



## Texas Fiduciary Litigation Update 2020-2021

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# Introduction

- Fiduciary litigation is an ever changing area of the law.
- The author reviews and reports on new cases regularly at his blog: Texas Fiduciary Litigator ([www.txfiduciaryliterator.com](http://www.txfiduciaryliterator.com))
- “The Intersection of Texas Courts and The Fiduciary Field.”
- You can sign up for email alerts!
- This presentation is intended to provide an update on current legal precedent that impacts fiduciaries.

# Legislative Update



# RAP Changes in Texas

- The Texas Legislatures recently passed a bill that takes effect on September 1, 2021 that extends the rule against perpetuities to 300 years for trusts.
- The Texas Constitution prohibits perpetuities: “Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed . . . .” Tex. Const. art. I, § 26.
- Historically, the rule against perpetuities renders invalid any will or trust that “attempts to create any estate or future interest which by any possibility may not become vested within a life or lives in being at the time of the testator’s death and twenty-one years thereafter, and when necessary the period of gestation.”

# RAP Changes in Texas

- The Texas Legislature recently amended Texas Trust Code Section 112.036, and that section now provides that an interest in a trust must vest, if at all: (1) not later than 300 years after the effective date of the trust, if the effective date of the trust is on or after September 1, 2021; or (2) except as provided by Subsection (d), not later than 21 years after some life in being at the time of the creation of the interest, plus a period of gestation, if the effective date of the trust is before September 1, 2021. Tex. Prop. Code 112.036(c).
- The effective date of the trust is the date that the trust becomes irrevocable. *Id.* at 112.036(b).
- The statute does clarify that a settlor of a trust may not direct that a real property asset be retained or refuse that a real property asset may be sold for a period of longer than 100 years. Tex. Prop. Code 112.036(f).

# RAP Changes in Texas

- A trust that has an effective date before September 1, 2021 may still have the 300 year period apply to it if the trust instrument provides that an interest in the trust vests under the provisions of Section 112.036 applicable to trusts on the date that the interest vests. Tex. Prop. Code 112.036(d). The new Section 112.036 does not address its interplay with Texas Trust Code Section 112.054(b-1), which was added in 2017.
- A trustee or beneficiary who wants to continue a trust that predates September 1, 2021 and is about to terminate due to the rule against perpetuities could seek to reform the trust instrument to state that an interest in the trust vests under the provisions of Section 112.036.
- If a court were to grant that relief, then the trust would be reformed to its creation to comply with Section 112.036(d)'s exception that allows trusts that predate September 1, 2021 to have a 300 year rule against perpetuities period.

# Accounting Statute

- Texas Legislator proposed a bill that would provide a defense to trustees who provided accountings.
- Sec. 113.153. BENEFICIARY'S APPROVAL OF ACCOUNTING.
- (a) This section does not apply to a trust that is under judicial supervision.
- (b) If a beneficiary does not object to a trustee's accounting before the 180th day after the date a copy of the accounting has been delivered to the last known address of the beneficiary: (1) the beneficiary is considered to have approved the accounting; and (2) absent fraud, intentional misrepresentation, or material omission, the trustee is released from liability relating to all matters in the accounting.
- The bill did not pass in this legislative session.



# De Facto Trustee



# De Facto Trustee

- “An ‘officer de jure’ is one who is in all respects legally appointed [or elected] and qualified to exercise the office; one who is clothed with the full legal right and title to the office; in other words, one who has been legally elected or appointed to an office and who has qualified himself [or herself] to exercise the duties thereof according to the mode prescribed by law.”
- There is precedent that an individual may become a de facto trustee by acting as same even though not officially named, appointed, or accepted as a trustee.

# De Facto Trustee

- In *Bird v. Carl C. Anderson*, a trust beneficiary sued a defendant for usurping a trustee's role and breaching fiduciary duties as a de facto trustee. No. 03-21-00140-CV, 2021 Tex. App. LEXIS 5036 (Tex. App.—Austin June 24, 2021, no pet. history).
- The defendant filed a motion to dismiss under Texas Rule of Civil Procedure 91, arguing that there was no de facto trustee status in Texas, which the trial court denied.
- The court of appeals declined to accept an interlocutory appeal because resolving that issue would not materially advance the termination of the litigation due to the existence of similar alternative theories.

