ALTERNATIVES TO TORTIOUS INTERFERENCE WITH INHERITANCE

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I. INTRODUCTION

For many years preceding the *Archer v. Anderson* case, fiduciary litigation practitioners used the cause of action of "tortious interference with inheritance rights" to address situations practitioners believed fell through the gaps of typical will or trust contests.[1] Over the years, Texas Courts of Appeals issued conflicting opinions on the availability of the cause of action as a remedy.[2] In the 2018 case of *Archer v. Anderson*, the Texas Supreme Court determined that in Texas, there is no cause of action for tortious interference with inheritance.[3]

This article gives an overview of tortious interference with inheritance and why it was struck down.[4] It then discusses other remedies that are available to practitioners who would have originally brought a tortious interference with inheritance claim in the past.[5]

Special thanks to Mark R. Caldwell and J. Brian Thomas for giving us permission to use portions of their paper, *Litigation Involving Powers of Attorney and Bank Accounts*, State Bar of Texas, Advanced Estate Planning & Probate, 2017 and their paper *Choosing Your Own "Adventure" and Navigating Self-Dealing Transactions Under the New Power of Attorney Rules*, State Bar of Texas, Estate Planning & Drafting, 2018.[6]

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1. *See* 9 GERRY W. BEYER, TEXAS LAW OF WILLS § 12:3 (TEX. PRAC. SERIES 4th ed. 2020).
2. *Id.*
3. Archer v. Anderson, 556 S.W.3d 228, 239 (Tex. 2018).
4. *See infra* Sections II.A–C.
5. *See infra* Sections IV–X.
6. Mark R. Caldwell & J. Brian Thomas, *Litigation Involving Powers of Attorney and Bank Accounts*, *in* ADVANCED ESTATE PLANNING & PROBATE (State Bar of Tex. 2017) [hereinafter *Litigation Involving Powers of Attorney*]; Mark R. Caldwell & J. Brian Thomas, *Choosing Your Own "Adventure"*

II. TORTIOUS INTERFERENCE WITH INHERITANCE

A. Overview and History of the Claim in Texas

In *King v. Acker*, the Houston Court of Appeals held that "a cause of action for tortious interference with inheritance rights exists in Texas," after concluding that the Texas Supreme Court had impliedly recognized the cause of action in *Pope v. Garrett.*[7] In *King*, the Court cited to the *Restatement (2nd) of Torts* section 774B, which defines the tort as follows:

> One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subjected to liability to the other for loss of the inheritance or gift.[8]

The court in *King* noted that the commentary for section 774B provides in part:

> Thus[,] the rule stated here applies when a testator has been induced by tortious means to make his first will or not to make it; and it applies also when he has been induced to change or remake it. It applies also when a will is forged*,* altered or suppressed.[9]

The court in *King* honed in on the maxim "where there is a right, there is a remedy," and "equity will not suffer a right to be without a remedy."[10] After the *King* case, a handful of Texas Courts of Appeals recognized the tort, and practitioners began asserting the alleged cause of action regularly.[11]

B. Kinsel v. Lindsey

In 2017, the Texas Supreme Court was asked to recognize tortious interference with inheritance as a viable cause of action.[12] "Lesey Kinsel owned 60% of the [family] ranch, and her step-children and step-grandchildren owned various shares of the other 40%."[13] In 1996,

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and Navigating Self-Dealing Transactions Under the New Power of Attorney Rules, *in* ESTATE PLANNING & DRAFTING (State Bar of Tex. 2018).

7. *See* King v. Acker, 725 S.W.2d 750, 754 (Tex. App.—Houston [1st Dist.] 1987, no writ).

8. *Id.* at 754.

9. *Id.* (emphasis added).

10. *Id.* (*citing* Chandler v. Welborn, 156 Tex. 312, 319, 294 S.W.2d 801, 807 (1956)).

11. *See, e.g.*, Stern v. Marshall, 471 S.W.3d 498, 516 (Tex. App.—Houston [1st Dist.] 2015, no pet.); Magana v. Citibank, N.A., 454 S.W.3d 667, 685 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *In re* Est. of Valdez, 406 S.W.3d 228, 233 (Tex. App.—San Antonio 2013, pet. denied); *In re* Est. of Russell, 311 S.W.3d 528, 535 (Tex. App.—El Paso 2009, no pet.).

12. *See* Kinsel v. Lindsey, 526 S.W.3d 411, 414 (Tex. 2017).

13. *Id.* at 415.

"Lesey deeded her share of the ranch to her intervivos trust."[14] The trust provided that her share of the property would pass to certain family members.[15] However, the trust was silent as to what would occur if the property was sold during her lifetime.[16] Accordingly, by default any prospective proceeds would pass to Jane, the residual beneficiary of the trust.[17]

The ranch was sold one month before Lesey died.[18] Members of the Kinsel family sued Jane, Lesey's nephew, and Lesey's attorney and his law firm over their role in the sale of the ranch.[19] The Kinsels argued that they were deceived by the defendants and led to believe Lesey was running out of money due to the mounting costs of her care and needed to liquidate the ranch.[20] In reality however, Lesey held around $1.4 million in marketable securities.[21] The plaintiffs claimed they would not have agreed to the sale had they known it was not necessary to support Lesey.[22]

The Kinsels alleged the defendants "unduly influenced Lesey and that she lacked capacity to execute . . . amendments to her trust or to sell her share of the ranch."[23] "They sought damages for tortious interference with their inheritances; statutory and common-law fraud; and conspiracy."[24] They also sought to create a constructive trust for Lesey's share of the ranch's proceeds that flowed to Jane as a residual beneficiary.[25] The jury ruled in favor of the Kinsels for each of their alleged causes of action and awarded them a total of $3.056 million (the amount due to Lesey for the sale of the ranch).[26] Additionally, the court created a constructive trust and placed Jane's share of any monies she would be entitled to in it for the purpose of satisfying the Kinsels' judgment.[27] The Kinsels were also awarded $800,000 in attorneys' fees.[28]

On appeal, the Amarillo Court of Appeals reversed the jury's award for damages for tortious interference with inheritance, asserting that the Texas Legislature and the Texas Supreme Court had not recognized it as a cause of

14. *Id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.*
23. *Id.* at 417.
24. *Id.*
25. *See id.*
26. *See id.*
27. *See id.*
28. *See id.*

action.[29] The court also reversed the award for fraud damages but upheld the imposition of a constructive trust.[30]

The Texas Supreme Court held that the court in *King* had inaccurately read *Pope* when it found that Texas recognizes the cause of action of tortious interference with inheritance.[31] Finding that the Legislature had not statutorily created the cause of action, the court determined the question of whether such a tort should exist under Texas law was the court's to answer.[32]

The court reviewed a host of factors in determining whether to recognize a new cause of action, including the existence and adequacy of other protections.[33] Recognizing that the trial court imposed a constructive trust on the funds Jane inherited from Lesey, the court found "no compelling reason to consider a previously unrecognized tort if the constructive trust proved to be an adequate remedy."[34] The court then determined that "the constructive trust was an adequate remedy even if it ultimately does not provide the full measure of relief the jury awarded."[35] The court held that on the facts of the *Kinsel* case, there was no basis to recognize a new cause of action.[36]

C. Archer v. Anderson

One year later, the Texas Supreme Court was again faced with the issue of whether to recognize tortious interference with inheritance as a cause of action in Texas in the case of *Archer v. Anderson*.[37]

In *Archer*, the testator ("Jack") executed an estate plan in 1991 that left the bulk of his estate to his closest relatives (the "Archers").[38] While Jack provided that twelve charities would receive part of his mineral interests, he left the remainder of his estate to the Archers.[39] In 1998, Jack suffered a stroke and remained hospitalized for several weeks.[40] During that time, "Ted Anderson, an attorney and Jack's longtime friend, drafted durable and medical powers of attorney appointing himself as Jack's attorney-in-fact."[41]

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29. *See id.* (citing Jackson Walker, LLP v. Kinsel, 518 S.W.3d 1, 9–10 (Tex. App.—Amarillo 2015, pet. granted)).
30. *See id.* at 418.
31. *See id.* at 423.
32. *See id.*
33. *See id.* at 423–24 (citing Ritchie v. Rupe, 443 S.W.3d 856, 879–82 (Tex. 2014)).
34. *See id*. at 424.
35. *See id.*
36. *See id.* at 425.
37. *See* Archer v. Anderson, 556 S.W.3d 228, 229 (Tex. 2018).
38. *See id.*
39. *See id.*
40. *See id.*
41. *See id.*

On the day Jack signed the documents, his medical records showed that he was delusional and appeared confused.[42]

Thereafter, Anderson retained attorneys Richard Leshin and Buster Adami to draft new estate planning documents for Jack.[43] In 1999, the Archers began guardianship proceedings for Jack.[44] At a hearing in the guardianship proceeding, Leshin and Adami agreed to the appointment of a temporary guardian for Jack's person and estate.[45] Leshin advised Anderson the estate planning would have to wait until the termination of the guardianship.[46] Instead, Anderson retained a new attorney who repudiated the agreed guardianship.[47] Thereafter, Leshin was instructed by Anderson to have Jack sign new will and trust instruments that disinherited the Archers and left Jack's entire estate to the twelve charities.[48] Leshin later testified that Anderson gave him all his instructions, that he did not speak with Jack before preparing new instruments, and that he knew doctors shared conflicting views regarding Jack's mental capacity.[49]

Ultimately, the court appointed a guardian for Jack's person and estate, and an accounting of the estate revealed that all of Jack's assets were held in a trust.[50] The Archers then learned of the new wills and trust disinheriting them.[51] Instead of waiting for Jack's death to challenge the contents of the will, the Archers immediately challenged the trust through a declaratory judgment proceeding.[52] An agreement was reached between the Archers and their attorney providing for a contingent fee of 40% of all of Jack's assets.[53] In the proceeding, the Archers alleged that Jack lacked the requisite mental capacity to execute the documents.[54] The charities were the defendants to the declaratory judgment proceeding.[55] The Archers and the charities ultimately reached a settlement agreement whereby "the charities agreed not to probate Jack's post-1991 wills, and the Archers agreed to give the charities Jack's coin collection and pay their attorneys' fees."[56] The charities' fees and coin collection totaled $588,054.[57] The attorneys' fees and expenses paid to the Archers' attorneys totaled over $2.8 million.[58]

42. *See id.*
43. *See id.*
44. *See id.*
45. *See id.* at 229–30.
46. *See id.* at 230.
47. *See id.*
48. *See id.*
49. *See id.*
50. *See id.*
51. *See id.*
52. *See id.*
53. *See id.*
54. *See id.*
55. *See id.*
56. *Id.*
57. *See id.*
58. *See id.*

When Jack died, his 1991 will was probated and the Archers received their bequests.[59] The Archers then sued Anderson's estate (Anderson had died) for tortious interference with their inheritance, alleging that Anderson unduly influenced Jack to disinherit them.[60] The Archers sought as damages the amount paid to the charities and their attorney's fees incurred in challenging the latter estate plan.[61]

The court held that Texas does not recognize a cause of action for tortious interference with inheritance rights.[62]

First, the court reasoned that recognizing the cause of action would "undermine the core principle of freedom of disposition that undergirds American inheritance law."[63] "Fundamentally, probate law protects a donor's right to freely dispose of his property as he chooses."[64] "A prospective beneficiary has no right to a future inheritance."[65] He has a "mere expectancy that is dependent on the donor's exercise of his own right."[66] The tort of intentional interference with inheritance would give the *beneficiary* a right that he does not otherwise have.[67]

Further, the court found that tort law "is ill-suited to posthumous reconstruction of the true intent of a decedent."[68] Probate law has established specialized doctrine and procedures to arrive at the testator's intent.[69] For instance, courts use the principles of undue influence and duress to distinguish between legitimate persuasion and overbearing influence.[70] Further, "the evidentiary rules and procedures in probate law strike a balance between honoring a testator's actions while addressing situations where those actions were wrongfully taken."[71] The court opined that the already existing provisions used in probate court should be respected.[72]

Additionally, the court was unmoved by the argument that the tort serves as a gap-filler when probate and other law do not provide an adequate remedy.[73] The court stated, "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."[74]

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59. *See id.*
60. *See id.*
61. *See id.* at 231.
62. *See id.* at 238.
63. *Id.* at 233 (citing John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335 (2013)).
64. *Id.* at 234.
65. *Id.*
66. *Id.*
67. *See id.*
68. *Id.* at 235.
69. *See id.*
70. *See id.*
71. *Id.*
72. *See id.*
73. *See id.* at 236.
74. *Id.*

The court addressed the argument that the remedies are inadequate when a will contestant successfully strikes down a will, but the will contestant's attorneys' fees are paid out of the *estate*.[75] Payment of fees out of the estate means the will contestant's interest in the estate is thereby reduced, and in effect, the successful will contestant is paying at least some of the fees rather than them being wholly borne by the wrongdoer.[76] Additionally, if the will is struck down, the wrongdoer may still inherit (for instance, under the laws of intestacy or under a prior will).[77] Such a situation leaves the wrongdoer unpunished and with little incentive to refrain from interfering.[78] The court responds to these arguments by stating that the rules regarding costs of a will contest are established by the law of probate.[79] "To use this example to argue for a tort remedy is to say, not that probate law is inadequate, but that it is wrong, and that courts should circumvent legislative policy."[80]

The Archers argued that "probate and other remedies are inadequate because they do not allow recovery of their attorney fees incurred in setting aside Jack's post-1991 estate planning documents and their expenses in settling with the charities."[81] The court responded that "settling their declaratory judgment action against the charities was the Archers' choice, as were their decisions not to seek attorney fees against the charities."[82] The Archers "argued that the remedies were inadequate because Anderson," the wrongdoer, was not punished.[83] But the court responded that "the Archers' argument is for a different probate process than the Legislature has created, specifically attorney fee shifting so that an award of fees does not diminish the estate."[84]

The *Archer* case hammers home several realities.[85] First, if there is an available remedy, use it.[86] The purpose of this article is to detail several remedies that might be available in these types of situations.[87]

Second, it is the court's position that a party cannot always be made whole after a wrongdoing has been committed.[88] In the 1950s, the court opined that "equity will not suffer a right to be without a remedy," and when the legal remedies available are not adequate for the protection of interests

75. *See id.*
76. *See id.*
77. *See id.* at 237.
78. *See id.*
79. *See id.*
80. *Id.*
81. *Id.* at 238.
82. *Id.*
83. *Id.*
84. *Id.*
85. Authors' suggestion for purposes of this comment.
86. *Id*.
87. Authors' original opinion.
88. Authors' suggestion for purposes of this comment.

in an estate, equity will permit the maintenance of a suit for the benefit of the estate.[89] However, in *Archer*, the court opined that "the limits of restitution seemly recognize that not every wrong can be remedied."[90] As stated by the court in the *Kinsel* matter, "the constructive trust was an adequate remedy even if it ultimately does not provide the full measure of relief the jury awarded."[91]

Interestingly, although all nine justices concurred that on the facts of the *Archer* case, it was not appropriate to recognize tortious interference with inheritance rights, and four justices joined in a dissent that would not have completely rejected the cause of action.[92] The dissenting justices would have withheld a decision rejecting the cause of action wholesale until such a time as the lower courts could apply the lessons of *Archer* and the court's earlier *Kinsel* decision on a case-by-case basis to clarify the small number of cases in which the cause of action might be useful to remedy a wrong.[93] The dissent disagreed with the majority opinion's reasoning that existing probate law "affords adequate remedies for all situations that might arise in the future where bad actors wrongfully relieve elderly persons of assets intended for others."[94] Noting there may be gaps in the law that wrongdoers could exploit, the dissent would not have foreclosed the possibility of a tortious interference with inheritance claim in the appropriate context.[95]

Since the *Archer* decision, some of the "gaps" in probate law and the law related to powers of attorney were shored up by the legislature.[96] For instance, it is now possible for a will contestant who is not offering up a different will for probate to receive her attorneys' fees out of the estate.[97] Further, in the context of durable powers of attorney, certain interested persons can now bring a proceeding to question the validity of the power of attorney or the agent's action, whereas in the past only the principal had standing.[98] Such changes are a great help, but more may be needed to ensure future wrongs do not go without any remedy.[99]

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89. *See* Chandler v. Welborn, 294 S.W.2d 801, 807 (Tex. 1956).
90. *Compare* Archer v. Anderson, 556 S.W.3d 228, 238 (Tex. 2018), *with Chandler*, 294 S.W.2d at 807 ("Equity will not suffer a right to be without a remedy.").
91. Kinsel v. Lindsey, 526 S.W.3d 411, 414 (Tex. 2017).
92. *See Archer*, 556 S.W.3d at 239–40.
93. *See id.* at 240–41.
94. *See id.* at 240.
95. *See id.*
96. Authors' original opinion.
97. *See* TEX. EST. CODE. ANN. § 352.052(c).
98. *See id.* § 751.251.
99. Authors' suggestion for purposes of this comment.

III. STANDING

One of the biggest obstacles to holding wrongdoers accountable is the issue of standing.[100] "A plaintiff must have both standing and capacity to file a lawsuit."[101] Standing is "implicit in subject matter jurisdiction, which is essential to the court's authority to decide a case."[102] "Subject matter jurisdiction is never presumed and cannot be waived."[103]

"The general test for standing in Texas requires that there (1) shall be a real controversy between the parties, which (2) will be actually determined by the judicial declaration sought."[104] The issue of standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a "justiciable interest" in its outcome.[105] A person has standing when they are personally aggrieved.[106]

Standing issues are addressed throughout the article as standing relates to specific types of claims.[107] For further coverage of standing and capacity issues in trust and estate litigation, see *Standing, Capacity and Personal Jurisdiction in Estate and Trust Litigation*.[108]

IV. ALTERNATIVES TO TORTIOUS INTERFERENCE WITH INHERITANCE

Where a tortious interference situation arises, there are generally two goals for the victims: (1) undo the wrongful transaction; and (2) hold the wrongdoer accountable for damages.[109] Below is an outline of possible bases on which a party could accomplish their goals, followed by case briefs evidencing how others have used these tools.[110]

A. Void or Rescind the Transaction[111]

In most situations, a document executed wrongfully is voidable rather than void.[112] The terms "voidable" and "void" have distinct legal

100. Authors' original opinion.
101. Jordan v. Lyles, 455 S.W.3d 785, 790 (Tex. App.—Tyler 2015, no pet.).
102. *Id.*
103. *Id.*
104. *Id.*
105. *See* Austin Nursing Ctr., Inc. v. Lovato, 171 S.W.3d 845, 849 (Tex. 2005).
106. *See id.*
107. Authors' original opinion.
108. Lauren Davis Hunt & Megan N. Grossman, *Standing, Capacity and Personal Jurisdiction in Estate and Trust Litigation*, State Bar of Texas, Fiduciary Litigation Course, 2016.
109. *Id.*
110. *Id.*
111. Parts of this section are from the paper by Mark R. Caldwell and J. Brian Thomas, *Litigation Involving Powers of Attorney and Bank Accounts*, State Bar of Texas, Advanced Estate Planning & Probate, 2017.
112. Authors' suggestion for purposes of this comment.

meanings.[113] If a transaction is void, it is null from its inception, of no legal effect, and is not susceptible of ratification.[114] A voidable document means the document is in effect until it has been judicially determined to be void.[115] For instance, a contract procured by fraud is merely voidable and will not be avoided unless the complaining party proves its right to avoid it.[116] A contract is only void where it violates a specific statute or is against public policy.[117] A voidable act can be subsequently ratified or confirmed.[118] Ratification occurs when a party, after learning all the material facts, confirms or adopts an earlier act that did not then legally bind it and that it could have repudiated.[119]

1. Standing to Void Transaction

Only the person whose primary legal right was breached has standing to seek redress for an injury.[120] "Without a breach of a legal right belonging to the plaintiff, no cause of action can accrue to his benefit."[121] "A suit to set aside a document obtained by fraud or other wrongdoing can only be maintained by the defrauded party.[122] "A party who was not defrauded by the conveyance has not suffered an invasion of a legal right and therefore does not have standing to bring suit based on that fraud."[123]

Thus, to void a transaction, the plaintiff must either be: (1) the person who was defrauded or harmed; (2) an attorney-in-fact acting on behalf of the person who was harmed; (3) a next friend of the person who was harmed; (4) a guardian for the person who was harmed; or (5) the personal representative of the estate of the person who was harmed.[124]

Below, this article addresses several potential ways to void or rescind a wrongfully executed instrument.[125]

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113. *See* Swain v. Wiley Coll., 74 S.W.3d 143, 146 (Tex. App.—Texarkana 2002, no pet.).

114. *See* Poag v. Flories, 317 S.W.3d 820, 825–26 (Tex. App.—Fort Worth 2010, pet. denied) (*quoting* Slaughter v. Qualls, 162 S.W.2d 671, 674 (Tex. 1942) ("That which is void is without vitality or legal effect. That which is voidable operates to accomplish the thing sought to be accomplished, until the fatal vice in the transaction has been judicially ascertained and declared.")); *cf. In re* Morgan Stanley & Co., 293 S.W.3d 182, 187 (Tex. 2009) (orig. proceeding) (explaining at length the distinction between contract formation and contract defenses in the context of arbitration).

115. *See Swain*, 74 S.W.3d at 146.

116. *See id.*

117. *See id.*

118. *See id.*

119. *See* City of The Colony v. North Tex. Mun. Water Dist., 272 S.W.3d 699, 732 (Tex. App.—Fort Worth 2008, pet. dism'd).

120. *See* Nobles v. Marcus, 533 S.W.2d 923, 927 (Tex. 1976).

121. *Id.*

122. *Id.*

123. *Id.*

124. Authors' suggestion for purposes of this comment.

125. Authors' original opinion.

2. *Incapacity*[126]

A contract with an incapacitated person is not automatically void; it is instead voidable at the election of the incapacitated person or a person authorized to act on his or her behalf.[127]

Several significant legal presumptions must be overcome to successfully prove incapacity.[128] First, the law presumes a party to have mental capacity and places the burden of proving incapacity on the party alleging it.[129] Elderly persons are not presumptively incapacitated.[130] Second, absent proof and determination of mental incapacity, a person who signs a document is presumed to have read it and understood the document.[131] In a transaction involving a fiduciary relationship, courts do not strictly apply the presumption that parties read and understood what they signed.[132]

Below are different standards of capacity that are required for the execution of different types of transactions.[133]

a. *Capacity to Contract*

To have capacity to contract, at the time of contracting, the person must be able to appreciate the effect of what they are doing and understand the nature and consequences of their acts and the business they are transacting.[134]

b. *Testamentary Capacity*

Testamentary capacity means that at the time of will execution, the testator has a sufficient mental ability to understand the business in which

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126. Parts of this section are from the article by Mark R. Caldwell and J. Brian Thomas, *Litigation Involving Powers of Attorney and Bank Accounts*, State Bar of Texas, Advanced Estate Planning & Probate, 2017.

127. *See* Price v. Golden, No. 03-99-00769-CV, 2000 WL 1228681, at *4 (Tex. App.—Austin Aug. 31, 2000, no pet.) (not designated for publication) (noting that the trial court erred in its conclusion of law that contract with incapacitated person was void) (*citing* Williams v. Sapieha, 61 S.W. 115, 116 (Tex. 1901); Knox v. Drews, 202 S.W.2d 335, 337 (Tex. App.—Austin 1947, writ dism'd); Breaux v. Allied Bank, 699 S.W.2d 599, 603 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.); Gaston v. Copeland, 335 S.W.2d 406, 409 (Tex. App.—Amarillo 1960, writ ref'd n.r.e.)).

128. *See* Jackson v. Henninger, 482 S.W.2d 323, 324 (Tex. App.—Austin 1972, no writ).

129. *See id.*

130. *See* Edward D. Jones & Co. v. Fletcher, 975 S.W.2d 539, 545 (Tex. 1998) ("Unlike minors, the elderly are not presumptively incompetent, nor, we believe, should they be"); Turner v. Hendon, 269 S.W.3d 243, 248 (Tex. App.—El Paso 2008, pet. denied).

