocy v. Abildtrup*, 345 S.W.3d 129, 137-38 (Tex. App.—Dallas 2011, no pet). There may also be an aiding-and-abetting-breach-of-fiduciary-duty claim in Texas. *See First United Pentecostal Church of Beaumont v. Parker,* 2017 Tex. LEXIS 295 (Tex. Mar. 17, 2017) (assumed that such a claim existed in Texas but held that it was not expressly so holding).

A civil conspiracy involves a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). An action for civil conspiracy has five elements: (1) a combination of two or more persons; (2) the persons seek to accomplish an object or course of action; (3) the persons reach a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts are taken in pursuance of the object or course of action; and (5) damages occur as a proximate result. *Id*.

The point is that a plaintiff may allege that the financial institution or some other person knew of the fiduciary relationship, knew that breaches were occurring, and still assisted in completing the transactions.

The plaintiff may cite to Texas Business and Commerce Code Section 3.307 as giving legal definition to when a financial institution or other defendant has notice of breach of fiduciary duty. Section 3.307 sets forth the rules dictating when a taker of an instrument would lose its holder-in-due-course status and potentially make financial institutions vulnerable to other causes of action, such as conversion due to having notice of fiduciary breaches. Tex. Bus. & Com. Code Ann. § 3.307. Section 307 has been explained in this way:

> When a fiduciary holds an instrument in trust for or on behalf of the represented person, he is usually authorized to negotiate the instrument only for the benefit of the represented person. When the fiduciary negotiates the instrument for his own benefit rather than for the benefit of the represented person in breach of his trust, an equitable claim of ownership on the part of the represented person arises. The represented person may assert this claim against any person not having the rights of a holder in due course. A taker cannot be a holder in due course if he has notice of the claim of the represented person. Section 3-307 determines when the taker has notice of such a claim that prevents her from becoming a holder in due course.

6 WILLIAM D. HAWKLAND & LARRY LAWRENCE, UNIFORM COMMERCIAL CODE SERIES § 3-307:3 (Rev. Art. 3) (1999).

Section 3.307(b) of the Texas Business and Commerce Code states:

> If (i) an instrument is taken from a fiduciary for payment or collection or for value, (ii) the taker has knowledge of the fiduciary status of the fiduciary, and (iii) the represented person makes a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, the following rules apply:
>
> (1) notice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person;

(2) in the case of an instrument payable to the represented person or the fiduciary as such, the taker has notice of the breach of fiduciary duty if the instrument is:

(A) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary;

(B) taken in a transaction known by the taker to be for the personal benefit of the fiduciary; or

(C) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person;

(3) if an instrument is issued by the represented person or the fiduciary as such, and made payable to the fiduciary personally, the taker does not have notice of the breach of fiduciary duty unless the taker knows of the breach of fiduciary duty; and

(4) if an instrument is issued by the represented person or the fiduciary as such, to the taker as payee, the taker has notice of the breach of fiduciary duty if the instrument is:

(A) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary;

(B) taken in a transaction known by the taker to be for the personal benefit of the fiduciary; or

(C) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

Tex. Bus. & Com. Code Ann. § 3.307.

Section 3.307 is a good place to start to determine whether there is notice that a party is breaching his or her fiduciary duty. But, this provision should not create a direct cause of action for breach of fiduciary duty or any other cause of action; it merely sets forth rules regarding when a taker of an instrument is on notice of a breach of fiduciary duty. *Wright v PNC Fin. Servs. Grp.*, 2015 U.S. Dist. LEXIS 100486 (E.D. Mich. 2015) (citing *First Independence Capital Corp. v. Merrill Lynch Business Financial Servs., Inc.*, 181 F. App'x 524 (6th Cir. 2006)); *Southland Health Servs., Inc. v. Bank of Vernon*, 887 F.Supp.2d 1158 (W.D. Ala. August 9, 2012) (no independent cause of action under Section 3.307); *Am. Sav., FSB v. Tokarski*, 959 N.E.2d 909, 918 (Ind. App. Ct. 2011) ("Section 307 therefore does not define a cause of action but only sets forth when a taker of an instrument has notice of a claim such that the taker is not a holder in due course and is therefore subject to a claim of a right in the instrument or its proceeds."); *Fine v. Sovereign Bank*, No. 06c11450, 2011 U.S. Dist. LEXIS 57268 (D.C. Mass. May 27, 2011) (same); *Chouteau Auto Mart, Inc. v. First Bank of Mo.*, 148 S.W.3d 17, 22 (Mo. App. 2004) (same).

At least one court has held that Section 3.307 of the Texas Business and Commerce Code is not only relevant to the notice inquiry for an aiding and abetting breach of fiduciary duty cause of action, it held that it is the only test for notice for that claim. *Quilling v Compass Bank*, No. 3:03-CV-2180-R, 2004 U.S. Dist. LEXIS 18811 (N.D. Tex. September 17, 2004). *See also Jelmoli Holding, Inc. v. Raymond James Fin. Servs.*, 470 F.3d 14, 18-19 (1st Cir. 2006).

For example, in *Wood Code 3, Inc. v. JPMorgan Chase Bank, N.A.*, a business sued a bank for aiding and abetting breach of fiduciary duty when the business's employee wrote checks and deposited the money in her account at the bank. 292 S.W.3d 795 (Tex. App.—Beaumont 2009, no pet.). The court described the facts as:

> From 2000 to 2005, Johnson wrote hundreds of Woodforest account checks and deposited the checks into her personal checking account with Chase. Some of the checks were made payable to Johnson and indorsed by her signature, but many of the checks were signed in blank or made payable to fictitious accounts or payees and were indorsed for deposit only to Johnson's personal account. Chase accepted the checks for deposit into Johnson's account and Woodforest honored all of the checks.

Id. at 796. The issue in the case was whether the bank had notice of the employee's breach of fiduciary duty. Regarding the checks signed by the employee as fiduciary to the employee as recipient or payee, the court held that there was no evidence that the bank knew of a fiduciary breach. The court stated: "The summary judgment evidence contains no evidence that any of the tellers who took the checks were aware or even suspected that Johnson did not have the authority to deposit the checks into her account." *Id*. Importantly, the court noted that none of the checks were made payable to the business or the employee as a fiduciary: "Americom contends Chase had notice of Johnson's breach of fiduciary duty sufficient to alter Chase's status as a holder in due course because the checks were deposited into an account other than an Americom account or a fiduciary account, but that notice would apply only to instruments made payable to Americom or to Johnson as a fiduciary." *Id*. at 798.

In *Max Duncan Family Invs. Ltd. v. NTFN, Inc*., a company sued its former president for using corporate property as collateral on a personal real estate transaction. 267 S.W.3d 447 (Tex. App.—Dallas 2008, pet. denied). The issue was whether a holder of note, who sold the property to the president, was a holder in due course. Citing Section 3.307(b)(4), the court found that the holder had notice of the president's breach of fiduciary duty because the holder knew the president was a fiduciary of the company, the company was the payor of the note, the holder did not see or request any documentation to establish the president had authority to pledge the corporate property as collateral, the holder was aware the note was for a personal debt of the president, and the holder sold the land to the president personally. *Id*. at 453.

In *West v. Regions Bank*, an estate filed suit against a bank that allowed a power of attorney holder to endorse checks made payable to the decedent and deposit them into the power of attorney's own bank accounts at the defendant bank. No. W2010-

020230COA-R3-CV, 2011 Tenn. App. LEXIS 403 (Tenn. Ct. App. July 26, 2011). The court of appeals held that the bank had notice of the breach of fiduciary duty and was liable for the transactions under a conversion cause of action. *Id.; Richards v. Seattle Metro Credit Union*, 117 Wn. App. 30 (Wash. Ct. App. 2003).