# De Facto Trustee

- The court did imply that the defendant may owe fiduciary duties depending on the facts of the case even though he was not formally appointed a trustee.
- “[T]he trial court has yet to make the more salient determination of whether John owed the beneficiaries a fiduciary duty-either as a “de facto trustee” or under equitable principles-which is a question of law for the court that turns on the specific facts yet to be developed rather than on the legal capacity in which John was sued, considering that “fiduciary duties are equitable in nature and generally not subject to hard and fast rules.” Even if this Court were to determine that the “de facto” capacity does not exist, such determination would not materially advance the litigation’s termination because the issue of whether John owed the beneficiaries a fiduciary duty-in his individual capacity by allegedly and informally acting in the role of a trustee-would nonetheless remain a live issue.”

# De Facto Trustee

- The Seventh Circuit Federal Court of Appeals has enunciated the standard for becoming a de facto trustee as follows: “Two elements are essential before these trustees can be deemed de facto trustees: 1. The office or position must be assumed under color of right or title. 2. Those claiming de facto status must exercise the duties of the office.”
- In this definition of de facto trustee, the court is really concerned with whether the de facto trustee has standing to make decisions for the trust that are binding and potentially whether the de facto trustee should be compensated.

# De Facto Trustee

- De facto status may impact a trustee's right to compensation.
- For example, in *Alpert v. Riley*, the court of appeals held that the purported trustee did not properly accept that position under the trust document and was never properly acting as a trustee. 274 S.W.3d277 (Tex. App.—Houston [1st Dist.] 2008, no pet.). It then later held that because the individual was not the de jure trustee, it was not entitled to any compensation. *Id.*
- Even regarding a “volunteer” trustee or “trustee de son tort,” someone who assumes the role of trustee without doing so under color of right or title, the trustee should still owe fiduciary duties.
- There is a similar term called “trustee ex maleficio,” which means: “a person treated as a trustee because guilty of wrongdoing and compelled to account as though he were a trustee for property to which he has legal title for the benefit of those injured and equitably entitled to it.”

# Trustee Release



# Trustee Release

- In *Austin Trust Co. v. Houren*, beneficiaries of a trust executed a family settlement agreement with the trustee and the former trustee's estate. No. 14-19-00387-CV, 2021 Tex. App. LEXIS 1955 (Tex. App.—Houston March 16, 2021, pet. filed).
- After the settlement agreement was executed, one of the parties sued the former trustee's estate for over a \$37 million debt (or due to over distributions).
- The estate then filed a motion for summary judgment based on the release in the settlement agreement, which the trial court granted.
- The court of appeals affirmed, finding that the release's language was sufficiently broad to cover these claims.



# Trustee Release

- The court also held that the fact that the decedent may have owed fiduciary duties did not impact the enforcement of the release.
- This court held that six factors were key to their decision to affirm the settlement agreement: (1) the terms of the contract were negotiated rather than boilerplate, and the disputed issue was specifically discussed; (2) the complaining party was represented by legal counsel; (3) the negotiations occurred as part of an arms-length transaction; (4) the parties were knowledgeable in business matters; (5) the release language was clear; and (6) the parties were working to achieve a once and for all settlement of all claims so they could permanently part ways.
- “An examination of the record reveals that all of these factors are present here with respect to appellants, the complaining parties.”
- The release was enforceable even though it was between a fiduciary and beneficiary.

# Trust Construction



# Trust Construction

- In *Ackers v. Comerica Bank & Trust, N.A.*, an income beneficiary sued a trustee for a declaration regarding the construction of a testamentary trust. No. 11-18-00352-CV, 2020 Tex. App. LEXIS 10442 (Tex. App.—Eastland December 31, 2020, pet. filed).
- The will provided that the income beneficiary was to receive the income from the corpus of the trust during his lifetime, and upon his death, the trust would terminate and the corpus of the trust would pass to the “then-living descendants” of the income beneficiary.
- The income beneficiary brought a declaratory judgment action seeking a determination that some of his descendants should be excluded at his death, and the trial court entered summary judgment that the relief sought was not ripe for consideration.

