



Webinar: Texas Fiduciary Litigation Update 2016-  
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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 ([txfiduciaryliterator.com](http://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.

# Claims Against Trustee

- *Wells Fargo v. Militello*, No. 05-15-01252-CV, 2017 Tex. App. LEXIS 5640 (Tex. App.—Dallas June 20, 2017, pet. filed).
- The beneficiary sued a trustee for breach of fiduciary duty based on the sale of oil and gas properties owned by the trust.
- The trial court awarded the beneficiary: \$1,328,448.35 past economic damages, \$29,296.75 disgorgement of trust fees, \$1,000,000.00 past mental anguish damages, \$3,465,490.20 exemplary damages, and \$467,374.00 attorney's fees.

# Claims Against Trustee

- The first issue involved expenses incurred by the beneficiary in curing harm allegedly caused by the trustee's not documenting the sales correctly.
- The errors caused problems in the preparation of tax returns, and attracted the attention of various tax authorities.
- When Militello attempted to obtain information to address these problems, the trustee did not provide her with a correct accounting.
- It was necessary for Militello to retain and consult her own tax advisors in order to resolve these problems.
- Militello's tax lawyer gave expert testimony to explain and quantify the damages relating to correcting her tax problems.
- The court of appeals affirmed the trial court's awards.

# Claims Against Trustee

- The trustee also challenged the trial court's award of \$1,000,000.00 in "past mental anguish damages pursuant to Texas Trust Code Section 114.008(a)(10)."
- Section 114.008 is entitled "Remedies for Breach of Trust," and Subsection 114.008(a)(10) allows a court to "order any other appropriate relief" to "remedy a breach of trust that has occurred or might occur." *Id.*
- The court held that breaches of fiduciary duty can lead to awards of mental anguish damages.

# Claims Against Trustee

- To sustain such an award “[t]here must be both evidence of the existence of compensable mental anguish and evidence to justify the amount awarded.”
- “Mental anguish is only compensable if it causes a ‘substantial disruption in . . . daily routine’ or ‘a high degree of mental pain and distress.’”
- “Even when an occurrence is of the type for which mental anguish damages are recoverable, evidence of the nature, duration, and severity of the mental anguish is required.”

# Claims Against Trustee

- Militello established that she was entirely dependent on the trustee's competent administration of her trusts for her financial security and daily living expenses.
- The primary source of Militello's monthly income was permanently depleted, leaving her constantly worried about her financial security. Militello testified that the stress aggravated her Lupus, and that she suffered an ulcer and "broke out in shingles."
- She received notices from the IRS and other tax authorities that tax was due on properties she did not own, and she owed thousands of dollars in penalties.
- Her trust officer refused to discuss these problems with her, referring her to its outside counsel.
- The court of appeals concluded that there was evidence to support an award of mental anguish damages.



# Claims Against Trustee

- The court next reviewed the amount of the award of mental anguish damages. Appellate courts must “conduct a meaningful review” of the fact-finder’s determinations, including “evidence to justify the amount awarded.”
- The court held that the \$1 million award was not supported by the evidence and suggested a remittitur down to \$310,000 based on evidence of other actual damages.

# Claims Against Trustee

- Regarding exemplary damages, the trustee contended that Militello did not establish harm resulting from fraud, malice, or gross negligence by clear and convincing evidence, as required by TCPRC Sec. 41.003.
- Gross negligence consists of both objective and subjective elements.
- Under the objective component, “extreme risk” is not a remote possibility or even a high probability of minor harm, but rather the likelihood of the plaintiff’s serious injury.
- The subjective prong requires that the defendant knew about the risk, but that the defendant’s acts or omissions demonstrated indifference to the consequences of its acts.
- The appellate court concluded there was clear and convincing evidence to support the trial court’s express finding that the trustee was grossly negligent.

# Claims Against Trustee

- The trustee's final argument dealt with an exculpatory clause in the trust agreement.
- By its express terms, the clause did not preclude the trustee's liability for gross negligence, bad faith, or willful breach of the trust's provisions.
- The court held that the finding of gross negligence took this case outside the protective reach of the exculpatory clause.
- The court affirmed the judgment in part.