G. Money Had and Received

A plaintiff may assert a claim for money had and received against a financial institution. Although an action for money had and received is an action at common law, it is equitable in its nature. *Color, Inc. v. T. C. Lordon Co., Inc.*, 524 S.W.2d 346, 350 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.); *Aetna Casualty & Surety Co. v. Corpus Christi National Bank*, 186 S.W.2d 840, 842 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.). Money had and received is an equitable doctrine applied to prevent unjust enrichment. *Phippen v. Deere & Co.*, 965 S.W.2d 713 n.1 (Tex. App.—Texarkana 1998, no pet.); *Miller-Rogaska, Inc. v. Bank One, Texas, N. A.*, 931 S.W.2d 655, 662 (Tex. App.—Dallas 1996, no writ); *Burlington Northern R.R. Co. v. Southwestern Elec. Power Co.*, 925 S.W.2d 92, 101 n. 5 (Tex. App.—Texarkana 1996, no writ). An action for money had and received arises when one person obtains money which in equity and good conscience belongs to another. *Staats v. Miller*, 150 Tex. 581, 243 S.W.2d 686, 687 (1951); *Phippen v. Deere & Co.*, 965 S.W.2d at n.1; *Amoco Prod. Co. v. Smith*, 946 S.W.2d 162, 164 (Tex. App.—El Paso 1997, no writ); *Color, Inc. v. T. C. Lordon Co., Inc.*, 524 S.W.2d 346, 350 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.). It is a quasi-contractual action involving an implied promise and leading to a claim of debt not evidenced by a writing.

This action is not premised on wrongdoing, but looks only to the justice of the case and inquires whether the defendant has received money which rightfully belongs to another. *Amoco Prod. Co*., 946 S.W.2d at 164; *Greer v. White Oak State Bank*, 673 S.W.2d 326, 329 (Tex. App.—Texarkana 1984, no writ). In *Staats*, the Texas Supreme Court explained that an action for money had and received is not to be denied or restricted by technicalities and formalities because such an action looks to the abstract justice of the case. *Staats*, 243 S.W.2d at 687. One court has stated:

> An action for restitution based on unjust enrichment or for money had and received will lie where one person has obtained money from another by fraud, duress, or taking an undue advantage; or when money is paid by one person in consideration for an act to be done by another and the act is not performed; or to recover money received on a consideration that has failed in whole or in part.

Austin v. Duval, 735 S.W.2d 647, 649 (Tex. App.—Austin 1987, writ denied) (quoting 6 TEX.JUR.2D ASSUMPSIT § 6 (1959)).

Generally, when a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory, such as money had and received. *Fortune Prod. Co. v. Conoco, Inc*., 52 S.W.3d 671, 684 (Tex. 2000) (involving claim for unjust enrichment); *UL, Inc. v. Prudeda*, No. 01-09-00169-CV, 2010 Tex. App. LEXIS 9806, *45 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (money and had and received not available where contract covered dispute);

DeClaire v. G & B McIntosh Family Ltd. P'ship, 260 S.W.3d 34, 49 (Tex. App.—Houston [1st Dist.] 2008, no pet.). Parties should be bound by their express agreements, and when a valid agreement already addresses the matter, recovery under an equitable theory is generally inconsistent with the express terms of the agreement. *Conoco*, 52 S.W.3d at 684; UL, Inc., 2010 Tex. App. LEXIS 9806 at *45, *see Edwards v. Mid-Continent Office Distribs., L.P.*, 252 S.W.3d 833, 837 (Tex. App.—Dallas 2008, pet. denied) ("The doctrine of unjust enrichment applies the principles of restitution to disputes that are not governed by a contract between the parties.").

H. Unjust Enrichment

A plaintiff may assert a claim for unjust enrichment against a financial institution. Unjust enrichment is an equitable principle holding that one who receives benefits unjustly should make restitution for those benefits. *Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App.--San Antonio 2004, pet. denied). Unjust enrichment occurs when the person sought to be charged has wrongfully secured a benefit or has passively received one which it would be unconscionable to retain. *Id*. A person is unjustly enriched when he obtains a benefit from another by fraud, duress, or the taking of an undue advantage. *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992). Unjust enrichment characterizes the result or failure to make restitution of benefits received under such circumstances as to give rise to an implied or quasi-contract to repay. *Villarreal*, 136 S.W.3d at 270. It has also been said that recovery under unjust enrichment is an equitable right and is not dependent on the existence of a wrong. *Id*. Unjust enrichment is not a proper remedy merely because it might appear expedient or generally fair that some recompense be afforded for an unfortunate loss to the claimant, or because the benefits to the person sought to be charged amount to a windfall. *Heldenfels,* 802 S.W.2d at 40.

There is a split in the courts of appeals regarding whether unjust enrichment is solely a remedy or whether it is an independent cause of action. Some courts hold that it is not an independent claim for relief and there is no valid underlying claim for that remedy. *See Argyle ISD ex rel. Bd. of Trustees v. Wolf*, 234 S.W.3d 229, 246 (Tex. App.—Fort Worth 2007, no pet.); *Barnett v. Coppell N. Tex. Court Ltd.*, 123 S.W.3d 804, 816-17 (Tex. App.—Dallas 2003, pet denied) (holding that, because unjust enrichment is not an independent cause of action, the trial court erroneously instructed the jury on it); *City of Corpus Christi v. Heldenfels Bros., Inc*., 802 S.W.2d 35, 40 (Tex. App.—Corpus Christi 1990), aff'd, 832 S.W.2d 39 (Tex. 1992); *City of Harker Heights, Tex. v. Sun Meadows Land, Ltd*., 830 S.W.2d 313, 317 (Tex. App.—Austin 1992, no writ) ("Restitution for unjust enrichment is often an appropriate measure of recovery for breach of contract;" however, "[i]t is a measure of damages, not a cause of action."); David Dittfurth, *Restitution in Texas: Civil Liability for Unjust Enrichment*, 54 S. TEX. L. REV. 225, 238 (2012) ("Most of the Texas courts of appeals and federal courts that have considered the question under Texas law have rejected the existence of an independent cause of action for unjust enrichment.").

Other courts hold that unjust enrichment is an independent cause of action. *Pepi Corp. v. Galliford*, 254 S.W.3d 457, 460 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 891 (Tex. 1998) ("We have recognized that, in some circumstances, a royalty owner has a cause of action against its lessee based on unjust enrichment, but only when the lessee profited at the royalty owner's expense."); *Heldenfels Bros. v. City of Corpus Christi*, 832 S.W.2d 39, 41-42 (Tex. 1992) (discussing subcontractor's inability to recover under quantum meruit and unjust enrichment theories); George P. Roach, *Unjust Enrichment in Texas: Is it a Floor Wax or a Dessert Topping?*, 65 BAYLOR L. REV. 153, 203-40 (2013) (exploring "the ongoing dispute of whether unjust enrichment is a cause of action").

While unjust enrichment is not per se a cause of action, an action for restitution, or seeking the imposition of a constructive trust, may lie on the legal theory of unjust enrichment. *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 891 (Tex. 1998); *Ginther v. Taub*, 675 S.W.2d 724, 728 (Tex. 1984); *Republic Bankers Life Ins. v. Wood*, 792 S.W.2d 768, 779 (Tex. App.—Fort Worth 1990, writ denied). Otherwise, it has been treated as part of a claim for money had and received, which requires a determination of whether a defendant holds money that in equity and good conscience belongs to the plaintiff. *See Mary E. Bivins Found. v. Highland Capital Mgmt. L.P.*, 451 S.W.3d 104, 112 (Tex. App.—Dallas 2014, no pet.).

If there is a claim for unjust enrichment, the analysis will be very similar to the money had and received claim discussed above.

I. <u>Bad Faith</u>

A party to an account may attempt to raise a bad faith claim for the bank's refusal to forward funds in an account. Ordinarily, when a depositor deposits funds into a bank account, a relationship of debtor and creditor arises. *Mauriceville Nat'l. Bank v. Zernial*, 892 S.W.2d 858, 860 (Tex. 1995); *Bandy v. First State Bank, Overton, Tex.*, 835 S.W.2d 609, 618-19 (Tex. 1992). The duty of good faith and fair dealing does not exist in Texas unless intentionally created by express language in a contract or unless a special relationship of trust and confidence exists between the parties to a contract. *See Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41, 47, 52 (Tex. 1998) (there is no general duty of good faith and fair dealing in ordinary, arms-length commercial transactions); *Arnold v. Nat. County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987); *Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984).

