Texas Fiduciary Litigation Update: 2017-2018

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

DAVID FOWLER JOHNSON

DFJOHNSON@WINSTEAD.COM

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

David maintains an active trial and appellate practice for the financial services industry. David has specialized in estate and trust disputes including: trust modification/clarification, trustee resignation/removal, breach of fiduciary duty and related claims, accountings, will contests, mental competency issues, and undue influence. David's recent trial experience includes:

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 (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[1]

The fiduciary field in Texas is a constantly changing area. Over time, statutes change, and Texas courts interpret those statutes, the common law, and parties' documents differently. This paper is intended to give an update on the law in Texas that impacts the fiduciary field from a period of mid-2017 to mid-2018. The author has a blog, the Texas Fiduciary Litigator (www.txfiduciarylitigator.com), wherein he regularly reports on fiduciary issues in Texas.

II. Trust-Related Litigation

A. The Texas Supreme Court Holds That Incorporating The AAA Rules Does Not Delegate Arbitrability Issues To The Arbitrator For Nonsignatories

1. Background: Arbitration Clauses May Apply To Trust Disputes

The Texas Supreme Court held that arbitration clauses in trust documents may be enforced regarding claims by beneficiaries against trustees. In *Rachal v. Reitz*, a beneficiary sued a trustee for failing to provide an accounting and otherwise breaching fiduciary duties. 403 S.W.3d 840 (Tex. 2013). The trustee filed a motion to compel arbitration of those claims due to an arbitration provision in the trust instrument. After the trial court denied that motion, the trustee appealed. The Texas Supreme Court reversed the court of appeals and held that the arbitration clause was enforceable. *Id*. The Court did so for two primary reasons: 1) the settlor determines the conditions attached to her gifts, which should be enforced on the basis of the settlor's intent; and 2) the issue of mutual assent can be satisfied by the theory of direct-benefits estoppel, so that a beneficiary's acceptance of the benefits of a trust constitutes the assent required to form an enforceable agreement to arbitrate. *See id*. The court of appeals had held that there was no mutual asset as the beneficiary and trustee did not sign the trust document. The Texas Supreme Court resolved the issue of mutual assent by looking to the theory of direct-benefits estoppel. Because the plaintiff had accepted the benefits of the trust for years and affirmatively sued to enforce certain provisions of the trust, the Court held that the plaintiff had accepted the benefits of the trust such that it indicated the plaintiff's assent to the arbitration agreement. The Court ordered the trial court to grant the trustee's motion to compel arbitration.

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

2. Some Courts Have Held That Incorporating The AAA Rules Does Delegate Arbitrability Issues To The Arbitrator

Parties can agree to delegate to the arbitrator the power to resolve gateway issues regarding the validity, enforceability, and scope of an arbitration agreement. *AT&T Technologies, Inc. v. Communications. Workers,* 475 U.S. 643 (1986) (holding parties may agree to arbitrate arbitrability); *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943 (1985) (holding question of primary power to decide arbitrability "turns upon what the parties agreed about that matter").

An arbitration provision can state that any dispute shall be settled by arbitration in accordance with the rules then in effect of the American Arbitration Association. Rule 7(a) of the Commercial Arbitration Rules of the AAA grants an arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the Arbitration Agreement." COMMERCIAL RULES OF THE AMERICAN ARBITRATION ASSOCIATION, Rule 7(a) (http://adr.org/aaa/faces/rules).

Federal courts have concluded that an arbitration agreement's incorporation of rules empowering an arbitrator to decide arbitrability and scope issues clearly and unmistakably evidences the parties' intent to allow the arbitrator to decide those issues. *See, e.g., Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671 (5th Cir. 2012) (We agree with most of our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) ("[W]e conclude that the arbitration provision's incorporation of the AAA Rules . . . constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator."); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372-73 (Fed. Cir. 2006) (concluding that agreement's incorporation of AAA rules clearly and unmistakably showed parties' intent to delegate issue of determining arbitrability to arbitrator); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332-33 (11th Cir. 2005) (holding that by incorporating AAA Rules into arbitration agreement, parties clearly and unmistakably agreed that arbitrator should decide whether arbitration clause was valid); *Contec Corp. v. Remote Solution, Co*., 398 F.3d 205, 208 (2d Cir. 2005) ("[W]hen . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."); *CitiFinancial, Inc. v. Newton*, 359 F. Supp. 2d 545, 549-52 (S.D. Miss. 2005) (holding that by agreeing to be bound by procedural rules of AAA, including rule giving arbitrator power to rule on his or her own jurisdiction, defendant agreed to arbitrate questions of jurisdiction before arbitrator); *Sleeper Farms v. Agway, Inc*., 211 F. Supp. 2d 197, 200 (D. Me. 2002) (holding arbitration clause stating that arbitration shall proceed according to rules of AAA

provides clear and unmistakable delegation of scope-determining authority to arbitrator).

In Texas, generally, courts have held that as between parties to a contract, that the incorporation of the AAA rules does delegate arbitrability issues to the arbitrator. For example, in *T.W. Odom Mgmt. Servs. v. Williford*, the court of appeals reversed a trial court's decision denying a motion to compel arbitration in an employee injury suit where the employment agreement clearly provided that the AAA rules would apply. No. 09-16-00095, 2016 Tex. App. LEXIS 9353 (Tex. App.—Beaumont August 25, 2016, no pet.). The court stated:

> The 2013 agreement states that "[t]he arbitration will be held under the auspices of the American Arbitration Association ("AAA")[,]" and "shall be in accordance with the AAA's then-current employment arbitration procedures." The agreement also references the AAA National Rules for Resolution of Employee Disputes. Under the AAA's Employment Arbitration Rules, Rule 6, the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." … [The parties] agreed that any arbitration would be conducted in accordance with the AAA's employment arbitration procedures, and the agreement references the AAA's National Rules for Resolution of Employee Disputes. The parties agreed to a broad arbitration clause that expressly incorporated rules giving the arbitrator the power to rule on its own jurisdiction and to rule on any objections with respect to the existence, scope, or validity of the agreement.

Id. at *12-13. The court therefore ordered that the trial court should have ruled that the arbitrator could make the decision on the scope and enforceability of the clause. *Id*.

3. Texas Supreme Court Recently Holds That Incorporating The AAA Rules Does Delegate Arbitrability Issues To The Arbitrator

In *Jody James Farms, JV v. Altman Grp., Inc.*, the Texas Supreme Court refused to rule on whether the incorporation of AAA rules in an arbitration clause would send arbitrability issues to the arbitrator as between signatories. No. 17-0062-CV, 2018 Tex. LEXIS 405 (Tex. May 11, 2018). The Court, however, held that such an incorporation did not send arbitrability issues to the arbitrator as between nonsignatories to an agreement. *Id.* The Court stated:

> While such deference may be the consequence of incorporating the AAA rules in disputes between signatories to an arbitration agreement, to the text of the note which we need not decide, the analysis is necessarily different when a dispute arises between a party to the arbitration agreement and a non-signatory. As to that matter, Texas courts differ

about whether an arbitration agreement's mere incorporation of the AAA rules shows clear intent to arbitrate arbitrability. We hold it does not. Even when the party resisting arbitration is a signatory to an arbitration agreement, questions related to the existence of an arbitration agreement with a non-signatory are for the court, not the arbitrator.

The involvement of a non-signatory is an important distinction because a party cannot be forced to arbitrate absent a binding agreement to do so. The question is not whether Jody James agreed to arbitrate with someone, but whether a binding arbitration agreement exists between Jody James and the Agency. What might seem like a chicken-and-egg problem is resolved by application of the presumption favoring a judicial determination. A contract that is silent on a matter cannot speak to that matter with unmistakable clarity, so an agreement silent about arbitrating claims against non-signatories does not unmistakably mandate arbitration of arbitrability in such cases.

Id. at *8-9.

4. Conclusion: The Incorporation Of AAA Rules In Trusts And Wills Will Likely Not Delegate Arbitrability Issue To The Arbitrator

To enforce an arbitration clause, the party wanting arbitration must generally prove in court the existence of an arbitration agreement and that the claims asserted fall within the scope of the agreement. *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999). Accordingly, the *Jody James Farms* case will likely impact how arbitration clauses in trusts or wills are litigated. Those clauses may contain an incorporation of the AAA rules. If such an incorporation was effective to send arbitrability issues to arbitration, then the arbitrator would determine whether claims fell within the scope, whether a trustee waived the right to arbitrate, whether the settlor was mentally competent to execute the trust document or will, etc. Arbitrators are generally inclined to keep claims and parties in arbitration where courts may be more unbiased on those issues. So, now, where the beneficiary or trustee does not sign the trust/will, the court will determine these issues and not the arbitrator. This may greatly impact the enforceability of arbitration clauses in trusts and wills.

B. Texas Supreme Court Rules That Trustee Is Not Liable For Fraud In Leasing Minerals Due To "Red Flags" And Express Contradictory Language That Negated Justifiable Reliance

In *JPMorgan Chase Bank, N.A. v. Orca Assets G.P.*, a trustee leased minerals to a lessee. No. 15-0712, 2018 Tex. LEXIS 250 (Tex. March 23, 2018). That lessee did not immediately record the lease. The trustee's agent then signed a letter of intent to lease tracts from the same area. When the new lease signed leases on the same property, the original lessee contacted the new lessee and informed it

of the title defect. The trustee then offered to refund the bonus payments to the new lessee, but that tender was refused. Rather, the new lessee sued the trustee for fraud and other related claims for $400,000,000 arising from statements that the acreage was open for lease. The trial court ruled for the trustee and concluded that the unambiguous terms of the letter of intent and the subsequent leases precluded the new lessee's contract claim and ruled as a matter of law that it could not establish the justifiable-reliance element of its fraud and negligent-misrepresentation claims. The court of appeals affirmed the trial court's contract ruling, but it reversed on fraud and negligent misrepresentation. The court of appeals held that the negation-of-warranty provision did not clearly and unequivocally disclaim reliance on prior representations.

The Texas Supreme Court reversed the court of appeals and affirmed the trial court's ruling for the trustee. The trustee stated at oral argument that the Court could assume that the statement regarding the acreage being "open" was made and that it was false (though the trustee denied that such statements were made or were false). Rather, it argued that the evidence disproved the justifiable reliance element for the fraud and negligent misrepresentation claims. Regarding this element, the Court stated:

> Justifiable reliance usually presents a question of fact. But the element can be negated as a matter of law when circumstances exist under which reliance cannot be justified. In determining whether justifiable reliance is negated as a matter of law, courts "must consider the nature of the [parties'] relationship and the contract." "In an arm's-length transaction[,] the defrauded party must exercise ordinary care for the protection of his own interests. . . . [A] failure to exercise reasonable diligence is not excused by mere confidence in the honesty and integrity of the other party." And when a party fails to exercise such diligence, it is "charged with knowledge of all facts that would have been discovered by a reasonably prudent person similarly situated." To this end, that party "cannot blindly rely on a representation by a defendant where the plaintiff's knowledge, experience, and background warrant investigation into any representations before the plaintiff acts in reliance upon those representations."

Id. The Court then discussed the concept of "red flags" as evidence that negates justifiable reliance. The Court previously held that "a person may not justifiably rely on a misrepresentation if 'there are "red flags" indicating such reliance is unwarranted.'" *Id*. (citing *Grant Thornton, LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010)). The Court used this "red flags" analysis to a non-professional fraud case. The Court stated that the trustee argued that the following "red flags" preclude justifiable reliance: (1) its agent's statement that he "would have to check" whether the property was open for lease; (2) its insistence on the stricter negation-of-warranty provision; (3) its refusal to accept responsibility for verifying title; (4) the letter of intent itself; (5) its agent's statement that other lessees were not doing careful title work; (6) the new

lessee's knowledge that competitors might delay recording their leases; (7) the new lessee's knowledge that it ceased checking property records after signing the letter of intent; and (8) the new lessee's landman's "doubts" at the closing, manifested by her request that the trustee confirm once more whether the property was "open." The Court stated:

> We are not prepared to say that any single one of these factors could preclude justifiable reliance on its own and as a matter of law. We especially reject the notion that the mere use of the negation-of-warranty and no-recourse provision in the letter of intent and the leases could wholly negate justifiable reliance. Oil-and-gas leases, like other instruments of conveyance, often negate warranties of title. As the courts did in Grant Thornton and Lewis, we must instead view the circumstances in their entirety while accounting for the parties' relative levels of sophistication.

Id. The Court then held that both parties were sophisticated, and after marching through the circumstances, the Court held that these "red flags" were sufficient to negate justifiable reliance. The Court also held that the lease expressly contradicted the false statements, thus proving that there was no justifiable reliance. Regarding the standard for this analysis, the Court stated:

> In reaching its conclusion, the court of appeals held that for a contradiction to preclude justifiable reliance, both the contractual clause and the extra-contractual representation it supposedly contradicts must explicitly speak to the same subject matter with sufficient specificity to correct and contradict the prior oral representation. Such a requirement is simply too strict to be workable as it essentially requires the contract and extra-contractual representation to use precisely the same terms.

Id. The Court concluded that the evidence showed that the new lease did not justifiably rely on the false statement that the acreage was open:

> Viewed in context with the numerous "red flags," Orca's sophistication in the oil-and-gas industry, and the direct contradiction between the representation and the letter of intent, Orca cannot maintain its claim of justifiable reliance. Orca, composed of experienced and knowledgeable businesspeople, negotiated an arm's-length transaction and then placed millions of dollars in jeopardy—all while operating under circumstances that similarly situated parties would have regarded as imminently risky. Orca needed to protect its own interests through the exercise of ordinary care and reasonable diligence rather than blindly relying upon another party's vague assurances. Its failure to do so precludes its claim of justifiable reliance as a matter of law.

Id. The Court made it a point to expressly state that "either 'red flags' alone or direct contradiction alone can negate justifiable reliance as a matter of law. In this

case, however, both theories apply. And either would be sufficient to preclude justifiable reliance." *Id*. n. 2. The court reversed and rendered for the trustee.

C. Court Denied Mandamus Relief To Review Order Denying Trustee Ability To Pay Attorney's Fees In The Interim

In *In re Cousins*, a trustee filed a mandamus proceeding to challenge a trial court's denial of a motion to pay his attorney's fees from the trust. No. 12-18-00104-CV, 2018 Tex. App. LEXIS 3930 (Tex. App.—Tyler May 31, 2018, original proceeding). A co-trustee sued the other co-trustee for a number of causes of action related to alleged breaches of fiduciary duty. The plaintiff filed a motion for court ordered payment of his legal fees and litigation expenses from the trust based on Section 114.063 of the Texas Trust Code. At a hearing on the motion, the plaintiff's counsel argued that the Texas Trust Code and the trust agreement authorized reimbursement for attorney's fees. He stated, "We're not asking you to award us attorney fees we're asking for access to the trust to pay our ongoing legal expenses." *Id*. He incurred fees totaled just over $650,000 and argued that "[i]t's not our burden today when seeking interim attorney's fees to do any proof to show what's reasonable and necessary at this stage in the game." *Id*. The trial court denied the request, and the plaintiff filed a petition for writ of mandamus seeking an order from the court of appeals to order the trial court to grant the motion.

The plaintiff relied on Section 114.063 of the Texas Trust Code, arguing that the trial court's order denies him "this statutory right to ongoing reimbursement." The court of appeals stated:

> Section 114.063 provides, in pertinent part, that a trustee may discharge or reimburse himself from trust principal or income or partly from both for expenses incurred while administering or protecting the trust or because of the trustee's holding or owning any of the trust property. Tex. Prop. Code Ann. § 114.063(a)(2) (West 2014). The trustee has a lien against trust property to secure reimbursement. *Id*. § 114.063(b). In any proceeding under the Texas Trust Code, "the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." *Id*. § 114.064(a) (West 2014).

Id. According to the plaintiff, Section 114.063 applies to reimbursement during the lawsuit and Section 114.064, but not Section 114.063, applies at the end of the litigation. He argued that absent mandamus review, Section 114.063's application evades appellate review and he will be forced to pursue litigation with his personal funds, which is "particularly egregious here when the trial court has already found a breach of fiduciary duty and thus validated some of [his] claims." *Id*. The court of appeals disagreed that mandamus relief was appropriate. The court stated:

> According to Cousins, "[p]roceeding forward with the litigation without mandamus relief jeopardizes Cousins's ability to diligently pursue his breach-of-fiduciary-duty lawsuit against [James], as Cousins is obligated by statute to do." However, the denial of Cousins' motion does not deprive him of a reasonable opportunity to develop the merits of his case, such that the proceedings would be a waste of judicial resources. An example of one such case arises "when a trial court imposes discovery sanctions which have the effect of precluding a decision on the merits of a party's claims—such as by striking pleadings, dismissing an action, or rendering default judgment—a party's remedy by eventual appeal is inadequate, unless the sanctions are imposed simultaneously with the rendition of a final, appealable judgment." *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992).

Id. The court of appeals held that the trial court's denial of the motion is not the type of ruling that has the effect of precluding a decision on the merits. "Cousins may still pursue his claims against James, including a claim for reimbursement under Section 114.063, and the eventual outcome has not been pre-determined by Respondent's ruling." *Id*. The court also held that mandamus review was not so essential to give needed and helpful direction regarding Section 114.063 that would otherwise prove elusive in an appeal from a final judgment. The court stated:

> Section 114.063 was added in 1983 and amended in 1993, and few appellate courts have cited to or substantially analyzed that section. See Act of May 27, 1983, 68th Leg., R.S., ch. 567, art. 2, § 2, 1983 Tex. Gen. Laws 3269, 3376; see also Act of May 28, 1993, 73rd Leg., R.S., ch. 846, § 31, 1993 Tex. Gen. Laws. 3337, 3350. Additionally, the Texas Trust Code expressly authorizes a court to "make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." Tex. Prop. Code Ann. § 114.064(a). We see no reason why a trial court's authority to award costs and attorney's fees would not encompass claims to reimbursement under Section 114.063. Thus, although Cousins' petition may present a question of first impression, we cannot conclude that the petition involves a legal issue that is likely to recur such that mandamus review, as opposed to a direct appeal from a final judgment, is necessary. Should Cousins find the verdict on his reimbursement claim to be unsatisfactory, he may appeal from the final judgment on that claim and nothing prevents him from relying on Section 114.063 in a direct appeal.

Id.

The plaintiff also argued that he must utilize personal funds to pursue the litigation is tantamount to an assertion that doing so makes the proceeding more costly or inconvenient. The court held that this fact, standing alone, did not warrant mandamus review. "This is particularly true given that, as previously

discussed, the denial does not preclude Cousins from presenting a claim for reimbursement at trial and, consequently, Respondent's failure to grant the motion does not result in an irreversible waste of resources." *Id*. The court of appeals denied the petition for writ of mandamus, concluding that an ordinary appeal of the order denying the motion served as a plain, adequate, and complete remedy.

D. Court Holds That Drafts Of Trust Documents Are Not Discoverable And Discusses The Attorney-Client Privilege

In *In re Rittenmeyer*, the mother of the decedent was the executor of his estate. No. 05-17-01378-CV, 2018 Tex. App. LEXIS 6647 (Tex. App.—Dallas August 22, 2018, original proceeding). The executor sued her son's wife and his employer, alleging that the estate had the right to certain bonuses due to a pre-nuptial agreement. The decedent's wife alleged that the pre-nuptial agreement may not be enforceable because of fraud, i.e. fair disclosure of property and financial obligations and fraudulent inducement to sign the agreement based on statements that the son made about having the wife cared for by a trust. The wife sought discovery of drafts of wills prepared after the will admitted to probate, trust documents where the decedent was a beneficiary, and communications reflecting the decedent's intentions regarding providing for the wife.

The mother objected to the discovery requests and asserted that the documents were privileged due to the attorney-client privilege. The wife maintained that the documents were excepted from privilege by Texas Rule Evidence 503(d)(2), which provides that the attorney-client privilege does not apply "if the communication is relevant to an issue between parties claiming through the same deceased client." *Id*. The trial court granted the wife's motion to compel, and the mother filed a petition for writ of mandamus.

The court of appeals initially denied the mandamus and issued an opinion. *In re Rittenmeyer*, No. 05-17-01378-CV, 2018 Tex. App. LEXIS 2812 (Tex. App.—Dallas April 19, 2018, original proceeding). The mother filed a motion for rehearing, and the court issued a new opinion, granting the relief sought.

The Court noted that wife had the burden of establishing that the exception applied and stated the importance of the attorney-client privilege. The court stated:

> For the exception to apply, the rule first requires that the information is "relevant to an issue between parties." It is well-established that evidence is relevant if: "(a) it has any tendency to make a fact more or less probable than it would be without the evidence, and (b) the fact is of consequence in determining the action." Texas courts have applied the rule 503(d)(2) exception when a party contends the information is relevant to a claim that a decedent lacked capacity to execute codicils or trust documents or was subject to undue influence."

Id. The wife argued that she believed that the mother destroyed a subsequent will that her husband had executed, and that drafts of wills and related communications would be relevant to that topic. The court disagreed and stated:

> Significantly, however, Chris could not have revoked the 2011 Will "except by a subsequent will, codicil, or declaration in writing, executed with like formalities, or by . . . destroying or cancelling the same or causing it to be done in his presence." Documents showing Chris's "present intent to change or revoke a testamentary instrument in the future cannot accomplish revocation of the instrument, nor [are they] evidence of the revocation." Consequently, drafts of wills are not relevant to whether Chris executed a later will. For the same reason, drafts of wills are not relevant to Nicole's claims that Hedy and Ashley destroyed "a later Will" that Chris executed.

Id. The court concluded that the wife did not establish that an exception applied to the attorney-client privilege regarding the draft wills and related correspondence.

The mother also challenged the trial court's order requiring her to produce trust documents naming her son and the wife. The court ruled that any trust created by the mother and the father would not be within the exception because they were the settlors and not the husband. Therefore, the court of appeals' new opinion granted mandamus relief for the mother.

E. Court Ruled Against Settlor's Claims Against Insurance Agent Regarding Commissions And Disclosures

In *Jessen v. Duvall*, an investor who established trusts to purchase life insurance policies sued an insurance agent for tort claims, including fraud, conspiracy, and aiding and abetting breach of fiduciary duty based on the insurance policies not being good investments and the investor losing more than $3.2 million dollars. No. 14-16-00869-CV, 2018 Tex. App. LEXIS 1369 (Tex. App.—Houston [14th Dist.] February 22, 2018, no pet.). Three events form the plaintiff's causes of action in this case: the defendant mispresenting the resale value of the policies, the failure to disclose the commission structure of the policies, and that he failed to disclose that he paid a referral fee to the plaintiff's tax attorney's son. The defendant filed a motion for summary judgment, which the trial court granted. The plaintiff appealed.

The court of appeals first addressed whether the plaintiff had standing to assert the claims because the insurance policies were owned by trust and the plaintiff was the settlor of the trusts, not the trustee. The court of appeals held that the plaintiff did have standing because he asserted claims based on the advice given to acquire the policies and not a breach of contract claim under the policy:

> [W]hile it is undisputed that the trustees purchased and sold the insurance policies, Jessen does not pursue claims based on duties created by the policies (contractual claims). Rather, Jessen asserts claims arising under state law (extra-contractual claims). Specifically, Jessen's claims for fraud, aiding and abetting and conspiracy to breach a fiduciary duty, and equitable theories remain viable because he seeks redress for misrepresentations made to him prior to the trusts being created and policies purchased. There is no indication here that Jessen assigned or relinquished the extra-contractual causes of action to the trustees. As such, Jessen has standing to assert them in this litigation. *See Lee v. Rogers Agency*, 517 S.W.3d 137, 144-153 (Tex. App.—Texarkana 2016, pet. filed) (op. on rehearing).

Id. Regarding the claims based on alleged failure to disclose the market value of the policies, the court held that the plaintiff failed to provide evidence that the defendant made any representations, indirectly, regarding the future market value of the policies, caused the reduced market value of the policies, or caused the plaintiff to receive a reduced value by some fraud or conspiracy. Rather, the defendant was the only party to offer an explanation as to why the policies were sold at a loss by submitting an uncontroverted affidavit of the vice president of a company that traded in life policies, who attested to the financial collapse in the life insurance industry in 2008 and the negative financial impact it had on the resale market for life insurance policies. The court concluded that the plaintiff proffered no evidence that the reduced resale value of the policies was the result of anything more than unforeseen market conditions.

Regarding the commission structure, the court held that there was no evidence that the defendant had a duty to disclose the commission structure or that the commissions received by him were the result of a conspiracy to defraud. The evidence demonstrated that the commission was in line with industry standards, and the court held that there was no evidence that the defendant had a duty to disclosure the commission structure that was within industry norms. Moreover, in terms of damages, the plaintiff did not show he was damaged by the defendant receiving a commission as his damages were based upon the decreased resale value of the life policies.

Regarding the referral fee, the plaintiff maintained that the nondisclosure of the referral fee paid by defendant was fraudulent. The court held that it was undisputed that referral fees were customary in the insurance industry and that defendant gave up part of his compensation to pay a referral fee. There was no evidence that the plaintiff paid more for the policies due to the referral fee, and the court held that there was no evidence that the defendant had any duty to disclose the referral fee. The court affirmed the summary judgment on the fraud and conspiracy to commit fraud claims.

The court then turned to the aiding and abetting breach of fiduciary duty claims. The plaintiff alleges that the defendant's nondisclosure of the referral fee

provided substantial assistance in his tax attorney's breach of his fiduciary duty by "secretly agreeing to and then paying Bond's son a part of the commission generated from the sale of the insurance policies to Plaintiff." *Id*. "To establish aiding and abetting, the plaintiff must demonstrate that the defendant, with unlawful intent, substantially assisted and encouraged a wrongdoer in a tortious act." *Id*. The court noted that "[a]iding and abetting is a dependent claim which is premised on an underlying tort." *Id*. The court then held that because the plaintiff failed to establish his breach of fiduciary duty claim against his attorney, his aiding and abetting claim also failed:

> With respect to the second element, Jessen contends "Jessen has submitted evidence that Bond breached that fiduciary duty by enticing Jessen to participate in the scheme alleged, while knowing that Jessen would not be able to sell the policies for a substantial profit in the manner intended." Jessen further claims "there is evidence that Duvall paid Jessen's attorney Bond a kickback in order to induce him to recommend that Jessen invest in the insurance policies at issue." … Jessen makes no reference to any part of the Texas Disciplinary Rules of Professional Conduct or case law to support his claim that Bond breached his fiduciary duty. Without the underlying tort being established, there can be no claims of aiding and abetting a breach of Bond's fiduciary duty and/or conspiracy to breach Bond's fiduciary duty. Moreover, even assuming, arguendo, that Jessen could establish the underlying tort, there is no evidence of Duvall knowingly aiding and abetting Bond, Sr. with such a breach. Similarly, there is no evidence of any meeting of the minds between Duvall and Bond to breach Bond, Sr.'s, fiduciary duty to Jessen. Because Jessen failed to raise any evidence to support his claim of aiding and abetting and conspiracy to breach fiduciary duty claim, summary judgment was proper..

Id. The court of appeals affirmed the summary judgment on all of the plaintiff's claims.

F. Court Discusses The Rules For Superseding Declaratory Relief In A Trust Dispute

In *In the Interest of K.K.W.*, a father and mother, who were settlors, filed competing claims regarding the interpretation of a trust for their son. No. 05-16-00795-CV, 2018 Tex. App. LEXIS 2174 (Tex. App.—Dallas March 27, 2018, no pet.). The trial court found for the father, granted him declaratory relief regarding the interpretation of the trust document, awarded $453,866.52 in attorney's fees to the father, $578,115.62 in attorney's fees to the trustee, court costs and also awarded $200,000 in conditional appellate attorney's fees to father and $145,000 in conditional appellate attorney's fees to the trustee. Based on costs and conditional appellate fees, the trial court set the bond at $401,475.00 to suspend enforcement of the judgment. The mother appealed the court's security ruling. The court of appeals first discussed the rules for superseding a judgment:

> Judgments for the recovery of money are subject to rule 24.2(a)(1), which provides that the amount of the bond, deposit, or security must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment. Tex. R. App. P. 24.2(a)(1). The security amount for a judgment that is for the recovery of money may not exceed the lesser of 50% of the judgment debtor's current net worth or 25 million dollars. Tex. R. App. P. 24.2(a)(1)(A)-(B). When the judgment is "for something other than money or an interest in real property," the security "must adequately protect the judgment creditor against loss or damage that the appeal might cause." Tex. R. App. P. 24.2(a)(3). Rule 24.2(a)(3) is routinely applied to judgments that are declaratory or injunctive in nature.

Id. The court then held that an award of attorney's fees is generally not included in the amount of security because they are not damages or costs. The court held that "If this were only a money judgment, then the security is excessive because it exceeds the amount of costs plus interest on those costs for the estimated duration of the appeal." Id. But the court went on to discuss the impact of the declaratory relief in the judgment:

> But there is also a declaratory component of the judgment and, therefore, the judgment is partially a judgment for something other than money or an interest in property. Under Rule 24.2(a)(3), the amount of security to suspend enforcement of declaratory relief "must adequately protect the judgment creditor against loss or damage the appeal might cause." Tex. R. App. P. 24.2(a)(3). The additional security awarded to suspend enforcement of the declaratory relief consists solely of conditional appellate fees awarded in the judgment. Such fees are not properly included as security and are excessive as a matter of law. The reasons are simple.
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> First, a court is prohibited from requiring a party to post bond for conditional appellate fees... Second, because recovery of conditional appellate fees are conditioned on a future event that may or may not occur, such fees are not a loss or damage that an appeal might cause and, therefore, are not properly included in the amount of security to suspend enforcement of a declaratory judgment… Finally, conditional appellate fees are attorney's fees, albeit fees not yet earned, and attorney's fees incurred in the prosecution or defense of a claim may not be included in the amount of security ordered by a trial court. Simply put, the trial court was prohibited from including conditional appellate fees in the security amount.
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> Appellees' attempt to characterize the security amount as something other than security for the conditional appellate fees is also unavailing. We disagree with appellees' contention that the trial court could pick any reasonable number for the security amount as long as it was less than

> 50% of Mother's net worth. The 50% of net worth limit applies to money judgments, and appellees maintain that this judgment is not for the recovery of money. Tex. R. App. P. 24.2(a)(1)(A). Instead, they argue that the additional security is to suspend execution of the declaratory judgment and is proper under Rule 24.2(a)(3). Under that rule, the trial court was charged with determining a security amount that could adequately protect appellees against loss of damage that the appeal might cause them in relation to the declaratory judgment. But there is no evidence in the record showing that the appeal will harm appellees in any way as to the declaratory judgment. The declaratory relief in the judgment does not require Mother to take any action or enjoin Mother from certain actions such that suspending enforcement of that part of the judgment would somehow harm Father or the Trustee. On the contrary, no changes were made to the Trust or its operations. All parties must simply continue acting under the Trust as they always have. No security is needed to protect appellees from any harm an appeal may cause in relation to the declaratory relief.

Id. The court decreased the amount of the bond to cover the court costs and interest thereon.

G. Court Reversed Order Removing Trustee Where Trustee Did Not Receive Notice Of The Hearing

In *In re Estate of Moore*, the court of appeals addressed the proper procedure for removing an acting trustee and appointing a successor trustee. No. 08-14-00298-CV, 2018 Tex. App. LEXIS 1950 (Tex. App.—El Paso March 15, 2018, no pet.). A beneficiary filed a motion to remove a trustee, but did not serve notice of the hearing. After the court removed the trustee, the trustee appealed on multiple grounds, including that she was denied due process by being removed without notice of the hearing.

The court of appeals first described the authority to remove a trustee:

> A trustee may be removed by the terms prescribed in the trust instrument, or by a court of competent jurisdiction after a hearing brought by an "interested person," provided the court finds cause for removal. Tex. Prop. Code Ann. § 113.082 (West 2014). Under the Texas Property Code, a district court has original jurisdiction over all proceedings against a trustee and all proceedings concerning trusts, including proceedings to construe a trust instrument and to appoint or remove a trustee. Tex. Prop. Code Ann. § 115.001(a)(West Supp. 2017); *Cone v. Gregory*, 814 S.W.2d 413, 414 (Tex. App.--Houston [1st Dist.] 1991, no pet.). A district court's jurisdiction over such proceedings is exclusive, except for jurisdiction conferred by law on lesser courts, including a county court at law. Tex. Prop. Code Ann. § 115.001(d). Further, in a county that lacks a statutory probate court but has a county court a law exercising original probate jurisdiction, the

> interpretation and administration of a testamentary trust or an inter vivos trust created by a decedent whose will has been admitted to probate in that court is considered a matter related to a probate proceeding. Tex. Est. Code Ann. § 31.002 (West 2014). Thus, under either code, a county court a law acting in this capacity has jurisdiction over a suit involving a testamentary trust. *Gregory*, 814 S.W.2d at 414. A trustee is a necessary party to an action involving a trust or against a trustee, provided a trustee is serving at the time the action is filed. Tex. Prop. Code Ann. § 115.011; *Smith v. Plainview Hospital and Clinic Foundation*, 393 S.W.2d 424, 427 (Tex. Civ. App.—Amarillo 1965, writ dism'd). Notice may be given to parties or those entitled to receive notice by the manner prescribed by the Texas Rules of Civil Procedure, or may be given directly to the party or to the party's attorney if the party has appeared by attorney or requested that notice be sent to his attorney. Tex. Prop. Code Ann. § 115.016 (West 2014). Texas Rules of Civil Procedure 21a allows service to be accomplished by delivering a copy to the party to be served or to the party's duly authorized agent or attorney of record. Tex.R.Civ.P. 21a.

