TRUSTEE QUANDARY: CRIMINAL ACTIVITY BY A BENEFICIARY WITH OR ON TRUST PROPERTY

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

Represented trustees regarding claims of mismanagement of assets;

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

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

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

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

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

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

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

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

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

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I. INTRODUCTION

Drug abuse and addiction are enormous issues in the United States and Texas. The Centers for Disease Control and Prevention reported last year that opioid overdoses are the leading cause of death for people younger than fifty. Unfortunately, it is not uncommon for a beneficiary of a trust to commit criminal activities on or with trust property. This places a trustee, who has knowledge of such conduct, in a difficult position with seemingly conflicting duties.

Take, for example, a trust that owns a vehicle and allows its primary beneficiary to use the vehicle for his personal needs and uses. The beneficiary has had drug problems in the past, and the trustee has had to use trust funds to pay for rehabilitation counseling on several occasions. The beneficiary then relapses and uses the vehicle to commit drug offenses, including selling methamphetamine and using that substance in the vehicle. The trustee finds out that the beneficiary has relapsed from the beneficiary's sibling, who is a secondary beneficiary. Should the trustee: 1) repossess the vehicle; 2) remediate and clean drug residue out of the vehicle; 3) sell the vehicle to a third party; 4) inform the police about the drug use or sale of drugs; 5) inform other secondary beneficiaries of the drug use issue; and/or 6) distribute additional funds to the beneficiary to allow the beneficiary to purchase a vehicle that the beneficiary will own? What if the police arrest the beneficiary in the act of committing a crime, can the government seize the trust's vehicle? What if the beneficiary is involved in an accident with an innocent third person while he is intoxicated? Can the innocent third person reach the trust's other assets to obtain compensation for his or her injuries? These are all troubling questions that trustees face when they have beneficiaries with a penchant for criminal activity.

There are several important concerns that a trustee should consider in such situations: 1) the duty of loyalty the trustee owes the beneficiary and its limits, 2) the duty to properly manage trust assets, 3) the duty to report criminal activity, and 4) the duty to preserve evidence. This article addresses these many concerns and provides suggestions to trustees who find themselves in this unenviable position.

II. DUTY OF LOYALTY

A. General Authority On The Duty Of Loyalty

When faced with a beneficiary's criminal activity, the trustee's initial reaction is to consider its duty of loyalty to the beneficiary in determining what it should do. The first and most fundamental duty that a trustee owes its beneficiaries is the duty of loyalty, which includes a duty to maintain the confidentiality of certain information.

Texas Property Code 113.051 provides: "The trustee shall administer the trust in good faith according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust the trustee shall perform all of the duties imposed on trustees by the common law." Tex. Prop. Code § 113.051. So, to determine a trustee's duty of loyalty, a trustee must first look to the trust document, relevant statutory provisions, and the common law. Trust documents often limit the duty of loyalty by containing exculpatory clauses that eliminate liability for negligent actions and that allow a trustee to make self-dealing transactions with a trust's assets. However, trust documents rarely discuss criminal activities, drug use, or limit a trustee's duty of loyalty regarding a beneficiary's criminal activity. In fact, more often than not, in the rare circumstance when a settlor mentions criminal activity in a trust document, he or she usually provides that a beneficiary forfeits his or her rights under the trust or grants the trustee discretion to do so.

In the absence of guidance from a trust document, a trustee should review relevant statutes. There are no Texas statutes that touch upon this exact issue, though the Texas Property Code generally provides that in "administering the trust the trustee shall perform all of the duties imposed on trustees by the common law." Tex. Prop. Code § 113.051. Other than looking

to the common law, Texas statutes tend to indicate that the duty of loyalty is not absolute and should be confined to trust property and inappropriate self-dealing and profits. Texas Property Code Section 117.007 provides: "A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries." *Id*. at § 117.007.

Moreover, Texas Property Code 114.001 describes a trustee's liability providing: "The trustee is accountable to a beneficiary for the trust property and for any profit made by the trustee through or arising out of the administration of the trust, even though the profit does not result from a breach of trust; provided, however, that the trustee is not required to return to a beneficiary the trustee's compensation as provided by this subtitle, by the terms of the trust instrument, or by a writing delivered to the trustee and signed by all beneficiaries of the trust who have full legal capacity." Tex. Prop. Code § 114.001(a). This provision focuses on a remedy against a trustee for breach of a duty or due to inappropriate profit made by the trustee arising from the administration of the trust.

Given the limited statutory guidance, one must look to the common law to determine the breadth of the duty of loyalty regarding a beneficiary's criminal activity. Under the common law, a trustee is held to a high fiduciary standard. *Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009). The fiduciary relationship exists between the trustee and the trust's beneficiaries, and the trustee must not breach or violate this relationship. *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377, 387-88 (Tex. 1945); RESTATEMENT (SECOND) OF TRUSTS § 170 CMT. A (1959); G. BOGERT, TRUSTS AND TRUSTEES § 543, at 217-18 (2d ed. rev. 1993). The fiduciary relationship comes with many high standards, including loyalty and utmost good faith. *Kinzbach Tool Co. v. Corbett-Wallce Corp.*, 160 S.W.2d 509, 512 (Tex. 1942).

A trustee owes a trust beneficiary an unwavering duty of good faith, loyalty, and fidelity over the trust's affairs and its corpus. *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied) (citing *Ames v. Ames*, 757 S.W.2d 468, 476 (Tex. App.—Beaumont 1988), modified, 776 S.W.2d 154 (Tex. 1989)). To uphold its duty of loyalty, a trustee must meet a sole interest standard and handle trust property solely for the benefit of the beneficiaries. Tex. Prop. Code §117.007; *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 898 (Tex. App.—Texarkana 1987, no writ).

Texas case law unfortunately does not provide much guidance regarding a beneficiary's criminal activity and its impact on a trustee's duty of loyalty. In fact, throughout the research, there was no instance where a trustee was sued for reporting a crime or dealing with criminal activity of a beneficiary (other than civil forfeiture proceedings discussed below).

There is no authority in Texas specifically commenting on the trustee's duty of loyalty when faced with a beneficiary's criminal activity. However, trustees in Texas can look to the Restatement of Trusts for guidance, as Texas courts routinely do so. *See, e.g., Westerfeld v. Huckaby*, 474 S.W.2d 189 (Tex.1971); *Messer v. Johnson*, 422 S.W.2d 908 (Tex. 1968); *Mason v. Mason*, 366 S.W.2d 552, 554-55 (Tex. 1963); *Lee v. Rogers Agency*, 517 S.W.3d 137, 160-61 (Tex. App.—Texarkana 2016, pet. denied); *Woodham v. Wallace*, No. 05-11-01121-CV, 2013 Tex. App. LEXIS 50 (Tex. App.—Dallas January 2, 2013, no pet.); *Wolfe v. Devon Energy Prod. Co. LP*, 382 S.W.3d 434, 446 (Tex. App.—Waco 2012, pet. denied); *Longoria v. Lasater*, 292 S.W.3d 156, 168 (Tex. App.—San Antonio 2009, pet. denied).

Regarding the duty of loyalty, the Restatement of Trusts states:

> (1) Except as otherwise provided in the terms of the trust, a trustee has a duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose.

> (2) Except in discrete circumstances, the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests.
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> (3) Whether acting in a fiduciary or personal capacity, a trustee has a duty in dealing with a beneficiary to deal fairly and to communicate to the beneficiary all material facts the trustee knows or should know in connection with the matter.

RESTATEMENT (THIRD) OF TRUSTS, § 78. It further provides:

> The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person. Thus, it is improper for the trustee to sell trust property to a third person for the purpose of benefiting the third person rather than the trust estate.
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> The trustee is under a duty to the beneficiary not to disclose to a third person information which he has acquired as trustee where he should know that the effect of such disclosure would be detrimental to the interest of the beneficiary.

RESTATEMENT (SECOND) OF TRUSTS §170. So, as a general proposition, a trustee should not administer the trust to benefit anyone but the beneficiary.

B. Duty Of Loyalty Is In Reference To Trust Assets

A trustee's duty of loyalty arises from its management of certain assets, and does not extend to all facets of life. The Texas Supreme Court has described the high standards that a trustee owes the beneficiaries of a trust in the context of trust property: "A trust is not a legal entity; rather it is a 'fiduciary relationship *with respect to property*.' High fiduciary standards are imposed upon trustees, *who must handle trust property* solely for the beneficiaries' benefit. A fiduciary 'occupies a position of peculiar confidence towards another.'" *Ditta*, at 191 (emphasis added).

A duty of loyalty to a beneficiary does not extend to every aspect of a trustee's existence. As one court stated:

> [T]he mere fact that a person occupies the position of an estate fiduciary does not result in coloring his entire life and action to the exclusion of all his other rights and interests. He still eats breakfast, performs his daily tasks, and retires for the night as an individual and these private activities are as immune from the prying eyes of the beneficiaries of the estate of which he is a fiduciary as if they had been performed by an entirely different person. As a matter of legal fact, he is not subject to scrutiny as a fiduciary except to those matters which are performed strictly in the management of the estate, and any knowledge or information he may possess or acquire in his extra fiduciary relations are as privileged as are his breakfast menu or his nocturnal habits.

In re Ebbets' Estate, 267 N.Y.S. 268, 267-68 (N.Y. Surrogate's Court, Kings County 1933).

In Texas, there is a distinction between the actions of a trustee of a trust in that capacity and the actions of trustee in some other capacity even where the same entity "wears both hats." *Adam v. Harris*, 564 S.W.2d 152 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.). In *Adam*, a plaintiff alleged that a trustee breached his fiduciary duty as trustee by engaging in a self-dealing transaction as a director of a corporation owned by the trust. *Id*. The court of appeals held that the trustee did not owe any fiduciary duties to the beneficiary in its capacity as a board member:

> The flaw in this argument, however, is that whatever breach of fiduciary duty Robert Adam committed was in his capacity as director of the truckline corporation and not in his capacity as trustee. Robert Adam did not self-deal with the trust property, the shares in the corporation, but rather with the corporation's property, the monies used to purchase the insurance for the trucks. Section twelve of the Texas Trust Act directs that a 'trustee shall not buy nor sell . . . any property owned by or belonging to the trust estate ... from or to ... a relative ....' Here, no property either entered or left the trust res; the trustee neither bought nor sold trust property. Under these circumstances we hold that no cause of action for self dealing lies against anyone on the basis of the beneficiary-trustee relationship.