Specifically, no general duty of good faith and fair dealing exists between a lending institution and its borrower. *See, e.g., Federal Deposit Ins. Corp. v. Coleman*, 795 S.W.2d 706, 709 (Tex. 1990) (where the court determined, among other things, that neither a secured creditor nor the FDIC owed guarantors a duty of good faith and fair dealing to foreclose promptly after default); *Eller v. NationsBank of Tex.*, 975 S.W.2d 884 (Tex. App. El Paso 1994, no writ); *Herndon v. First National Bank*, 802 S.W.2d 396, 399 (Tex. App.—Amarillo 1991, writ denied) (no duty of good faith between lender and customer under a note); *Thomas v. First City*, 1992 Tex. App. LEXIS 1629 (Tex. App.—Houston [14th Dist.] June 18, 1992). Therefore, it would be highly unlikely that a customer could assert a bad faith claim against a bank for failing to pay funds in an account where there is a dispute regarding the ownership of those funds.

J. <u>Criminal Statutes</u>

A plaintiff may assert a claim based on a criminal statute, such as financial exploitation of the elderly. Tex. Pen. Code § 32.53. "The Texas Penal Code does not create private causes of action," and as a result, "these 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.). A plaintiff should not be able to assert any civil claim based on a criminal statute.

XIV. LIABILITY FOR FAILING TO CORRECTLY OPEN AN ACCOUNT

Customers raise claims against banks for failing to properly create an account with rights of survivorship language. *See, e.g., Cweren v. Texas Capital Bank, N.A.*, No. 01-94-00995-CV, 1996 Tex. App. LEXIS 3319 (Tex. App.—Houston [1st Dist.] August 1, 1996, writ denied) (not design. for pub.). Historically in Texas, a customer, who allegedly was a party to a joint tenancy account with rights of survivorship, could not sue a bank for the funds in the joint account without tendering a valid written bank agreement with the appropriate language contained therein. *Stauffer v. Henderson* is the leading case on interpreting JTROS accounts. 801 S.W.2d 858 (Tex. 1990). In that case, the Texas Supreme Court held that language on a signature card did not create rights of survivorship and noted that under Texas Probate Code section 439(a), the Texas Legislature made a written agreement necessary to create a JTROS account. *See id*. The Court held that "the necessity of a written agreement signed by the decedent to create a right of survivorship in a joint account is emphatic...." *Id.* at 862-63. Furthermore, the Court found that a party could not introduce parol evidence, documents and oral communications before the account agreement was created, in an attempt to prove that the account was intended to be a JTROS account. Numerous Texas courts of appeals have applied this rather black-and-white rule to bar claims as to the ownership of funds in an account. But, does this rule stop claims against banks for failing to set up JTROS accounts? The answer is "no," it does not.

A. *A.G. Edwards* Opinion – A Customer May Sue For Not Properly Creating A JTROS 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"). The daughter and father discussed the creation of a JTROS account with a Bank representative. After the representative recommended that they create a new JTROS account, the daughter and father delivered all of the documentation necessary to create such an account. However, the Bank lost the documentation and before new documents could be signed, the father fell into a coma and later died. The Bank paid the funds, which it held in an older account that was not a JTROS account, to the father's estate. 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.

In the Texas Supreme Court, the principal issue was whether Texas Probate Code section 439(a) (now Estates Code section 113.151-.153) barred extrinsic evidence regarding the creation of a JTROS account. The daughter argued that the section only applied to multiple party disputes as to the ownership of the funds in a JTROS account and did not apply to disputes alleging a bank's malfeasance in failing to properly set up such an account. The Texas Supreme Court agreed with the daughter: "Section 439(a) does not govern [the daughter's] claim against [the bank]. [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. *Id*. 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. The Court then limited its prior *Stauffer* opinion to "ownership disputes over a joint account" and held that it did not apply to claims against a bank for failing to create a JTROS account. *Id*.

B. <u>Courts Of Appeals' Application Of *A.G. Edwards*</u>

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.). In this case, in the 1990s, Parker Williams purchased six CDs that totaled over $1.2 million and were marked as multi-party accounts with rights of survivorship. These CDs listed multiple parties with rights of ownership. In July 2004, the defendant informed Williams that the CDs were not fully covered by FDIC insurance. Williams 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.

Williams then died intestate approximately one month later. The plaintiffs were not Williams's heirs under the laws of intestate succession and would not receive any of the funds from the new CDs. The plaintiffs 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 of appeals first held that under Texas Probate Code Section 448, the plaintiffs had no claim regarding Williams cashing in the original CDs. Texas Probate Code Section 448 provides that "payments made from a multi-party account to one or more of the individuals listed on the account discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between the parties." Tex. Prob. Code Ann. § 448. The appellate court held that the bank was discharged from claims for the payment it made to Parker as a joint owner when it closed the original CDs: "To the extent that any of claimants' causes of action relate to those original CDs or to actions taken before the original CDs were closed, those claims are ruled by Section 448." *Clark*, 2010 Tex. App. LEXIS 4376 at *12-13. The court then turned to the plaintiffs' tort claims based on the bank's actions that occurred after the original CDs were closed.

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.

The plaintiffs also claimed that the bank was negligent when it failed to take sufficient steps to protect their inheritance rights when it opened the new CDs. The court held that the plaintiffs did not establish that the bank owed them a duty: "Claimants' pleadings reveal that all of the actions for which Claimants seek to recover on their negligence cause of action were directed at Parker Williams and related to the duties the bank owed to Williams." *Id.* at *17. The court concluded that there was no evidence that the bank owed any duties to the plaintiffs.

The court distinguished *A.G. Edwards & Sons v. Beyer*, 235 S.W.3d 704 (Tex. 2007). The court noted that in *A.G. Edwards & Sons*, the father and daughter both sought to open a joint account and both signed the account agreement with right of survivorship. "The context of the language in the opinion makes it clear that the Court was referring to the duties arising out of the contract signed by Alicia and her father." *Clark*, 2010 Tex. App. LEXIS 4376 at *18. In contrast, the court held that the claimants did not have any contractual relationship with the bank: "There is no evidence that they ever participated in the opening of the CDs or, as in *Beyer*, jointly executed any documents with Williams that would have given them any rights to the funds at issue." *Id.* at *19. Therefore, the appellate court affirmed the trial court's summary judgment.

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. The bank had Robert sign a file maintenance form that included the sole notation: "Add Beneficiary: Kenneth B. Koonce." *Id*. Two years later, Robert died, and his son took the CD to the bank, the bank distributed the funds of the CD to the son. Robert's daughter later sued her brother and the bank claiming that the funds distributed to the son were an asset of Robert's estate and that there was no POD effect. The trial court granted summary judgment in favor of the sister, determining that the CD funds were an estate asset. Later, the son sued the bank in connection with that judgment 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 for failing to change the account designation as directed by Robert and violated the DTPA by breaching its warranty that the account designation would be changed as directed by Robert. 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 bank initially argued that the file maintenance form was sufficient to create a POD account. The court of appeals disagreed stating that the probate code requires a "specific, definite written agreement before such property is allowed to pass outside a testamentary instrument."

Id. The court found that there was no such specificity present. The term "Payment on Death" or "POD" appeared nowhere on the form. *Id*. The term, "Add Beneficiary" on the file maintenance form could have referred to several different matters, and thus, the file maintenance form was simply too vague and ambiguous to comply with the written agreement requirement of the probate code. *Id*.

The court noted that in cases where the issue is ownership of the funds on deposit, the plaintiff may not use extrinsic evidence to show whether the account is a valid right of survivorship or a POD account. However, in cases where the issue is whether the financial institution breached its agreement with the decedent in failing to set up the requested account, the plaintiff may utilize extrinsic evidence to prove its 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. Therefore, the court of appeals held that the trial court erred in granting summary judgment on the son's breach of contract claim.