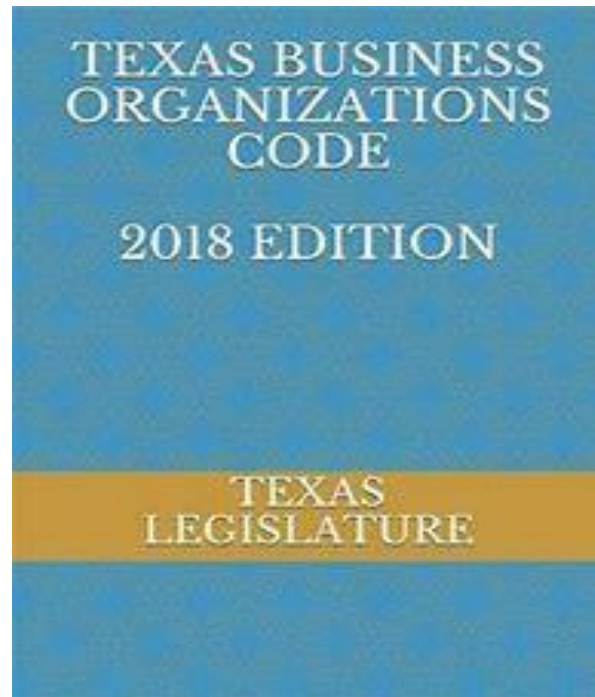
# Trust Construction

- The Uniform Declaratory Judgments Act (UDJA), which states that “[a] person interested under a . . . will . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder.”
- “However, a plaintiff bringing suit under the UDJA must still properly invoke the trial court’s subject-matter jurisdiction[,] [and] the UDJA does not permit courts to render advisory opinions..., and does not authorize a court to decide a case in which the issues are hypothetical or contingent—the dispute must still involve an actual controversy.”
- “[T]he time for ascertaining Appellant’s descendants who will receive the corpus of the trust is to be determined at Appellant’s death and not before. Until Appellant’s death, the interests of his descendants are only contingent interests.”

# Trust Construction

- In *Ochse v. Ochse*, a mother created a trust that provided that the trustee was authorized to make distributions to her son and the son's spouse. No. 04-20-00035-CV, 2020 Tex. App. LEXIS 8922 (Tex. App.—San Antonio November 18, 2020, pet. filed).
- At the time of the trust's execution, the son was married to his first wife, but he later divorced and married his second wife.
- The trial court and court of appeals both held that the terms “primary beneficiary's spouse” and “son's spouse” in the trust solely referred to the first wife because she was the son's spouse at the time the trust was executed.

# Business Interests In Trusts



# Business Interests In Trusts

- In *Benge v. Thomas*, a settlor created a trust and appointed her daughter, Missi, as the trustee. No. 13-18-00619-CV, 2020 Tex. App. LEXIS 6888 (Tex. App.—Corpus Christi August 27, 2020, no pet.).
- The trust owned an interest in a limited partnership that contained mineral interests.
- Missi’s daughter, Benge, was a beneficiary of the trust, and Benge sued Missi for various claims of breach of fiduciary duty arising from the operation of the limited partnership and other issues.
- The court held that the trust owned a limited partnership interest and as such had not authority over challenged transactions: “AFT Minerals would have had to bring these claims and not Missi in her capacity as trustee or Benge as a remainder beneficiary.”

# Business Interests In Trusts

- Bengie also complained that Missi did not keep adequate records of the trust, and specifically complained that “Missi had a duty to keep records of AFT Minerals’ transactions pursuant to her role as trustee of the 2012 Trust.”
- The court acknowledged that a trustee has a duty to maintain accurate records regarding a trust’s transactions, but disagreed that the trustee had a duty to maintain records regarding the transactions of a limited partnership that the trust has an interest in.



# Business Interests In Trusts

- The court then addressed Benges's claim that Missi breached duties by failing to sue third parties to protect the trust's assets.
- The court framed this as a derivative claim on behalf of the trust against the trustee.
- The court stated that Benges solely relied on her standing as a "vested" remainder beneficiary of the trust to provide her standing to bring that claim.
- The court held that Benges was not a "vested" beneficiary, but a "contingent" beneficiary, and held that a contingent remainder beneficiary does not have standing to sue regarding the administration of a trust.

