FIDUCIARY LITIGATION: AVOIDING (OR MINIMIZING) THE TRAPS, TRIBULATIONS, AND TRIALS

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I. SCOPE OF ARTICLE

The term "fiduciary" means "any person who occupies a position of peculiar confidence towards another."[1] While these appointments often arise out of a relationship of trust, the fiduciary role can be a thankless one.[2] Once appointed, fiduciaries face a host of issues including deciding to serve, balancing divergent interests, facing threats of litigation, and accounting for and defending their own actions.[3]

As the number of lawsuits involving the role and responsibilities of a fiduciary continues to increase, professionals representing and advising these individuals face an equally difficult job. Unfortunately, neither the Texas Probate Code nor the Texas Property Code—which contains the Texas Trust Code—provides definitive guidance for the role, responsibility, and potential liability of a fiduciary. Adherence to some central considerations and measures may allow fiduciaries to fulfill their fiduciary duties and also substantially reduce (but not eliminate) the potential claims against, and the liability of, the fiduciary. The following is a discussion of ways to reduce potential litigation in this area.

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1. Montague v. Brassell, 443 S.W.2d 703, 713 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.) (quoting Cartwright v. Minton, 318 S.W.3d 449, 453 (Tex. Civ. App.—Eastland 1958, writ ref'd n.r.e.).

2. *See id.*

3. *See id.*

II. FIDUCIARY RELATIONSHIPS

A. Overview

The term fiduciary is derived from civil law.[4] Most courts have held that it is not possible "to give a definition of the term [fiduciary] that is comprehensive enough to cover all cases."[5] Courts have generally found that a fiduciary is a person "who occupies a position of peculiar confidence towards another."[6] The term "refers to integrity and fidelity . . . [and] contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction."[7] But the term can also include "informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations."[8]

Although some fiduciary relationships are not defined, Texas law has clearly established the following fiduciary relationships: attorney to client,[9] trustee to beneficiary,[10] executor to beneficiary,[11] guardian to ward,[12] spouse to spouse,[13] partner to partner,[14] and agent to principal.[15]

B. Trustees

Probably the most commonly recognized and encountered fiduciary relationship is that of a trustee. A trustee is "the person holding the property in trust, including an original, additional, or successor trustee, whether the person is appointed or confirmed by a court."[16] A trust may be created by any of the following: a property owner's declaration that the owner holds the property as trustee for another person, a property owner's inter vivos transfer of the property to another person as trustee for the transferor or a third person, a property owner's testamentary transfer to another person as trustee for a third person, an appointment under a power of appointment to another person as trustee for the donee of the power or for a third person, or a promise to another person whose rights under the promise are to be held in trust for a third person.[17] Once a trust is created, the trustee is a fiduciary to all the

4. *Id.*
5. *Id.* (alteration in original).
6. *Id.* (citation omitted) (alteration in original).
7. *Id.*
8. *Id.*
9. Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999).
10. Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996).
11. *Id.*
12. *See* Byrd v. Woodruff, 891 S.W.2d 689, 710 (Tex. App.—Dallas 1994, writ denied).
13. *See* Schlueter v. Schlueter, 975 S.W.2d 584, 589 (Tex. 1998).
14. Bohatch v. Butler, 977 S.W.2d 543, 545 (Tex. 1998).
15. Kinzbach Tool Co. v. Corbett-Wallace, 160 S.W.2d 509, 512 (Tex. 1942).
16. TEX. PROP. CODE ANN. § 111.004(18) (West 2007).
17. *See id.*

beneficiaries of the trust, both current and remaindermen, vested and contingent.[18]

C. Personal Representatives

A personal representative is an executor or administrator appointed to serve as the legal representative of a decedent's estate.[19] This representative can be appointed either temporarily or permanently and either dependently or independently.[20] The executor or administrator is a fiduciary to the beneficiaries of the estate and, in some cases, to the beneficiaries' surviving spouses if their property is subject to administration.[21] The executor or administrator is generally not a fiduciary to creditors.[22]

D. Guardians

A guardian is a person or entity appointed by a court to serve as the legal representative for an incapacitated person.[23] A guardianship includes a person or entity appointed as a permanent, temporary, or successor guardian.[24] A guardian is a fiduciary to the ward for which the guardian is appointed to serve.[25]

E. Agents

An attorney-in-fact or agent is the person or entity appointed to serve as a principal's agent pursuant to a power of attorney.[26] Attorneys-in-fact or agents are fiduciaries to their principal.[27] If properly drafted, a "durable" power of attorney survives the principal's incapacity so the agent continues to act on behalf of an incapacitated principal.[28]

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18. *See id.*
19. *See* McMahan v. Greenwood, 108 S.W.3d 467, 488 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).
20. *See* TEX. PROB. CODE ANN. § 3(aa) (West 2003).
21. *See* TEX. PROB. CODE ANN. §§ 230, 232, 235 (West 2003).
22. *See* FCLT Loans, L.P. v. Estate of Bracher, 93 S.W.3d 469, 480 (Tex. App.—Houston [14th Dist.] 2002, no pet.). *But see Ex parte* Buller, 834 S.W.2d 622, 626 (Tex. App.—Beaumont 1992, no writ).
23. *See* King v. Payne, 292 S.W.2d 331, 335 (Tex. 1956).
24. *See id.*
25. *See id.*
26. TEX. PROB. CODE ANN. § 489B(a) (West 2003).
27. *See id.*
28. *See id.*