The bank also challenged the son's negligence claim and asserted that there was no evidence that the bank owed any common-law negligence duty to the son. The court of appeals stated: "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 court of appeals noted that it was the son's own contention that the bank owed him a duty arising out of its agreement with Robert to change the CD to a POD account with the son as a beneficiary. The court held that the son had identified no duty separate from the contract and had produced no evidence of any such duty. The court of appeals affirmed the trial court's summary judgment on the son's negligence claim.

Finally, the court of appeals addressed the son's DTPA claim based upon the bank's failure to properly create the POD account. The son contended that because he was a creditor beneficiary of Robert's account, he was a consumer as defined by the DTPA. The court assumed, for the sake of argument, without deciding same, that a creditor beneficiary was a DTPA consumer but found that the son produced no evidence that he was a creditor beneficiary. The court noted that the son produced no evidence that Robert made him a beneficiary of the CD account out of any legally enforceable duty by Robert to appellant, such as the satisfaction of a debt or contractual obligation. The court of appeals thus affirmed the trial court's granting of summary judgment on the son's DTPA claim.

C. <u>Conclusion On *A.G. Edwards*</u>

The *A.G. Edwards* opinion is a dangerous precedent for financial institutions. Because extrinsic evidence is not allowed, the issue of whether an account belongs to an estate or belongs to a listed beneficiary should be a rather straight-forward analysis. The issue is whether the appropriate language exists on the forms creating the account. If it does not, the money goes to the estate. Then the beneficiary can seek a damage award against the bank. So, in essence, the depositors' heirs will get a double recovery, the estate gets the money and a particular beneficiary also gets the money.

On what basis did the Texas Supreme Court create such a potentially unfair liability? 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.

D. Failure To Properly Create Retirement Account

A financial institution may also be held liable for not properly setting up a retirement account. *McDade v. Texas Commerce Bank, Nat'l Ass'n*, 822 S.W.2d 713 (Tex. App.—Houston [1st Dist.] 1991, writ denied). In *McDade*, eight months after retiring from defendant's employ, plaintiff discovered that defendant had invested plaintiff's retirement funds in a taxable money market account rather than a nontaxable money market IRA account, as plaintiff had requested. The mistake cost plaintiff $ 228,000 in federal taxes. The jury found for plaintiff on claims of negligence, breach of contract, and breach of an express warranty under the Texas Deceptive Trade Practices Act (DTPA). The trial court directed verdict for the bank.

The court of appeals held that more than a scintilla of evidence was introduced to prove that defendant breached an express warranty to plaintiff and violated the DTPA because the conduct of defendant's investment specialist supported plaintiff's version of events. The court held that the plaintiff qualified as a consumer eligible for redress under the DTPA because he sought defendant's services. The court reversed, reinstating the jury verdict awarding plaintiff $ 228,000 in actual damages, a statutory penalty, and attorney fees.

XV. LITIGATION ARISING FROM INVESTMENTS FROM ACCOUNTS

Financial institutions may take on the responsibility of acting as the custodian of a customer's accounts. If actions are taken that result in losses to the account, the customer may sue the financial institution for various claims, including breach of contract, breach of fiduciary duty, negligence, conversion, etc. There is one very important initial step in analyzing the financial institution's liability: what duties are owed by the financial institution.

A. Self-Directed Accounts

A self-directed account agreement generally provides that the customer retains the right to invest the proceeds and that the financial institution has no discretion and shall invest as directed by the customer. Typical agreements severely limit custodian duties and in most instances the only remaining duty is the duty to transfer funds as directed by investor. *See, e.g., Tucker v. Soy Capital Bank & Trust Co.*, 2012 IL App (1st) 103303 (Ill. App. Ct. 1st Dist. 2012).

Further, there are generally releases regarding the financial institution actin in conformity with the customer's directives.

"In a non-discretionary account, the agency relationship begins when the customer places the order and ends when the broker executes it because the broker's duties in this type of account, unlike those of an investment advisor or those of a manager of a discretionary account, are "only to fuffill the mechanical, ministerial requirements of the purchase or sale of the security or future[s] contracts on the market." *Hand v. Dean Witter Reynolds Inc*., 889 S.W.2d 483, 493 (Tex. App.—Houston [14th Dist.] 1994, writ denied). "As a general proposition, a broker's duty in relation to a non-discretionary account is complete, and his authority ceases, when the sale or purchase is made and the receipts therefrom accounted for." *Id*.

Indeed, Texas courts have generally held that self-directed IRAs are not special deposits that require fiduciary duties between the holder and depositor. *Lee v. Gutierrez*, 876 S.W.2d 382 (Tex. App.—Austin 1994, no writ); *Sammons v. Elder*, 940 S.W.2d 276 (Tex. App.—Waco 1997, no writ). In one case, the court held that a custodian had no right to approve a transaction, and that the customer had the legal right to transfer assets that were supposed to be in the account. *Colvin v. Alta Mesa Resources*, 920 S.W.2d 688 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

Notwithstanding, customers have sued financial institutions for doing as directed and not warning the customer of the impact of the directions. In *Sterling Trust Co. v. Adderley*, the Texas Supreme Court remanded an issue back to the trial court due to an improper jury instruction regarding breach of fiduciary duties. 168 S.W.3d 835 (Tex. 2004). The self-directed IRA custodian-defendant was originally found to be secondarily liable for aiding a fraudulent scheme that misappropriated money from investors. The jury instruction regarding a breach of fiduciary duty was held to be improper because it was overly broad and did not account for the contractual limitations on fiduciary duties, which the Court held were allowed under Texas law. *Id*. at 847. The limiting provisions stated, "Sterling Trust has no responsibility to question any investment directions given by the individual regardless of the nature of the investment," and that "Sterling Trust is in no way responsible for providing investment advice." *Id*. Although the Texas Supreme Court did not analyze common-law duties owed by custodians, it did make clear that contractual limitations would impact duties owed between parties.

In *Holmes v. Newman*, the plaintiff made an investment in a start-up internet company that provided betting tips to gamblers for a fee. No. 01-16-00311-CV, 2017 Tex. App. LEXIS 6177 (Tex. App.—Houston [1st Dist.] July 6, 2017, no pet.). The defendant, Newman, worked at TD Ameritrade and the plaintiff, Holmes, was a customer. Newman left TD Ameritrade before the investment in the start-up company. After the investment did not turn out as hoped, the plaintiff sued the defendant for various claims, including breach of fiduciary duty. The defendant filed a no-evidence motion for summary judgment, which the trial court granted.

In the appellate court, the plaintiff did not contend that any formal relationship between him and the defendant gave rise to a fiduciary duty at the time of their agreement; rather, he argued that the prior broker/client relationship between the two gave rise to an informal fiduciary duty because that prior relationship of trust and confidence caused him to rely on the defendant for financial advice, including the decision to invest in the start-up business. The court of appeals analyzed the duties owed by brokers:

> While a broker owes his investor-client a fiduciary duty, that duty varies in scope with the nature of their relationship. The nature of the account—whether nondiscretionary or discretionary—is one factor to be considered, as are the degree of trust placed in the broker and the intelligence and qualities of the consumer. A broker's duty is usually restricted to executing the investor's order when the investor controls a nondiscretionary account and retains the ability to make investment decisions. In a nondiscretionary account, the fiduciary relationship is one of principal/agent, and the agency relationship begins when the customer places the order and ends when the broker executes it; the broker's duties in this type of account are only to fulfill the mechanical, ministerial requirements of the purchase or sale of the security or futures contracts on the market. As a general proposition, a broker's duty in relation to a nondiscretionary account is complete, and his authority ceases, when the sale or purchase in made and the receipts therefrom accounted for. There is nothing in the record to show that Holmes's account with TD Ameritrade was discretionary or that the broker/client relationship between the two gave rise to anything other than a principal/agent duty to execute the trades ordered. Thus, Holmes has not raised a fact question regarding whether Newman owed him any fiduciary duty other than fulfilling the trades authorized by Newman.
>
> Because Newman's fiduciary duty was satisfied once the trades were made in accordance with Holmes's instructions, it is not the sort of preexisting relationship of trust and confidence that would give rise to a continuing, informal relationship imposing even broader fiduciary duties than Newman held under the prior relationship.