# Trustee's Power To Sell Asset



# Trustee's Power To Sell Asset

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

# Trustee's Power To Sell Asset

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

# Trustee's Power To Sell Asset

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

# Exculpatory Clauses



# Exculpatory Clauses

- In *Benge v. Roberts*, a beneficiary sued co-trustees and sought to remove them for breaching duties by not considering claims against a former trustee. No. 03-19-00719-CV, 2020 Tex. App. LEXIS 6335 (Tex. App.—Austin August 12, 2020, no pet.).
- The co-trustees filed a motion for summary judgment based on a clause in the trust that provided:
- “No successor Trustee shall have, or ever have, any duty, responsibility, obligation, or liability whatever for acts, defaults, or omissions of any predecessor Trustee, but such successor Trustee shall be liable only for its own acts and defaults with respect to the trust funds actually received by it as Trustee.”

# Exculpatory Clauses

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



# Acceptance of Benefits



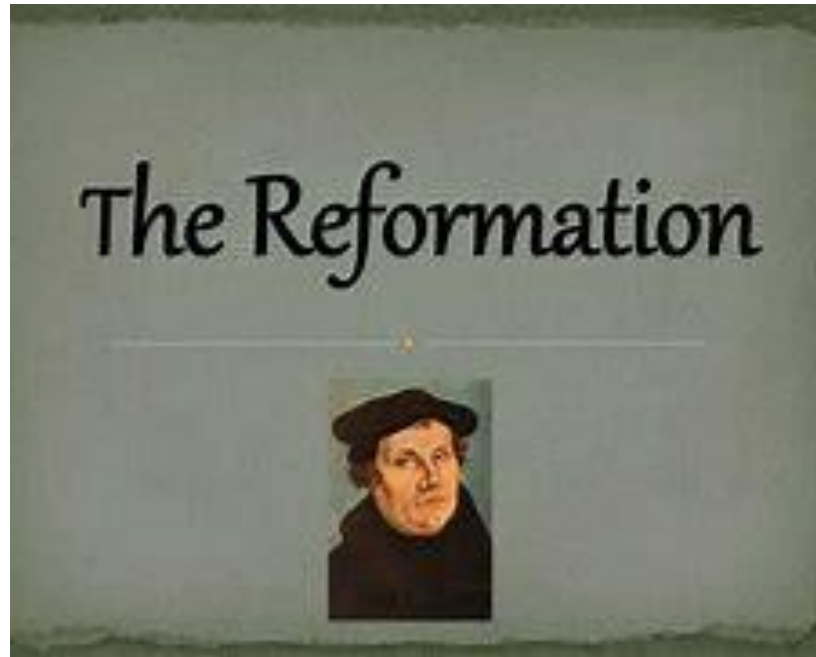
# Acceptance of Benefits

- In *In the Estate of Johnson*, a child of the decedent accepted over \$143,000 from the decedent's estate and then decided to challenge the will due to mental capacity and undue influence. No. 20-0424, 2021 Tex. LEXIS 426 (Tex. May 28, 2021).
- The trial court ruled that the child could not accept a benefit under the will and then challenge the will and dismissed the child's claim.
- The court of appeals reversed, holding that the child did not receive anything that the child would not also receive if there was no will, and therefore, she was not inconsistent and was not estopped from bringing her will contest.
- The Texas Supreme Court rejected the theory that "a will contestant may presently accept benefits under the will based on a hypothetical claim to greater benefits should a court declare it invalid."

# Acceptance of Benefits

- The Court stated that this bright-line test would not harm a beneficiary that accepts a benefit without sufficient knowledge of the facts:
- “MacNerland argues that an opportunistic executor could offensively deny a would-be will contestant’s claim by partially distributing the estate to an unwitting beneficiary to avoid a will contest. The doctrine sufficiently accounts for this concern, however, by requiring that a beneficiary voluntarily accept the benefit. If a beneficiary or devisee lacks knowledge of some material fact at the time of acceptance, she may take steps to reject the benefit. MacNerland did not attempt to return the mutual fund account to the estate or assert in this case that her acceptance of the account was involuntary.”