131. *See* Reyes v. Storage & Processors, Inc., 995 S.W.2d 722, 725 (Tex. App.—San Antonio 1999, pet. denied), *abrogated on other grounds by* Lawrence v. CDB Servs., Inc., 44 S.W.3d 544 (Tex. 2001); *see* Miller v. Miller, 700 S.W.2d 941, 949 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

132. *See* Reyes, 995 S.W.2d at 725.

133. *See supra* Section IV.A.2.a.

134. *See* Mandell & Wright v. Thomas, 441 S.W.2d 841, 845 (Tex. 1969); *see also* Bach v. Hudson, 596 S.W.2d 673, 675–76 (Tex. App.—Corpus Christi 1980, no writ); Board of Regents of the Univ. of Tex. v. Yarbrough, 470 S.W.2d 86, 90 (Tex. App.—Waco 1971, writ ref'd n.r.e.).

the testator is engaged, the effect of their act in making the will, and the general nature and extent of their property.[135] The testator must also know their next of kin and the natural objects of their bounty.[136] The issue is whether the testator has capacity on the day the will is executed, although evidence of the testator's prior and subsequent mental condition may be relevant if it suggests that the condition persisted and had some probability of being the same condition existing on the date of the will execution.[137]

c. Capacity to Execute a Durable Power of Attorney

"A person seeking to set aside a power of attorney based on the principal's lack of mental capacity must show that the executor did not understand the nature or consequences of his act at the time the power of attorney was executed."[138]

d. Capacity to Gift

The mental capacity required to sign a contract is substantially similar to the donative capacity to make gifts.[139] Texas courts have considered the improvidence of the gift (i.e., the practical effect of the gift) as a factor in determining donative capacity.[140]

3. Undue Influence

Undue influence describes "such influence or dominion as exercised at the time, under the facts and circumstances of the case, which destroys the free agency of the testator, and substitutes in the place thereof the will of another."[141] To justify setting aside an instrument due to undue influence, the contestant must establish: (1) an influence existed and was exerted; (2) the influence undermined or overpowered the mind of the settlor at the time he executed the document; and (3) the settlor would not have signed the

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135. *See In re* Est. of Vackar, 345 S.W.3d 588, 595 (Tex. App.—San Antonio 2011, no pet.).

136. *See id.*

137. *See id.*

138. *Id.* at 597.

139. 38A C.J.S. *Gifts* § 12 (2008).

140. Henneberger v. Sheahan, 278 S.W.2d 497, 498 (Tex. App.—Dallas 1955, writ ref'd n.r.e.) (Capacity to make a gift and intent to make the gift are distinct: "They seem to us to convey different concepts. Understanding includes a realization in every direction of the practical effects and consequences of a proposed act. On the other hand, intent looks merely to the accomplishment of an act without necessarily understanding its effect and consequences . . . Here Mrs. Sarah M. Henneberger, in her confused state of mind may have had the intention to give away her property, but her mental capacity was such that she was incapable of realizing the practical effect and consequences of so doing, to appreciate the significance of her act, or to comprehend the relation of things.").

141. Long v. Long, 125 S.W.2d 1034, 1035 (Tex. 1939); *see* Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963).

instrument but for the influence.[142] The burden is on the contestant to prove each of the allegations by a preponderance of the evidence.[143]

Courts consider the following factors in determining whether undue influence existed: (1) the nature and type of relationship existing between the testator, the non-movants, and the individual accused of exerting the influence; (2) the opportunities existing for the exertion of the type of influence; (3) the circumstances surrounding the drafting and execution; (4) the existence of a fraudulent motive; (5) whether there had been a habitual subjection of the testator to the control of another (6) the state of the testator's mind at the time of execution; (7) the testator's mental state or physical incapacity to resist an influence; (8) words and acts of the testator; (9) the weakness of body and mind of the testator; and (10) whether the instrument executed is unnatural in its terms of disposition.[144]

The exercise of undue influence may be accomplished in many ways—"directly and forcibly, as at the point of a gun; but also by fraud, deceit, artifice and indirection; by subtle and devious, but none-the-less forcible and effective means."[145] Undue influence may also take the form of "force, intimidation, duress, excessive importunity or deception used in an effort to overcome or subvert the will of the maker of the testament and induce the execution thereof contrary to his will."[146]

Undue influence can be established by direct or circumstantial evidence.[147] However, the circumstantial evidence must be of a "reasonably satisfactory and convincing character" and it must not be equally "consistent with the absence of such influence."[148] Because the influence may be as a result of an "extended course of dealings and circumstances," rather than one event, evidence of events occurring before and after the execution are relevant.[149] Mere opportunity is insufficient to establish undue influence.[150]

4. Duress

Duress exists when: (1) there is a threat to do some act which the party threatening has no legal right to do; (2) there is some illegal exaction or fraud

142. *Long*, 125 S.W.2d at 1035; *see Rothermel*, 369 S.W.2d at 922; Cooper v. Cochran, 288 S.W.3d 522, 533 (Tex. App.—Dallas 2009, no pet.).
143. *In re* Woods' Est., 542 S.W.2d 845, 846 (Tex. 1976) (quoting *Rothermel*, 369 S.W.2d at 917).
144. *Rothermel*, 369 S.W.2d at 923.
145. *In re* Olsson's Est., 344 S.W.2d 171, 173–74 (Tex. App.—El Paso 1961, writ ref'd n.r.e.).
146. *Rothermel*, 369 S.W.2d at 922.
147. *Id.*; *Olsson's Est.*, 344 S.W.2d at 173.
148. *Rothermel*, 369 S.W.2d at 922.
149. *Id.*
150. *Id.* at 923; *see In re* Kam, 484 S.W.3d 642, 652 (Tex. App.—El Paso 2016, pet. denied).

or deception; and (3) the restraint is imminent and is such as to destroy free agency without present means of protection.[151]

5. Fraud in the Inducement

A claim of "undue influence" under Texas law is broad enough to encompass fraud, deceit, and duress and may be alleged in the alternative with a claim based on lack of testamentary capacity.[152] Fraud in the inducement occurs when a fact "outside of the document" is intentionally misrepresented and, without such misrepresentation, the testator would not have executed the document.[153] In Texas, "fraud in the inducement of a dispositive instrument and undue influence are treated as one."[154] For instance, in *Holcomb v. Holcomb*, the jury found one of the beneficiaries had fraudulently induced the testator to leave him part of his estate by various misrepresentations to the testator about what he had received from someone else.[155] Fraud in the inducement can include promissory misrepresentation as well as misrepresentation of an existing fact.[156]

The elements of fraud in the inducement are: (1) a false representation was made by the wrongdoer; (2) the victim detrimentally relied upon the false representation; and (3) the victim suffered injury.[157] The misrepresentation must relate to a material fact.[158] The speaker need not know the falsity of the representation.[159] However, the failure to disclose a material fact will not support rescission unless the wrongdoer had a duty to disclose arising from the nature of the relationship between the wrongdoer and the victim.[160]

A promise regarding future behavior will not support rescission unless the wrongdoer had no intent to carry out the promise at the time it was made.[161] Where the victim had knowledge of the falsity, rescission will not lie.[162]

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151. *See* Housing Authority of Dallas v. Hubbell, 325 S.W.2d 880, 903 (Tex. App.—Dallas 1959, writ ref d, n.r.e.); *see* Hailey v. Fenner & Beane, 246 S.W. 412 (Tex. App.—Dallas 1923, no writ).

152. *See* Guthrie v. Suiter, 934 S.W.2d 820, 833 (Tex. App.—Houston [1st Dist.] 1996, no writ).

153. *See* Curry v. Curry, 270 S.W.2d 208, 214 (Tex. 1954).

154. Smith v. Smith, 389 S.W.2d 498, 504 (Tex. App.—Austin 1965, writ ref'd n.r.e.) (*quoting Curry*, 270 S.W.2d at 211.

155. *See* Holcomb v. Holcomb, 803 S.W.2d 411, 415 (Tex. App.—Dallas 1991, writ denied).

156. *See id.*

157. *See* Citizens Standard Life Ins. Co. v. Muncy, 518 S.W.2d 391, 394 (Tex. App.—Amarillo 1974, no writ).

158. *See* Runfield v. Runfield, 324 S.W.2d 304, 306 (Tex. App.—Amarillo 1959, writ ref d n.r.e.).

159. *See Muncy*, 518 S.W.2d at 394.

160. *See* Anderson v. Anderson, 620 S.W.2d 815, 819 (Tex. App.—Tyler 1981, no writ).

161. *See* Bassett v. Bassett, 590 S.W.2d 531, 533 (Tex. App.—Houston [1st Dist.] 1979, writ dism'd).

162. *See* Shaw Equip. Co. v. Hoople Jordan Const. Co., 428 S.W.2d 835, 839 (Tex. App.—Dallas 1968, no writ).

6. Fraud in the Factum

Fraud in the factum occurs when a person "is misled as to the nature or content of the instrument being executed."[163] In the context of a will contest, a mistake of fact or law must be accompanied by evidence of fraud or undue influence to defeat the will's admission to probate.[164] The mistake of fact must also go to the main issue in the will contest, not simply to a collateral issue.[165]

7. Accident

In *Henry S. Miller Co. v. Evans*, the Texas Supreme Court discussed what constitutes an accident sufficient to rescind or cancel a transaction.[166] The court described such an accident as:

> an unforeseen and unexpected event, occurring externally to the party affected by it, *and of which his own agency is not the proximate cause*, whereby, contrary to his own intention and wish, he loses some legal right or becomes subject to some legal liability and another acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain . . . If the party's own agent is the proximate cause of the event, it is mistake rather than an accident.[167]

8. Mistake

A document may be voidable if it was entered under both parties' misconception or ignorance of a material fact.[168] The mistake must relate to a material and essential issue, not an incidental one.[169] The mistake cannot have resulted from the negligence of the party seeking to negate the transaction.[170] Ordinarily, an error in predicting the future will not support

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163. Guthrie v. Suiter, 934 S.W.2d 820, 833 (Tex. App.—Houston [1st Dist.] 1996, no writ).

164. *See* Carpenter v. Tinney, 420 S.W.2d 241, 244 (Tex. App.—Austin 1967, no writ) (wife/testator's mistaken belief that husband's will left estate to two of couple's four children that caused her to write will leaving property to other two did not justify rewriting of the will absent fraud or undue influence), *accord* Holcomb v. Holcomb, 803 S.W.2d 411, 415 (Tex. App.—Dallas 1991, writ denied).

165. *See* Est. of Flores, 76 S.W.3d 624, 631 (Tex. App.—Corpus Christi 2002, no pet.) (testator's mistake of fact regarding deceased child was not probative to show he was mistaken regarding his desire to disinherit one son).

166. *See* Henry S. Miller Co. v. Evans, 452 S.W.2d 426, 432 (Tex. 1970).

167. *Id.* (emphasis added).

168. *See* Williams v. Glash, 789 S.W.2d 261, 264 (Tex. 1990); Hanover Ins. Co. v. Hoch, 469 S.W.2d 717, 722 (Tex. App.—Corpus Christi 1971, writ ref d n.r.e.).

169. *See* Simpson v. Simpson, 387 S.W.2d 717, 719 (Tex. App.—Eastland 1965, no writ).

170. *See* Plains Cotton Coop. Assn. v. Wolf, 553 S.W.2d 800, 803 (Tex. App.—Amarillo 1977, writ ref'd n.r.e.).

rescission or cancellation.[171] A mistake as to a party's existing legal rights can support voiding the document.[172]

9. Attack Agent's Authority to Act

Where an unauthorized agent enters into a contract on behalf of his principal, the contract is not enforceable.[173] Instead, "the agent is liable to the other party for damages for his breach of an implied warranty or authority to contract."[174] Such claim "is not based on the contract itself, but on the agent's implied warranty of authority and the damages that flow from his misrepresentation."[175]

10. Transaction with a Self-Dealing Fiduciary Is Voidable[176]

In a case where it is alleged that a fiduciary entered into a self-dealing transaction, the complaining party does not need to prove damages to avoid the fiduciary's self-dealing transaction.[177] Such a transaction can be avoided even if the fiduciary acted in good faith.[178] "[A] self-dealing transaction itself constitutes an injury *vel non*, the undoing of which is an available remedy."[179]

When a fiduciary engages in a self-dealing transaction with his principal, a presumption of unfairness arises, which shifts the burden of persuasion to the fiduciary to show that the transaction was fair and equitable to the principal.[180] "All transactions between the fiduciary and his principal are presumptively fraudulent and void, which is merely to say that the burden lies on the fiduciary to establish the validity of any particular transaction in which he is involved."[181] The fiduciary may rebut the presumption.[182] In

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171. *See* City of Austin v. Cotten, 509 S.W.2d 554, 557 (Tex. 1974).
172. *See Wolf*, 553 S.W.2d at 803.
173. *See* Angroson, Inc. v. Indep. Commc'ns, Inc., 711 S.W.2d 268, 273 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).
174. *Id.*
175. *Id.*
176. Parts of this section are from the article by Mark R. Caldwell and J. Brian Thomas, *Litigation Involving Powers of Attorney and Bank Accounts*, State Bar of Texas, Advanced Estate Planning & Probate, 2017.
177. *See* Fisher v. Miocene Oil & Gas Ltd., 335 F. App'x 483, 487 (5th Cir. 2009) (concluding that since Texas law does not require proof of damages as an element of a claim for breach of fiduciary duty, judgment should be entered voiding challenged self-dealing transactions).
178. *See id.*
179. *See id.*
180. *See* Texas Bank & Tr. Co. v. Moore, 595 S.W.2d 502, 509 (Tex. 1980); *see also* Lee v. Hasson, 286 S.W.3d 1, 22 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (explaining that the burden rested on fiduciary to show payments he received constituted fair and reasonable compensation for the services rendered and having failed to meet his burden, the contract was void).
181. Chien v. Chen, 759 S.W.2d 484, 495 (Tex. App.—Austin 1988, no writ).
182. *See* Stephens Cty. Museum, Inc. v. Swenson, 517 S.W.2d 257, 261 (Tex. 1974).

other words, fiduciaries in Texas are not strictly prohibited from self-dealing.[183] To the contrary, Texas courts have upheld the validity of some self-dealing transactions.[184]

In other words, self-dealing alone is not a breach of fiduciary duty, but it creates a presumption that the fiduciary failed to comply with specific duties, which the fiduciary must disprove.[185] Texas law allows the principal both to recover damages and avoid the self-dealing transaction, provided the relief does not constitute double recovery.[186]

Courts have also voided self-dealing transactions due to a breach of the duty to disclose.[187] An agent's duty of full and complete disclosure, and the duty to act with integrity, fidelity and good faith, prevents an agent from acting without informing their principal in the context of changing beneficiary designations.[188]

11. Rescission Due to Breach of Fiduciary Duty

Rescission is distinct from declaring the transaction void, but it is closely related.[189] The difference between a void transaction and a voidable transaction clarifies and explains why the equitable remedy of rescission is available in breach-of-fiduciary-duty suits.[190] Rescission "operates to extinguish a contract that is legally valid but must be set aside due to fraud, mistake, or for some other reason to avoid unjust enrichment."[191] Thus, rescission is not available when a contract is voidable—because there is no

183. *See Chien*, 759 S.W.2d at 495 (explaining that, while such transactions are presumptively void, the fiduciary is given the opportunity to rebut that presumption).

184. *See* Vogt v. Warnock, 107 S.W.3d 778, 785 (Tex. App.—El Paso 2003, pet. denied) (donor established fairness of gifts as a matter of law).

185. *See Chien*, 759 S.W.2d at 495.

186. *See* Fisher v. Miocene Oil & Gas Ltd., 335 F. App'x 483, 487 (5th Cir. 2009).

187. Est. of Wallis, No. 12-07-00022-CV, 2010 WL 1987514, at *6–7 (Tex. App.—Tyler May 19, 2010, no pet.) (affirming trial court's judgment declaring void and setting aside beneficiary designations that the attorney-in-fact had changed to name herself without full disclosure to her principal).

188. *See id.* at *4.

189. Authors' original thoughts.

190. *See* E. Link Beck, *Remedies and Damages*, State Bar of Texas, Fiduciary Litigation, Ch. 11, at 6 (2008) (*citing* Archer v. Griffith, 390 S.W.2d 735, 740 (Tex. 1964), for the proposition that cancelling a deed was appropriate when the fiduciary failed to establish the deed was fair, honest, and equitable); *see also* Miller v. Miller, 700 S.W.2d 941, 948 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (rescinding shareholder agreement entered into with fiduciary was proper when fiduciary failed to establish fairness of contract).

191. Martin v. Cadle Co., 133 S.W.3d 897, 903 (Tex. App.—Dallas 2004, pet. denied) (*citing* Humphrey v. Camelot Ret. Cmty., 893 S.W.2d 55, 59 (Tex. App.—Corpus Christi 1994, no writ)); Country Cupboard, Inc. v. Texstar Corp., 570 S.W.2d 70, 73–74 (Tex. App.—Dallas 1978, writ ref'd n.r.e.).

contract to rescind by definition.[192] Rescission is available to remedy an unfair agreement between a fiduciary and a beneficiary.[193]

When rescission is appropriate, "the measure of damage is the return of the consideration [the plaintiff] paid, together with such further special damage or expense as may have been reasonably incurred by the party wronged on account of the contract."[194] Under general contract principles, the party seeking rescission must offer to return any consideration it received from the other party under the contract.[195] The court may order rescission without restoring consideration when it is more equitable.[196] For example, restoring consideration may be unnecessary to the extent that the fraudulent party's wrongful conduct prevents restoration.[197]

B. Seek Damages Based on Breach of Fiduciary Duty

1. Identify the Fiduciary Duties

Often in cases where tortious interference with an inheritance arises, the wrongdoer acts in multiple fiduciary capacities.[198] Generally speaking, the term "fiduciary" applies to any person who occupies a position of peculiar confidence towards another.[199] It refers to integrity and fidelity, and it contemplates fair dealing and good faith, rather than a legal obligation, as the basis of the transaction.[200]

In reviewing these types of cases, it is important to identify all possible fiduciary relationships the wrongdoer may have held.[201] For instance, in *Archer*, Ted Anderson was an attorney for Jack Archer, he became Jack's attorney-in-fact under a power of attorney, and he was a lifelong friend whom Jack came to trust and rely on, particularly after Jack's stroke when Jack had substantial physical and mental impairments.[202] Throughout the relationship, Ted Anderson held such roles at varying times.[203] For instance, at one point, Ted resigned as Jack's attorney in fact and at another point, he

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192. *See* Wesley v. Amerigo, Inc., No. 10-05-00041-CV, 2006 WL 22213, at *3 (Tex. App.—Waco Jan. 4, 2006, no pet.) (*citing Martin*, 133 S.W.3d at 903).

193. *See Miller*, 700 S.W.2d at 942 (holding wife was entitled to rescind stock agreement executed with husband because husband breached his duty of disclosure).

194. Italian Cowboy Partners, Ltd. v. Prudential Ins. Co., 341 S.W.3d 323, 345 (Tex. 2011) (*quoting* Smith v. Nat'l Resort Cmtys., Inc., 585 S.W.2d 655, 660 (Tex. 1979)); *see also* TEX. R. CIV. P. 56 (requiring special damages to be pleaded).

195. *See* Turner v. Hous. Agric. Credit Corp., 601 S.W.2d 61, 65 (Tex. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (*citing* Texas Co. v. State, 281 S.W.2d 83, 91 (Tex. 1955)).

196. *See id.*

197. *See id.*

198. *See* Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 512–14 (1942).

199. *See id.*

200. *See id.*

201. Authors' original opinion.

202. *See* Archer v. Anderson, 556 S.W.3d 228, 229 (Tex. 2018).

203. *See id.*

surrendered his law license.[204] In a case like *Archer*, it can be important to create a timeline that tracks when each fiduciary capacity was in effect, and when the alleged bad acts occurred.[205]

a. Formal Fiduciary Relationships

"A fiduciary duty requires the fiduciary to place the interest of the other party above his own."[206] There are two categories of fiduciary relationships.[207] "The first is a formal fiduciary relationship in which a fiduciary duty arises as a matter of law, such as attorney-client, principal-agent, trustee-beneficiary, partners in a partnership, and corporate officers and directors."[208] The term "fiduciary" contemplates fair dealing and good faith.[209]

"Certain fiduciary duties are owed by a trustee to a beneficiary of a trust, an executor to beneficiaries of an estate, an attorney to a client, and partners to each other."[210] For example, "trustees and executors owe beneficiaries a duty of full disclosure of all material facts that might affect the beneficiary's rights."[211] The relationship between general partners imposes the obligation of loyalty and of the utmost good faith, fairness, and honestly in their dealings with each other with respect to matters pertaining to the partnership.[212]

b. Informal Fiduciary Relationships

Fiduciary duties may also arise in informal fiduciary relationships, commonly referred to as a "relationship of trust and confidence" or a "confidential relationship."[213] "A fiduciary duty may arise from an informal relationship where one person trusts in and relies upon another, whether the relation is a moral, social, domestic, or purely personal one."[214]

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204. *Id.*
205. Authors' original opinion.
206. Chapman Children's Tr. v. Porter & Hedges, L.L.P., 32 S.W.3d 429, 439 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).
207. *Id.*
208. *Id.*; *see also* Int'l Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 576 (Tex. 1963).
209. Tex. Bank & Tr. Co. v. Moore, 595 S.W.2d 502, 507 (Tex. 1980) (*citing* Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp., 160 S.W.2d 509, 513 (Tex. 1942)).
210. Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 199 (Tex. 2002).
211. Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996).
212. Bohatch v. Butler & Binion, 977 S.W.2d 543, 545 (Tex. 1998).
213. *See* comm. on Pattern Jury Charges, STATE BAR OF TEX., *Texas Pattern Jury Charges: Business* PJC 104.1 (2018).
214. Young v. Fawcett, 376 S.W.3d 209, 214 (Tex. App.—Beaumont 2012, no pet.), *citing* Fitz-Gerald v. Hull, 237 S.W.2d 256, 261 (1951); *accord* Ritchie v. Rupe, 443 S.W.3d 856, 874 n.27 (Tex. 2014).

In *Thigpen v. Locke*, the Texas Supreme Court described a confidential relationship as "existing where, because of family relationship or otherwise, the transferor is in fact accustomed to be guided by the judgment or advice of the transferee or is justified in placing confidence in the belief that the transferee will act in the interest of the transferor."[215] "Mere subjective trust alone is not enough to transform arms-length dealing into a fiduciary relationship."[216] Not every relationship involving a high degree of trust and confidence rises to the level of a formal fiduciary relationship, thus, the law recognizes the existence of confidential relationships when influence has been acquired and abused, and in which confidence has been reposed and betrayed.[217]

A question of fact occurs when the existence of an informal relationship of trust and confidence occurs.[218] Factors in determining whether a confidential relationship exists include whether the plaintiff relied on the defendant for support, the plaintiff's advanced age and poor health, and evidence of the plaintiff's trust.[219]

2. *Damages for Breach of Fiduciary Duty*[220]

"Breach of fiduciary duty is a tort."[221] When a fiduciary engages in a self-dealing transaction with his principal, a presumption of unfairness arises, which shifts the burden of persuasion to the fiduciary to show that the transaction was fair and equitable to the principal.[222] However, the fiduciary may rebut the presumption.[223] In other words, fiduciaries in Texas are not

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215. Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962).

216. *Id.*

217. *See Fawcett*, 376 S.W.3d at 214 (*citing* Texas Bank & Trust Co. v. Moore, 595 S.W.2d 502, 507 (Tex. 1980)).

218. *See* Crim. Truck & Tractor Co. v. Navistar Inter. Trans. Corp., 823 S.W.2d 591, 594 (Tex. 1992).

219. *See Fawcett*, 376 S.W.3d at 215 ("The trust must be justifiable.").

220. Parts of this section are from the article by Mark R. Caldwell and J. Brian Thomas, *Litigation Involving Powers of Attorney and Bank Accounts*, State Bar of Texas, Advanced Estate Planning & Probate, 2017.

221. Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co., 150 S.W.3d 718, 734 (Tex. App.—Austin 2004, no pet.) (*citing* Brosseau v. Ranzau, 81 S.W.3d 381, 398 (Tex. App.—Beaumont 2002, pet. denied)); Douglas v. Aztec Petroleum Corp., 695 S.W.2d 312, 318 (Tex. App.—Tyler 1985, no writ).

222. *See* comm. on Pattern Jury Charges, STATE BAR OF TEX., *Texas Pattern Jury Charges: Family & Probate* PJC 235.10, 232.2 (2020) (trustees and personal representatives of estates); Stephens Cnty. Museum, Inc. v. Swenson, 517 S.W.2d 257, 261 (Tex. 1975); *see* Texas Bank & Trust Co. v. Moore, 595 S.W.2d 502, 509 (Tex. 1980); *see also* Lee v. Hasson, 286 S.W.3d 1, 22 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (explaining that the burden rested on fiduciary to show payments he received constituted fair and reasonable compensation for the services rendered and having failed to meet his burden, the contract was void). "*All* transactions between the fiduciary and his principal are presumptively fraudulent and *void*, which is merely to say that the burden lies on the fiduciary to establish the validity of any particular transaction in which he is involved." Chien v. Chen, 759 S.W.2d 484, 495 (Tex. App.—Austin 1988, no writ) (emphasis on "void" added).

223. *See Swenson*, 517 S.W.2d at 261.

strictly prohibited from self-dealing.[224] To the contrary, Texas courts have upheld the validity of some self-dealing transactions.[225]

When the fiduciary uses the principal's "funds or other assets to acquire property for himself, the principal may seek the property itself or its value."[226] Under general damage principles, when personal property is damaged, the owner may generally recover damages for the loss of the property's value.[227] This is typically measured by the difference in the property's market value immediately before and after the damage.[228]

To recover monetary damages for breach of fiduciary duty in Texas, the plaintiff must prove: (1) the defendant is his fiduciary; (2) the fiduciary breached his duty to the plaintiff; and (3) the breach injured the plaintiff or benefited the fiduciary.[229] A plaintiff who wishes to recover monetary damages must prove not only a breach of fiduciary duty, but also causation and damages.[230]

3. *Seek Damages from Participating Third Parties (i.e.,* Kinzbach *Claims)*

A third party may be held liable as a joint tortfeasor with a fiduciary when the third party knowingly participates or benefits in the breach of fiduciary duty.[231] This type of claims is known as a "*Kinzbach*" claim from *Kinzbach v. Corbett-Wallace Corp.*[232]

In *Kinzbach*, Turner was an employee of Kinzbach Tool Company and owed Kinzbach fiduciary duties.[233] Corbett-Wallace Corporation was a competitor of Kinzbach.[234] Corbett owned a sales right contract on a tool and decided to sell such contract right to Kinzbach.[235] Corbett solicited Turner to assist in getting Kinzbach to purchase the contract right in exchange for a sales commission.[236] Turner approached Kinzbach with the opportunity to purchase the contract right, but did not disclose to his employer that he knew Corbett's lowest selling price or that he would receive a commission from

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224. *See Chien*, 759 S.W.2d at 495 (explaining that, while such transactions are presumptively void, the fiduciary is given the opportunity to rebut that presumption).

225. *See* Vogt v. Warnock, 107 S.W.3d 778, 785 (Tex. App.—El Paso 2003, pet. denied) ("donor established fairness of gifts as a matter of law").

226. Lesikar v. Rappeport, 33 S.W.3d 282, 304 (Tex. App.—Texarkana 2000, pet. denied).

227. *See* Pasadena State Bank v. Isaac, 228 S.W.2d 127, 128 (Tex. 1950).

228. *See id.*

229. *See* Punts v. Wilson, 137 S.W.3d 889, 891 (Tex. App.—Texarkana 2004, no pet.).

230. *See* Fisher v. Miocene Oil & Gas Ltd., 335 F. App'x 483, 486–87 (5th Cir. 2009) (concluding that since Texas law does not require proof of damages as an element of a claim for breach of fiduciary duty, judgment should be entered voiding challenged self-dealing transactions).

231. *See* Kinzbach v. Corbett-Wallace Corp., 138 Tex. 565, 574 (1942); *see also* comm. on Pattern Jury Charges, STATE BAR OF TEX., *Texas Pattern Jury Charges: Family & Probate* PJC 235.19 (2020)

232. *See Kinzbach,* 138 Tex. at 574.

233. *See id.* at 572.

234. *See id.*

235. *See id.*

236. *See id.*

Corbett on the sale.[237] Upon discovery of these facts, Kinzbach filed suit against Corbett and Turner.[238] The court found that Turner abused his fiduciary duties as a trusted employee of Kinzbach because he failed to disclose his adverse interest in the deal.[239] Furthermore, the Texas Supreme Court found that when Corbett employed Turner, knowing Turner was Kinzbach's fiduciary, Corbett became a party to the breach of duty committed by Turner, and therefore became a joint tortfeasor with Turner.[240]

There are three principle components to establishing a *Kinzbach* claim: (1) a fiduciary relationship existed; (2) the fiduciary breached its fiduciary duties; and (3) a third-party knowingly assisted in the breach.[241] To succeed on a *Kinzbach* claim, the plaintiff need not show that the third party owed them a fiduciary duty or that the third party's conduct breached such a duty.[242]

In *City of Fort Worth v. Pippen*, the City of Fort Worth, in acquiring numerous tracts of property for its streets and airport, placed funds in the hands of Rattikin Title Company with instructions for insuring title and closing the transactions with the sellers.[243] The City's land agent, Mr. Hall, obtained city authorization of one price while making a settlement with the seller to take a lesser amount.[244] Mr. Hall obtained the difference in the price from Mr. Pippen, Rattikin Title Company's Vice President.[245] The court did not engage in a discussion of Mr. Hall's breach of fiduciary duties, but nevertheless found both Mr. Pippen and Rattikin were liable to the City.[246] Mr. Pippen and Rattikin were held liable for knowing about Mr. Hall's breach of fiduciary duties and failing to warn or provide assistance to the City.[247]

C. File a Petition for Declaratory Judgment

1. Overview

Declaratory judgment actions can be helpful to determine rights related to trusts, wills, or other legal documents, and there is an opportunity to

237. *See id.*
238. *See id.*
239. *See id.*
240. *See id.*
241. *See* Wilcox v. Wilcox, 09-06-045 CV, 2006 WL 3824012, at *9 (Tex. App.—Beaumont Dec. 28, 2006, no pet.).
242. *See* Villareal v. Wells Fargo Brokerage Servs., LLC, 315 S.W.3d 109, 127 (Tex. App.—Houston [1st Dist.] 2010, no pet.).
243. *See* City of Fort Worth v. Pippen, 439 S.W.2d 660, 662 (Tex. 1969).
244. *See id.*
245. *See id.*
246. *See id.* at 665.
247. *See id.* at 664–65.

receive attorneys' fees in a declaratory judgment action.[248] The existence of another adequate remedy does not preclude a party's right to seek a declaratory judgment.[249] Between Texas Civil Practice and Remedies sections 37.004 and 37.005, declaratory judgments are a great option for individuals who may not otherwise have standing to complain about a transaction.[250]

Under Texas Civil Practice and Remedies Code section 37.005, a person interested as or through an executor or administrator, a trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or *cestui que* trust in the administration of a trust or of the estate of a decedent, an infant, mentally incapacitated person, or insolvent, may have a declaration of rights or legal relations with respect to the trust or estate:

> a) to ascertain any class of devisees, legatees, heirs, next of kin or others;
> b) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity;
> c) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or
> d) to determine the rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.[251]

Under Texas Civil Practice and Remedies section 37.004, a person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute or contract, may have determined any question of construction or validity arising under the instrument, statute or contract and obtain a declaration of rights, status, or other legal relations thereunder.[252] A contract may be construed either before or after a breach occurs.[253]

The Uniform Declaratory Judgments Act is to be "liberally construed and administered."[254] The purpose of the Act is to "settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations."[255] The Act gives courts the power to render judgment as to such issues whether further relief is, or could be, claimed.[256] Essentially, a court

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248. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.004.
249. *See* MBM Financial Corp. v. Woodlands Operating Co., LP, 292 S.W.3d 660, 669 (Tex. 2009).
250. *See* TEX. CIV. PRAC. &. REM. CODE ANN. §§ 37.004–.005.
251. *See id*. § 37.004.
252. *Id.*
253. *See id*. § 37.004(b).
254. *See id*. § 37.002.
255. *See id.*
256. *See id*. § 37.003(a).

can utilize this power whenever a declaratory judgment would serve a useful, beneficial purpose.[257] A declaratory judgment will be appropriate when there is a justiciable controversy about the rights and status of the parties, and the declaration would resolve the controversy.[258]

In *Harkins v. Crews*, one family used section 37.005 to have the court declare the invalidity of a will that had not been submitted for probate.[259] In *Harkins*, the decedent executed three wills.[260] The decedent's wife submitted the third will for probate.[261] The decedent's children from a prior marriage submitted the first will for probate.[262] The wife had in her possession the second will, but refused to offer it for probate.[263] The decedent's children contested the third will on grounds of undue influence, lack of testamentary capacity, and actual or constructive fraud.[264] They also sought a declaratory judgment that the second will was invalid and without legal effect.[265] They further sought actual and exemplary damages for tortious interference with their inheritance rights.[266] The jury found that both the second and third wills were executed when the decedent lacked testamentary capacity and that the 1990 will resulted from undue influence.[267] The jury found that the wife prosecuted the proceeding in "good faith and with just cause," despite the findings of incapacity and undue influence.[268] The wife claimed on appeal that it was error to submit to the jury issues related to the second will because such will had not been offered for probate, and the court's judgment wrongfully precludes the wife from her right to offer such will for probate.[269] The court of appeals disagreed, holding that in the case in which all of the known wills are before the court, it is in the interest of justice to determine all rights incident to an estate in a single proceeding, and a declaratory judgment related to a will not be submitted for probate is appropriate.[270]

257. *See* Standard Fire Ins. Co. v. Fraiman, 514 S.W.2d 343, 346 (Tex. App.—Houston [14th Dist.] 1974, no writ).
258. *See* Bonham State Bank v. Beadle, 907 S.W.2d 465, 467 (Tex. 1995).
259. *See* Harkins v. Crews, 907 S.W.2d 51 (Tex. App.—San Antonio 1995, writ denied).
260. *See id.*
261. *See id.*
262. *See id.*
263. *See id.*
264. *See id.*
265. *See id.*
266. *See id.*
267. *See id.*
268. *See id.*
269. *See id.*
270. *See id.* at 57.

2. *Attorneys' Fees*

In any proceeding for declaratory judgment, the court may award costs and reasonable and necessary attorneys' fees as are equitable and just.[271] The language of section 37.009 is almost identical to the language of Texas Property Code section 114.064 relating to trust proceedings, and the same principles apply.[272]

The fees can be awarded out of a trust, estate, or against any of the parties.[273] Section 37.009 is not a "prevailing party" statute; therefore the non-prevailing party can be awarded fees.[274] The statute allows the court discretion in deciding whether to award fees or not.[275] The reasonableness and necessity of the fees are a fact question.[276] Whether the award of fees is equitable and just is a matter of law to be determined at the court's discretion.[277] Unreasonable fees cannot be awarded, even if the court believed them just, but the court may conclude it is not equitable or just to award even reasonable and necessary fees.[278]

Although the Declaratory Judgment Act allows for "costs," it does not allow for an award of "expenses."[279] "Costs" usually refer to "fees and charges required by law" to be paid to the courts or some of their officers, and the amount is fixed by statute or the court's rules.[280] This usually refers to the fees and charges required by law to be paid to the courts or their officers, the amount of which is fixed by statute or the court's rules, such as filing and service fees.[281] Under the Texas Civil Practice and Remedies Code, a party may recover fees of the clerk and service fees due to the court, court reporter fees, and other such costs and fees permitted to be awarded by other rules and statutes.[282] Costs generally do not include expenses billed to the client as part of the attorney's fee for services provided.[283] Further, expert fees necessary to establish an evidentiary matter are not considered "costs."[284]

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271. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009.
272. *See* TEX. PROP. CODE ANN. §§ 37.009, 114.064.
273. *See id.* §§ 37.009, 114.064.
274. *See* Scottsdale Ins. Co. v. Travis, 68 S.W.3d 72, 77 (Tex. App.—Dallas 2001, pet. denied).
275. *See* Bocquet v. Herring, 972 S.W.2d 19, 20 (Tex. 1998).
276. *See id.* at 21.
277. *See id.*
278. *See id.*
279. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009.
280. *See* Petrello v. Prucka, 415 S.W.3d 420, 433 (Tex. App.—Houston [1st Dist.] 2013, no pet.).
281. *See* Sterling Bank v. Willard M, L.L.C., 221 S.W.3d 121, 125 (Tex. App.—Houston [1st Dist.] 2006, no pet.).
282. *See id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 31.007(b).
283. *See Willard M, L.L.C.*, 221 S.W.3d at 121.
284. *See* Bundren v. Holly Oaks Townhomes Ass'n, 347 S.W.3d 421, 440 (Tex. App.—Dallas 2011, pet. denied).

By contrast, in a will contest, reasonable attorney's fees *and expenses* can be recovered under some circumstances.[285] Further, reasonable attorney's fees and expenses incurred incident to the removal of an executor may be paid to the party seeking removal.[286]

A party cannot use the Declaratory Judgment Act as a vehicle to obtain otherwise impermissible attorneys' fees.[287] Texas follows the "American Rule," which prohibits fee awards unless specifically provided by contract or statute.[288] The Texas Supreme Court has stated that "if repleading a claim as a declaratory judgment could justify a fee award, attorney's fees would be available for all parties in all cases. That would repeal not only the American Rule but also the limits imposed on fee awards in other statutes."[289] In *Woodlands*, the plaintiff recovered no damages on its breach of contract claim, so it could not recover attorney's fees for breach of contract.[290] The court held that the plaintiff could not recover the same fees under a declaratory judgment action to get around the requirement in a breach of contract case that there be a recovery of damages before attorneys' fees are awarded.[291]

If a party is seeking fees, they must segregate their fees between claims for which fees are recoverable and claims for which fees are not.[292] However, when discrete legal services advance both a recoverable and unrecoverable claim, they are so intertwined that they do not need to be segregated.[293]

D. Seek Injunctive Relief[294]

A temporary restraining order and temporary injunction are often necessary to immediately protect and preserve the principal's property under the control of a rogue fiduciary.[295] Often the fiduciary's lack of personal assets provides the motivation to plunder the principal's property in the first place.[296]

285. *See* TEX. EST. CODE ANN. § 352.052.
286. *See id.* § 404.0037.
287. MBM Financial Corp. v. Woodlands Operating Co., LP, 292 S.W.3d 660, 669 (Tex. 2009).
288. *Id.*
289. *Id.*
290. *See id.* at 670.
291. *See id.*
292. *See* Tony Gullo Motors I, LP v. Chapa, 212 S.W.3d 299, 311 (Tex. 2006).
293. *See id.*
294. *See* Caldwell & Thomas, *Litigation Involving Powers of Attorney*, *supra* note 6.
295. *See* TEX. R. CIV. P. 680; Fairfield v. Stonehenge Ass'n, 678 S.W.2d 608, 610 (Tex. App.—Houston [14th Dist.] 1984, no writ) ("First, the ultimate purpose of a temporary injunction is to preserve the status quo of the parties pending a final trial of the case on the merits.").
296. *See* Deborah L. Jacobs, *Putting Your Faith in a Power of Attorney*, N.Y. TIMES (May 20, 2009), https://www.nytimes.com/2009/05/21/your-money/estate-planning/21POWER.html?pagewanted=all [https://perma.cc/QV9Y-QZZF] ("'A power of attorney is a license to steal. . . . You have to be careful who you appoint as your agent.'") (quoting Bernard A. Krooks).

Temporary injunctive relief is generally less expensive (and may be a less restrictive alternative to address the imminent danger posed to the principal) for the principal than a temporary guardianship and preserves the status quo pending trial.[297] Texas courts have defined the "status quo" as "the last, actual, peaceable, non-contested status which preceded the pending controversy."[298] A temporary restraining order is emergency injunctive relief and is an equitable remedy.[299]

Since "courts of equity" impose fiduciary duties, it is unsurprising that certain aspects of fiduciary law make injunctive relief more accessible.[300] Generally, to obtain a temporary restraining order, the applicant must show: (1) a cause of action against the party seeking to be enjoined; (2) a probable right to the relief requested; and (3) imminent, irreparable harm in the interim.[301] Normally, the party requesting the injunction has the burden to prove the necessary elements.[302]

E. File for a Temporary Guardianship[303]

A temporary guardianship is essentially an emergency proceeding designed to supervise and protect individuals alleged to be "incapacitated" and whose assets or personal safety are in imminent danger.[304] An important difference between a temporary injunction and a temporary guardianship is that a temporary injunction only restrains a potential wrongdoer, while a temporary guardianship grants a third party the right to act positively for the principal.[305] The court must limit the power of a temporary guardian, to only those powers and duties necessary to protect the principal against the imminent danger shown.[306] A permanent guardianship automatically suspends the power of an attorney-in-fact to act, but a temporary guardianship will only suspend the power of an attorney-in-fact to act if the order appointing the temporary guardian expressly addresses the power of attorney.[307]

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297. *See* Twyman v. Twyman, No. 01-08-00904-CV, 2009 WL 2050979, at *3 (Tex. App.—Houston [1st Dist.] July 16, 2009, no. pet.) (mem. op.).

298. *See* Janus Films, Inc. v. City of Fort Worth, 358 S.W.2d 589, 589 (Tex. 1962).

299. *Twyman*, 2009 WL 2050979, at *6.

300. *See* TEX. R. CIV. P. 680–93.

301. *See* Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002).

302. *See* Patrick v. Thomas, No. 2-07-339-CV, 2008 WL 1932104, at *2 (Tex. App.—Fort Worth May 1, 2008, no pet.) (mem. op.).

303. *See* Caldwell & Thomas, *Litigation Involving Powers of Attorney*, *supra* note 6.

304. *See* TEX. EST. CODE ANN. § 1251.001(a).

305. *See id.*

306. *See id*. § 1251.010(b).

307. *Compare* TEX. EST. CODE ANN. § 751.052(a) (stating that (1) when a court of the principal's domicile appoints a permanent guardian of the estate of the principal, the powers of the attorney-in-fact terminate when the guardian qualifies, and (2) the attorney-in-fact must deliver to the guardian of the estate all assets of the estate of the principal in the attorney-in-fact's possession and must account to the guardian of the estate as the attorney in fact would to the principal had the principal terminated his

To obtain a temporary guardianship, the applicant must present substantial evidence that the proposed ward is an incapacitated person.[308] The court must also have probable cause to believe that the proposed ward or the proposed ward's estate requires the immediate appointment of a guardian.[309] Texas Estates Code section 1251.010(a) also states that the court shall establish a temporary guardianship if there is substantial evidence that: (1) the proposed ward is incapacitated,[310] and (2) there is imminent danger that the physical health or safety of the proposed ward will be seriously impaired, or that the proposed ward's estate will be seriously damaged or dissipated unless immediate action is taken.[311]

Generally, a temporary guardianship only lasts sixty days except as provided by Texas Estates Code section 1251.052.[312] An expedited permanent guardianship can sometimes be a more efficient and effective remedy.[313] The breach of any fiduciary duty that poses an imminent danger to the principal's (proposed ward's) assets will support an application to establish a temporary guardianship.[314] For example, a temporary guardianship may be appropriate when the attorney-in-fact has breached the duty of loyalty through self-dealing transactions that transferred the principal's property to the attorney-in-fact or third parties.[315] Similarly, a breach of the attorney-in-fact's duty of care by failing to pay the principal's monthly bills or maintain the principal's property may support a temporary guardianship.[316]

F. Seek a Constructive Trust[317]

A constructive trust provides a vehicle to recover wrongfully taken property.[318] It is essentially an equitable legal fiction designed to prevent

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powers), *with* § 751.052(b) (providing that when a court of the principal's domicile appoints a temporary guardian of the estate of the principal, the court may suspend the powers of the attorney-in-fact on the qualification of the temporary guardian until the temporary guardianship expires).

308. *See* TEX. EST. CODE ANN. § 1251.001(a).

309. *Id.*

310. *Id.* § 1002.017 defines an "incapacitated person" as "a minor" or "an adult who, because of a physical or mental condition, is substantially unable to: (A) provide food, clothing, or shelter for himself or herself; (B) care for the person's own physical health; *or* (C) manage the person's own financial affairs."; *Id.* (emphasis added).

311. *Id.* § 1002.017 defines an "incapacitated person" as "a minor" or "an adult who, because of a physical or mental condition, is substantially unable to: (A) provide food, clothing, or shelter for himself or herself; (B) care for the person's own physical health; *or* (C) manage the person's own financial affairs"; *Id.* (emphasis added); *see id.* § 1251.010(a).

312. *See id.* §§ 1251.151, 1251.052.

313. *See id.* §§ 1251.151, 1251.052.

314. *See id.* § 1251.003(b)(2).

315. *See id.*

316. *See id.*

317. *See* Caldwell & Thomas, *Litigation Involving Powers of Attorney*, *supra* note 6.

318. *See* Est. of Wallis, No. 12-07-00022-CV, 2010 WL 1987514, at *4 (Tex. App.—Tyler May 19, 2010, no pet.) (mem. op.).

unjust enrichment.[319] It is not a real trust or cause of action, but instead a remedy that arises by operation of law.[320] "A constructive trust is a judgment that the person holding legal title has an equitable duty to convey the property to another because the original acquisition was wrongful, and the holder would be unjustly enriched if permitted to retain the property.[321] "A constructive trust's 'scope and application, within some limitations, is generally left to the discretion of the court imposing' it."[322] Appellate courts review a trial court's decision to impose a constructive trust under an abuse-of-discretion standard.[323]

To obtain a constructive trust, the proponent must prove (1) the breach of a special trust, fiduciary relationship, or actual fraud, (2) unjust enrichment of the wrongdoer, and (3) tracing to an identifiable res.[324]

The second element, unjust enrichment, is not an independent cause of action.[325] Instead, it "characterizes the result of a failure to make restitution of benefits either wrongfully or passively received under circumstances that give rise to an implied or quasicontractual obligation" to return the property to its owner."[326] A constructive trust can apply to property in the hands of innocent third parties who gave no consideration.[327] The doctrine applies the principles of restitution to disputes when there is no actual contract, based

319. *See id.* (citing Procom Energy, L.L.A. v. Roach, 16 S.W.3d 377, 381 (Tex. App.—Tyler 2000, pet. denied).

320. 4 WILLIAM V. DORSANEO III, *Texas Litigation Guide* § 55.01[2] (2011) (*citing* Mills v. Gray, 210 S.W.2d 985, 987 (Tex. 1948)).

321. *See* Est. of Wallis, 2010 WL 1987514, at *4 (citing Baker Botts, L.L.P. v. Cailloux, 224 S.W.3d 723, 736 (Tex. App.—San Antonio 2007, pet. denied); *see also* BOGERT, THE LAW OF TRUSTS & TRUSTEES § 471 (3d ed. 2009) ("The constructive trust may be defined as a device used by equity to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs.").

322. *Cailloux*, 224 S.W.3d at 736 (*citing* Wheeler v. Blacklands Prod. Credit Ass'n, 627 S.W.2d 846, 849 (Tex. App.—Fort Worth 1982, no writ)).

323. *See id.* (*citing* Leach v. Conner, No. 13-01-468-CV, 2003 WL 22860911, at *7 (Tex. App.—Corpus Christi Dec. 4, 2003, no pet.) (a trial court abuses its discretion in matters of equity when it rules: "(1) arbitrarily, unreasonably, or without regard to guiding legal principles; or (2) without supporting evidence.")).

324. Troxel v. Bishop, 201 S.W.3d 290, 297 (Tex. App.—Dallas 2006, no pet.); Hubbard v. Shankle, 138 S.W.3d 474, 485 (Tex. App.—Fort Worth 2004, pet denied).