Id. The court held that the order removing the trustee must be reversed because she was not served with notice of the hearing:

> Here, it is undisputed that Appellant did not personally receive notice in the proceeding below. It is also undisputed that Wm. Monroe Kerr and A.M. Nunley III, Appellant's attorneys of record in the original probate proceeding, were not served with notice of the hearing. The record only contains a certificate of service on Brandon S. Archer, who did not appear as attorney of record in the original probate proceeding and was not designated to receive service on Appellant's behalf as allowed by Section 115.016 of the Texas Property Code. Failure to give proper notice "violates 'the most rudimentary demands of due process of law.'" *Peralta v. Heights Medical Center, Inc*., 485 U.S. 80, 84, 108 S.Ct. 896, 899, 99 L.Ed.2d 75 (1988)(quoting *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S.Ct. 1187, 1190, 14 L.Ed.2d 62 (1965)). If improper notice is given to a party of proceedings when notice is required, any subsequent court proceedings vis-à-vis the party not given notice are void. *Lytle v. Cunnigham,* 261 S.W.3d 837, 840 (Tex. App.—Dallas 2008, no pet.); *Gutierrez v. Lone Star Nat. Bank*, 960 S.W.2d 211, 214 (Tex. App.—Corpus Christi-Edinburg 1997, pet. denied). At the time of the hearing below, Appellant had been serving and holding herself out as acting trustee for more than twenty years. Appellee asserts that she did not qualify as interested person under the Estates Code and therefore there was no requirement that she be cited or otherwise given notice. But Appellant was not required to show that she was an interested person; per Section 115.011 of the Texas Property Code, as trustee, Appellant was a necessary party to the proceedings. Tex. Prop. Code Ann. § 115.011. She was, however, not served with citation, and "[i]f proper service is not affirmatively shown, there is error on the face of the record." *Westcliffe,*

> *Inc. v. Bear Creek Const., Ltd.*, 105 S.W.3d 286, 290 (Tex. App.--Dallas 2003, no pet.)(citing *Primate Const., Inc. v. Silver*, 884 S.W.2d 151, 153 (Tex. 1994)). Because Appellant was a necessary party and has demonstrated error on the face of the record, she has carried her burden under elements two and four to succeed on restricted appeal. *Alexander,* 134 S.W.3d at 848. Since proper service on Appellant is not shown, it is apparent that the county court at law did not obtain jurisdiction over Appellant and the proceeding to have her removed as trustee and a successor trustee appointed is void. *Lytle*, 261 S.W.3d at 840.

Id. The court reversed and remanded for further proceedings.

H. Court Enforced Forum-Selection Clause In Trust Document

In *In re JP Morgan Chase Bank, N.A.*, trust beneficiaries sued the trustee for alleged breaches of fiduciary duty in Dallas, Texas. No. 05-17-01174-CV, 2018 Tex. App. LEXIS 1883 (Tex. App.—Dallas March 14, 2018, original proceeding). The settlor executed the trust agreement in New York, and it included the following forum-selection clause: "The validity and effect of the provisions of this Agreement shall be determined by the laws of the State of New York, and the Trustee shall not be required to account in any court other than one of the courts of that state." *Id*. The trustee filed a motion to dismiss the Texas suit due to the forum-selection clause, alleging that the beneficiaries had to file suit in New York. The trial court denied the motion, and the trustee filed a petition for writ of mandamus with the court of appeals.

In the court of appeals, the beneficiaries argued that the language of the forum-selection clause applied only to a claim for an accounting and did not apply to their breach-of-fiduciary-duty claim. The court of appeals disagreed, holding that the phrase "to account" was broader. After reviewing several definitions of the phrase, the court stated: "[W]e conclude 'required to account in' is used as a broad, unrestricted phrase and means relators may not be sued or otherwise required to explain alleged wrongdoing regarding the Trust or its administration in any state other than New York." *Id*. The court also found support for its conclusion from the trust document in that "account" was used broadly in other portions of the trust. The court concluded the scope of the forum-selection clause included the beneficiaries' claims for breach of fiduciary duty.

The beneficiaries also argued that trial court correctly denied the motion to dismiss because the mandatory venue statute in Texas Property Code Section 115.002(c) showed a strong public policy to keep the action in Texas. The court of appeals held that, although a venue-selection clause that was contrary to Section 115.002 would be unenforceable, the same was not true of a forum-selection clause. *Id*. (citing *Liu v. Cici Enters., LP*, No. 14-05-00827-CV, 2007 Tex. App. LEXIS 81, 2007 WL 43816, at *2 (Tex. App.—Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.) ("The distinction between a forum-selection clause and a venue-selection clause is critical. Under Texas law, forum-selection

clauses are enforceable unless shown to be unreasonable, and may be enforced through a motion to dismiss. In contrast, venue selection cannot be the subject of private contract unless otherwise provided by statute.")). Further, although the beneficiaries contended that proceeding in New York would be unreasonable and seriously inconvenient, they failed to present any evidence to support those contentions. The court held that the trial court abused its discretion in denying the motion to dismiss and granted mandamus relief.

Interesting Note: This is the first case in Texas to enforce a forum-selection clause contained in a trust document. "A forum-selection clause is a creature of contract." *Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 611 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Interestingly, the court of appeals in In re JPMorgan Chase Bank, N.A., did not address an argument that the forum-selection clause should not be enforced because a trust is not a contract between the trustee and the beneficiary.

In 2013, the Texas Supreme Court enforced an arbitration clause that was contained in a trust document. *Rachel v. Reitz*, 403 S.W.3d 840 (Tex. 2013). The Court did so for two primary reasons: 1) the settlor determines the conditions attached to her gifts, which should be enforced on the basis of the settlor's intent; and 2) the issue of mutual assent can be satisfied by the theory of direct-benefits estoppel, so that a beneficiary's acceptance of the benefits of a trust constitutes the assent required to form an enforceable agreement to arbitrate. *Id*. The Court stated that generally Texas courts strive to enforce trusts according to the settlor's intent, which courts should divine from the four corners of unambiguous trusts. The Court noted that the settlor intended for all disputes to be arbitrated via the trust language. *Id*. The Court then looked to the Texas Arbitration Act, which provides that a "written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that: (1) exists at the time of the agreement; or (2) arises between the parties after the date of the agreement." *Id*. (citing Tex. Civ. Prac. & Rem. Code 171.001(a) (emphasis added)). The Court noted that the statute uses the term "contract" in another provision, and that the Legislature intended for the terms "agreement" and "contract" to be different. As the statute does not define the term "agreement," the Court defined it as "a mutual assent by two or more persons." *Id*. Thus, a formal contract is not required to have a binding "agreement" to arbitrate. The Court resolved the issue of mutual assent by looking to the theory of direct-benefits estoppel. Because the plaintiff had accepted the benefits of the trust for years and affirmatively sued to enforce certain provisions of the trust, the Court held that the plaintiff had accepted the benefits of the trust such that it indicated the plaintiff's assent to the arbitration agreement. The Court ordered the trial court to grant the trustee's motion to compel arbitration.

There is not a comparable statute that requires the enforcement of "agreements" for forum-selection. There could be an issue of whether the *Rachel v. Reitz*/arbitration-clause analysis should apply to forum-selection clauses. However, there is precedent in Texas that arbitration clauses are a type of forum-

selection clause. *St. Clair v. Brooke Franchise Corp*., No. 2-06-216-CV, 2007 Tex. App. LEXIS 2805, 2007 WL 1095554, at *4 (Tex. App.—Fort Worth Apr. 12, 2007, no pet.) (mem. op.). *See generally Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528, 534, 115 S. Ct. 2322, 2326, 132 L. Ed. 2d 462 (1995) (recognizing arbitration provisions are a subset of forum-selection clauses).

I. Court Affirmed Summary Judgment For A Trustee Due To An Exculpatory Clause

In *Kohlhausen v. Baxendale*, the court affirmed a summary judgment for a trustee on the basis of an exculpatory clause in a trust document. No. 01-15-00901-CV, 2018 Tex. App. LEXIS 1828 (Tex. App.—Houston [1st Dist.] March 13, 2018, no pet.). A mother created a testamentary trust for the benefit of her son Kelley William Joste. The will, which named Kelley as trustee and beneficiary of his trust, also set forth the provisions governing the administration:

> 6.2 With regard to each trust created by this [Article VI], my Trustee shall distribute to the Beneficiary of such trust or any descendant of such Beneficiary such amounts of trust income and principal as shall be necessary, when added to the funds reasonably available to each such distributee from all other sources known to my Trustee, to provide for the health, support, maintenance and education of each such distributee, taking into consideration the age, education and station in life of each such distributee.
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> 9.4 . . . Any Executor or Trustee shall be saved harmless from any liability for any action such Executor or Trustee may take, or for the failure of such Executor or Trustee to take any action if done in good faith and without gross negligence.

Id. After the mother died, Kelley exercised his right to become the sole trustee of his trust. After Kelley died, his estranged daughter received control of the trust's assets. She then died. Her executor then sued her father's executor for the father allegedly breaching his fiduciary duty by: (1) failing to disclose information; (2) engaging in self-dealing, i.e., gifting himself trust assets in excess of his support needs; (3) failing to make any distributions to his daughter or consider her support needs; (4) failing to consider his other sources of support and his own station in life before making distributions to himself; (5) commingling trust assets with personal assets; (6) pledging trust assets as collateral in violation of the will's terms; and (7) failing to document his activity as trustee.

The father's executor filed a motion for summary judgment and argued that the claims should be dismissed because the will's exculpatory clause relieved the trustee from liability for any actions or omissions "if done in good faith and without gross negligence." *Id*. After a hearing, the trial court granted the motion.

The court of appeals held that an exculpatory clause argument is an affirmative defense. "A defendant urging summary judgment on an affirmative defense is in the same position as a plaintiff urging summary judgment on a claim," and that the party asserting an affirmative defense has the burden of pleading and proving it. *Id*. The court held that after the trustee established the existence of the exculpatory clause, the burden shifted to the non-movant to bring forward evidence negating its applicability. The court stated:

> In this case, Baxendale pleaded the exculpatory clause and attached a copy of the Will containing the clause to his summary judgment motion. The Will plainly states that Kelley is not liable for any acts or omissions so long as such conduct was done "in good faith and without gross negligence." Because Baxendale established that he was entitled to summary judgment as a matter of law on all of Kohlhausen's claims based on the plain language of the Will, Kolhausen was required to bring forth more than a scintilla of evidence creating a fact issue as to the applicability of the clause, i.e., evidence that Kelley's acts or omissions were done in bad faith or with gross negligence.
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> ….
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> In her affidavit, Kohlhausen averred that after reviewing the financial documents available to her she was "unaware of any evidence that Kelley made any distributions to Valley from the Trust between 1997 and 2012." Kohlhausen further averred: "I have reviewed the account statements produced by [Baxendale]. These statements are incomplete and I am unable to ascertain from them an accurate account of what receipts and distributions were made from the Trust during the time Kelley was trustee." Kohlhausen also stated that she was "unaware of any documentation to suggest Kelley ever contacted Valley to inquire about her support needs during the time he was trustee."
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> ….
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> Kohlausen's affidavit does not raise a fact issue as to whether Kelley failed to disclose information regarding the Trust to Valleyessa, make distributions to Valleyssa, consider her support needs, or document his activities as trustee. The paucity of evidence in this case is a result of the fact that both principals to the dispute have passed away. There is no one to depose and no affidavits to file establishing key facts. Moreover, the terms of the Will provided that Valleyessa was a contingent beneficiary, and Kelley, as the primary beneficiary, was allowed but not required to make a distribution to Valleyessa. Kohlhausen's attorney is reduced to an attempt to build a case on the scant records left behind by Kelley. Such evidence amounts to no more than a scintilla and is insufficient to even establish what actions Kelley took or failed to take as trustee, much less that Kelley acted in bad faith or with gross negligence.

Id. The court held that because the summary judgment evidence failed to raise an issue of material fact as to whether any of the father's alleged acts or omissions were taken in bad faith for involved gross negligence, the plaintiff failed to meet her burden of establishing the inapplicability of the exculpatory clause to such acts or omissions and affirmed the summary judgment for the defendant.

J. In Trust Dispute, Texas Supreme Court Affirms A Constructive Trust Based On A Finding Of Mental Incompetence

In *Jackson Walker LLPO v. Kinsel*, Lesey and E.A. Kinsel owned a ranch, and when E.A. died, he divided his half between his children and Lesey. *Jackson Walker, LLPO v. Kinsel*, No. 07-13-00130-CV, 2015 Tex. App. LEXIS 3586 (Tex. App.—Amarillo April 10, 2015), *aff'd in part*, 526 S.W.3d 411 (Tex. 2017). Lesey owned sixty percent at that point. Lesey placed her interest into an intervivos trust, which provided that upon her death, her interests would pass to E.A.'s children. Lesey became frail and moved near a niece, Lindsey, and nephew, Oliver. Lindsey and Oliver referred Lesey to an attorney to assist in drafting a new will and trust amendments. The attorney informed E.A.'s children that Lesey needed to sell the ranch to pay for her care. At that time, Lesey had approximately $1.4 million in liquid assets and did not need to sell the ranch. Not knowing Lesey's condition, E.A.'s children agreed to sell, and the ranch was sold. Lesey's $3 million in cash went into her trust. Lindsey, as a residual beneficiary in the trust, would receive most of the money – not E.A.'s children. The attorney also effectuated amending the trust to grant Lindsey and Oliver greater rights, while advising them to withhold that information from E.A.'s children. E.A.'s children sued Lindsey, Oliver, and the attorney for tortious interference with inheritance rights and other tort claims. The jury returned a verdict for E.A.'s children.

The Amarillo court of appeals first addressed the tortious interference with inheritance claim: "Someone who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." *Id*. The court noted that many Texas intermediate appellate courts recognized such a claim. The court reviewed several Fort Worth Court's opinions, where the case had been transferred from, to see if Fort Worth had recognized such a claim, and determined that Fort Worth had not directly done so. The court also noted that it and the Texas Supreme Court had not recognized the claim. The court held that it was solely the authority of the Texas Legislature or the Texas Supreme Court to create a new cause of action. Court rendered for the defendants refusing to recognize that new cause of action. The court reversed on the fraud and other tort claims due to insufficient evidence of damages. The court affirmed the mental incompetence finding on the trust changes and sale of the ranch. The court then 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*, 526 S.W.3d 411 (Tex. 2017). The Court first addressed whether Lesey had mental capacity to execute the documents:

> Documents executed by one who lacks sufficient legal or mental capacity may be avoided. Lesey had the mental capacity to execute the documents effectuating the ranch sale and the fourth and fifth amendments to her trust if she "appreciated the effect of what she was doing and understood the nature and consequences of her acts and the business she was transacting." The proper inquiry is whether Lesey had capacity on the days she executed the documents at issue. But courts may also look to state of mind at other times if it tends to show one's state of mind on the day a document was executed.

The Court quoted from the court of appeals summary of her deterioration in the final years of her life:

> [Lesey] 1) grew more infirm, 2) experienced macular degeneration, 3) became legally blind, 4) had to have others give her the pills she had to take, 5) had to have others manage her doctors' care and her finances, 6) became extremely frail, 7) required assistance in walking, bathing, dressing, and eating, 8) became incontinent of urine or urinated on herself, 9) experienced continual confusion and forgetfulness, 10) experienced agitation, and 11) experienced depression. So too did she begin to experience congestive heart failure in 2007 and grow less responsive to the medications administered to ameliorate that condition. The condition resulted in her having renal insufficiency or a precursor to renal failure. Consequently, fluid was pooling in her body, and her heart was unable to "clear it out." That, according to a physician who testified, could affect a person's mental state "[w]hen it gets that significant."

Id. at *16. The Court held that not all of Lesey's afflictions suggested that she was mentally compromised, and noted that evidence of physical infirmities, without more, does not tend to prove mental incapacity. *Id*. at *16-19. "But evidence of physical problems that are consistent with or can contribute to mental incapacity is probative." *Id*. The Court noted that a board-certified forensic psychiatrist testified how Lesey's physical challenges contributed to her mental incapacity. She testified that by February 2007 Lesey had "mild to moderate dementia and cognitive impairment." *Id*. She added that in 2007 and 2008 Lesey was in the latter stages of congestive heart failure, which led to renal insufficiency. She testified a person's mental state can be affected by that condition. She testified that Lesey began having "confusion" about her medication in 2007 and that nurse and caregiver notes on Lesey indicated "she was confused, she was forgetful. And those began going up until she passed away." *Id*. The psychiatrist opined that by the end of February 2007, Lesey had

neither "the executive functioning nor the overall mental capability" to transact business or sign legal documents. *Id*. As to Lesey's dementia, the testimony was that "as you're losing brain cells and if you keep losing so many, some days your brain cells that you have left function better than other days" but that "you'll still have a significant limitation." *Id*. The psychiatrist also noted the deterioration of Lesey's handwriting as evidence of her mental decline.

The Kinsels testified that well before Lesey executed a document in 2007, Lesey was consistently confused, forgetful, and unable to comprehend conversations and documents. She would ask for a car she no longer owned and could no longer understand jokes. *Id*. at *20-21. Due at least in part to her loss of vision, she could no longer read, work crossword puzzles, or play board games, all pursuits she once enjoyed. *Id*. One testified to a "dramatic change in her mental and physical health" beginning in 2006: "She was very forgetful. She was hard to talk to. Just a little disassociative with people." Carole testified that by Thanksgiving of 2006 Lesey was no longer lucid and would talk and respond only in short sentences or by nodding. *Id*. "She was not the Lesey that I had known my entire life," she testified. Another testified that in late 2006 Lesey was "clearly becoming more and more confused and forgetful, and she would forget things that she had recently done or did." *Id*. He visited Lesey four days after Lesey executed the document, and testified she was "very agitated and confused." *Id*. Lesey told him: "I think I've signed something and I don't know what I've signed." *Id*. He testified that by 2008, Lesey only sometimes remembered conversations from minutes earlier. *Id*. He added, "[O]ftentimes I found that she either had not heard what I said or understood it, or didn't understand it, because I'd have to repeat myself." *Id*.

The Court noted that although the defendant maintained at trial that Lesey never lost mental capacity, the jury considered evidence that contradicted this evidence. *Id*. The Court held:

> We agree with the court of appeals that there is sufficient evidence to support the jury's mental-incapacity finding. Keith's [the attorney's] testimony, and that of those who accompanied him on his visits with Lesey, tends to contradict the evidence that Lesey was mentally impaired. And the evidence shows that Keith took his responsibilities seriously and executed his duties carefully and ably. But it is not our place to weigh the testimony adduced at trial. That is the jury's province.

Id.

The Court then turned to whether Texas recognizes the tort of tortious interference with inheritance rights. *Id*. at *24-31. The Court held that it and the Legislature had never recognized such a tort. It then held:

> 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. In this case, the Kinsels secured judgments holding Jane, Bob, Keith, and Jackson Walker personally liable for fraud and tortious interference with their inheritances. But the trial court also imposed a constructive trust on the funds Jane inherited from Lesey as the trust's residual beneficiary. Provided the trial court acted in its discretion in doing so, an issue we separately address below, we see no compelling reason to consider a previously unrecognized tort if the constructive trust proved to be an adequate remedy.

Id. 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. *Id*.

Regarding a constructive trust, the defendants had several arguments for why the trial court abused its discretion in creating a constructive trust in this case. *Id*. at *31-35. The Court disagreed and held that there does not have to be a breach of a fiduciary duty by the defendants owed to the plaintiffs. *Id*. There was no duty owed by the defendants to the plaintiff. *Id.* Citing to an earlier opinion, the Court held: "It is true that we recently recognized that a 'breach of a special trust or fiduciary relationship or actual or constructive fraud' is 'generally' necessary to support a constructive trust. But in that same case we reaffirmed our statement in *Pope* that '[t]he specific instances in which equity impresses a constructive trust are numberless—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts.'" *Id.*

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

The Court also held that undue influence was not, by itself, a cause of action that allowed an award of damages. *Id.* at n. 3. Rather, the Court held that it was a legal theory that allowed a court to disregard a document, such as a trust or will. The Court also held that there was no evidence that the attorney unduly influenced Lesey. *Id.* at n. 8. The Court held that the following evidence was not sufficient to prove undue influence: the attorney was present for the execution of a document he did not prepare and he drafted a second document and was present for the execution of that document. There was no evidence of what was said between the attorney and Lesey, and the Court also expressly noted that the attorney did not personally gain from these transactions. *Id*.

The Court affirmed the lower court's judgment, sustained the constructive trust, and refused to rule on whether a claim of tortious interference with inheritance rights exists in Texas.

K. Court Interpreted the Phrase "In Equal Shares Per Stirpes" in a Trust Document

In *Archer v. Moody*, the litigants in the declaratory judgment action were remainder beneficiaries of a trust created in 1934 and owned a 15,000-acre ranch near Junction, Texas. 544 S.W.3d 413 (Tex. App.—Houston [14th Dist.] 2017, no pet.). The legal dispute focused on how to calculate the fractional shares of the trust estate allocable to the remainder beneficiaries when the trust terminated in 2014. The issue was whether the grandchildren should be treated equally (1/8 share each) or whether they should take an interest in their parent's share (some individual shares increase from 1/8 to 1/6 and others decrease from 1/8 to 1/12). The court described the trust's language as follows:

> Under Article III, W.L. Moody, III's grandchildren are remainder beneficiaries entitled to share in the trust estate at the trust's termination upon Bill Moody's death. Article III distributes the trust estate upon termination as follows: ". . . [T]he Trustee shall, upon the termination of the Trust, distribute the Trust Estate in equal shares per stirpes to the then living grandchildren of William Lewis Moody, III, and the surviving issue of his deceased grandchildren."

Id. The court's task was to determine the meaning of the phrase "in equal shares per stirpes" in Article III. The court concluded: "Article III's operative phrase 'in equal shares per stirpes' requires an initial division of the trust estate in thirds among W.L. Moody, III's three children; W.L. Moody, III's grandchildren share equally in the 1/3 share of the sibling from whom they are descended." *Id*. The court explained:

> "Per stirpes" is defined as "[p]roportionately divided between beneficiaries according to their deceased ancestor's share." The grandchildren are descendants of W.L. Moody, III's three children: Edna Moody, Virginia Moody, and Bill Moody. By instructing that the trust estate be disbursed to W.L. Moody, III's grandchildren "in equal shares per stirpes," Article III contemplates a distribution to the grandchildren dependent on their deceased ancestor's share. The deceased ancestors here are Edna Moody, Virginia Moody, and Bill Moody. Second, the Edna and Virginia Moody Appellants' interpretation of Article III's operative phrase comports with an examination of the trust instrument as a whole. …
>
> Third, cases and secondary sources analyzing similar dispositive language provide additional support for the interpretation of Article III advanced by the Edna and Virginia Moody Appellants…. The Restatement (Second) of Property also supports the Article III interpretation advanced

> by the Edna and Virginia Moody Appellants. It concludes that a "per stirpes" class distribution requires a distribution by ancestor: "If a gift is made to the 'grandchildren' of a designated person 'per stirpes,' the described class members stem from different children of the designated person. In such case, the words 'per stirpes' suggest an initial division of the subject matter of the gift into shares, one share for the children of each child of the designated person, thereby overcoming the per capita division otherwise called for by the rules of this section." Restatement (Second) of Prop.: Donative Transfers § 28.1 cmt. i. (1988) (emphasis added).

Id. The court concluded: "Accordingly, the trust estate initially is divided into three shares for each of W.L. Moody, III's children, and the grandchildren share equally in the 1/3 interest of the sibling from whom they are descended." *Id*.

L. Court Held That Trustee Had Authority To Sell Real Property And That The Beneficiaries Did Not Have A Right of First Refusal

In the *Estate of Rodriguez*, a trust beneficiary sued the trustee to enjoin the sale of real property owned by a testamentary trust. No. 04-17-00005-CV, 2018 Tex. App. LEXIS 254 (Tex. App.—San Antonio January 10, 2018, no pet.). The trust stated: "My Trustee can sell the corpus of this Trust, but it [is] my desire my ranch stay intact as long as it is reasonable. If the corpus is sold it shall be distributed as set out in Section III, C and D." *Id*. It also generally stated: "The Trustee during the continuation of each trust shall have the sole and complete right to possess, control, manage, and dispose of each trust estate and the said Trustee shall have the powers, rights, responsibilities and duties given to or imposed upon by trustees by the Texas Trust Code as such Code now exists." *Id*. The trial court granted a motion for summary judgment filed by the trustee, allowing the trustee to close on a real estate contract for the real property. *Id*. The beneficiary appealed.

After providing the general rules for will and trust construction, the court of appeals described the rules for whether language was precatory or mandatory:

> A court's analysis regarding whether particular words are precatory or mandatory turns on "the testator's expressed intent as evidenced by the context of the will and surrounding circumstances, 'and words which are precatory in their ordinary meaning will nevertheless be construed as mandatory when it is evident that such was the testator's intent.'" Generally, courts construe words akin to "want," "wish," "request," and "desire" as precatory in their ordinary sense and not as imposing a legal obligation. These same words, however, become mandatory "'when used in a will where it appears from the context or from the entire document that they are the expression of the testator's intention in disposing of his property.'"

Id. The court noted that the language granting the power to sell the trust estate uses mandatory language and provides the trustee "shall have the sole and complete power to . . . dispose of each trust estate." *Id*. The court concluded: "In view of the mandatory language used in granting Frank the power to sell the corpus of the trust, we hold the reference to Frank's "desire" to keep the Ranch intact is precatory language which did not impose any legal obligation preventing Frank from entering into the to sell the Ranch to Christians." *Id*.

The court also held that the beneficiary did not have a right of first refusal to purchase the property. Under such a provision, if the owner desires to sell the property, and has an offer he would accept, he must first offer to the holder of the right an opportunity to buy the property on the terms offered by a bona fide purchaser. The beneficiary argued that the testator's statements to others, in combination with two clauses contained within the will, demonstrated his intent to create a right of first refusal for the beneficiaries under the trust. The clauses upon which the beneficiary relied were: "My Trustee can sell the corpus of this Trust, but it [is] my desire my ranch stay intact as long as it is reasonable…. If any of the four beneficiaries of his estate wants to sell their portion of the properties they can only sell it to the remaining beneficiaries." *Id*. The court of appeals disagreed:

> Neither of the clauses, however, requires the trustee to offer to anyone, much less the beneficiaries, an opportunity to purchase the property on the same terms offered to another potential buyer. Rather than imposing limitations on the trustee's power to sell, the second clause is designed to impose limitations on a beneficiary's power to sell, precluding a beneficiary from selling to anyone other than another beneficiary. No similar limitation is imposed on the trustee's power to sell. We conclude that neither of the clauses on which Blanca relies nor the Will as a whole evidence an intent to limit Frank's power to sell by creating a right of first refusal in favor of the trust beneficiaries.

Id.

M. Court Reverses Jury Verdict And Holds That Trustor Could Not Revoke Trust

In *Coyle v. Jones*, two sisters fought over whether $197,000 belonged to their mother's estate or to a trust. No. 05-16-00876-CV, 2017 Tex. App. LEXIS 11173 (Tex. App.—Dallas November 30, 2017, no pet.). A trustor and her husband formed a revocable trust that stated: "At any time during the joint lives of the Trustors, . . . the Trustors may . . . revoke this Trust Agreement in part or in whole." Id. It further provided that "except as otherwise provided," on the death of either trustor, the designation of the beneficiaries of specific gifts in the Agreement would become irrevocable, and not subject to amendment or revocation. Id. The trustor's husband died in 2001. In 2010, the trustor executed a document purporting to revoke the trust and transfer all trust assets to herself.

The trustor died in April 2011. One daughter was the trustee of the trust, and the other daughter was the executor of the trustor's estate. They sued each other over who rightfully owned the property, which was cash. A jury determined that the trustor had revoked the trust, and the trial court entered judgment that the cash belonged to the estate.

The court of appeals reversed, holding that the evidence proved as a matter of law that the trust had not been revoked and that it should own the cash. The court stated:

> In the case before us, the jury was instructed that a settlor may revoke a trust "unless it is irrevocable by the express terms of the trust agreement creating it or of an instrument modifying it." The express language of the Agreement creating the trust at issue provided that the trust agreement could be revoked "at any time during the joint lives of the Trustors." The Agreement further provided that other than that, when either trustor died, "the designation of Beneficiaries of specific gifts in this Trust shall become irrevocable, and not subject to amendment or modification." The only evidence of revocation before the jury, however, was Frances's 2010 written revocation. It is undisputed that Frances executed the revocation almost nine years after Stuart's death. Absent any evidence to support the jury finding that the Agreement was revoked while both trustors were alive, there is legally insufficient evidence to support the jury's revocation finding. To the contrary, the evidence at trial conclusively established that Frances could not revoke the Agreement after Stuart's death. Because there is no evidence to support jury's revocation finding, we resolve Coyle's third issue in her favor. Our resolution of this issue makes it unnecessary to address Coyle's issues complaining of charge error or the legal sufficiency of the jury's damage award.

Id.

N. Court Holds That Trust Did Not Violate The Rule Against Perpetuities and That A Beneficiary's Assignment Of Interests Violated A Spendthrift Provision

In *Bradley v. Shaffer*, family members placed mineral interests they inherited into the trust. No. 11-15-00247-CV, 2017 Tex. App. LEXIS 11154 (Tex. App.—Eastland November 30, 2017, no pet.). The trust instrument contained a spendthrift provision precluding the beneficiaries of the trust from assigning their interests in the trust. A beneficiary of the trust executed deeds purporting to convey his share of the mineral estate to a third party. The trustees of the trust sued and obtained a summary judgment declaring the deeds to be invalid with respect to the beneficiary's interest in the trust.

The court of appeals first addressed the general principals at issue:

> A trust is a mechanism used to transfer property. "[W]hen a valid trust is created, the beneficiaries become the owners of the equitable or beneficial title to the trust property and are considered the real owners." The trustee is merely the depository of the bare legal title. The trustee is vested with legal title and right of possession of the trust property but holds it for the benefit of the beneficiaries, who are vested with equitable title to the trust property. A trust beneficiary who has capacity to transfer property has the power to transfer his equitable interest, unless restricted by the terms of the trust.
>
> "[A] spendthrift trust is one in which the beneficiary is prohibited from anticipating or assigning his interest in or income from the trust estate." "Texas courts have long upheld and enforced spendthrift provisions, justifying this restraint on alienation not out of consideration for the beneficiary, but rather for the right of the donor creating the trust to control his gift." The Texas Trust Code also specifically protects the right of a trust settlor to include a spendthrift provision in a trust. Section 112.035(a) provides that "[a] settlor may provide in the terms of the trust that the interest of a beneficiary in the income or in the principal or in both may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee." Thus, assignments of beneficial interests in trusts are invalid when they are subject to a spendthrift provision in the trust.

Id. (internal citation omitted).

The language of the trust's spendthrift provision provided that "[n]o . . . beneficiary of this Trust shall have any right or power to anticipate, pledge, assign, sell, transfer, alienate or encumber his or her interest in the Trust in any way." *Id*. The court determined that the express terms of the trust precluded the beneficiary from assigning his beneficial interest in the trust, and his conveyances were invalid at the time they occurred. The court then stated that the "more pressing question is whether or not Darell's invalid conveyances became valid later." *Id*.

The beneficiary asserted that the trust violated the rule against perpetuities. Section 112.036 of the Texas Trust Code provides that "[a trust] interest is not good unless it must vest, if at all, not later than 21 years after some life in being at the time of the creation of the interest, plus a period of gestation." *Id*. (citing Tex. Prop. Code § 112.036). In applying the rule, the court looks at the conveyance instrument as of the date it is executed, and it is void if by any possible contingency the grant or devise could violate the rule. The court noted that it should construe a trust to be valid where possible.