Id. *See also Diaz v. Elkin*, 434 S.W.3d 260, 264 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (analyzing whether claims against a defendant arose from an individual capacity or capacity as an executor).

A trustee certainly owes a fiduciary duty of loyalty arising from the management of assets in a trust. But this duty of loyalty does not extend to other assets or other issues not related to the administration of the trust. Where a beneficiary commits a crime, a trustee should not have a duty of loyalty to cover the crime up or otherwise not report the crime.

C. Duty Of Loyalty Does Not Mean That A Trustee Has To Participate In Or Support Criminal Activities

The Restatement clarifies that the general rules concerning a duty of loyalty or other duties does not require a trustee to participate in or support criminal activities. Specifically, the Restatement provides that the trustee stands in a fiduciary relationship with respect to the beneficiaries as to all matters within the scope of the trust relationship, that is, all matters involving the administration of the trust and its property. RESTATEMENT (THIRD) OF TRUSTS § 78. But "[t]he trustee is not under a duty to the beneficiary to do an act which is criminal or tortious." RESTATEMENT (SECOND) OF TRUSTS §166, cmt. a. The Restatement provides:

> (1) The trustee is not under a duty to the beneficiary to comply with a term of the trust which is illegal.
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> (2) The trustee is under a duty to the beneficiary not to comply with a term of the trust which he knows or should know is illegal, if such compliance would be a serious criminal offense or would be injurious to the interest of the beneficiary or would subject the interest of the beneficiary to an unreasonable risk of loss.
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> (3) To the extent to which a term of the trust doing away with or limiting duties of the trustee is against public policy, the term does not affect the duties of the trustee.

Id. at §166. In addition to specifically indicating that the trustee is under no duty to the beneficiary to engage in a criminal or tortious act, the Restatement also clarifies that "[i]t is immaterial that the act is not criminal or tortious at the time of the creation of the trust, if it becomes so before the time for performance." *Id*. The Restatement further states:

> A trustee is not bound by a term of the trust which directs him to do an act, although the act itself is not criminal or tortious, if it is against public policy to compel the performance of such an act. See § 62. Similarly, a trustee is not bound by a term of the trust which directs him to refrain from doing an act, if it is against public policy to compel the trustee to refrain from doing the act. Thus, the trustee is not bound by a term of the trust which violates the rule against perpetuities or a rule as to accumulations or a rule against restraints on alienation. See § 62, Comments l-u.
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> Not only is the trustee under no duty to the beneficiary to comply with a term of the trust which is illegal, but he is ordinarily under a duty not to comply. He is not justified in complying if such compliance would be a serious criminal offense. Thus, in Illustration 2 the trustee is not justified in carrying on the distillery business. Similarly, the trustee is not justified in complying if such compliance would be injurious to the interest of the beneficiary or would subject his interest to an unreasonable risk of loss. Whether the risk of loss is unreasonable depends upon the extent of the risk, the amount of loss which might be incurred, and the possible advantages resulting to the trust.

Id.; *see also Amalgamated Transit Union Local 1338 v. Dallas Public Transit Bd*., 430 S.W.2d 107, 117 (Tex. Civ. App.—Dallas 1968, writ ref 'd n.r.e.); *In re Enron Corp. Sec., Derivatives & ERISA Litig.*, 284 F. Supp. 2d 511, 565 (S.D. Tex. 2003) ("A fiduciary's duty of loyalty should also not be construed to require him to enable and encourage plan participants to violate the law…A trustee has no duty to violate the law to serve his beneficiaries."); *Sutherlin v. Wells Fargo & Co.*, 297 F. Supp. 3d 1271 (M.D. Fl. March 8, 2018); *Quan v. Computer Sciences Corp.*, 623 F.3d 870, n. 8 (9th Cir. 2010) (fiduciary duties owed by ERISA plan sponsor do not include violating securities laws); *In re McKesson HBOC, Inc. ERISA Litig.*, No. 00-20030(RMW),2002 U.S. Dist. LEXIS 19473, 2002 WL 31431588, at *21 (N.D. Cal. Sept. 30, 2002) (same); *Gouley v. Land Title Bank and Trust Co.*, 329 Pa. 465, 468, 198 A. 7(1938) (trust provisions that are against public policy should be ignored). Thus, on grounds of public policy, the trustee is not under a duty to the beneficiary to comply with a term of the trust if such compliance would be injurious to the community as well as to the beneficiary.

So, a trustee has no duty of loyalty to enable a beneficiary to commit crimes and to hide those crimes. Moreover, the good-faith reporting of a crime that occurred on trust property would be consistent with the trustee's duties to exercise reasonable care and skill, retain control of and preserve trust property, and comply with the prudent investor rule. For the trustee to effectively perform these duties, the trustee must exercise a high level of care and protection of the trust property. In caring for and protecting the property—not only for the safety of the property but also for the investment value of the property—a trustee might be prudent to report the crime to the appropriate authorities.

D. Duty of Confidentiality

The duty of loyalty includes a duty to maintain the confidentiality of a beneficiary's

information. The duty of confidentiality becomes more complicated when the duty comes in conflict with a duty to disclose to other beneficiaries. Notwithstanding the trustee's duty of confidentiality, a trustee also has a duty of full disclosure of all material facts known to it that might affect the beneficiaries' rights. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). Further, a trustee has a duty of candor. *Welder v. Green*, 985 S.W.2d 170, 175 (Tex. App—Corpus Christi 1998, pet. denied). Regardless of the circumstances, the law provides that beneficiaries are entitled to rely on a trustee to fully disclose all relevant information. *See generally Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 788 (1938). In fact, a trustee has a duty to account to the beneficiaries for all trust transactions, including transactions, profits, and mistakes. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996); *see also Montgomery*, 669 S.W.2d at 313. A trustee's fiduciary duty even includes the disclosure of any matters that could possibly influence the fiduciary to act in a manner prejudicial to the principal. *Western Reserve Life Assur. Co. v. Graben*, 233 S.W.3d 360, 374 (Tex. App.—Fort Worth 2007, no pet.). The duty to disclose reflects the information a trustee is duty-bound to maintain as he or she is required to keep records of trust property and his or her actions. *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

The Restatement addresses the conflicting position that a trustee is in when a duty to maintain the confidentiality of a beneficiary's information abuts a duty to disclose to other beneficiaries:

> Incident to the duty of loyalty, but necessarily more flexible in its application, is the trustee's duty to preserve the confidentiality and privacy of trust information from disclosure to third persons, except as required by law (e.g., rules of regulatory, supervisory, or taxing authorities) or as necessary or appropriate to proper administration of the trust. Thus, the trustee's duty of loyalty carries with it a related duty to avoid unwarranted disclosure of information acquired as trustee whenever the trustee should know that the effect of disclosure would be detrimental to possible transactions involving the trust estate or otherwise to the interests of the beneficiaries.
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> This duty of confidentiality ordinarily does not apply to the disclosure of trust information to beneficiaries or their authorized representatives (see duties to inform and report, §§ 82 and 83) or, in the interest of one or more trust beneficiaries, to the trustees of other trusts or the fiduciaries of fiduciary estates in which a beneficiary has an interest. Even in providing information to or on behalf of beneficiaries, however, the trustee has a duty to act with sensitivity and, insofar as practical, with due regard for considerations of relevancy and sound administration, and for the personal concerns and privacy of the trust beneficiaries.

RESTATEMENT (THIRD) OF TRUSTS §78. When a beneficiary's information does not affect a co-beneficiary's rights, the trustee should generally maintain the information in confidence and not disclose it. However, where a beneficiary's information does impact a co-beneficiary's interest in the trust, a trustee may be in a position where a duty of loyalty requires disclosure. For example, if the trustee knows that a beneficiary will, or is likely to, use trust property for criminal activities, this would risk the loss of the asset. Such use would implicate the co-beneficiaries' rights to trust assets. In these instances, if a co-beneficiary knew of the facts, he or she would certainly have standing to

seek judicial assistance in limiting the risk, i.e., forcing the trustee to not allow the criminal beneficiary to use trust assets.

For example, assume a trust owns ranch property and routinely allows the beneficiaries to access and enjoy the ranch. One wayward beneficiary plants marijuana plants on the ranch and attempts to operate a drug manufacturing business on the property. The trustee discovers this conduct and therefore must address the issue of whether it has a duty to inform the other beneficiaries of the trust of this activity. Under such circumstances, there is a very good basis for the trustee to determine that it has a duty to disclose this activity to the other beneficiaries because it represents a substantial risk to a material trust asset.

E. Drafting Options Regarding Criminal Activities Of Beneficiaries

A settlor or testator may want to protect a trustee from potential claims or threats of claims by expressly allowing a trustee to withhold distributions to a beneficiary or to terminate a beneficiary's interest where the beneficiary participates in criminal activity. For example, in one instance, a trust document stated:

> (d) BENEFICIARY ENGAGED IN DRUGS, ALCOHOL, GAMBLING OR CRIMINAL ACTS: Notwithstanding any distribution provisions herein, if the Trustee(s)/Personal Representative(s), at the time provided for distribution, have reason to believe a beneficiary is addicted to and/or abusive of alcohol or drugs or gambling or engaged in or was engaged in criminal activity, then the Trustee(s)/Personal Representative(s) in their full and absolute discretion are authorized (1) to delay and/or terminate the distribution to the beneficiary, and/or (2) terminate the interest of the beneficiary in the estate or trust and the beneficiary's interest may be administered and distributed as though the beneficiary were deceased. The Trustee(s)/Personal Representative(s) shall have authority to require the beneficiary to submit to drug tests, counseling or other improvement regimen before receiving distributions of principal or income. The Trustee(s)/Personal Representative(s) may hire professionals and/or social workers and/or any others for advice concerning an appropriate course of action. All costs and services for drug testing, drug rehabilitation and/or professional advice and/or counseling regarding same may be paid from the beneficiary's interest of the estate/trust. If the beneficiary will not follow a drug testing program or other improvement regimen established by the Trustee(s)/Personal Representative(s) then there is reason to believe that the beneficiary is addicted to and/or abusing alcohol or drugs or gambling. The Trustee shall have no liability for exercising or not exercising the authority granted. If the beneficiary sues the Trustee(s)/Personal Representative(s) for exercising his/her/their discretion under this provision, then the beneficiary's interest shall terminate. If the Trustee(s)/Personal Representative(s) exercises his/her/their discretion under this provision, the beneficiary can require arbitration of the decision by notifying the

> Trustee(s)/Personal Representative(s) in writing. The beneficiary shall appoint an arbitrator, the Trustee(s)/Personal Representative(s) shall appoint a second arbitrator, and the two arbitrators shall appoint a third arbitrator. The three arbitrators shall do an independent investigation to determine if the Trustee(s)/Personal Representative(s) should make a distribution and, if so, in what amount. A decision of a majority of the arbitrators shall be binding on all parties. Expenses of said arbitration shall be paid for from the beneficiary's interest in the estate/trust.