III. SOURCES OF GUIDANCE AND AUTHORITY

A. Trustees

It is well settled in Texas that the first principle of trust construction is to honor the intent of the settlor.[29] Thus, the terms of a trust as set forth in the governing instrument generally control.[30] This principle has been recognized by section 111.0035(b) of the Texas Property Code, which provides as follows:

> (b) The terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit:
> (1) the requirements imposed under Section 112.031;
> (2) the applicability of Section 114.007 to an exculpation term of a trust;
> (3) the periods of limitation for commencing a judicial proceeding regarding a trust;
> (4) a trustee's duty:
> (A) with regard to an irrevocable trust, to respond to a demand for accounting made under Section 113.151 if the demand is from a beneficiary who, at the time of the demand:
> (i) is entitled or permitted to receive distributions from the trust; or
> (ii) would receive a distribution from the trust if the trust terminated at the time of the demand; and
> (B) to act in good faith and in accordance with the purposes of the trust;
> (5) the power of a court, in the interest of justice, to take action or exercise jurisdiction, including the power to:
> (A) modify or terminate a trust or take other action under Section 112.054;
> (B) remove a trustee under Section 113.082;
> (C) exercise jurisdiction under Section 115.001;
> (D) require, dispense with, modify, or terminate a trustee's bond; or
> (E) adjust or deny a trustee's compensation if the trustee commits a breach of trust; or Subsection (6) below is effective for trusts existing or created on or after June 19, 2009.
> (6) the applicability of Section 112.038.[31]

The Texas Property Code applies to all trusts governed by Texas law unless the trust instrument indicates a clear intent to provide otherwise and only insofar as the provisions do not limit the matters set forth in section 111.0035.[32]

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29. *See* State v. Rubion, 308 S.W.2d 4, 8 (Tex. 1957).

30. *See id.*

31. TEX. PROP. CODE ANN. § 111.0035(b) (West 2007 & Supp. 2012). *See also* Beaty v. Bales, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) ("Where the language of the trust instrument is unambiguous and expresses the intentions of the [settlor], the trustee's powers are conferred by the instrument and neither the court nor the trustee can add or take away such power.") (alteration in original).

32. *See* PROP. § 111.0035(b).

Therefore, unless the terms of a trust validly provide otherwise, the Texas Property Code also governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.[33]

Finally, the powers and duties of a trustee are governed by common law if the trust instrument does not validly provide otherwise, and the powers and duties are applicable and not inconsistent with the provisions of the Texas Property Code.[34]

Along with the preceding mandatory sources of guidance, persuasive guidance may be found in Restatements of the Law, the Uniform Trust Code, and treatises.

1. Restatement of Trusts

The Restatement of Trusts is not binding in Texas. Nevertheless, the Restatements provide some guidance when construing and interpreting a trust.[35] Care should first be taken in determining whether the applicable provisions of the Texas Property Code conflict with the Restatement's position. If so, the Restatement should be completely disregarded.

Further, Texas courts cite the Restatement (Second) of Trusts more frequently than they cite the Restatement (Third) of Trusts.[36] Time will tell whether Texas courts will adopt the provisions of the Restatement (Third) of Trusts as often as they have the (Second) of Trusts.

2. Uniform Trust Code

Texas has not adopted the Uniform Trust Code; in fact, the legislative history indicates certain provisions of the Texas Property Code were enacted to expressly disavow attempts to apply certain provisions.[37] Nevertheless, the Uniform Trust Code provides some guidance when drafting, construing, and administering trusts. Approved in 2000 by the National Conference of

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33. *See* PROP. § 111.0035(a).

34. *See* TEX. PROP. CODE ANN. § 111.005 (West 2007) ("If the law codified in this subtitle repealed a statute that abrogated or restated a common law rule, that common law rule is reestablished, except as the contents of the rule are changed by this subtitle.").

35. *See generally* RESTATEMENT (SECOND) OF TRUSTS (1959); RESTATEMENT (THIRD) OF TRUSTS (2003).

36. *See* Longoria v. Lasater, 292 S.W.3d 156, 167 (Tex. App.—San Antonio 2009, pet. denied); Alpert v. Riley, 274 S.W.3d 277, 291 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *In re* Townley Bypass Unified Credit Trust, 252 S.W.3d 715, 719 (Tex. App.—Texarkana 2008, pet. denied); Keisling v. Landrum, 218 S.W.3d 737, 742 (Tex. App.—Fort Worth 2007, pet. denied); Moon v. Lesikar, 230 S.W.3d 800, 805 (Tex. App.—Houston [14th Dist.] 2007, no pet.); Marsh v. Frost Nat'l Bank, 129 S.W.2d 174, 177–78 (Tex. App.—Corpus Christi 2004, pet. denied); Bergman v. Bergman Davison Webster Charitable Trust, No. 07-02-0460-CV, 2004 WL 24968, at *2 (Tex. App.—Amarillo Jan. 2, 2004, no pet.).

37. *See* Kara Blanco, *The Best of Both Worlds: Incorporating Provisions of the Uniform Trust Code into Texas Law*, 38 TEX. TECH L. REV. 1105, 1106 (Summer 2006).

Commissioners on Uniform State Laws, the Uniform Trust Code is the first codification of trust law.