The beneficiary argued that the trust violated the rule because, at the time the trust instrument was executed, it could have extended beyond a life in being plus twenty-one years if it were extended. The court noted that "[t]his argument

focuses on the duration of the trust rather than the vesting of the beneficial interests in the trust." *Id*. "The duration of the trust is not the relevant inquiry and it is immaterial that full possession and enjoyment of the property is postponed beyond the time period for the rule against perpetuities as long as the beneficial interests become vested within the applicable period." *Id*.

The court disagreed with the beneficiary's argument that the trust delayed the vesting of the beneficiaries' interests until some point in the future. The court noted that the trust immediately vested the settlors/initial beneficiaries' interests in the trust at the time the trust came into existence. The trust specified the respective ownership interests of the settlors/initial beneficiaries in the mineral estate at the outset. Furthermore, the trust granted the trustees with broad powers, including the power to sell the mineral estate or lease it for exploration, that could be exercised at the outset. "The fact that the trustees were authorized to sell trust property at any time indicates that the beneficiaries' interests vested immediately." The court noted that this is not a case where a transfer has been made to trustees to hold property out of commerce for a class of beneficiaries, the membership of which will not be known for a period of time in excess of the rule. "To the contrary, the beneficiaries of the trust 'had the fixed right of future enjoyment upon the termination of the trust.'" *Id*.

The trust also contained a remainder provision whereby an initial beneficiary's vested interest passed to his surviving issue at his death. This remainder provision does not violate the rule against perpetuities because the surviving issue becomes "substitutional takers" of their parent's vested beneficial interest at their parent's death. Furthermore, since their beneficial interests in the trust passed to them at the death of an initial beneficiary, their beneficial interests in the trust vested within twenty-one years of a life in being. The court concluded: "Accordingly, this trust did not violate the rule against perpetuities. Furthermore, the extension of the trust only affected the trust's duration and not the vesting of an interest in the trust." *Id*. The court affirmed the trial court's determination that the mineral interests remained in the trust and that the purported conveyance was void.

O. Court Denies Request For Mandamus Relief Regarding Court Order Requiring Spouse of Deceased Trustee To Prepare An Accounting

In *In re Ng*, after a jury found that a deceased trustee did not breach fiduciary duties, a trial court nonetheless ordered the deceased trustee's spouse to prepare an accounting of the trust. No. 09-17-00386-CV, 2017 Tex. App. LEXIS 10129 (Tex. App.—Beaumont October 27, 2017, original proceeding). The spouse filed a notice of appeal and also filed a petition for writ of mandamus. The spouse argued that she did not have time to appeal by the deadline the trial court set for the accounting. The court of appeals denied the petition for writ of mandamus because the spouse could have potentially superseded the order requiring an accounting:

> Mandamus is an extraordinary remedy that is available when a trial court clearly abuses its discretion and there is no adequate remedy by appeal. Mandamus is not available to compel what may be accomplished by supersedeas. After reviewing the petition and the response, we conclude that Ng has not shown that she has no adequate remedy by appeal. Accordingly, we deny the petition for a writ of mandamus and the motion for temporary relief.

Id.

Interested Note: Because the trial court ordered relief that was not monetary relief or an interest in real property, the trial court had the obligation to set an amount for supersedeas under Rule 24.2(a)(3), "when the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post." Tex. R. App. P. 24.2(a)(3). This Rule provides:

> (3) Other Judgment. When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post. The security must adequately protect the judgment creditor against loss or damage that the appeal might cause. But the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if an appellate court determines, on final disposition, that that relief was improper.

Id. This type of relief could be injunctive or declaratory relief and would also include orders removing a fiduciary, appointing a receiver, or requiring an audit or accounting. This "language is mandatory" and, thus, a judgment debtor must be given the opportunity to preserve the status quo during its appeal:

> The purpose of Rule of Appellate Procedure 24 is to provide the means for a party to suspend enforcement of a judgment pending appeal in civil cases. By superseding a judgment against it, the judgment debtor may "preserve[ ] the status quo of the matters in litigation as they existed before the issuance of the order or judgment from which an appeal is taken."

Alpert v. Riley, 274 S.W.3d 277, 297 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

However, under Rule 24, a judgment debtor's right to supersede the enforcement of a judgment during the pendency of an appeal is not absolute. Rule 24.2(a)(3) recognizes that a trial court may refuse to allow a judgment debtor to supersede the judgment so long as the judgment is considered an "other" judgment and the

judgment creditor posts security "in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted . . . ." Tex. R. App. P. 24.2(a)(3). In such cases, the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if the appellate court reverses. Id. See also El Caballero Ranch, Inc. v. Grace River Ranch, LLC, No. 04-16-00298-CV, 2016 Tex. App. LEXIS 9180 (Tex. App.—San Antonio August 24, 2016, mot. denied) (court affirmed trial court's order denying supersedeas to judgment debtor where creditor posted security).

P. Court Addresses Breach Of Fiduciary Duty and Partition Issues In Trust Dispute

In *Koda v. Rossi*, a mother created a trust that provided that her son was to serve as trustee and that she, he, and a daughter were the beneficiaries. No. 11-15-0150-CV, 2017 Tex. App. LEXIS 8194 (Tex. App.—Eastland August 26, 2017, no pet.). Upon the mother's death, the trust was to terminate and the trust estate would be distributed to her son and daughter. After the mother died, the son never formally terminated the trust and never distributed the trust estate. The daughter sued the son for breach of fiduciary duty and sought partition of real property owned by the trust. Her claims for breach of fiduciary duty were that the son had used trust funds to pay his own personal and business obligations and expenses in the amount of $21,921.28, and that he had never made any distributions to her. After a bench trial, the trial court entered a judgment terminating the trust, awarding her attorney's fees and expenses of $17,349.60, and assessed "damages" against the son in the amount of $1,647.25. The trial court also held that each of the parties owned an undivided 50% interest the trust's property, and found that the real property was susceptible to partition in kind, and it ordered a partition. The son appealed on multiple grounds.

The court of appeals first addressed the son's argument that the trial court should have granted him a new trial because his attorney did not perform well by not admitting evidence and allowing other evidence to be admitted. The court of appeals first held that "the doctrine of ineffective assistance of counsel does not apply to civil cases where, as here, there is no constitutional or statutory right to counsel." *Id*. The court then held that the trial court did not abuse its discretion in making its evidentiary rulings. The court of appeals also held that it could not grant a new trial based solely on the interest of justice where the trial court did not commit any error.

The court of appeals then turned to the partition issue. The son argued that the trial court should not have ordered a partition in kind, but rather, should have ordered a partition by sale. The court of appeals held: "Texas law favors partition in kind. The burden of proof is upon the party who opposes partition in kind and seeks instead a partition by sale. The party who seeks partition by sale bears the burden to prove that a partition in kind would not be fair and equitable." *Id*. The

court examined the record for the existence of testimony that would show that the real property could not be fairly and equitably partitioned in kind. The real property consisted of sixty acres that appraised for approximately $230,000, that there was a house on the property, that there was a mortgage on the real property, and that a third party leased fifty-five acres of the property for deer hunting. The court concluded that the son did not meet his burden to show that the real property was not subject to a fair and equitable division and was, therefore, incapable of an in-kind partition.

The daughter also appealed and complained that the trial court erred when it failed to find that the son's "actions in using funds belonging to the Trust to pay his business debts, writing checks to his corporation, and depositing funds belonging to the Trust into his personal bank accounts were a breach of his fiduciary duty entitling Agnes Rossi to additional damages." *Id*. She argued that he owed her an additional $20,274.03 in trust funds that he expended for his personal benefit prior to the mother's death. The trial court held that, before the trust terminated, the son, as a beneficiary, had the right to use the funds for himself. The son presented some testimony about the reasons for some of the withdrawals and expenditures, but the court held that "a judgment based upon that incomplete testimony is against the great weight and preponderance of the evidence upon this record." *Id*. The court sustained her cross-point and remanded the case for further proceedings.

Q. Court Affirms Arbitration Decision Arising From Trust Dispute

In *Saks v. Rogers*, a beneficiary of a trust challenged a trial court's enforcement of an arbitration decision. No. 04-16-00286-CV, 2017 Tex. App. LEXIS 6923 (Tex. App.—San Antonio July 26, 2017, no pet.). The parties entered into a mediated settlement agreement (MSA) that included an arbitration agreement for "disputes aris[ing] with regard to the interpretation and/or performance of [the MSA] or any of its provisions, including the form of further documents to be executed . . . ." *Id*. Although not present at the mediation, the beneficiary provided another a power of attorney to act on her behalf for the MSA. Later, a party filed a motion to compel arbitration. The dispute went to arbitration, and the arbitrator issued certain findings and conclusions. The beneficiary then challenged the arbitrator's decision because allegedly her complaints were not within the scope of the arbitration clause. The trial court enforced the arbitrator's decision, and the beneficiary appealed.

The court of appeals concluded that the use of the language "disputes arise with regard to the interpretation and or performance of this Agreement or any of its provisions," speaks to the broad nature of the arbitration agreement and that it was not limited to claims that literally arose under the agreement, but instead embraced all disputes between the parties that have a significant relationship with the agreement. The court then found that the beneficiary's claims fell within the scope of the arbitration clause:

> The MSA's primary goal was the execution of documents regarding properties owned by the trust. At the heart of Landen's dispute is the distribution of the trust's corpus. In the previous appeal, Landen did not dispute the probate court's order that she was a party to the MSA. Whether a conflict of interest exists regarding Appellees' procurement of Landen's power of attorney turns on any benefits Appellees might receive under the MSA. Similarly, whether any payment of monies to Appellees, under the MSA, involved elements of fraud also requires an evaluation of any monies owed under the MSA or the distribution of benefits stemming from the MSA. The probate court's order, about which Landon complains, required her to execute documents under the trust. We conclude Landen failed to prove that her claims stand-alone from the MSA and that they are not "'inextricably enmeshed' with, or are 'factually intertwined'" with the MSA and distributions from the trust.

Id. The court of appeals affirmed the trial court's order enforcing the arbitrator's opinion.

R. Court Reviews Damages For Mental Anguish, Exemplary Damages, and Other Categories For A Trustee's Breach Of Fiduciary Duty

In *Wells Fargo v. Militello*, a trustee appealed a judgment from a bench trial regarding a beneficiary's claims for breach of fiduciary duty, negligence, and fraud. No. 05-15-01252-CV, 2017 Tex. App. LEXIS 5640 (Tex. App.—Dallas June 20, 2017, pet. filed). Militello was an orphan when her grandmother and great-grandmother created trusts for her. She had health issues (Lupus) that prevented her from working a normal job, and she heavily relied on the trusts. When Militello was 25 years old, one of the trusts was terminating, and it contained over 200 producing and non-producing oil and gas properties. The trustee requested that Militello leave the properties with it to manage, and she created a revocable trust allowing the trustee to remain in that position.

Later, in late 2005 and early 2006, Militello advised the trustee that she was experiencing cash flow problems as a result of her divorce and expensive medical treatments. Instead of discussing all six accounts with Militello, the trustee suggested that she sell the oil and gas interests in her revocable trust. The trustee then sold those assets to another customer of the trustee; a larger and more important customer. There were eventually three different sales, and the buyer ended up buying the assets for over $500,000 and later sold those same assets for over $5 million. The trustee did not correctly document the sale, continued reporting income in the revocable trust, and did not accurately report the sales to the beneficiary. The failure to accurately document and report the sales and income caused Militello several tax issues, and she had to retain accountants and attorneys to assist her in those matters.

The beneficiary sued, and the trial court held a bench trial in 2012. Later, the trial court awarded Militello: $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. The trustee appealed, alleging that the evidence was not sufficient to support many of the damages award but did not appeal the liability finding of breach of fiduciary duty. The beneficiary agreed that the economic damages should be remitted (decreased) by around $340,000, which would also impact the exemplary damages award. The trustee argued that the evidence did not support other awards of damages.

The trial court awarded damages based on Militello's expenses associated with dealing with tax issues, including accountant fees and attorney's fees. The evidence at trial was that the trustee did not timely or properly document any of the sales from Militello's trust, did not notify the oil and gas producers of the transfer of Militello's interests, and did not prepare and record correct deeds until three years after the fact. It failed to amend its internal accounting, resulting in Militello's accounts showing the receipt of amounts that were no longer attributable to interests owned by her trust. These errors caused problems in the preparation of Militello's tax returns, and attracted the attention of various tax authorities. When Militello attempted to obtain information from the trustee to address these problems, it 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. At trial, Militello's tax lawyer gave expert testimony to explain and quantify Militello's damages relating to correcting her tax problems. The court of appeals affirmed the trial court's awards for the Militello for these issues.

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)." *Id*. 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. 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." *Id*. "Mental anguish is only compensable if it causes a 'substantial disruption in . . . daily routine' or 'a high degree of mental pain and distress.'" *Id*. "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.'" *Id*.

The record included her testimony and months of communications between Militello and the bank showing multiple disruptions and mental distress in Militello's daily life in attempting to obtain her own and her children's housing, medical care, and other needs. 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." *Id*. 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.

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." *Id*. 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:

> [T]he record supports a lesser amount of mental anguish damages. The items making up the remainder of Militello's actual damages, net of the $921,000 related to the market value of the oil and gas properties, represent expenses, fees, and losses Militello incurred as a direct result of Wells Fargo's gross negligence and breaches of fiduciary duty. These items include legal fees incurred relating to drafting, creation, and recording of void deeds, lost production revenue, improperly transferred money market funds, bank fees, and the tax-related amounts we have discussed in detail above, among other items. These amounts total $310,608.89, after subtraction of the amounts Militello voluntarily remitted. Much of the mental anguish Militello described is a direct result of the bank's unresponsiveness and gross negligence in carrying out its fiduciary duties to her, and is reflected in these expenses. We conclude that the evidence is sufficient to support the amount of $310,608.89, representing amounts of actual damages caused by the bank's breaches of fiduciary duty and gross negligence, but excluding the actual damages attributable to market value of the properties. We conclude that this amount would fairly and reasonably compensate Militello for the mental anguish she suffered.

Id.

The trustee requested that the appellate court disallow the award of prejudgment interest attributable to the trial court's delay in signing the judgment. Citing rule of judicial administration 7(a)(2), the trustee argued that "the Court should cut off prejudgment interest for the period starting at the Rule 7(a)(2) date line, which was July 26, 2012." *Id*. The court held that "[p]rejudgment interest is awarded to fully compensate the injured party, not to punish the defendant." *Id*. The court stated: "If we were to sustain Wells Fargo's complaint, Militello would not be fully compensated for lost use of the money due as damages during the lapse of time

between the accrual of the claim and the date of judgment. As between Militello, who established Wells Fargo's liability for breaches of its duties to her, and Wells Fargo, we conclude that Wells Fargo should bear the prejudgment interest cost of the delay." *Id*.

The court next turned to the trustee's challenge to the exemplary damages award. The trustee contended that Militello did not establish harm resulting from fraud, malice, or gross negligence by clear and convincing evidence, as required by section 41.003 of the Texas Civil Practice and Remedies Code. The trustee argued that breach of fiduciary duty, by itself, is insufficient predicate under section 41.003. The appellate court did not resolve that issue because it concluded there was clear and convincing evidence to support the trial court's express finding that the trustee was grossly negligent.

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. *Id*. The subjective prong, in turn, 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 court of appeals held that the evidence in the case supported the trial court's findings:

> The record reflects that Wells Fargo and its predecessors had served as Militello's fiduciaries since her childhood. As well as serving as trustee for the Grantor Trust, Wells Fargo also served as the trustee for several other family trusts of which Militello was a beneficiary. As trustee, Wells Fargo was aware of the amount of income Militello received each month from each trust, combining the amounts in a single monthly payment made to Militello. If Wells Fargo was not earlier aware that income from the trusts was Militello's sole source of income, it became aware when Militello first contacted the bank about her financial problems in 2005. She explained to Tandy that the income she received from the trusts was insufficient to meet her expenses and debts, and she asked for help. When Tandy retired, Militello again explained her financial situation to Randy Wilson, and made clear the source of her financial problems and her need for help in solving them. Wells Fargo was therefore actually aware of the risk to Militello's financial security from depletion of the Grantor Trust. As Wallace testified, however, Wells Fargo breached its fiduciary duty by failing to explore other possible options to assist Militello through her financial difficulties. Wallace testified that Wells Fargo's conduct involved an extreme degree of risk. He divided his evaluation of Wells Fargo's conduct as a fiduciary into three time periods. His first period, the "evaluation phase," began in December 2005 when Militello contacted Wells Fargo for help, and ended in late May 2006 when the decision to sell the properties was made. Wallace's

> second period covered the sale itself, including the marketing of the properties and the decision to sell. The third period covered the execution of the sale, and included Wells Fargo's adherence to its own internal policies and carrying out its duties to Militello in distribution of the properties after the sale. Wallace testified in detail regarding the duties that Wells Fargo, as Militello's fiduciary, should have carried out in each of the three periods. He testified that, among other deficiencies, Wells Fargo failed: to provide sufficient information to Militello to make an informed decision about sales from the Grantor Trust, to obtain a "current evaluation of the property prepared by a competent engineer" before the sales, to explain the valuation to Militello and discuss the tax consequences of a sale, to market the properties to more than one buyer, to negotiate to get the best price possible for the properties, to negotiate a written purchase and sale agreement, to convey correct information to the attorneys preparing the deeds for the sales, to notify the oil and gas producers of the change in ownership, and to create a separate account after the sales, instead commingling the proceeds received "for a period of up to three years." . . . Under our heightened standard of review, we conclude the trial court could have formed a firm belief or conviction that Wells Fargo's conduct involved an extreme degree of risk, and Wells Fargo was consciously indifferent to that risk. We also conclude that Militello offered clear and convincing evidence to support the trial court's finding that Wells Fargo was grossly negligent, and therefore met her burden to prove the required predicate under section 41.003(a).

Id. The court also held that the amount awarded was supported by the evidence: "Having considered the relevant *Kraus* and due process factors, we conclude an exemplary damages award of $2,773.826.67 is reasonable and comports with due process." *Id*. The court did suggest a remittitur due to the decrease in economic damages.

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 Trustee shall not be liable for any loss or depreciation in value of the properties of the Trust, except as such loss is attributable to gross negligence, willful breach of the provisions of this Trust, or bad faith on the part of the Trustee. The Trustee shall not be responsible for any act or omission of any agent of the Trustee, if the Trustee has used good faith and ordinary care in the selection of the agent.

Id. The trustee contended that the property code "expressly allows exculpatory clauses to shield a trustee from ordinary negligence." *Id*. (citing Tex. Prop. Code

§ 114.007). It also argued that it "used good faith and ordinary care" in selecting its agents, including "(1) the law firm that prepared the erroneous deeds, (2) Leonard, who prepared the mineral interest valuation used by the bank, and (3) Harrell, who prepared erroneous tax returns, and consequently is not liable for errors made by those agents." *Id*.

The court of appeals disagreed with the trustee's arguments: "We have concluded that the evidence supports the trial court's finding that Wells Fargo's conduct constituted gross negligence." *Id*. In addition, there was evidence that the trustee "failed to use ordinary care in its selection of Leonard, if not its other agents." *Id*. "Because the exculpatory clause in the Grantor Trust does not apply to losses 'attributable to gross negligence,' we conclude that the trial court did not err in refusing to enforce it to bar Militello's claims." *Id*.

Interesting Note: This is an interesting case because it deals with exemplary damages and mental anguish damages in the context of a breach of fiduciary duty by a trustee.

Exemplary Damages. "Exemplary damages" includes punitive damages. Tex. Civ. Prac. & Rem. Code Ann. § 41.001(5). A jury may only award exemplary damages if the claimant proves, by clear and convincing evidence, that the harm resulted from: (1) fraud; (2) malice; or (3) gross negligence. *Id*. at § 41.003(a). A defendant's breach of a fiduciary duty is ordinarily not enough, by itself, to support an award of exemplary damages. There must be an aggravating factor, such as actual fraud, gross negligence, or malice. *Hawthorne v. Guenther*, 917 S.W.2d 924, 936 (Tex. App.—Beaumont 1996, writ denied). A breach of fiduciary duty, however, often involves aggravated or fraudulent conduct, regardless of the actual motive of the defendant, that justifies an award of exemplary damages to deter such conduct. *See, e.g., International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 584 (Tex. 1963); *Natho v. Shelton*, No. 03-11-00661-CV, 2014 Tex. App. LEXIS 5842, 2014 WL 2522051, at *2 (Tex. App.—Austin May 30, 2014, no. pet.); *Lesikar v. Rappeport*, 33 S.W.3d 282, 311 (Tex. App.—Texarkana 2000, pet. denied); *Fidelity Nat'l Title Co. v. Heart of Tex. Title Co.*, No. 03-98-00473-CV, 2000 Tex. App. LEXIS 72 (Tex. App.—Austin 2000, no pet.); *Hawthorne v. Guenther,* 917 S.W.2d at 936; *NRC, Inc. v. Huddleston*, 886 S.W.2d 526, 533 (Tex. App.—Austin 1994, no writ) (upholding portion of district court's judgment awarding actual and punitive damages for breach of fiduciary duty); *Murphy v. Canion*, 797 S.W.2d 944, 949 (Tex. App.—Houston [14th Dist.] 1990, no pet.); *Cheek v. Humphreys*, 800 S.W.2d 596, 599 (Tex. App.—Houston [14th Dist.] 1990, writ denied) ("Exemplary damages are proper where a fiduciary has engaged in self-dealing"); *Morgan v. Arnold*, 441 S.W.2d 897, 905–906 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.).

One important protection for defendants is the statutory cap on the amount of exemplary damages. The Texas Civil Practice and Remedies Code permits exemplary damages of up to the greater of: (1) (a) two times the amount of economic damages; plus (b) an amount equal to any noneconomic damages

found by the jury, not to exceed $750,000; or (2) $200,000. Tex. Civ. Prac. & Rem. Code Ann. § 41.008(b). This cap need not be affirmatively pleaded as it applies automatically and does not require proof of additional facts. *Zorrilla v. Aypco Constr., II, LLC*, 469 S.W.3d 143 (Tex. 2015). However, these limits do not apply to claims supporting misapplication of fiduciary property or theft of a third degree felony level. Tex. Civ. Prac. & Rem. Code Ann. § 41.008(c)(10). *Natho v. Shelton*, 2014 Tex. App. LEXIS 5842 at n. 4. The statute states that the caps "do not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if … the conduct was committed knowingly or intentionally…." *Id*. Accordingly, if a defendant is found liable for one of these crimes with the required knowledge or intent, it cannot take advantage of the statutory exemplary damages caps.

Mental Anguish. A plaintiff can potentially recover mental-anguish damages if the damages are a foreseeable result of a breach of fiduciary duty. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 266-67 (Tex. App.—Corpus Christi 1991, writ denied) (client was entitled to mental anguish award in breach of fiduciary duty by an attorney regarding the disclosure of confidential information). In *Douglas v. Delp*, the Texas Supreme Court stated that mental-anguish damages were not allowed when the defendant's negligence harmed only the plaintiff's property. 987 S.W.2d 879, 885 (Tex. 1999). In those cases, damages measured by the economic loss would make the plaintiff whole. *Id*. Applying those concepts to attorney malpractice, the court stated that limiting the plaintiff's recovery to economic damages would fully compensate the plaintiff for the attorney's negligence. *Id*. The court concluded "that when a plaintiff's mental anguish is a consequence of economic losses caused by an attorney's negligence, the plaintiff may not recover damages for that mental anguish." *Id*.

The Texas Supreme Court reiterated that when an attorney's malpractice results in financial loss, the aggrieved client is fully compensated by recovery of that loss; the client may not recover damages for mental anguish or other personal injuries. *Belt v. Oppenheimer, Blend, Harrison & Tate*, 192 S.W.3d 780, 784 (Tex. 2006). In *Tate*, the Court held that estate planning malpractice claims seeking purely economic loss are limited to recovery for property damage. *Id*. The Court held that when the damages are financial loss, a party is fully compensated by recovery of that loss. *Id*. So, if the plaintiff is seeking a claim for breach of fiduciary duty based on negligent conduct, a plaintiff may not be able to obtain mental anguish damages if the economic damages make the plaintiff whole.

In a situation where the plaintiff's breach of fiduciary duty claim is based on non-negligent conduct, such as fraud or malice, a plaintiff can "recover economic damages, mental anguish, and exemplary damages." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006) (mental anguish damages permissible for fraud claim); *City of Tyler v. Likes*, 962 S.W.2d 489, 497 (Tex. 1997) (stating that mental anguish damages are recoverable for some common law torts

involving intentional or malicious conduct). For example, in *Parenti v. Moberg*, the court of appeals affirmed an award of mental anguish damages for a beneficiary suing a trustee for breach of fiduciary duty. No. 04-06-00497-CV, 2007 Tex. App. LEXIS 4210 (Tex. App.—San Antonio May 30, 2007, pet. denied). The court stated: "Here, the jury found that Parenti acted with malice, and Parenti does not challenge that finding. Therefore, because the jury found that Parenti acted with malice, we hold that the trial court did not err in awarding mental anguish damages to Moberg." *Id*.

Finally, even if allowed, mental anguish damages are difficult to prove. The Texas Supreme Court has noted: "The term 'mental anguish' implies a relatively high degree of mental pain and distress. It is more than mere disappointment, anger, resentment or embarrassment, although it may include all of these. It includes a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair and/or public humiliation." *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995). The Court held that an award for mental anguish will normally survive appellate review if "the plaintiffs have introduced direct evidence of the nature, duration, and severity of their mental anguish thus establishing a substantial disruption in the plaintiff's routine." *Id*.

In *Service Corp. International v. Guerra*, the Texas Supreme Court reversed an award of mental anguish damages. 348 S.W.3d 221, 231-32 (Tex. 2011). The Court held: "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." *Id*. at 231. In *Guerra*, the jury awarded mental anguish damages to three daughters of the deceased when the cemetery disinterred and moved the body of their father. *Id*. at 232. One daughter testified that it was "the hardest thing I have had to go through with my family" and that she "had lots of nights that I don't sleep." *Id*. Another daughter testified, "We're not at peace. We're always wondering. You know we were always wondering where our father was. It was hard to hear how this company stole our father from his grave and moved him." *Id*. There was also evidence from third parties that the daughters experienced "strong emotional reactions." *Id*. Yet, the Court held that this was not sufficient to support an award of mental-anguish damages. *Id*. *See also Hancock v. Variyam*, 400 S.W.3d 59 (Tex. 2013) (reversing award of mental anguish damages).

In *Martin v. Martin*, the court of appeals reversed a mental anguish award against a trustee based on a claim of intentional breach of fiduciary duty because the beneficiary did not have sufficient evidence of harm. 363 S.W.3d 221 (Tex. App.—Texarkana 2012, pet. denied). The evidence of mental anguish was: "It's impacted our whole family. We don't -- for generations and generations to come, we don't have any -- it just hurts. It's affected my father. I worry about him every day talking to him on the phone, the stress. I worry about those in the company that have to deal with what's going on." *Id*. The court held that: "Courtney failed to establish a high degree of mental pain and distress that is more than mere

worry, anxiety, vexation, embarrassment, or anger." *Id*. *See also Onyung v. Onyung,* No. 01-10-00519-CV, 2013 Tex. App. LEXIS 9190 (Tex. App.—Houston [1st Dist.] July 25, 2013, pet. denied) (reversed mental anguish damages because plaintiff did not have sufficient evidence of harm). However, in *Moberg,* the court of appeals affirmed the modest award of $5,000 in mental anguish damages in a breach of fiduciary duty case against a trustee where the evidence showed that the beneficiary: "cried, lost sleep, vomited, and missed work for 'several days'. . ." 2007 Tex. App. LEXIS 4210. These are very fact-specific determinations.

III. Probate Litigation

A. A Fractured Texas Supreme Court Holds That There Is No Tortious Interference With Inheritance Claim In Texas

In *Archer v. Anderson*, Jack, who had no children, executed a will leaving his estate to his brother and his brother's children, the Archers. No. 16-0256, 2018 Tex. LEXIS 611 (Tex. June 22, 2018). Later, Jack had a stroke and was mentally incompetent. Jack's friend Anderson, an attorney, drafted durable and medical powers of attorney appointing himself as Jack's attorney-in-fact. Jack signed the documents, but his medical records showed that the day he signed them he was delusional and appeared confused. Anderson also tried to have Jack change his estate plan. Anderson proposed that Jack sell his ranch and transfer the proceeds into a charitable remainder trust with the 12 charities as beneficiaries so that Jack's entire estate would go to the charities and the Archers would be disinherited. At Anderson's request, Jack sign new wills and trust documents, all disinheriting the Archers and leaving Jack's entire estate to the charities. With Jack still alive, the Archers sued for a declaratory judgment that Jack had lacked the mental capacity to execute the wills and trust documents. The charities were defendants, and the parties settled with the Archers agreeing to give the charities Jack's coin collection and pay their attorney fees, which totaled $588,054.

After Jack's death, the Archers sued Anderson's estate, who had also died, for intentional interference with their inheritance. Anderson never profited personally from his efforts, and the Archers received all that Jack left them in his earlier will, but they claimed the $588,054 they gave the charities in settlement, plus $2,865,928 in attorney fees and litigation expenses they incurred avoiding Jack's post-1991 wills and trusts. The jury found in favor of the Archers, and the trial court rendered judgment for them for well over $2 million dollars. Anderson's estate appealed. The court of appeals reversed and rendered for Anderson's estate, holding that there was no tortious interference with inheritance claim in Texas.

The Texas Supreme Court affirmed the court of appeals's holding. The Court noted that there was a split in the courts of appeals regarding whether such a claim existed and noted its recent opinion in *Kinsel v. Lindsey,* 526 S.W.3d 411,

423 (Tex. 2017), where the Court held that the it and the Texas Legislature had never expressly recognized such a claim. The Court stated:

> A tort of intentional interference with inheritance is needed, it is argued, as a gap-filler when probate and other law do not provide an adequate remedy. Texas law thoroughly governs inheritance through probate and restitution and, as we noted in *Kinsel*, provides remedies for unfairness, such as a constructive trust. If these remedies are inadequate, it is because of legislative choice or inaction, and filling them is work better suited for further legislation than judicial adventurism.

Id. at *17-18. Ultimately, the Court held that a new tort is not needed in Texas even if other remedies would not be complete. The Court concluded: "The fundamental question is why tort law should provide a remedy in disregard of the limits of statutory probate law. We think here it should not. The tort of intentional interference with inheritance is not recognized in Texas. The decisions of the courts of appeals to the contrary are overruled." *Id*. at *25-26.

The majority of the court affirmed the court of appeals and held that there was never going to be a claim for tortious interference with inheritance, at least not until the Texas Legislature created such a cause of action. There were four justices of the nine member Court, however, that only agreed in the result in this case. They would hold that the Court should not have held that such a claim could never be recognized in Texas. The dissenting justices stated:

> The Court concludes that the Archers had an adequate remedy because they ultimately received their inheritance, albeit minus attorney's fees and a settlement with the charities. But rather than leaving open the issue of whether to recognize the cause of action as we did in *Kinsel*, the Court changes course and closes that door. It does so even though that door might, in some instances, provide the only avenue to relief for parties who suffer loss at the hands of actors who intentionally—not merely negligently—caused the loss.
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> The Court says that a judicially recognized gap-filler cause of action is unnecessary because statutory probate law provides adequate remedies. My overriding concern is that neither we nor the courts of appeals have considered a sufficient spectrum of factual circumstances for us to confidently conclude that foreclosing the cause of action will not leave parties without any avenue of relief against those whose actions intentionally and wrongfully divest an elderly person with diminished capacity of assets and thus interfere with that person's last-expressed true intentions about the disposition of his or her property.
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> The Court recognizes that a constructive trust can provide a remedy for unfairness. But the typical remedy of imposing a constructive trust resulting from a successful restitution action is not always available or may not provide an adequate remedy, as this Court has recognized. While we have stated that "[t]he specific instances in which equity impresses a constructive trust are numberless," we have also acknowledged that "the reach of a constructive trust is not unlimited." The imposition of a constructive trust generally requires the requesting party to establish (1) a breach of a special trust or fiduciary relationship or actual or constructive fraud, (2) unjust enrichment of the wrongdoer, and (3) an identifiable res that can be traced back to the original property. As applied in the inheritance context, the would-be beneficiary must trace the fraudulently obtained property to funds received by the wrongdoer. However, if the property has been dissipated or traceable funds have been depleted, there will be nothing remaining upon which to impose a constructive trust. A judgment obtained from a tort action, on the other hand, would provide the expectant beneficiary with at least potential redress.