325. Casstevens v. Smith, 269 S.W.3d 222, 229 (Tex. App.—Texarkana 2008, pet. denied).

326. *Id.* (*quoting* Friberg-Cooper Water Supply Corp. v. Elledge, 197 S.W.3d 826, 832 (Tex. App.—Fort Worth 2006), *rev'd on other grounds*, 240 S.W.3d 869 (Tex. 2007) *(in turn quoting* Walker v. Cotter Props., Inc., 181 S.W.3d 895, 900 (Tex. App.—Dallas 2006, no pet.))); *see* 2 WILLIAM V. DORSANEO III, *Texas Litigation Guide* § 21A.04[1] (2011); *see also* Lilani v. Noorali, No. H-09-2617, 2011 WL 13667, at *11 (S.D. Tex. Jan. 3, 2011) ("The majority of Texas appellate courts hold that unjust enrichment is not an independent cause of action. This view prevails among Texas courts notwithstanding the fact that the Texas Supreme Court . . . refers to an unjust enrichment as a 'cause of action,' a 'remedy,' and a 'basis for recovery.' Most Texas courts have nevertheless read these statements as reiterations of the well-established principle that an equitable suit for restitution may be raised against a party based on the theory of unjust enrichment. The theory may apply when a defendant obtains a benefit from the plaintiff 'by fraud, duress, or the taking of an undue advantage.'") (internal citations omitted).

327. *See* Pope v. Garrett, 211 S.W.2d 559, 562, (Tex. 1948).

on the equitable principle, it would be unconscionable for the person holding legal title to retain the property.[328]

The third element, tracing to an identifiable res, often proves the most difficult to establish, especially in which the attorney-in-fact has converted the principal's property into additional forms.[329] The general rule is "when a party attempts to impose a constructive trust over funds," Texas law requires that "'the trust fund must be clearly traced into other specific property; that nothing must be left to conjecture, and that no presumptions, except the usual and necessary deductions from facts proven, can be indulged.'"[330] The Texas Supreme Court reaffirmed the tracing requirement in *Wilz v. Flournoy*.[331] Under *Wilz*, once the plaintiff traces the property to an item of property, the entire property is subject to the constructive trust, except to the extent the fiduciary can distinguish and separate their own property from the trust property.[332] When the fiduciary or wrongdoer mingles the trust funds with their own property or invests it in such a manner that the trust funds can no longer be separated or identified, the entire property is subject to the constructive trust remedy.[333]

A constructive trust is a broad remedy and follows the property or its proceeds if it is converted into a new form.[334] In addition, at least one Texas court has imposed a constructive trust over the interests of individuals (non-fiduciaries) acquiring an ownership interest with the attorney-in-fact in the principal's property, noting that a constructive trust "reaches all those who are actually concerned in the fraud, all who directly and knowingly participate in its fruits, and all those who derive title from them voluntarily or with notice."[335]

A court may impose a constructive trust when one acquires legal title to property in violation of a fiduciary relationship.[336] Texas courts have held a constructive trust is appropriate when the following fiduciary duties were

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328. *See* Omohundro v. Matthews, 341 S.W.2d 401, 405 (Tex. 1960); *Cailloux*, 224 S.W.3d at 736.

329. *See* Mary C. Burdette & Scott D. Weber, *Remedies for Breach of Fiduciary Duty*, STATE BAR OF TEX. (Sept. 26, 2020), https://www.dallasprobatelawfirm.com/documents/Remedies-For-Breach-Of-Fiduciary-Duty.pdf [https://perma.cc/NSP6-DPMF].

330. *In re* Harrison, 310 S.W.3d 209, 213 (Tex. App.—Amarillo 2010, pet. denied) (*quoting* Meyers v. Baylor Univ., 6 S.W.2d 393, 394 (Tex. App.—Dallas 1928, writ ref'd).

331. *See* Wilz v. Flournoy, 228 S.W.3d 674, 676 (Tex. 2007).

332. *See In re* Harrison, 310 S.W.3d at 213 (*citing Wilz*, 228 S.W.3d at 676 (*in turn citing* Eaton v. Husted, 172 S.W.2d 493, 498–99 (Tex. 1943))).

333. *See id.* (*citing Meyers*, 6 S.W.2d at 395).

334. *See In re* Est. of Crawford, 795 S.W.2d 835, 841 (Tex. App.—Amarillo 1990, no writ) (*citing* Hand v. Errington, 242 S.W. 722, 724 (Tex. Comm'n App. 1922, judgm't adopted)).

335. Smiley v. Johnson, 763 S.W.2d 1, 4 (Tex. App.—Dallas 1988, writ denied) (*quoting* Miller v. Himebaugh, 153 S.W. 338, 342 (Tex. App.—Amarillo 1913, writ ref'd) (*in turn quoting* Martin v. Robinson, 3 S.W. 550, 557 (Tex. 1887))).

336. *See* Lesikar v. Rappeport, 33 S.W.3d 282, 303 (Tex. App—Texarkana 2000, pet. denied).

breached: (1) breach of the duty of loyalty;[337] and (2) the duty to disclose.[338] In connection with the duty of loyalty, the practitioner should not overlook recovering the principal's property in the hands of third parties who aided and abetted the fiduciary, conspired with the fiduciary, or did not give value for the property.[339]

The Texas Supreme Court has recognized a constructive trust is not limited to cases where a breach of a fiduciary relationship is involved.[340] Indeed, when one obtains the legal title to property through actual fraud, misrepresentation, concealment, undue influence, duress, or through any other similar means which render it unconscionable for the holder of legal title to retain the interest, equity imposes a constructive trust on the property in favor of the one who is equitably entitled to the same.[341]

In *Archer*, the Texas Supreme Court cited Texas courts' "broad authority to rectify inequity using a constructive trust in an action for restitution to prevent unjust enrichment."[342] It noted that courts have been creating constructive trusts to remedy the improper disposition of property caused by fraud, duress, undue influence, or other misconduct related to the execution of estate planning documents for the better part of a century.[343]

Despite the court's description of constructive trusts as being "malleable to fit the particular needs of each situation," constructive trusts cannot remedy every situation.[344] The dissenting opinion in *Archer* identified a major weakness to the remedy of a constructive trust.[345] Hypothetically, an interfering individual could transfer a vulnerable individual's assets to a third-party prior to their death.[346] In this scenario, the third-party may then dissipate or consume the assets, or the third-party may simply disappear.[347] The decedent may expect that his assets will pass pursuant to his estate plan, but by the time he passes away, he has no assets left to pass on.[348] Under

337. *See Wilz*, 228 S.W.3d at 676–77 (constructive trust imposed on real property obtained through using ward's funds to purchase real property).

338. *See id.* (constructive trust imposed on real property obtained through using ward's funds to purchase real property); *see also* Est. of Wallis, No. 12-07-00022-CV, 2010 WL 1987514, at *6–7 (Tex. App.—Tyler May 19, 2010, no pet.) (mem. op.) (holding constructive trust was properly imposed on retirement and insurance proceeds where attorney-in-fact failed to disclose to the principal that she had changed the beneficiary designations on the accounts).

339. *See infra* note 344.

340. *See* Meadows v. Bierschwale, 516 S.W.2d 125, 128 (Tex. 1974).

341. *See In re* Loftis, 40 S.W.3d 160, 165 (Tex. App.—Texarkana 2001, no pet.), *citing* Wheeler v. Blacklands Prod. Credit Ass'n, 627 S.W.2d 846, 849 (Tex. App.—Fort Worth 1982, no writ); *see also* Andrews v. Brown, 10 S.W.2d 707, 708 (Tex. Comm'n App. 1928) (imposing constructive trust in the case of undue influence).

342. *See* Archer v. Anderson, 556 S.W.3d 228, 236 (Tex. 2018).

343. *See id.*

344. *Id.*

345. *Id.* at 242–43.

346. *Id.*

347. *See id.*

348. *See id.*

these circumstances, the remedies of a constructive trust or restitution would have little if any benefit to the party seeking to enforce the decedent's intent.[349] If the property has been dissipated or traceable funds have been depleted, nothing remains upon which to impose a constructive trust.[350] The dissent noted that there are any number of factual scenarios that could occur that would leave parties without any avenue of relief against those whose actions interfere with an individual's last-expressed true intentions about the disposition of his or her property.[351]

G. Possibly File a Legal Malpractice Claim

The Texas Supreme Court has wrestled with the issue of estate planner liability over the past quarter-century, beginning with *Barcelo v. Elliot*.[352] In *Barcelo*, the beneficiaries of a trust established by their grandmother sued the grandmother's estate planner after the trust was declared invalid.[353] The Texas Supreme Court affirmed a summary judgment against the beneficiaries' claims because the beneficiaries were not in privity with the estate planner and therefore the estate planner owed no professional duty to the beneficiaries.[354]

The Court revisited the issue of estate planner liability in *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc*.[355] In *Belt*, independent co-executors sued the decedent's estate planner alleging that the attorney's negligent estate planning resulted in excess tax liability.[356] Reversing the lower courts, who had relied on *Barcelo*'s privity defense to dismiss the claims, the Texas Supreme Court held that personal representatives may maintain claims against estate planners based on economic loss to the decedent's estate.[357] This is because, unlike the situation in *Barcelo*, a personal representative's claim for damages to the estate, which is derivative of the claim the testator would have had during life, does not implicate divided loyalties on the part of the estate planner.[358]

Thus, when an estate planning attorney takes some wrongful action that dissipates the estate, a legal malpractice claim might be an available

349. *See id.*
350. *See id.*
351. *See id.*
352. *See* Barcelo v. Elliot, 923 S.W.2d 575, 577 (Tex. 1996).
353. *See id.* at 576–77.
354. *See id.* at 579.
355. *See* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 782 (Tex. 2006).
356. *See id.* at 783.
357. *See id.* at 789.
358. *See id.* at 787.

remedy.[359] However, standing remains an issue, as the claim belongs to the decedent's personal representative rather than the beneficiaries.[360]

H. File a Claim for Conversion

"Conversion is the wrongful exercise of dominion or control over another's property in denial of or inconsistent with" the other's rights in that property.[361] Under certain situations, money may be converted.[362] Money may be converted when the money is: "(1) delivered for safe keeping; (2) intended to be kept segregated; (3) substantially in the form in which it is received or in an intact fund; and (4) not the subject of a title claim by the keeper."[363]

In conversion cases, the owner may recover damages for the loss in value of the wrongfully detained property or the loss-of-use damages.[364] In cases where the property's value fluctuates—for example, stocks and bonds—the general loss-of-value measure is slightly modified.[365] Texas courts have held that the measure of damages is the highest intermediate value of the stock between the time the stock is converted and a reasonable time after the owner has received notice of the conversion.[366] Prejudgment interest is also recoverable for loss of use of the property from the date of conversion through the date of judgment.[367]

I. Case Briefs

The following are examples of how other attorneys have used the above tools to hold wrongdoers accountable.[368]

In *Cortes v. Wendl*, Hardy was a resident of an assisted living facility.[369] Hardy executed documents giving Cortes and Fernandes 75% of her mineral rights and all of her previously accrued mineral and royalty interests.[370] When Hardy's nurse and friend, Wendl, learned of the "gift," she obtained a

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359. *See infra* notes 366–372.
360. *See infra* notes 366–372.
361. *See* Edlund v. Bounds, 842 S.W.2d 719, 727 (Tex. App.—Dallas 1992, writ denied).
362. *See id.*
363. *Id.*
364. *See* Winkle Chevy-Olds-Pontiac, Inc. v. Condon, 830 S.W.2d 740, 746 (Tex. App.—Corpus Christi 1992, writ dism'd).
365. *See* Reed v. White, Weld & Co., 571 S.W.2d 395, 397 (Tex. App.—Texarkana 1978, no writ).
366. *See id.*
367. *See* Associated Tel. Directory Publishers, Inc. v. Five D's Publ'g Co., 849 S.W.2d 894, 900 (Tex. App.—Austin 1993, no writ).
368. Authors' introduction to material.
369. *See* Cortes v. Wendl, No. 06-17-00121-CV, 2018 WL 3040322, *1 (Tex. App.—Texarkana June 20, 2018, no pet.).
370. *See id.*

power of attorney from Hardy.[371] Subsequently, she filed suit on Hardy's behalf as attorney-in-fact and next friend against Cortes and Fernandes, alleging that the mineral deed was executed as a result of the defendants' exertion of duress, coercion, and undue influence on Hardy, that no consideration was paid for the conveyance, and that Hardy did not execute the conveyance of her own free will or volition.[372] She also alleged that Cortes took a check payable to Hardy for $67,876.89 representing royalties paid and owed to her.[373] The evidence showed that the defendants would visit the nursing home monthly and pressure Hardy to give them the mineral interests.[374] They told Hardy she would be in trouble with the IRS if she refused to sign over the minerals.[375] Hardy became fearful the defendants would harm her.[376] Hardy suffered from seizures after her husband's death, and she was afraid she would start having seizures again from the pressure to sell her minerals.[377] She testified that she felt like a "nervous wreck," that "she had no choice but to sell the minerals," and that she "just couldn't take it any longer."[378] Although Hardy needed the mineral income to pay her bills, she testified that she "just [gave] up."[379]

After a bench trial, the court voided the mineral deed and assessed damages of $52,881.89 and punitive damages of $50,000 against both Cortes and her husband.[380] The court of appeals upheld the judgment based on undue influence.[381]

In *Cooper v. Cochran*, the court invalidated an irrevocable trust, finding that it was created as a result of duress and fraud.[382] In 1998, Hubbard created an irrevocable trust and named Cooper, Hubbard's grandson, as trustee.[383] "Hubbard transferred several properties to Cooper by special warranty deed.[384] Under the deed, Hubbard retained a life estate . . . including the right to receive rents, revenues and profits from the properties."[385] The trust provided that Cooper was to pay to Hubbard as much of the "net income and principal of the trust as [Cooper], in his [sole] and absolute discretion, determines is necessary for [Hubbard's] education, health, maintenance[,]

371. *See id.*
372. *See id.*
373. *Id.*
374. *Id.* at *2.
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.*
382. *See* Cooper v. Cochran, 288 S.W.3d 522, 525 (Tex. App.—Dallas 1991, writ denied).
383. *Id.* at 528.
384. *Id.*
385. *Id.*

and support.[386] Cooper "testified that Hubbard offered the properties to him in exchange for his services in renovating and maintaining the properties."[387] Cooper then got a loan "using as security a part of the properties Hubbard had deeded him."[388] Cooper used some of the money from the loan to buy a "new, larger home" for himself, "ostensibly to provide room for Hubbard," but Hubbard did not move to the house and "instead moved to Cooper's former house," where "Cooper charged Hubbard $950 per month rent."[389] Though Cooper collected thousands of dollars in rent from Hubbard, Cooper "refused to use the money for Hubbard's benefit."[390] In 1999, Hubbard and her brother, Cochran, sued Cooper.[391] The trial court issued a temporary injunction "appointing Cochran as trustee and receiver for the properties and enjoin[ing] Cooper from selling or encumbering any of the properties."[392] Despite the temporary injunction, Cooper defaulted on his note that was secured by trust property and the bank "began foreclosure proceedings and scheduled the sale of the property."[393] Cooper also "failed to pay taxes owed on the properties, resulting in foreclosure actions based on tax liens."[394]

"Hubbard's son and agent under a durable power of attorney intervened in the lawsuit and asserted claims of breach of fiduciary duty and an accounting," and "sought a declaratory judgment, constructive trust, and dissolution of the trust."[395] The trial court determined that the "trust was executed by Hubbard under duress and undue influence from Cooper and Cooper made representations and promises to Hubbard to induce her to enter into the trust knowing the representations and promises were false at the time they were made."[396] "The court found that Cooper had breached his fiduciary duty to Hubbard under the trust."[397] "The court dissolved the trust, ordered the properties made [the] subject of the trust to be conveyed to Cochran as court-appointed receiver for the benefit of Hubbard, ordered the properties be sold and the proceeds used" to pay the mortgages and tax liens, and placed a constructive trust on Cooper's home for the benefit of Hubbard.[398] The court also awarded attorneys' fees.[399]

In *Finch v. McVea*, a transaction was voided based on fraud and undue influence in which the wrongdoer misrepresented a promise regarding future

386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.*
390. *Id.*
391. *Id.*
392. *Id.* at 529.
393. *Id.*
394. *Id.*
395. *Id.*
396. *Id.* at 529–30.
397. *Id.* at 530.
398. *Id.*
399. *Id.*

behavior.[400] McVea (seventy-five years old and in poor health) executed a warranty deed to the defendant family members.[401] As consideration, the grantees executed a promissory note for $40,000 payable in monthly installments of $300.[402] The note "provided that 'in the event' of McVea's death prior to the final payment on the note, the remaining obligation would be extinguished.[403] The defendants "promised orally and by letter to sell the land and share the profits equally if the money received by McVea from the $300 monthly note payments were insufficient" to support her.[404] After having a stroke, McVea's "needs began to exceed considerably the $300" she received monthly, and the defendants were notified, but refused to provide additional support.[405] McVea and her attorney-in-fact filed suit alleging "fraud and undue influence by the grantees in inducing the execution of the deed."[406] The court stated: "the law is well settled that actionable fraud can be based upon a promise to perform a future action without a present intention to perform."[407] Citing *Stone v. Williams*,[408] the court stated:

> Where, as here, the representation is a promise to do something in the future and there exists at the time of the representation intention not to perform, there is a representation of an existing fact. While a mere failure to perform is not sufficient to prove the existence of an intention not to perform at the time the promise is made, where the party allegedly making the promise denies making the promise, there is sufficient evidence to support a finding that there was the absence of intention to perform when it was made.[409]

The court found the grantees "denied the promise to sell the land conditioned on McVea's needs," and held there was sufficient evidence, "together with the refusal to perform, to sustain the trial court's finding of fraud."[410]

The next case to examine is *In re Estate of Everett*, a will contest case.[411] Cliff had four children with whom he had distant relationships.[412] Cliff spent significant time and energy on his Holiday Travel Park.[413] Cliff's step-grandson, James, worked at the park and assisted Cliff in the daily

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400. Finch v. McVea, 543 S.W.2d 449 (Tex. App.—Corpus Christi 1976, writ ref'd n.r.e.).
401. *Id.* at 451.
402. *Id.*
403. *See id.*
404. *Id.*
405. *Id.*
406. *Id.*
407. *Id.* at 451–52.
408. *Id.* at 452 (*citing* Stone v. Williams, 358 S.W.2d 151, 155 (Tex. App.—Houston [1st Dist.] 1962, writ ref'd n.r.e.).
409. *Id.*
410. *Id.*
411. *See In re* Est. of Everett, No. 04-09-00050-CV, 2010 WL 4008366 (Tex. App.—San Antonio Oct. 13, 2010, no pet.).
412. *See id.* at *1.
413. *See id.*

management of the park.[414] "The first will . . . was prepared by a local attorney and devised $100 to each of Cliff's four children and four step-children, with the residuary estate [including the Holiday Travel Park] to James."[415] Cliff became ill and Cliff's daughter's husband created a new will from internet sources that devised the park equally between James and Cliff's four children.[416] The second will was executed under suspicious circumstances while Cliff was in recovery from surgery and still under the effects of anesthesia.[417] The third will was prepared by Cliff's daughter-in-law and was executed eleven days after the second will, just thirty minutes before a surgery that caused Cliff to become and remain comatose until death.[418]

Coworkers and trusted friends testified that Cliff always wanted to leave the park to James.[419] There was testimony of false statements regarding the will and potential IRS consequences that would require James to sell the property, a consequence that Cliff feared.[420] Conflicting testimony existed as to whether Cliff directed the contents of the second and third wills.[421] Cliff's friend who witnessed the execution of the third will "described Cliff as 'sedated' and was not sure that Cliff even recognized them."[422] The witnesses further testified that the daughter's husband appeared to be "directing the signing of the will."[423] The involvement of Cliff's children in the preparation and execution of the second and third will and the "motive, character, and conduct surrounding the incidents in question" raised issues of fraud and undue influence.[424]

The trial court invalidated the second and third wills based on fraud and undue influence and admitted the first attorney-prepared will into probate.[425] The court of appeals affirmed.[426]

V. INTERFERENCE WITH WILLS

One of the most common areas in which tortious interference occurs is in the execution (or interference with the execution) of wills.[427] In the past, it was argued that a cause of action for tortious interference with inheritance

414. *See id.*
415. *Id.*
416. *See id.* at *4.
417. *See id.* at *4.
418. *See id.*
419. *See id.*
420. *See id.*
421. *See id.*
422. *See id.* at *5.
423. *See id.*
424. *See id.* at *7.
425. *See id.* at *2.
426. *See id.* at *7.
427. Authors' original opinion.

was necessary to fill some gaps in probate law that could allow wrongdoers to interfere with the execution of wills.[428] In some cases, the plaintiff who expected to receive an inheritance may not have standing to challenge a wrongdoing.[429] If, for example, the testator intends to execute a will leaving his estate to charity, and his children interfere and physically prevent the testator from executing his will, the charities do not have standing to complain, as there is no instrument to demonstrate their interest.[430] Thus, the charity would not meet the Texas Estates Code definition of an "interested person."[431]

Other arguments for the existence of a claim for tortious interference with inheritance include the fact that in an estate proceeding, there is limited opportunities for an award of attorney's fees.[432] Although recent legislative changes have expanded the opportunity to recover attorneys' fees in a will contest, there are still limitations that could cause inequitable results.[433]

A. Standing in Estate Proceedings

The following is a summary of Texas Estates Code provisions that address standing in various estate or probate matters.[434] The definition of "interested person" will be addressed after the review of relevant provisions.[435]

1. Application to Probate a Will

The only persons eligible to file an application to admit a will to probate are:

- the executor named in the will,
- an independent administrator designated by all of the distributees of the decedent, or
- an interested person.[436]

2. Opposition to Application for Letters of Administration

"An 'interested person' may, at any time before an application for letters of administration is granted, file an opposition to the application and

428. *Id.*
429. *Id.*
430. *Id.*
431. *See* Lauren Davis Hunt & Megan N. Grossman, *Standing, Capacity and Personal Jurisdiction in Estate and Trust Litigation*, State Bar of Texas, Fiduciary Litigation Course, 2016.
432. *See id.*
433. *See id.*
434. *See id.*
435. *See id.*
436. TEX. EST. CODE ANN. § 256.051.

may apply for the grant of letters to the interested person or any other person."[437]

3. *Heirship Proceedings*

The only persons eligible to commence or maintain a proceeding to declare heirship of a decedent are:

- the personal representative of the decedent's estate;
- a person claiming to be a creditor or the owner of all or part of the decedent's estate;
- the guardian of the estate of the decedent if the decedent was a ward;
- a party seeking appointment of an independent administrator under § 401.003 (intestate estate by agreement); or
- the trustee of a trust holding assets for the benefit of a decedent.[438]

4. *Standing to Contest a Will*

Any person "interested in an estate" has standing to file a written opposition to an issue in a probate proceeding before the court decides such issue.[439]

After the will has been admitted to probate, an interested person may commence a suit to contest the validity thereof no later than the second anniversary of the date the will was admitted to probate, except that an interested person may commence a suit to cancel a will for forgery or other fraud not later than the second anniversary of the date the forgery or fraud was discovered.[440]

An incapacitated person may bring suit under section 256.204(a) "on or before the second anniversary of the date the person's disabilities are removed."[441]

5. *"Interested Person" Defined*

As it relates to a decedent's estate, an "interested person" is defined by the Estates Code as: "an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered."[442] There is substantial case law on whether a person is an "interested person" for

437. *Id.* § 301.101.
438. *Id.* § 202.004.
439. *See id.* § 55.001.
440. *See id.* § 256.204(a).
441. *See id.* § 256.204(b).
442. *Id.* § 22.018.

purposes of various estate and probate matters.[443] In 1956, the Texas Supreme Court opined on the meaning of the term "person interested" in the context of a will contest.[444] Although *Logan* was decided nine years before the Texas Legislature enacted the predecessor to section 22.018 of the Texas Estates Code that set forth the definition of "interested person," *Logan* continues to be cited for the following excerpt:

> In this and other jurisdictions where will contests are limited to 'persons interested in the estate of the testator,' the term 'person interested' has a well-defined but restricted meaning. The interest referred to must be a pecuniary one, held by the party either as an individual or in a representative capacity, which will be affected by the probate or defeat of the will. An interest resting on sentiment or sympathy, or any other basis other than gain or loss of money or its equivalent, is insufficient. Thus the burden is on every person contesting a will, and on every person offering one for probate, to allege, and, if required, to prove, that he has some legally ascertained pecuniary interest, real or prospective, absolute or contingent, which will be impaired or benefited, or in some manner materially affected, by the probate of the will.[445]

At a minimum, a person contesting the probate of a will must allege "that he has some interest in the estate of the testator that will be affected by such will if admitted to probate."[446] If there is no interest, "a contestant is a mere meddlesome intruder."[447]

a. Prior Wills & Interested Persons

Where a party contests the probate of a will because of the existence of a prior will, the party must show that he was named as a beneficiary in the prior will to have standing to file the contest of the subsequent will.[448] Merely alleging the existence of a prior lost will is not sufficient to show standing.[449] As long as the contestant can show it is a beneficiary of a testamentary instrument executed with the formalities required by law, he has standing.[450]

If a person's only interest in an estate is in a will that is denied probate, such person does not have standing to contest the probate of a prior will because he is not an "interested person."[451]

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443. *See infra* Sections V.A.5.a–g.
444. *See* Logan v. Thomason, 202 S.W.2d 212, 216 (Tex. 1947).
445. *Id.* at 215.
446. *See* Abrams v. Ross' Est., 250 S.W. 1019, 1021 (Tex. Comm'n App. 1923, judgm't adopted).
447. *See id.*
448. *See* Hamilton v. Gregory, 482 S.W.2d 287, 288–89 (Tex. App.—Houston [1st Dist.] 1972, no writ).
449. *See id.*
450. *Id.*
451. *See* Aven v. Green, 320 S.W.2d 660, 662–63 (Tex. 1959).