The Uniform Trust Code has been adopted by the District of Columbia and approximately twenty-two states: Alabama, Arizona, Arkansas, Florida, Kansas, Maine, Missouri, Michigan, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, and Wyoming.[38] In 2012, Maryland, Massachusetts, and New Jersey introduced bills seeking its adoption.[39]

3. Treatises

Treatises such as Scott on Trusts and The Law of Trusts and Trustees also provide guidance in this area.[40]

B. Personal Representatives

The powers of a personal representative of a decedent's estate are based on the governing authority. To the extent a personal representative (generally, an executor) is appointed pursuant to the term of a will, the personal representative is

> vested with unbridled authority over the estate and is authorized to do any act respecting it which the court could authorize to be done if the entire estate were under its control; or whatever testator himself could have done in his lifetime, except as restrained by the terms of the will itself.[41]

To the extent a personal representative is appointed in a dependent capacity, the personal representative is generally limited to those powers set forth in the Texas Probate Code.[42]

The duties of a personal representative are set forth in the Texas Probate Code.[43] Additionally, common law governs a personal representative's rights, powers, and duties to the extent it does not conflict with statutory law.[44] And testators may limit some—but not all—of a personal representative's duties under the terms of their will.

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38. *See id.*

39. *See id.*

40. WILLIAM F. FRATCHER, SCOTT ON TRUSTS (4th ed. 1988); GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES (6th ed. 2006).

41. Marlin v. Kelly, 678 S.W.2d 582, 588 (Tex. App.—Houston [14th Dist.] 1984, writ granted) (*citing* Hutcherson v. Hutcherson, 135 S.W.2d 757, 758 (Tex. Civ. App.—Galveston 1939, writ ref'd)). *See also* TEX. PROB. CODE ANN. § 332 (West 2003).

42. *See* TEX. PROB. CODE ANN. §§ 1–904 (West 2003 & Supp. 2012).

43. *See id.*

44. *See* PROB. § 32.

C. Guardians

The duties of guardians are primarily set by statute.[45] For decades, the statutes that regulated decedents' estates also governed guardianships.[46] These sections did not address the specific needs of individuals subject to a guardianship or allow the courts and guardians the flexibility to custom-tailor a guardianship to the particular needs and limitations of each ward. In 1993, the Texas Legislature completely revamped the Texas Probate Code.[47] This resulted in the removal of the guardianship statutes from their inclusion in decedents' estates and other probate statutes and the enactment of Chapter XIII of the Texas Probate Code, entitled "Guardianships."[48]

If knowledge of the plethora of guardianship sections is not enough, the laws and rules governing estates of decedents still apply to and govern guardianships.[49] Thus, a guardian and his advisors cannot ignore the first approximately four hundred sections of the Texas Probate Code.

Additionally, common law governs the powers and duties of a guardian to the extent they are applicable and not inconsistent with the provisions of the Texas Probate Code.[50]

D. Agents

Chapter XII of the Probate Code governs the execution and construction of a durable power of attorney.[51] Section 490 provides a form known as a "statutory" durable power of attorney.[52] A power of attorney, however, is not required to conform or even substantially conform to the statutory forms to be valid in Texas.[53]

IV. FUNDAMENTAL FIDUCIARY DUTIES

A. Overview

Just as no single correct definition of what constitutes a fiduciary relationship exists, there are no fixed rules defining the duties of a fiduciary, and the duties may overlap considerably. Justice Cardozo may have best

45. *See* PROB. § 602.

46. Frank N. Ikard, *Texas Probate Jurisdiction*, TEX. PROB. (Oct. 20, 2012), http://texasprobate.net/articles/jurisd.htm.

47. *See* PROB. §§ 1–904.

48. *See id.*

49. *See* PROB. § 603.

50. *See* PROB. § 32 ("The rights, powers and duties of executors and administrators shall be governed by the principles of the common law, when the same do not conflict with the provisions of the statutes of this State.").

51. *See* PROB. §§ 481–506.

52. *See* PROB. § 490.

53. *Id.*

summarized what is expected of a fiduciary in the case of *Meinhard v. Salmon*, in which he stated the following:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A [fiduciary] is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions . . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.[54]

In addition, for certain types of fiduciaries (such as trustees), the duties may be defined by the trust instrument or statutes that alter or negate certain fiduciary duties that would otherwise be imposed by Texas common law.[55]

The duties of a fiduciary may be roughly categorized under four main headings: the duty of loyalty, the duty to make full disclosure, the duty of competence, and the duty to reasonably exercise discretion.

It is important to recognize that while different types of fiduciaries have similar duties, they are not all subject to the same duties.[56] For example, the duties of a trustee will differ from those of an executor as it relates to investment returns.[57]

B. Duty of Loyalty

The duty of loyalty is fundamental to a fiduciary relationship.[58] It requires trustees to place the interests of a beneficiary above their own, and it prohibits fiduciaries from using the advantage of their position to gain any benefit for themselves at the expense of any beneficiary.[59] This duty is strictly applied.[60] Thus, if a fiduciary accepts a significant gift from a beneficiary, or takes advantage of an opportunity that presents itself as a direct result of a fiduciary

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54. Meinard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). *See also* Langford v. Shamburger, 417 S.W.2d 438, 443–44 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.).

55. *See generally* TEX. PROP. CODE ANN. §§ 113.051–.058 (West 2011).

56. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 6, Reporter's Notes (1959).

57. *See* RESTATEMENT (SECOND) OF TRUSTS § 6 cmt. a–b (1959) ("Although an executor, unlike a trustee, is not ordinarily under a duty to make investments, he may under some circumstances have a power or a duty to invest."). *See also* Humane Soc'y of Austin v. Austin Nat'l Bank, 531 S.W.2d 574, 577 (Tex. 1975) ("A dependent executor of an estate has no such power absent an authorization from the probate court or an express grant of authority from testator.").