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

In *Scionti v. First Trust Corp.*, a federal district court in Texas granted summary judgment in favor of First Trust, an self-directed IRA custodian, regarding multiple claims brought by an investor whose IRA investments were allegedly worthless because an agent of First Trust did not properly list Scionti on a real estate deed. 1999 U.S. Dist. LEXIS 23253 (S.D. Tex. June 23, 1999). Scionti, the investor, brought several federal and Texas common law claims against the custodian bank, including claims of negligence per se, negligence, breach of fiduciary duty, breach of contract, and a claim for a prohibited transaction in violation of §4975 of the

Internal Revenue Code. *Id*. at *17-*18. According to Scionti, First Trust failed to perform obligations under the agreement to confirm investment asset values, allowed its agents to fraudulently misrepresent facts, and failed to maintain proper internal and account control procedures mandated under GAAP trust account rules, among other allegations. *Id*. at *22.

First Trust motioned for summary judgment on all claims and presented three arguments specifically for the prohibited transaction in violation of §4975 of the I.R.C. claim. *Id*. at *61-*64. First Trust argued that the investor represented that the investment was not prohibited through an initialed statement, that it had no duty to inquire whether Scionti's investment was a prohibited transaction under §4975 of the I.R.C., and that no private action for an alleged breach of the I.R.C. exists. *Id*. The investor eventually conceded First Trust's third point while alleging his negligence per se claim. *Id*. at *87. First Trust urged the court to follow Metz and prevent the investor from "foist[ing] responsibility … onto a nondiscretionary trustee … merely by claiming that [the custodian] had a duty to admonish [the investor] that his representation was incorrect." *Id*. at *62-*63.

The court granted summary judgment in favor of First Trust, acknowledging that it was "sympathetic to Scionti's plight in the loss of his savings and can understand his anger and frustration, but merely desiring to strike out, sue, and prevail over any person or entity involved in any way with his voluntary transferring of his assets does not make that defendant liable. . . ." *Id*. at *126. The court held that the negligence per se claims failed because: 1) no private cause of action existed under the tax code, 2) Scionti represented that the investment did not constitute a prohibited transaction, and 3) Scionti's produced no evidence that Intrust's failure to oversee and prevent a transaction in violation of Internal Revenue Code § 4975 constituted negligence per se. *Id*. at *135-*36.

The court also held that no fiduciary duties existed between the parties and dismissed all related claims against the custodian. *Id*. at *131. Evidence reflected that Scionti's investment advisor selected and made the investment, and no evidence showed that First Trust participated in any investment decisions or discretionary matters regarding the investment of Scionti's IRA funds. *Id*. The court mentioned that the agreement expressly limited First Trust's duties to non-discretionary matters only. *Id*. at *132. Scionti is a good example of how courts treat the wide range of claims brought by bitter investors against custodians for negligence, breach of fiduciary duties, breach of contract, failure to comply with the Internal Revenue Code. The holding follows the weight of authority that there are no fiduciary duties, duties to alert the customer as to the soundness of their investment exists, or duties to maintain compliance with tax provisions, where the role of the custodian is non-discretionary.

In *Tapia v. Chase Manhattan Bank, N.A.*, an investor sued his bank over various investments under various claims. 149 F.3d 404, 412 (5th Cir. 1998). The bank raised statute of limitations as a defense, and the investor stated that the statute of limitations was tolled due to the fiduciary status of the bank. The district court granted the bank a motion for summary judgment. The Fifth Circuit affirmed and held:

> while the nature of the duty owed by a broker will vary depending on the relationship between the broker and the

> investor, where the investor controls a nondiscretionary account and retains the ability to make investment decisions, the scope of any duties owed by the broker will generally be confined to executing the investor's order. Our review of the summary judgment record reveals that none of the Defendants possessed the authority to act without [the investor's] direction. The Management Agreement between [the investor] and [the bank] provided that funds would only be invested on the advice of [the investor]. Nothing in the summary judgment record suggests that [the investor] gave [the bank's employees] any discretionary investment authority. We therefore agree with the district court that any fiduciary relationship between [the investor] and the [bank] was limited to making investments approved by [the investor].

Id. at 412. Therefore, the Fifth Circuit has held that the fiduciary duties between an investor and his broker can be limited by the parties' agreement. *See also Art v. Stifel, Nicolaus & Co.*, 86 F.3d 973, 978 (9th Cir. 1996) (where broker had nondiscretionary authority in the sale of client's shares, the fiduciary duty owed by the broker to the client was "to carry out the ordered sale with due care and loyalty and not to make unauthorized sales"); *Puckett v. Rufenacht, Bromagen & Hertz, Inc.*, 949 F.2d 789 (5th Cir. 1992); *Hotmar v. Lowell H. Listrom & Co.*, 808 F.2d 1384, 1385-87 (10th Cir. 1987) (in the absence of evidence that broker exercised control over account, no fiduciary duty was imposed on broker beyond executing requested transactions); *Commodity Futures Trading Comm'n v. Heritage Capital Advisory Servs., Ltd.*, 823 F.2d 171, 173 (7th Cir. 1987) (only a broker operating a discretionary account-in which the broker determined which investments to make-is viewed as a fiduciary); *Romano v. Merrill Lynch, Pierce, Fenner & Smith*, 834 F.2d 523, 530 (5th Cir. 1987); *Hill v. Bache Halsey Stuart Shields Inc.*, 790 F.2d 817, 825 (10th Cir. 1986) ("fiduciary duty in the context of a brokerage relationship is only an added degree of responsibility to carry out pre-existing, agreed-upon tasks properly"); *Limbaugh v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 732 F.2d 859, 862 (11th Cir. 1984) ("duty owed by the broker was simply to execute the order"). Texas precedent seems to be consistent. *See e.g. Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539 (Tex. 1998).

There are multiple cases from other jurisdictions that hold that the custodian is not liable for simply following the customer's directions.

In *Metz v. Serfling*, an IRA accountholder loaned his IRA funds to his investment advisor, Serfling, who subsequently took off with over $300,000 of the investor's money. 1992 U.S. Dist. LEXIS 1164 (N.D. Ill. Feb. 5, 1992). Metz, the investor, sued Sterling, the thief/advisor but also included the self-directed IRA custodian, Intrust, in the suit on claims that Intrust should have discovered that Serfling was deemed to be unfit to handle customer funds, that Intrust should have known that Serfling, as a fiduciary investment advisor, was a "disqualified person" under § 4975 of the Internal Revenue Code, and that Intrust should have notified Metz that the transaction was "prohibited" under § 4975(c). *Id*. at *5-*6.

The court cited the parties' agreement as a clear indication that Intrust had a limited, non-discretionary duty to hold trust funds until directed by an authorized person to disperse the funds. *See id*. at *11. Metz also verified to Intrust that the transaction at issue did not violate § 4975 of the tax code upon authorization. First, in determining Intrust's fiduciary duty to investigate Serfling, the court held:

> Based on the clear and unequivocal language of the [agreement], Metz was completely responsible for releasing the funds to Serfling, and Intrust had no such responsibility. Intrust had no duty to investigate Serfling's background or refuse to release the funds to Serfling. In fact, if Intrust had not released the funds upon Metz's direction, it would have violated the trust agreement. . . . Metz confirmed that the release of funds was proper. Intrust fulfilled its duty by holding the funds until directed by Metz and then releasing them at Metz's direction. Metz cannot now blame Intrust for his own failure to investigate Serfling's background. Under the trust agreement, Metz bore the responsibility to discover the fact that Serfling's trading license had been revoked three weeks earlier, and not Intrust.