In *Bendtsen*, a person named executor in a will that was found to be invalid attempted to contest an earlier will and the actions of the court-appointed temporary administrator of the estate.[452] The court held that the person did not have standing to contest the earlier will.[453] As a named executor in an invalid will, she was not an "interested person" under section 3(r) of the Texas Probate Code (predecessor to section 22.018 of the Texas Estates Code) because she was not an heir, devisee, spouse, or creditor of the decedent and she did not have a property right in or claim against the decedent's estate.[454] She also lacked a pecuniary interest in the estate, as required by *Logan*.[455]

b. Interests as Heirs of a Deceased Devisee

In a situation in which a person is an interested person in a third party's estate and such person dies, his estate or heirs become interested persons in the third party's estate.[456]

c. Indirect Interests

A person who does not have a direct interest in the estate itself can still be an "interested person" in some instances in which the admission or defeat of a will has a pecuniary effect on such person.[457]

For instance, a remainder beneficiary of a testamentary trust has standing to contest the probate of another will that would knock out the will that created the trust.[458]

A person who is not a named beneficiary in a will, but becomes a beneficiary of an estate after a will beneficiary exercises a power of appointment has standing to challenge the administration of the estate.[459] In *Foster*, the decedent appointed his brother Billy as executor of his estate and directed that the estate was to be divided by Billy "equally as he sees fit."[460] The court determined such direction granted Billy a power of appointment over the estate.[461] Billy exercised the power of appointment by appointing one-half of the assets to William.[462] When William did not receive one-half

452. *See* Est. of Bendtsen, 230 S.W.3d 832 (Tex. App.—Dallas 2007, no pet.).
453. *Id.* at 834.
454. *See id.*
455. *See id.*
456. *See* Dickson v. Dickson, 5 S.W.2d 744, 746 (Tex. Comm. App. 1928); *see In re* Est. of York, 951 S.W.2d 122, 126 (Tex. App.—Corpus Christi 1997, writ denied); *see* Logan v. Thomason, 202 S.W.2d 212, 215 (Tex. 1947).
457. *See* Schindler v. Schindler, 119 S.W.3d 923, 925 (Tex. App.—Dallas 2003, pet. denied).
458. *See id.* at 928.
459. *See* Foster v. Foster, 884 S.W.2d 497, 501 (Tex. App.—Dallas 1993, no writ).
460. *See id.* at 499.
461. *See id.* at 500.
462. *See id.* at 499.

of the estate, he sued for partition and distribution of the estate.[463] Billy claimed William lacked standing and was not an interested person in the estate because William was not a beneficiary under the will.[464] The court disagreed, stating that William claimed a property right in one-half of the estate assets because of the exercise of the power of appointment, and therefore he was an interested person with standing.[465]

When a decedent designates as beneficiary of a life insurance policy a trustee of a trust created under her will and names a third party as an alternate beneficiary of the life insurance policy, the third party is an interested person for purposes of a will contest because defeat of the will would cause the third party to take under the life insurance policy.[466]

d. Assignments of Interests

Interested persons include grantees, assignees, beneficiaries, or devisees of an heir.[467] When a person assigns his or her interest in an estate to a third party, the third party then has standing to bring an action against the independent executor accused of committing waste.[468] In *Oldham*, the Keatons bought the interests of two of the devisees of the decedent's estate.[469] The Keatons then sued the independent executor of the will to compel closure of the independent administration and distribution of the assets of the estate.[470] The court held that the Keatons had standing as assignees of an interest in the estate.[471]

"A purchaser from a devisee is entitled to have a will probated when such probate constitutes an essential link in his title."[472]

e. Executors and Administrators as "Interested Persons"

An independent executor or administrator is not among those listed as an "interested person" under the Texas Estate Code section 22.018.[473] In *Muse, Currie and Kohen v. Drake*, the Texas Supreme Court held a court-appointed administrator has no standing to contest a purported will of

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463. *See id.*
464. *See id.* at 501.
465. *See id.*
466. *See* Maurer v. Sayre, 833 S.W.2d 680, 681–82 (Tex. App.—Fort Worth 1992, no writ); *see also In re* Rasco, 552 S.W.2d 557 (Tex. App.—Dallas 1977, no writ).
467. *See* Trevino v. Turcotte, 564 S.W.2d 682, 687 (Tex. 1978); *see* Estate of York, 951 S.W.2d 122, 126 (Tex. App.—Corpus Christi 1997, writ denied); Dickson v. Dickson, 5 S.W.2d 744, 746 (Tex. Comm. App. 1928).
468. *See* Oldham v. Keaton, 597 S.W.2d 938, 943–44 (Tex. App.—Texarkana 1980, writ ref'd n.r.e.).
469. *See id.* at 941.
470. *See id.*
471. *See id.* at 942.
472. Fontinberry v. Fontinberry, 326 S.W.2d 717, 719 (Tex. App.—Waco 1959, writ ref'd n.r.e.).
473. *See* TEX. EST. CODE ANN. § 22.018.

a decedent because the administrator had no pecuniary interest in the defeat of the will.[474]

In *Cunningham v. Fox*, the court held that an executor does not have standing to prosecute a bill of review because an executor is not an "interested person."[475]

However, another court has held that although section 22.018 of the Texas Estate Code does not include executors in the list of "interested persons," once a will is admitted to probate, section 352.052 grants an executor standing to defend a will, and thus, an executor who contested a codicil had standing.[476] As stated in *Travis*, "after a will is admitted to probate, the executrix does not have to stand by and do nothing but may protect the estate from a subsequent will or codicil which may have been obtained by forgery, fraud or undue influence, while the testator was of unsound mind, or under any other circumstances which might prevent the subsequent document from being the legally declared final disposition of the testatrix's estate."[477]

f. Ad Litems and Standing

In *In re Estate of Stanton*, the attorney ad litem appointed to represent unknown and unascertained beneficiaries had standing to oppose the appointment of a temporary administrator and to propose appointment of an independent third party as temporary administrator.[478] If the ad litem's clients had been present, they could have opposed the appointment of a temporary administration and applied for the appointment of an independent third-party administrator.[479] Because they were not present, the ad litem had both standing and authority to take those actions on behalf of his clients.[480]

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474. *See* Muse, Currie & Kohen v. Drake, 535 S.W.2d 343, 344 (Tex. 1976).

475. *See* Cunningham v. Fox, 879 S.W.2d 210, 211–12 (Tex. App—Houston [14th Dist.] 1994, writ denied).

476. *See generally* Travis v. Robertson, 597 S.W.2d 496, 497 (Tex. App.—Dallas 1980, no writ.) (Section 352.052 of the Texas Estates Code provides that any person designated as executor in a will (or alleged will) or as administrator with the will (or alleged will) annexed, who, for the purpose of having the will or alleged will admitted to probate, defends the will or alleged will or prosecutes any proceeding in good faith and with just cause, whether or not successful, shall be allowed out of the estate the executor's or administrator's necessary expenses and disbursements in those proceedings, including reasonable attorney's fees).

477. *See id.* at 498.

478. *See In re* Est. of Stanton, 202 S.W.3d 205 (Tex. App.—Tyler 2006, pet. denied).

479. *See id.* at 208–09.

480. *See id.* at 208.

g. Losing Standing

A party who once had standing can lose standing.[481] A will beneficiary who has already accepted benefits under a will is estopped from contesting the will and as such is not an "interested person" for purposes of a will contest.[482] "A person cannot receive beneficial interests under a will and at the same time retain or claim any interest, even if well founded, which would defeat or in any way prevent the full effect and operation of every part of the will."[483]

Acceptance of benefits under a will lends itself to standing, and matters such as estoppel, acceptance of benefits and relinquishment of interest are considered in determining whether a contestant is an "interested person."[484] The issue of standing is jurisdictional and can thus be raised for the first time on appeal.[485] However, like other forms of estoppel, estoppel due to the acceptance of benefits is an affirmative defense that must be specifically pleaded or it is waived.[486]

Additionally, a party who executes a release of an estate from any and all claims or demands does not then have standing to offer a will for probate.[487]

6. Standing to Bring Suit on Behalf of an Estate

Generally, only the personal representative of an estate is entitled to sue to recover estate property, but there are a few exceptions.[488]

An heir at law can maintain a suit on behalf of an estate during the four-year period allowed by law for instituting administration proceedings if they allege and prove that there is no administration pending and none is necessary.[489] Further, "when an estate administration has closed, an heir can file suit to recover property of the estate."[490] Additionally, "a family agreement regarding the disposition of the estate's assets can support the assertion that no administration of the decedent's estate is necessary."[491] And

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481. *See generally In re* Est. of McDaniel, 935 S.W.2d 827, 829 (Tex. App.—Texarkana 1996, writ denied) ("A person estopped to contest a will due to acceptance of benefits thereunder does not qualify as a person interested in the estate").

482. *See* Sheffield v. Scott, 620 S.W.2d 691, 694 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (*citing* Trevino v. Turcotte, 564 S.W.2d 682 (Tex. 1978)); *see McDaniel*, 935 S.W.2d at 829.

483. *See Trevino*, 564 S.W.2d at 685–86.

484. *See In re* Est. of Davis, 870 S.W.2d 320, 322 (Tex. App.—Eastland 1994, no writ).

485. Austin Nursing Center, Inc. v. Lovato, 171 S.W.3d 845, 849 (Tex. 2005).

486. *See Davis*, 870 S.W.2d at 322.

487. *See* Womble v. Atkins, 331 S.W.2d 294, 297–98 (Tex. 1960).

488. *See Lovato*, 171 S.W.3d at 850; Shepherd v. Ledford, 962 S.W.2d 28, 31–32 (Tex. 1998); Frazier v. Wynn, 472 S.W.2d 750, 752 (Tex. 1971).

489. *Shepherd*, 962 S.W.2d at 31–32.

490. Jordan v. Lyles, 455 S.W.3d 785, 790–91 (Tex. App.—Tyler 2015, no pet.).

491. *Lovato*, 171 S.W.3d at 851.

where an order admits a will to probate as a muniment of title, and the order contains findings that there are no unpaid debts owing the estate and there is no necessity of administration of the estate, the heirs have standing because that is the same as the closing of an independent administration.[492]

Moreover, heirs may bring suit when the personal representative will not bring suit or when the representative's interests are different than those of the estate.[493]

B. Attorneys' Fees in Estate Disputes

Whether attorney's fees may be recovered in a will contest is set forth in section 352.052 of the Texas Estates Code.[494] Subsection (a) states that "a person named as executor in a will who . . . for the purpose of having the will admitted to probate, defends the will or prosecutes any proceeding in good faith and with just cause, whether or not successful, shall be allowed out of the estate their necessary expenses and disbursements in those proceedings, including their reasonable attorney's fees."[495]

The statute goes on to say that "a person designated as a beneficiary of a will . . . who, for purposes of having the will admitted to probate, defends the will or prosecutes any proceeding in good faith and with just cause, whether or not successful, may be allowed out of the estate the person's necessary expenses and disbursements in those proceedings, including reasonable attorney's fees."[496]

In 2019, the Texas Legislature added subsection (c) which fills a gap that previously existed.[497] Under this subsection, "an 'interested person' who, in good faith and with just cause, successfully prosecutes a proceeding to contest the validity of a will offered for or admitted to probate may be allowed out of the estate the person's necessary expenses and disbursements in that proceeding, including reasonable attorney's fees."[498] The subsection expressly provides that the term "interested person" in the subsection "does not include a creditor or any other person having a claim against the estate."[499]

Before the addition of subsection (c), successful will contestants could get their attorneys' fees paid out of the estate only if they offered a different will for probate.[500] There were often situations where a person who was an

492. *See Lyles*, 455 S.W.3d at 790–91.
493. *See* Mayhew v. Dealey, 143 S.W.3d 356, 370–71 (Tex. App.—Dallas 2004, pet. denied), *citing* Chandler v. Welborn, 294 S.W.2d 801, 806 (Tex. 1956).
494. *See* TEX. EST. CODE ANN. § 352.052.
495. *Id.* § 352.052(a).
496. *Id.* § 352.052(b).
497. *See id.*
498. *Id.*
499. *Id.*
500. *See id.*

intestate heir of a decedent successfully contested a will, but did not have a valid will to offer for probate in its place.[501] In that situation, the heir had to pay her own attorneys' fees to strike down a bad will—clearly an inequitable situation.[502] The addition of (c) allows the will contestant without another will the ability to seek recovery of their attorneys' fees.[503]

Each party seeking to recover their attorneys' fees out of the estate has the affirmative burden of obtaining a finding of good faith and just cause in the trial court under section 52.052 of the Texas Estate Code.[504] Whether someone acts in good faith and with just cause in prosecuting or defending a will is a question of fact to be determined by the jury upon a consideration of all of the circumstances of a case.[505] Interestingly, a finding that an individual procured a will by undue influence does not preclude a finding that the individual acted in good faith and with just cause in attempting to admit the will to probate or in defending the will against a will contest.[506] In *Harkins v. Crews*, the jury found the will proponents acted in good faith despite also finding that the wills were obtained through undue influence, and thus, the will proponents were entitled to attorneys' fees.[507]

Additionally, section 352.052 of the Texas Estate Code makes a distinction as to mandatory versus permissive reimbursement of attorneys' fees between its various sections.[508] Under section (a), a designated executor or administrator "shall" have their attorneys' fees paid out of the estate if they receive a favorable jury finding on good faith and just cause.[509] Conversely, a beneficiary or other interested persons under sections (b) and (c) "may" receive reimbursement of their attorneys' fees out of the estate after obtaining their good faith and just cause finding, leaving further discretion to the judge.[510]

Section 352.052 allows parties to recover more than just attorneys' fees.[511] The recovery can also include all "necessary expenses and disbursements" incurred in the proceeding.[512] This is clearly more generous than many other statutory provisions for the recovery of attorney's fees and may include court reporter or copy costs and other expenses not usually

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501. *See id.*
502. Authors' original opinion.
503. *Id*.
504. *See* TEX. EST. CODE ANN. § 352.052.
505. *See* Huff v. Huff, 124 S.W.2d 327, 330 (1939); *see also* Russell v. Moeling, 526 S.W.2d 533, 536 (Tex. 1975) (recognizing that the question of whether executor acted in good faith and with just cause is a question for the jury that should be determined in the original probate proceeding).
506. *See Huff*, 124 S.W.2d at 329.
507. *See* Harkins v. Crews, 907 S.W.2d 51, 62 (Tex. App.—San Antonio 1995, writ denied), *citing Huff*, 124 S.W.2d at 330.
508. *See* TEX. EST. CODE ANN. § 352.052.
509. *See id.*
510. *See id.*
511. *See id.*
512. *See id.*

recoverable as "court costs" such as expert witness fees, and travel expenses incurred directly in connection with the will contest proceedings.[513]

Unlike many statutory fee provisions in which the award is made to the "prevailing party," Texas Estate Code section 352.052 provides that you do not have to prevail as a condition precedent to an award of "necessary and reasonable" expenses or fees as long as there is a finding that the person seeking recovery acted in "good faith" and with "just cause."[514]

Different from the Trust Code provision and the Declaratory Judgment provision for attorney's fees, under section 352.052, the only place the attorneys' fees can be "awarded" from is the estate of the decedent.[515] This can also create an inequitable result, like a successful challenge to a wrongfully executed will results in fees and expenses coming out of the challenger's inheritance.[516] This could be further exacerbated if the wrongdoing party remains a beneficiary of the estate, either through an earlier will or through intestacy.[517]

C. Deadline to Contest a Will Where There Is Fraud

There is an important exception for the deadline to contest a will that could be helpful in a tortious interference situation.[518] Under section 256.204 of the Texas Estate Code, after a will is admitted to probate, an interested person may commence a suit to contest the validity thereof no later than the second anniversary of the date the will was admitted to probate.[519] However, an interested person may commence a suit to cancel a will for forgery or other fraud no later than the second anniversary of the date the forgery or fraud was discovered.[520] Additionally, an incapacitated person may commence the contest on or before the second anniversary of the date the person's disabilities are removed.[521]

Case law has imposed important restrictions on the application of this statute.[522] "A person is charged with constructive notice of the actual

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513. *See id.*

514. *See e.g.*, Huff v. Huff, 124 S.W.2d 327, 328 (Tex. 1939) (even if executor was guilty of undue influence in obtaining the will, he could have recovered his attorneys fees in the will contest if he had obtained a finding that he had offered the will in good faith); Blackmon v. Nelson, 534 S.W.2d 439, 442 (Tex. App.—Texarkana 1976, no writ) (trial court's failure to determine question of executor's good faith in defense of will set aside based on executor's undue influence, required remand of that issue to the trial court since the finding of undue influence did not conclusively establish her lack of good faith in offering the will for probate).

515. *See* TEX. EST. CODE ANN. § 352.052.

516. *See id.*

517. *See id.*

518. Authors' original opinion.

519. *See* TEX. EST. CODE ANN. § 256.204.

520. *See id.* § 256.204(a).

521. *See id.* § 256.204(b).

522. Authors' original opinion.

knowledge that could have been acquired by examining public records."[523] Constructive notice creates an irrebuttable presumption of actual notice.[524] Probate proceedings are actions in rem and are binding on all persons unless they are set aside in the manner required by law.[525] "Persons interested in an estate admitted to probate are charged with notice of the contents of the probate records."[526]

The type of fraud that invalidates a probate judgment under section 256.204 of the Texas Estate Code is "extrinsic fraud," not "intrinsic fraud."[527] Intrinsic fraud occurs when the fraudulent act relates to an issue within the original suit.[528] Extrinsic fraud occurs when the fraudulent act is not concerned with the original suit but instead stops a trial from taking place.[529] In *Neil v. Yett*, the court noted that no party took any act that induced the contestant to delay filing a contest to the probate of the will.[530] The fraud was related to the execution of the will, which could have been brought in the original application to probate the will.[531] Thus, section 256.204 is helpful only in the case of extrinsic fraud, as shown in the following scenario.[532]

Scenario:[533] Don lives in Texas and his sister Anna lives in New York. Don has a will leaving his entire estate to Anna.[534] Don is deaf, so he and Anna communicate via text and e-mail.[535] Don becomes sick and goes to live with his caregiver, Fred.[536] Fred tells Don that Anna died and convinces Don to execute a new will leaving the entire estate to Fred.[537] Fred uses Don's email account and phone to text and email Anna periodically.[538] When Don dies, Fred does not tell Anna that Don has died.[539] Fred continues to use Don's email account and phone to text Anna so she thinks Don is still alive.[540] In the meantime, Fred files Don's will for probate.[541] Two years

523. Mooney v. Harlin, 622 S.W.2d 83, 85 (Tex. 1981).
524. *See id.*
525. *See id.*
526. *Id.*
527. *See* Neil v. Yett, 746 S.W.2d 32, 35 (Tex. App.—Austin 1988, writ denied).
528. *See id.*
529. *See id.*
530. *See id.*
531. *See id.*
532. *See id.*
533. The facts of this scenario are based loosely on Schilling v. Herrera, 952 So. 2d 1231, 1235–37 (Fla. Dist. Ct. App. 2007).
534. *Id*.
535. *Id*.
536. *Id*.
537. *Id*.
538. *Id*.
539. *Id.*
540. *Id*.
541. *Id*.

later, Fred tells Anna that Don died, and Anna then discovers what really happened.[542]

Analysis: In this situation, there are several frauds that occurred.[543] The execution of the will should be invalidated because Fred misrepresented the facts to Don (that Anna had died).[544] Additionally, Fred committed fraud on Anna by pretending to be Don for two years after he probated the will so that Anna would be barred from contesting the will.[545] The statute provides that "an interested person may commence a suit to cancel a will for forgery or other fraud not later than the second anniversary of the date the forgery or fraud was discovered."[546] As shown above, the statute covers the extrinsic fraud committed by Fred on Anna, rather than the intrinsic fraud committed by Fred on Don.[547] Because of the extrinsic fraud, Anna should be able to bring the will contest outside of the two-year statute of limitations.[548]

VI. INTERFERENCE RELATED TO TRUSTS

A. Standing

According to section 115.011(a) of the Texas Property Code, the ability to bring an action related to a trust is limited to "interested persons"—in other words, persons with some threshold interest in the trust.[549] An interested person is defined in the Property Code as:

> A trustee, beneficiary, or any other person having an interest in or claim against the trust. Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes and matter involved in the proceeding.[550]

A "beneficiary" is defined as "a person for whose benefit property is held in trust, regardless of the nature of the interest."[551]

An "interest" is "any interest whether legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible."[552]

542. *Id.*
543. *Id.*
544. *Id.*
545. *Id.*
546. TEX. EST. CODE ANN. § 256.204(a).
547. *See Schilling*, 952 So. 2d at 1235–37.
548. *See* TEX. EST. CODE ANN. § 256.204.
549. *See* TEX. PROP. CODE ANN. § 115.011(a).
550. *Id.* § 111.004(7).
551. *Id.* § 111.004(2).
552. *Id.* § 111.004(6).