In re James Daron Clark 2015 Trust, Case No. CV-2015-1501, 2015 Okla. Dist. LEXIS 3768 (District Court of Oklahoma August 21, 2015).

Other potential clauses are:

> 1) Provisions Relating to Substance Abuse or Incarceration. Notwithstanding any other provision in this Trust Agreement, the Trustee shall withhold from distribution to a beneficiary any amounts otherwise distributable to such beneficiary (except distributions for medical needs as determined by the Trustee in the Trustee's sole discretion) during any period in which the beneficiary is incarcerated or in which the beneficiary is abusing the use of alcohol or drugs (whether legal or illegal); provided, however, that the Trustee shall make funds available to or for the benefit of the beneficiary for treatment and/or rehabilitation. If the Trustee reasonably believes the beneficiary is abusing the use of alcohol or drugs, the Trustee may request the beneficiary to submit to one or more appropriate examinations (including, without limitation, psychological testing and laboratory tests of hair, tissue, or bodily fluids) and to consent to a full disclosure of the results of such examinations to the Trustee (who shall keep such information confidential). For purposes of this subsection, a determination of whether the beneficiary is abusing the use of alcohol or drugs shall be made by the examining physician or facility. If the beneficiary refuses to submit to such examinations or to consent to the release of the results of such examinations, the Trustee may suspend distributions to such beneficiary until the beneficiary consents to the examinations and disclosure to the Trustee.
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> 2) Protection from Substance Abuse. If the Trustees reasonably believe that the Primary Beneficiary or the Designated Beneficiary (as the case may be) (a) uses or consumes any illegal drug or other illegal substance; or (b) is clinically dependent upon the use or consumption of alcohol or any other legal drug or chemical substance that is not prescribed by a board certified medical doctor or psychiatrist in a current program of treatment supervised by such doctor or psychiatrist; and, if the Trustees reasonably believe that as a result of such use or consumption the Primary Beneficiary or the Designated Beneficiary is incapable of caring for himself or herself or

is likely to dissipate his or her financial resources, then in such event:

The Trustees shall request the Primary Beneficiary or the Designated Beneficiary to submit to one or more examinations (including laboratory tests of bodily fluids) determined to be appropriate by a board certified medical doctor or psychiatrist selected by the Trustees. The Trustees shall request the Primary Beneficiary or the Designated Beneficiary to consent to full disclosure by the examining doctor or facility to the Trustees of the results of all such examinations. The Trustees shall maintain strict confidentiality of those results and shall not disclose those results to any person other than the Primary Beneficiary or Designated Beneficiary without the prior written permission of the Primary Beneficiary or the Designated Beneficiary.

The Trustees may totally or partially suspend all distributions permitted to be made to that Primary Beneficiary or Designated Beneficiary until the Primary Beneficiary or the Designated Beneficiary (as the case may be) consents to the examination and disclosure to the Trustees. Nevertheless, the Trustees cannot suspend any mandatory distributions to or for the benefit of the Primary Beneficiary or the Designated Beneficiary that are required in order for that trust to qualify for any federal transfer tax exemption, deduction or exclusion allowable with respect to that trust, or that are required to qualify the trust as a qualified Subchapter S trust.

If in the opinion of the examining doctor or psychiatrist the examination indicates current or recent use of a drug or substance as described above, the Primary Beneficiary or the Designated Beneficiary shall consult with the examining doctor or psychiatrist to determine an appropriate method of treatment (for example, counseling or treatment on an in-patient basis in a rehabilitation facility). If the Primary Beneficiary or the Designated Beneficiary consents to the treatment, the Trustees may pay the costs of treatment in any private rehabilitation program.

Except as provided above for mandatory distributions that must be made for federal tax purposes, or to ensure that the beneficiaries of this Trust qualify as designated beneficiaries for purposes of Section 401(a)(9) of the Code or any substitute or successor provision thereof, and the Treasury Regulations promulgated thereunder, all mandatory distributions to the Primary Beneficiary or the Designated Beneficiary during his or her lifetime of income or principal (including distributions upon termination of the trust) will be suspended until, in the case of use or consumption of an illegal drug or illegal substance, examinations indicate no such use, and in all cases until the Trustees in their sole judgment determine that the Primary Beneficiary or the Designated

> Beneficiary is fully capable of caring for himself or herself and is no longer likely to dissipate his or her financial resources. While mandatory distributions are suspended, the trust will be administered as a discretionary trust to provide for the Primary Beneficiary's or the Designated Beneficiary's health, support and maintenance.
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> It is not the Settlors' intention to make the Trustees (or any doctor or psychiatrist retained by the Trustees) responsible or liable to anyone for a Primary Beneficiary's or a Designated Beneficiary's actions or welfare. The Trustees shall have no duty to inquire whether a Primary Beneficiary or a Designated Beneficiary uses drugs or other substances as described in this Paragraph 8.28. The Trustees (and any doctor or psychiatrist retained by the Trustees) shall be indemnified from the trust and held harmless from any liability of any nature in exercising their judgment and authority under this Paragraph 8.28, including any failure to request a Primary Beneficiary or a Designated Beneficiary to submit to medical examination, and including a decision to distribute suspended amounts to a Primary Beneficiary or a Designated Beneficiary.

So, settlors can incorporate provisions that protect a trustee from liability or grant a trustee the authority to handle a beneficiary participating in criminal activities. Such provisions may also act as a deterrent and encourage a beneficiary to avoid criminal activities or else lose his or her rights to trust distributions and trust assets.

Trustees, however, may want to be wary of these types of provisions. A trustee's ability to cut a beneficiary out or eliminate distributions is a fruitful area for litigation risk. A beneficiary who is cut out may sue and argue that the trustee abused its discretion or otherwise violated its fiduciary duties in making that decision. Conversely, if the trustee does not act to cut out the offending beneficiary, other beneficiaries may sue the trustee for not exercising that authority. Exercising or failing to exercise this type of authority is often viewed as a lose/lose proposition. Due to the increased litigation risk posed by such provisions, some trustees require that this type of provision be eliminated (trust modified) before taking on the trustee role due.

F. Modification Of A Trust To Address A Beneficiary's Criminal Activities

Where a trust document is silent about a beneficiary's criminal activities, another consideration is whether a trust can be modified to stop distributions to or otherwise protect trust assets from a beneficiary who commits a crime. A settlor of a revocable trust can amend the trust and omit beneficiaries. Tex. Prop. Code §112.051(a) ("A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it."); *Snyder v. Cowell*, No. 08-01-00444-CV, 2003 Tex. App. LEXIS 3139 (Tex. App.—El Paso Apr. 10, 2003, no pet.).

Regarding an irrevocable trust, a trustee must seek judicial modification of the trust. Texas Property Code 112.054 provides:

> (a) On the petition of a trustee or a beneficiary, a court may order that the trustee be changed, that the terms of the trust be modified, that the trustee be directed or permitted to do acts that are not authorized or that are forbidden by the terms of the trust, that the trustee be prohibited from performing acts required by the terms of the trust, or that the

> trust be terminated in whole or in part, if: (1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill; (2) because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust; (3) modification of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or impairment of the trust's administration; (4) the order is necessary or appropriate to achieve the settlor's tax objectives or to qualify a distributee for governmental benefits and is not contrary to the settlor's intentions; or (5) subject to Subsection (d): (A) continuance of the trust is not necessary to achieve any material purpose of the trust; or (B) the order is not inconsistent with a material purpose of the trust.

Tex. Prop. Code §112.054(a). The only seemingly applicable provision is Section 112.054(a)(2), providing that a court may modify a trust if circumstances not known to or anticipated by the settlor will further the purposes of the trust. *Id*. But, under this provision, a trial court cannot modify a trust solely on its own discretion; rather, it must consider the settlor's intent. For example, a court of appeals held that a trial court abused its discretion in modifying the terms of a trust and appointing a successor trustee because, while modification was necessary, the trial court erred by not exercising its discretion in a manner that conformed to the settlor's intent. *Conte v. Ditta*, 312 S.W.3d 951 (Tex. App.—Houston [1st Dist.] Mar. 11, 2010, no pet.). A trustee may have a difficult time establishing a settlor's intent where the settlor is no longer alive. Further, it is not unusual for beneficiaries to have criminal issues; indeed, settlors often create trusts where beneficiaries do not have adequate life skills.

For example, in one case, a Georgia court of appeals held that a trust could not be modified simply because a beneficiary committed a crime. In *Smith v. Hallum*, a trustee filed suit to modify a trust to eliminate any distributions to a beneficiary. 286 Ga. 834, 691 S.E.2d 848 (Ga. S. Ct. 2010). The wife of a settlor survived an attack in her home during which she was shot and also stabbed over 20 times by the beneficiary. The trustee filed a petition to amend the trust in order to "forego any distributions of Trust property to" the beneficiary. The trial court granted the relief sought, and the beneficiary appealed. The court of appeals reversed:

> OCGA § 53-12-153 "gives courts equitable powers of modification in extraordinary circumstances to change administrative or other terms, but only when the intent of the settlor would be defeated by circumstances unanticipated or unknown at the time of the trust's establishment." *Friedman v. Teplis*, 268 Ga. 721, 722 (1) (492 SE2d 885) (1997). Based on the assumption above that appellant committed the attack on Inez Smith, we recognize that the evidence would support the trial court's conclusion that this attack was a circumstance unanticipated by Settlor, inasmuch as it is uncontroverted that appellant was only seven years old at the time the Trust was created. However, the unknown or unanticipated event requirement in OCGA § 53-12-153 is only part of the equation. Equitable modification is authorized only when such action is also necessary to avoid the defeat or substantial impairment of the trust's purpose. Friedman, supra; see also 3 Scott and Ascher on Trusts, § 16.4 (5th ed.). Given