# Reformation of Wills



# Reformation of Wills

- In *Odom v. Coleman*, a brother and a sister sued each other regarding their father's estate. 615 S.W.3d 613 (Tex. App.—Houston [1st Dist.] 2020, no pet.).
- The dispute centered on whether the father's will should be reformed pursuant to Texas Estates Code Section 255.451(a)(3) that permits a court to modify or reform a will if "necessary to correct a scrivener's error in the terms of the will, even if unambiguous, to conform with the testator's intent," which must be established by clear and convincing evidence.

# Reformation of Wills

- The will contained a residuary clause that devised “personal property” to the son and then to the daughter. A strict reading of the will meant that the decedent’s real property would not be included in the residuary clause and would pass by intestacy.
- The son sued to reform the will to omit the word “personal” in the residuary clause.
- The trial court ruled for the son and the daughter appealed, which the court of appeals affirmed.
- The court reviewed the evidence. The testator had a hand written will that stated that he intended to “leave all my worldly goods, land, property accounts all that I own to my son Howard W. Coleman, on this day 6-15-2015. If anything happens to Howard W Coleman it will go to my daughter Nadine Odom then to Thomas B. Coleman.”
- The court held that the attorney drafting the will made an error in adding the term “personal” to the term “property” in the residuary clause.

# Reformation of Wills

- The court held that the attorney's mistake was a scrivener's error.
- Because the statute did not define scrivener's error, the court cited to a dictionary: "Black's Law Dictionary defines "scrivener's error" as a synonym for "clerical error." A "clerical error" is one "resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." Iverson's failure to delete the word "personal" from the residuary clause falls within the definition of "scrivener's error.""
- The court also held that the trial court's determination was based on clear and convincing evidence.

# Aiding and Abetting





# Aiding and Abetting

- In *Hampton v. Equity Trust Co.*, an individual sold fraudulent investments to the plaintiff. No. 03-19-00401-CV, 2020 Tex. App. LEXIS 5674 (Tex. App.—Austin July 23, 2020, no pet.).
- The individual ran a Ponzi scheme and had recommended that the plaintiff open a retirement account with Equity Trust Company.
- Equity Trust Company was the custodian of the plaintiff's self-directed IRA, from which the plaintiff made the investments.
- After the scheme came a halt, the plaintiff sued the individual for various claims and Equity Trust Company of aiding and abetting breach of fiduciary duty.
- After a jury trial, the trial court entered judgment for the plaintiff against Equity Trust Company for aiding and abetting breach of fiduciary duty.

# Aiding and Abetting

- The court of appeals reversed, holding that Texas does not have a claim for aiding and abetting breach of fiduciary duty. The court first noted that “Absent legislative or supreme court recognition of the existence of a cause of action, we, as an intermediate appellate court, will not be the first to do so.”
- The court concluded: “In the absence of recognition by the Supreme Court of Texas or the Legislature, we conclude that a common-law cause of action for aiding and abetting does not exist in Texas.”
- The court reversed and rendered for the defendant Equity Trust Company.

# Aiding and Abetting

- The court held that there is no *aiding and abetting* breach of fiduciary duty claim in Texas because the Texas Supreme Court has not used those words.
- But what is clear is that there is a claim for *knowing participation* in breach of fiduciary duty in Texas. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942).
- It is hard to understand how the court of appeals issued an opinion reversing and rendering that there is no aiding and abetting cause of action when there is a knowing participation cause of action.

# Injunctions Against Trustees



# Injunctions Against Trustees

- In *Marshall v. Marshall*, a beneficiary sued the original trustee and five co-trustees of two trusts regarding claims that they breached fiduciary duties. No. 14-17-00930-CV, 2021 Tex. App. LEXIS 1949 (Tex. App.—Houston [14th Dist.] March 16, 2021, no pet.).
- After the original lawsuit was filed in Texas, the original trustee filed a petition for declaratory relief in a Louisiana court, requesting the court declare, among other things, that the co-trustees were properly appointed as co-trustees of the trust.
- The beneficiary obtained a temporary injunction preventing the co-trustees from receiving compensation, disposing of trust assets, and participating in litigation against the beneficiary in Louisiana.

# Injunctions Against Trustees

- The court of appeals first reversed the anti-suit injunction aspect of the temporary injunction order because allowing the suit to continue would not create a miscarriage of justice.
- “This single parallel proceeding brought by some of the co-trustees in Louisiana, consistent with the trusts’ requirements that the co-trustees file suit in Louisiana, cannot justify issuing an anti-suit injunction. Even if there are overlapping or identical issues, the Louisiana suit does not create a miscarriage of justice.”