58. Slay v. Burnett Trust, 187 S.W.2d 377, 387 (Tex. 1945).

59. *Id.*

60. *See id.*

relationship, it may lead to a presumption of unfairness and be resolved in the imposition of a harsh liability standard against the fiduciary.[61]

The most common breach of the duty of loyalty involves a claim of a self-dealing fiduciary. This generally refers to any conduct by the fiduciary that takes advantage of the fiduciary's position to benefit the fiduciary in some way.[62]

Although some forms of self-dealing are allowed, Texas law places limits on these waivers.[63] For example, an independent executor cannot be exonerated from self-dealing as a sale unless the will "expressly authorizes the sale" or if a decedent entered into a binding written buy-sell agreement before the decedent's death.[64]

C. Duty of Full Disclosure

A fiduciary has much more than the traditional obligation not to make any material misrepresentations. Fiduciaries have an affirmative duty to make a full and accurate confession of their fiduciary activities, transactions, profits, and mistakes even when—and especially if—it hurts.[65]

The breach of the duty of full disclosure by a fiduciary has been argued to be tantamount to fraudulent concealment.[66] The beneficiary is not required to prove the elements of fraud or even that he "relied" on the fiduciary to disclose the information.[67] The fiduciary duty of full disclosure operates before and after litigation and has been filed along with any obligations of disclosure imposed by the "rules of discovery."[68]

Even though a trustee may not have technically violated any other fiduciary duty, the failure to disclose his activities may nonetheless result in liability.[69] For example, the court in *InterFirst Bank Dallas, N.A. v. Risser* implied that the trustee violated its common law duty of full disclosure by failing to notify the beneficiaries of the sale of a major trust asset.[70] And "while Texas law does not require the consent of beneficiaries before selling trust

61. *See* Texas Bank & Trust Co. v. Moore, 595 S.W.2d 502, 507 (Tex. 1980); *Slay*, 187 S.W.2d at 387.

62. BLACK'S LAW DICTIONARY 1481 (9th ed. 2009).

63. *See* TEX. PROP. CODE ANN. § 114.007 (West 2011).

64. TEX. PROB. CODE ANN. § 352(b)–(c) (West 2011).

65. *See* Montgomery v. Kennedy, 669 S.W.2d 309, 313 (Tex. 1984); Kinzbach Tool Co. v. Corbett-Wallace Corn, 160 S.W.2d 509, 514 (Tex. 1942); City of Fort Worth v. Pippen, 439 S.W.2d 660, 665 (Tex. 1969).

66. *See* Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988).

67. Johnson v. Peckham, 120 S.W.2d 786, 787–88 (Tex. 1938); Miller v. Miller, 700 S.W.2d 941, 947 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). *See* Archer v. Griffith, 390 S.W.2d 735, 738–40 (Tex. 1964), Langford v. Shamburger, 417 S.W.2d 438, 442–43 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.).

68. *See* Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996); *Montgomery*, 669 S.W.2d at 313–14.

69. *See* Grey v. First Nat'l Bank in Dallas, 393 F.2d 371, 381 (5th Cir. 1968).

70. InterFirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 891–92 (Tex. App.—Texarkana 1987, no writ). *But cf.* Tex. Commerce Bank, N.A. v. Grizzle, 96 S.W.3d 240, 254–55 (Tex. 2002) (holding that a trust beneficiary could not recover in fraud based on a trustee's letter to a beneficiary informing her of its merger with former trustee, even if she was not informed of the consequences that flowed from the merger).

assets, the fact that the property is in a trust does not require that the beneficiaries are to be kept in ignorance of the administration of the trust."[71]

Omissions or misstatements in accountings violate the duty of disclosure, and even previously filed and court approved accountings may be re-examined upon a final accounting.[72] Trustee or personal representatives will be held liable if they knowingly disclose false information or knowingly fail to disclose harmful information regarding their dealings with trust or estate assets.[73] Even the existence of litigation between the beneficiaries and the trustee does not alter the trustee's duty to disclose material facts.[74]

D. Duty of Competency

The duty of competence is not defined by statute but presumes that the fiduciary acts in accordance with the governing instrument and all applicable laws, such as the Texas Property Code and the Texas Probate Code.[75] For example, a trustee must invest in and manage the trust in compliance with the prudent investor rule.[76] Additionally, personal representatives must act prudently in caring for their own property.[77]

The duty of competence implicitly requires that fiduciaries take affirmative actions to properly carry out their duties. Furthermore, it presumes that fiduciaries will not delegate their fiduciary duties except as allowed by the instrument or law.[78]

E. Duty to Reasonably Exercise Discretion

Further, fiduciaries have a duty to reasonably exercise their own discretions.[79] This is most applicable to trustees and includes a trustee making informed decisions based primarily on the terms of the trust, carrying out the settlor's intent as set forth in the terms of the trust instrument.[80] Unless the

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71. *Risser*, 739 S.W.2d at 906 n.28. *See also Grey*, 393 F.2d at 381 (stating that the bank failed to make full disclosure regarding its own interests in dealing with property it held as trustee).

72. *See* Portanova v. Hutchison, 766 S.W.2d 856, 858 (Tex. App.—Houston [1st Dist.] 1989, no writ) (citing Thomas v. Hawpe, 80 S.W. 129, 130 (Tex. Civ. App.—Dallas 1904, writ ref'd); *In re* Higganbotham's Estate, 192 S.W.2d 285, 289 (Tex. Civ. App.—Tyler 1946, no writ)).

73. *Cf. Montgomery*, 669 S.W.2d at 313 (Tex. 1984) (holding that trustees and executors who withheld information from beneficiary to induce her to enter into agreed judgment committed "extrinsic" fraud justifying bill of review).