> that the purpose of the Trust in this case is to provide financially for Settlor's descendants when he and his wife are no longer living, the modification approved by the trial court actively promotes the defeat of the Trust's purpose in that, by artificially treating one of Settlor's descendants as having predeceased him, it removes that descendant from among those entitled to receive Trust proceeds.
>
> Moreover, even assuming, arguendo, that removal of a beneficiary in this manner is a proper subject of modification under OCGA § 53-12-153, there is no clear and convincing evidence that it would "defeat or substantially impair" the purpose of the Trust for appellant to receive Trust funds. Appellee claims that appellant attacked Inez Smith in order to accelerate his receipt of the Trust funds and, based on this claim, speculates that Settlor would have wanted the Trust modified to prevent appellant from profiting from his wrongdoing. We need not speculate whether, if appellee's claim regarding appellant's intent were proven by clear and convincing evidence, Settlor's intent in creating the Trust would have been substantially impaired thereby. That is because appellee failed to adduce any evidence to establish that appellant intentionally attacked Smith for this reason. Given the strong evidence in the record that appellant is suffering from a serious mental illness, e.g., the trial court's appointment of a guardian ad litem for appellant as an incapacitated adult, the lack of any opposition thereto, and the trial court's own recognition of the unresolved competency issues in the criminal proceedings against appellant, the possibility remains that appellant's attack on Smith was not motivated by greed but instead arose out of a paranoid delusion caused by a psychotic disorder. Hence, despite the attack, Settlor might well have wanted appellant, his only grandson, to receive Trust proceeds in order to facilitate treatment for his illness.
>
> "[T]he most important issue for the trial court is whether the denial of the modification will impair the purpose of the trust." (Footnote omitted.) *Friedman*, supra, 268 Ga. at 722 (1). Because the record does not contain the clear and convincing evidence required by OCGA § 53-12-153 to establish that it would defeat or substantially impair the purpose of the Trust for appellant (should he survive Inez Smith) to receive his share of the Trust funds, we conclude that the trial court abused its discretion by ordering equitable modification of the trust at issue. *See generally Friedman*, supra at 723 (2).

Id.

Accordingly, it is unlikely that a trial court would modify a trust to omit a beneficiary or to limit distributions to a beneficiary where the beneficiary opposes that relief. One could see a circumstance where a beneficiary owes money to a third party (crime victim), and the beneficiary agrees to modify a trust to stop mandatory distributions (at least for a while). In such circumstances, where all relevant parties

agree to that relief, a trial court may grant the request.

III. SLAYER RULE

A. General Discussion of Slayer Rule in Texas

A beneficiary's criminal conduct also necessarily raises of issue of what happens when one beneficiary kills another and potentially gains from that criminal act. For example, it is very common for a contingent remainder beneficiary to inherit all of the trust's assets upon the death of a primary beneficiary. For further example, let us suppose that a remainder beneficiary then kills the primary beneficiary (maybe a child kills his or her parent). Does the trustee have a duty to terminate the trust and transfer the assets to the criminal remainder beneficiary as per the strict wording of the trust document?

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. Recent Texas Case On Slayer Rule

There is a recent case in Texas discussing the equitable constructive trust remedy for a slayer situation. 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*.

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.

So, getting back to our example, a trustee could be placed in the position of raising a claim against the criminal beneficiary to seek a constructive trust to protect the assets. Alternatively, another remainder beneficiary could also seek a constructive trust. If there are no other remainder beneficiaries, then this may be a situation where the trust fails and the assets would go back to the settlor's estate and heirs thereunder. In any event, it would seem that some action should be taken to ensure that the criminal beneficiary does not benefit from his or her misdeeds.

C. Trust Drafting Considerations For The Slayer Rule

A settlor may want to add a term to a trust document to ensure that a slayer/beneficiary does not profit from his or her actions. Such a provision could state:

> With reference to the so-called "slayer rule," no person named or referenced hereunder shall, in any event, in the sole and absolute discretion of the Trustees, be permitted "…to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime," and any such person shall in any such event be deemed for all purposes hereunder to have predeceased the date of this Trust Agreement without having any issue surviving.

Certainly, this would be an appropriate provision to add to any trust document and would end any need for a trustee or beneficiary to seek a constructive trust. Rather, such a party would likely, in an abundance of caution, file suit for a declaration that this language has been triggered and applies due to a finding that the beneficiary's conduct meets its standard.

IV. DUTY TO PROPERLY MANAGE TRUST ASSETS

A. General Authority On Duty To Properly Manage Trust Assets

In addition to a duty of loyalty, a trustee has a duty to manage trust assets prudently, and meeting this duty may require a trustee to take certain actions to protect trust assets that are placed at risk when a beneficiary commits crimes. As discussed, a trustee owes to his beneficiaries an unwavering duty of good faith, fair dealing, loyalty, and fidelity over the affairs of the trust and its corpus. *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied); *Interfirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 888 (Tex. App.—Texarkana 1987, no writ). "A trustee's fundamental duties include the use of the skill and prudence which an ordinary, capable, and careful person will use in the conduct of his own affairs as well as loyalty to the trust's beneficiaries." *Herschbach*, 883 S.W.2d at 735. Furthermore, trustees who hold themselves out as having special expertise in the area of finance and investments must use this expertise in managing their trusts. RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. d (2007) ("If the trustee possesses a degree of skill greater than that of an individual of ordinary intelligence, the trustee is liable for a loss that results from failure to make reasonably diligent use of that skill."). "The duty of care requires the trustee to exercise reasonable effort and diligence in making and monitoring investments for the trust, with attention to the trust's objectives." *Id.* at cmt. d. "It is the duty of the trustee to exercise such care and skill to preserve the trust property as a man of ordinary prudence would exercise in dealing with his own property, and if he has greater skill than that of a man of

ordinary prudence, he is under a duty to exercise such skill as he has." RESTATEMENT (SECOND) OF TRUSTS §176(a). "It is the duty of the trustee to use reasonable care to protect the trust property from loss or damage." *Id*. at (b).

Chapter 117 of the Texas Property Code provides that a trustee who invests and manages trust assets owes a duty to the beneficiaries to comply with the prudent investor rule. Tex. Prop. Code Ann. § 117.003(a). The prudent investor rule provides: (a) a trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." Tex. Prop. Code Ann. § 117.004; *see also Barrientos v. Nava*, 94 S.W.3d 270, 282 (Tex. App.—Houston [14th Dist.] 2002, no pet.). This duty to properly manage starts as soon as the trustee takes control over the trust's assets. "Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this chapter." Tex. Prop. Code Ann. § 117.006; *Langford v. Shamburger*, 417 S.W.2d 438, 444-45 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.) (concluding the trustee should "put trust funds to productive use and the failure to do so within a reasonable period of time can render the trustee personally chargeable with interest."). A trustee has the duty to make assets productive while at the same time preserving the assets. *Hershbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied). It has a duty to properly manage, supervise, and safeguard trust assets. *Hoenig v. Texas Commerce Bank*, 939 S.W.2d 656, 661 (Tex. App.—San Antonio 1996, no writ).

B. Risk of Civil Forfeiture Due To Criminal Activity

A trustee has a duty to prevent criminal activity on or with trust property of which it has knowledge of because there is a risk that a state or federal governmental authority may seek a forfeiture of the property. Tex. Code Crim. Proc. §59; 18 U.S. Code § 981. Civil forfeiture is a legal process in which law enforcement take assets suspected of involvement with crime or illegal activity. It involves a dispute between law enforcement and the property. In civil forfeiture, assets are seized by police based on a suspicion of wrongdoing, and without necessarily even charging a person with specific wrongdoing, with the case being between police and the thing itself. The owner of the property does not have to be the one involved in the criminal activity. For example, authorities have attempted to seize hotels where illegal drug activities have occurred.

Certainly, authorities can seize trust assets where appropriate. For example, in *3607 Tampico Dr. v. State*, the government brought a forfeiture proceeding under Texas Code of Criminal Procedure Article 59.02(a) for a house owned by a trust. No. 11-13-00306-CV, 2015 Tex. App. LEXIS 13056 (Tex. App.—Eastland December 31, 2015, pet. denied). The house was held in a spendthrift trust for a son, and the mother was the trustee. The trustee allowed the beneficiary to live in the house while the trust paid for the house and all expenses related to it. The beneficiary operated a heroin operation out of the house and was charged and sentenced to federal prison for that crime. The state authorities then filed a notice of seizure and intent to forfeit the house. The trial court forfeited the property after a bench trial. Chapter 59 of the Texas Code of Criminal Procedure governs proceedings to forfeit contraband. Property that is contraband is subject to forfeiture and seizure by the State. "Contraband" is property of any nature, including real property that is used in the commission of the crimes referenced in Article 59.01(2). Possession of a controlled substance with intent to deliver is one of those crimes. The court of appeals held that the state had the burden to prove that the

property was used in the commission of a crime referenced in Article 59.01(2) and that probable cause existed for seizing the property. After reviewing the evidence, the court held that it supported a reasonable belief that there was a substantial connection between the property and delivery of heroin and that probable cause existed for seizing the property.

The court rejected an argument that the state could not seize the property because the perpetrator did not own the property. Rather, the court held that ownership was not an element of the claim. Further, the court held that "a beneficiary of a valid trust is the owner of the equitable or beneficial title to the trust property and is considered the 'real' owner of trust property." *Id*. The court reviewed the trustee's "innocent owner" defense under Chapter 59. The trustee's burden was to prove that the trust acquired an ownership interest in the real property before a lis pendens was filed and that the trust did not know or should not reasonably have known, at or before the time of acquiring the ownership interest, of the acts giving rise to the forfeiture or that the acts were likely to occur. The trustee testified that she did not know that the beneficiary was distributing heroin at the property. The court of appeals, however, affirmed the trial court's judgment citing that, at the time the trust purchased the property, the trustee knew that the beneficiary had previously pleaded guilty to possession with intent to distribute nine pounds of marijuana a decade earlier in another state. The court also cited to the following facts: the trust paid all expenses of the house, the beneficiary had a roommate at times, the beneficiary had brittle diabetes, and that the beneficiary never had any employment. The court concluded: "The trust acquired an ownership interest in the Tampico Drive property before a lis pendens was filed. However, we believe that the evidence fails to conclusively show that Ruth, as trustee, did not know or should not reasonably have known, prior to the time that the trust acquired the property, that it was likely that the property would be used for illegal purposes." *Id*.