1. How Far Does the Definition of "Interested Person" Extend?

If the first sentence of the Texas Property Code section 111.004(7) is read in isolation, then it appears a determination of "interested person" status (and thus standing) is clear-cut.[553] The first sentence appears to say *any* person who is a beneficiary of a trust or who has any other "interest" in the trust is automatically an "interested person" in that trust, and therefore under section 115.011(a) would have standing to sue.[554]

However, the standing conferred under the Texas Property Code is not black and white—rather, when the plaintiff is not a trustee or a named beneficiary, the trial court must determine in its discretion whether the plaintiff is an "interested person" for the "particular purposes and matter involved in the proceeding."[555]

While a person might have an "interest" in the trust, he still may not be an "interested person" for standing purposes if the court determines his interest is too speculative and remote to bring the particular action.[556]

In *Gamboa v. Gamboa*, the wife in a divorce proceeding was an "interested person" in a trust and thus "had standing to bring an action related to trusts that [the] husband had created during the marriage."[557] The wife alleged that the trusts "were the husband's alter ego and used to perpetrate fraud and divest her of her share of the marital estate."[558]

2. Contingent vs. Vested Remaindermen

A contingent remainder interest arises either when taking possession is subject to a condition precedent (such as when taking is contingent upon surviving the previous interest holder), or when a remainder is created in favor of unascertained persons.[559]

A person's heirs cannot be ascertained until they die.[560] Therefore, any remainder to the heirs of a person is a remainder created in unascertainable persons, and is thus a contingent remainder.[561] Further, to become an heir, it is a condition precedent to survive the decedent.[562]

A remainder vests, on the other hand, when it is in an ascertainable person and no conditions precedent exist other than the termination of prior

553. *See id.* § 111.004(7).
554. *Id.*
555. *See id.*
556. *See id.*
557. Gamboa v. Gamboa, 383 S.W.3d 263, 273 (Tex. App.—San Antonio 2012, no pet.).
558. *Id.*
559. *See Remainder*, BLACK'S LAW DICTIONARY (11th ed. 2019).
560. *See* Glenn v. Holt, 229 S.W. 684, 685–86 (Tex. App.—El Paso 1921, no writ).
561. *See id.* at 686.
562. *See* RESTATEMENT OF PROPERTY § 249 cmt. e (AM. L. INST. 1940).

estates.[563] For example, if the trust says that on A's death, the trust terminates and goes to B, B has a vested remainder in the interest.[564]

Equity demands someone always have standing to assert causes of action against a trustee on behalf of the remainder beneficiaries.[565] An issue arises, however, when a person sues a trustee, and that person has a very remote or speculative chance of taking under a trust.[566] Technically, such person may fall under the definition of "beneficiary" because they have a contingent remainder interest.[567] Should that person be permitted to engage in costly litigation if it is almost impossible that they will ever receive any part of the trust?[568] There is a developing trend in trust law to limit standing in situations where the contingent remainderman's interest is remote.[569]

The strength of a beneficiary's interest in a trust can be measured on a continuum, with one end of the continuum reflecting a beneficiary who has a strong interest in the trust and the other end of the continuum reflecting a beneficiary who has a highly speculative and remote remainder interest in the trust.[570] While in the typical trust, the number of potential beneficiaries who will actually become beneficiaries is only a handful of people, when the term "heirs" is used, the pool of potential beneficiaries expands exponentially because heirs are not determined until a person's death.[571] That pool may include distant cousins, great grandchildren, nieces, nephews, aunts, uncles, and essentially any person who in some fathomable way could be considered a prospective heir at law.[572]

In *Davis*, a trust was created by the plaintiff's mother for the benefit of the plaintiff's children.[573] The plaintiff argued he had standing to sue the trustees of the trust because, if one of his children died intestate, he would inherit that child's interest in the trust.[574] The court held that the plaintiff did not have standing based on his claim that he is a *potential* beneficiary of the trust because "the possibility of inheritance does not create a present interest or right of title in property."[575] The right to inherit does not vest until the death of the intestate.[576] Thus, the plaintiff could not sue for the enforcement

563. *See In re* Townley Bypass Unified Credit Tr., 252 S.W.3d 715, 717 (Tex. App.—Texarkana 2008, pet. denied).
564. Authors' original hypothetical.
565. *Id*.
566. *Id*.
567. *Id*.
568. *Id*.
569. *Id*.
570. *Id*.
571. *Id*.
572. *Id*.
573. Authors' original hypothetical; Davis v. Davis, 734 S.W.2d 707, 709–10 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).
574. *See Davis*, 734 S.W.2d at 709.
575. *See id*.
576. *See id*.

or adjudication of a right in property that he *expected* to inherit because he had no present right or interest in the property.[577]

Consider a trust where A is the current beneficiary, and the remaindermen are A's "heirs."[578] A's living relatives include five children, ten grandchildren, two brothers, two parents and a great-great niece.[579] Under a "common disaster" scenario, that great-great niece may find herself "fortunate" enough to become a current beneficiary of the trust upon the simultaneous death of A and her more closely related kin.[580] However, such a likelihood is very low and speculative.[581] The great-great niece, therefore, has a valid but very remote and speculative contingent remainder interest.[582]

According to some authorities, the mere fact that the great-great niece has *some* remainder interest grants her standing as an "interested person" and she could therefore sue the trustee of A's trust, although the chance of her taking under the trust is almost entirely implausible.[583] The effect would be that a person with little chance of ever becoming a beneficiary of the trust could significantly impact the trust and potentially alter its course forever, either to the detriment of the current beneficiary, or other remainder beneficiaries who will in reality be the takers.[584]

One may wonder why a great-great niece would waste her money suing in such a situation.[585] After all, it will cost her significant attorney's fees, and she is unlikely to take under the trust.[586] But consider a trust worth $100 million.[587] It may be worth it to the trustee to pay the great-great niece some money to drop the lawsuit rather than spend millions in litigation.[588] In effect, the great-great niece, who would otherwise get nothing, has secured for herself a nice payout.[589] Further, as discussed in detail below, the great-great niece also has a chance to receive an award of her attorneys' fees and costs, either from the trust estate or any other party to the proceeding.[590]

The Trust Code's standing statute allows the court flexibility to recognize that, although technically when named in the trust, a potential heir is no different in substance than a potential intestate heir with a mere

577. *Id.*
578. Authors' original hypothetical.
579. *Id.*
580. *Id.*
581. *Id.*
582. *Id.*
583. *Id.*
584. *Id.*
585. *Id.*
586. *Id.*
587. *Id.*
588. *Id.*
589. *Id.*
590. *Id.*

expectancy who, it has been held, is not an "interested person" in a trust (because his interest is too speculative).[591]

B. Attorneys' Fees in Trust Litigation

Under section 114.064 of the Texas Property Code, in any proceeding brought under the Trust Code, "the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just."[592]

Section 115.001(a) provides a list of the types of "proceedings" concerning trusts that can be brought under the Code.[593] Such proceedings include the following:

> (1) construe a trust instrument;
> (2) determine the law applicable to a trust instrument;
> (3) appoint or remove a trustee;
> (4) determine the powers, responsibilities, duties, and liability of a trustee;
> (5) ascertain beneficiaries;
> (6) make determinations of fact affecting the administration, distribution, or duration of a trust;
> (7) determine a question arising in the administration or distribution of a trust;
> (8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle;
> (9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and
> (10) surcharge a trustee.[594]

The list of proceedings described by subsection (a) over which a district court has exclusive and original jurisdiction is not exhaustive.[595] 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), regardless of whether the proceeding is listed in subsection (a) or not.[596] In counties with statutory probate courts, a statutory probate court has concurrent jurisdiction with district courts in an action by or against a trustee.[597]

The Trust Code fee provision is almost identical to the Declaratory Judgment fee provision.[598] The fees can be awarded out of a trust or against

591. *See* Davis v. Davis, 734 S.W.2d 707, 708 (Tex. App. — Houston [1st Dist.] 1987, writ red'd n.r.e.).
592. TEX. PROP. CODE ANN. § 114.064; *Davis*, 734 S.W.2d at 708.
593. *See* TEX. PROP. CODE ANN. § 115.001(a)(1)–(10).
594. *Id.*
595. *See id.* § 115.001(a-1).
596. *See id.*
597. *See* TEX. EST. CODE ANN. § 32.007.
598. *See* TEX. CIV. PRAC. & REM. CODE § 37.009.

any of the parties to the proceeding.[599] Section 114.064 of the Trust Code is also not a "prevailing party" statute and the non-prevailing party can be awarded fees.[600] The statute allows the court discretion in deciding whether to award fees or not.[601] The reasonableness and necessity of the fees are a fact question.[602] Whether the award of fees is equitable and just is a matter of law to be determined in the court's discretion and such determination depends on the concept of fairness and in light of all the surrounding circumstances.[603] Unreasonable fees cannot be awarded even if the court believed they are just, but the court may conclude that it is not equitable or just to award even reasonable and necessary fees.[604]

To recover attorneys' fees, a party must first obtain a finding from the jury as to the amount of reasonable and necessary attorneys' fees.[605] Then, the judge (in the judgment phase of the trial) will determine whether the award is equitable and just, as well as which party must pay the fees.[606] The amount of fees deemed by the jury to be "reasonable and necessary" sets the outer boundary of fees that the trial court may award under Trust Code section 114.064, and the court may award so much of that sum as it determines to be both equitable and just.[607] The decision of the trial court will be overturned only for abuse of discretion or if there is insufficient evidence to support the award.[608] Thus, the court can award fees in an amount less than that found by the jury to be reasonable and necessary, or even order that no fees be recovered.[609]

Although the Trust Code allows for "costs," it does not allow for an award of "expenses."[610] Costs usually refers to "fees and charges required by law" to be paid to the court or some of its officers, and the amount is fixed by statute or the court's rules.[611] Under the Texas Civil Practice and Remedies Code, a party may recover "fees of the clerk and service fees due

599. *Id.*

600. *See* TEX. PROP. CODE ANN. § 114.064; Hachar v. Hachar, 153 S.W.3d 138, 143 (Tex. App.—San Antonio 2004, no pet.) (the award of fees is within the discretion of the court. While a party's success may be considered it is not required).

601. *See In re* Est. of Johnson, 340 S.W.3d 769, 788–89 (Tex. App.—San Antonio 2011, pet. denied); *see* Lesikar v. Moon, 237 S.W.3d 361, 375–76 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (court may conclude that it is not equitable or just to award fees, even if found reasonable by the jury).

602. *See Moon*, 237 S.W.3d at 375–76; *see, e.g.*, Riley v. Alpert, 2012 WL 3042991, at *7 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) and cases cited therein.

603. *See Moon*, 237 S.W.3d at 375–76; *Riley*, 2012 WL 3042991, at *7; Ridge Oil Co. v. Guinn Invs., Inc., 148 S.W.3d 143, 162 (Tex. 2004).

604. *See Moon*, 237 S.W.3d at 375–76.

605. *See id.* at 375.

606. *See id.*

607. *See* TEX. PROP. CODE ANN. § 114.064; *see also In re* Lesikar, 285 S.W.3d 577, 584 (Tex. App.—Houston [14th Dist.] May 7, 2009, no pet.).

608. *See In re* Lesikar, 285 S.W.3d at 584.

609. *See id.*

610. *See* TEX. PROP. CODE ANN. § 114.064.

611. *See* Petrello v. Prucka, 415 S.W.3d 420, 433 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

the court, court reporter fees, and other such costs and fees permitted to be awarded by other rules and statutes."[612] Costs generally do not include expenses billed to the client as part of the attorney's fee for services provided.[613] Further, expert fees necessary to establish an evidentiary matter are not considered costs.[614]

Often trustees threaten to use the beneficiary's money in the trust to defend the claims against them.[615] First, this looks horrible at trial.[616] Second, the trustee cannot ignore the provisions of section 114.064 of the Trust Code and its finding requirements.[617] If the beneficiary knows the trustee is paying his defense costs from the trust, and the trustee has not requested that fees be awarded under section 114.064, the beneficiary should make a claim that the trustee be required to reimburse the trust for such attorneys' fees.[618] This can be done even if the trust document provides that defense costs and fees for the trustee may be paid from the trust.[619] Also, when the fiduciary's omission or malfeasance is at the root of the litigation, the estate or trust will not be required to reimburse the fiduciary for his or her attorneys' fees.[620]

VII. INTERFERENCE UNDER POWERS OF ATTORNEY[621]

In 2017, the Texas legislature made many significant changes to the statutes related to durable powers of attorney.[622] This section of the article is largely a reprint by permission of an excellent paper by Mark R. Caldwell and J. Brian Thomas, C*hoosing Your Own "Adventure" and Navigating Self-Dealing Transactions Under the New Power of Attorney Rules*, State Bar of Texas, Estate Planning & Drafting, 2018.[623]

A. Introduction

In many ways, the 2017 legislative changes to the Texas Durable Power of Attorney Act (the "Act") signaled a paradigm shift in litigation involving

612. *Id.*; *see* TEX. CIV. PRAC. & REM. CODE § 31.007(b)(4).
613. *See* TEX. CIV. PRAC. & REM. CODE § 31.007(b); *Sterling Bank*, 221 S.W.3d at 125.
614. Bundren v. Holly Oaks Townhomes Ass'n, Inc., 347 S.W.3d 421, 440 (Tex. App.—Dallas 2011, pet. denied).
615. *See Can Trustees Use Trust Funds to Defend Litigation?*, ROMANO & SUMNER, LLC, https://romanosumner.com/blog/can-trustees-use-trust-funds-to-defend-litigation/ (last visited Sept. 26, 2020) [https://perma.cc/QG79-TTRG].
616. Authors' original opinion.
617. *See* TEX. PROP. CODE ANN. § 114.064.
618. *See id.*
619. *See id.*
620. *See* Oldham v. Keaton, 597 S.W.2d 938, 945 (Tex. App.—Texarkana 1980, writ ref'd n.r.e.).
621. *See* Caldwell & Thomas, *Litigation Involving Powers of Attorney*, *supra* note 6.
622. *See id.*
623. *See id.*

durable powers of attorney ("DPOA").[624] While there were many important changes to a variety of issues, this section of the articles focuses on those legislative changes which affect an agent's self-dealing with his or her principal.[625] For an excellent general overview of the legislative changes, see *Highlights of the New and Improved Texas Durable Power of Attorney Act: A Panel Discussion,* written by Lora G. Davis and Donald L. Totusek.[626]

Analyzing self-dealing transactions is no longer as simple as before.[627] Under the old statutory scheme and case law, applying the traditional fiduciary analysis was generally fairly straightforward.[628] Now, the scope of authority analysis is more complicated.[629] The primary question appears to be, "was the agent authorized by the terms of the DPOA to engage in the self-dealing transaction?"[630] Then, assuming the answer is yes, the analysis shifts to whether the transaction constituted impermissible self-dealing.[631]

The new statutory scheme does not lend itself to a quick reading and an easy answer.[632] Many sections contain multi-layered exceptions and cross references to other sections.[633] It can thus be very difficult to easily ascertain those circumstances by which an agent's transaction, self-dealing, or both is permitted (or not permitted).[634] The POA itself and the relevant Texas Estate Code sections must be read and re-read very carefully.[635]

B. Hot Powers

The Act now expressly authorizes a principal to grant an agent certain estate planning powers (sometimes referred to as "hot powers"), including the power to (a) create, amend, revoke or terminate an inter vivos trust, (b) make gifts, (c) create or change rights of survivorship, (d) create or change a beneficiary designation (including a pay on death designation), or (e) delegate authority granted under the durable power of attorney.[636] These changes eliminate the uncertainty resulting from previous Texas cases dealing with an agent's ability to exercise certain powers, such as the power

624. *See id.*
625. *See id.*
626. *See* Lora G. Davis & Donald L. Totusek, Presentation to the Collin County Bar: Highlights of the New & Improved Texas Durable Power of Attorney Act (Jan. 12, 2018), https://www.collincountybar.org/assets/Councils/McKinney-TX/library/Handout%20Totusek%20Jan%2012%202018.pdf [https://perma.cc/NKV7-CAS7].
627. *See* Caldwell & Thomas, *Litigation Involving Powers of Attorney*, *supra* note 6.
628. *See id.*
629. *See id.*
630. *See id.*
631. *See id.*
632. *See id.*
633. *See id.*
634. *See id.*
635. *See id.*
636. *See* TEX. EST. CODE ANN. § 751.031.

to create a trust on behalf of the principal or name a pay on death beneficiary.[637]

While there are many legitimate reasons for a principal to grant an agent a hot power, the risk these powers will be abused by an agent remains.[638] In some ways, the risk has increased substantially, considering many agents fulfill their roles without the assistance of legal advice.[639] Invariably, agents who engage in self-dealing will claim the terms of the DPOA expressly authorized such self-dealing and therefore the traditional fiduciary analysis and applicable burdens do not apply.[640]

The terms of the DPOA will have to be scrutinized to determine if the agent was truly authorized to self-deal.[641] Interestingly, although the Code states that an agent who is not an ancestor, spouse, or descendant of the principal cannot exercise these powers in favor of himself, herself or anyone he or she has a legal obligation to support, the Code does not expressly say the inverse is true: that is, that an ancestor, spouse, or descendant of the principal who is named as the agent can exercise these powers in favor of himself, herself or anyone he or she has a legal obligation to support.[642] One reason for this distinction is to avoid the possibility that the property subject to the hot power might be includible in the agent's gross estate.[643] Thus, it is common for many DPOAs to include language authorizing an agent to make a gift "to anyone, but not the agent."[644]

All agents exercising hot powers should be aware they have an affirmative duty to preserve the principal's estate plan, to the extent he or she has actual knowledge of the plan, as long as doing so is in the principal's best interest based upon all relevant factors, including (a) the principal's property, (b) the principal's foreseeable obligations and maintenance needs, (c) tax minimization, and (d) eligibility for benefits.[645]

C. DPOA Basics

1. The DPOA

A durable power of attorney is a written instrument that authorizes an agent to manage the principal's specified financial affairs.[646] A durable

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637. *See* Filipp v. Till, 230 S.W.3d 197, 203 (Tex. App.—Houston [14th Dist.] 2006, no pet.); Armstrong v. Roberts, 211 S.W.3d 867 (Tex. App.—El Paso 2006, pet. den.).
638. *See* Caldwell & Thomas, *Litigation Involving Powers of Attorney*, *supra* note 6.
639. *See id.*
640. *See id.*
641. *See id.*
642. *See id.*
643. *See id.*
644. *See id.*
645. *See* TEX. EST. CODE ANN. § 751.122.
646. *See* Hardy v. Robinson, 170 S.W.3d 777, 780 (Tex. App.—Waco 2005, no pet.).

power of attorney is effective regardless of the principal's subsequent disability or incapacity.[647] The parties to this instrument are the principal and the agent.[648] The principal is the party who entrusts the management of his or her financial affairs to the agent.[649] The principal depends upon the agent.[650] The agent is the party authorized to act on the principal's behalf by and through the power of attorney.[651]

2. *The Agent's Fiduciary and Other Legal Duties*

A power of attorney creates an agency relationship.[652] "Agency is a consensual relation between two parties 'by which one party acts on behalf of the other, subject to the other's control.'"[653] The existence and nature of an agency relationship is generally a question of fact.[654] An executed power of attorney, however, creates an agency relationship as a matter of law.[655]

The agency relationship reflected by a DPOA is also a fiduciary relationship as a matter of law.[656] "[A]n agent's duties of performance to the principal are subject to the terms of any contract between them."[657] Unless otherwise provided by statute or law, duties owed by an agent to his principal may be altered by agreement.[658]

The Texas Estate Code mandates that an agent shall timely inform the principal of each action taken under a durable power of attorney.[659] An agent has a statutory duty to maintain records of each action taken or decision made

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647. *See* TEX. EST. CODE ANN. § 751.002; *see also* Gerry W. Beyer, *Estate Plans: The Durable Power of Attorney for Property Management*, 59 TEX. B.J. 314, 316 (1996).

648. *See* TEX. EST. CODE ANN. § 751.002.

649. *See* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 800 (1983).

650. *See id.*

651. *See* TEX. EST. CODE ANN. § 751.0021.

652. *See* Vogt v. Warnock, 107 S.W.3d 778, 782 (Tex. App.—El Paso 2003, pet. denied); In re Estate of Wallis, No. 12-07-00022-CV, 2010 WL 1987514, at *4 (Tex. App.—Tyler May 19, 2010, no pet.); Sassen v. Tanglegrove Townhouse Condominium Assoc., 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied).

653. Suzlon Energy Ltd. v. Trinity Structural Towers, Inc., 436 S.W.3d 835, 841 (Tex. App.—Dallas 2014, no pet.) (*citing* Reliant Energy Servs., Inc. v. Cotton Valley Compression, L.L.C., 336 S.W.3d 764, 782–83 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (internal quotation omitted).

654. Brown & Brown of Tex., Inc. v. Omni Metals, Inc., 317 S.W.3d 361, 377 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); Novamerican Steel, Inc. v. Delta Brands, Inc., 231 S.W.3d 499, 511 (Tex. App.—Dallas 2007, no pet.).

655. *Sassen*, 877 S.W.2d at 492.

656. *Vogt*, 107 S.W.3d at 782 (stating that "a power of attorney creates an agency relationship, which is a fiduciary relationship as a matter of law").

657. *In re* Est. of Miller, 446 S.W.3d 445, 455 (Tex. App.—Tyler 2014, no pet.) (*citing* National Plan Adm'rs, Inc. v. Nat'l Health Ins. Co., 235 S.W.3d 695, 702 (Tex. 2007) (*quoting* RESTATEMENT (THIRD) OF AGENCY § 8.07 cmt. a (AM. L. INST. 2006)).

658. *See id.*

659. *See* TEX. EST. CODE ANN. § 751.102.

by the agent.[660] The agent must also maintain all records until delivered to the principal, released by the principal, or discharged by a court.[661]

a. To Act Within the Scope of Authority

An agent has a duty to act within the scope of the authority granted.[662] Because one of the simplest methods to attack an agent's self-dealing transaction is to examine whether the agent was authorized to perform the transaction (either by the DPOA or by statute), it should never be assumed that a questionable transaction was within the agent's scope of authority.[663] When the agency relationship is not in dispute, the scope of the agency relationship is a question of law.[664]

The scope of an agent's authority must be ascertained from the language of the power of attorney.[665] Generally, an agent's ability to bind his principal is limited to the scope of authority the principal grants.[666] The Restatement (Third) of Agency imposes a duty on the agent to interpret the principal's grant of authority reasonably.[667]

Actions exceeding an agent's authority are voidable.[668] An agent's unauthorized actions do not bind the principal unless: (1) the principal

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660. *See id.* § 75 1.103(a).

661. *See id.* § 751.103(b).

662. *See* RESTATEMENT (THIRD) OF AGENCY § 8.09 (AM. L. INST. 2005).

663. *See id.*

664. *See* English v. Dhane, 286 S.W.2d 666, 669 (Tex. App.—Fort Worth), *rev 'd on other grounds*, 294 S.W.2d 709 (Tex. 1956) ("It is only when the facts appertaining to the relation of principal and agent are in dispute that the issues as to agency and scope of agency need to be submitted to the jury."); *see also*, *e.g.*, Jerome I. Wright & Assocs. v. First Metro L.P., No. 03-04-00283-CV, 2004 WL 2186330, at *5–6 (Tex. App.—Austin Sept. 30, 2004, no pet.) (noting that when the language of a statutory durable power of attorney form was unambiguous, the trial court could ascertain an attorney-in-fact's authority for the purpose of establishing personal jurisdiction).

665. *First Metro*, 2004 WL 2186330, at *5–6.

666. *See* Gaines v. Kelly, 235 S.W.3d 179, 185 n.3 (Tex. 2007) (restating the "general rule that [a] principal will not be charged with liability to a third person for the acts of the agent outside the scope of his delegated authority").

667. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e (AM. L. INST. 2006).