Id. at *11-*12. The court then analogized to the general rule that brokers cannot be held liable for a breach of fiduciary duty when the investor directs an investment be made. The court held that a fiduciary relationship exists when the broker has discretion in handling an investor's money. *Id*.

The court dismissed Metz's claim that Intrust had a duty to prevent authorization of a transaction prohibited under I.R.C. § 4975, stating that Metz's argument has several "serious flaws." *Id*. at *15. The court cites Metz's personal certification that his transaction did not constitute a prohibited transaction under the tax code, stating:

> Metz cannot foist responsibility for his tax decisions onto a non-discretionary trustee under the prudent person rule merely by claiming that Intrust had a duty to admonish Metz that his representation was incorrect. Intrust was not hired to act as Metz's tax advisor. For these reasons, the Court holds that a trustee of a non-discretionary trust has no duty under the prudent person rule to inform the settlor of the tax consequences of a loan of the trust funds directed by the settlor absent some language to that effect in the trust agreement.

Id. The court held that Intrust did not exceed its authority under the agreement by authorizing the transaction in violation of the tax code, nor did Intrust have a duty to alert Metz as to the prohibited nature of the transaction under I.R.C. § 4975. *Id*.

The court applied an elevated prudent person standard to Intrust, in a custodial role, but still determined that no duty existed to give tax advice or to investigate an advisor's background. *Id*. at *15-*16. The prudent person standard mentioned above by the court is part of Illinois statutory scheme governing the actions of trustees. The rule requires trustees to "exercise the judgment and care under the circumstances then prevailing, which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital." *Id*. at *15. While the prudent person rule applies to trustees, most jurisdictions do not consider custodians to be "trustees," as such title implies the existence of a fiduciary relationship.

On appeal, the Seventh Circuit affirmed summary judgment for Intrust. *Metz v. Independent Trust Corp.*, 994 F.2d 395 (7th Cir. 1993). Regarding Intrust's alleged duty to speak up about a violation of I.R.C. § 4975, the court rejected the argument because "[c]ommon sense and logic also dictate the conclusion that Metz may not hold Intrust liable for following Metz's explicit direction to loan the trust funds to Serfling. Metz did not engage Intrust as an investment counsellor or tax adviser. . . ." *Id*. at 402. The court stated that Metz attempted to shift the responsibility onto Intrust when Serfling fled with his money, "[t]hus Metz's complaint falls on deaf ears." *Id*. at 403.

In *Grund v. Delaware Charter Guarantee & Trust Co.*, a class of investors brought claims against the defendant-custodian of negligence, breach of contract, and breach of fiduciary duties that survived a motion to dismiss. 788 F. Supp. 2d 226, 246 (S.D.N.Y. 2011). The negligence claims survived due to language in the parties' agreement acknowledging a basis of custodial liability for negligence, stating that "[t]he [custodian] shall not be liable for any act or omission made in connection with the Trust except for its intentional misconduct or negligence." *Id*. at 248. The court held that because the negligence claims focused on duties outside of the contract, they were not precluded by separate breach of contract claims made by the class. *Id*.

The breach of contract claims similarly survived, as those claims were supported by obligatory language in letters allegedly sent from the custodian to investors expanding the custodian's duties. *Id*. at 246. Fiduciary duty claims survived dismissal due to inadvisable actions on behalf of the custodian, who allegedly acknowledged through various IRA account documents and written materials that the custodian had "fiduciary obligations to monitor and safeguard the investments of Plaintiffs and Class Members." *Id*. at 249. While Grund is unfavorable to the custodian, the court's opinion is not necessarily inconsistent with other holdings because of the distinct nature of the custodian's actions and language in the parties' agreement.

In a New York appellate court, summary judgment was granted in favor of an self-directed IRA custodian arguing that no duty of due diligence was owed to investors who directed the custodian to invest in a subsequently exposed Ponzi scheme. *Winick v. Van Zandt*, 2012 N.Y. Misc. LEXIS 4216 (N.Y. Sup. Ct. Aug. 2, 2012). Negligence and breach of fiduciary duty claims were dismissed because the custodian had "no duty to act for plaintiffs or give them advice with respect to the [SDIRA] accounts." *Id*. at *8. The court continued by stating, "[t]here can be no negligence or breach of contract on the part of an investment management company, with respect to a [self-directed IRA], unless the investment company disregards the customer's instructions." *Id*.

In *Tarquinio v. Equity Trust Company*, an Ohio court of appeals held that when self-directed IRA investors and custodians enter into standard business relationships via an arm's-length contract, self-directed IRA custodians have no duties independent of those contracts. 2007 Ohio App. LEXIS 3061 (Ohio Ct. App., Lorain County June 29, 2007). Because no duty could be established outside of the agreement, the negligence tort claim was dismissed. *Id.; see also Lamm v. State St. Bank & Trust Co.,* 889 F. Supp. 2d 1321, 1331-32 (S.D. Fla. 2012) ("[P]arties to a contract can only seek tort damages if the alleged tortious conduct constitutes a tort distinct from the parties' contractual rights and obligations."). The court held that no fiduciary relationship or duty exists between IRA custodians (self-directed or otherwise) and investors outside of those created by contract or statute. *Id*. at *16. The custodian did not breach its contract with the investor, as it did not distribute any of the investor's funds in a manner inconsistent with investor's instructions. *Id*. at *17-*20.

In *Matkin v. Fidelity National Bank*, a South Carolina federal court granted summary judgment in favor of an self-directed IRA custodian regarding negligence and breach of fiduciary duty claims. 2002 U.S. Dist. LEXIS 27571 (D.S.C. July 11, 2002). The plaintiff alleged negligence by the self-directed IRA custodian-defendant for allowing funds to be invested in a pyramid scheme, but the court held that any duties owed by the custodian were contractually defined and that no provisions governing the relationship were breached. *Id*. at *7-*8. The duty of care typically imposed on trustees was not imputed onto the custodian because the custodian's only obligations under the agreement was to property maintain the funds and issue the funds pursuant to the investor's directions. *Id*. at *7-*9. The custodian had no duty to protect the funds or question the plaintiff-investor's investment decisions. *Id*. at *9.

The plaintiff's breach of fiduciary duty claim was dismissed despite evidence that a custodian's employee offered verbal opinions on investments, allegedly establishing a fiduciary relationship. The court held that the relationship was limited by the agreement and no indication existed that the custodian exceeded the scope of its custodial agreement by saying an investment "appeared to be a good deal." *Id*. at *10-*11 ("[A] party cannot impose a fiduciary duty through its own unilateral action.").

In *Mandelbaum v. Fiserv, Inc.*, account holders, victims of the Bernie Madoff Ponzi scandal, brought a punitive class action suit against a custodian bank that provided only limited administrative services, made no valuations, gave no advice, and did no due diligence regarding plaintiffs' investments. 787 F. Supp. 2d 1226, 1232 (D. Colo. 2011). The class contended that the custodian owed duties, beyond the relevant agreements, to retain possession of the trust assets, verify how Madoff held the assets, oversee the investments, and alert investors to information received regarding the questionable nature of Madoff's operations, among other claims. *Id*. at 1233. The court held, "[p]laintiffs have failed to identify any duties that exist independent of the IRA Agreements. . . . Accordingly, the Court finds that Defendants' at-issue duties of care do not have an existence independent of the IRA Agreements, themselves." *Id*. at 1240.

The court held that the underlying IRA agreements between the parties exculpated the defendant custodian from any fiduciary duty to investors. *Id*. at 1238. "To the extent that Defendants might have had a pre-existing duty to provide accurate account statements, investigate red flags, and retain control over the trust assets, the IRA Agreements exculpate Defendants of any such duties. Thus, Plaintiffs' negligence and breach of fiduciary duty claims fail as a matter of law." *Id*. at 1241.