This case raises the issue that a trustee may have an innocent owner defense to a governmental entity's civil forfeiture claim. Texas Code of Criminal Procedure 59.02(c) provides:

> (c) An owner or interest holder's interest in property may not be forfeited under this chapter if the owner or interest holder proves by a preponderance of the evidence that the owner or interest holder acquired and perfected the interest: (1) before or during the act or omission giving rise to forfeiture or, if the property is real property, he acquired an ownership interest, security interest, or lien interest before a lis pendens notice was filed under Article 59.04(g) of this code and did not know or should not reasonably have known of the act or omission giving rise to the forfeiture or that it was likely to occur at or before the time of acquiring and perfecting the interest or, if the property is real property, at or before the time of acquiring the ownership interest, security interest, or lien interest; or (2) after the act or omission giving rise to the forfeiture, but before the seizure of the property, and only if the owner or interest holder: (A) was, at the time that the interest in the property was acquired, an owner or interest holder for value; and (B) was without reasonable cause to believe that the property was contraband and did not purposefully avoid learning that the property was contraband.

Tex. Code Crim. Proc. § 59.02(c). This defense may be difficult to prove. *See One 2007 Lexus IS 250 v. State*, No. 05-16-01296-CV, 2018 Tex. App. LEXIS 183 (Tex. App.—Dallas Jan. 8, 2018, no pet.) (trial court properly rejected a wife's innocent owner defense and forfeited her car as contraband where the wife

knew or reasonably should have known that her husband of 22 years was using the car in the commission of a drug felony); *2005 Acura TSX v. State*, 508 S.W.3d 608, 2016 Tex. App. LEXIS 4547 (Tex. App.—El Paso Apr. 29, 2016, no pet.) (owner of a vehicle that was used by the owner's on in an armed robbery was not entitled to the innocent owner defense because he provided the vehicle to his son knowing that his son used drugs and had committed theft and driving while intoxicated in the past).

Therefore, one serious risk involved with criminal activity by a beneficiary or other third person is that the state or federal government may try to obtain the trust's asset that is being used in the crime. Once successfully seized, the government can then simply auction the property and recoup the proceeds. The trust is left without that asset or its value. A prudent trustee should know of this risk and act accordingly to limit the risk by eliminating any criminal activity on or with trust property.

C. Risk Of Negligent-Entrustment Claim From Criminal Activity

The trustee should also take care to avoid the risk of loss to other trust assets resulting from the improper use of trust assets by a beneficiary or other third person.

In Texas, an owner of property or other person who has the right to control the property can potentially be liable for damages due to negligently entrusting the property to a third person who commits a tort with the property. In Texas, the elements of negligent entrustment are: (1) entrustment of property by the owner; (2) to an unlicensed, incompetent, or reckless person; (3) that the owner knew or should have known to be unlicensed, incompetent, or reckless; (4) that the person was negligent on the occasion in question; and (5) that the person's negligence proximately caused the incident. *Williams v. Steves Indus., Inc*., 699 S.W.2d 570, 571 (Tex. 1985) (citing *Mundy v. Pirie-Slaughter Motor Co.*, 146 Tex. 314, 206 S.W.2d 587, 591 (1947)); *4Front Engineered Sols., Inc. v. Rosales*, 505 S.W.3d 905, 909 (Tex. 2016); *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 758 (Tex. 2007); *Williams v. Parker*, 472 S.W.3d 467, 472 (Tex. App.—Waco 2015, no pet.). *See also Shupe v. Lingafelter*, 192 S.W.3d 577, 580 (Tex. 2006) ("On a negligent entrustment theory, a plaintiff must prove, among other elements, that the driver was negligent on the occasion in question and that the driver's negligence proximately caused the accident.").

Importantly, with regard to the first element, the entrustor need only have the right of control and does not have to be the owner of the property. *McCarty v. Purser*, 379 S.W.2d 291, 294 (Tex. 1964); *De Blanc v. Jensen*, 59 S.W.3d 373, 376 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Rodriguez v. Sciano*, 18 S.W.3d 725, 728 n.6 (Tex. App.—San Antonio 2000, no pet.) (providing that an entrustor "need only have the right of control"); *Loom Craft Carpet Mills, Inc. v. Gorrell*, 823 S.W.2d 431, 432 (Tex. App.—Texarkana 1992, no writ). Negligent entrustment can apply to property other than vehicles. *See Prather v. Brandt*, 981 S.W.2d 801, 806 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (firearm). For example, in *Kennedy v. Baird*, the plaintiffs went to the defendant's house. 682 S.W.2d 377, 377 (Tex. App.—El Paso 1984, no writ). The defendant's son began shooting at them and injured them. The plaintiffs sued the defendant for negligently entrusting his son with a gun. The defendant filed a motion for summary judgment, which was granted, and the plaintiffs appealed. After deciding that it was possible to bring an action for negligent entrustment of a firearm, the appellate court examined the affidavit of the defendant. That affidavit stated that the defendant's son was self-employed, had his own car, and that the defendant seldom saw him. He stated that he had no knowledge of his son ever using a gun on any person or car and did not believe that his son had a violent temper. The plaintiffs responded by offering affidavits that proved that the son had pushed another boy down on one occasion and had a reputation for having a violent temper. The court found that the defendant had no knowledge of his son's propensity to commit the type of act complained of or to use rifles dangerously and affirmed the summary judgment. *Id*. at 379-80.

Trustees can be sued for negligent entrustment. For example, in *Arkansas Bank & Trust Co. v. Erwin*, a plaintiff sued a bank, who was the guardian of a ward, who entrusted the ward with a vehicle. 300 Ark. 599, 781 S.W.2d 21(1989). When the ward caused an accident, the other party sued the bank for negligently entrusting a vehicle to someone it knew had psychological problems. *Id*. In an opinion dealing with a venue objection, the Arkansas Supreme Court held that the plaintiff had stated an adequate claim:

> Here, the plaintiffs, in support of their theory of negligent entrustment, alleged the following: (a) J. D. Burchette was incompetent by reason of insanity caused by schizophrenic reaction; (b) That Arkansas Bank & Trust Company knew of its ward's condition and proclivities; (c) That Arkansas Bank & Trust Company allowed its ward to operate said vehicle and in fact to do so without liability insurance; (d) That the aforesaid entrustment and operation of said vehicle without insurance created an appreciable risk of harm to the public in general and these plaintiffs in particular and a correlational duty on the part of the defendant guardian; and (e) That the harm to the plaintiffs herein was proximately caused by the negligent driving of J. D. Burchette and the negligence of defendant Arkansas Bank & Trust Company in allowing J. D. Burchette to operate said vehicle and further to operate said vehicle without liability insurance.
>
> Although the plaintiffs included in their complaint a second count that set out another cause of action based on a breach of fiduciary duties imposed by statutory law and common law, they also clearly alleged the separate tort cause of action for entrustment. 2Link to the text of the note Plaintiffs' entrustment theory, as alleged in their complaint, rests on its own facts and law and does not depend on whether the Bank breached its duties to Burchette's estate. Because negligent entrustment, as alleged, is a wrong which resulted in the death or injuries of the plaintiffs, venue, under § 16-60-112(a), is proper in Randolph County because that county is where the plaintiffs lived at the time of injury.

Id.; Merlo v. Hill, No. 2017-C-0102, Dec. LEXIS 6106 (Com. Pleas Ct. of Penn. April 10, 2017) (trustee sued for negligent entrustment from vehicle accident). *But see Sligh v. First Nat'l Bank of Holmes Co.*, 735 So. 2d 963 (Miss. 1999) (holding trustee not liable for negligent entrustment for financing a beneficiary's purchase of a car that was later used in an accident); *Feketa v. Zacharzewski*, No. 2:18-CV-14156, 2018 U.S. Dist. LEXIS 128888 (D.C. Fla. August 1, 2018) (dismissing negligent entrustment claim where there was no allegation that the trustee supplied a vehicle to the driver); *Folwell v. Sanchez Hernandez*, No. 1:01-CV-1061, 2003 U.S. Dist. LEXIS 10301, 2003 WL 21418098 (M.D.N.C. May 7, 2003) (dismissing negligent entrustment claim against trustee where it had no knowledge that employee was a dangerous driver).

Accordingly, where the elements are met, a trustee may be liable for negligently entrusting property to a beneficiary who harms a third party.

D. Risk Of Negligent Activity or Premises Defect Claim Based on Criminal Acts of Third Persons

Generally, a person has no legal duty to protect others from the criminal acts of third parties.

UDR Texas Properties, L.P. v. Petrie, 517 S.W.3d 98, 100 (Tex. 2017); *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 205 (Tex. 2015); *Trammell Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9, 12 (Tex. 2008); *Timberwalk Apts. Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998); *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). *See also* David F. Johnson, *Paying For The Sins of Another—Parental Liability in Texas for the Torts of Children*, 8 TEX. WESLEYAN L. REV. 359, 377 (2002). Given "the pervasive and often random nature of crime in our society," the Supreme Court has "avoided imposing a universal duty on landowners to protect persons on their property from third-party criminal acts." *Trammel Crow Central Texas Ltd. v. Gutierrez*, 267 S.W.3d 9, 10 (Tex. 2008).

There is, however, an exception to this rule: an owner or operator of premises has a duty to use ordinary care to protect invitees from criminal acts of third parties if it knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee. *UDR Texas Properties*, 517 S.W.3d at 100 (quoting *Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 53 (Tex. 1997)); *Trammell Crow*, 267 S.W.3d at 12; *Timberwalk*, 972 S.W.2d at 756. Texas law begins with a presumption against the foreseeability of a crime: "[C]rime may be visited upon virtually anyone at any time or place, but criminal conduct of a specific nature at a particular location is never foreseeable merely because crime is increasingly random and violent and may possibly occur almost anywhere, especially in a large city." *Timberwalk*, 972 S.W.2d at 756. "[A] landowner is not the insurer of crime victims. The foreseeability requirement protects the owners and controllers of land from liability for crimes that are so random, extraordinary, or otherwise disconnected from them that they could not reasonably be expected to foresee or prevent the crimes." *Trammel Crow*, 267 S.W.3d at 17.

The Texas Supreme Court has recognized only two ways to rebut the presumption against the foreseeability of a crime. The first is through past specific instances of similar criminal conduct. Those previous crimes must have been "sufficient to put the owner on notice of the need for security." *Viveros v. United States*, 494 Fed. App'x 437, 439 (5th Cir. 2012). Specific prior similar crimes are "a prerequisite." *Timberwalk*, 972 S.W.2d at 756. Whether the risk of a crime was foreseeable "must not be determined in hindsight but rather in light of what the premises owner knew or should have known before the criminal act occurred." *Timberwalk*, 972 S.W.2d at 756-57. Without a history of crime, crime is not foreseeable as a matter of law. *Id*. In *Timberwalk*, for example, a sexual assault at the defendant's apartment complex was not foreseeable because no violent personal crime had occurred at the complex in the prior ten years. *Id*. at 759. In reviewing evidence of previous crimes, a court should consider five parameters: proximity, publicity, recency, frequency, and similarity. *Trammell Crow*, 267 S.W.3d at 15; *Timberwalk*, 972 S.W.2d at 757. *See also Park v. Exxon Mobil Corp.*, 429 S.W.3d 142, 145 (Tex. App.—Dallas 2014, pet. denied) ("These factors have come to be known as 'the Timberwalk factors.'"). These factors are considered together, and the evidence must be weighed in light of all factors. *Timberwalk*, 972 S.W.2d at 759.