# Injunctions Against Trustees

- The court also reversed the other aspects of the temporary injunction order as there was no evidence to support an irreparable harm finding.
- “[T]here was no evidence that the co-trustees had taken any action or planned to take any action to transfer, sell, or dispose of any unique and irreplaceable assets of the trust.”
- Also, the trial court reversed the burden of proof by requiring the trustees to prove that they could pay a judgment: “To the extent Preston sought to establish that the co-trustees were insolvent and thus could not satisfy a judgment, it was Preston’s burden to adduce some evidence to support the claim.”

# No Contest Clause





# No Contest Clause

- In *Marshall v. Marshall*, a son, who was a trust beneficiary, sued his mother and brother alleging breaches of fiduciary duty and sought a declaratory judgment that they violated an in terrorem clause of the will. No. 14-18-00094-CV, No. 14-18-00095-CV, 2021 Tex. App. LEXIS 423 (Tex. App.—Houston [14th Dist.] January 21, 2021, pet. filed).
- Mother had created a different trust, merged the trust into the different trust, and sought a judgment that ratified the transaction.
- The mother/trustee filed a motion to dismiss the in terrorem clause claim.

# No Contest Clause

- The son contended that the “petition for instructions,” and the mother’s consent to it, triggered the in terrorem clause “because it was a “proceeding . . . to prevent any provisions [of the will] from being carried out in accordance with its terms.” Preston identifies three provisions of the will that the Wyoming proceeding undermined: (1) removing Preston as the designated successor trustee and authorizing Pierce to be the successor trustee; (2) changing the governing law from Texas to Wyoming; and (3) introducing a different in terrorem clause.”
- The court disagreed, and held that the mother had solely sought to modify administrative terms, which did not violate the in terrorem clause.
- The court reversed the order denying the motion to dismiss on the in terrorem claims as against the mother.

# Settlement Agreement



# Settlement Agreement

- In *Maxey v. Maxey*, in a dispute that arose from the probate of an estate, two sisters mediated and reached a settlement agreement concerning the division of certain real property. No. 01-19-00078-CV, 2020 Tex. App. LEXIS 10281 (Tex. App.—Houston [1st Dist.] December 29, 2020, no pet.).
- The parties disagreed on what the settlement agreement meant, and once again sued each other regarding breach of the agreement.
- The trial court found the settlement agreement was ambiguous and submitted the meaning of the agreement to a jury.
- After the jury trial, the court entered judgment on the verdict, and the losing sister appealed.

# Settlement Agreement

- The court of appeals reversed and held that the settlement agreement was not ambiguous:
- “We disagree with the trial court that the Settlement Agreement is ambiguous. The Settlement Agreement identifies the Marble Falls Property, provides that it is to be divided in such a way that Mary’s trust receives a tract worth one-half of the value of the entire property and Carolyn’s trust receives a tract worth one-half of the value of the entire property, and further provides that Mary’s trust is to receive the “West 50%” and Carolyn’s trust the “East 50%.” As Mary argues, this language is clear and can be given definite meaning...”

# Settlement Agreement

- Regarding the statute of frauds, the court held:
- “The fact that the Settlement Agreement did not specify, through metes and bounds or some other method, how Carolyn was to divide the Marble Falls Property does not make the language in the Settlement Agreement ambiguous. The agreement provided that the property was to be divided into two tracts of equivalent value, with Mary receiving the western tract and Carolyn receiving the eastern tract. As we have held, this language can be given certain and definite legal meaning, and it is not susceptible to more than one reasonable interpretation.”
- The court therefore remanded the case back to the trial court to construe the settlement agreement and properly divide the real property.

# Extra Material



# Extra Material

- Trust, Probate, Business Divorce, and Potpourri Precedent
- Receiverships in Trust and Estate Disputes
- Use of Equitable Defenses in Breach of Fiduciary Duty Litigation



# Conclusion

- Fiduciary issues arise in many different fact patterns—yet, they always interconnect.
- They are ever evolving and changing depending on the mood of the judiciary and legislature.
- The author hopes that this presentation was informative on the recent issues that impact trust/fiduciary relationships.