74. *See* Huie v. DeShazo, 922 S.W.2d 920, 923–25 (Tex. 1996).

75. *See* TEX. PROP. CODE ANN. § 117.003 (West 2007); TEX. PROB. CODE ANN. § 230 (West 2003).

76. PROP. § 117.003.

77. PROB. § 230.

78. *See* discussion *supra* Part IV.A.

79. *See* Sassen v. Tanglegrove Townhouse Condo. Ass'n, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied).

80. GERRY W. BEYER, TEXAS TRUST LAW: CASES & MATERIALS 123 (AuthorHouse, 2d ed. 2009).

agreement is ambiguous, the terms and provisions of the instrument must solely determine the settlor's intent.[81]

Generally no statutory guidelines exist regarding how discretion must be exercised or what constitutes the reasonable exercise of discretion.[82] Although some statutes—such as the Texas Property Code—provide some safe harbor rules, the reasonable exercise of discretion is often open for dispute.[83]

F. Defining Standards of Conduct

Liability or exoneration from liability is often based on standards of conduct.[84] Some examples of these standards include good faith, bad faith, and reckless indifference.[85] When drafting these provisions, familiarity with how courts construe such terms is important.

1. Bad Faith/Good Faith

Bad faith in a trustee relationship is properly defined as "acting knowingly or intentionally adverse to the interest of the trust beneficiaries" and with an "improper motive."[86] Improper motive is an essential element of bad faith.[87]

2. Good Faith

Texas recognizes a standard of good faith that combines subjective and objective tests.[88] Fiduciaries act in good faith when they (1) subjectively believe their defense is viable, and (2) the defense is reasonable in light of existing law.[89] The newly enacted Pattern Jury Charges for Express Trusts defines good faith as "an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct."[90]

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81. *Id.*

82. *See* Di Portanora v. Monroe, 229 S.W.3d 324, 330–31 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

83. *See id.*

84. *See* Texas Commerce Bank, N.A. v. Grizzle, 96 S.W.3d 240, 253 (Tex. 2002).

85. *See id.*

86. *See* Interfirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 897–98 (Tex. App.—Texarkana 1987, no writ) (disapproved of on other grounds by Texas Commerce Bank, N.A. v. Grizzle, 96 S.W.3d 240, 249 (Tex. 2002)). *See also* King v. Swanson, 291 S.W.2d 773, 775 (Tex. Civ. App.—Eastland 1956, no writ).

87. *See* Ford v. Aetna Ins. Co., 394 S.W.2d 693, 698 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.).

88. *See* Lee v. Lee, 47 S.W.2d 767, 795 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

89. *See id.*

90. STATE BAR COMM. ON PATTERN JURY CHARGES—FAMILY, TEXAS PATTERN JURY CHARGES—FAMILY & PROBATE § 253.11 (2012 ed.).

3. Gross Negligence

> Gross negligence means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected. An act or omission that is merely thoughtless, careless, or not inordinately risky cannot be grossly negligent. Only if the defendant's act or omission is unjustifiable and likely to cause serious harm can it be grossly negligent.[91]

Although gross negligence refers to a different character of conduct than ordinary negligence, a party's "conduct cannot be grossly negligent without being negligent."[92] Gross negligence involves proof of two elements:

> [(1)] [V]iewed objectively from the actor's standpoint, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others . . . 'Extreme risk' is not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff[; and (2)] the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others.[93]

Ordinary negligence rises to the level of gross negligence when it can be shown that the defendant was aware of the danger "but [his] acts or omissions demonstrated that [he] did not care to address it."[94]

G. Burden of Proof

It is important to recognize who would have the burden at trial if the action became the subject of a lawsuit involving a fiduciary's liability. The issue of who has the burden to prove or disprove a claim depends on the type of duty or breach alleged.[95]

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91. Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 20–22 (Tex. 1994) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (West Supp. 1994)).

92. Trevino v. Lightning Laydown, Inc., 782 S.W.2d 946, 949 (Tex. App.—Austin 1990, writ denied).

93. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(11) (West 1997 & Supp. 2012); Louisiana-Pacific Corp. v. Andrade, 19 S.W.3d 245, 246–47 (Tex. 1999); Mobil Oil Corp. v. Ellender, 968 S.W.2d 917, 921 (Tex. 1998) (citing *Moriel*, 879 S.W.2d at 22 (Tex. 1994)).

94. *See* CIV. PRAC. & REM. § 41.001(11); *Andrade*, 19 S.W.3d at 246–47; *Ellender*, 968 S.W.2d at 921 (citing *Moriel*, 879 S.W.2d at 23).

95. *See* Lundry v. Mason, 260 S.W.3d 482, 505 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) ("Texas courts apply a rebuttable presumption of unfairness to transactions between a fiduciary and a party to whom he owes a duty of disclosure.").