Id. *42-44. In the end, the majority of the Court abdicated its role as a common-law court and placed all responsibility on the Legislature to create causes of action. The concurring and dissenting justices would have held that a tortious interference with inheritance rights claim may be permissible under the right circumstances (where a constructive trust claim is not a remedy because the ill-gotten gains have been dissipated) and would not have closed the door at this time.

So, at this point, plaintiffs will have to rely on other causes of action to vindicate their rights when the elderly and infirm are taken advantage of by bad people. It appears that the Court believes that a constructive trust is the principal claim in this situation. For example, in *Kinsel v. Lindsey,* 526 S.W.3d 411, 423 (Tex. 2017), family members and an attorney convinced an elderly woman, who did not have mental capacity, to execute new estate planning documents and sell a ranch. The ranch would have gone to other family members, but since the ranch was sold, its proceeds (cash) went to the bad individuals. The Court held that a constructive trust, based on a mental incapacity finding, provided an adequate remedy and there was no need to recognize the tort of tortious interference with inheritance rights. *Id*.

Regarding a constructive trust, the defendants had several arguments for why the trial court abused its discretion in creating a constructive trust in this case. *Id*. at *31-35. The Court disagreed and held that there does not have to be a breach of a fiduciary duty by the defendants owed to the plaintiffs. *Id*. There was no duty owed by the defendants to the plaintiff. *Id.* Citing to an earlier opinion, the Court held: “It is true that we recently recognized that a ‘breach of a special trust or fiduciary relationship or actual or constructive fraud’ is ‘generally’ necessary to support a constructive trust. But in that same case we reaffirmed our statement in *Pope* that ‘[t]he specific instances in which equity impresses a constructive trust

are numberless—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts.'" *Id.*

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

But, the issue remains, what if the ranch proceeds had been dissipated? How would the plaintiffs recover what was due to them?

The Court's opinion in *Archer* is good news for parties who regularly deal with the elderly and infirm. Trusted advisors have been at risk for tortious interference claims. Attorneys that draft wills and trusts, financial advisors, financial institutions, broker/dealers, insurance agents, accountants, and others who provide advice have been at risk for tortious interference claims. For example, the Archers sued Anderson, who was an attorney. The Kinsels sued Jackson Walker, who were attorneys, for tortious interference. The risk of such a claim is now gone. Of course, creative plaintiffs may think of other claims and theories to bring trusted advisors into litigation against the "bad guy" that influenced an elderly or infirm person. Claims such as conspiracy, aiding and abetting breach of fiduciary duty, and knowing participation in breach of fiduciary duty, may be raised under the correct circumstances.

B. Court Holds That Administrator Is Not Bound By Arbitration Clause In A Will

In *Ali v. Smith*, a successor administrator of an estate sued the former executor for breach of fiduciary duties arising from his management of the finances of the estate, converting assets of the estate, and using estate funds. No. 14-18-00003-CV, 2018 Tex. App. LEXIS 5129 (Tex. App.—Houston [14th Dist.] July 10, 2018, no pet. history). The defendant filed a motion to compel arbitration based on an arbitration provision contained in the will. The will provided:

> If a dispute arises between or among any of the beneficiaries of my estate, the beneficiaries of a trust created under my Will, the Executor of my estate, or the Trustee of a trust created hereunder, or any combination thereof, such dispute shall be resolved by submitting the dispute to binding arbitration. It is my desire that all disputes between such parties be resolved amicably and without the necessity of litigation.

Id. The trial court denied the motion, and the defendant appealed.

On appeal, the defendant argued that the trial court erred by not enforcing the will's arbitration clause because the arbitration clause was enforceable under the doctrine of direct-benefits estoppel as the plaintiff had (1) "enforced the will" and

brought claims against defendant "for failing to comply with the will" and (2) "received appointee fees." *Id*.

The court of appeals held that the party asserting a right to arbitration has to prove a binding arbitration agreement. "Typically, a party manifests its asset by signing an agreement." *Id*. The parties agreed that they were not signatories to the will. "But the Texas Supreme Court has 'found assent by nonsignatories to arbitration provisions when a party has obtained or is seeking substantial benefits under an agreement under the doctrine of direct benefits estoppel.'" *Id*. (citing *Rachal v. Reitz*, 403 S.W.3d 840, 843 (Tex. 2013)). The court described direct-benefits estoppel thusly:

> This doctrine precludes a plaintiff from seeking to hold a defendant liable based on the terms of an agreement that contains an arbitration provision while simultaneously asserting the provision lacks force because the plaintiff or defendant is a non-signatory. "When a claim depends on the contract's existence and cannot stand independently—that is, the alleged liability arises solely from the contract or must be determined by reference to it—equity prevents a person from avoiding the arbitration clause that was part of that agreement." On the other hand, "when the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law, direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract or would not have arisen but for the contract's existence." Additionally, a non-signatory may be compelled to arbitrate if they deliberately seek or obtain substantial benefits from the contract by a means other than the lawsuit itself. This analysis focuses on the non-signatory's "conduct during the performance of the contract." This doctrine will not apply if the benefits are either insubstantial or indirect.

Id. (internal citations omitted).

The court held that the plaintiff was not seeking any relief under the will, but was seeking relief under Texas statutes and common law and thus direct-benefits estoppel did not apply:

> Smith alleges in the petition that Ali (1) "Failed to responsibly handle the finances of the estate"; (2) "Converted assets of the Estate to his own personal use"; and (3) "Used estate funds in violation and dereliction of his fiduciary duties." Unlike the beneficiary in Rachal who alleged violations of the trust terms, Smith does not allege in the petition that Ali violated any terms of the will. Rather, Smith contends that her claims are based on common law and statutory provisions such as Sections 351.001 and 351.101 of the Estates Code: "The rights, powers, and duties of executors and administrators are governed by common law principles to the extent that those principles do not conflict with the statutes of this state. An executor or administrator of an estate shall take care of estate property as

> a prudent person would take of that person's own property . . . ." An executor such as Ali also has a statutory duty to deliver the property of the estate to a successor representative such as Smith. And, Smith alleges in the petition that this action was brought pursuant to Section 361.153, which provides that a successor representative is "entitled to any order or remedy that the court has the power to give to enforce the delivery of the estate property" to the successor representative.
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> The plain language of the statutes impose duties on both executors and administrators, but executors and administrators are not the same. An executor is named in a will, while an administrator with will annexed is not. The source of the executor's power to act is the will. The source of an administrator's power to act is the statutes and the court. Nothing in Smith's petition indicates that Ali's liability need be determined by reference to the will, even though he would not have been an executor "but for" the will. The substance of the claims arise from general duties imposed by statutes and the common law. Smith has not alleged that Ali violated any terms of the will, so this theory of direct-benefits estoppel is inapplicable.
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> Under the second avenue for proving direct-benefits estoppel, Ali contends that Smith has obtained a benefit from the will by collecting "appointee fees" from the estate. Smith contends that she was entitled to the fees by statute, not the will. We agree with Smith. The trial court's order authorizing Smith to collect appointee fees does not state that Smith collected a benefit under the will. And, the authorizing statute does not make a distinction based on the existence of a will. Because the trial court awarded fees and expenses to Smith without reference to the will, Ali has not shown that Smith deliberately sought or obtained substantial benefits from the will by a means other than the lawsuit.

Id. (internal citations omitted). The court of appeals affirmed the trial court's order denying the motion to compel arbitration.

There was a dissenting justice who would have reversed the order and compelled the case to arbitration. That justice would hold that both parties agreed to the arbitration clause by accepting an appointment to administer the estate:

> It is self-evident that neither Ali nor Smith physically signed Sultan's will at the time it was executed. However, it can hardly be said that they are strangers to the will. Their acceptance of appointments to serve as executors of the will (and all its provisions) constitutes the assent required

> to form an enforceable agreement to arbitrate under the Texas Arbitration Act. Texas jurisprudence regarding non-signatories to an arbitration agreement, therefore, should not be applied to this dispute. Because the majority has done so, I respectfully dissent.

Id. (Jamison, J. dissenting). The dissenting justice continued: "Smith agreed to her appointment, which was to carry out Sultan's clearly expressed intent in his will, including the intention for disputes to be arbitrated. As Smith's counsel stated in oral argument, '[The administrator] does not get to re-write the will.' Exactly." *Id*.

C. Don't Try It Yourself, Hire A Lawyer! Court Dismisses Pro Se Party's Appeal Due To Procedural Errors

In *In re Newman*, a woman appealed a trial court's order regarding admitting her husband's will and the conduct of her step-son as executor. No. 04-17-00209-CV, 2018 Tex. App. LEXIS 4249 (Tex. App.—San Antonio June 13, 2018, no pet. history). She made the mistake of representing herself in the appeal. The court of appeals dismissed her appeal due to her failure to follow appellate procedural rules:

> Leta was required to file a brief that "contain[s] a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." See Tex. R. App. P. 38.1(i); ERI Consulting Eng'rs, Inc. v. Swinnea, 318 S.W.3d 867, 880 (Tex. 2010). Construing her brief reasonably yet liberally, we nevertheless necessarily conclude that she did not.
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> We recognize that Leta is not an attorney and is representing herself in this appeal. However, except in some circumstances not applicable here, a pro se litigant must comply with the Texas Rules of Appellate Procedure. "There cannot be two sets of procedural rules, one for litigants with counsel and the other for litigants representing themselves. Litigants who represent themselves must comply with the applicable procedural rules, or else they would be given an unfair advantage over litigants represented by counsel." [Her] brief was required to identify the trial court's alleged errors and present a "clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." Because her brief does not provide appropriate citations to the record and does not provide clear and concise arguments to support the issues she attempts to raise, her brief does not present anything for appellate review.

Id.

D. Independent Executor Had Authority To Sell Estate Real Property Despite Nothing In Will Giving Him That Authority

In *Graff v. 2920 Park Grove Venture, Ltd.*, an executor was sued after selling estate real estate because the executor allegedly sold the property for less than fair market value. No. 05-16-01411-CV, 2018 Tex. App. LEXIS 4266 (Tex. App—Dallas June 13, 2018, no pet. history). Among other claims and arguments, the plaintiff alleged that the executor had no authority to sell the property because the will was silent with regards to the authority to sell real property, and therefore, the transaction should be rescinded.

The court of appeals held that the executor had that authority:

> It is undisputed that the will did not expressly state the executor had the authority to sell the estate's real property. However, under Texas law, independent executors like Hayden have authority to do any act which an ordinary executor may do under an order of the probate court without the need for an order. Where the will contains no restrictive terms upon his authority, an independent executor may incur reasonable expenses in the management of the estate, adjust and pay debts against the estate and for that purpose may sell property of the estate, although the will does not expressly grant that power.
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> The existence of debts against the estate is sufficient to authorize the independent executor to sell real property. Stanley does not dispute that the estate had certain outstanding debts at the time of the sale. In fact, the summary judgment record reveals at the time Hayden decided to sell the apartment complex, the estate had limited cash and several outstanding debts, including federal estate taxes of over $3 million, a mortgage on the apartment complex, executor's fees of about $800,000, as well as outstanding attorney's fees incurred in the administration of the estate. Accordingly, Hayden had authority to sell real property to satisfy the outstanding debts of the estate.
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> As for his contention with respect to probate court authorization, Stanley argues that because the record does not conclusively establish that Hayden needed to sell the property in order to satisfy the estate's outstanding debts, Park Grove has not shown the probate court would have authorized the sale. According to Stanley, because he put forth evidence of an alternative way to satisfy the outstanding debt without the sale, Park Grove was not entitled to summary judgment on this rescission claim for lack of authority. However, Stanley cites no cases to support his position. To the contrary, the cases upon which he relies suggest that all that is required to authorize a sale is to show the existence of such facts as would authorize the probate court to order a sale, such as outstanding estate debts.

Id. The court of appeals affirmed a summary judgment for the executor on this claim.

E. Court Holds That Lender Did Not Have Standing To Sue An Estate For A Deficiency After Electing That Its Claim Is A Preferred Debt And Lien

In *In re Estate of Chapman*, Peoples Bank (the Bank) conducted a non-judicial foreclosure sale of secured real estate owned by an estate and then sued the administrator of the estate in district court due to a deficiency remaining on the note after the foreclosure sale. No. 06-17-00051-CV, 2017 Tex. App. LEXIS 10478 (Tex. App.—Texarkana November 9, 2017, no pet.). The Bank obtained a default judgment against the estate and then filed an action in the probate court seeking to remove the administrator and to enforce its claim against certain funds that might be payable to the estate in a separate lawsuit. After a hearing, the probate court ordered that any funds payable to the estate be paid first to the Bank. The administrator appealed, arguing that the Bank did not have standing to intervene in the lawsuit and obtain an order directing payment to itself that should have gone to the estate.

The court of appeals noted that to have standing in probate cases, the Texas Estates Code "requires the person to qualify as an 'interested person,'" and an "interested person" is "an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered." *Id*. (citing Tex. Est. Code Ann. § 22.018(1)). The Bank asserted that it was an interested person because it was a creditor. The court of appeals described the process that a secured creditor must follow to assert a claim against an estate:

> Under the Texas Estates Code, if a secured creditor does not elect to have its claim treated as a matured secured claim within a prescribed time period, the creditor has effectively elected that the claim will be a preferred debt and lien against the property securing the indebtedness "and the claim may not be asserted against other assets of the estate." Explaining the effect of the predecessor Probate Code provisions, the Texas Supreme Court has explained that, when a secured creditor elects for its claim to be approved as a matured secured claim, upon any sale of the collateral, the creditor's claim has priority over any other claim, except for claims for funeral and last illness expenses and for the expenses of administering the estate. Further, if the proceeds from the sale of the collateral did not pay off its note, the matured secured claimant can "collect[] the deficiency as an unsecured seventh-class creditor." However, when the secured creditor elects to have its claim approved as a preferred debt and lien, the creditor has priority over all other claims on sale of the collateral, but the preferred debt and lien claimant "forfeit[s] any possibility of collecting a deficiency from the estate."

> In other words, the Texas Estates Code provides that, when a secured creditor elects to have its claim approved as a preferred debt and lien claim, if the independent executor defaults in the payment of the debt, the secured creditor may look only to its collateral for the satisfaction of any claim it may have against the estate. By foreclosing on the secured real estate, the Bank satisfied any debt or claim against the Chapman estate and did not have a deficiency claim as asserted in its notice of claim and motion to remove the Administrator. Therefore, the Bank's pleadings do not support its contention that it had a claim against the Chapman estate.
>
> By foreclosing on its collateral, the bank effectively satisfied its claim against the estate, and under Tex. Estates Code Ann. § 403.052 (2014), the bank was forbidden from asserting the claim against any other asset of the estate; by obtaining the deficiency judgment in the district court based on the amount remaining after foreclosure, and seeking to enforce that judgment in the probate court, the bank attempted to do indirectly what the Texas Estates Code forbid it from doing directly. Because neither the bank's pleadings nor the record showed that it was an interested person, it lacked standing to sue on a deficiency.

Id. (internal citations omitted). The court then held that the deficiency judgment was void:

> In this case, the Bank elected to have its claim allowed as a preferred debt and lien against its secured real property, thereby electing to look only to its collateral for the satisfaction of its claim. By foreclosing on its collateral, the Bank effectively satisfied its claim against the estate. Under the Texas Estates Code, the Bank was forbidden from asserting the claim against any other asset of the estate. By obtaining the Deficiency Judgment in the District Court based on the amount remaining after foreclosure, and seeking to enforce that judgment in the Probate Court, the Bank attempted to do indirectly what the Estates Code forbids it from doing directly. Under these circumstances, the Deficiency Judgment is void and does not constitute a claim against the estate.

Id. (internal citations omitted).

F. Texas Supreme Court Holds That Testator Devised Property As A Life Estate

In *Knopf v. Gray*, the will disposed of the testator's entire estate, specifically including a tract of land. No. 17-0262, 2018 Tex. LEXIS 249 (Tex. March 23, 2018). The provision through which the testator devised the land stated: "NOW BOBBY I leave the rest to you, everything, certificates of deposit, land, cattle and machinery, Understand the land is not to be sold but passed on down to your children, ANNETTE KNOPF, ALLISON KILWAY, AND STANLEY GRAY. TAKE CARE OF IT AND TRY TO BE HAPPY." *Id*. The testator's son attempted to then

transfer the land to a third party, and his children sued for a declaration that the son did not have the right to do so because he only had a life estate. The parties filed competing summary judgment motions, and the trial court and court of appeals both ruled for the son.

The Texas Supreme Court reversed both lower courts. The Court first reviewed the standards for interpreting wills:

> A court must construe a will as a matter of law if it has a clear meaning. However, when a will's meaning is ambiguous, its interpretation becomes a fact issue for which summary judgment is inappropriate. A will is ambiguous when it is subject to more than one reasonable interpretation or its meaning is simply uncertain. Whether a will is ambiguous is a question of law for the court. The cardinal rule of will construction is to ascertain the testator's intent and to enforce that intent to the extent allowed by law. We look to the instrument's language, considering its provisions as a whole and attempting to harmonize them so as to give effect to the will's overall intent. We interpret the words in a will as a layperson would use them absent evidence that the testator received legal assistance in drafting the will or was otherwise familiar with technical meanings.

Id. The issue in the case is whether the land was devised in fee simple or whether a life estate was created. The Court stated that "An estate in land that is conveyed or devised is a fee simple unless the estate is limited by express words, but the law does not require any specific words or formalities to create a life estate." *Id*. The words used in the will must only evidence intent to create what lawyers know as a life estate. "[A] will creates a life estate 'where the language of the instrument manifests an intention on the part of the grantor or testator to pass to a grantee or devisee a right to possess, use, or enjoy property during the period of the grantee's life.'" *Id*.

The Court held that the provision, read as a whole, merely created a life estate:

> We need only read the provision as a whole to see a layperson's clearly expressed intent to create what the law calls a life estate. Reading all three clauses together, Allen grants the land to Bobby subject to the limitations that he not sell it, that he take care of it, and that it be passed down to his children. This represents the essence of a life estate; a life tenant's interest in the property is limited by the general requirement that he preserve the remainder interest unless otherwise authorized in the will. Allen's words in the contested provision unambiguously refer to elements of a life estate and designate her grandchildren, the petitioners, as the remaindermen. The language thus clearly demonstrates that the phrase "passed on down," as used here, encompasses a transfer upon Bobby's death.

Id. Therefore, the Court reversed and rendered for the son's children.

G. Court Holds That Laches Did Not Bar A Will Contest

In *In re Estate of Perez-Muzza*, two days before the statute of limitations period ended, a contestant filed a will contest seeking to have a court set aside an order admitting a will to probate. No. 04-16-00755-CV, 2018 Tex. App. LEXIS 1859 (Tex. App.—San Antonio March 14, 2018, no pet.). Will contests must be filed within two years of the trial court's order admitting the will to probate. Id. (citing Tex. Est. Code Ann. § 256.204(a)). The trial court entered an order granting the contestant's traditional motion for summary judgment and setting aside its previous order admitting the will to probate. On appeal, the original will's proponent contended that there was a genuine issue of material fact regarding his laches defense to the contestant's motion.

The court of appeals affirmed the trial court's order setting aside the order admitting the will to probate. Regarding the laches defense, the court stated:

> The affirmative defense of laches precludes a plaintiff from asserting a legal or equitable right after an unreasonable delay against a defendant who has changed his position in good faith and to his detriment because of the delay. As a general rule, laches is inappropriate when a statute of limitations applies to the cause of action. To prevail on a laches defense where the cause of action was filed within the applicable statute of limitations, the defendant must additionally show "extraordinary circumstances" that would work a "grave injustice."

Id. The court concluded that because the contestant filed her suit two days before the statute of limitations expired, the proponent was required to show the circumstances of this case were so "extraordinary" that allowing her to prosecute her will contest would work a "grave injustice."

To support his laches defense, the proponent filed an affidavit wherein he attested that although he interacted with the contestant during the administration of the estate as independent executor, neither she nor anyone else in the family expressed concerns regarding the will's validity. He further stated that he relied on the validity of the will by paying estate debts and taxes and distributing estate assets. To support his argument that the case presented extraordinary circumstances that would work a grave injustice, the proponent stated: "I no longer have much of the property that I inherited under the Will and that remained after paying estate debts and expenses as specifically ordered to do by this Court. Setting aside the probate of the Will at this late date would result in a grave injustice to me and any other person who acquired title and ownership of estate property without knowledge that the Will might be invalid, such as the banks who foreclosed on the certificates of deposit and the Internal Revenue Service." *Id*.

The court noted that the proponent was the sole beneficiary under the probated will. The court held that although the proponent argued that he acted in good faith to his detriment because of the delay in filing the will contest, he did not present evidence that the delay was unreasonable. The court stated:

> Rolando merely asserts he followed the procedures required for closing the estate and argues that the independent administration of the estate was terminated prior to suit being filed. Other than mentioning the IRS and the banks that foreclosed on the estate's certificates of deposit, Rolando does not specify how setting aside the trial court's previous order probating the will would result in a grave injustice to him or others, besides the IRS and banks. Additionally, Rolando does not specify who acquired title and ownership of the disposed-of property or under what circumstances. Further, Rolando does not specify when he disposed of estate property he inherited — before or after Veronica filed suit to contest the validity of the will. Even taking as true all evidence favorable to Rolando and resolving any doubts in his favor, given the scant evidence presented by Rolando, we cannot say the circumstances of this case are so extraordinary that allowing Veronica to prosecute her will contest would work a grave injustice.

Id.

The court held that the proponent had the burden to establish a fact issue on every element of his affirmative defense, and that he did not show that he changed his position in good faith, and to his detriment, due to the delay in filing the will contest. Also, it held that he failed to show the case presented extraordinary circumstances that would work a grave injustice. Therefore, the court held that the trial court did not err by granting the contestant's motion for summary judgment and setting aside its previous order admitting the will to probate.

H. Court Held That Will Contestant Expressly Waived Right To Appeal From Bench Trial

In *Estate of Crawford*, after the first day of a will contest, the parties' attorneys announced on the record that they agreed that neither party would assert a claim for attorney's fees via a good-faith finding and that they would not appeal the trial court's judgment. No. 14-17-00703-CV, 2017 Tex. App. LEXIS 10554 (Tex. App.—Houston 14th Dist.] November 9, 2017, pet. denied). Later, the trial court signed a judgment, found the will submitted was valid and enforceable, and denied the contest. The judgment noted that:

> Pursuant to the agreement of the parties read into the Court record on May 22, 2017, Defendant/Will Contestant Jimmy Crawford is prohibited

> from appealing this Judgment regarding the Court's finding of an enforceable Will and is further prohibited from asserting any claims or actions against Judy Taylor, Lauren Crawford, Adam Crawford and/or Heath Crawford that arise or might arise from the filing and probating of the Will by the Executrix, Judy Taylor.

Id. Notwithstanding this statement, the contestant filed a notice of appeal and argued that the agreement to not appeal was not enforceable because it was not in writing and he fired his attorney. The court of appeals disagreed with the contestant/appellant and dismissed the appeal, stating:

> An attorney may execute an enforceable agreement on behalf of the attorney's client. An attorney's authority to do so flows from the agency relationship that exists between the attorney and the client; the attorney's acts and omissions within the scope of the attorney's employment are regarded as the client's acts. It is presumed that the attorney has actual authority conferred by the client to act on the client's behalf, and that the attorney is acting in accordance with the client's wishes. This presumption may be rebutted by affirmative proof that the client did not authorize the attorney to enter into an agreement, such as an affidavit from the client to that effect. "Every reasonable presumption is to be indulged in favor of a settlement made by an attorney duly employed, and especially so after a court has recognized such an agreement and entered a solemn judgment on it." Appellant contends that because he fired his attorney the day after the agreement was announced in open court, the agreement is unenforceable. The record does not contain affirmative proof that appellant did not authorize his attorney to enter into the agreement. We conclude that these circumstances do not overcome the presumption that appellant's attorney acted with actual authority in making the agreement read into the record in open court on appellant's behalf. By the terms of the agreement, appellant agreed not to appeal the court's judgment. The right to appellate review may be waived by agreement. Because appellant expressly agreed not to appeal from the judgment in this appeal, we will enforce the terms of his agreement.

Id.

I. Court Held That A Testator Was Partially Intestate And Did Not Leave His Real Property To His Niece Under His Will

In *In re Estate of Neal*, Larry Ronald Neal executed a will in which he bequeathed his personal property to his niece, Valorie Jean White, and omitted a devise to his daughter. No. 02-16-00381-CV, 2018 Tex. App. LEXIS 120 (Tex. App.—Fort Worth January 4, 2018, no pet.). The will stated: "I do give and bequeath to my niece, Valorie Jean (Neal) White, all my personal effects and all my tangible personal property, including automobiles, hangars, aircraft, fly-drive vehicles, patents, companies, and all other things owned by me at the time of my death,

including cash on hand in bank accounts in my own name, or companies[‘] names, or securities, or other intangibles.” *Id*. The determinative question in the case was whether Larry also devised his real property to Valorie. The trial court found that he did, awarded Larry’s real property to Valorie, and determined that no part of Larry’s estate passed by intestacy. Larry’s daughter appealed, claiming that Larry died partially intestate and that she should inherit his real property.

The court of appeals set forth the rules for construing wills as follows:

> The cardinal rule for construing a will is that the testator’s intent must be ascertained by looking at the language and provisions of the instrument as a whole, as set forth within its four corners. The question is not what the testator intended to write, but the meaning of the words he actually used. Terms used are to be given their plain, ordinary, and generally accepted meanings unless the instrument itself shows them to have been used in a technical or different sense. If possible, all parts of the will must be harmonized, and every sentence, clause, and word must be considered in ascertaining the testator’s intent. We must presume that the testator placed nothing meaningless or superfluous in the instrument. Where practicable, a latter clause in a will must be deemed to affirm, not to contradict, an earlier clause in the same will. Whether a will is ambiguous is a question of law for the court. A term is not ambiguous merely because of a simple lack of clarity or because the parties proffer different interpretations of a term. Rather, a will is ambiguous only when the application of established rules of construction leave its terms susceptible to more than one reasonable meaning. If the court can give a certain or definite legal meaning or interpretation to the words used, the will is unambiguous, and the court should construe it as a matter of law.

Id. (quoting *Steger v. Muenster Drilling Co*., 134 S.W.3d 359, 372-73 (Tex. App.—Fort Worth 2003, pet. denied)). The court went on to state that when construing wills that the court “cannot divorce text from context”:

> The meaning of words read in isolation is frequently contrary to the meaning of words read contextually in light of what surrounds them. Given the enormous power of context to transform the meaning of language, courts should resist rulings anchored in hyper-technical readings of isolated words or phrases. The import of language, plain or not, must be drawn from the surrounding context, particularly when construing everyday words and phrases that are inordinately context-sensitive.

Id. (quoting *In re Estate of Tyner,* 292 S.W.3d 179, 182 (Tex. App.—Tyler 2009, no pet.)). “When the meaning of language used in a will has been settled by usage and sanctioned by judicial decisions, it is presumed to be used in the sense that the law has given to it, and should be so construed, unless the context of the will shows a clear intention to the contrary.” *Id*.

The court of appeals held that Larry first gave Valorie "all [his] personal effects," which describes a subset of personal property. He then gave Valorie "all [his] tangible personal property, including automobiles, hangars, aircraft, fly-drive vehicles, patents, [and] companies," which did not indicate an intent to devise real property. He then gave Valorie "all other things owned by [him] at the time of [his] death, including cash on hand in bank accounts in [his] own name, or companies[‘] names, or securities, or other intangibles." *Id*. The administrator argued that the "all other things" phrase devised Larry's real property to Valorie. The court of appeals disagreed, stating:

> Larry expressly linked "all other things" to bank account balances, which are intangible personal property; to securities, which are intangible personal property; and to "other intangibles," a reference to the intangible personal property he had just described. Thus, we hold that without ambiguity, when read in context, the plain meaning of "all other things owned by me at the time of my death" is that Larry gave Valorie, without limitation, what remained of his personal property that was not encompassed in personal effects or tangible personal property, namely, his intangible personal property. Considering all three phrases together, nothing within Article II, the only provision within the will that purports to dispose of Larry's property, expressly or implicitly refers to his real property. The natural, plain meaning of Article II is that the article applies to tangible and intangible personal property, not real property.

Id. The court stated that it would not apply the strong presumption against partial intestacy in the presence of an executed will: "The presumption 'must yield,' however, when the 'the testator, through design or otherwise, has failed to dispose of his entire estate.'" *Id*.

Finally, the executor argued that the language that allows him to dispose of and convey "any property, real or personal," in distributing the estate clearly indicates Larry intended real property to pass" under the will. *Id*. The court of appeals disagreed because the law permits an independent executor to exercise control over real property even when that property passes through intestacy, and Larry's reference to "real or personal" property confirms that he knew the difference between those two types of property. The court reversed the trial court's judgment and held that the real property passed intestate to his daughter and not via Larry's will to his niece.

J. Court Held That Statutory Probate Court Had Subject Matter Jurisdiction Over Trust Dispute

In *Barcroft v. Walton,* a statutory probate court entered sanctions, struck a defendant's pleadings, and entered a default judgment against a defendant in a trust case. No. 02-16-00110-CV, 2017 Tex. App. LEXIS 8541 (Tex. App.—Fort Worth September 7, 2017, no pet. history). The defendant appealed on multiple

grounds, and the court of appeals first addressed the defendant's jurisdictional complaints.

The court of appeals addressed its prior precedent. In *In re Guardianship of Gibbs (Gibbs I),* 253 S.W.3d 866, 869, 877 (Tex. App.—Fort Worth 2008, pet. dism'd), the court concluded that the probate court lacked jurisdiction over tort claims raised in a trust case. In determining that the probate court lacked subject matter jurisdiction over claims for restitution and breach of fiduciary duty in *Gibbs I*, the court reviewed the then-applicable statutes and noted that a statutory probate court's jurisdiction over actions involving trusts is concurrent with that of a district court. The court reviewed the list of ten items that former Texas Property Code section 115.001(a) set out for actions "concerning trusts" over which a district court had jurisdiction. The court determined that the plaintiff's causes of action were not enumerated in former Section 115.001(a) and did not fall within its scope. In *Gibbs I*, the court stated that the mere fact that trust funds were implicated by a claim did not transform the claim into one "concerning" or "involving" trusts, and because no law at that time gave the trial court subject matter jurisdiction over tort claims, the trial court lacked subject matter jurisdiction over those claims.

The court in *Barcroft* noted that the Texas Legislature amended Texas Property Code section 115.001 in 2007 and added subsection (a-1) and some additional language to subsection (a). The new statute provides that "a district court has original and exclusive jurisdiction over all proceedings by or against a trustee and …" the other items mentioned in the statute. Tex. Prop. Code Ann. § 115.001(a-1). Further, subsection (a-1) provides: "The list of proceedings described by Subsection (a) over which a district court has exclusive and original jurisdiction is not exhaustive. A district court has exclusive and original jurisdiction over a proceeding by or against a trustee or a proceeding concerning a trust under Subsection (a) whether or not the proceeding is listed in Subsection (a)." Id. The court held that under the new statutory terms, that the trial court had jurisdiction:

> This case was brought in the probate court to remove a trustee but also to obtain damages for tort claims—fraud and other misdeeds—involving the trust. Because the legislature has expressly provided that the list of proceedings in subsection 115.001(a) is not exhaustive and that a district court has jurisdiction over a proceeding by or against a trustee or a proceeding concerning a trust under subsection (a) "whether or not the proceeding is listed" therein, and because "the district court's jurisdiction over actions involving trusts determines the extent of a statutory probate court's jurisdiction over such actions," Gibbs I, 253 S.W.3d at 871, we conclude that the trial court had subject matter jurisdiction to hear the case.

Id.

The court then overruled the appellant's other procedural complaints because they were waived by the appellant failing to comply with rules of civil and appellate procedure. In one complaint, the appellant, who was pro se, complained that the trial court was biased against pro se parties and always ruled against them. The court of appeals noted: "Barcroft did not support this claim in his motion with any sort of documentation and he ignored entirely the more obvious reason pro se litigants might tend to lose, i.e., their lack of legal education or training, which tends to lead them, as here, to critical mistakes of form and substance." *Id*. at n. 11.