The only other way to prove that a crime was legally foreseeable is to show the property owner or controller had "actual and direct knowledge" that a violent crime "was imminent." *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 769 (Tex. 2010) ("Del Lago"). In *Del Lago*, the defendant bar owner "continued to serve drunk rivals who were engaged in repeated and aggressive confrontations," yet failed to take steps to prevent the brawl that predictably happened. 307 S.W. at 769. Although the bar did not have a history of prior crimes, a sharply divided Texas Supreme Court created a narrow exception to *Timberwalk* because the defendant had "actual and direct knowledge that a violent brawl was imminent between drunk, belligerent patrons and had ample time and means to defuse the situation." *Id*. at 769. The exception recognized in *Del Lago* was narrow: "We do not announce a general rule today. We hold only, on these facts, that during the ninety minutes of recurrent hostilities at the bar, a duty arose on Del Lago's

part to use reasonable care to protect the invitees from imminent assaultive conduct." *Id*. at 770. The *Del Lago Court* specifically held that *Timberwalk* continued to apply "in situations where the premises owner has no direct knowledge that criminal conduct is imminent." *Id*. at 768.

Timberwalk and *Del Lago* "created two frameworks under which lower courts should analyze whether property owners have a duty to protect against third parties' criminal acts against invitees." *QuikTrip Corp. v. Goodwin*, 449 S.W.3d 665, 671 (Tex. App.—Fort Worth 2014, pet. denied). "The distinction in the scenarios between those two cases … is the timing of events giving rise to a duty on behalf of the premises owner, that is, whether those events occurred in the past (*Timberwalk*) or contemporaneous in nature (*Del Lago*)." *Stainbrook v. Texas Christian University*, No. 02-13-00433-CC, 2014 WL 5798273, at *3 (Tex. App.–Fort Worth Nov. 6, 2014, pet. denied).

The third party's claim may be framed as a negligent activity claim or a premises defect claim. Regarding real property, a third party may sue a trustee for premises liability if he or she is injured on the trust's property. Generally, a premises owner or controller is liable for a premises defect if its past negligent conduct created an unreasonably dangerous condition on the premises that causes the plaintiff's injury. *See, e.g., Del Lago Partners, Inc. v. Smith,* 307 S.W.3d 762, 775 (Tex. 2010); *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998). To succeed in a premises liability suit, an invitee plaintiff must prove the following four elements: (1) actual or constructive knowledge of some condition on the premises by the owner/operator; (2) that the condition posed an unreasonable risk of harm; (3) that the owner/operator did not exercise reasonable care to reduce or eliminate the risk; and (4) that the owner/operator's failure to use such care proximately caused the plaintiff's injuries. *Wal-Mart Stores, Inc. v. Gonzales,* 968 S.W.2d 934, 936 (Tex. 1998). In a premises-liability case, the plaintiff must establish a duty owed to the plaintiff, breach of the duty, and damages proximately caused by the breach. *Del Lago Partners*, 307 S.W.3d at 767. "The threshold issue in a premises defect claim is whether the defendant had actual or constructive notice of the allegedly dangerous condition." *Hall v. Sonic Drive-In of Angleton, Inc.*, 177 S.W.3d 636, 644 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). "Premises liability is a special form of negligence where the duty owed to the plaintiff depends upon the status of the plaintiff at the time the incident occurred." *W. Invs., Inc. v. Urena*, 162 S.W.3d 547 (Tex. 2005) (citing *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 675 (Tex. 2004)). Where the plaintiffs are invitees, the premises liability inquiry focuses on whether defendant's conduct proximately caused the plaintiff's injuries "by failing to use ordinary care to reduce or to eliminate an unreasonable risk of harm created by a premises condition that it knew about or should have known about." *Id*. (citing *Timberwalk*, 972 S.W.2d at 753.

So, if a trustee has notice of some dangerous condition and does nothing to repair that issue, and a third-party is injured due to that condition, a trust may be at risk for a premises liability claim.

It is important to determine whether the plaintiff's cause of action falls under a negligent activity or a premises defect theory. *Clayton W. Williams, Jr. Inc. v. Olivo*, 952 S.W.2d 523, 527 (Tex. 1997). *See also* David F. Johnson, *Employers' Liability for Independent Contractors' Injuries*, 52 BAYLOR L. REV. 1 (2000). As one court has stated:

> It is true that a negligent activity is often more advantageous to the plaintiff than a premises liability theory because of additional elements that the plaintiff may be required to prove . . . Texas courts have found this distinction between negligence and premises liability cases: 'Cases involving potential liability for an on premises activity 'are properly charged as typical negligence

> cases,' while cases involving potential liability for an on-premises defect are properly charged as premises liability cases.'

Lucas v. Titus County Hosp. Dist., 964 S.W.2d 144, 153 (Tex. App.—Texarkana 1998, pet. denied per curiam).

Under a negligent activity theory, the plaintiff must establish that he was injured by or as a contemporaneous result of the activity itself rather than by a condition created by the activity. *Timberwalk Apartments, Partners, Inc. v. Cain,* 972 S.W.2d at 753; *Exxon Corp. v. Garza*, 981 S.W.2d 415, 420 (Tex. App.—San Antonio 1998, pet. denied). In *Keetch v. Kroger Co.*, the Texas Supreme Court stated: "Recovery on a negligent activity theory requires that the person has been injured by or as a contemporaneous result of the activity itself, rather than by a condition created by the activity." 845 S.W.2d 262,264 (Tex. 1992). However, if the plaintiff's injury was not caused contemporaneously with the employer's activity, it is a premises defect.

The distinction between negligent activity and premises defect claims is neither novel nor recent. *Sibai v. Wal-Mart Stores, Inc*., 986 S.W.2d 702, 706 (Tex. App.—Dallas 1999, no pet.). The distinction has been well established in Texas since the turn of the century, and more recent cases are in accord. *See id*. (citing case law history). The Texas Supreme Court has repeatedly recognized the distinction between a premises liability claim and a negligent activity claim. *See id*. (citing numerous Supreme Court cases in addition to those cited above). "Because our Supreme Court has repeatedly 'declined to eliminate all distinction between premises conditions and negligent activities,' a court must determine whether [the employee's] injuries resulted from a condition or an activity." *Garza*, 981 S.W.2d at 420.

Texas courts have routinely held that a claim arising out of a criminal act on real property was a premises defect claim. *Timberwalk Apartments, Partners, Inc. v. Cain,* 972 S.W.2d at 753 ("A complaint that a landowner failed to provide adequate security against criminal conduct is ordinarily a premises liability claim."); *Lefmark Management Co. v. Old*, 946 S.W.2d 52, 53 (Tex. 1997); *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex. 1993); *Mayer v. Willowbrook Plaza Ltd. P'ship*, 278 S.W.3d 901, 908(Tex. App.—Houston [14th Dist.] 2009, no pet.).

Therefore, a trustee has a risk that a third person may sue under a negligent activity theory or a premises defect theory based on the criminal conduct of a beneficiary. The trustee should take precautions to limit this risk to the trust.

E. Methods To Limit Risk

Based on the claims set forth above, a third party may have a money judgment against the trustee that may far exceed the value of the asset at risk. For example, a trustee may allow a beneficiary to drive a $25,000 vehicle. If the beneficiary has an accident, the trust may not be harmed by just the loss of the vehicle. Rather, if the beneficiary harms a third party, the third party may sue the trustee for all of his or her damages. For example, if the accident leaves a thirty-five year old doctor, who is married and has children, a paraplegic, the doctor may obtain a huge verdict for his pain and suffering, mental anguish, loss of earnings, medical care in the past and future, and his children and wife may also obtain judgments for their personal injury damages. This could easily be over $50 million dollars. Those judgment creditors are not limited to the trust's asset at issue; rather, they may reach other trust assets to satisfy the judgment. Based on this substantial risk, the trustee should take precautions to limit that risk.

One option is to remove the beneficiary from the property or retake possession of the trust's personal property. This may be difficult to do if the beneficiary does not cooperate with the trustee. In fact, the trustee may have to evict its own beneficiary, and that legal process can be timely and expensive.

Another option is that a trustee may simply distribute the asset to the beneficiary where the

trust is a one-beneficiary trust and the trust terms to not prevent the distribution. In this scenario, the trustee no longer has the trust asset and has no duty to administer or protect it.

Another option is to sell the trust property and use the proceeds for the beneficiary. For instance, if the criminal activity involves real property, the trustee may sell the property and use the proceeds to rent a house or apartment for the beneficiary. Similarly, if the criminal activity involves a vehicle, the trustee can sell the vehicle and distribute money to the beneficiary to rent a car or take a taxi. A trustee should take great caution to consider the assets under its care and to structure the trust to limit the risk of losing the asset. This option is more complicated when there are multiple beneficiaries. A trustee has a duty to treat multiple beneficiaries fairly, and giving an asset to one beneficiary may not comply with a trustee's duties to other beneficiaries. In this circumstance, the trustee should attempt to have an agreement among all beneficiaries regarding the transfer of the asset. This agreement may include a release and consent by all of the beneficiaries.

If a trust document or a particular beneficiary throws up a road block to a trustee selling or distributing an asset, the trustee can seek court approval of the transaction and/or modification of the trust to allow same. In the end, a trustee can always seek court advice regarding the administration of the trust.

Another option, in addition to the suggestions set forth above, to potentially mitigate risk is for the trustee to create a holding entity, such as a limited liability company, to own the asset. The trustee would then own the holding company. Holding companies generally create a barrier for liability in that third parties can only sue the holding company (and obtain its assets), leaving its owners free from liability. Then, arguably, the limited liability company would be at risk for the entrustment or premises liability claim, and the claim may potentially be limited to the limited liability company's assets, not the other assets of the trust.

Finally, another option is for a trustee to make sure that there is sufficient insurance coverage to protect the trust's assets from potential liability claims based on beneficiary's negligent or intentional actions.