# Lost Document

- *Gause v. Gause*, No. 03-13-00768-CV, 2016 Tex. App. LEXIS 8138 (Tex. App.—Austin June 29, 2016, no pet.).
- A father executed a will and a trust document, and after his death, a child read the documents to the other children and took the documents to her home.
- The documents later became missing.
- The child then produced a deed to real property to herself that was supposed to be in the trust.
- Another child sued to hold the deed void and to establish the terms of the trust.

# Lost Trust

- The trial court ruled that the trust was effective, set forth its terms via oral testimony, and otherwise voided the deed.
- The court of appeals held that a deed or other document is not made ineffective by its destruction or loss.
- Rather, production of the original document is excused when it is established that the document has been lost or destroyed, and parol evidence of its contents is admissible.
- Trusts involving real property have to meet the statute of frauds, but that rule does not remove a trust from the operation of the general rule for lost documents.

# Will Contest

- *Merrick v. Helter*, No. 03-14-00708-CV, 2016 Tex. App. LEXIS 8966 (Tex. App.—Austin August 18, 2016, pet. denied).
- Two days before a father died, he signed a will that left no property to his only child, a daughter, and explicitly disinherited her.
- After he died and his will was admitted to probate, the daughter filed a contest seeking to invalidate the will on public policy reasons: namely the public policy against sexual abuse of children.
- She alleged that her father had sexually abused her when she was a teenager and had disinherited her after she confronted him decades later.

# Will Contest

- The trial court granted the executor's motion to dismiss under Texas Rule of Civil Procedure 91a.
- The court of appeals noted that Rule 91a permits a party to “move to dismiss a cause of action on the grounds that it has no basis in law or fact.”
- The court noted that the general rule is that a person of sound mind has a perfect legal right to dispose of his property as he wishes and may disinherit an heir if he desires.
- The daughter relied on authority that certain terms in wills may be deemed unenforceable on “public policy” grounds.

# Will Contest

- She argued that public policy strongly condemns sexual abuse or conduct aimed at concealing or aiding it; that the father used his will as a means of “silencing” her from divulging the sexual abuse and subsequently “punishing” her for confronting him about it; and the will provision disinheriting her was contrary to public policy, rendering it unenforceable.
- The court disagreed, holding that a testator has a “perfect legal right to dispose of his property as he wishes,” a right that includes the prerogative of disinheriting an heir if the testator sees fit.
- The court noted that the Legislature has not seen fit either to require testators to provide an inheritance for their victim or to proscribe them from disinheriting the victim.



# Claims Against Trust

- *In the Interest of H.D.V.*, No. 05-15-00421-CV, 2016 Tex. App. LEXIS 9520 (Tex. App.—Dallas August 26, 2016, pet. denied).
- A mother set up a trust for her son and funded it with various assets, including a vehicle.
- The son was the trustee and primary beneficiary and his children were named as secondary beneficiaries.
- The husband allowed his wife to drive the trust's vehicle.
- In the divorce proceedings, the wife sought ownership of the vehicle, and the trial court awarded it to her.
- On appeal, the husband contended that the trial court erred in awarding the wife the vehicle because it was owned by the trust.

# Claims Against Trust

- The court of appeals noted that the trust agreement gave the husband as trustee the power to “sell, exchange, give options upon, partition, convey, or otherwise dispose of . . . any property that may from time to time be or become part of the Trust estate.”
- As the husband testified at trial that the car was in the wife’s possession, the court of appeals held that there was evidence the vehicle had been conveyed or distributed from the trust and was no longer protected by the spendthrift provision.
- The court of appeals concluded that the “trial court did not abuse its discretion in awarding the car, which was in Wife’s possession, to her as separate property.”