K. Court Reverses Trial Court's Order Denying An Application To Probate A Will As A Muniment of Title

In *Ramirez v. Galvan*, a probate court denied the application for probate of a will as a muniment of title where the application was filed more than four years after the testator's death. No. 03-17-00101-CV, 2018 Tex. App. LEXIS 222 (Tex. App.—Austin January 10, 2018, no pet. history). The applicant appealed. The court of appeals stated:

> Pursuant to section 256.003(a) of the Texas Estates Code, a will must be submitted for probate within four years of the testator's death. After expiration of the four-year period, a will may be probated as a muniment of title so long as the proponent is not in "default." As used in section 256.003(a), "default" means failure to probate a will because of the absence of reasonable diligence by the party offering the instrument. The burden is on the party applying for the probate to demonstrate that he was not in default. Whether the party applying for probate is in default is usually a question of fact. Mere ignorance of the law does not excuse failure to file probate proceedings within the four-year period. Texas case law is quite liberal in permitting a will to be offered as a muniment of title after the four-year limitation period has expired.

Id. The court of appeals held that the trial court's finding that the applicant was in default was against the great weight and preponderance of the evidence. The court held that before the decedent's death, the applicant started paying her debts. Further, the court noted that:

> Right away, he distributed her property according to her wishes, as expressed in the will and in the non-testamentary document. On the belief that the intent of the will had been accomplished, he continued to live in the house believing that he now was the sole owner." Ulises testified that he thought the way Olivia "willed her interest" in the house was sufficient. As soon as he learned of the title problem, he consulted counsel as advised by the title company, and the application for probate was promptly filed. It appears that Ulises did not offer the will for probate, not through any lack of diligence, but because he did not realize any further act was necessary. This Court has considered and weighed all the evidence, some

> of which has been set out in this opinion, and has concluded that the probate court's finding is so against the great weight and preponderance of the evidence so as to be clearly wrong and unjust.

Id.

L. Court Affirms Judgment For Estate Representative Due To A Statute-Of-Limitations Tolling Statute

In *Kaptchinskie v. Estate of Kirchner*, the purchasers of property sued an estate to establish that the estate's claim under a note was extinguished by the statute of limitations. No. 14-15-01080-CV, 2017 Tex. App. LEXIS 7012 (Tex. App.—Houston [14th Dist.] July 27, 2017, no pet.). The independent administratrix of the estate filed a counterclaim for the amounts due and owing. The trial court ruled for the independent administratrix, and the purchasers appealed. The trial court made no express findings of fact about the limitations defense, and the appellate court had to presume that the trial court made all findings necessary to support the judgment. The court of appeals held that the general rule is that contract claims are barred four years after accrual, but noted that there are exceptions. "Upon the death of a person to whom the cause of action belongs, the limitations period is tolled for the earlier of (a) one year, or (b) the date on which the estate's executor or administrator is qualified." *Id*. (citing Tex. Civ. Prac. & Rem. Code § 16.062). Due to when the independent administratrix was appointed, the limitations period was tolled for one year. Due to this, the court held that she could assert a breach-of-contract claim for up to five years after the claim accrued. The court concluded: "the Kaptchinskies' next payment was due on August 1, 2009. That payment was never made. Huffman asserted her breach-of-contract claim on July 31, 2014, and at trial, she sought recovery only of amounts due on or after August 1, 2009; thus, the entirety of her claim was filed within the applicable five-year limitations period." *Id*.

M. Court Affirms Summary Judgment In Will Contest Where There Was No Evidence Of Undue Influence

In *Estate of Frye*, parties filed an application to set aside an order probating a will due to an allegation of undue influence. No. 07-16-00398-CV, 2017 Tex. App. LEXIS 6992 (Tex. App.—Amarillo July 26, 2017, no pet. history). The decedent left bequests to her daughters, Judy and Patsy, in her will, but left nothing to her grandchildren, Jackson and Frye, despite her purported comments that she would do so. The grandchildren alleged that this omission was due to the efforts of Judy and Patsy to induce the decedent to change her will when her husband died. The aunts filed a no-evidence motion for summary judgment, which the trial court granted, and the grandchildren appealed.

The court of appeals held that a claim of undue influence contains several elements: 1) the existence and exertion of an influence upon the testator, 2) that subverted or overpowered his mind at the time the will was executed, and 3) so that the testator executed an instrument he would not otherwise have executed but for such influence. The court noted that influence is not "undue" unless it destroys the testator's free agency resulting in the testament reflecting not the desires of the decedent but rather those of the person exerting the influence. "In other words, requesting or entreating another to execute a favorable dispositive instrument fails to evince undue influence; rather, the entreaties must be so excessive as to subvert the will of the maker." *Id*. The court held that a will contestant must not only provide evidence that an undue influence existed, they must also offer evidence of the testatrix's state of mind at the time the will was executed that would tend to show her free agency was overcome by such influence. The court affirmed the no-evidence summary judgment, holding that there was no evidence to support a finding of undue influence:

> It is the legal truism that a person of sound mind has the right to dispose of his property as he wishes. One may be old, may be suffering from maladies, may be susceptible to influence, and may select an unordinary way to dispose of his property, but the disposition may still be emanating from her own will or choice. Simply put, the evidence of record fails to create a genuine issue of fact establishing the exertion of any influence on the part of Judy or Patsy with regard to the identity of those who were to be beneficiaries of Margaret's estate. There is evidence that Judy and Patsy may have informed their mother of her need to change the will. So too is there evidence that Judy and or Patsy may have taken their mother to a lawyer's office within three weeks of Eugene's death. Frye stated in his deposition that Judy and Patsy informed Margaret that this was needed because the person designated as executor of her will (her son Gerald) had died and that they wanted to be co-executors. Yet, we are cited to nothing indicating what transpired in the lawyer's office. Nor were we cited to evidence indicating that either Judy or Patsy was present when Margaret spoke with the lawyer or what the lawyer and Margaret discussed. It is clear that neither Judy nor Patsy were present when Margaret executed the new will.… It may be that Patsy informed Jackson, years after the will's execution, that "we cut ya'll out"... Yet, "we cut ya'll out" indicates a result. It illustrates neither the presence of any communications on the matter between Judy, Patsy, and Margaret or their tenor. And though the result may have been agreeable to Judy and Patsy, there is no evidence that they asked, told, or demanded that from Margaret. At most, the evidence indicates opportunity to influence. Opportunity alone, though, is not enough to establish undue influence. Nor is it enough to create genuine issues of material fact on the matter.

Id. The court then held that the grandchildren's claim for tortious interference with inheritance rights failed because there was no such claim in Texas: "this court does not recognize the cause of action for tortious interference with inheritance

rights… Until either the Supreme Court or the legislature recognizes it, we will not for the reasons expressed in our *Kinsel* opinion. Thus, the trial court did not err in granting summary judgment against them on that claim." *Id*.

N. Court Held That Estate Representative Was Entitled To Discover Documents To Establish A Claim

In *In re Cokinos, Boisien & Young*, a representative of an estate of a deceased attorney sought documents from a lawfirm related to an alleged agreement to share fees. No. 05-16-01331-CV, 2017 Tex. App. LEXIS 6911 (Tex. App.—Dallas July 25, 2017, original proceeding). The trial court ordered that the estate representative be given access to correspondence to which the deceased lawyer was a party where that correspondence may be relevant to a fee-sharing dispute between the estate and a law firm. The law firm filed a petition for writ of mandamus, challenging the order and arguing that the trial court allegedly abused its discretion by compelling production of the e-mails because they were privileged attorney-client communications and/or subject to the work product doctrine.

The court of appeals held that an executor is a personal representative who stands in the decedent's shoes. The court held that the estate is entitled to copies of the decedent's e-mail correspondence just as the decedent would be entitled to the e-mails if he were alive. "Indeed, where it is reasonable to do so, the estate representative is to exercise ordinary diligence to collect all claims and debts due the estate. The Estate, thus, had a duty to seek out these communications to determine if fees were owed to the Estate and litigate if necessary to recover those fees." *Id*. Regarding the claim of privilege, the court held that an attorney is permitted to retain a copy of his file and that a privilege would only protect discovery by third-parties, not discovery by a party to the communication. *Id*. The court denied the petition for writ of mandamus and allowed the discovery order to proceed.

O. Court Holds That Wife Devised Property In Fee Simple Determinable To Her Husband With An Executory Interest To Her Son In Fee Simple Absolute; So, After Husband Died, If He Still Owned The Property, It Went To The Son

In *In re Estate of Hernandez*, the issue in the case was whether clauses in a will conveyed a life estate to the decedent's husband. No. 05-16-01350-CV, 2018 Tex. App. LEXIS 755 (Tex. App.—Dallas January 24, 2018, no pet. history). The will stated:

> The rest and residue of my estate, both real, personal and mixed property of every kind and character whatsoever I may own or have any interest in at my death, is hereby bequeathed to my husband, ARTURO HERNANDEZ, to do with as he desires. Upon the death of my husband, ARTURO HERNANDEZ, I give, devise and bequeath any of the rest and

residue of my estate both real, personal and mixed property of every kind whatsoever that he may own or have any interest in to my son, ERIC H. FARLEY.

Id. The court of appeals noted as follows regarding fee simple absolute:

> "An estate in land that is conveyed or devised is a fee simple unless the estate is limited by express words or unless a lesser estate is conveyed or devised by construction or operation of law." Generally, the greatest estate will be conferred on a devisee that the terms of the devise permit. "[W]hen an estate is given in one part of a will, in clear and decisive terms, it cannot be cut down or taken away by any subsequent words that are not equally clear and decisive." A lesser estate must be created by express words or operation of law. Otherwise, a devise is read to be in fee simple absolute. A "fee simple absolute" is an estate over which the owner has unlimited power of disposition in perpetuity without condition or limitation. A fee simple absolute is an estate in fee simple that is not subject to a special limitation, a condition subsequent, or an executory limitation. A fee simple estate subject to an "executory limitation" is called a "determinable fee simple estate" or a "fee simple determinable." An "executory limitation" is an event which, if it occurs, automatically divests one of the devised property. A "fee simple determinable" is an estate that automatically expires on the happening of a named event. This is a fee simple interest in every respect, except that it passes to another if the contingency occurs. Until the occurrence of the contingency, the recipient has an "executory interest." While no specific words are needed to create a fee simple determinable, certain words generally indicate an intent to create one. The terms "while," "during," "until," or "so long as" are examples of words used to establish an intent to create a fee simple determinable. Typical language establishing a fee simple determinable includes: "When I die, my property goes to A (in fee), and when A dies, any property remaining goes to B." The first taker of a fee simple determinable has complete power of control and disposition of the property during his lifetime. In a fee simple determinable, the first taker is entitled to the proceeds of the property disposed of by him. The first taker may devise the proceeds, and the executory interest holder has no right to trace and recover those proceeds.

Id. (internal citations omitted). The court then described life estates:

> A will creates a "life estate" if the language of the will manifests an intention on the testator's part to pass to the first taker a right to possess, use, or enjoy the property during his life. A testator may give the power of disposition with the life estate. No particular language is required to make a life estate. A "life estate" is created by words showing intent to give the right to possess, use, and enjoy the property during life. There can be no life estate in property, real or personal, without a remainder. Dispositions

> of life estate property by the life tenant must be within the authority of the will. If the life tenant is given the power to sell and reinvest any life tenancy property, the life tenant is subject, with respect to the sale and reinvestment of the property, to all of the fiduciary duties of a trustee imposed by the Texas Trust Code or the common law. Because a life estate terminates upon the death of the life tenant, the power to dispose of the property does not empower a life tenant to devise any of the property that remains at his death. Proceeds of the sale made by the life tenant, undisposed of at the time of his death, as well as the unsold part of the very property devised, pass to the remainderman. If a life estate holder has the right of full disposition and the right to use the proceeds without accounting to anyone, then the remainderman is entitled to trace the proceeds of the sale.

Id. (internal citations omitted).

Under this precedent, the court analyzed whether the spouse had a life estate or fee simple determinable in the property:

> The part of the residuary clause devising the estate to Arturo Hernandez is not limited to his right to possess, use or enjoy the property during his life. Instead, the will states that Arturo Hernandez has the right "to do with [the property] as he desires." Although there is no specific formula of words required to create a life estate, Patricia Hernandez's will must have clearly and unequivocally provided for a life estate to overcome the presumption that she intended to give Arturo Hernandez an estate greater than a life estate. Here, the clause does not explicitly grant Arturo Hernandez the property for his life using a phrase such as "during his life" or "as long as he lives." Further, the will states the "rest and residue" of the estate passes to Eric Farley. In accordance with the applicable rules of interpretation, we conclude the language in Paragraph IV of the will unambiguously, as a matter of law, conveyed the property of Patricia Hernandez to Arturo Hernandez in fee simple determinable. The first sentence in Paragraph IV, "my estate . . . is hereby [devised] to my husband, ARTURO HERNANDEZ, to do with as he desires," definitively conveys a fee simple in Arturo Hernandez. However, the second sentence in Paragraph IV limits that fee simple interest by expressly stating, "[u]pon the death of my husband, ARTURO HERNANDEZ, I give, devise and bequeath any of the rest and residue of my estate . . . that he may own or have any interest in to my son, ERIC H. FARLEY," devised to Eric Farley whatever interest Arturo Hernandez, upon his death, still held in the property. The occurrence of the "executory limitation," i.e., Arturo Hernandez's death, automatically divested his estate of the remaining devised property operating as a fee simple determinable causing that property to pass to Eric Farley in fee simple absolute. Our conclusion is consistent with standard words and phrases that indicate an intent to create a fee simple determinable.

Id. The court held that the will conveyed the property in fee simple determinable to Arturo Hernandez with an executory interest to Eric Farley in fee simple absolute.

P. Court Held That Estate Beneficiary Did Not Have Standing To Assert Forfeiture Or Breach Claim Against Executrix's Attorneys, That An Executrix Had No Authority To Pay Her Attorney's Fees In The Interim In Defending A Removal Action, And That The Trial Court Erred In Refusing A Motion To Compel Distribution Of The Estate

In *In re Nunu*, an estate beneficiary sued the executrix to have her removed due to alleged breaches of fiduciary duty and also sought to have the court refuse to pay her attorneys in representing her in a removal action and/or sought to have those fees forfeited. No. 14-16-00394-CV, 2017 Tex. App. LEXIS 10306 (Tex. App.—Houston [14th Dist.] November 2, 2017, pet. denied). Texas Estates Code section 404.0037 provides: "[a]n independent executor who defends an action for the independent executor's removal in good faith, whether successful or not, shall be allowed out of the estate the independent executor's necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings." *Id*. (citing Tex. Est. Code Ann. § 404.0037(a)). The executrix used estate funds to pay at least some of the attorneys' fees incurred in her defense in this suit. The beneficiary challenged the payment of the attorneys' fees by (a) arguing that the attorneys were professionally negligent and breached fiduciary duties they owed to the executrix and to the estate, or perhaps to the beneficiaries, and that as a result of this misconduct, their fees should be forfeited; (b) seeking declaratory judgment that the fees should be forfeit or disallowed; and (c) arguing that the requirements of section 404.0037 for payment of attorneys' fees from estate have not been met.

The court of appeals first held that the beneficiary had no standing to assert a fee forfeiture claim against the attorneys in his personal capacity because he had no attorney/client relationship with the attorneys. The court also held that the beneficiary had no standing to assert a breach claim against the executrix's attorneys. The fact that the attorneys owed fiduciary duties to the executrix and that the executrix owed fiduciary duties to the beneficiary, did not mean that the attorneys owed duties to the beneficiaries. The court held: "These are separate relationships, however, and the distinction between them cannot be ignored." *Id*.

The court then addressed the declaratory judgment claims. Texas Civil Practice and Remedies Code Section 37.005(3) allows declaratory relief "to determine any question arising in the administration" of an estate. The court, however, held that "although section 37.005(3) does not limit 'the types of questions' that a litigant may ask, it does not remove the limitations on the questions that the trial court can answer." *Id*. "A declaratory judgment requires a justiciable controversy as to the rights and status of parties actually before the court for adjudication, and the declaration sought must actually resolve the controversy." *Id*. The court

held that a declaration that the fees "should be" forfeited would not actually result in fee forfeiture because Section 37.006(a) provides that when declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties and the attorneys were not parties. Further, even though Texas Civil Practice and Remedies Code Section 37.005(4) allows declaratory relief "to determine rights or legal relations of an independent executor . . . regarding fiduciary fees and the settling of accounts," the court held that this provision dealt with the compensation of the executrix, not her attorneys.

The court next turned to Texas Estate's Code Section 404.0037, which states that if an independent executor defends a removal action in good faith that the reasonable and necessary attorney's fees for the defense "shall be allowed out of the estate." *Id*. (citing Tex. Est. Code Ann. § 404.037(a)). The court noted that good faith is an issue on which the independent executor bears the burden of proof. The court held:

> "[A]n executor acts in good faith when he or she subjectively believes his or her defense is viable, if that belief is reasonable in light of existing law." Good faith is established as a matter of law if reasonable minds could not differ in concluding from the undisputed facts that the person in question acted in good faith. Because it is an incontrovertible fact that Paul nonsuited his removal action against Nancy with prejudice, whether Nancy defended the action in good faith is a question of law. As a matter of law, "a dismissal or nonsuit with prejudice is 'tantamount to a judgment on the merits.'" Moreover, a party who voluntarily nonsuits his claims generally cannot obtain reversal of the order on appeal. And where, as here, the party seeking the executor's removal voluntarily and unilaterally nonsuits all such claims with prejudice on the third day of a jury trial, reasonable minds could not differ in concluding that the executor's "efforts cause[d] [her] opponents to yield the playing the field." Thus, when Paul irreversibly conceded his claim for Nancy's removal, the viability and reasonableness of Nancy's defense were established as a matter of law. Although Paul points out that the trial court made no finding that Nancy resisted her removal in good faith, a finding is unnecessary if a matter is established as a matter of law. Paul now attempts to resurrect the same grounds on which he sought Nancy's removal as grounds for challenging Nancy's good faith in defending the action; in essence, he contends that Nancy could not have resisted her removal in good faith because Paul would have prevailed on the merits. Those arguments must fail because his voluntary nonsuit of his removal claims with prejudice constitutes a judgment against him on the merits, and he does not (and cannot) challenge that portion of the judgment on appeal.

Id.

The court held that the executrix had no authority to pay her attorneys from estate funds in the interim and before the court allowed such an award after the removal issue was resolved:

> There is no such order in the record, and the trial court could not properly have approved payments made before the removal action had been decided. *See Klein v. Klein*, 641 S.W.2d 387, 387 (Tex. App.—Dallas 1982, no writ) (dismissing an executor's claims for attorneys' fees and expenses as premature because the removal action was still pending).... Although Nancy appears to have assumed that she could pay her legal fees without first obtaining findings that the fees were both necessary and reasonable, the statute does not authorize such a procedure."

Id. The court sustained the beneficiary's issue in part and remanded to the trial court the determination of the amount to be paid from the estate for the executrix's "necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings." *Id*.

Finally, the beneficiary challenged the trial court's denial of his two motions to compel the executrix to distribute the estate. "A person interested in an estate may petition the court for an accounting and distribution any time after the expiration of two years from the date the court clerk first issued letters testamentary or letters of administration to any personal representative of the estate." *Id*. (citing Tex. Est. Code § 405.001(a)). "Unless the court finds a continued necessity for administration of the estate, the court shall order its distribution by the independent executor to the persons entitled to the property. If the court finds there is a continued necessity for administration of the estate, the court shall order the distribution of any portion of the estate that the court finds should not be subject to further administration by the independent executor." *Id*. The court held that the trial court did not abuse its discretion in denying the first motion because it was filed before the removal issue was resolved, and there were still issues continuing for the administration of the estate. However, the court held that the trial court should have granted the second motion, which was filed after the removal action was nonsuited. The court "reverse[d] this portion of the judgment, and remand the cause to the trial court (1) to determine the amount of Nancy's reasonable and necessary attorneys' fees and expenses to be paid from the Estate; (2) to authorize Nancy to pay that amount from Estate funds (and, if necessary, to order her to reimburse the Estate for excess legal fees and expenses already paid without authorization); and (3) to order distribution of the Estate." *Id*.

IV. Fiduciary Duties In Business Relations

A. Texas Supreme Court Enforces Forum-Selection Clause In Breach Of Fiduciary Duty Case Arising From A Shareholder Agreement

In *Pinto Tech. Ventures, L.P. v. Sheldon*, the Texas Supreme Court held that business tort claims, including breach of fiduciary duty, were subject to a forum-selection clause in a shareholders agreement. No. 16-0007, 2017 WL 2200357, at *9 (Tex. May 19, 2017). The plaintiffs, two shareholders, asserted business tort claims related to the alleged dilution of their equity interests against the majority shareholders and certain corporate officers. 2017 WL 2200357, at *2. The shareholders agreement included a forum selection clause in which the parties agreed to resolve "any dispute arising out of this Agreement" in Delaware. *Id*. at *3. The shareholders asserted no contract claims, and instead, asserted claims for fraud, breach of fiduciary duty, minority-shareholder oppression, Texas Blue Sky Law violations, and conspiracy. *Id*. The defendants moved to dismiss based on the forum selection clause, and the trial court granted the motion. *Id*. at *3-4. In a split decision, the court of appeals reversed, holding the forum-selection clause inapplicable to the dispute because an "arising out of" forum-selection clause applies only when the claims would not exist "but for" the agreement containing the clause. *Id*. at *4. The court determined that the shareholders' claims did not arise out of the agreement because the rights and obligations underlying the claims were derived from statutes and common law. *Id*.

The Texas Supreme Court reversed and held that the shareholders' business tort claims were subject to the forum-selection clause. *Id*. at *9. The Court noted that the use of the term "dispute" instead of "claim" in the clause established that the clause applied beyond claims for breach of the agreement. *Id*. at *7. "Dispute" refers to a conflict or controversy whereas a "claim" means the assertion of an existing right or a demand for money, property, or a legal remedy to which one asserts a right. *Id*. The Court also held that a but-for relationship between the disputes and the shareholders agreement was "evident" because the shareholders' extra-contractual statutory and tort claims involved the same operative facts as a breach of contract claim and related to rights purportedly promised under the agreement. *Id*. at *8. As the Court noted, the non-contractual claims were "integral to the dispute's resolution" and, although "shareholders and corporations can have relationships without an agreement like the one at issue here, we cannot ignore the reality that an agreement, in fact, governs their relationship and Sheldon's and Konya's alleged grievances emanate from the existence and operation of that agreement." *Id*. at *9. The Court reversed the court of appeals and affirmed the trial court's dismissal as to the majority shareholder defendants: "we hold that the [minority] shareholders' statutory and common-law tort claims evidence a "dispute arising out of" the shareholders agreement because (1) the existence or terms of the agreement are operative

facts in the litigation and (2) "but for" that agreement the shareholders would not be aggrieved." *Id*.

The Court then held that defendants who were nonparties to the shareholder agreement (defendant's CEO and CFO) could not enforce the forum-selection clause in the agreement. The Court held that they were not parties to the agreement, were not transaction participants, and that the concerted misconduct doctrine did not apply.

B. In An Usurpation Of Corporate Opportunity Case, The Texas Supreme Court Reversed A Constructive Trust Due To A Failure To Trace The Property To The Alleged Fiduciary Breaches And Reversed A Disgorgement Award Because There Was No Finding Of The Fiduciaries' Profits

In *Longview Energy Co. v. The Huff Energy Fund*, *LP*, Longview Energy Company sued two of its directors and their affiliates after discovering one affiliate purchased mineral leases in an area where Longview had been investigating the possibility of buying leases. No. 15-0968, 2017 Tex. LEXIS 525 (Tex. June 9, 2017). A jury found that the directors breached their fiduciary duties in two ways: by usurping a corporate opportunity and by competing with the corporation without disclosing the competition to the board of directors. The trial court rendered judgment awarding a constructive trust to Longview on most of the leases in question and related property and also awarded Longview $95.5 million in a monetary disgorgement award. *Id*. The court of appeals reversed and rendered judgment for the defendants, concluding that (1) the evidence was legally insufficient to support the jury's finding that the directors breached their fiduciary duties by usurping a corporate opportunity, and (2) the pleadings were not sufficient to support a claim for breach of fiduciary duty by undisclosed competition with the corporation. *Longview Energy Co. v. The Huff Energy Fund*, 482 S.W.3d 184 (Tex. App.—San Antonio 2015).

The Texas Supreme Court affirmed the court of appeals's judgment. *Longview Energy Co.*, 2017 Tex. LEXIS at 525. The Court first held that Delaware law prevailed in this case on substantive issues, but that Texas law prevailed on procedural issues. The Court addressed the issue of whether the plaintiff had to trace specific property that supported the constructive trust. Citing Delaware law, the Court held:

> A "constructive trust is a remedy that relates to specific property or identifiable proceeds of specific property." "The constructive trust concept has been applied to the recovery of money, based on tracing an identifiable fund to which plaintiff claims equitable ownership, or where the legal remedy is inadequate—such as the distinctively equitable nature of the right asserted." Thus, to obtain a constructive trust over these properties located in Texas, Longview must have procedurally proved that the properties, or

> proceeds from them, were wrongfully obtained, or that the party holding them is unjustly enriched. "Definitive, designated property, wrongfully withheld from another, is the very heart and soul of the constructive trust theory." Imposition of a constructive trust is not simply a vehicle for collecting assets as a form of damages. And the tracing requirement must be observed with "reasonable strictness." That is, the party seeking a constructive trust on property has the burden to identify the particular property on which it seeks to have a constructive trust imposed.

Id. at *15-16. The plaintiff argued that it did not have the burden to trace because that burden shifted to the defendants once the plaintiff proved the assets were commingled. The Court disagreed and noted that "the leases were separately identifiable, were not purchased with commingled funds, and were identified, lease by lease, in both the evidence and the judgment." *Id*. The Court held that "[g]iven those facts, Longview had the burden to prove that, as to each lease for which it sought equitable relief of disgorgement or imposition of a constructive trust, Riley-Huff acquired that lease as a result of Huff's or D'Angelo's breaches of fiduciary duties." *Id*. The Court concluded that there was no evidence that the defendants obtained any leases due to a breach of fiduciary duty:

> There must have been evidence tracing a breach of fiduciary duty by Huff or D'Angelo to specific leases in order to support the imposition of a constructive trust on those leases. The court of appeals noted, and we agree, that there is no evidence any specific leases or acreage for leasing were identified by the brokers as possible targets for Longview to purchase or lease, nor is there evidence that any specific leases or acreage for leasing were recommended to or selected by Longview or its board for pursuit or purchase. Thus, the evidence in this case is legally insufficient to support a finding tracing any specific leases Riley-Huff acquired to a breach of fiduciary duty by either Huff or D'Angelo. Accordingly, Longview was not entitled to have a constructive trust imposed on any leases acquired by Riley-Huff or on property associated with them. Nor was Longview entitled to have title to any of the leases or associated properties transferred to it. The trial court erred by rendering judgment imposing the constructive trust on and requiring the transfer of leases and properties to Longview.

Id. at *22-23.

The Court then turned to the award of disgorgement damages and noted that both Delaware and Texas limits disgorgement to a fiduciary's profit. "Thus, under either Delaware or Texas law, the disgorgement award must be based on profits Riley-Huff obtained as a result of Huff's or D'Angelo's breaches of fiduciary duties." *Id*. at *28. The Court noted that the amount of profit resulting from a breach of fiduciary duty will generally be a fact question. The jury question only

required the jury to find the amount of *revenues* the defendants received. The Court held that because jury question submitted an incorrect measure for equitable disgorgement of profit, and there was no other finding that could be used to calculate the profit, there was no jury finding that supported the trial court's disgorgement award. Therefore, the Court affirmed the court of appeals's judgment for the defendants.

C. Court Rules On Lost Profits, Lost Good Will, Disgorgement, and Forfeiture Remedies Against A Former Employee For Breach of Fiduciary Duty

In *Samuel D. Orbison & Am. Piping Inspection v. Ma-Tex Rope Co.*, a jury found that a former employee breached fiduciary duties by working for a competitor while being employed by the plaintiff. No. 06-17-00112-CV, 2018 Tex. App. LEXIS 4381 (Tex. App.—Texarkana June 15, 2018, no pet. history). The jury awarded lost profits, lost good will, and the court awarded other disgorgement and forfeiture relief. The defendant appealed.

The court of appeals first reversed the award of $2,000 in lost profits because there not sufficient evidence to show how such an award was calculated. The court stated:

> Matthews testified that Ma-Tex had lost profits of $2,321.00 based on the total amount API charged Halliburton Pinnacle and Arklatex. He provided no explanation of how these lost profits were determined, and Ma-Tex points to no other evidence in the record that provided an explanation of how the lost profits were determined.… [H]is testimony … does not provide this Court with the objective facts, figures, or data from which the amount of lost profits were calculated, nor the method he used to calculate them. Consequently, the evidence is legally insufficient to support the finding of $2,321.00 in lost profits.

Id. The court also reversed the award of damages due to lost good will because the evidence was simply too conclusory:

> Matthews merely testified that the damage to Ma-Tex's good will would be $10,000.00 a month for twelve months, totaling $120,000.00. Matthews never testified how he determined these estimates. Ma-Tex does not point to any testimony, and we have found none, that provides any objective facts, figures, or data in support of his opinion. Consequently, we find the evidence is legally insufficient to support the trial court's finding of $120,000.00 in good will damages.

Id. The court then turned to the disgorgement damages and affirmed. The court discussed the concept of an employee breaching fiduciary duties:

> Generally, the term fiduciary "applies to any person who occupies a position of peculiar confidence towards another" and "contemplates fair

> dealing and good faith." It is well established in Texas that an employee may be in a fiduciary relationship with his or her employer. An employee may not, without breaching his fiduciary duties, "(1) appropriate the company's trade secrets, (2) solicit the former employer's customers while still working for his employer, (3) solicit the departure of other employees while still working for his employer; or (4) carry away confidential information." In an unchallenged conclusion of law, which is supported by the evidence, the trial court found Orbison breached his fiduciary duties in each of these ways.

Id. The court then discussed the legal standards for forfeiture/disgorgement relief:

> When the court finds a breach of fiduciary duty, it may fashion an appropriate equitable remedy, including forfeiture of fees and disgorgement of any profit made at the expense of the employer. As the Texas Supreme Court noted, when an agent breaches his fiduciary duty, he is entitled to no compensation for conduct related to the breach, and if his breach is willful, "he is not entitled to compensation even for properly performed services." The main purpose of these equitable remedies "is not to compensate an injured principal," but rather "to protect relationships of trust by discouraging agents' disloyalty." Thus, a court "may disgorge all ill-gotten profits from a fiduciary when a fiduciary . . . usurps an opportunity properly belonging to a principal, or competes with a principal." It may also require the fiduciary to forfeit any compensation for his work paid by the principal.

Id. Regarding the application of these standards to the fact, the court sustained the trial court's award of a forfeiture of the compensation that the defendant was paid by the plaintiff and also a disgorgement of the compensation paid by the new employer to the defendant:

> Since the trial court found that Orbison breached his fiduciary duties to Ma-Tex, it had discretion to impose appropriate equitable remedies for the breach. Here, it elected to require forfeiture of a portion of the compensation paid by Ma-Tex to Orbison during the period of time that Orbison was assisting API to set up its recertification shop and was soliciting two of Ma-Tex's employee's to work for API. In addition, the trial court required disgorgement of an amount equal to the compensation paid by API to Orbison during the time that Orbison was actively competing with Ma-Tex by using Ma-Tex's confidential information to solicit its customers. Under Swinnea and the cases cited therein, we see no essential distinction between forfeiting a fee paid to an attorney or trustee who breaches his fiduciary duty and forfeiting the salary paid to an employee who does the same. In each instance the breaching fiduciary received compensation from the principal while breaching his trust. Neither do we see an essential distinction between disgorging a fee paid

> to, or the profit made by, an agent who usurps his principal's business opportunity and disgorging an amount equal to the salary paid to a former employee by his new employer when the former employee uses confidential information and trade secrets to solicit the customers of his former employer. In each instance, the breaching fiduciary profited by, or received compensation for, breaching the trust of his principal. The same principles apply to each of these circumstances, and the remedies of forfeiture and disgorgement are "necessary to prevent such abuses of trust." Consequently, we find that, under the circumstances of this case, Orbison was subject to the forfeiture of his salary paid by Ma-Tex and to the disgorgement of the salary paid to him by API while he was actively using Ma-Tex's confidential information to solicit its customers.

Id.