The use of trust assets by a beneficiary who indulges in criminal activity certainly creates many concerns for a trustee working to meet its duty to manage trust assets with care.

F. Trusts' Claims Against Beneficiaries

If the beneficiary causes harm to the trust due to his or her activities, a trustee may have a claim against the beneficiary. Texas Property Code Section 114.031 provides:

> A beneficiary is liable for loss to the trust if the beneficiary has: (1) misappropriated or otherwise wrongfully dealt with the trust property; (2) expressly consented to, participated in, or agreed with the trustee to be liable for a breach of trust committed by the trustee; (3) failed to repay an advance or loan of trust funds; (4) failed to repay a distribution or disbursement from the trust in excess of that to which the beneficiary is entitled; or (5) breached a contract to pay money or deliver property to the trustee to be held by the trustee as part of the trust.

Tex. Prop. Code § 114.031(a). So, if a beneficiary has caused loss to the trust due to wrongfully dealing with trust property, a trustee has a claim against the beneficiary, who is liable for the loss. *Id*.

One important issue is that the beneficiary may not have any assets, so suing the beneficiary may be a worthless exercise. The Texas Property Code also has a provision that allows a trustee to offset any distributions to the beneficiary due to a loss:

> Unless the terms of the trust provide otherwise, the trustee is authorized to offset a liability of the beneficiary to the trust estate against the beneficiary's interest in the trust estate, regardless of a spendthrift provision in the trust.

Tex. Prop. Code § 114.031(b). So, if a trustee establishes a claim against the beneficiary, the trustee can then simply payoff that debt by offsetting distributions otherwise due to the beneficiary from the trust.

These rights may not practically be relevant if the only beneficiary of the trust is the beneficiary who has committed the crime and caused the loss. But where the trust has multiple beneficiaries, these rights are important to allow a trustee to treat all beneficiaries fairly, which it has a fiduciary duty to do.

V. THE DUTY TO REPORT CRIMINAL ACTIVITY

A trustee must also consider the legal duties it has to report criminal activity to governmental authorities. No trustee should have to go to jail protecting its beneficiary.

A. Federal Law Regarding The Duty To Report Criminal Activity

Federal law generally requires the reporting of a crime. Federal courts have held that there is a duty to report a crime, regardless of the type of crime. *Lightbourne v. Dugger*, 829 F.2d 1012, 1020 (11th Cir. 1987); *Jenkins v. Anderson*, 447 U.S. 231, 243 (1980). However, there does not appear to be criminal penalties for not reporting a misdemeanor. Instead, the duty to report a misdemeanor crime surfaces in tort liability and civil administrative cases, where the failure to report a crime was considered a factor in finding negligence. *Rucker v. Davis*, 237 F.3d 1113, 1140 (9th Cir. 2001). *See also Roberts v. United States*, 445 U.S. 552, 565 n.3, 100 S. Ct. 1358, 1367 (1980) ("I observe only that such laws have fallen into virtually complete disuse, a development that reflects a deeply rooted social perception that the general citizenry should not be forced to participate in the enterprise of crime detection."). Further, some courts have held that criminalizing the failure to report all crimes would be over-burdensome to society and the courts:

> …neither the common law crime nor the statute was meant to punish in every instance every person who knows of a crime but does not report it. In 1822, Chief Justice Marshall noted, "It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man." Further, it is clear that misprision of felony cannot be read so broadly as to "make a criminal of anyone who, as the victim of a crime or faced with a criminal threat, resisted a . . . suggestion that the police be called." The scope of the obligations imposed by the statute is an important issue in today's society where police investigations are often hampered by codes of silence and fearful refusal by witnesses to cooperate. Those issues are beyond the scope of this opinion.

United States v. Caraballo-Rodriguez, 480 F.3d 62, 73 (1st Cir. 2007) (quoting *Marbury v. Brooks*, 20 U.S. 556, 575-76 (1822); *United States v. Rakes*, 136 F.3d 1, 5 (1st Cir. 1998)).

Misprision of a felony is a federal statute that holds that a person is criminally liable for the failure to report a felony crime and taking action to conceal the crime. 18 U.S.C. § 4. It is not enough that a person knows of a felony and fails to report the crime. *Roberts*, 445 U.S. at 557. The person must also perform some act in

furtherance of concealing the crime from the authorities. *See id*.

B. Texas Law Regarding The Duty To Report Criminal Activity

As a general matter, there is no duty to report a crime in Texas. Texas Penal Code Section 6.01(c) states: "[a] person who omits to perform an act does not commit an offense…." Tex. Penal Code § 6.01 (c). The failure to report that a crime occurred would not normally trigger an offense under the theory that it would be an omission under the Texas Penal Code. Texas courts have consistently held that there is no general or common-law duty to report a crime unless the crime is a felony or there is a special relationship between the alleged criminal and the person with knowledge of the crime. *Ed Rachal Found. v. D'Unger*, 207 S.W.3d 330, 332 (Tex. 2006) (reasoning that, "Like the various whistleblower statutes, specific criminal statutes requiring certain crimes to be reported would be unnecessary if every failure to report a crime were itself a crime.").

However, a person can be held liable for failure to report a crime when "a law…provides that the omission is an offense or otherwise provides that he has a duty to perform the act." *Id*. *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1987); *Gonzalez v. South Dallas Club*, 951 S.W.2d 72, 76 (Tex. App.—Corpus Christi 1997, no writ). The occasions where there is a duty to report a crime are generally classified as such based upon the type of relationship that is present between any two of the criminal, victim, and third-party with knowledge of the crime. The relationship between the person committing the crime and the person not reporting the crime is frequently sufficient to hold a duty to report or prevent the crime. *Butcher v. Scott*, 906 S.W.2d 14, 15 (Tex. 1995); *Plowman v. Glen Willows Apartments*, 978 S.W.2d 612, 614 (Tex. App.—Corpus Christi 1998, no writ). *See e.g., Gutierrez v. Scripps-Howard*, 823 S.W.2d 696, 699 (Tex. App.—El Paso 1992, writ denied) (newspaper owed duty to warn photographer of man previously identified as a drug czar); *Cain v. Cain*, 870 S.W.2d 676, 680-81 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (head of household had a duty to prevent sexual assault by another adult male occupying the house).

Several relationships produce the duty to report a crime under a more generalized duty of care, loyalty, or prudence. The special relationship exceptions occur when the "special relationship exists between the actor and the third person that imposes a duty upon the actor to control the third person's conduct." *San Benito Bank & Tr. Co. v. Travels*, 31 S.W.3d 312, 319 (Tex. App.—Corpus Christi 2000, no pet.) (citing *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) and *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307, 311 (Tex. 1983)). The relationships that the courts have found to be significant in the duty to report a crime include those relationships between parent and child, employer and employee, and independent contractor and another contracting party. *See, e.g., Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 720 (Tex. 1995); *Phillips*, 801 S.W.2d at 525; *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 735-36 (Tex. 1998) (vacuum cleaner manufacturer owed duty to woman raped by door-to-door salesman); *but see, e.g., Villacana v. Campbell*, 929 S.W.2d 69, 75-76 (Tex. App.--Corpus Christi 1996, writ denied) (does not apply to parents of adult son living at home); *Wofford v. Blomquist*, 865 S.W.2d 612, 614-615 (Tex. App.—Corpus Christi 1993, writ denied) (does not apply to grandparents). One court stated that "control is the critical factor" when deciding whether the relationship is one where a person should be held liable for the conduct of the alleged criminal. *San Benito Bank*, 31 S.W.3d at 319. For example, an employee has a duty to report crimes that are being committed by the company for which the employee works. *D'Unger*, 207 S.W.3d at 333 ("Both employers and employees have civic and social obligations to report suspected crimes; 'gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship.'") (quoting *Roberts v. U.S.*, 445 U.S. 552, 558 (1980)). Even though a duty to report a crime may exist due to the relationship, there still must be a "'balancing of competing interests' and 'crafting remedies…'" *D'Unger*, 207 S.W.3d at

333 (quoting *Austin v. Healthtrust, Inc.*, 967 S.W.2d 400, 403 (Tex. 1998)). Balancing the competing interests involves evaluating the person's duty to perform or refrain in one area of law compared to the person's duty to perform or refrain in a different area of law.

Further, there is a duty in Texas to report felonies—in contradiction to the general "no duty" rule. Texas has a statutory provision that bears a resemblance to the federal misprision of a felony statute. *Compare* Tex. Penal Code § 38.171 *with* 18 U.S.C. § 4. Texas holds a person criminally liable for the failure to report a felony crime when that person observed the felony take place and was in a position to report the crime. Tex. Penal Code § 38.171. The main difference is that Texas requires the person to personally "observe the commission of a felony" whereas the federal statute merely requires knowledge that the felony occurred. *Compare* Tex. Penal Code § 38.171(a)(1) *with* 18 U.S.C. § 4. Additionally, Texas separates the requirement to preserve evidence and the duty to report a felony into separate statutes compared with that of the single federal statute. *Compare* Tex. Penal Code § 38.171 and Tex. Penal Code § 37.09 with 18 U.S.C. § 4. For example, in Texas it is a felony crime to possess any quantity of Penalty Group 1 substances. Tex. Health & Safety Code § 481.1150(b). Penalty Group 1 substances include all opiate-based substances and synthetic drugs—such as methamphetamine. Tex. Health & Safety Code § 481.102(6). Failure to report possession of one of these drugs is a crime. Because the possession of drug is a felony crime under Texas law, the failure to report possession of such would trigger both federal and state reporting statutes. Therefore, arguably, simply being on notice that possession of a controlled substance may be a crime triggers the requirement that the observer report the suspected crime.