# Venue For Trust Dispute

- *In re Green*, No. 08-16-00233-CV, 2016 Tex. App. LEXIS 12830 (Tex. App.—El Paso December 2, 2016, orig. proceeding).
- A beneficiary filed suit against a trustee for breach of fiduciary duty.
- The defendant filed a motion to transfer venue and averred that he had never managed the testamentary trust from the county of suit, and that he had administered the trust from his business office in another county.

# Venue For Trust Dispute

- The trustee relied on Section 115.002(b)(2) of the Texas Property Code that provides: “(b) If there is a single, noncorporate trustee, an action shall be brought in the county in which: ... (2) the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed.”
- The Property Code defines “situs of administration” as meaning the location where the trustee maintains the office that is primarily responsible for dealing with the settlor and beneficiaries of the trust.

# Venue For Trust Dispute

- The fact that the will was probated in the county of suit or that a business owned by the trust was in the county of suit did not matter.
- The court granted mandamus relief to require the trial court to grant the motion to transfer venue to the county where the trustee's business office existed and where he dealt with the beneficiaries.

# Release Of Trustee

- *Harrison v. Harrison Interests*, No. 14-15-00348-CV, 2017 Tex. App. LEXIS 1677 (Tex. App.—Houston [14th Dist.] February 28, 2017, no pet. history).
- A beneficiary of an estate and multiple trusts had a dispute with the executors/trustees.
- The parties then executed an agreement that allowed the parties to dissociate themselves and contained releases for the fiduciaries.
- After the agreement was signed, the beneficiary had additional complaints and filed suit.
- The trial court granted summary judgment for the defendants based on the release language, and the beneficiary appealed.

# Release Of Trustee

- The court of appeals held that “Texas courts have applied a presumption of unfairness to transactions between a fiduciary and a party to whom he owes a duty of disclosure, thus casting upon the profiting fiduciary the burden of showing the fairness of the transactions.”
- The court of appeals held that it must balance this principle with an obligation to honor the contractual terms that parties use to define the scope of their obligations and agreements, including limiting fiduciary duties that might otherwise exist.
- “This principle adheres to our public policy of freedom of contract.”

# Release Of Trustee

- The court held that in deciding whether the release is valid, the court should consider the following: “(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 counsel; (3) the parties dealt with each other in an arms-length transaction; (4) the parties were knowledgeable in business matters; and (5) the release language was clear.”
- The also emphasized that the fact that the parties “are effecting a ‘once and for all’ settlement of claims” weighs in favor of upholding the release.



# Release Of Trustee

- The beneficiary was of legal age and had capacity, attended college for several years, and studied business.
- He sought a split of interest in assets that were held in common with the fiduciaries, as well as early distribution of assets.
- He was represented by counsel that he described as “talented and intelligent” throughout the negotiations of the agreement.
- He was very involved in the negotiations and suggested many of the terms in the agreement himself.
- He actively participated in the decisions on the agreement.
- The releases were disputed and specifically discussed.
- The agreement clearly and unequivocally released the fiduciaries, in all capacities, from any and all claims, excluding breaches or defaults under the agreement.
- “[T]he record before this court rebuts the presumption of unfairness or invalidity attaching to the release.”

# Pre-Suit Deposition

- *In re Meeker*, No. 02-16-00103-CV, 2016 Tex. App. LEXIS 6883 (Tex. App.—Fort Worth June 29, 2016, original proceeding).
- After accepting assets under a will and not opposing its probate, an heir filed a Rule 202 petition for pre-suit deposition regarding claims that the will was void due to mental incompetence and undue influence.
- Rule 202 allows a person to petition a court for an order authorizing the taking of a deposition to “perpetuate or obtain the person’s own testimony or that of any other person for use in an anticipated suit” or “to investigate a potential claim or suit.”

# Pre-Suit Deposition

- The trial court granted the petition, and the defendants filed a mandamus petition.
- The defendants argued that the petition should have been denied due to the acceptance of the benefits.
- Appellate court held: “If a party receives \$10,000 under will A, accepts those funds, and then challenges will A in favor of Will B, the party will not be estopped from making that challenge if the party will receive \$10,000 or more under Will B.”
- The court denied mandamus relief, but a dissenting justice would hold that obtaining benefits under a will should trigger rule even if a party would obtain the same or more of a benefit under a different will.