D. Court Holds That Contractual Relationship Does Not Create Fiduciary Duties

In *Na Ins. Servs. Holding Corp. v. Hilb Group of Ind*., a federal magistrate recommended that the district court grant a defendant's motion to dismiss a breach of fiduciary duty claim. No. 4:17CV600-ALM-KPJ, 2017 U.S. Dist. LEXIS 186544 (E.D. Tex. October 23, 2017). The plaintiff alleged that it entered into a contract whereby it would sell the defendant's insurance products. The commissions for those sales would go to the defendant, who would then send the commissions to the plaintiff, who would then distribute the commissions to the selling agents. Plaintiff alleged that at some point, the defendant failed to pay the correct amount of commissions due under the terms of the contract. Plaintiff sued and asserted the following causes of action: declaratory judgment, breach of contract, breach of fiduciary duty, and theft. Regarding the breach of fiduciary duty claim, the magistrate stated:

> The elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant. Jones v. Blume, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2004), pet. denied. Contractual relationships do not typically give rise to fiduciary duties among the parties to the contract. Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 177 (Tex. 1997). A fiduciary or confidential relationship may arise from the circumstances of a particular case; however, to impose such a relationship in a business transaction, the relationship must exist prior to, and apart from, the agreement made the basis of the suit. Id. In the complaint, Plaintiff asserts no allegations to indicate that a prior fiduciary relationship had previously arisen between Plaintiff and Defendant, or between NALP and Defendant. Plaintiff only alleges that Defendant assumed rights under an existing contract between

non-parties NALP and MAH. These bare allegations without more factual detail are insufficient to survive a motion to dismiss.

Id. The magistrate therefore recommended dismissing breach of fiduciary duty claim.

E. Magistrate Recommends Refusing A Request For A Preliminary Injunction Based On A Breach Of Fiduciary Duty Claim Arising From An LLC's Former Member Competing For Opportunities

In *BCOWW Holdings, LLC v. Collins*, plaintiffs sued a former member and his new company asserting breach of fiduciary duty and numerous other claims based in part on the defendants allegedly usurping a corporate opportunity. No. SA-17-CA-00379-FB, 2017 U.S. Dist. LEXIS 142618 (W.D. Tex. September 5, 2017). The plaintiff sought a preliminary injunction, and the magistrate recommended that it be denied.

The magistrate noted that under Texas law plaintiffs may obtain injunctive relief for breaches of fiduciary duty, but only if the requirements for an injunction are met. "To prevail on a claim for breach of fiduciary duty, a plaintiff must establish that (1) a fiduciary relationship exists between the plaintiff and defendant; (2) the defendant breached his fiduciary duty to the plaintiff; and (3) the defendant's breach resulted in injury to the plaintiff or benefit to the defendant." *Id*. The magistrate stated that the plaintiff's primary argument was that the defendant breached his fiduciary duty by usurping a business opportunity. The magistrate stated: "As a founding member and officer of BCOWW, Collins owed a fiduciary duty to BCOWW to refrain from 'usurp[ing] corporate opportunities for personal gain.' To establish a breach of fiduciary duty for usurping a corporate opportunity, BCOWW must prove that Collins misappropriated a business opportunity that properly belongs to the company." *Id*.

The defendant did not dispute that he undertook a venture and that it was a corporate opportunity that would have properly belonged to the plaintiff. Rather, he argued that the plaintiff did not have the financial resources to take advantage of the business opportunity and alternatively, he argued that the plaintiff abandoned the opportunity. The magistrate held that: "A corporation's financial inability to take advantage of a corporate opportunity and the corporation's abandonment of a business opportunity are two defenses to a suit alleging usurpation of a corporate opportunity." *Id*. The magistrate found that the defendant introduced evidence to at least raise a genuine issue of fact on these defenses. The magistrate, however, found that the evidence demonstrated that the defendant breached the fiduciary duty of good faith when he actively competed with the plaintiff while still a member of the company and without full disclosure to its members. Yet, the magistrate still held that the plaintiff was not entitled to an injunction because of a lack of irreparable harm:

> An injunction, however, would still be inappropriate in this case. BCOWW cannot establish irreparable harm. First, as discussed above, monetary damages will fully compensate BCOWW for any harm allegedly suffered as a result of Collins's actions. Second, Collins's breach occurred in the past, and he is no longer a member or employee of BCOWW. Accordingly, BCOWW cannot establish a reasonable likelihood that Collins will commit further breaches of his fiduciary duty in the future, and effects from Collins's past violations cannot serve as a basis for injunctive relief. BCOWW's request for a punitive injunction should be denied.

Id.

F. Federal Courts Hold That Lenders Do Not Owe Fiduciary Duties To Borrowers

In *Hagood v. Countrywide Home Loans, Inc.*, a borrower sued a lender for several claims, including breach of fiduciary duties. No. A-17-CA-00784-SS, 2017 U.S. Dist. LEXIS 165943 (W. D. Tex. October 6, 2017). The defendant filed a motion to dismiss for failure to state a claim, and the district court granted same:

> Without providing details, Plaintiff contends Defendants breached their fiduciary duties to him. However, "[u]nder Texas law, a mortgage lender or servicer generally does not owe a fiduciary duty to a borrower." Plaintiff has failed to allege extraordinary circumstances giving rise to a fiduciary duty owed to him in this case. To the extent Plaintiff relies on fiduciary duties between Defendants themselves, such claims also fail because Plaintiff himself was owed no duty.

Id.

In *Adams v. United States Bank, N.A.*, a borrower sued a former lender for breaching fiduciary duties in assigning the loan to another lender. No. 3:17-cv-723-B-BN, 2017 U.S. Dist. LEXIS 165378 (N.D. Tex. October 1, 2017). The plaintiff contended that the first lender breached a fiduciary duty by either assigning the loan to the new lender or selecting it as the mortgage servicer because the first lender had "knowledge of the pattern and practice of [U.S. Bank's] disregard of applicable law in the servicing of mortgage loans, and should not have attempted to assign ownership and/or servicing of the Loan to [U.S. Bank], thus jeopardizing Plaintiff's ownership and use of the Property." Id. The defendant filed a motion to dismiss for failure to state a claim, and the magistrate recommended that it be granted:

> Texas recognizes two types of fiduciary relationships. "The first is a formal fiduciary relationship," such as "the relationship of an attorney-client, principal-agent, or trustee-beneficiary relationship." The second is an informal fiduciary relationship — that is, a confidential relationship "where

> one person trusts and relies on another, whether the relation is a moral, social, domestic or purely personal one." The Texas Supreme Court has recognized that "confidential relationships may arise not only from the technical fiduciary relationships such as attorney-client, trustee-cestui que trust, partner and partner, etc. - which as a matter of law are relationships of trust and confidence — but may arise informally from moral, social, domestic or purely personal relationships." "The existence of the fiduciary relationship is to be determined for the actualities of the relationship between the parties involved." Texas courts have consistently held that the mortgagor-mortgagee relationship is not a special relationship that generally gives rise to a fiduciary duty.
>
> . . .
>
> Courts have therefore only entertained the notion that a mortgage lender or service might owe a mortgagee a fiduciary duty where its relationship to the mortgagee was such that the mortgagee could reasonably expect the lender or service to act in his or her best interest. "'[A] person is justified in placing confidence in the belief that another will act in his or her best interest only where he or she is accustomed to being guided by the judgment or advice of the other party, and there exists a long association in a business relationship as well as personal friendship.'" The parties' special relationship must also have existed prior to and apart from the agreement in the suit.
>
> Ms. Adams alleges that Guild breached a fiduciary duty to her by either assigning the Loan to U.S. Bank or selecting it as the mortgage service even though it knew of U.S. Bank's alleged issue with complying with the law. But she fails to provide any explanation in her complaint or in her brief as to why she was "justified in placing confidence in the belief that" Guild would act in her best interest in the first place. She has not suggested that she had some long-standing relationship with Guild — separate from its relationship to the Property. Nor is there any other indication in her pleadings that Ms. Adams had some objective reason to believe that she would be justified in placing her confidence in Guild or its employees to act in her best interest. The State Court Petition, at most, suggests that Ms. Adams may have had some subjective, unspecified belief that she could trust Guild. But Plaintiff's "subjective trust and feelings of trust and confidence [are] not ... enough to create a fiduciary relationship."
>
> Ms. Adams's claim for breach of fiduciary duty should be dismissed. But — because it is not yet clear that Ms. Adams has pleaded her best case — the dismissal should be without prejudice.

Id. Therefore, the magistrate recommended that the district court grant the motion to dismiss without prejudice.

G. Court Refuses To Enforce Arbitration Clause By Financial Advisor

In *Steer Wealth Mgmt., LLC v. Denson*, Denson, in her individual capacity and as executor of her husband's estate, sued Steer Wealth Management, LLC, for causes of action including breach of fiduciary duty, breach of contract and fraud arising out of the alleged improper transfer of assets from several of the Densons' brokerage accounts. No. 01-17-00066-CV, 2017 Tex. App. LEXIS 8525 (Tex. App.—Houston [1st Dist.] September 7, 2017, no pet.). After Mr. Denson's death in 2013, Ms. Denson learned that her husband had allegedly transferred funds out of their joint brokerage accounts into accounts in his name, Tan Tang's name, or in the name of entities controlled by him and Tang. Individuals that started Steer Wealth had a long relationship with Mr. Denson, and there was a contract between the Densons and a prior firm, LPL Financial, that required the arbitration of disputes. Denson asserted causes of action against Steer Wealth—but not against LPL Financial or Steer Wealth's representative Varcados, who used to work with LPL Financial. Steer Wealth moved to compel arbitration and stay all trial court proceedings based on an arbitration clause contained in the contract between the Densons and LPL Financial. The trial court denied the motion. Steer Wealth appealed the order alleging that it could enforce the arbitration clause on the basis of third-party beneficiary status or direct-benefits estoppel.

Steer Wealth argued that it was a third-party beneficiary of the Densons' contract with LPL Financial because the express language of the arbitration agreement provided that it applied to controversies "between [Denson] and LPL and/or your Representative(s)," which, it contended, refers to Steer Wealth and its representative. Steer Wealth contended that because it could act only through its sole manager, "[b]y its own terms, the LPL arbitration provision is intended to benefit Steer Wealth which is a DBA for Varcados, the 'Representative' identified in the arbitration provision." The court of appeals disagreed:

> Although there is evidence in the record that Varcados uses Steer Wealth to conduct his financial advising business for LPL Financial, there is also evidence in the record that Steer Wealth is a registered domestic limited liability company and is therefore a distinct legal entity from both Varcados and LPL Financial. We thus agree with Denson that Varcados and Steer Wealth cannot be conflated such that references in the Master Account Agreement—and its arbitration provision—to Denson's "Representative" refer to both Varcados and the separate legal entity of Steer Wealth.

Id.

Steer Wealth also argued that it could enforce the arbitration agreement because Ms. Denson, in her claims against Steer Wealth, sought a benefit by holding it liable based on duties imposed by her contracts with LPL Financial, which contain arbitration clauses. The court noted that Texas law "requires a nonparty

to arbitrate a claim 'if it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision.'" *Id*. If a plaintiff's right to recover and her damages depend on the agreement containing the arbitration provision, the party is relying on the agreement for her claims. If, however, the facts alleged in support of the claim stand alone and are completely independent of the contract containing the arbitration provision, and the claim can be maintained without reference to the contract, the claim is not subject to arbitration. The court held that Denson's claims arose from her own contracts with Steer Wealth and not with LPL Financial:

> In light of Denson's allegations that she and her husband had a contractual relationship with Steer Wealth in which Steer Wealth allegedly agreed to provide financial and investment advice and other services—allegations unrebutted by evidence to the contrary—we conclude that Denson's allegations refer to a separate contractual agreement with Steer Wealth, as opposed to a contractual agreement with LPL Financial…Thus, although Denson's claims against Steer Wealth may "relate to" Denson's contracts with LPL Financial, her breach of contract and other claims against Steer Wealth "arise out of" and "directly seek the benefits of" a separate and independent alleged contract between Denson and Steer Wealth for the provision of financial services to Denson by Steer Wealth.

Id. So, the court of appeals affirmed the trial court's decision to deny the motion to compel arbitration.

H. Court Finds That Breach Of Fiduciary Duty Claims Is Preempted By Trade Secrets Claim

In *Super Starr Int'l, LLC v. Fresh Tex Produce, LLC*, a Texas entity that distributes produce throughout the United States filed suit against another Texas entity that imports foreign grown produce into the United States and other related entities for a variety of claims arising from the defendants' attempts to distribute produce without the plaintiff. 531 S.W.3d 829 (Tex. App.—Corpus Christi 2017, no pet.). The plaintiff's claims included breach of various agreements, breach of fiduciary duty, misappropriation of trade secrets, and aiding and abetting breach of fiduciary duty. The plaintiff sought and obtained a temporary injunction that precluded the defendants from distributing the produce and other relief, including an order to preserve electronic evidence. The defendants appealed.

The court of appeals reversed and rendered in part and remanded in part. "To obtain a temporary injunction, the applicant must plead and prove three elements: (1) a cause of action; (2) a probable right to relief; and (3) a probable, imminent, and irreparable injury in the interim." *Id*. The court first analyzed the plaintiff's claim that the plaintiff was really a partnership because the parties used the term "partner" in various contexts. The court held that it was solely a limited liability company due to the Texas Business Organizations Code and the wording of the LLC agreement:

> The "term 'partner' is regularly used in common vernacular and may be used in a variety of ways," and "[r]eferring to . . . a 'partner' in a colloquial sense is not legally sufficient evidence of expression of intent to form a business partnership." Here, the context in which the statements were made establishes that the parties' use of the term "partner" was colloquial, not legal. Absent something more, we conclude that the Distributor presented no evidence that conclusively negates the plain text of the business organizations code and the operating agreements, both of which require us to determine as a matter of law that the LLC was solely a limited liability company, not a partnership

Id.

The court then held that the plaintiff's breach of fiduciary duty claim was preempted by its trade secret claim:

> The gravamen of the Distributor's breach of fiduciary duty claim duplicates its claim based on the Texas Uniform Trade Secrets Act. . . . The Texas Uniform Trade Secrets Act generally "displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret." . . . Where a claim is based on a misappropriation of a trade secret, then it is preempted by the Texas Uniform Trade Secrets Act. In this case, the Distributor's breach of fiduciary duty claim duplicates its alleged violation of the Texas Uniform Trade Secrets Act. Appellants could not "divert[] [the LLC's] accounts and business" or "solicit[] [the LLC's] accounts and employees" without the use of alleged trade secrets. Accordingly, the preemption provision in the Texas Uniform Trade Secrets Act precludes the Distributor's breach of fiduciary duty claim from serving as a basis for temporary injunctive relief.

Id.

The court then reviewed the plaintiff's aiding and abetting breach of fiduciary duty claim and held that same could not survive without an underlying breach of fiduciary duty claim: "Generally, when a breach of fiduciary duty claim fails, so should an aiding and abetting in the breach of fiduciary duty claim, to the extent one exists in Texas." *Id*. The court held that there was not a showing of a probable right of recovery regarding these claims.

Finally, the temporary injunction order prohibited the defendants from: "Destroying, deleting, erasing, losing, hiding, altering, or modifying in any manner the electronic information, including emails, text messages, recordings, and other communications involving or mentioning [the Importer], [the Grower], [the LLC], [the Distributor] or any of its principals or employees, or accounts which have done business through [the LLC]." *Id*. The court held that this relief should be

reversed because "the Distributor presented no evidence or argument of a probable, imminent, and irreparable injury in the interim stemming from the acts restrained in Restriction 8." *Id*.

I. Court Reversed A Finding Of Breach Of Fiduciary Duty (And $470,000,000 Judgment) Because No Partnership Ever Existed Due To The Failure Of Conditions Precedent

In *Enterprise Prods. Partners, L.P. v. Energy Transfer Partners, L.P.,* the jury found Enterprise Products Partners, L.P. ("Enterprise") was in a general partnership with Energy Transfer Partners, L.P. ("ETP") regarding a pipeline project and that Enterprise breached its duty of loyalty as a partner to ETP. No. 529 S.W.3d 531 (Tex. App.—Dallas 2017, pet. filed). The trial court's judgment awarded ETP actual damages of $319,375,000 and disgorgement of $150,000,000. Enterprise argued on appeal that the trial court erred by denying Enterprise's motions for directed verdict and JNOV because the parties' written agreements contained unperformed conditions precedent that as a matter of law precluded the forming of the disputed partnership, and without a partnership, Enterprise owed no fiduciary duties to ETP.

The court of appeals agreed that the parties' agreement had certain unperformed conditions precedent before any partnership was created: "In this case, the Letter Agreement barred the formation of a partnership 'unless and until [1] the Parties have received their respective board approvals and [2] definitive agreements . . . have been . . . executed and delivered by both of the Parties.' These conditions precedent were not performed. Unless they were waived, no partnership was formed, and ETP cannot recover on its claims for breach of joint enterprise and breach of fiduciary duty." *Id*. The court then analyzed whether the Enterprise waived the conditions precedent. ETP did not submit a jury question on waiver, and so under Texas Rule of Civil Procedure 279, such a claim was waived unless it was proved as a matter of law. The court reviewed the evidence and held that there was at least a fact question on waiver. The court concluded "that ETP waived its waiver theory by failing to obtain a jury finding on the waiver theory. Because the conditions precedent were not performed and ETP did not conclusively prove the parties waived the conditions precedent, there was no partnership between Enterprise and ETP. We therefore conclude the trial court erred by denying Enterprise's motions for directed verdict and JNOV." The court reversed the considerable judgment and rendered for defendant Enterprise.

J. Court Holds That Majority Shareholders In Closely Held Corporation Do Not Owe Fiduciary Duties To Minority Shareholders

In *Herring Bancorp, Inc. v. Mikkelsen*, a corporation acquired a majority of the outstanding shares of preferred stock by "repurchasing" those shares in accordance with the Articles of Incorporation, including the shares owned by a trustee. 529 S.W.3d 216 (Tex. App.—Amarillo 2017, pet. denied). This was

against the wishes of the trustee, a minority shareholder. The trustee filed claims for oppression of a minority shareholder in a closely-held corporation and breach of fiduciary duty.

The court of appeals held that oppression of a minority shareholder was not a viable claim. The court of appeals noted that in *Ritchie* opinion, the Texas Supreme Court specifically refused to recognize a common-law cause of action for minority shareholder oppression in closely-held corporations and concluded that section 11.404 of the Texas Business Organizations Code authorizes the only remedy for oppressive conduct by those in control of a corporation—appointment of a rehabilitative receiver. *Id*. (citing *Ritchie v. Rupe,* 443 S.W.3d 856, 866 (Tex. 2014)). "Because Appellee's oppression of a minority shareholder in a closely-held corporation is not a viable cause of action," the court reversed that finding. *Id*.

The court then turned to the breach of fiduciary duty claim. The court held that there was no formal fiduciary duty between a majority and minority shareholder in a closely-held corporation:

> The Texas Supreme Court has never recognized a formal fiduciary duty between a majority and minority shareholder in a closely-held corporation. One's status as a co-shareholder in a closely-held corporation alone does not automatically create a fiduciary relationship between co-shareholders. "A co-shareholder in a closely held corporation does not as a matter of law owe a fiduciary duty to his co-shareholder." Even in the context of disproportionate ownership interests, the vast majority of intermediate appellate courts of this State have declined to recognize a broad formal fiduciary relationship between majority and minority shareholders that applies as a matter of law to every transaction between them.

Id. The court therefore reversed a breach of fiduciary duty finding in this case as well.

K. Court Holds That Board Of Trustees Of A Nonprofit Do Not Owe The Same Duties As A Trustee Of A Trust

In *Young v. Heins*, Young brought third-party claims against the board of trustees of a nonprofit home owner association for breach of fiduciary duty, breach of the duty of good faith and fair dealing, breach of contract, intentional infliction of emotional distress, and for a declaratory judgment. No. 01-15-00500-CV, 2017 Tex. App. LEXIS 5075 (Tex. App.—Houston [14th Dist.] June 1, 2017, no pet.). In his claims for breach of fiduciary duty and the duty of good faith and fair dealing, Young argued that because the trustees had a fiduciary relationship with him, they owed him a "duty to refrain from self-dealing, a duty of care and loyalty, a duty of full disclosure, a duty to act with the strictest integrity, and the duty of fair, honest dealing." *Id*. Young further argued that they breached their duties to him

because they had claimed that he had violated deed restrictions, knowing that he had not done so, and claimed that he had not timely paid his maintenance assessments, knowing that he had in fact paid them. The trustees filed a summary judgment motion, which the trial court granted. The court of appeals noted that the association's bylaws, states that the affairs of the association "shall be managed by a Board of five . . . trustees, who need not be members of the Association." But the court held that the mere use of the word "trustee," does not create a trust or a trustee relationship. *Id*. (citing *Nolana Dev. Ass'n. v. Corsi,* 682 S.W.2d 246, 249 (Tex. 1984); *Stauffacher v. Coadum Cap. Fund 1, LLC*, 344 S.W.3d 584, 588-89 (Tex. App.—Houston [14th Dist.] 2011, pet. denied)). The court concluded that "the duties that a trustee has to a trust do not apply to a director of a nonprofit corporation." *Id*. The court affirmed the summary judgment for the board of trustee members.

L. Federal Court Dismisses Breach of Fiduciary Duty Claim Because It Was Preempted By The Texas Uniform Trade Secret Act

In *Embarcadero Techs., Inc. v. Redgate Software, Inc.*, four employees left their employer and began working at a new company. No. 1:17-cv-444-RP, 2018 U.S. Dist. LEXIS 1902 (W.D. Tex. January 5, 2018). The plaintiffs sued the four former employees for breach of fiduciary duty and sued their new employer for aiding and abetting breach of fiduciary duty and also sued the defendants for misappropriation of trade secrets under the Texas Uniform Trade Secrets Act ("TUTSA"), Tex. Civ. Prac. & Rem. Code § 134A.001 as well as other claims. The defendants file a motion to dismiss the plaintiffs' breach of fiduciary duty and aiding and abetting claims due to preemption by the TUTSA.

The TUTSA contains a preemption provision: "(a) Except as provided by Subsection (b), this chapter displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret. (b) This chapter does not affect: (1) contractual remedies, whether or not based upon misappropriation of a trade secret; (2) other civil remedies that are not based upon misappropriation of a trade secret; or (3) criminal remedies, whether or not based upon misappropriation of a trade secret." Tex. Civ. Prac. & Rem. Code § 134A.007.

The parties' dispute centered on the meaning of "based upon misappropriation of a trade secret" in subsection (b)(2). The defendants argued that the breach of fiduciary duty claim is preempted by TUTSA because it was based on the same underlying facts as plaintiffs' TUTSA claim—the improper taking of confidential business information—and is therefore "based upon misappropriation of a trade secret." *Id*. Plaintiffs contended that their breach of fiduciary duty claim was not preempted because it alleged the improper taking of confidential information, and not trade secrets. The court stated:

After reviewing the reasoning in Super Starr and that of various other courts across the country applying Uniform Trade Secrets Act preemption, the Court finds that TUTSA's preemption provision encompasses all claims based on the alleged improper taking of confidential business information. Without more, a breach of fiduciary duty claim cannot proceed. The underlying purpose of the TUTSA preemption provision is, as many courts have noted, to "prevent inconsistent theories of relief for the same underlying harm by eliminating alternative theories of common law recovery which are premised on the misappropriation of a trade secret." To narrow the preemption's application exclusively to information that qualifies as a trade secret under the statute would frustrate this purpose. Plaintiffs would like to have a TUTSA claim for all of their information taken by Frignoca that qualifies as a trade secret and a fiduciary duty claim for all of the information taken by Frignoca that does not qualify as a trade secret. But both claims stem from the same underlying harm—the taking of Plaintiffs' confidential information. To allow multiple theories of relief for this same underlying harm would be to read the preemption provision too narrowly. Accordingly, the Court finds that TUTSA's preemption clause applies to a breach of fiduciary duty claim that is based solely upon taking confidential information.

….

Plaintiffs would like for TUTSA to permit them a cause of action for every piece of information claimed to be improperly taken by Frignoca, whether or not it satisfies the statutory elements of a trade secret. This reading has been adopted by at least one federal district court in Texas. See AMID, Inc. v. Medic Alert Foundation U.S., Inc., 241 F. Supp. 3d 788, 826-27 (S.D. Tex. 2017) (finding an unfair competition claim based on confidential information not preempted by TUTSA). But given the purpose behind TUTSA's preemption provision and the number of cases across the country applying Uniform Trade Secrets Act preemption and finding to the contrary, the Court finds that a breach of fiduciary claim based only on the improper taking of confidential information is preempted by TUTSA.

Here, Plaintiffs' sole basis for their breach of fiduciary duty claim is the misappropriation of confidential business information. Plaintiffs state in their amended complaint that their breach of fiduciary duty claim is expressly based upon the misappropriation of trade secrets. (See Pls.' Am. Compl., Dkt. 33, ¶ 38 ("Frignoca breached these fiduciary duties by accessing Plaintiffs' valuable confidential and proprietary information and trade secrets for activities that were disloyal to, and harmful to, the interests of Plaintiffs. Frignoca took and used Plaintiffs' confidential and proprietary information and trade secrets both during and after his employment with Plaintiffs for the benefit of his new employer.")). Indeed, this language is strikingly similar to the wording of the claim for breach of fiduciary duty found preempted by TUTSA in Super Starr, which alleged

> the diversion of accounts and business "by using confidential and proprietary information owned by [the defendant] against the interests of [the defendant]." 531 S.W.3d at 843. Plaintiffs allege no other factual basis for the breach of fiduciary duty claim. The fact that some of the confidential information taken may not fit the statutory definition of trade secret does not change the outcome. Because Plaintiffs have not pleaded any facts unrelated to misappropriation of confidential information to support their claim for breach of fiduciary duty, the claim is preempted by TUTSA.

Id. The court also held that the aiding and abetting breach of fiduciary duty should be dismissed because it required the existence of a breach of fiduciary duty. *Id*.

M. Court Affirms Submission of Mitigation Instruction In A Breach Of Fiduciary Duty Case To Affirm A Jury's Finding Of No Damages

In *E.L. & Associates v. Pabon*, a company sued two former directors and their son for breaching fiduciary duties when the company lost a lease for a restaurant it operated and the directors' son opened a nearly identical restaurant in the same location. 525 S.W.3d 764 (Tex. App.—Houston [14th Dist.] 2017, no pet.). A jury found that the directors breached their fiduciary duties and that their son assisted in the breaches of fiduciary duty, but awarded no damages to the company. The company appealed and complained that the trial court should not have submitted a mitigation instruction in the damages question. The instruction stated: "Do not include in your answer any amount that you find E.L. & Associates, Inc. could have avoided by the exercise of reasonable care." *Id*. at *7.

The court of appeals first discussed the concept of the duty to mitigate damages:

> The doctrine of mitigation of damages, sometimes referred to as the doctrine of avoidable consequences, requires an injured party to use reasonable efforts to avoid or prevent losses. In the context of a breach of contract case, the doctrine has been stated as follows: "'Where a party is entitled to the benefits of a contract and can save himself from the damages resulting from its breach at a trifling expense or with reasonable exertions, it is his duty to incur such expense and make such exertions.'" The doctrine has been applied in breach of contract and tort cases.

Id. at *9 (internal citations omitted).

The company argued that it could not have a duty to mitigate before it incurred damages, and the court of appeals disagreed: "It is not the damages themselves that trigger the duty to mitigate, but knowledge by the non-breaching party of the

breach that ultimately causes the damages. The question before us, then, is what the breach of fiduciary duty was, and when EL&A had knowledge of the breach." *Id*. at *13.

The court then found that the company had knowledge of the defendant's breaches before any damages occurred and that it could have done something to mitigate the harm:

> [T]he jury properly could have considered evidence of Efrain or George's failure to mitigate by signing a new lease if there was evidence that they were aware of the breach before the Pabons' lease was signed on March 15, 2011. To that end, the record contains evidence that EL&A repeatedly was made aware throughout 2009 and 2010 that the Pabons were refusing to renew and provide a guaranty for the lease on EL&A's behalf. The record also contains evidence that EL&A was made aware at least as early as January 2011 that the Pabons had disclosed Efrain's status as the majority shareholder of EL&A. Based on this evidence, the record before us could support a jury finding that EL&A failed to reasonably mitigate its damages — its loss of the restaurant location — by having Efrain sign and become guarantor of a lease after learning of the Pabons' breaches but before (1) the month-to-month lease was terminated in February 2011; or (2) Solis signed the new lease for the same location on March 15, 2011.

The court then held that the trial court did not err by including a mitigation instruction in the damages question and affirmed the judgment.

N. Court Denied Preliminary Injunction To Breach-Of-Fiduciary-Duty Plaintiff Due To Delay In Seeking Relief

In *Embarcadero Techs., Inc. v. Redgate Software, Inc.*, a former employer sued four former employees and their new employer for a number of claims, including breach of fiduciary duty and aiding and abetting breach of fiduciary duty arising out of alleged inappropriate competition and the use of trade secrets. No. 1:17-cv-444-RP, 2017 U.S. Dist. LEXIS 191317 (W.D. Tex. November 20, 2017). The plaintiff sought a preliminary injunction prohibiting the defendants from competing and contacting former customers. The district court denied the motion.

The court noted that a plaintiff seeking a preliminary injunction must establish that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in the public interest. The court held that the plaintiff failed to make a sufficient showing of irreparable harm "with respect to all of their claims primarily because of the extensive delay they have exhibited in seeking a preliminary injunction." *Id*. The court held:

> A long delay by plaintiff after learning of the threatened harm also may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction. Undue delay in seeking a preliminary injunction tends to negate the contention that the feared harm will truly be irreparable. There was a significant delay between the time that Plaintiffs discovered that Frignoca was employed by Redgate—the genesis of this lawsuit—and when they sought an injunction. Plaintiffs were aware that Frignoca was working at Redgate as early as November 11, 2016, when Michael Shea told Embarcadero and Idera CEO Randy Jacops that Frignoca was now working at Redgate. Although Jacops suggested at the hearing that he was not completely certain that this information was correct until a few months later, when he saw Frignoca's name on a United Kingdom document listing members of boards of directors, Jacops testified that Shea had not given him inaccurate information in the past. Additionally, shortly thereafter, on November 17, 2016, Embarcadero acted upon this information by having an attorney send Frignoca a cease-and-desist letter reminding him of the agreement he signed while employed with Embarcadero. This action was filed on May 11, 2017, about six months later. Plaintiffs did not request a hearing on or file a brief in support of their application for a preliminary injunction until June 13. When the Court set a hearing for July 25, Plaintiffs sought a delay of the hearing to a date in early September, nearly five months after they became aware of all of the facts underlying their claims in this lawsuit.
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> …
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> If the harm Plaintiffs feared were indeed irreparable, it is unclear why they, knowing all of the primary facts forming the basis for their claims by April at the latest, filed the complaint on May 11, did not request a hearing or file a brief supporting their application for a preliminary injunction until June 12, and, once the Court set a hearing for July 25, requested that the hearing be moved to early September.

Id. Finding that there was no evidence if irreparable harm, the court denied the motion.

Interesting Note: Parties who want to seek equitable relief from a federal court should not slumber on their rights. They have a duty to seek equitable relief in a timely fashion. In the context of preliminary injunction applications, delay in seeking the extraordinary remedy of a preliminary injunction is an important factor bearing on the actual need for injunctive relief. *Wireless Agents, LLC v. T-Mobile USA, Inc.*, Civ. No. 3:05-cv-0094, 2006 U.S. Dist. LEXIS 36590, 2006 WL 1540687, at *13 (N.D. Tex. June 6, 2006) (citing *High Tech Med. Instrumentation v. New Image Indus., Inc.*, 49 F.3d 1551, 1557 (Fed. Cir. 1995)); *Rimkus Consulting Grp., Inc. v. Cammarata,* 255 F.R.D. 417, 438 (S.D. Tex. 2008) (denying injunctive relief after an alleged breach of a non-compete where movant unreasonably delayed to file suit, then requested multiple continuances to the

injunction hearing). With respect to delay, the relevant period of delay begins when the plaintiff learned of the alleged violation. *Fashion Week, Inc. v. Council of Fashion Designers of Am., Inc.*, No. 16-CV-5079 (JGK), 2016 U.S. Dist. LEXIS 107358, 2016 WL 4367990, at *3 (S.D.N.Y. Aug. 12, 2016). If a party unduly delays seeking injunctive relief, then logically, that party "demonstrates that there is no apparent urgency to the request for injunctive relief." *Wireless Agents*, at *15; *High Tech Med. Instrumentation*, 49 F.3d at 1557. Such delay is inapposite of immediate and irreparable harm. *Polymer Techs., Inc. v. Bridwell*, 103 F.3d 970, 974 (Fed. Cir. 1996). Delay, or too much of it, indicates that a suit or request for injunctive relief is more about gaining an advantage (either a commercial or litigation advantage) than protecting a party from irreparable harm. *Pippin et al. v. Playboy Entm't Group, Inc. et al*., 2003 U.S. Dist. LEXIS 25415, *6 (M.D. Fla. 2003). Delay alone has been held to be evidence of a lack of the irreparable harm needed to obtain a preliminary injunction. Thus even if laches is not held to bar preliminary relief, the fact of delay may serve to bar relief on the ground that such delay indicates the absence of irreparable harm. *Chase Manhattan Corp. v. N.W. Mut. Life,* 1993 U.S. Dist. LEXIS 2271 (S.D.N.Y. 1993) (denying injunctive relief where movant waited six months to file suit and one year to seek injunctive relief after discovering alleged misappropriation). The use of delay in this context is a direct denial of a plaintiff's claim for injunctive relief in that it confronts an element of the plaintiff's claim.