In *Hines v. FiServ, Inc*., the plaintiff-investors sued the non-discretionary custodian, alleging negligence, breach of fiduciary duty, and breach of contract, along with other fraud claims. 2010 U.S. Dist. LEXIS 39896 (M.D. Fla. Mar. 25, 2010). The investors claimed the custodian breached a duty of care by violating certain FDIC imposed regulations, but the investors never allege how those regulations apply to a non-discretionary custodian with no advisory role. *Id*. at*12-*14. The investors also alleged a breach of contract claim, based partially on a requirement that the investments meet IRS and I.R.C. standards, but did not support that claim with evidence of a contractual provision. *Id*. at *14. Interestingly, the court dismissed the negligence and breach of contract claims without prejudice due to a pleading deficiency, instead of holding that no duties existed as a matter of law. *Id*. at *14.

Hines, is an example of an unsuccessful attempt by plaintiffs to establish a fiduciary duty by relying on the incorporation of Section 408 of the I.R.C. into the agreement with the custodian. 2010 U.S. Dist. LEXIS 39896 (M.D. Fla. Mar. 25, 2010). In *Hines*, the plaintiffs argued that I.R.C. § 408 imposes fiduciary duty by incorporation into the agreement, even though the agreement expressly disclaimed any fiduciary duties owed by the custodian. *Id*. at *8. The plaintiffs also admitted that no private right of action under I.R.C. § 408 existed. *Id*. The court rejected the plaintiffs' attempted breach of duty claim arising out of the tax code, holding:

> I.R.C. § 408(h) recognizes that custodial IRAs, such as the Plaintiffs' accounts here, are not trusts. They are only treated as trusts for tax deferral purposes. Courts applying this section of the code in relation to custodial IRA accounts have held that I.R.C. § 408 and the corresponding regulations do not create any fiduciary or other duties of care. . . . The IRA contract here is unambiguous and does not contradict itself. I.R.C. § 408 imposes no duties on IRA custodians and the IRA contract expressly provides that [custodian] owes no fiduciary duties to the plaintiffs. Plaintiffs cannot maintain a claim for a breach of fiduciary duty where no duty exists.

Id. at *7-*8.

In *Brown v. California Pension Administrators & Consultants, Inc*., investors in self-directed IRAs brought an action to recover funds based on the failure of the administrator of their IRAs to notify plaintiffs that the borrower of their funds had defaulted in payments to other investors. 45 Cal. App. 4th 333 (Cal. Ct. App. 1996). The plaintiffs filed claims for breach of contract, negligence, and breach of fiduciary duty. Using state law, the California Court of Appeals held that the agreements between plaintiffs and the administrator limited the administrator's contractual and common law duties, absolving it of any duty to investigate, select, or monitor plaintiff's

IRA investments. *Id*. at 346-47. The court held that the plaintiffs did not have a breach of contract claim:

> The contracts, read together, did not impose any duty on respondents to notify appellants that Lewis had failed to make interest or principal payments to other IRA investors. It follows, of course, that respondents' failure to give such notice did not breach the negligence clause in the Investment Instruction. Respondents had a duty to provide account information to each participant with regard to his or her own IRA. Appellants' own evidence was that CALPAC provided appellants with quarterly statements, and that those statements reflected that Lewis made interest payments to appellants until 1986, but not after that date. Appellants do not, and cannot, complain that respondents failed to meet their duty to report to appellants on appellants' own IRA account activity.

The court similarly held that the plaintiffs could not assert a negligence cause of action:

> Respondents certainly had the duty to perform ministerial functions as plan administrator and trustee with due care; no claim is made that they failed to do so. But respondents retained no discretion as to appellants' choice of investments, nor any responsibility for advising about the risk of any investments. Those functions were expressly excluded from their relationship, and allocated to appellants as part of appellants' authority to "self direct" their accounts. Since appellants' losses were allegedly caused by their lack of notice that Lewis had defaulted on other loans, and since respondents had no duty to provide that notice, appellants cannot succeed on their cause of action for negligence.

Id. at 347 (citations omitted). Lastly, the court rejected the plaintiffs' claim that the administrator, like a stock broker, owed fiduciary duties and held that the administrator did not owe a fiduciary duty to the IRA customers:

> In our case, as we have explained, the relationship between appellants and respondents encompassed very limited responsibilities. . . . [T]he relationship was confined to respondents' performance of transactions selected by their customers; respondents had absolutely no responsibility to advise appellants with regard to the wisdom of their investment choices. This was not an expansive fiduciary relationship giving rise to a duty to notify the customer of the risky nature of an investment, or in our case, of the poor performance of similar investments held by

> different customers. Appellants did not and cannot allege facts supporting a cause of action for breach of fiduciary duty.

Id. at 348. Accordingly, the court affirmed the summary judgment on behalf of the administrator.

In *Paszamant v. Retirement Accounts, Inc.*, investors in self-directed IRAs brought negligence claims against the custodian of their IRAs based on the custodian's failure to seek or assure reasonable verification that the investors' funds had been invested in mortgages actually assigned to the investors. 776 So. 2d 1049, 1051 (Fla. Dist. Ct. App. 2001). The trial court granted summary judgment to the custodian, finding that no duty existed independent of the Custodian Agreement between the parties and that the Custodian Agreement provided that the custodian had no duty other than to transfer funds as directed by the particular investor. Relying in large part on the California court's decision in Brown, the Florida District Court of Appeals affirmed the trial court's decision as follows:

> We agree with the trial court that Brown is dispositive of this case. The investors' complaint in Brown was that the administrator failed to give notice of a default and the allegation in the instant case is that RAI failed to give notice that Plaza did not respond correctly to RAI's request for recorded documents. In Brown, the investors sued in contract and in tort and lost on both theories because the contract excluded any duty to advise of choice or risk of investments, and thus, no independent duty of due care arose. In the instant case, the Investors did not pursue any contract claim because the Custodian Agreement also excluded advice with respect to choice or risk. It was the Investors who chose the options of directing and managing the IRA funds, and consequently, the obligation to determine the form of documentation that would reflect their investments.

Id. at 1043. Accordingly, the court affirmed the summary judgment for the custodian.

In *Goldblatt v. Federal Deposit Insurance Corporation*, a depositor sued the FDIC in an action for a determination of the priority of his claim against an insolvent bank. 105 F.3d 1325 (9th Cir. 1997). The depositor alleged that his IRA account with the bank was a special account that allowed him priority pursuant to a California statute. The court of appeals affirmed a summary judgment entered for the FDIC. In determining that the depositor's IRA account was not a "special" account, the court of appeals looked to the IRA custodial agreement. The court found that the agreement expressly provided that no fiduciary duties existed, and therefore, no trust-type relationship existed between the depositor and the bank. *Id*. at 1329.

In *Abbott v. Chemical Trust*, investors brought an action against several defendants, including a bank/custodian of their IRA accounts arising out of a Ponzi scheme. No. 01-2049-JWL, 2001 U.S. Dist. LEXIS 6214 (D.C. Kansas April 26, 2001). A trustee for a chemical trust asset called the bank and inquired whether the bank would be willing to handle self-directed IRAs for people wishing to invest in his trust. *Id*. at *13. In evaluating the trust asset, the bank looked only at the asset and determined that it was the type of debt instrument that was administratively feasible. After the bank agreed to administer the IRAs, it received requests from investors to open those accounts and had instructions from the investors to invest their funds in the trust asset. *Id*. at *16. The bank made no assessment of the asset's risk prior to purchasing it for the investors. The bank issued monthly investment reviews to the investors that identified a market value for the trust asset, however this value was derived solely from the purchase price and did not make any attempt to estimate a market value. *Id*. at *17.

The bank received a grand jury subpoena from a United States district court requiring it to testify in a criminal proceeding brought against the chemical trust and its trustee. *Id*. at * 18. Pursuant to the subpoena instructions and directions of legal counsel, the bank did not disclose this to the investors and continued to purchase the chemical trust asset for new customers. *Id*. at *19. Later, the bank discovered that another agency was investigating the chemical trust and its trustee and decided that since such was public information it would act to discontinue purchasing the asset and discontinue being the custodian. However, the bank failed to inform its investors of the true reason it resigned as custodian. *Id*. at *22.