It should also be noted that there is a duty to disclose known methamphetamine use in residential real property under Texas law. *See* Tex. Prop. Code § 5.008. However, the disclosure does not apply to a transfer "by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust." Tex. Prop. Code § 5.008 (e) (5); *Van Duren v. Chife*, No. 01-17-00607-CV, 2018 Tex. App. LEXIS 3494 (Tex. App.—Houston [1st Dist.] May 17, 2018, no pet.); *Garza v. Wells Fargo Home Mortg., Inc.*, No. 04-03-00391-CV, 2004 Tex. App. LEXIS 7590 (Tex. App.—San Antonio Aug. 25, 2004, pet. denied). *See also Sherman v. Elkowitz*, 130 S.W.3d 316, 321 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("Indeed, the notice makes clear that it is a disclosure by the seller only, not the seller and the broker."). Procedurally, the required disclosure forms are filled out and signed by the seller. Despite statutory provisions precluding a trustee from a requirement to disclose known defects, nothing is preventing a purchaser from pursuing common law remedies such as unconscionability. *D&J Real Estate Servs. v. Perkins*, No. 05-13-01670-CV, 2015 Tex. App. LEXIS 5720, at *5 (Tex. App.—Dallas June 4, 2015, pet. denied) (contractual provision that broker has no duty to inspect the property); Glassman v. Pena, No. 08-02-00541-CV, 2003 Tex. App. LEXIS 10643, at *14 (Tex. App.—El Paso Dec. 18, 2003, no pet.) (holding that broker was not liable for misrepresentation because the broker made no representation in an "as-is" contract). *See also* Tex. Occ. Code § 1101.805(e).

C. Conflict Between A Trustee's Duty of Loyalty and Proper Management and Reporting Duties

One of the most difficult issues that a trustee may face when a beneficiary commits crimes is balancing the duty of loyalty to the beneficiary and duty to properly manage trust assets versus a duty to report the crime. In determining whether one duty supersedes the other, there must be a "balancing of the competing interests." *D'Unger*, 207 S.W.3d at 333 (quoting *Austin v. Healthtrust, Inc*., 967 S.W.2d 400, 403 (Tex. 1998)). *See also* Arthur B. Laby, *Article: Resolving Conflicts of Duty in Fiduciary Relationships*, 54 AM. U.L. REV. 75, 86 (2004). The balancing of competing interests at issue is the duty of loyalty to the beneficiaries of a trust and the duty to report a crime under federal or Texas law.

Courts tread lightly on the subject of conflicting duties. Arguably the most famous case of a conflict related to the reporting of a crime or potential crime is *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 430 (1976). In *Tarasoff*, a therapist was held liable for not reporting a patient's plan to hurt a third-party. The issue was the conflict between the duty of safeguarding confidential communications and the societal duty to report a crime or, in this case, a potential crime. *Id*. In analyzing the conflict against the duty of loyalty to the patient, the California Supreme Court held that "Against this interest, however, we must weigh the public interest in safety from violent assault. The Legislature has undertaken the difficult task of balancing the countervailing concerns." *Id*. at 346. The *Tarasoff* case is an example of the balancing of the competing interests. Courts around the nation have cited the *Tarasoff* case, and many states enacted laws requiring the reporting of a crime or potential crime over the competing interest in loyalty. While Texas statutes do not require the disclosure of a crime, the case remains an example of the complex analysis needed to address the conflict of duties properly. Particularly, Texas Health & Safety Code provides that the disclosure of confidential information be permitted if the information is given to a "governmental agency," and the "disclosure is required" by law. Tex. Health & Safety Code § 611.004 (a) (1). Texas laws, such as Section 611.004, demonstrate an overriding concern that persons be obligated to report crimes over their duty of confidentiality or loyalty.

VI. DUTY TO PRESERVE EVIDENCE

A trustee who learns that the beneficiary has used trust property for criminal activity may want to eventually clean the property. For example, methamphetamine is a crystal that vaporizes when heated, adheres to surfaces, and reforms into crystals. People who contact these surfaces can ingest the meth crystals through their skin. Babies are especially vulnerable as they crawl on all fours, touch many surfaces, and put everything in their mouths. It takes only small amounts of methamphetamine crystals to affect a baby. A trustee may reasonably want to clean up this contamination as soon as possible to protect its employees, the beneficiary, and other parties. But this desire to clean up contaminated property may conflict with a duty to preserve evidence.

A. Federal Law On The Duty To Preserve Evidence

Under 18 U.S.C. § 1519, it is a crime to knowingly destroy evidence if there is a reasonable anticipation of litigation:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 1519. A reasonable anticipation of litigation is colloquially called the "as soon as the shot rang out" rule, showing that a person is on notice to preserve evidence at any indication that a crime has occurred. *Yates v. United States*, 135 S. Ct. 1074, 1087 (2015); *United States v. Yielding*, 657 F.3d 688, 714 (8th Cir. 2011); *United States v. McRae*, 702 F.3d 806 (5th Cir. 2012).

Federal courts have applied this statute liberally, especially in cases of drug and paraphernalia possession. Courts have interpreted the knowledge element to be more objective in their strict application of the obstruction law. Typically, scienter is based upon a showing of a subjective knowledge that the crime is being committed. However, in the cases of obstruction of justice, courts have held consistently that

constructive knowledge is sufficient to hold the person liable under 18 U.S.C. § 1519. *See United States v. Yielding*, 657 F.3d 688, 711 (8th Cir. 2011) (the proceeding "need not be pending or about to be instituted at the time of the offense."); *United States v. Moyer*, 674 F.3d 192, 208 (3d Cir. 2012) ("knowledge of a pending federal investigation or proceeding is not an element of the obstruction crime."); *United States v. McRae*, 702 F.3d 806, 836 (5th Cir. 2012).

B. State Law

In Texas, a party can be guilty of destroying or concealing evidence of a crime. "A person commits an offense if, *knowing that an investigation or official proceeding is pending or in progress*, he: (1) alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding." Tex. Penal Code § 37.09(a). This offense requires that the defendant know that there is an investigation or a proceeding that is pending or in process. The statute also provides: "A person commits an offense if the person: (1) knowing that an offense has been committed, alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of or official proceeding related to the offense." *Id*. at § 37.09(d). This offense only requires that the defendant know that an offense has been committed.

"Conceal" is not defined by the statute nor elsewhere in the Penal Code, but courts have held that it means to hide, to remove from sight or notice or to keep from discovery or observation. *Rotenberry v. State*, 245 S.W.3d 583, 588-89 (Tex. App.—Fort Worth 2007, pet. ref'd); *Hollingsworth v. State*, 15 S.W.3d 586, 595 (Tex. App.—Austin 2000, no pet.). Texas courts apply section 37.09 liberally. Texas courts have held persons liable merely for moving vehicles at the scene of an accident, reasoning that there is a presumption that the person moved the vehicle knowing the vehicle may be evidence in a potential crime. *Carnley v. State*, 366 S.W.3d 830, 835 (Tex. App.—Fort Worth 2012, pet. ref'd). In *Williams v. State*, the defendant stepped on a crack pipe after it had fallen to the ground. 270 S.W.3d 140, 146 (Tex. Crim. App. 2008). The court held that the defendant did not have to be aware that the crack pipe was evidence in an investigation as it existed at the time of the destruction. Similarly, a court of appeals held that a person who swallowed a "marijuana roach," the ashes remaining after the marijuana had been smoked, was liable under section 37.09. *Harris v. State*, No. 12-07-00279-CR, 2008 Tex. App. LEXIS 5412, at *8-9 (Tex. App.—Tyler July 23, 2008).

Accordingly, a trustee should be very careful to not destroy or conceal evidence of a beneficiary's criminal conduct, as doing so may expose the trustee to potential federal or state criminal charges. The trustee should take control of the property as soon as possible and stop any further criminal activity. The trustee should then cooperate with authorities regarding the criminal activity and only remediate the property (thus destroying evidence) after the authorities have given permission for same.

VII. ADVICE OF COUNSEL

When a trustee faces the difficult situations described above, the trustee should retain counsel to provide advice. Advice of counsel will provide protection that the trustee is complying with all legal requirements to avoid conflicts with governmental authorities. Further, advice of counsel may be a defense in any claim raised by a beneficiary. *In re Estate of Boylan*, No. 02-14-00170-CV,2015 Tex. App. LEXIS 1427, 2015 WL 598531 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.). The Restatement provides:

> The work of trusteeship, from interpreting the terms of the trust to decision making in various aspects of administration, can raise questions of legal complexity. Taking the advice of legal counsel on such matters evidences prudence on the part

> of the trustee. Reliance on advice of counsel, however, is not a complete defense to an alleged breach of trust, because that would reward a trustee who shopped for legal advice that would support the trustee's desired course of conduct or who otherwise acted unreasonably in procuring or following legal advice. In seeking and considering advice of counsel, the trustee has a duty to act with prudence. Thus, if a trustee has selected trust counsel prudently and in good faith, and has relied on plausible advice on a matter within counsel's expertise, the trustee's conduct is significantly probative of prudence.

RESTATEMENT (THIRD) OF TRUSTS § 77 cmt. b(2), c. So, following the advice of counsel can be evidence to show that a trustee acted prudently, though it, by itself, does not show prudence as a matter of law. To obtain the "silver bullet" defense, a trustee should seek instructions from a court. *Id*. at § 93 cmt. c (2012).

It should be noted that if a trustee asserts a defense of counsel defense, the trustee will likely waive any right to maintain privilege for those communications. If a party introduces any significant part of an otherwise privileged matter, that party waives the privilege. *See* Tex. R. Evid. 511. *See also Mennen v. Wilmington Trust Co.*, 2013 Del. Ch. LEXIS 238, 2013 WL 5288900 (Del. Ch. Sept. 18, 2013). For example, in *Mennen*, a trustee was sued for breach of fiduciary duty. *Mennen*, at *3. One of the trustee's defenses was that he received legal advice from counsel. *See id*. at *5. The trustee attempted to block production of the alleged bad advice from counsel, citing attorney-client privilege. *See id*. The court was unpersuaded by the trustee's invocation of privilege, stating that "a party's decision to rely on advice of counsel as a defense in litigation is a conscious decision to inject privileged communications into the litigation." *Id*. at *18 (citing *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3rd Cir. 1995).

VIII. CONCLUSION

Trustees find themselves in very difficult positions when their beneficiaries engage in criminal activities with or on trust property. Trustees know that they have a duty of loyalty to their beneficiaries, but this duty is not all encompassing. A trustee does not violate a duty of loyalty by refusing to allow a beneficiary to commit a crime, hide a crime, or participate in a crime. Rather, there is a duty to report a felony crime under both federal and Texas law. Regarding the duty to preserve evidence, both federal and state courts are liberal in the application of their respective laws criminalizing a party who destroys or hides evidence.

Of course, every situation is different and there are no black and white rules, but, generally, a trustee should take care to not allow a beneficiary to use trust property to commit a crime, it should preserve any evidence of the crime so that the proper authorities can collect that evidence, it should report felony crimes of which it has knowledge, and it should disclose the factual circumstances of the criminal activity to other beneficiaries if that fact may impact the other beneficiaries' interests. Though this may seem contradictory to a trustee's duty of loyalty, it is not.