Federal courts across the country have denied preliminary injunctions where the movants waited just a few months to seek such relief. *Norman Bridge Drug Co. v. Banner*, 529 F.2d 822, 826 (5th Cir. 1976) (Drug Enforcement Agency's seven-month delay in seizing controlled substances from pharmacy was inconsistent with its assertion that imminent danger to the public health and safety required seizure without notice, so that the public interest element of preliminary injunction analysis did not favor such seizure); *Badillo, et al. v. Playboy Entm't Group, Inc., et al.*, 2004 U.S. Dist. LEXIS 8236, *7 (M.D. Fla. 2004) (denying motion for preliminary injunction in that irreparable harm not established where movant waited over nine months before moving to enjoin); *Chase Manhattan Corp. v. N.W. Mut. Life*, 1993 U.S. Dist. LEXIS 2271 (S.D.N.Y. 1993) (citing *Lanvin Inc. v. Colonia, Inc.,* 739 F.Supp. 182, 192 (S.D.N.Y. 1990)) ("Thus, a delay in seeking preliminary injunctive relief, even if not amounting to laches barring such relief, demonstrates that speedy action to protect the erosion of movant's rights is not needed and thus that movant is not entitled to a preliminary injunction in the first place. Parties cannot seek relief for the erosion of their rights if such erosion arose because they sat on those rights") (citations omitted); *Citibank, N.A. v. Citytrust,* 756 F.2d 273, 276 (2nd Cir. 1985); *Le Sportsac, Inc. v. Dockside Research, Inc*., 478 F. Supp. 602, 609, 205 U.S.P.Q. (BNA) 1055, 1062 (S.D.N.Y. 1979) (one-year delay "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury"); *High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1557 (2nd Cir. 1995) (17 month delay meant no irreparable harm); *Fisher Price, Inc. v. Well Made Toy Mfg.,* 25 F.3d 119, 124, 125 n.1 (2nd

Cir. 1994) (indicating that three-month delay is unreasonable in seeking injunctive relief).

The impact of delay on a finding of irreparable harm is a different issue from the impact of delay for the equitable defense of laches. Laches would be an affirmative defense to a claim for injunctive relief. The defense of laches is an equitable doctrine that prevents a plaintiff from postponing the assertion of his or her rights. *National Ass'n of Gov't Employees v. City Pub. Serv. Bd.*, 40 F.3d 698, 708 (5th Cir. 1994). Laches is an inexcusable delay in taking legal action that prejudices the defendant. *Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 668 (5th Cir. 2000). To succeed on a defense of laches, a defendant must show that plaintiff "delayed in asserting the rights at issue; that the delay is inexcusable; and that [the opposing parties] have suffered undue prejudice as a result of the delay." *Uptown Grill, L.L.C. v. Shwartz*, 817 F.3d 251, 256 (5th Cir. 2016). "The period for laches begins when the plaintiff knew or should have known of the infringement." *Elvis Presley Enters. v. Capece,* 141 F.3d 188, 205 (5th Cir. 1998). Laches specifically applies when a defendant incurs significant expenses and will suffer losses that could have been avoided if the plaintiff did not delay in the assertion of a claim. *See Abraham v. Alpha Chi Omega*, 708 F.3d 614, 625 (5th Cir. 2013) (finding significant investments in equipment, advertising, and employee salaries provided evidence of prejudice to support laches in a trademark infringement case); *Compaq Comput. Corp. v. Ergonome, Inc.*, 210 F. Supp. 2d 845, 848 (S.D. Tex. 2002) (holding prejudice may be "economic, that is, loss of monetary investments, incurring damages that might otherwise have been avoided by an earlier suit"). For example, one court held that the failure to enforce rights after sending a cease-and-desist letter prejudices an opposing party as it implicitly indicates that the holder will not further attempt to enforce its asserted rights. *H.G. Shopping Centeres L.P. v. Birney*, 2000 U.S. Dist. LEXIS 21062, at *35–36 (S.D. Tex. Nov. 27, 2000) (mem. op.) (holding laches applies upon finding that the failure to pursue a legal claim after sending a cease and desist letter misled an IP infringer to believe further use would not be challenged); *accord Conan Props. v. Conans Pizza, Inc.*, 752 F.2d 145, 152-53 (5th Cir. 1985).

O. Court Denies Objection To Personal Jurisdiction Concerning Breach of Fiduciary Duty Claim Against Former Employee

In *Turman v. POS Partners, LLC*, a Texas employer asserted contract and breach-of-fiduciary-duty claims against a former Oklahoma employee. No. 14-17-00105-CV, 2018 Tex. App. LEXIS 95 (Tex. App.—Houston [14th Dist.] January 4, 2018, no pet.). The defendant asserted a special appearance objecting to the Texas court's exercise of personal jurisdiction over him. The trial court denied the special appearance, and the court of appeals affirmed. The court of appeals stated the general rules of jurisdiction as follows:

> The extent of a defendant's contacts that are sufficient to support personal jurisdiction depends upon whether general jurisdiction or specific

> jurisdiction is alleged. A court may exercise general jurisdiction over a nonresident defendant if the defendant's contacts with the forum state "are so 'continuous and systematic' as to render [it] essentially at home in the forum State." A court may exercise specific jurisdiction if the nonresident defendant's "alleged liability arises from or is related to an activity conducted within the forum," even if the defendant's contacts with the forum state are isolated or sporadic.

Id. The court held that there were not sufficient contacts to establish general jurisdiction. The court then turned to specific jurisdiction and held:

> Regarding POSP's tort claim for breach of fiduciary duty, the Texas long-arm statute authorizes the exercise of personal jurisdiction over a defendant who "commits a tort in whole or in part in this state." But as previously mentioned, specific jurisdiction exists only if there is a "substantial connection" between the defendant's forum contacts and the operative facts of the litigation. When analyzing Turman's arguments concerning POSP's tort claim, we accordingly begin by identifying the elements of the claim and determining whether there is a substantial connection between Texas and the operative facts that must be proved to establish the claim.
>
> Breach of fiduciary duty requires proof that (1) a fiduciary relationship existed between the plaintiff and the defendant, (2) the defendant breached its fiduciary duty, and (3) the breach resulted in injury to the plaintiff or benefit to the defendant. In identifying the facts to be adjudicated at trial, we note that POSP does not allege that the parties had an informal fiduciary relationship, and that whether the parties have a formal fiduciary relationship is generally a question of law for the court. On the other hand, the parties disagree about whether the cash register Turman sold to Robbin's True Value Hardware was a model carried by POSP, and thus, whether Turman usurped POSP's opportunity to make the sale. When the facts are disputed, the question of whether a party breached a fiduciary duty is a question of fact. If a breach is proven, then POSP additionally would have to prove damages. The evidence at trial therefore will be primarily concerned with (1) whether, in this and similar instances, Turman breached any fiduciary duty to POSP by making sales on behalf of his own company that he instead should have made on behalf of POSP; and if so, (2) the extent to which Turman benefitted or POSP was injured by Turman's conduct. In this example, Turman is said to have breached his fiduciary duty in Texas by selling equipment to POSP's Texas customer. Thus, in this instance, the evidence at trial likely will focus on events that occurred in Texas.
>
> The record before us accordingly supports the existence of specific jurisdiction over POSP's breach-of-fiduciary duty claim.… We accordingly

affirm the denial of Turman's special appearance as it applies to POSP's claim for breach of fiduciary duty.

Id.

P. Court Affirmed Finding That A Partnership Existed And That A Partner Breached Fiduciary Duties

In *Harun v. Rashid*, two individuals started a restaurant business; one operated the business and the other financed it. No. 05-16-00584-CV, 2018 Tex. App. LEXIS 231 (Tex. App.—Dallas January 9, 2018, no pet.). After some disagreements, the operator froze the financier out of the business. The financier sued, asserting claims of breach of fiduciary duty and breach of contract, and sought actual and exemplary damages and attorney's fees. The case proceeded to trial before the court, and the court entered a judgment awarding the financier actual damages of $36,000, exemplary damages of $36,000, and attorney's fees of $79,768.64.

On appeal, the operator argued that there was no evidence of a partnership. The court of appeals noted:

> In determining whether a partnership was created, we consider several factors, including (1) the parties' receipt or right to receive a share of profits of the business; (2) any expression of an intent to be partners in the business; (3) participation or right to participate in control of the business; (4) any agreement to share or sharing losses of the business or liability for claims by third parties against the business; and (5) any agreement to contribute or contributing money or property to the business. Proof of each of these factors is not necessary to establish a partnership. We review the factors under the totality of the circumstances.

Id. Under these factors, the court of appeals affirmed the trial court's finding of a partnership:

> At trial, Rashid presented evidence through his testimony that: (a) Huran approached him indicating he had found a good location to open a restaurant and needed a partner to finance the operation; (b) Huran asked him to be his partner; (c) he and Huran were equal business partners in the restaurant; (d) he and Huran agreed to share equally in the profits and losses; (e) he and Huran met with the leasing agents to negotiate the lease of the restaurant space; (f) he and Huran had equal access to the restaurant's bank account; (g) he hired and communicated with the bookkeeper; (h) he was very involved in preparing paperwork for the restaurant; (i) he paid restaurant related bills, and purchased furniture and equipment for the restaurant; (j) he was not an employee of the restaurant or Harun, nor did he receive any pay for the work he performed on behalf of the restaurant; and (k) he invested approximately $60,000 in the

> business. We conclude the trial court's finding a partnership existed between Huran and Rashid is supported by more than a scintilla of evidence, and is not against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Accordingly, we overrule appellants' first issue.

Id. The court affirmed the trial court's judgment.

Q. Court Rejects Claim That Mortgage Lender Owed Fiduciary Duties To Borrower And Addressed The Discovery Rule For The Statute of Limitations

In *Wakefield v. Bank of Am., N.A.*, a borrower stopped paying on her mortgage because she felt she was assisting in a fraud. No. 14-16-00580-CV, 2018 Tex. App. LEXIS 545 (Tex. App.—Houston [14th Dist.] January 18, 2018, no pet.). She later sued the lender for breach of fiduciary duty, and the lender filed a motion for summary judgment based on the statute of limitations, which the trial court granted. The court of appeals discussed the discovery rule in the context of a breach of fiduciary duty claims:

> The limitations period for fraud and breach of fiduciary duty is four years. "As a general rule, a cause of action accrues and the statute of limitations begins to run when facts come into existence that authorize a party to seek a judicial remedy." A cause of action "accrues when a wrongful act causes a legal injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur." There is, however, a "very limited exception" to the general rule for determining accrual of the cause of action. "The discovery rule exception defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the cause of action." Under the discovery rule, accrual may be deferred if "the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." "An injury is inherently undiscoverable if it is, by its nature, unlikely to be discovered within the prescribed limitations period despite due diligence." The issue of when a cause of action accrues is a question of law. And, whether an injury is inherently undiscoverable is a legal question "decided on a categorical rather than case-specific basis; the focus is on whether a type of injury rather than a particular injury was discoverable."
>
> ….
>
> In the context of a fiduciary relationship, "the nature of the injury is presumed to be inherently undiscoverable, although a person owed a fiduciary duty has some responsibility to ascertain when an injury occurs." The rationale for this presumption is that fiduciaries are presumed to possess superior knowledge, meaning the injured party is presumed to

> possess less information than the fiduciary. Consequently, the Supreme Court of Texas has repeatedly "held a fiduciary's misconduct to be inherently undiscoverable." If a fiduciary relationship exists, "a person to whom a fiduciary duty is owed is relieved of the responsibility of diligent inquiry into the fiduciary's conduct."

Id. The court then addressed whether the mortgage lender owed fiduciary duties to the borrower and held that it did not:

> Generally, the relationship between a borrower and a lender does not create a fiduciary duty. "[T]he great weight of authority is that while the relationship between the mortgagor and mortgagee is often described as one of trust, technically it is not of a fiduciary character." "A special relationship does not usually exist between a borrower and lender, and when Texas courts have found one, the findings have rested on extraneous facts and conduct, such as excessive lender control or influence in the borrower's business activities." Not every relationship involving a high degree of trust and confidence gives rise to an informal fiduciary duty, and for an informal fiduciary duty to arise in a business transaction, "the relationship must exist prior to, and apart from, the agreement made the basis of the suit." Wakefield did not allege an informal fiduciary relationship; in her pleadings she based her breach-of-fiduciary-duty claim on her status as "lendee" and did not plead any facts to support the existence of an informal relationship.

Id. After holding that the lender did not owe fiduciary duties, the court held that there was no presumption that the claim was undiscoverable and affirmed the summary judgment based on the statute of limitations.

R. Court Holds That Plaintiff Did Not Establish Continuing Tort Theory To Defeat A Statute Of Limitations Defense To A Breach Of Fiduciary Duty Claim

In *Vaschenko v. Novosoft, Inc*., a partner from an alleged oral partnership sued his partner for breach of fiduciary duty. No. 03-16-00022-CV, 2018 Tex. App. LEXIS 2286 (Tex. App.—Austin January 26, 2018, no pet.). The trial court granted the defendant's motion for summary judgment based on limitations, and the plaintiff appealed.

The court of appeals first held that the plaintiff waived his appellate argument that his claims were not barred because the partnership and the defendant's fiduciary duties were still ongoing. The court held that a summary judgment nonmovant has to preserve its arguments or issues in the trial court. "To expressly present issues to the trial court, 'the written answer or response to the motion must fairly apprise the movant and the court of the issues the non-movant contends should defeat the motion.'" *Id*. Further, "the fair-apprisal requirement 'clearly contemplates that the trial court is not required to guess why a non-movant

presents certain evidence or consider every possible reason the evidence might defeat summary judgment.'" *Id*. The court concluded: "the mere fact that the alleged existence of a partnership underpinned Vaschenko's causes of action was insufficient to apprise the trial court, in a summary-judgment proceeding regarding the applicability of limitations, of his specific appellate argument that the limitations period was tolled because the partnership was never terminated." *Id*. The court then addressed the issue that was preserved in the trial court:

> We now turn to the general continuing-tort allegation that Vaschenko did raise in his response to Novosoft's motion for traditional summary judgment. The allegedly tortious conduct that seems to form the basis of his defense are (1) Novosoft's use of the Russian legal system to deprive him of assets, (2) that Brenan and Eure "deconstruct[ed] the business that Vaschenko had set-up into" various independent companies, and (3) that those companies are selling software he and Brenan developed to Vaschenko's clients. However, Vaschenko fails to demonstrate how any such conduct constitutes tortious conduct that would support a continuing-tort defense to limitations. See Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc., 219 S.W.3d 563, 587-88 (Tex. App.—Austin 2007, pet. denied) ("Texas Disposal has not offered any authority, nor have we found any, that broadens the continuing tort doctrine to include actions based on defamation, tortious interference, or tortious acts that are intermittent and irregular in nature. Rather, our research has revealed only contrary authority.").

Id. The court affirmed the summary judgment for the defendant.

S. Court Affirms Punitive Damages In A Breach-Of-Fiduciary-Duty/Partnership Dispute

In *Home Comfortable Supplies, Inc. v. Cooper*, the defendant induced others to start a new limited partnership with his corporation. No. 14-16-00906-CV, 2018 Tex. App. LEXIS 1381 (Tex. App.—Houston [14th Dist.] February 22, 2018, no pet.). Among other things, he then seized the new business's tangible assets and gave the use of the assets to a new company formed by his wife. The plaintiffs sued for fraudulent inducement, breach of fiduciary duty, conversion, and breach of contract, and trial court awarded actual damages, punitive damages, and attorney's fees. On appeal, the defendant argued that the only actual damages proven and awarded were for breach of contract, which did not support an award of punitive damages. The defendant did not ask the trial court to identify the actual damages awarded or link them to a specific cause of action.

The court of appeals first described an appealing party's duty to request findings:

> Unchallenged findings of fact bind the appellate court unless the contrary is established as a matter of law or no evidence supports the finding. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986). If the factual

> findings include at least one element of a given ground of recovery or defense, any omitted unrequested elements that are supported by the evidence are supplied by a presumption in support of the judgment. Tex. R. Civ. P. 299. Although a party can avoid a presumed finding by requesting additional or amended findings that include the omitted element, see Tex. R. Civ. P. 298, no such request was made here.

Id. The court then held that there was evidence to support a finding of breach of fiduciary duty, which would support the award of punitive damages:

> Punitive damages also are available for breach of fiduciary duty. *See Manges v. Guerra*, 673 S.W.2d 180, 184 (Tex. 1984) (op. on reh'g). Partners share "the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise." *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998). Zhao and Home Comfortable Supplies do not challenge the trial court's findings that clear and convincing evidence establishes that Zhao, individually and as president of Home Comfortable Supplies, wrongfully took possession and control of Paragon's business assets and transferred them with the intention of destroying Paragon's business, harming Paragon's partners, and enriching himself. Thus, damages may have been awarded for breach of fiduciary duty. These damages may have included the value of Cooper's and Bonner's interest in Paragon's assets, if the assets had been liquidated as required, as well as the money Cooper invested to obtain a larger membership interest in the General Partner.

Id. Thus, the court of appeals affirmed the trial court's award of punitive damages.

Interesting Note: Many attorneys and clients that lose in a trial court via a bench trial are reluctant to want the trial court to explain its ruling and awards. They may feel that the findings will make them look worse than the actual judgment. That may be true, but any good appellate attorney will recommend that a losing party request findings of fact and conclusions of law. A trial court will usually not rule for the wining party on every element of every claim, and may focus the findings on just one claim or a few claims. Moreover, there is nothing to lose because if a losing party does not request findings, all findings will be presumed found to support the judgment. *Worford v. Stamper,* 801 S.W.2d 108, 109 (Tex. 1990). So, generally, express findings cannot be worse than the presumption, and there is no harm in obtaining adverse express findings whereas there can be more harm in having adverse presumed findings.

Parties should be aware that in Texas there are strict requirements to preserve a request for findings. The party must file a request for findings of fact and conclusions of law within twenty days of the signing of the judgment. Tex. R. Civ. P. 296. The court is supposed to file its findings of fact and conclusions of law

within twenty days of the request. Tex. R. Civ. P. 297. If the court fails to do so, then the requesting party must file a notice of past due findings of fact and conclusions of law within thirty days of the filing of the original request. See id. Thereafter, the court should file findings of fact and conclusions of law within forty days from the filing of the original request. See id. If a party fails to file a notice of past due findings of fact and conclusions of law, he has waived any error in the court failing to file such, and all facts will be presumed in favor of the judgment. *Curtis v. Commission for Lawyer Discipline*, 20 S.W.3d 227, 232 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Once the court files findings, a party can file a request for additional findings of fact within ten days after the original findings are filed. Tex. R. Civ. P. 298. This request for additional findings must be specific and must contain proposed findings, otherwise any error in refusing the request is waived. *Alvarez v. Espinoza*, 844 S.W.2d 238, 241 42 (Tex. App.—San Antonio 1992, writ dism'd).

Just as a losing party should want express findings, a winning party should generally not want the court to issue express findings because of the presumption. Because it is difficult to preserve error on a trial court's failure to issue findings, a winning party should be reluctant to prepare proposed findings for a trial court just because a judgment is entered or just because the losing party initially requests findings.

T. Magistrate Recommends Denying A Motion To Dismiss Against A Bank For Aiding and Abetting Breach Of Fiduciary Duty

In *Schmidt v. JP Morgan Chase Bank, N.A.*, the plaintiff's employee opened credit cards in the employer's name, used those credit cards for the employee's own personal use, and paid those credit card bills with funds from the employer's operating account and/or through advances from the employer's line of credit. No. H-17-0532, 2018 U.S. Dist. LEXIS 43665 (S.D. Tex. February 2, 2018). The employer sued the bank for aiding and abetting breach of fiduciary duty and other claims for the amounts the employer lost as a result of the employee's conduct. The defendant filed a motion to dismiss for failure to state a claim. The magistrate recommended granting it in part and denying it in part. Regarding the aiding and abetting claim, the court stated:

> "Under Texas law, 'where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such.' To establish a claim for knowing participation in a breach of fiduciary duty, a plaintiff must assert: (1) the existence of a fiduciary relationship; (2) that the third party knew of the fiduciary relationship; and (3) that the third party was aware that it was participating in the breach of that fiduciary relationship." Here, Schmidt alleges, in a conclusory fashion, that Defendants "knowingly participated" in Rhodes' breach of fiduciary duty, and that they "allowed" Rhodes to open credit card accounts in Schmidt's name without his authorization,

> and "allowed" Rhodes to obtain a cashier's check from Schmidt's account. While Schmidt does not allege that Defendants knew Rhodes was acting without Schmidt's authorization, and does not allege that Defendants were aware of Rhodes' fiduciary duty to Schmidt and her breach of that duty, Schmidt could arguably do so if there are facts that would support such allegations. On this record, therefore, Schmidt should be allowed an opportunity to include such allegations in an amended pleading that conforms with the requirements of FED. R. Civ. P. 11(b) in an attempt to state a plausible claim for aiding and abetting a breach of fiduciary duty.

Id.

Interesting Note: The court cites to knowing participation cases in discussing the plaintiff's aiding and abetting claim. The Texas Supreme Court has not expressly adopted an aiding-and-abetting claim for breach of fiduciary duty. It has adopted a knowing-participation claim. The law in Texas is ambiguous regarding whether knowing participation and aiding and abetting are the same or different theories, and if they are different, how they are different. This opinion certainly blurs the distinction between the two theories.

U. Court Holds That There Is A Fact Issue By Former Employer Against Employee For Breach Of Fiduciary Duty in Self-Dealing Transactions

In *Roberts v. Overby-Seawell Co.*, an employee sued his former employer for the failure to pay commissions. No. 3:15-CV-1217-L, 2018 U.S. Dist. LEXIS 47821 (N.D. Tex. March 23, 2018). The former employer filed a counterclaim for breach of fiduciary duty arising out of the employee's failure to disclose that he had an interest in other entities with whom the employer was entering into transactions. Both parties filed dispositive motions, and the court refused to dismiss the defendant's counterclaim. The employee argued that he did not owe a fiduciary duty and that the former employer had no evidence of damages arising from his alleged breach of fiduciary duties. The former employer argued that the employee owed a fiduciary duty and breached that duty by failing to disclose his ownership interest in other entities, and by focusing his time and effort on those entities to his own personal benefit instead of pursuing new business for the employer. The court stated:

> Under Texas law, the elements of a breach of fiduciary duty claim are: (1) the existence of a fiduciary relationship; (2) a breach of the fiduciary duty; and (3) the breach resulted in injury to the plaintiff or benefit to the defendant. Texas recognizes that the agent-principal relationship gives rise to a fiduciary duty. An agent "has a duty to deal openly with the employer and to fully disclose to the employer information about matters affecting the company's business." Further, an agent who negotiates on behalf of his principal must disclose any adverse interest in the matter of the negotiation. An agent owes a "duty to deal fairly with the principal in all

> transactions between them." First, the court concludes that Roberts, acting as an agent who negotiated on behalf of OSC, owed Defendants a fiduciary duty that arose as a matter of law as part of the principal agent relationship. Second, contrary to Roberts's argument in his motion for summary judgment, Defendants do not need evidence of damages, as a benefit to the plaintiff suffices to prevail on a breach of fiduciary duty claim. Roberts's income tax returns are evidence of profits from these other businesses sufficient to raise a genuine dispute of material fact as to whether he benefited from the alleged breach. Having reviewed the summary judgment record, the court determines that the parties have provided conflicting evidence as to whether Roberts fully disclosed his ownership interest and active role in other entities to Defendants, including Equiguard Agency, Lendwell, and Tech2Roi. As this issue is at the heart of Defendants' breach of fiduciary duty counterclaim, the court will deny Roberts's motion for summary judgment on this counterclaim.

Id.

V. Court Held That Real Estate Broker Did Not Owe Fiduciary Duties To Other Parties In A Transaction

In *Van Duren v. Chife*, the buyers of a home sued the sellers as well as the sellers' real estate broker and his company regarding water penetration that damaged the home. No. 01-17-00607-CV, 2018 Tex. App. LEXIS 3494 (Tex. App.—Houston [1st Dist.] May 17, 2018, no pet. history). The trial court dismissed the buyers' breach of fiduciary duty claim against the sellers' agent. The court of appeals affirmed on that issue and held:

> The existence of a fiduciary duty is an element of a claim for breach of fiduciary duty. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017). Real estate brokers owe a fiduciary duty to their clients. *See Birnbaum,* 2015 Tex. App. LEXIS 8775, 2015 WL 4967057, at *10 (citing 22 Tex. Admin. Code § 531.1). While brokers also must treat other parties to a transaction fairly, this obligation does not make the broker a fiduciary of these other parties whom he does not represent. *See Kubinsky v. Van Zandt Realtors,* 811 S.W.2d 711, 715 (Tex. App.—Fort Worth 1991, writ denied) (realtors' fiduciary duties ran to sellers they represented in transaction). The evidence establishes that Mathews was the Chifes' real estate broker with respect to the Royal Lakes home sale and that another broker, Lofton, represented the Van Durens. The Royal Lakes contract identifies Mathews and Lofton as the brokers for the sellers and buyers respectively. Gesare testified that Mathews represented her and her husband in connection with the sale of the Royal Lakes home. Sonya likewise testified that Mathews represented the Chifes in this transaction. There is no contrary evidence in the record. Mathews met his burden to conclusively negate the existence of a fiduciary duty, a necessary element of the Van Durens' claim for breach of

fiduciary duty against him with respect to the Royal Lakes home sale. We therefore hold that the trial court properly granted summary judgment in favor of Mathews and his company on this claim.

Id.

V. Potpourri Issues

A. Texas Supreme Court Addresses The Causation Requirement For A Breach Of Fiduciary Duty Claim And Conspiracy, Aiding And Abetting Breach Of Fiduciary Duty, And Joint Venture Theories

In *First United Pentecostal Church of Beaumont v. Parker*, a church hired an attorney to defend it against sexual abuse allegations. 514 S.W.3d 214 (Tex. 2017). During the same time, the church also engaged the attorney to assist in a hurricane/insurance claim. When the insurance company offered to pay over $1 million to settle the claim, the attorney generously suggested that the church leave those funds in the attorney's trust account to assist with creditor protection. The attorney then withdrew those funds in 2008 and used them for his personal expenses and the expenses of his firm. The attorney had a contract attorney working with his firm. The contract attorney did not know about the improper use of the money at the time that it was done. Rather, he learned about it in 2010, but failed to disclose that information to the client. Eventually, the contract attorney did disclose the information and sent a letter wherein he repented and admitted to breaching his fiduciary duty. The original attorney fled to Arkansas, but was later caught. He pled guilty to misappropriation of fiduciary property and received a fifteen-year sentence.

Not in the forgiving mood, the church then 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. Basically, he argued that the deed was already done when he learned of the attorney's theft and his assistance in covering up the theft did not cause any damage. The trial court granted the motion for summary judgment, and the client appealed. The court of appeals affirmed the judgment, though there was a dissenting justice.

The Texas Supreme Court first addressed whether the trial court correctly rendered judgment for the contract attorney on the breach-of-fiduciary-duty claim. The court held that the elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary duty, (2) breach of the duty, (3) causation, and (4) damages. The court agreed in part with the client's argument that under *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942), that proof of damages was not required when the claim is that an attorney

breached his fiduciary duty to a client and that the client need not produce evidence that the breach caused actual damages. The court held that when the client seeks equitable remedies such as fee forfeiture or disgorgement, that the client does not need to prove that the attorney's breach caused any damages. However, the court held that when the client seeks an award of damages (a legal remedy) that the client does have to prove that the attorney's breach caused the client injury:

> Plainly put, for the church to have defeated a no-evidence motion for summary judgment as to a claim for actual damages, the church must have provided evidence that Parker's actions were causally related to the loss of its money. It did not do so. On the other hand, the church was not required to show causation and actual damages as to any equitable remedies it sought.

The contract attorney argued that the summary judgment should be affirmed because, although the client did plead equitable remedies in the trial court, that the client waived those claims by failing to raise them in its appellate briefing. The court held that, although the client did not use the terms "equitable," "forfeiture," or "disgorgement" in its brief, that the client's issue statement "fairly" included that argument. The court reversed the trial court's summary judgment regarding the client's equitable remedies because there was no causation requirement.

The court then turned to the conspiracy claim. The court held that an action for civil conspiracy has five elements: (1) a combination of two or more persons; (2) the persons seek to accomplish an object or course of action; (3) the persons reach a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts are taken in pursuance of the object or course of action; and (5) damages occur as a proximate result. The court explained:

> An actionable civil conspiracy requires specific intent to agree to accomplish something unlawful or to accomplish something lawful by unlawful means. This inherently requires a meeting of the minds on the object or course of action. Thus, an actionable civil conspiracy exists only as to those parties who are aware of the intended harm or proposed wrongful conduct at the outset of the combination or agreement.

In this case, 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 conspiracy plaintiff must establish that a conspiracy defendant's

actions caused an amount of harm, and thus prior actions by co-conspirators are not sufficient to prove causation:

> The actions of one member in a conspiracy might support a finding of liability as to all of the members. But even where a conspiracy is established, wrongful acts by one member of the conspiracy that occurred before the agreement creating the conspiracy do not simply carry forward, tack on to the conspiracy, and support liability for each member of the conspiracy as to the prior acts. Rather, for conspirators to have individual liability as a result of the conspiracy, the actions agreed to by the conspirators must cause the damages claimed. Here the church does not reference evidence of a conspiracy between Parker and Lamb to take or spend the church's money. Rather, it points to evidence that once Parker learned that the church's money was gone, he was concerned—as he well should have been—and he agreed with Lamb to try to replace it. The evidence that Parker conspired with Lamb to cover up the fact that the money was missing and attempt to replace it was evidence that Parker tried to mitigate the church's loss, not that he conspired to cause it. The damage to the church had already been done when Parker and Lamb agreed to cover up the theft and try to replace the money.

The court affirmed the trial court's summary judgment on the conspiracy claim.

The court reviewed the aiding and abetting breach of fiduciary duty claim. The court first held that the client did not adequately raise that claim in the summary judgment proceedings and waived it. In any event, assuming such a claim existed and assuming it was adequately raised, the court held that there was not sufficient evidence to support such a claim in this case:

> Moreover, as noted above, although we have never expressly recognized a distinct aiding and abetting cause of action, the court of appeals determined that 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. In his response to the PSI report, Lamb disclaimed Parker's involvement, and Parker clearly and consistently disclaimed knowing that Lamb was taking the church's money from the firm's trust account until the summer of 2010 after the money was gone. While it is true that Parker helped Lamb cover up the theft, this cannot be the basis for a claim against Parker for aiding and abetting Lamb's prior theft or misapplication of the church's money when there is no evidence that Parker was aware of Lamb's plans or actions until after they had taken place. *See Juhl*, 936 S.W.2d at 644-45 (noting that

> courts should look to the nature of the wrongful act, kind and amount of assistance, relation to the actor, defendant's presence while the wrongful act was committed, and defendant's state of mind (citing RESTATMENT (SECOND) OF TORTS § 876 cmt. d (1977))). As we discussed above, Lamb spent all of the church's money before Parker became involved, and there is no evidence the church was harmed by the only wrongful act in which Parker assisted or encouraged Lamb—covering up the fact that Lamb had spent the church's money.

The court finally addressed a joint venture claim by the client. The court held that the elements of a joint venture are (1) an express or implied agreement to engage in a joint venture, (2) a community of interest in the venture, (3) an agreement to share profits and losses from the enterprise, and (4) a mutual right of control or management of the enterprise. "Joint venture liability serves to make each party to the venture an agent of the other venturers and hold each venturer responsible for the wrongful acts of the others in pursuance of the venture." The court reviewed evidence offered by the client and held that it was taken out of context. The court held that none of the evidence provided support for the client's claim that there was "an express or implied agreement by Parker to be part of a joint venture with Lamb for the purpose of stealing the church's money." Therefore, the court affirmed the summary judgment on the joint venture claim.