1. Burden on Complainant

The complainant has the burden to prove a fiduciary breached the following duties: existence of a fiduciary relationship,[96] fiduciary not acting competently,[97] fraud,[98] breach of contract,[99] conversion,[100] tortious interference with trust administration,[101] removal of trustee by petition,[102] and conspiracy.[103]

2. Burden on Fiduciary

Fiduciaries have the burden to prove they did not breach the following duties: self-dealing and presumption of unfairness;[104] tracing commingled funds;[105] gifts from beneficiary to fiduciary;[106] conflict of interest;[107] usurpation of trust opportunity;[108] purchase loans, contracts, and business transactions of fiduciary in relation to trust or beneficiary;[109] and failure to keep records, exercise discretion, or obtain information.[110] Texas recently adopted new pattern jury charges for trusts and estates.[111]

3. Open Issues

The government has created regulations and rules that impose duties and obligations for national bank trustees.[112] However, the manner in which certain issues will be submitted to a jury and the corresponding burdens of proof and persuasion remain open issues.[113] With self-dealing allegations, the burden is on the fiduciary to rebut the presumption that the transaction was unfair.[114]

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

97. Jewitt v. Capital Nat'l Bank of Austin, 618 S.W.2d 109, 112 (Tex. App.—Waco 1981, writ ref'd n.r.e.).

98. Archer v. Griffith, 390 S.W.2d 735, 740 (Tex. 1965).

99. Omohundro v. Matthews, 341 S.W.2d 401, 417 (Tex. 1960).

100. Avila v. Havana Painting Co., 761 S.W.2d 398, 399–400 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

101. TEX. PROP. CODE ANN. § 114.031(a)(1) (West 2007).

102. TEX. PROP. CODE ANN. § 113.082 (West 2007).

103. Int'l Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 593 (Tex. 1963).

104. *See* Tex. Bank & Trust Co. v. Moore, 595 S.W.2d 502, 510 (Tex. 1980).

105. *See* Eaton v. Husted, 172 S.W.2d 493, 498 (Tex. 1943).

106. *See* Sorrell v. Elsey, 748 S.W.2d 584, 585 (Tex. App.—San Antonio 1988, writ denied).

107. *See* Stephens Cnty. Museum, Inc. v. Swenson, 517 S.W.2d 257, 260 (Tex. 1975).

108. Huffington v. Upchurch, 532 S.W.2d 576, 578 (Tex. 1976).

109. Lang v. Lee, 777 S.W.2d 158, 161–62 (Tex. App.—Dallas, 1989, no writ); Dominguez v. Brackey Enters., Inc., 756 S.W.2d 788, 792 (Tex. App.—El Paso 1988, writ denied); InterFirst Bank Dallas v. Risser, 739 S.W.2d 882, 891 (Tex. App.—Texarkana 1987, no writ).

110. Corpus Christi Bank & Trust v. Roberts, 597 S.W.2d 752, 753 (Tex. 1980); Jewitt v. Capital Nat'l Bank of Austin, 618 S.W.2d 109, 112 (Tex. Civ. App.—Waco 1991, writ ref'd n.r.e.).

111. Joan F. Jenkins, *Pattern Jury Charges—Family & Probate*, TEX. B.J. (July 2012), www.texasbar.com/AM/Template.cfm?section=Texas_Bar_Journal&Template=1CM/contentdisplay.cfm&contentID=18925.

112. *See* Fiduciary Activities of Nat'l Banks, 12 C.F.R. § 9 (2010).

113. Texas Bank & Trust Co. v. Moore, 595 S.W.2d 502, 512 (Tex. 1980)

114. *See* Stephens Cnty. Museum, Inc. v. Swenson, 517 S.W.2d 257, 261 (Tex. 1974).

Case law indicates the presumption is "rebuttable."[115] The question is, if the unfairness presumption is rebutted, does the burden shift to the plaintiff to submit a finding as to whether a specific fiduciary duty was breached? If so, does the fairness issue disappear or become part of an instruction?[116]

If a transaction is fair, the fiduciary will want the jury question phrased in terms of whether the fiduciary "fulfilled" the duty, not in terms of whether the fiduciary "breached" the duty. Is this the correct placement of the burden? Case law varies on both the burden and whether it is submitted as a "breach" or whether fiduciaries "fulfilled" and "complied" with their duties.[117]

H. Limits on Exculpation or Indemnity Provisions

Texas Property Code section 114.007 provides that a settlor may exculpate a trustee from liability other than for "(1) a breach of trust committed: (A) in bad faith; (B) intentionally; or (C) with reckless indifference to the interest of a beneficiary; or (2) any profit derived by the trustee from a breach of trust."[118]

Additionally, some settlors provide that an uncompensated trustee—either by choice or by instrument—shall be entitled to a higher level of exoneration than a compensated trustee.

V. FUNDAMENTALS OF INTERPRETING DOCUMENTS

A. The "General Rule"

The Texas Property Code empowers the trustee of an express trust to perform various acts on behalf of the trust.[119] A trustee is generally vested with a wide measure of discretion in prudent operation of the trust.[120] And "[i]t is fundamental that a trustee has a duty to obey [distribution] instructions, unless it is impossible or illegal for him to do so, or unless he is excused by the court."[121]

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115. *See id.*

116. *See* Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1965).

117. *See* Townes v. Townes, 867 S.W.2d 414, 417 (Tex. App.—Houston [14th Dist.] 1994, writ denied); Sorrell v. Elsey, 748 S.W.2d 584, 586 (Tex. App.—San Antonio 1988, writ denied); Johnson v. J. Hiram Moore, Ltd., 763 S.W.2d 496, 499 (Tex. App.—Austin 1988, writ denied); Cole v. Plummer, 559 S.W.2d 87, 89–90 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).

118. TEX. PROP. CODE ANN. § 114.007 (West 2007).

119. *See* TEX. PROP. CODE ANN. §§ 113.001–.002 (West 2007 & Supp. 2012).

120. *See* Barrientos v. Nava, 94 S.W.3d 270, 288 (Tex. App.—Houston [14th Dist.] 2002, no writ).