668. *See* Morton v. Morris, 66 S.W. 94, 98 (Tex. App.—San Antonio 1901, no writ) (holding deed void because attorney-in-fact under power of attorney exceeded the scope of his authority). Scope-of-authority issues are also important when determining whether the agent is personally liable for transactions he claims to perform with third parties. When an agent exceeds his authority under the agency agreement, he is personally liable. *See* Albright v. Lay, 474 S.W.2d 287, 291 (Tex. Civ. App.—Corpus Christi 1971, no writ); *see also* Schwarz v. Straus-Frank Co., 382 S.W.2d 176, 178 (Tex. App.—San Antonio 1964, writ ref'd n.r.e.). Similarly, if an individual purports to act as an agent, but has no authority, he is liable individually, and the principal is not liable. *See Gaines*, 235 S.W.3d at 185 (reversing court of appeals and affirming no-evidence summary judgment exonerating the principal because there was no evidence the agent had actual or apparent authority for acts). If the agent acts within the scope of authority, but does not disclose the agency, then both agent and principal are liable. Medical Personnel Pool of Dallas, Inc. v. Seale, 554 S.W.2d 211, 214 (Tex. App.—Dallas 1977, writ ref'd n.r.e.).

ratifies those actions; or (2) something estops the principal from denying the agent's authority to perform those actions.[669]

When a court interprets a power of attorney, it construes the document as a whole in order to ascertain the parties' intentions and rights.[670] In determining the limits of an agent's authority, two well established rules of construction set forth by the Texas Supreme Court are applied:

> First, the meaning of the general words in the document will be restricted by the context and construed accordingly.[671] Second, the authority will be construed strictly so as to exclude the exercise of any power that is not warranted either by the actual terms used, or as a necessary means of executing the authority with effect.[672]

Under these rules of construction, powers of attorney, unlike deeds and wills, are to be strictly construed, and authority delegated is limited to the meaning of the terms in which it is expressed.[673] Where there is a "very comprehensive" grant of general power and an enumeration of specific powers, the established rules of construction limit the authority derived from the general grant of power to the acts authorized by the language employed in granting the special powers.[674] Construction of an unambiguous power of attorney is a question of law.[675]

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669. A competent principal can ratify an unauthorized transaction if the agent acted on the principal's behalf, the agent provided all material facts to the principal, and the agent's actions did not amount to a fraud on the principal. A principal cannot ratify a transaction if he lacks the mental capacity required to engage in the transaction on his own. RESTATEMENT (SECOND) OF AGENCY § 86 (AM. L. INST. 1958). When attempting to establish a principal's liability for his agent's unauthorized transaction, the party alleging ratification has the burden of proof. BancTEXAS Allen Parkway v. Allied Am. Bank, 694 S.W.2d 179, 181 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). If the agent fully and completely disclosed to the principal all material facts known to the agent regarding the transaction, a principal can choose to be bound by the agent's actions by making a definitive affirmation of the Transaction. Tex. First Nat'l Bank v. Ng, 167 S.W.3d 842, 864 n. 44 (Tex. App.—Houston [14th Dist.] 2005, pet. granted, judgm't vacated w.r.m.). A principal may also ratify the transaction by retaining the benefits of the transaction after learning of the unauthorized conduct; Willis v. Donnelly, 199 S.W.3d 262, 273 n. 17 (Tex. 2006) (recognizing the general rule and finding it inapplicable); Land Title Co. of Dall. v. F.M. Stigler, Inc., 609 S.W.2d 754, 757 (Tex. 1980) (applying the rule); *see also* RESTATEMENT (SECOND) OF AGENCY § 140 (AM. L. INST. 1958). "Ratification of the results of conduct without full knowledge of the conduct does not constitute express or (implied) ratification of the conduct." Crooks v. M1 Real Estate Partners, Ltd., 238 S.W.3d 474, 488 (Tex. App.—Dallas 2007, pet. denied). Because an agent must act to benefit his principal, Texas courts do not allow a principal to ratify a transaction in which the agent's actions amount to a fraud upon the principal. *See* Herider Farms-El Paso, Inc. v. Criswell, 519 S.W.2d 473, 477–78 (Tex. App.—El Paso 1975, writ ref'd n.r.e.).

670. *See In re* Est. of Miller, 446 S.W.3d 445, 455 (Tex. App.—Tyler 2014, no pet.) (internal citations omitted).

671. *Id.* (*citing* Gouldy v. Metcalf, 12 S.W. 830, 831 (1889)).

672. *Id.*

673. *See id.*

674. *Id.* (*citing Gouldy*, 12 S.W. at 831).

675. *Id.*

Scope of authority questions will likely take center stage in litigation concerning self-dealing transactions, especially in light of the complex "hot powers" a principal can now grant to an agent.[676] In many cases, analyzing the agent's scope of authority will make the self-dealing analysis more complex.[677]

b. To Refrain from Self-Dealing

Generally, an agent has a duty "to act loyally for the principal's benefit in all matters connected with the agency relationship."[678] Texas case law establishes that, if the agent gains a benefit from the unauthorized use of his position or the principal's property, he engages in self-dealing.[679] Self-dealing is generally defined as an occurrence in which the fiduciary uses the advantage of his position to gain a benefit at the expense of those to whom he owes a fiduciary duty.[680] A "benefit" can be an advantage, a privilege, profit, or gain.[681] Similarly, an "advantage" is a "relatively favorable position."[682] A contract between an agent and his principal is subject to the same scrutiny as any other transaction between them.[683]

Generally, an agent's duty to refrain from self-dealing or an agent's duty of loyalty can be altered.[684] The following cases and authorities support the proposition that a principal can authorize his or her fiduciary to engage in self-dealing:

- <u>Absent the principal's consent</u>, an agent must refrain from using his position or the principal's property to gain a benefit for himself at the principal's expense.[685]
- "<u>Unless otherwise agreed</u>, 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."[686]

Determining whether an agent's traditional fiduciary duty to refrain from self-dealing has been altered has become complex under the new statutory scheme because the analysis required to determine the agent's scope of

676. *Id.*
677. *Id.*
678. *Id.* at 453 (*citing* RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. L. INST. 2006)).
679. *Id.*; *see also* Cohen v. Hawkins, No. 14-07-00043-CV, 2008 WL 1723234, at *6 (Tex. App.—Houston [14th Dist.] Apr. 15, 2008, pet. denied).
680. Mims-Brown v. Brown, 428 S.W.3d 366, 374 (Tex. App.—Dallas 2014, no pet.).
681. *Miller*, 446 S.W.3d. at 453.
682. Jordan v. Lyles, 455 S.W.3d 785, 795 (Tex. App.—Tyler 2015, no pet.).
683. *Miller*, 446 S.W.3d at 453.
684. *See* RESTATEMENT (THIRD) OF AGENCY § 8.06 (AM. L. INST. 2006).
685. *Miller*, 446 S.W.3d at 453 (*citing* Texas Bank & Tr. Co. v. Moore, 595 S.W.2d 502, 508–09 (Tex. 1980); Mims-Brown v. Brown, 428 S.W.3d 366, 374 (Tex. App.—Dallas 2014, no pet.); *see also* RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (AM. L. INST. 2006).
686. *Miller*, 446 S.W.3d at 453 (citing Johnson v. Brewer & Pritchard, P. C., 73 S.W.3d 193, 200 (Tex. 2002) (*quoting* RESTATEMENT (SECOND) OF AGENCY § 387 (AM. L. INST. 1958)).

authority is more complex.[687] But even when the duty of loyalty is altered by agreement, an agent's power to self-deal still appears to be subject to certain conditions.[688] For example, the Restatement (Third) of Agency section 8.06 states:

> (1) Conduct by an agent that would otherwise constitute a breach of duty as stated in sections 8.01, 8.02, 8.03, 8.04, and 8.05 does not constitute a breach of duty if the principal consents to the conduct, provided that
>
> a. in obtaining the principal's consent, the agent
>   i. acts in good faith,
>   ii. discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and
>   iii. otherwise deals fairly with the principal; and
>
> b. the principal's consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.
>
> (2) An agent who acts for more than one principal in a transaction between or among them has a duty
>
> a. to deal in good faith with each principal,
>
> b. to disclose to each principal
>   i. the fact that the agent acts for the other principal or principals, and
>   ii. all other facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and
>
> c. otherwise to deal fairly with each principal.[689]

Similarly, even when an agent is authorized to make gifts, the Texas Estate Code states that unless the DPOA provides otherwise, the power to make a gift is limited or subject to certain conditions:

> An agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if the agent actually

687. *See id.*
688. RESTATEMENT (THIRD) OF AGENCY § 8.06 (AM. L. INST. 2006).
689. *Id.*

> knows those objectives. If the agent does not know the principal's objectives, the agent may make a gift of the principal's property only as the agent determines is consistent with the principal's best interest based on all relevant factors, including the factors listed in Section 751.122 and the principal's personal history of making or joining in making gifts.[690]

c. The Duty to Preserve the Principal's Estate Plan

As previously mentioned, an agent now also has the duty to preserve the principal's estate plan in certain situations.[691] Sometimes however, an agent under a DPOA actually takes actions to unravel the principal's estate plan.[692] In *Yost v. Fails*, for example, McGowan had a 1979 will leaving her estate to her sister.[693] In 2011, after a fall, McGowan went to live with her nephew, Fails.[694] Fails secured a power of attorney from McGowan and then assumed management of McGowan's finances.[695] Fails steered McGowan to Fails' attorney, who prepared a new will in 2011.[696] Fails paid the firm to prepare the will and he assisted in the planning of the will by supplying his own will as a template and drafted a handwritten list of McGowan's bequests.[697] He acted as an intermediary between the firm and McGowan, and Fails drove McGowan to the law firm to execute the will.[698] The will was changed to make Fails the primary beneficiary, and McGowan's sister (the sole beneficiary of the prior will) was disinherited.[699] The jury determined the will was executed under undue influence, and the will was denied probate and the prior will was admitted to probate.[700]

D. Compensation

Texas Estates Code section 751.024 now states that unless the durable power of attorney otherwise provides, an agent is entitled to: "(1) reimbursement of reasonable expenses incurred on the principal's behalf; and (2) compensation that is reasonable under the circumstances."[701] In other words, compensation is the default rule.[702] When under scrutiny,

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690. *See* TEX. EST. CODE ANN. § 751.032(d).
691. *See id.* § 751.122.
692. *See* Yost v. Fails, 534 S.W.3d 517 (Tex. App.—Houston [1st Dist.] 2017, no pet.), *overruled on other grounds*, Archer v. Anderson, 556 S.W.3d 228, 239 n. 78 (Tex. 2018).
693. *See id.*
694. *See id.* at 520.
695. *See id.*
696. *See id.*
697. *See id.* at 523.
698. *See id.*
699. *See id.* at 524.
700. *See id.* at 533.
701. TEX. EST. CODE ANN. § 751.024.
702. *See id.*

many agents commonly argue that funds they received from the principal were really "compensation" for services they allegedly rendered to the principal or for the principal's benefit.[703] However, rarely does the agent report this compensation on the agent's federal income tax return and rarely can the agent produce time sheets or detailed descriptions of the services rendered.[704]

E. Standing

In 2017, the legislature greatly expanded the scope of persons with standing to bring claims, even during the principal's life, related to the validity of a power of attorney or the actions of the agent.[705] Before 2017, the only person with standing to bring suit concerning a power of attorney was the principal.[706] If the family of the principal was concerned about an agent acting improperly, they had to either file for guardianship or wait until the principal died, and only then could the personal representative of the principal's estate pursue claims against the agent on behalf of the estate.[707] At that point, the assets of the estate may have dissipated.[708]

With the addition in 2017 of section 751.251, the family or other persons interested in the principal's welfare or estate have a remedy to challenge wrongdoing by the agent, *while the principal is still alive*.[709] Under section 751.251, the following persons may bring an action requesting that a court construe or determine the validity or enforceability of a durable power of attorney or review an agent's conduct under a durable power of attorney and grant appropriate relief:[710]

1) The principal or the agent;
2) A guardian, conservator, or other fiduciary acting for the principal;
3) A person named as a beneficiary to receive property, a benefit, or a contractual right on the principal's death;
4) A governmental agency with regulatory authority to protect the principal's welfare; and
5) A person who demonstrates to the court sufficient interest in the principal's welfare or estate.[711]

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703. *See generally* Michele M. Hughes, *Remedying Financial Abuse by Agents Under a Power of Attorney for Finances*, 2 MARQUETTE ELDER'S ADVISOR 39, (2012) (illustrating alleged services by agents).
704. *See generally id.* (demonstrating agent's failure to report compensation).
705. *See* TEX. EST. CODE ANN. § 751.251.
706. *See id.*
707. *See id.*
708. *See id.*
709. *See id.*
710. *Id*.
711. *Id.*

This new section gives incredibly broad standing to bring an action related to a power of attorney and is a fantastic tool to stop a wrongdoer with a power of attorney from taking further improper action.[712] However, if the principal files a motion to dismiss the action, the court must dismiss the action unless it finds that the principal lacks capacity to revoke the agent's authority or the durable power of attorney.[713]

F. Agent Must Be Acting as Agent

Before 2017, the statute provided that "an attorney in fact or agent is a fiduciary and has a duty to inform and to account for actions taken under the power of attorney."[714] Upon amendment, the statute now reads: "[a] person who accepts appointment as an agent under a durable power of attorney as provided by section 751.022 is a fiduciary as to the principal only when acting as an agent under the power of attorney and has a duty to inform and to account for actions taken under the power of attorney."[715]

The amendment came in response to *Vogt v. Warnock*.[716] In *Vogt*, the principal designated an agent in a power of attorney, and thereafter made gifts to the agent and paid her to manage his affairs.[717] Although the agent knew about the principal's appointment of her as his agent, she never exercised any authority under the power.[718] Upon the principal's death, the executor of his estate sued the agent for breach of fiduciary duty under the power of attorney because the agent had received gifts from the principal.[719] The appellate court held the agent was a fiduciary to the principal and had the burden of proving all transactions were fair, even if she never exercised any authority under the power of attorney.[720]

In 2017, the statute was amended to clarify that a person named as agent under a power of attorney is a fiduciary to the principal only if: (1) the person accepts appointment as an agent, and (2) only when the person is acting as an agent under the power of attorney.[721]

Thus, an agent who receives a gift from a principal is not necessarily liable if the agent did not act in his or her capacity as an agent to make the

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712. Authors' original opinion.
713. *See* TEX. EST. CODE ANN. § 751.251(c).
714. *Id.* § 751.101.
715. *Id.*
716. *See* Vogt v. Warnock, 107 S.W.3d 778 (Tex. App.—El Paso 2003, no pet.).
717. *See id.* at 781.
718. *See id.* at 782.
719. *See id.* at 781.
720. *See id.* at 785.
721. TEX. EST. CODE ANN. § 751.101.

gift.[722] However, fiduciary duties may still attach as a result of the existence of a confidential fiduciary relationship.[723]

G. Removal of Agent

There is now a statutory mechanism to remove an agent and appoint a successor trustee.[724] In addition to injunctive relief, the ability to remove an agent also precludes the agent from further using the principal's assets to pay attorney's fees to defend any challenged self-dealing transactions.[725] The following persons can file a petition to remove an attorney-in-fact:

> (1) Any person named as a successor attorney in fact or agent in a durable power of attorney; or
> (2) If the person with respect to whom a guardianship proceeding has been commenced is a principal who has executed a durable power of attorney, any person interested in the guardianship proceeding, including an attorney ad litem or guardian ad litem.[726]

The court may enter an order to remove the attorney-in-fact if the court finds the attorney-in-fact or agent has breached his or her fiduciary duties to the principal; that the agent has materially violated or attempted to violate the terms of the durable power of attorney and the violation or attempted violation results in a material financial loss to the principal; that the agent is incapacitated or is otherwise incapable of properly performing the agent's duties; or the agent has failed to make a required accounting.[727]

H. Damages[728]

An attorney-in-fact is liable for actual damages that were proximately caused by the breach of his fiduciary duties.[729] Where the attorney-in-fact is related to the principal and shares in the principal's estate, either by will or by intestacy, recovering monetary damages against the attorney-in-fact can

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722. *See id.*
723. Caldwell & Thomas, *Litigation Involving Powers of Attorney*, *supra* note 6, at 17.
724. *See* TEX. EST. CODE ANN. § 753.001.
725. *See id.*
726. *See id.* § 753.001(b).
727. *See id.*
728. Caldwell & Thomas, *Litigation Involving Powers of Attorney*, *supra* note 6.
729. *See generally* Morehead v. Gilmore, No. 01-02-00685-CV, 2003 WL 1848724 (Tex. App.—Houston [1st Dist.] Apr. 10, 2003, no pet.) (affirming trial court's judgment awarding each sibling $27,800, which represented the amount of damages suffered by each sibling as a result of attorney-in-fact claiming ownership of their parents' estate, despite assurances she would divide it equally among all siblings); *see* Duncan v. Lichtenberger, 671 S.W.2d 948, 953 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.); *see also* Si Kyu Kim v. Harstan, Ltd., 286 S.W.3d 629, 635 (Tex. App.—El Paso 2009, pet. denied) (stating that breach of fiduciary duty requires showing that breach caused an injury).

be useful as an offset or to eliminate the attorney-in-fact's beneficial share of the principal's property.[730]

VIII. INTERFERENCE WITH FINANCIAL ACCOUNTS[731]

One of the more common ways to tortiously interfere with an inheritance is to cause a person to change the designated beneficiaries on financial accounts.[732] Claims include financial accounts that pass by beneficiary designation or right of survivorship, life insurance beneficiary designations, transfer-on-death deeds, and other types of beneficiary designation documents.[733]

There are two types of accounts in particular that cause significant litigation.[734] One is an account with a payable on death ("P.O.D.") beneficiary designation, and the other is an account that is a joint account with right of survivorship ("JTWROS").[735] Although Texas Estate Code Chapter 113 addresses other types of accounts, this article focuses on the P.O.D. account and the JTWROS account.[736]

Transfers of funds in a JTWROS or a P.O.D. account that occur because of death are effective by reason of the account contracts involved and Texas Estates Code Chapter 113 and are not considered testamentary transfers or subject to the testamentary provisions of the Estates Code.[737] Thus, for these non-probate transfers, contract law applies.[738]

The Texas Estates Code makes an important distinction between ownership of account proceeds and who may permissibly withdraw funds from such an account.[739] For instance, section 113.101 states that the provisions of the Texas Estates Code that relate to beneficial ownership between parties, or between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant only to controversies between those persons and do not affect the withdrawal power of those persons under the terms of an account contract.[740]

With regard to a joint account, during the lifetime of all parties to the joint account, the account belongs to the parties in proportion to the net contributions by each party to the sums on deposit, unless there is clear and

730. Authors' original opinion.
731. Caldwell & Thomas, *Litigation Involving Powers of Attorney*, *supra* note 6.
732. *See id.*
733. *See id.*
734. *See id.*
735. *See id.*
736. Authors' original opinion.
737. TEX. EST. CODE ANN. § 113.158.
738. *See id.*
739. *See id.*
740. *See id.* § 113.101.

convincing evidence of a different intent.[741] However, amounts in a joint account may be paid, on request, to any party to the joint account without regard to whether any other party is incapacitated or deceased at the time the payment is demanded.[742] Payment made in accordance with section 113.203 discharges the financial institution from all claims for those amounts paid, regardless of whether the payment is consistent with the beneficial ownership of the account between the parties.[743] However, the protection provided by section 113.209(a) to financial institutions does not affect the rights of parties in disputes between the parties concerning the beneficial ownership of funds in, or withdrawn from, multi-party accounts.[744]

Thus, if Mary contributes $10,000 to a joint account and adds Bob as a party to the account, but Bob does not contribute any funds, Mary owns 100% of the funds in the account.[745] Yet, as a party to the account, Bob has the authority to withdraw all of the funds.[746] The financial institution is not liable for permitting Bob to make the withdrawal, but Bob can still be sued for conversion of Mary's funds because Bob had no actual ownership interest in the funds.[747]

A. Account Terminology

To understand who can bring claims related to P.O.D. and JTWROS accounts, it is first necessary to understand the terminology set forth in chapter 113.[748]

An "account" is a "contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, or other similar arrangement."[749]

A "'financial institution' means an organization authorized to do business under state or federal laws relating to financial institutions, [and] includes a bank or trust company, savings bank, building and loan association, savings and loan company or association, credit union, and brokerage firm that deals in the sale and purchase of stocks, bonds, and other types of securities."[750]

A multi-party account means a joint account, a convenience account, a P.O.D. account, or a trust account.[751]

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741. *See id.* § 113.102.
742. *See id.* § 113.203(a).
743. *See id.* § 113.209(a).
744. *See id.* § 113.209(d).
745. Authors' original hypothetical.
746. *Id*.
747. *Id*.
748. *Id*.
749. *See* TEX. EST. CODE ANN. § 113.001(1).
750. *See id.* § 113.001(3).
751. *See id.* § 113.004(3).

Perhaps most importantly, for purposes of chapter 113, a "'party' means a person who, by the terms of a multi-party account, has a present right, subject to request, to payment from the account."[752] However, "the term does not include a named beneficiary unless the beneficiary has a present right of withdrawal."[753]

B. P.O.D. Accounts

A "P.O.D. account" means an account payable on request to one or more person(s) during their life and, on their death, to one or more payable-on-death payees.[754] A P.O.D. account includes a transfer on death or "T.O.D." account.[755]

A "P.O.D. payee" is a person designated on a P.O.D. account as a person to whom the account is payable on request after the death of one or more persons.[756]

A P.O.D. payee is not a "party" to an account until "the account becomes actually payable to the P.O.D. payee or beneficiary" as a result of either the P.O.D. payee or beneficiary surviving the original payee.[757]

During the lifetime of an original payee of a P.O.D. account, the account belongs to the original payee and does not belong to the P.O.D. payee or payees.[758]

1. Ownership on Death

If the account is a P.O.D. account and there is a written agreement signed by the original payee, then on the death of the original payee, any sums remaining on deposit belong to the P.O.D. payee.[759]

2. Permissible Payees of P.O.D. Account

Payment on a P.O.D. account can be made, on request, to the P.O.D. payee "on the presentation to the financial institution of proof of death showing that the P.O.D. payee survived each person named as an original payee."[760]

Regardless of whether the payment is in accordance with beneficial ownership of the account between parties or P.O.D. payees, payment made

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752. *See id.* § 113.002(a).
753. *See id.*
754. *See id.* § 113.004(4).
755. *See id.*
756. *See id.* § 113.001(5).
757. *See id.* § 113.002(b).
758. *See id.* § 113.103.
759. *See id.* § 113.152(a).
760. *See id.* § 113.204(b).

in accordance with section 113.204 will discharge the financial institution from all claims for the amounts paid.[761]

However, such protection does not extend to a financial institution for payments made "after a financial institution receives, from any party able to request present payment, written notice to the effect that withdrawals in accordance with the terms of the account should not be permitted."[762] Unless the person giving notice withdraws it, the successor of a deceased party must concur in a demand for withdrawal for the financial institution to be protected under section 113.209(a).[763]

3. *Joint Accounts with Right of Survivorship*

A "joint account" is an account that is payable on request to one or more of two or more parties, regardless of a right of survivorship.[764]

a. *Ownership of JTWROS on Death*

When one party to a joint account dies, the sums on deposit in the joint account will belong to the surviving parties only if the deceased party signed a written agreement that says the deceased party's interest survives to the surviving parties on his or her death.[765]

An agreement is sufficient to convey an absolute right of survivorship to parties on a joint account when the agreement contains a statement such as: "On the death of one party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate."[766]

b. *Permissible Payees of JTWROS*

Amounts in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded.[767] Thus, in a joint account, regardless of whether it has a "right of survivorship designation," the financial institution can allow a joint account owner to withdraw funds from the account at any time.[768]

A financial institution that pays an amount from a joint account to a surviving party to that account in accordance with a written agreement under

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761. *See id.* § 113.209(a).
762. *See id.* § 113.209(b).
763. *See id.*
764. *See id.* § 113.004(2).
765. *See id.* § 113.151(a).
766. *See id.* § 113.151(b).
767. *See id.* § 113.203.
768. *See id.*

section 113.151 is not liable to an heir, devisee, or beneficiary of the deceased party's estate.[769]

Payment made in accordance with section 113.207 discharges the financial institution from all claims for those amounts paid, regardless of whether the payment is consistent with the beneficial ownership of the account between parties and P.O.D. payees.[770] However, such protection does not extend to a financial institution for payments made after a financial institution receives, from any party able to request present payment, written notice to the effect that withdrawals in accordance with the terms of the account should not be permitted.[771] Unless the notice is withdrawn by the person giving notice, the successor of a deceased party must concur in a demand for withdrawal for the financial institution to be protected under subsection (a).[772]

4. Changes to Account Designations

The form of an account may be altered by written order given by a party to the financial institution to change the form of the account or to stop or vary payment under the terms of the account.[773] The order or request must be signed by a party, received by the financial institution during the party's lifetime, and not countermanded by another written order of the same party during the party's lifetime.[774]

5. Claims by Personal Representative of Decedent's Estate

The personal representative of a decedent's estate may have standing to bring a claim when a third party wrongfully causes a change to the beneficiaries of a decedent's financial accounts.[775]

When the estate would have an interest in the proceeds of the account, but for the interference, the personal representative certainly has standing, as the personal representative has a pecuniary interest in recovering the assets for the estate.[776] The personal representative can seek to void any beneficiary designation changes under the theories set forth above (i.e. incapacity, fraud, duress, undue influence, etc.).[777]

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769. *See id.* § 113.207.
770. *See id.* § 113.209(a).
771. *See id.* § 113.209(b).
772. *See id.*
773. *See id.* § 113.157.
774. *See id.*
775. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a).
776. *See id.*
777. *See id.*

Further, the personal representative may seek to hold a person liable for the change by filing a breach of fiduciary duty claim.[778] The remedy of constructive trust is also available.[779]

Scenario: Don has two children: Anna and Bob.[780] Don lives with and is wholly dependent on Bob.[781] Bob isolates Don and screens his phone calls. Anna is unable to get in touch with Don and Don believes Anna has abandoned him. Bob has Don add Bob to Don's bank accounts.[782] The accounts are multi-party accounts with rights of survivorship.[783] While Don is alive, Bob withdraws $50,000 from the account to pay for a lavish vacation to Europe.[784] Upon Don's death, Bob transfers the funds in the account to his internet girlfriend, who then disappears.[785]

Analysis: During the lifetime of all parties, the funds in the account are owned by the parties in proportion to the net contributions by each party to the sums on deposit.[786] Thus, while Don is alive, he owns 100% of the funds in the account because Bob did not contribute any funds to the account.[787] However, amounts in a joint account may be paid on request to any party to the joint account, and the financial institution is discharged from all claims for those amounts paid, regardless of whether the payment is consistent with the beneficial ownership of the account between the parties.[788] Thus, while Bob had no ownership interest in the funds in the account while Don was alive, he was legally authorized to withdraw the funds and the bank is not liable.[789]

Although the bank is protected in this situation, the provisions protecting the bank do not affect the rights of parties in disputes concerning the beneficial ownership of funds withdrawn from the multi-party account.[790]

The executor of Don's estate files suit as follows:

> (1) The addition of Bob to the account was achieved through duress and undue influence and such document should be voided. If successful, the document is void and the executor can seek a constructive trust over the proceeds of the account. However, to the extent the funds are gone, there is no other recourse.[791]

778. *Id.*
779. *Id.*
780. *Id.*
781. *Id.*
782. *Id.*
783. *Id.*
784. *Id.*
785. *Id.*
786. *See* TEX. EST. CODE ANN. § 113.102.
787. *See id.*
788. *See id.* §§ 113.203(a), 113.209(a).
789. *See id.* § 113.203(a).
790. *See id.* § 113.209(d).
791. *See id.* § 113.203(a).