# Will Construction

- *In the Estate of Setser*, No. 01-15-00855-CV, 2017 Tex. App. LEXIS 937 (Tex. App.—Houston [1st Dist.] February 2, 2017, no pet.).
- The decedent signed a 1993 will naming his daughter as the sole beneficiary.
- In 2014, he signed a hand-written will naming his good friend and roommate Heim as the sole beneficiary of his estate. This 2014 will stated: “I, Frankie Lee Setser will my property to Charles Edward Heim, 2748 County Road 32, Angleton, Texas 77515-7749.”
- The trial court rejected this will as being too conclusory and vague.

# Will Construction

- Appellate court held that when used in a will, an unqualified reference to “property” encompasses everything of exchangeable value that the testator owned. “Property” is synonymous with “estate” and includes assets of every category.
- “As the ordinary meaning of ‘property’ is well-settled and Setser used that term without restriction in his handwritten 2014 will, the will is susceptible to only one interpretation—it unambiguously bequeaths all of Setser’s property to Heim.”
- The court reversed and rendered that the 2014 will should be admitted to probate.

# Aiding And Abetting

- *First United Pentecostal Church of Beaumont v. Parker*, No. 15-0708, 2017 Tex. 295 (Tex. March 17, 2017).
- A church hired an attorney to defend it against sexual abuse allegations.
- Due to a hurricane claim, an insurance company offered over \$1 million, and the attorney generously suggested that the church leave those funds in the attorney's trust account to assist with creditor protection.
- The attorney then stole the funds.

# Aiding And Abetting

- Not in the forgiving mood, the church filed a lawsuit against the attorney, his firm, and the contract attorney for a number of causes of action, including breach of fiduciary duty, conspiracy to breach fiduciary duty, and aiding and abetting breach of fiduciary duty.
- The contract attorney filed a no-evidence motion for summary judgment, mainly arguing that there was no evidence that his conduct caused any damages to the client.

# Aiding And Abetting

- The client argued that there were two possible conspiracies: an initial conspiracy to steal its money, and a subsequent conspiracy to cover up the theft.
- Regarding the first theory, the court held that there was no evidence that the contract attorney knew that the original attorney had withdrawn and spent the money at the time that it happened and affirmed the trial court's summary judgment on that theory.
- Regarding the second theory, the court held that there was no evidence that the contract attorney's actions caused any damage.
- The court held that a plaintiff must establish that a defendant's actions caused an amount of harm, and thus prior actions by co-conspirators are not sufficient to prove causation.



# Aiding And Abetting

- The court reviewed the aiding-and-abetting breach-of-fiduciary duty claim.
- Court first “assumed” such a claim existed.
- The court held that there was not sufficient evidence to support such a claim in this case.
- Such a claim requires evidence that the defendant, with wrongful intent, substantially assisted and encouraged a tortfeasor in a wrongful act that harmed the plaintiff.
- “Here the church references no evidence that Parker assisted or encouraged Lamb in stealing the church’s money.”
- Court affirmed summary judgment on this claim.

# Tortious Interference/Constructive Trust

- *Jackson Walker, LLPO v. Kinsel*, No. 07-13-00130-CV, 2015 Tex. App. LEXIS 3586 (Tex. App.—Amarillo April 10, 2015, pet. granted).
- Leseey and E.A. Kinsel owned a ranch, and when E.A. died, he divided his half between his children and Leseey.
- Leseey owned 60% at that point.
- Leseey placed her interest into an intervivos trust, which provided that upon her death, her interests would pass to E.A.'s children.
- Leseey became frail and moved near a niece, Lindsey, and nephew, Oliver.