After the chemical trust asset failed, the investors sued several defendants including the bank on multiple claims. The plaintiffs moved for partial summary judgment against defendant bank on their claims for fraud, negligence, breach of fiduciary duty, constructive trust, breach of contract, violation of the Texas Deceptive Trade Practices Act and violation of the California Business and Professions Code. *Id*. at *24. The defendant cross-moved for summary judgment. The court granted summary judgment for defendant, holding that plaintiffs failed to show that the defendant committed fraud, negligence, breach of fiduciary duty, constructive trust, breach of contract, or statutory violations.

In support of the investors' fraud claims, they alleged that the bank failed to disclose the existence of the grand jury subpoena, failed to disclose other information that the bank knew about other agencies investigating the chemical trust asset, misrepresented to them that it had reviewed the chemical trust asset, misrepresented the value of the asset each month, and misrepresented why it resigned as custodian. *Id*. at *34-33. In support of the investors' negligence claims, they alleged that a reasonably prudent bank would have investigated the asset before transferring the investors' funds.

The court held that the bank had no common law or contractual duties to investigate or review the chemical trust asset and had no such duties to disclose any information concerning the chemical trust asset:

> Like the circumstances in Brown and Paszamant, the relationship between the parties here-as evidenced by the written agreements between the parties-encompassed very limited responsibilities. The custodial agreement between the parties clearly states that FNB has "no responsibility or involvement in evaluating or selecting any assets for disposition, and shall have no

> liability for any loss or damages that may result from or be associated with any requested investment transaction." The agreement also clearly states that FNB "assume[s] no responsibility for rendering investment advice with respect to your IRA, nor will we offer any opinion or judgment to you on matters concerning the value or suitability of any investment or proposed investment for your IRA." With respect to plaintiffs' negligence claim, then, the agreement between the parties provided that FNB had no duty to plaintiffs other than to transfer funds as directed by plaintiffs and plaintiffs have failed to identify any independent duty of due care owed by FNB to plaintiffs. Thus, because FNB had no duty to investigate or review the Chemical Trust asset, plaintiffs' negligence claim fails as a matter of law. With respect to plaintiffs' fraud claim, plaintiffs have wholly failed to show that the relationship between FNB and plaintiffs was one which would give rise to a duty on the part of FNB to communicate the information that plaintiffs contend FNB should have disclosed. While FNB may have had some fiduciary duty to plaintiffs, that duty was limited to executing the transactions requested by plaintiffs. While the parties certainly had a contractual relationship, the contract itself expressly limited FNB's obligations to communicate investment information to plaintiffs. Thus, because plaintiffs have failed to demonstrate that FNB had a legal or equitable obligation to communicate various facts to plaintiffs, plaintiffs' fraud claim fails as a matter of law.

Id. at *38-39.

Regarding the investors' breach of fiduciary duty claim, they alleged that the bank owed them fiduciary duties because it undertook a review of the chemical trust contract and undertook to value the asset each month for the investors. *Id*. at *40. The court held that to the extent the bank owed a fiduciary duty to the investors it was limited to executing the particular transactions requested by the plaintiffs:

> It is beyond dispute that plaintiffs' self-directed IRAs with FNB were nondiscretionary accounts. That is, plaintiffs instructed FNB to purchase specific assets and FNB exercised no discretion in that regard. Moreover, despite plaintiffs attempt to argue that FNB somehow assumed a duty to review or value the Chemical Trust asset, it is uncontroverted that any review of the asset was limited to assessing the administrative feasibility of the asset. In addition, there is no evidence that plaintiffs actually believed that FNB

> would review or evaluate the Chemical Trust asset for purposes of assessing the soundness of plaintiffs' investment decision. In such circumstances, the law is clear that FNB's fiduciary duty to plaintiffs-to the extent such a duty exists-is limited to carrying out the transactions requested by plaintiffs. Here, there is no evidence whatsoever that FNB served as an advisor to plaintiffs with respect to their investment decisions or that FNB had any obligation to supervise or monitor plaintiffs' investment decisions. There is no evidence that FNB induced plaintiffs to make particular investments. There is no evidence that plaintiffs requested FNB to investigate or review the asset, that plaintiffs believed that FNB would undertake an investigation or review of the asset or that FNB had any obligation to undertake any investigation or review of the asset. In short, to the extent FNB owed a fiduciary duty to plaintiffs, that duty was limited to executing the transactions requested by plaintiffs. FNB fulfilled that duty. Thus, plaintiffs' claim for breach of fiduciary duty fails as a matter of law. Summary judgment in favor of FNB is granted on this claim.

Id. at 39-41 (internal citations omitted). The court similarly dismissed the investors' other claims under RICO, breach of contract, constructive trust, securities fraud, the Texas Deceptive Trade Practices Act, and the California Business and Professions Code, and granted summary judgment for the bank.

B. <u>Discretionary IRA Accounts</u>

As opposed to a self-directed IRA account, a discretionary account allows the custodian to make investment and other decisions for the customer. "A discretionary account is one where the broker makes the investment decisions and manages the account." As one court described, "[a]n unsophisticated investor is necessarily entrusting his funds to one who is representing that he will place the funds in a suitable investment and manage the funds appropriately for the benefit of his investor/entrustor. The relationship goes well beyond a traditional arms'-length business transaction that provides "mutual benefit" for both parties." *Western Reserve Life Assur. Co. v. Graben*, 233 S.W.3d 360 (Tex. App.—Fort Worth 2007, no pet.) (affirmed breach of fiduciary duty claim against discretionary account custodian).

The custodian of a discretionary account has to meet a higher duty of care. *Anton v. Merrill Lynch*, 36 S.W.3d 251, (Tex. App.—Austin 2001, pet. denied). In *Anton*, the court described these duties as:

> (1) manage the account in a manner directly comporting with the needs and objectives of the customer as stated in the authorization papers or as apparent from the customer's investment and trading history; (2) keep informed regarding the changes in the market which affect his customer's interest and act

> responsively to protect those interests; (3) keep his customer informed as to each completed transaction; and (4) explain forthrightly the practical impact and potential risks of the course of dealing in which the broker is engaged.

Id. at 257-58 (citing *Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951 (E.D. Mich. 1978), *aff'd* 647 F.2d 165 (6th Cir. 1981); *McCoun v. Rea (In re Rea)*, 245 B.R. 77, 90 (Bankr. N. D. Tex. 2000) (outlining duties of Texan who day-traded stocks using adversary plaintiffs' money)).

Interestingly, in *Anton*, the court held that "the scope of the appellees' duty to keep appellant informed about her accounts is limited to information about assets in the account and activities related to those assets." *Id*. at 258. The court held that that "the duty does not extend to the client's assets outside the account or to assets that the client anticipates someday will be in her control." *Id*. Therefore, the *Anton* court held that the custodian did not have a duty to inform a beneficiary of an account that she was eliminated as a beneficiary or that the custodian breached any duty in failing to pay her the funds in the account and in paying her children after the change of beneficiary was completed.

Further, whereas a self-directed IRA custodian can simply execute the trades directed by the customer without fear of liability, the same cannot be said of a discretionary account custodian. As one court stated, the custodian "acted as a financial advisor whom the Clients trusted to monitor the performance of their investments and recommend appropriate financial plans to them. Accordingly, the duty that Hutton owed the Clients went well beyond the 'narrow' duty of executing trade orders." *See Western Reserve Life Assur. Co. v. Graben*, 233 S.W.3d at 374.

It should be noted that at least one Texas case would seem to limit a negligence cause of action against a discretionary account custodian due to multiple reasons, including the economic loss rule. *Vodicka v. Lahr*, No. 03-10-00126-CV, 2012 Tex. App. LEXIS 4557 (Tex. App.—Austin 2012, no pet.).

XVI. SLAYER RULE

A. Introduction

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 willfully 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 willfully 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 willfully 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).

B. <u>Apply Slayer Rule To Joint Accounts</u>

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, pet. denied). 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. 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.).

XVII. CONCLUSION

Because joint accounts hold money, there will always be disputes over the ownership of that money. This paper was intended to give general guidance when these disputes arise.