(2) Even if the addition of Bob to the account was valid, during Don's life, the funds in the account were owned by Don, not Bob, because Don contributed 100% of the funds to the account, thus, Bob converted the $50,000 that he withdrew from the account while Don was alive. In a case for conversion, the owner may recover damages for the loss in value of the property or loss of use damages while the property was wrongfully detained.[792]

(3) Bob was a fiduciary for Don (likely an informal fiduciary relationship), and as such, Bob's removal of the $50,000 was a breach of fiduciary duty. The plaintiff should seek a constructive trust over the funds wrongfully taken and also seek actual damages and punitive damages payable by Bob.[793]

What is less clear is the situation when the estate does not stand to gain from bringing the claim.[794]

Scenario: Don previously designated Anna as a P.O.D. payee, and then Bob unduly influences Don to change the P.O.D. payee to Bob.[795]

Analysis: In this situation, the estate will not benefit if the designation of Bob as P.O.D. payee is undone.[796] The personal representative steps into the shoes of Don, and Don is the person aggrieved (i.e. his true wishes are not honored by the designation of Anna as P.O.D. payee).[797] However, the estate has no pecuniary interest to recover, and it would likely be a breach of the personal representative's duties to spend money on attorney's fees pursuing claims that recover nothing for the estate.[798] Under this situation, the personal representative is not likely to have standing to pursue the claims.[799]

6. Claims by Original Designated Payee

In the situation where Don has designated Anna as a P.O.D. payee, and then Bob unduly influences Don to change the P.O.D. payee to Bob, does Anna have standing to sue to void the contract or to sue for breach of fiduciary duty?[800]

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792. Winkle Chevy-Olds-Pontiac, Inc. v. Condon, 830 S.W.2d 740, 746 (Tex. App.—Corpus Christi 1992, writ dism'd).

793. *Id.*

794. Authors' original opinion.

795. Authors' original hypothetical.

796. Authors' original analysis.

797. *Id*.

798. *Id*.

799. *Id*.

800. *See* Winkle Chevy-Olds-Pontiac, Inc. v. Condon, 830 S.W.2d 740, 746 (Tex. App.—Corpus Christi 1992, writ dism'd).

Anna, individually, cannot bring a claim for breach of fiduciary duty against Bob for any duties Bob owed to Don because Anna individually does not have standing to bring such claim.[801]

Anna could file a petition for declaratory judgment under section 37.004 of the Texas Civil Practice and Remedies Code to ask the court for relief.[802] Anna is a "person interested" with standing because the voiding of the beneficiary change form will result in the property passing to Ann.[803]

IX. INTERFERENCE WITH LIFE INSURANCE

There are a series of cases in which one spouse changes the beneficiary designation on a life insurance policy from his or her spouse to a third party.[804] On death, the surviving spouse brings a claim of fraud on the community.[805]

"Proceeds from a life insurance policy acquired as a benefit of employment during marriage are community property."[806] The policy is the sole management community property of the employee spouse, and such spouse may designate the beneficiary of the policy.[807] "However, because a trust relationship exists between husband and wife regarding the community property controlled by each spouse, if the designation of a third-party beneficiary constitutes actual or constructive fraud on the community, proceeds may be awarded to the surviving spouse rather than the designated beneficiary."[808]

The surviving spouse can establish a prima facie case of constructive fraud on the community by proving the policy was bought with community funds for the benefit of a person outside the community.[809] The donor or designated beneficiary seeking to overcome a prima facie case of fraud must prove that "the disposition of the surviving spouse's one-half community interest is fair."[810] In determining whether a gift of proceeds is fair, the fact finder is to consider:

> (1) the size of the gift in relation to the total size of the community estate;
> (2) the adequacy of the estate remaining to support the surviving spouse in spite of the gift;

801. *Id.*
802. TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a).
803. *Id.*
804. *Id.*
805. *Id.*
806. *In re* Est. of Vackar, 345 S.W.3d 588, 598 (Tex. App.—San Antonio 2011, no pet.).
807. *Id.* (*citing* Madrigal v. Madrigal, 115 S.W.3d 32, 34-35 (Tex. App.—San Antonio 2003, no pet.)).
808. *Id.*
809. *Id*.
810. *Id.* (*citing Madrigal*, 115 S.W.3d at 34–35).

(3) the relationship of the donor to the donee; and
(4) whether special circumstances existed to justify the gift.[811]

X. INTERFERENCE THROUGH GIFTS[812]

The party claiming that a transfer is a gift has the burden to prove the elements of a gift.[813] This means if the gift cannot be invalidated for lack of donative capacity, it nonetheless may be invalidated if the party claiming the gift cannot prove donative intent.[814]

To establish that the donor made a gift of property to the donee, the donee has the burden to prove: (1) the principal intended to make a gift; (2) the principal delivered the property to the attorney-in-fact; and (3) the attorney-in-fact accepted the property.[815] The party claiming the gift was made must prove these elements by "clear and convincing evidence."[816]

The donor's intent is generally the primary issue.[817] The Texas Commission of Appeals noted this fact over ninety years ago:

> Among the indispensable conditions of a valid gift are the intention of the donor to absolutely and irrevocably divest himself of the title, dominion, and control of the subject of the gift in praesenti at the very time he undertakes to make the gift; * * * the irrevocable transfer of the present title, dominion, and control of the thing given to the donee, so that the donor can exercise no further act of dominion or control over it.
>
> "[T]he requisite donative intent is established by, among other things, evidence that the donor intended an immediate and unconditional divestiture of his or her ownership interests and an immediate and unconditional vesting of such interests in the donee."[818]

Texas courts have held statements of future intent coupled with retaining control over the allegedly gifted asset are insufficient to establish donative intent.[819] Similarly, titling assets in the donee's name for purposes other than

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811. *Id.*
812. Caldwell & Thomas, *Litigation Involving Powers of Attorney*, *supra* note 6.
813. *Id.*
814. *See* Dorman v. Arnold, 932 S.W.2d 225, 228 (Tex. App.—Texarkana 1996, no writ).
815. *See* Sumaruk v. Todd, 560 S.W.2d 141, 146 (Tex. App.—Tyler 1977, no writ).
816. *See Dorman*, 932 S.W.2d at 227 (*citing* Oadra v. Stegall, 871 S.W.2d 882, 892 (Tex. App.—Houston [14th Dist.] 1994, no writ)).
817. Nipp v. Broumley, 285 S.W.3d 552, 559 (Tex. App.—Waco 2009, no pet.) (*citing* Hayes v. Rinehart, 65 S.W.3d 286, 289 (Tex. App.—Eastland 2001, no pet.)); Lee v. Lee, 43 S.W.3d 636, 642 n.4 (Tex. App.—Fort Worth 2001, no pet.); *Dorman*, 932 S.W.2d at 227; Thompson v. Lawson, 793 S.W.2d 94, 96 (Tex. App.—Eastland 1990, writ denied)).
818. Harmon v. Schmitz, 39 S.W.2d 587, 589 (Tex. Comm'n App. 1931, judgm't adopted) (alteration in original) (*quoting* Allen-West Comm'n Co. v. Grumbles, 129 F. 287, 290 (8th Cir. 1904)).
819. *See id.* (holding donor lacked donative intent to transfer ownership of certificates of deposit when evidence to prove donative intent consisted of past statements about donor's future intent); *see also Hayes*, 65 S.W.3d at 288–89.

making a gift has also been held insufficient to establish donative intent.[820] One way to demonstrate donative intent is to establish a presumption of gift by proof the transaction transferred property from parent to child.[821]

When property is deeded from a parent to a child or children, it is presumed the parent intended to make a gift.[822] An exchange of consideration, however, precludes a gift.[823]

XI. CONCLUSION

The Court's reasoning for not recognizing a new cause of action for tortious interference with inheritance in *Archer* is persuasive.[824] The law has long denied an expectant beneficiary any interest in an expected inheritance in order to protect the testator's fundamental right to dispose of his property as he chooses.[825] Probate law has established procedures and rules to ensure that the testator's last wishes are known and followed.[826]

The creation of a tort for interference with inheritance complicates matters that are otherwise fairly straightforward.[827] It recognizes a right in a beneficiary to an expected inheritance, which is contrary to current law.[828]

In probate, there are strict laws regarding the construction of wills and determination of testator intent because of the great difficulty in discerning the intent of a decedent who cannot explain himself after he has died.[829] For a will to be valid, it must either be wholly in the testator's handwriting and signed by the testator, or be signed by the testator and attested by two or more credible witnesses who subscribe their names to the will in their own handwriting in the testator's presence.[830]

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820. *See Hayes*, 65 S.W.3d at 288–89 (The donor's brother and sister-in-law offered evidence that donor put money in alleged donee's name to get breathing machine and medication paid for by Medicare and Medicaid and to receive treatment at the V.A. Hospital.).

821. *See* Richardson v. Laney, 911 S.W.2d 489, 492 (Tex. App.—Texarkana 1995, no writ).

822. *Id.* at 493 (finding presumption of gift from parent to child rebutted when evidence established that the parent did not relinquish possession, but continued to live on the property, the property was put in child's name to retain Medicaid benefits, the deed was not recorded until after parent's death, and child judicially admitted parent owned property on parent's death); *see also Oadra*, 871 S.W.2d at 891 ("A presumption of gift arises if a parent delivers possession, conveys title, or purchases property in the name of a child. We have found no cases where the presumption arises when a child does the same for a parent." (citations omitted)).

823. Hardy v. Hardy, No. 03-02-00780-CV, 2003 WL 21402002, at *3 (Tex. App.—Austin June 19, 2003) (mem. op.) ("Presumptions that transfers are gifts can be overcome by a showing that consideration was exchanged." (citing Ellebracht v. Ellebracht, 735 S.W.2d 658, 659–60 (Tex. App.—Austin 1987, no writ) (finding evidence supported decision that parent-to-child conveyance of land was not a gift because it was made in exchange for money and child's assumption of the debt encumbering the property))).

824. *See* Archer v. Anderson, 556 S.W.3d 228, 229 (Tex. 2018).

825. *See id.*

826. *See id.* at 235.

827. *See id.* at 229.

828. *Id.*

829. *See* TEX. EST. CODE ANN. §§ 251.051–.052.

830. *Id.*

In contrast, to bring a claim for tortious interference with inheritance, the Restatement (Second) of Torts section 774B provides that tortious interference is shown when a person shows that he has been prevented from receiving an inheritance or gift "*that he would otherwise have received*."[831] The comments to section 774B provide that "there must be proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator or that the gift would have been made inter vivos if there had been no such interference."[832] The Restatement recognizes that in some cases this standard can be shown with complete certainty.[833] For instance, if a person destroys or suppresses a will after the death or incompetence of a testator, it is certain that the devisee under the will would have inherited but for the destruction or suppression of the will.[834] However, in many cases it will be very difficult to be "reasonably certain" that the bequest or devise would have been in effect at the testator's death.[835] The Restatement explains:

> If there is a reasonable certainty established by proof of a high degree of probability that the testator would have made a particular legacy or would not have changed it if he had not been persuaded by the tortious conduct of the defendant and there is no evidence to the contrary, the proof may be sufficient that the inheritance would otherwise have been received.[836]

This standard is a lot less clear than what is normally required in probate.[837]

Additionally, as shown by this article, there are already many remedies people can use to address wrongdoing in these types of cases.[838] In most cases, one, if not many, of the actions outlined in this article will be sufficient to make things right.[839]

The fundamental purposes of our tort system are to deter wrongful conduct, shift losses to responsible parties, and fairly compensate deserving victims.[840]

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831. RESTATEMENT (SECOND) OF TORTS § 774B (AM. L. INST. 1979).
832. *Id.* § 774B, cmt. d.
833. *Id.*
834. *Id.*
835. *Id.*
836. *Id.*
837. *See* TEX. EST. CODE ANN. §§ 251.051–.052.
838. *See supra* Parts IV–X.
839. Authors' original opinion.
840. Roberts v. Williamson, 111 S.W.3d 113, 118 (Tex. 2003) (in the context of whether to recognize a new cause of action).

Probate law is more akin to contract law.[841] Courts can void the transaction if there is undue influence, fraud, or duress.[842] Like contract law, there is no recovery for exemplary damages.[843]

The problem is this: in most of the tortious interference-type cases, the wrongdoer preys upon the most vulnerable in our society.[844] Persons who, because of physical or mental impairments, are unable to protect themselves.[845] It is usually family dealing with family, or a non-family member who has inserted themselves into the testator's life and the testator has become reliant upon that person.[846] Any experienced fiduciary litigator can tell you many tales of the abhorrent measures some people take to ensure they receive an inheritance they would not have otherwise received.[847] What is left in the aftermath is often a family shattered, with ripple effects for generations to come.[848]

Though arguments about the history and tradition of the current law are persuasive, reforming the law would provide an effective deterrent if an individual's moral compass is not working.[849] The law as it currently stands is not effective in protecting a testator's freedom of disposition, or the most vulnerable in society.[850]

Under the current state of the law, unless there is some claim for breach of fiduciary duty or conversion, the primary remedy available is to undo the transaction.[851] And while the Supreme Court champions the constructive trust, that remedy is only effective if the wrongfully acquired assets are still there.[852] If the wrongdoer spends the money, there is no recourse.[853] That does not sit well, particularly when considering the atrocious acts many practitioners see.[854]

In the context of a will execution, a wrongdoer can subject a testator to horrific situations to try to persuade the testator to change their will.[855] The

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841. Authors' original opinion.

842. RESTATEMENT (SECOND) OF CONTRACTS §§ 175, 177 (AM. L. INST. 1981); *See* Jim Walter Homes, Inc. v. Reed, 711 S.W.2d 617, 618 (Tex. 1986); Manges v. Guerra, 673 S.W.2d 180, 184 (Tex. 1984); Amoco Prod. v. Alexander, 622 S.W.2d 563, 571 (Tex. 1981).

843. *Reed*, 711 S.W.2d at 618.

844. *See* Archer v. Anderson, 556 S.W.3d 228, 241–42 (Tex. 2018) (Johnson, J., concurring in part and dissenting in part).

845. *See* TEX. FIN. CODE ANN. § 281.001.

846. *See* Kinsel v. Lindsey, 526 S.W.3d 411, 415 (Tex. 2017); Archer, 556 S.W.3d at 230–31.

847. Authors' original opinion.

848. *Id.*

849. *Id.*

850. *See supra* Parts IV–X.

851. *See supra* Section IV.A.2.

852. TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a); Pope v. Garrett, 211 S.W.2d 559, 562 (Tex. 1948).

853. *Pope,* 211 S.W.2d at 562.

854. Authors' original opinion.

855. *See infra* Scenarios 1–3.

transaction may be undone, but the wrongdoer is never held accountable for their wrongful actions.[856]

The following is just a sampling of cases where the current law is inadequate to meet the ends of justice:

Scenario 1: Don's children are Anna and Bob.[857] Don does not have a will. Don lives with and is wholly dependent on Bob.[858] Bob isolates Don and screens his phone calls.[859] Anna is unable to get in touch with Don, and Don believes Anna has abandoned him.[860] Bob then threatens to throw Don out of the house if Don does not execute a will leaving Bob his entire estate.[861] Don executes the will.[862]

Analysis: On Don's death, Anna brings a will contest and successfully defeats the probate of the will because the will was executed under undue influence and duress.[863] Don's estate passes by intestate succession.[864] In this scenario, no matter what Bob did wrong, he is guaranteed to receive at least 50% of the estate (less approved attorneys' fees) because Bob is an intestate heir.[865]

Before the 2019 addition of section 352.052(c) of the Texas Estate Code, Anna would not have been allowed to get her attorney's fees incurred in the contest to be paid out of the estate because she did not have another will to probate.[866] However, with the addition of section 352.052(c), Anna can now get her fees paid out of the estate.[867] While this is better than nothing, the effect is still that Anna is bearing the burden of undoing Bob's wrongdoing.[868] If the estate is worth $1 million and Anna's attorney's fees are $200,000, the estate is reduced to $800,000, and Anna will receive $400,000 instead of $500,000.[869]

Additionally, there have been some reported cases where a jury determined that a decedent executed a will as a result of undue influence, but the jury somehow also found that the will proponent (who was the wrongdoer) acted in good faith in applying to probate the will.[870] In those cases under section 352.052 of the Texas Estate Code, if the will proponent

856. *See supra* Parts IV–V.
857. *Id.*
858. *Id.*
859. *Id.*
860. *Id.*
861. *Id.*
862. *Id.*
863. Authors' original analysis.
864. *Id.*
865. *Id.*
866. *See* TEX. EST. CODE ANN. § 352.052(c).
867. *Id.*
868. *Id.*
869. *Id.*
870. Harkins v. Crews, 907 S.W.2d 51, 54 (Tex. App.—San Antonio 1995, writ denied) (jury found will proponents acted in good faith, despite also finding that the wills were obtained through undue influence, thus, the will proponents were entitled to attorneys' fees).

is the person named as executor in the wrongfully procured will, the court "*shall*" allow the wrongdoer's attorneys' fees and expenses out of the estate.[871]

Thus, in the previous hypothetical, if Bob spends $300,000 in attorneys' fees and expenses in defending the will that he unduly influenced Don to execute, and if the jury finds Bob acted in good faith in seeking to probate the will, then the estate is reduced by $500,000 (Anna's $200,000 fees/expenses and Bob's $300,000 fees/expenses), leaving Anna with a $250,000 inheritance rather than the $500,000 she would have received but-for Bob's undue influence.[872]

With the law as it currently stands, there is little incentive for someone like Bob not to wrongfully interfere, and the innocent sister must bear the burden of undoing the transaction and protecting her father's wishes.[873]

Scenario 2: Don is 85, lives alone, and is hard of hearing and losing his eyesight.[874] Don has a housekeeper, Mary.[875] One day, Mary tells Don that she needs Don to sign a document verifying for her employer she was at his house that day.[876] Don doesn't have his glasses but agrees to sign the document where Mary indicates.[877] When Don dies, his family discovers that Mary had Don sign a document making all of his financial accounts multi-party accounts with right of survivorship.[878] Don's entire estate is held in the bank accounts.[879] Shortly after Don's death, Mary withdraws all of the funds from the accounts and sends the funds to her internet boyfriend, whom promptly disappears.[880]

Analysis: The accounts were multi-party accounts and Mary was a party to the account.[881] Amounts in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded.[882] A financial institution that pays an amount from a joint account to a surviving party to that account in accordance with the contract is not liable to an heir, devisee or beneficiary of the deceased party's estate.[883]

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871. *Id.*
872. *Id.*
873. *Id.*
874. Authors' original hypothetical.
875. *Id*.
876. *Id*.
877. *Id*.
878. *Id*.
879. *Id*.
880. *Id*.
881. Authors' original analysis.
882. TEX. EST. CODE ANN. § 113.203.
883. *Id.* § 113.207.

Although the bank is protected in this situation, the provisions protecting the bank do not affect the rights of parties in disputes concerning the beneficial ownership of funds withdrawn from the multi-party account.[884]

The executor of Don's estate files suit claiming that the addition of Mary to the account was achieved through fraud.[885] The court agrees and voids the designation as a joint account with right of survivorship.[886] The executor's remedy is to seek a constructive trust over the account funds.[887] But in this situation, the money is gone.[888] Mary was scammed by her internet boyfriend.[889] It is unlikely that the executor can establish that Mary owed a fiduciary duty to Don, so a breach of fiduciary duty claim is out of the question.[890] Additionally, the attorneys' fees required to pursue the claim come out of the estate.[891] There is no authority to shift the burden of attorneys' fees to Mary.[892] In the end, there are no funds to recover, there is no way to hold Mary liable for damages, and the estate (that has no funds) is stuck paying the attorneys' fees.[893]

Scenario 3: Christine and David are married.[894] Betty is Christine's niece.[895] Christine instructed her attorney to draft a will and trust for Betty's benefit, but David contacted the attorney and prevented him from completing the will.[896] Christine died intestate and David, as surviving spouse, inherited the entire estate.[897]

Analysis: This fact scenario comes from a case in Alabama.[898] A written copy of the unexecuted will was submitted into evidence, and the will-drafting attorney testified to the interference.[899] On this basis, the Alabama Supreme Court initially recognized the tort of tortious interference with inheritance.[900] However, three justices dissented.[901] One complained that the plaintiffs could not show that David's alleged interference denied them an inheritance they would have otherwise received because the will was

884. *Id.* § 113.209(d).
885. Authors' original hypothetical.
886. *Id*.
887. *Id*.
888. *Id*.
889. *Id*.
890. *Id*.
891. *See* TEX. EST. CODE ANN. § 352.052.
892. *See id.*
893. *See id.*
894. The facts of this scenario come from *Ex parte* Batchelor, No. 1999507, (Ala. Jan. 5, 2001), https://casetext.com/case/ex-parte-batchelor-2/?PHONE_NUMBER_GROUP=P [https://perma.cc/62EC-92YL].
895. *Id.*
896. *Id.*
897. *Id.*
898. *Id.*
899. *Id.*
900. *Id.*
901. *Id.*

never executed.[902] Four months later, on application for rehearing, the Alabama Supreme Court withdrew the prior opinion recognizing the tort.[903] Under Texas law, Betty would have no recourse in this situation.[904]

902. *Id.*
903. *Id.*
904. *Id.*