# Tortious Interference/Constructive Trust

- Lindsey and Oliver referred Lesey to an attorney to assist in drafting a new will.
- The attorney informed E.A.'s children that Lesey needed to sell the ranch to pay for her care.
- At that time, Lesey had approximately \$1.4 million in liquid assets and did not need to sell the ranch.
- Not knowing Lesey's condition, E.A.'s children agreed, the ranch was sold and \$3 million went into the trust.
- Lindsey, as a residual beneficiary in the trust, would receive most of the money – not E.A.'s children.
- E.A.'s children sued Lindsey, Oliver, and the attorney for tortious interference with inheritance, constructive trust, mental incapacity, undue influence, and fraud.

# Tortious Interference/Constructive Trust

- The jury returned a verdict for E.A.'s children.
- The court of appeals first addressed the tortious interference with inheritance claim: “Someone who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.”
- The court held that it was solely the authority of the Texas Legislature or the Texas Supreme Court to create a new cause of action.
- Court rendered for the defendants refusing to recognize that new cause of action.

# Tortious Interference/Constructive Trust

- The court affirmed the mental incompetence finding on the trust changes and sale of the ranch.
- The court affirmed in part a finding of a constructive trust, making Lindsey hold any proceeds that should have gone to E.A.'s heirs in trust for them.
- The Texas Supreme Court granted the petition for review in *Jackson Walker, LLPO v. Kinsel*, No. 15-0403, 2017 Tex. LEXIS 477 (Tex. May 26, 2017).
- The Court first addressed whether Lesey had mental capacity to execute the documents, and affirmed the jury's finding of mental incompetence.

# Tortious Interference/Constructive Trust

- The Court then turned to whether Texas recognizes the tort of tortious interference with inheritance rights.
- The Court held that it and the Legislature had never recognized such a tort.
- “We take a host of factors into account when considering a previously unrecognized cause of action. Not the least of them is the existence and adequacy of other protections.”
- The Court held that the constructive trust, based on the mental incapacity finding, provided an adequate remedy and there was no need, in this case, to recognize the tort of tortious interference with inheritance rights.

# Tortious Interference/Constructive Trust

- Regarding a constructive trust, the Court held that there does not have to be a breach of a fiduciary duty by the defendants owed to the plaintiffs. *Id.*
- The Court reaffirmed its statement that “[t]he specific instances in which equity impresses a constructive trust are numberless—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts.”
- The Court concluded that the trial court acted within its discretion in imposing a constructive trust: “We hold the mental-incapacity finding, coupled with the undue-influence finding, provided a more than adequate basis for the trial court to impose a constructive trust.”

# Tortious Interference/Constructive Trust

- The Court affirmed the lower court's judgment, sustained the imposition of a constructive trust, and refused to rule on whether a claim of tortious interference with inheritance rights exists in Texas.
- The Court still has pending *Anderson v. Archer*, No. 03-13-00790-CV, 2016 Tex. App. LEXIS 2165 (Tex. App.—Austin March 2, 2016, pet. filed), which poses the same issue of whether Texas recognizes a tortious interference with inheritance claim.



# Legislative Update



# Legislative Update

- The Texas Legislature has recently instituted broad changes to the Texas Estates Code's Texas Durable Power of Attorney Act regarding durable power of attorney provisions.
- Planners were frustrated by financial institutions not accepting those documents.
- Accordingly, one aspect of the new statutory provisions is to make sure that financial institutions and other entities accept power of attorney documents.
- The provisions also potentially allow broad additional powers to the designated agents; powers that would even allow the agents to benefit themselves from the principal's assets.

# Legislative Update

- HB 3921 creates a new chapter 280 of the Texas Finance Code and a new Article 581, Section 45, of the Texas Securities Act in the Texas Civil Statutes.
- The Texas Legislature now requires employees to report suspected incidences of financial exploitation to their employers, and for the financial institution, security dealers, or financial adviser to similarly make reports to the Texas Department of Family and Protective Services (the “Department”).

# Conclusion

- Fiduciary litigation is an ever changing field.
- The law expands and contracts depending on the mood of the Legislature and judiciary.
- The author hopes that this update provides assistance to financial institutions that choose to take on fiduciary duties.