Interesting Note: The court held that it had previously expressly stated that Texas had not adopted an aiding and abetting claim at this time. The court cited to its previous opinion of *Juhl v. Airington*, 936 S.W.2d 640, 643 (Tex. 1996), wherein the court held that there was a question in Texas as to whether there is a concert of action theory. That case dealt with whether a group of parties were responsible for a negligence claim and did not address a breach of fiduciary duty claim.

This case highlights a rather confusing area of law in Texas. The Texas Supreme Court has previously held that there is a claim for knowing participation in a breach of fiduciary duty in Texas. *See Kinzbach Tool Co. v. Corbett-Wallace Corp*., 138 Tex. 565, 160 S.W.2d 509, 514 (1942). The general elements for a knowing-participation claim are: 1) the existence of a fiduciary relationship; 2) the third party knew of the fiduciary relationship; and 3) the third party was aware it was participating in the breach of that fiduciary relationship. *Meadows v. Harford Life Ins. Co*., 492 F.3d 634, 639 (5th Cir. 2007).

Depending on how the Texas Supreme Court rules in the future, there may be a recognized aiding-and-abetting breach-of-fiduciary-duty claim in Texas. The Texas Supreme Court has stated that it has not expressly adopted a claim for aiding and abetting outside the context of a fraud claim. *See Ernst & Young v. Pacific Mut. Life Ins. Co*., 51 S.W.3d 573, 583 n. 7 (Tex. 2001); *West Fork Advisors v. Sungard Consulting*, 437 S.W.3d 917 (Tex. App.—Dallas 2014, no pet.). Notwithstanding, Texas courts have found such an action to exist. *See*

Hendricks v. Thornton, 973 S.W.2d 348 (Tex. App.—Beaumont 1998, pet. denied); *Floyd v. Hefner*, 556 F.Supp.2d 617 (S.D. Tex. 2008). One court identified the elements for aiding and abetting as the defendant must act with unlawful intent and give substantial assistance and encouragement to a wrongdoer in a tortious act. *West Fork Advisors*, 437 S.W.3d at 921.

There is not any particularly compelling guidance on whether these claims (knowing participation and aiding and abetting) are the same or different or whether they are recognized in Texas or not. And if they do exist and are different, what differences are there regarding the elements of each claim? The Texas Supreme Court still has much to explain related to this area of law.

The Texas Supreme Court does appear to clear up one important causation issue. There was confusion as to whether a finding of conspiracy or aiding and abetting or knowing participation automatically imposes joint liability on all defendants for all damages. Most of the cases seem to indicate that a separate damage finding is necessary for each defendant because the conspiracy may not proximately cause the same damages as the original bad act. *See THPD, Inc. v. Continental Imports, Inc.,* 260 S.W.3d 593 (Tex. App.—Austin 2008, no pet.); *Bunton v. Bentley*, 176 SW.3d 1 (Tex. App.—Tyler 1999), *aff'd in part, rev'd in part on other grounds*, 914 S.W.3d 561 (Tex. 2002); *Belz v. Belz*, 667 S.W.2d 240 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). The court has now held that the conspiracy defendant's actions must cause the damages awarded against it, and a plaintiff cannot solely rely on just the original bad actor's conduct. So, there should be a finding of causation and damages for each conspiracy defendant (unless the evidence proves as a matter of law that all conspiracy defendants were involved from the very beginning). For a great discussion of these forms of joint liability for breach of fiduciary duty, please see E. Link Beck, *Joint and Several Liability*, STATE BAR OF TEXAS, 10TH ANNUAL FIDUCIARY LITIGATION COURSE (2015).

B. Fiduciary Duties Meet Jerry Springer: Court Holds That Participants To An Extra-Marital Affair Do Not Owe Each Other Fiduciary Duties

In *Markl v. Leake,* a husband started a long-time extramarital relationship with his girlfriend in 2004. No. 05-17-00174-CV, 2018 Tex. App. LEXIS 3384 (Tex. App.—Dallas May 14, 2018, no pet. history). The husband gave her money, placed her on the payroll of his business, provided her a credit card, and maintained her vehicle and real property. The husband invested approximately $50,000 in his girlfriend's real properties. The relationship ended when the girlfriend caused the husband to be indicted for four felony charges related to an "altercation" and obtained a protective order prohibiting his entry upon her real property. Apparently, the giflfriend had initiated a relationship with the husband's nephew, which upset the husband. The husband and wife then sued the girlfriend for breach of fiduciary duty and other tort claims arising from the benefits bestowed upon her during the relationship. They sought a temporary injunction to

prevent the girlfriend from disposing of the two parcels of real property in which they purportedly invested money. Two months after the breakup, the husband and his wife sued the girlfriend for breach of fiduciary duty, arguing that her breach deprived them of the community funds invested in her property. They also alleged fraud, conversion, and promissory estoppel. At trial, the trial court granted the girlfriend's motion for directed verdict as to the breach of fiduciary duty claim and the jury found against the husband and wife on their other claims. They appealed the trial court's directed verdict on their breach of fiduciary duty claim.

The court appeals affirmed the judgment. The husband solely relied on a theory that his confidential relationship with his girlfriend created fiduciary duties. The court of appeals stated:

> Informal relationships, termed "confidential relationships," may arise "where one person trusts in and relies upon another, whether the relation is a moral, social, domestic, or merely personal one." *Id*. A confidential relationship exists in those cases in which influence has been acquired and abused and confidence has been extended and betrayed. *Moore*, 595 S.W.2d at 507. Whether a fiduciary relationship exists depends on the circumstances and is "determined from the actualities of the relationship between the parties." *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). The mere fact that one party to a relationship subjectively trusts the other does not indicate the existence of a fiduciary relationship. *Smith v. Deneve*, 285 S.W.3d 904, 911 (Tex. App.—Dallas 2009, no pet.). "The problem is one of equity" and the circumstances giving rise to the confidential relationship "are not subject to hard and fast lines." *Moore*, 595 S.W.2d at 507.
>
> But a fiduciary relationship is an extraordinary one and will not be created lightly. *Smith*, 285 S.W.3d at 911. Not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship. *Meyer v. Cathey*, 167 S.W.3d 327, 330 (Tex. 2005). The law simply does not protect just any relationship between people:
>
> Fiduciary law protects only those important social and economic interactions of high trust and confidence that create an implicit dependency and peculiar vulnerability of the beneficiary to the fiduciary. While placing ordinary trust and confidence in others may create contractual or tortious obligations, only high trust and confidence reposed within the context of the types of important social and economic relations contemplated above will give rise to fiduciary obligations. . . . Relationships, not individuals, are the prime concern of fiduciary law.
>
> *Leonard I. Rotman, Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 B.U. L. REV. 921, 933 (2011). The fiduciary character of a relationship is determined by looking at both the

> degree of dependence and vulnerability that exists within it, and the value of the interaction to the society at large. *Id.* at 934. Although we recognize the existence of a confidential relationship is ordinarily a question of fact, when the issue is one of no evidence, it becomes a question of law. *Crim Truck*, 823 S.W.2d at 594.
>
> In this case, the Markls want to use fiduciary law to recoup money John spent on making repairs to the property of a woman with whom he had a ten-year clandestine relationship. The Markls argue there is no Texas case precluding as a matter of law an extramarital affair from rising to the level of a fiduciary relationship. At the same time, they direct us to no cases where such a relationship has been recognized as fiduciary in nature.

Id. The court then discussed a case that held that having an illicit relationship does not create a fiduciary relationship. *Id.* (citing *In re R.O.*, No. 03-04-00506-CV, 2005 Tex. App. LEXIS 2990, 2005 WL 910231 (Tex. App.—Austin Apr. 21, 2005, no pet.)). The court also cited to one of its prior opinions holding that a long term girlfriend/boyfriend relationship does not create a fiduciary relationship. *Id*. (citing *Smith v. Deneve*, 285 S.W.3d 904, 911 (Tex. App.—Dallas 2009, no pet.)). The court held that no evidence showed that the husband was accustomed to being guided by the girlfriend's judgment or advice or that she ever gave him financial advice or assumed the role of a fiduciary toward him. The court noted:

> Even though Ethel testified John could trust her and believe what she told him, that evidence does not elevate the status of their relationship into a fiduciary one. Moreover, as in R.O., although John argues their relationship was "based upon trust," he described the stalemate dating "clear back to early in the relationship." If John wanted out of the relationship, Ethel would tell his wife and he would lose both women; if Ethel wanted out of the relationship, she had to "settle up on the property." Thus, the evidence shows each was acting in his or her own interest. Whether John and Ethel's relationship contained aspects similar to a marriage is unavailing because, in this case, John was married—to Debra. Recognizing John and Ethel's relationship as fiduciary in character, under the circumstances here, would make light of the very notion of the concepts of trust and confidence. Considering the evidence in the light most favorable to the Markls, we conclude this case does not present any evidence of justifiable trust and confidence as will create an informal fiduciary relationship. We overrule the sole issue.

Id. The court affirmed the trial court's directed verdict order for the girlfriend.

C. Court Rejects Claim That Ex-Spouses Owed Each Other Fiduciary Duties

In *Robins v. Robins*, an ex-wife sued her ex-husband for breaching fiduciary duties regarding the sale of their former marital residence. No. 02-16-00285-CV, 2018 Tex. App. LEXIS 3534 (Tex. App.—Fort Worth May 17, 2018, no pet. history). The trial court entered a judgment finding that the ex-husband breached a fiduciary duty to his former wife and awarded her all the net proceeds from the sale and awarded her attorney's fees. The ex-husband appealed, and the court of appeals reversed and rendered. The court stated:

> Generally, to prove a claim for breach of fiduciary duty, a plaintiff must prove that the defendant had a fiduciary duty to the plaintiff, breached it, and thereby caused damages to the plaintiff. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017). While spouses owe fiduciary duties to one another, ex-spouses generally do not. *See Solares v. Solares*, 232 S.W.3d 873, 881 (Tex. App.—Dallas 2007, no pet.) (holding that "in a contested divorce where each spouse is independently represented by counsel, the fiduciary relationship terminates"); *In re Marriage of Notash*, 118 S.W.3d 868, 872 (Tex. App.—Texarkana 2003, no pet.) (noting that any fiduciary duty between spouses terminates upon divorce); *Bass v. Bass,* 790 S.W.2d 113, 119 (Tex. App.—Fort Worth 1990, no writ) ("Although marriage may bring about a fiduciary relationship, such a relationship clearly does not continue when a husband and wife hire numerous independent professional counsel to represent them respectively in a contested divorce proceeding.") (citation omitted). Jerry therefore had no formal fiduciary duty to Rhonda as a matter of law. Rhonda contends that "[a] moral and social relationship was created when [she and Jerry] decided post-divorce not to sell the home and [to] maintain it while the children finished high school" and that "[a] fiduciary duty existed for each party to not harm the other's fifty percent interest in the [P]roperty." While it is true that an informal fiduciary duty may arise from a moral, social, domestic or purely personal relationship of trust and confidence, *Collins v. Kappa Sigma Fraternity*, No. 02-14-00294-CV, 2017 WL 218286, at *10-12 (Tex. App.—Fort Worth Jan. 19, 2017, pet. denied), no evidence in the record before us indicates that Rhonda and Jerry had that sort of relationship after their divorce; Jerry therefore also had no informal fiduciary duty to Rhonda. *See Higgins v. Higgins*, 514 S.W.3d 382, 389-90 (Tex. App.—San Antonio 2017, pet. denied). We sustain Jerry's first issue.

Id. The court also held that as attorney's fees are not available for a breach-of-fiduciary-duty claim, the trial court erred in awarding the ex-wife her fees.

D. Court Holds That Attorneys Acted As An Escrow Agent And Could Be Sued For Breach Of Fiduciary Duty By A Non-Client

In *Alexander O&G, LLC v. Nomad Land & Energy Res., LLC*, Nomad entered into a Purchase and Sale Agreement ("PSA") with Alexander O&G, LLC ("AOG") for the sale of oil and gas interests. No. H-16-2065, 2017 U.S. Dist. LEXIS 130415 (S.D. Tex. August 16, 2017). The PSA provided that AOG would deposit earnest money into an escrow account:

> Upon execution and delivery of the Agreement, [AOG] shall tender [Nomad], in an agreed escrow agent's account, an earnest money deposit of $100,000.00 to help ensure [AOG's] performance hereunder, which deposit shall be non-refundable, except in the event that [Nomad] shall be unwilling or unable to perform his obligations hereunder, in which case the entirety of the earnest money deposit, and any interest or any additions thereto, shall be refunded to [AOG].

Id. AOG later informed Nomad that it was terminating the PSA, and Nomad requested that AOG's counsel release the $100,000 deposit they held in escrow pursuant to the terms of the PSA. AOG's counsel responded that it had returned the funds to its client, AOG, as it was the owner of those funds. Nomad then sued AOG and AOG's counsel, and alleged that AOG's counsel breached fiduciary duties as an escrow agent. AOG's counsel filed a motion to dismiss the complaint.

The federal district court denied the motion to dismiss regarding the claims against the attorneys. The court first determined whether the attorneys acted as an escrow agent. The court held that to create an escrow relationship "the parties to the underlying transaction need only to deposit instruments or funds with a third party and to agree to the terms in which the third party would deliver the items deposited." *Id*. "There must be a valid underlying contract to support the escrow agreement. However, in the absence of a contract, a fiduciary relationship may still exist." *Id*. The court held that "[e]ven where no formal escrow agreement exists, a party that receives money accompanied by specific instructions on how to apply the money has the duties of an escrow agent." *Id*.

The court then held that Nomad sufficiently pled the existence of a fiduciary relationship by alleging that "the PSA between AOG and Nomad is a valid, underlying contract in which the parties agreed to clear and definite escrow terms." *Id*. Further, "Nomad also alleged that the Counter-Defendants were counsel to AOG for the PSA, and therefore should have been on notice of the instructions to the escrow agent." *Id*. The court concluded that "these facts create a more than plausible basis that the Counter Defendants were on notice of the explicit instructions to the escrow agent in the PSA and assumed a fiduciary duty to Nomad when they accepted the $100,000 earnest money deposited into Jones Gill's IOLTA account" and that a fiduciary relationship existed between the attorneys and Nomad.

The court noted that in Texas an escrow agent owes the duty of loyalty, the duty to make full disclosure, and the duty to exercise a high degree of care to conserve the money and pay it only to those entitled to receive it. Id. Thereunder, the court found that Nomad alleged facts that the attorneys breached their fiduciary duty because the earnest money was returned to the wrong party and that such breach resulted in injury. The court denied the motion to dismiss.

E. Court Holds That Former Broker Did Not Owe Fiduciary Duties To Client Regarding An Investment

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

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

> While a broker owes his investor-client a fiduciary duty, that duty varies in scope with the nature of their relationship. The nature of the account—whether nondiscretionary or discretionary—is one factor to be considered, as are the degree of trust placed in the broker and the intelligence and qualities of the consumer. A broker's duty is usually restricted to executing the investor's order when the investor controls a nondiscretionary account and retains the ability to make investment decisions. In a nondiscretionary account, the fiduciary relationship is one of principal/agent, and the agency relationship begins when the customer places the order and ends when the broker executes it; the broker's duties in this type of account are only to fulfill the mechanical, ministerial requirements of the purchase or sale of the security or futures contracts on the market. As a general proposition, a broker's duty in relation to a nondiscretionary account is complete, and his authority ceases, when the sale or purchase in made and the receipts therefrom accounted for. There is nothing in the record to show that Holmes's account with TD Ameritrade was discretionary or that the broker/client relationship between the two gave rise to anything

> other than a principal/agent duty to execute the trades ordered. Thus, Holmes has not raised a fact question regarding whether Newman owed him any fiduciary duty other than fulfilling the trades authorized by Newman.
>
> Because Newman's fiduciary duty was satisfied once the trades were made in accordance with Holmes's instructions, it is not the sort of preexisting relationship of trust and confidence that would give rise to a continuing, informal relationship imposing even broader fiduciary duties than Newman held under the prior relationship.

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

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

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

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

Trust is in no way responsible for providing investment advice." *Id*. Although the Texas Supreme Court did not analyze common-law duties owed by defendants, it did make clear that contractual limitations would impact duties owed between parties.

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

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

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

> (1) manage the account in a manner directly comporting with the needs and objectives of the customer as stated in the authorization papers or as apparent from the customer's investment and trading history; (2) keep informed regarding the changes in the market which affect his customer's interest and act responsively to protect those interests; (3) keep his customer informed as to each completed transaction; and (4) explain forthrightly the practical impact and potential risks of the course of dealing in which the broker is engaged.

Id. at 257-58.

F. Court Held That Retirement Benefits Belonged To The Worker's Sister, Who Was Designated Beneficiary, And Not The Wife

In *Estate of Gibson*, a man named his sister as the beneficiary of his retirement plan in 1989. No. 06-17-00059-CV, 2017 Tex. App. LEXIS 9963 (Tex. App.—

Texarkana October 13, 2017, no pet.). The man married in 2003, but failed to change the beneficiary designation. When he died in 2011, his wife, who was his executor, sued in probate court for a declaration that she was entitled to the benefits. The probate court disagreed, ordered that the benefits were not community property, and ordered that they were to go to the sister. The wife appealed.

The court of appeals disagreed with the probate court's holding on separate property, but affirmed the judgment. The probate court's conclusion of law stated that "[a]ny presumption that the TRS Plan Benefits were community property . . . w[as] rebutted by the proof, by clear and convincing evidence, of the beneficiary designation . . . ." *Id*. The wife argued that, because the plan benefits were in the possession of the man during their marriage, they were presumed to be community property and that the sister did not offer any evidence to overcome that presumption. The court of appeals held that "[d]eferred compensation plans, such as the TRS plan, are considered community property only to the extent they are attributable to the spouse's employment during marriage." *Id*. The court of appeals held that "that portion of the TRS plan benefits attributable to Gibson's employment while he was married to Fox-Gibson is community property." *Id*.

That did not end the inquiry. "Property passing at death pursuant to the terms of a contract, such as contributory retirement plans, are non-probate assets that are not subject to disposition by will or by the rules of intestate succession." *Id*. (citing *Valdez v. Ramirez*, 574 S.W.2d 748, 750 (Tex. 1978)). The court held that the disposition of these assets is controlled by lifetime transfer rules. *Id*. While being earned by the employee spouse, the right to the benefits under the retirement plan is subject to the employee spouse's sole management, control, and disposition. This includes the right to designate how the benefits will be paid, whether at retirement or in the event of the employee spouse's death. "By statute, a TRS plan member may "designate one or more beneficiaries to receive benefits payable by [TRS] on the death of the member" and file it with TRS." *Id*. (citing Tex. Gov't Code Ann. § 824.101(a)).

Therefore, the probate court's unchallenged findings of fact that "the TRS plan benefits are non-probate assets; that the TRS plan, to the extent it accrued benefits during the marriage of Gibson and Fox-Gibson, was the sole management community property of Gibson; that Gibson designated Ward as his plan beneficiary in June 1989; that the designation was never revoked, amended, or changed; and that at Gibson's death the TRS plan benefits became payable to Ward" "are consistent with the Supreme Court's holdings in *Valdez*." *Id*. The court held that "since the probate court entered the proper judgment, its erroneous conclusion of law does not require reversal." *Id*.

G. Court Held That Power-Of-Attorney Holder Was Not Authorized To Name Himself As A Beneficiary Of The Principal's Insurance Policy, But Could Name His Sister

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

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

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

> matters connected with his agency." Accordingly, "absent the principal's consent, an agent must refrain from using his position or the principal's property to gain a benefit for himself at the principal's expense."

Id. (internal citation omitted).

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

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

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

beneficiary under a contract procured by the principal before executing the power of attorney." *Id*. (citing Tex. Est. Code Ann. § 752.108 (b)). Further, "Unless the principal has granted the authority to create or change a beneficiary designation expressly . . . an agent may be named a beneficiary of an insurance contract . . . only to the extent the agent was named as a beneficiary by the principal." *Id*.

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

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

> To bring these claims, Nicholas must show that he has standing as the principal in a fiduciary relationship with Christian or demonstrate that he was deprived of a legitimate property interest. He can do neither. As the discussion above establishes, while Christian's designation of himself as beneficiary of the Policy was not authorized by statute, his actions did not constitute self-dealing or breach any duty he held as fiduciary. Furthermore, Christian was authorized by statute to designate Sarah as the contingent beneficiary of the Policy and the Annuity Contract. Accordingly, Christian acted lawfully in removing Nicholas as the beneficiary of the Policy and Annuity Contract, and Nicholas cannot recover against him for it.

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

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

insurance contract . . . only to the extent the agent was named as a beneficiary by the principal." Tex. Est. Code Ann. § 752.108(b). Accordingly, because the power of attorney was executed in October 2015, the court applied the 2015 statute and not the 2017 amendment.

H. Bankruptcy Court In Texas Held That Client Did Not Adequately Plead An Aiding and Abetting Breach of Fiduciary Duty Claim Against Former Attorneys

In *In re Westech Capital Corp.*, a bankruptcy trustee sued a company's former attorneys for breaching fiduciary duties and also for aiding and abetting the breach of fiduciary duty. No. 16-10300-TMD, 2018 Bankr. LEXIS 969 (W.D. Tex. Bankr. March 29, 2018). The attorneys filed a motion to dismiss. The court first determined that, under Delaware and Texas law, the attorneys did not breach fiduciary duties by simply committing legal malpractice: "In short, all the actions taken by Greenberg as alleged by the Trustee were actions taken in the context of the attorney-client relationship, and no more, and so the Trustee has not alleged a cognizable claim for breach of fiduciary duty on the part of Greenberg." *Id*. The court then addressed the aiding and abetting claim and similarly held that it should be dismissed:

> Under Texas law, aiding and abetting a breach of fiduciary duty is more often called knowing participation in a breach of fiduciary duty. But the Texas Supreme Court has not expressly decided that this cause of action exists. In First United Pentecostal Church of Beaumont v. Parker, the Texas Supreme Court stated that if a claim for aiding and abetting a breach of fiduciary duty did exist, the plaintiff would have to prove "that the defendant, with unlawful intent, substantially assisted and encouraged a tortfeasor in a wrongful act that harmed the plaintiff." In an earlier case, *Juhl v. Airington*, the Texas Supreme Court explained that whether substantial assistance was provided can be evaluated by considering these factors: a. The nature of the wrongful act; b. The kind and amount of the assistance; c. The relation of the defendant and the actor; d. The presence or absence of the defendant at the occurrence of the wrongful act; and e. The defendant's state of mind.
>
> The scienter elements are like the requirement in Delaware law in that it requires both knowledge of the fiduciary relationship and knowledge of the breach. Even though Texas law was not discussed by either the Trustee or Greenberg, based on the arguments presented in the pleadings, the only element brought into question by Greenberg is whether Greenberg knew that it was participating in breaches of fiduciary duty. The central question therefore is whether Greenberg knew that the acts it assisted were breaches of fiduciary duty.
>
> Courts applying Texas law (and assuming the cause of action does exist) have found the requisite knowledge when the plaintiff alleged that legal

> counsel had adequate information because of the context in which those actions were taken.

Id. The court then analyzed the pleading and held that the trustee did not adequately plead a claim for aiding and abetting breach of fiduciary duty because the pleading did not state that the attorneys had sufficient knowledge.

VI. Fiduciary Litigation Practice Tip: Streamlining Discovery To Threshold Legal Issues

Litigation can unfortunately be a costly endeavor. This is as true with fiduciary litigation as with any other type of litigation. The parties have to exchange documents, take depositions, retain experts, conduct legal research on many issues, prepare dispositive motions and respond to same, prepare for trial, prepare lengthy jury instructions, etc. However, there are often certain threshold issues that, if determined early in a case, may streamline the disposition of the case. For example, there are a number of issues in fiduciary cases that may make the rest of the case moot: personal jurisdiction, forum issues, the statute of limitations, exculpatory and/or release clauses, whether fiduciary duties are owed, etc. When a case has a threshold issue, it would make sense to bifurcate discovery and allow the threshold issue to be resolved before the remainder of the case is fully litigated.

Of course, plaintiffs often fight these attempts. Plaintiffs see the cost of litigation as a leverage tool to pressure a more friendly settlement. They also do not want to limit their discovery as they may believe that egregious facts on liability or damages may impact the way a court will view a threshold issue. There may be some truth to those beliefs. However, for most cases, it really is better for all parties, and certainly the court system, to streamline the case and have an orderly and thoughtful schedule for its resolution.

So, what is a defendant to do when it wants to advocate for a streamlined scheduling order? What discretion does a trial court have to enter such an order?

Texas Rule of Civil Procedure 166 provides that a district court has discretion to determine what issues need to be decided and in what order. Tex. R. Civ. P. 166. The Rule states:

> In an appropriate action, to assist in the disposition of the case without undue expense or burden to the parties, the court may in its discretion direct the attorneys for the parties and the parties or their duly authorized agents to appear before it for a conference to consider: … (c) A discovery schedule; … (e) Contested issues of fact and the simplification of the issues;… (g) The identification of legal matters to be ruled on or decided by the court; … (p) Such other matters as may aid in the disposition of the action. The court shall make an order which recites the action taken at the pretrial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties

> as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions, agreements of counsel, or rulings of the court; and such order when issued shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.

Tex. R. Civ. P. 166. The purpose of Rule 166 is to assist in the disposition of the case without undue expense or burden to the parties. *Walden v. Affiliated Computer Servs., Inc.*, 97 S.W.3d 303, 2003 Tex. App. LEXIS 314 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Rule 166(g) expressly allows a trial court to use a pretrial conference to consider the identification of legal matters to be ruled on or decided by the court. *Id*.

Moreover, in Texas, a court has discretion to stay discovery on issues that may be mooted by a threshold issue. In discovery, a trial court is granted latitude in limiting or tailoring discovery. Tex. R. Civ. P. 192.4. Generally, a trial court should limit discovery methods to those which are more convenient, less burdensome, and less expensive, or when the burden or expense of the proposed discovery outweighs its likely benefit. *In re Alford Chevrolet—Geo*, 997 S.W.2d 173, 182-83 (Tex. 1999) (orig. proceeding). *See also* Tex. R. Civ. P. 192.4. Discovery requests themselves must be reasonably tailored to matters relevant to the case at issue. *In re Xeller,* 6 S.W.3d 618, 626 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding). Consequently, the trial court has broad discretion to limit discovery requests by time, place, and subject matter. *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995). Specifically, the Texas Rules of Civil Procedure expressly allow a trial court to protect a party from inappropriate or untimely discovery requests:

> To protect [a party filing a motion for protection] from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may – among other things – order that: . . . (3) the discovery not be undertaken at the time or place specified.

Tex. R. Civ. P. 192.6(b). A court can stay discovery – put it on hold – if it is untimely. *Id*. For example, the Texas Supreme Court stated: "courts may limit discovery pending resolution of threshold issues like venue, jurisdiction, forum non conveniens, and official immunity." *In re Alford Chevrolet-Geo*, 997 S.W.2d at 181. For example, one court has repeatedly stayed discovery pending the resolution of a special appearance motion. *Lattin v. Barrett*, No. 10-03-287-CV, 2004 Tex. App. LEXIS 177 (Tex. App.—Waco January 5, 2004, no pet.); *Lacefield v. Electronic Fin. Group*., 21 S.W.3d 799, 800 (Tex. App.—Waco 2000, no pet.) (stayed proceedings pending disposition of special appearance appeal).

A court has the power to stay discovery until it determines the outcome of threshold issues. *See Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520-21 (Tex. 1995) (affirming summary judgment granted by trial court based on interpretation of unambiguous contract provision and rejecting the argument that summary judgment was inappropriate because it was decided before the plaintiff had the opportunity to conduct discovery); *Davis v. Star-Telegram,* No. 05-98-00088-CV, 2000 Tex. App. LEXIS 4526, at *16-17 (Tex. App.—Dallas July 7, 2000, pet. denied) (holding that the trial judge did not abuse his discretion in staying discovery pending a ruling on a motion for summary judgment). In fact, a court can stay the entire case pending a motion for summary judgment. *See In re Messervey,* No. 04-00-00700-CV, 2001 Tex. App. LEXIS 430, 2001 WL 55642, at *3 (Tex. App.—San Antonio July 24, 2001, orig. proceeding) (not designated for publication) ("[The court] has the authority to stay the case temporarily while he considers the motion for summary judgment and determines whether the discovery sought by Messervey is relevant and necessary for Messervey to contest the issues raised by Northbrook."); *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 693-94 (Tex. App.—Amarillo 1998, pet. denied) (no abuse of discretion for trial court to continue trial date sua sponte pending ruling on summary judgment). For example, a court of appeals affirmed a trial court's refusal to allow discovery where an immunity issue was pending on summary judgment. *Barnes v. Sulak*, No. 03-01-00159-CV, 2002 Tex. App. LEXIS 5727, at *16-17 (Tex. App.—Austin 2002, pet. denied). *See also Elgohary v. Lakes on Eldridge N. Cmty. Ass'n*, No. 01-14-00216-CV, 2016 Tex. App. LEXIS 8876, at *21-22 (Tex. App.—Houston [1st Dist.] Aug. 16, 2016, no pet.); *Doe v. Roman Catholic Archdiocese of Galveston-Houston ex rel. Dinardo*, 362 S.W.3d 803, 809, 812 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

Courts in the Fifth Circuit routinely stay discovery that will be mooted by dispositive motions. *See, e.g., Whalen v. Carter*, 554 F.2d 1087, 1098 (5th Cir. 1992); *Montgomery v. United States,* 933 F.2d 348, 350 (5th Cir. 1991); *Williamson v. United States Department of Agriculture*, 815 F.2d 368, 382 (5th Cir. 1987); *Drake v. Nat'l Broadcasting Co., Inc.*, No. 3-04-CV-0652-R, 2004 U.S. Dist. Lexis 25090, at *3-5 (N.D. Tex. 2004) (granting a stay of discovery under federal law pending the outcome of a motion to dismiss and noting that such a stay is particularly appropriate when the disposition of a motion "might preclude the need for discovery altogether, thus saving time and expense"); *Tschirn v. Kurzweg*, No. 03-0369, 2003 U.S. Dist. LEXIS 8294 (E. D. La. May 8, 2003) (magistrate's opinion); *Leclerc v. Webb*, No. 3-664, 2003 U.S. Dist. LEXIS 7569 (E. D. La. May 1, 2003). *See also Young v. Burks*, 849 F.2d 610 n.6 (6th Cir. 1988); *Spencer Trask Software & Info. Servs., LLC v. RPost Int'l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002); *Veniard v. NB Holdings Corp.*, 2000 U.S. Dist. LEXIS 20518 (M.D. Fla. August 8, 2000), *vacated in part on other grounds,* 2001 U.S. Dist. LEXIS 22907 (August 27, 2001); *Richmond v. W.L. Gore & Assocs.*, 881 F.Supp. 895 n.13 (S.D. N.Y. 1995); *International Graphics, Div. of Moore v. United States*, 3 Cl. Ct. 715, 717-18 (1983); *Blair Holdings Corp. v. Rubinstein*, 159 F.Supp. 14, 15 (S.D.N.Y. 1954).

For example, in *Landry v. Air Line Pilots Ass'n Int'l*, the Fifth Circuit affirmed a district court's order limiting discovery pending the resolution of a summary judgment motion. 901 F.2d 404, 435-36 (5th Cir. 1990). The court stated:

> "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown," a district court is authorized to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." F.R.Civ.P. 26(c). In their motions for protective orders, the defendants gave several reasons why this discovery was not needed prior to the resolution of the summary judgment motions which, if granted, would preclude the need for the discovery altogether.
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> . . . .
>
> Discovery is not justified when cost and inconvenience will be its sole result. On the record before it, the trial court had to reach the decision that it did reach. The procedural posture of the case and the showings of the parties left it little choice. Whether the trial judge surmised that pilots would not be able to defeat the summary judgment motions or whether he, like us, saw sufficient disputed facts to preclude summary judgment is irrelevant. Under the circumstances, there was no abuse of discretion in the order staying discovery until the summary judgment motions were resolved.

Id.

Therefore, in state and federal court in Texas, a court has discretion to rule on whether threshold issues should be determined in a particular order and may stay discovery on other issues that may be mooted by the determination of threshold issues. That makes sense as every case should be reviewed for its particular needs and courts should enter orders to save parties from needless expense. Once again, as the Texas Supreme Court held, "a trial court should limit discovery methods to those which are more convenient, less burdensome, and less expensive, or when the burden or expense of the proposed discovery outweighs its likely benefit." *In re Alford Chevrolet—Geo,* 997 S.W.2d at 182-83. Courts should exercise their discretion to do just that.

VII. Conclusion

This paper was intended to provide an update of recent legal issues in the complex area of fiduciary litigation in Texas. For more information, please visit www.txfiduciarylitigator.com.