121. Doherty v. JPMorgan Chase Bank, No. 01-08-00682-CV, 2010 WL 1053053, at *7 (Tex. App.—Houston [1st Dist.] Mar. 11, 2010) (unpublished opinion) (citing G. BOGERT, THE LAW OF TRUSTS & TRUSTEES § 811 (2d ed.1979)).

B. Importance of Settlor's Intent

The primary focus of interpreting the provisions of the trust is the intent of the settlor.[122] Courts generally interpret a trust agreement like a contract.[123] A court should first determine the intention of the settlor from the language used within the four corners of the document.[124] In doing so, courts "construe the [trust] instrument to give effect to all provisions so that no provision is rendered meaningless."[125]

C. How Ambiguity Affects Construction

When the language of the trust instrument is unambiguous and expresses the intentions of the settlor, the instrument confers the trustee's powers "and neither the court nor the trustee can add or take away such power[s]. The trust is entitled to that construction which the [settlor] intended."[126] In such circumstances, outside evidence should not be considered.[127]

What if the language is unclear? When the intent of the settlor is not clear from the language of the instrument, the trustee should consider the value of the corpus of the trust, the relations between the settlor and the beneficiaries, and all circumstances regarding the trust and beneficiaries at the time the trust was executed.[128]

D. Commonly Used Terms

1. Shall Versus May

Most practitioners understand the terms "shall" and "may" to have the following meanings: shall is mandatory, and may is discretionary.[129]

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122. *See* State v. Rubion, 308 S.W.2d 4, 8 (Tex. 1957).

123. *See* Goldin v. Bartholow, 166 F.3d 710, 715 (5th Cir. 1999).

124. *See* Hurley v. Moody Nat'l Bank of Galveston, 98 S.W.3d 307, 310 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (citing Rekdahl v. Long, 417 S.W. 2d 387, 389 (Tex. 1967)); Myrick v. Moody, 802 S.W.2d 735, 738 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

125. *Myrick*, 802 S.W.2d at 738. *See Hurley*, 98 S.W.3d at 310.

126. *See* Beaty v. Bales, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

127. *See id.*

128. First Nat'l Bank of Beaumont v. Howard, 229 S.W.2d 781, 783 (Tex. 1950) (citing McCreary v. Robinson, 59 S.W. 536, 537 (Tex. 1900)).

129. *See* TEX. GOV'T CODE ANN. § 311.016 (West 2005) ("The following constructions apply unless the context in which the word or phrase appears necessarily requires a different construction or unless a different construction is expressly provided by statute: (1) 'May' creates discretionary authority or grants permission or a power. (2) 'Shall' imposes a duty."); TEX. GOV'T CODE ANN. § 312.002 (West 2005). *But see* Penix v. First Nat'l Bank of Paris, 260 S.W.2d 63, 64–66 (Tex. Civ. App.—Texarkana 1953, writ ref'd) (noting that the trustee was within his discretion to withhold a portion of income generated by the trust despite language of the trust that stated "[income] *shall* be used for . . . support, maintenance and schooling.") (emphasis added).

2. Absolute or Uncontrolled Discretion

Case law provides that the terms "absolute discretion" and "uncontrolled discretion" are not to be interpreted literally.[130] A trustee's discretion "is [always] subject to judicial review and control."[131] A trustee is required to act honestly and in a manner contemplated by the settlor.[132] The inclusion of these terms are often intended to provide support for the trustee and thus attempt to discourage remaindermen from second-guessing the trustee's decisions.

3. Sole, Final, or Conclusive Discretion

Likewise, terms such as sole, final, or conclusive do not vest unlimited discretion in a trustee.[133] Thus, even when a "trustee's discretion is declared to be final and conclusive, the courts will interfere if [the trustee] acts outside the bounds of a reasonable judgment."[134]

E. Modifying and Clarifying the Terms

1. Modifying Without Court Intervention

To reduce uncertainty in administering a trust and clarify matters that could not have been foreseen, the trustor has the option to modify the terms of the trust.[135] Texas Property Code section 112.051 specifically addresses revocation, modification, or amendment by a settlor and provides as follows:

> (a) A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it.
> (b) The settlor may modify or amend a trust that is revocable, but the settlor may not enlarge the duties of the trustee with the trustee's express consent.
> (c) If the trust was created by a written instrument, a revocation, modification, or amendment of the trust must be in writing.[136]

If the trust agreement provides specific requirements to modify the terms, care should be taken to assure the requirements are met.

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130. *See, e.g.*, State v. Dyer, 200 S.W.2d 813, 815 (Tex. 1947).
131. State v. Rubion, 308 S.W.2d 4, 9 (Tex. 1957).
132. *See* discussion *supra* Part III.A.
133. *See First Nat'l Bank of Beaumont*, 229 S.W.2d at 783.
134. *Id. But see* Story v. Story, 176 S.W.2d 925, 927–28 (Tex. 1944); Ballenger v. Ballenger, 668 S.W.2d 467, 469 (Tex. App.—Corpus Christi 1984, writ dism'd) ("[The] trial court erred . . . in granting a temporary injunction" to restrict the trustees from exercising their "sole discretion" authority by substituting judgment of the trial court for that of named trustees.).
135. *See* TEX. PROP. CODE ANN. § 112.051 (West 2007).
136. *Id.*

2. Modifying with Court Intervention

Texas Property Code section 112.054 provides for a judicial option to modify or terminate a trust when it cannot be accomplished under section 112.051; specifically, section 112.054 states the following:

> (a) On the petition of a trustee or a beneficiary, a court may order that the trustee be changed, that the terms of the trust be modified, that the trustee be directed or permitted to do acts that are not authorized or that are forbidden by the terms of the trust, that the trustee be prohibited from performing acts required by the terms of the trust, or that the trust be terminated in whole or in part, if:
>
> (1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill;
>
> (2) because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust;
>
> (3) modification of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or avoid impairment of the trust's administration;
>
> (4) the order is necessary or appropriate to achieve the settlor's tax objectives and is not contrary to the settlor's intentions; or
>
> (5) subject to Subsection (d):
>
> (A) continuance of the trust is not necessary to achieve any material purpose of the trust; or
>
> (B) the order is not inconsistent with a material purpose of the trust.
>
> (b) The court shall exercise its discretion to order a modification or termination under Subsection (a) in the manner that conforms as nearly as possible to the probable intention of the settlor. The court shall consider spendthrift provisions as a factor in making its decision whether to modify or terminate, but the court is not precluded from exercising its discretion to modify or terminate solely because the trust is a spendthrift trust.
>
> (c) The court may direct that an order described by Subsection (a)(4) has retroactive effect.
>
> (d) The court may not take the action permitted by Subsection (a)(5) unless all beneficiaries of the trust have consented to the order or are deemed to have consented to the order. A minor, incapacitated, unborn, or unascertained beneficiary is deemed to have consented if a person representing the beneficiary's interest under Section 115.013(c) has consented or if a guardian ad litem appointed to represent the beneficiary's interest under Section 115.014 consents on the beneficiary's behalf.[137]

137. TEX. PROP. CODE ANN. § 112.054 (West 2007 & Supp. 2012) (emphasis added).

VI. INITIAL CONSIDERATIONS

A. Overview

Every appointed fiduciary should first consider whether to accept the job. Fiduciaries must initially decide whether they have the knowledge and skills to carry out the required duties and whether they have the time to attend to them. If so, fiduciaries should identify the people they owe duties and responsibilities to and determine whether these individuals are reasonable to work with. The instrument should clearly define those involved, either by individual or by class. If these people appear to have litigious tendencies, the fiduciary should strongly consider declining because—as they say—no good deed goes unpunished.

Furthermore, the fiduciary should carefully review the governing instrument to determine both guidance and reasonable exoneration and protection from unwarranted claims. Fiduciaries should be cognizant that some provisions may adversely affect the ability to carry out their duties. For example, certain beneficiaries may be granted the power to remove a trustee, which can be used as a retaliatory tool when a beneficiary's request for discretionary distribution is denied. Likewise, if the instrument is drafted in a manner that will hamper a fiduciary from fulfilling the role—for example, imposing unrealistic goals or objectives—the fiduciary should consider declining to serve. Finally, fiduciaries may be appointed to various roles that could create conflicting responsibilities, duties, or powers. Thus, fiduciaries should consider whether they should decline to act in certain capacities to avoid future claims and conflicts. A brief discussion of some of the more common red flags follows.

B. Successor Appointments

Because history has a tendency to repeat itself, fiduciaries should consider how many prior trustees there are, as well as when and why they are no longer serving. Specifically, a fiduciary should consider who has removal rights, what are the standards for removal, and how often these rights can be used. Additionally, a fiduciary should take into account whether a co-trustee who is also a beneficiary holds a removal right. Finally, a fiduciary should evaluate the prior administration of the trust; specifically, the fiduciary should determine whether the prior administration ran smoothly or whether the prior trustee, beneficiaries, or both have been involved in litigation.

C. Risk of Pre-Commitments

Some beneficiaries seek upfront commitments from proposed trustees regarding discretionary distribution and other judgments. Committing to

certain matters, such as substantial future distributions, may bring liability. It is reasonable to discuss and even commit to certain approaches consistent with the instrument and Texas law. It may also be reasonable to provide a beneficiary an estimate of the distributions for the following year or foreseeable period of time if the proposed trustee has received sufficient information to do so. A settlor should avoid commitments that restrict a trustee's obligations to properly and impartially administer the trust or obligations that create unrealistic expectations.

D. Family "Dynamite"

Beneficiaries come in all shapes and sizes. Some have no idea what the terms of the trust are and rely on the trustee for wisdom and guidance. Others know that the squeaky wheel gets the grease. Others may be gladiators for their cause, such as continued ownership of a family business or ranch, which may or may not be in the best interest of the trust or all of the beneficiaries. Also, some beneficiaries have unrealistic expectations of their fiduciary's powers and abilities.

Further, every trustee must balance interests and when those interests detest each other, a new dimension is added. This often causes one side to accuse the trustee of partiality.

E. Roadmap for Successor Disaster

As discussed previously, with a few exceptions, the trust agreement sets the parameters for the fiduciary relationship.[138] Before fiduciaries accept appointments, they should review the trust agreement to determine if the distribution provisions are clear and if the settlor gives preference to a beneficiary or class of beneficiaries. If the agreement involves more than current beneficiaries, fiduciaries must decide if the priorities and the distribution provisions are workable. Additionally, fiduciaries must review the trust agreement to see if it provides for items such as reasonable limits on distributions, reasonable means to address beneficiaries with special needs, powers of appointment provisions, removal and resignation provisions, and indemnity and exoneration provisions. Next, it is important for fiduciaries to determine whether the trustee holds a power of sale and whether the co-trustees have any limitations or powers. Lastly, fiduciaries must consider whether the trust mandates that they hold certain assets or if the trust restricts sales of particular assets.

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138. *See* discussion *supra* Part VI.A.

F. No Direct Correlation Between Size and Complexity of Trusts

The size of the trust does not directly correlate to the complexity of its administration; rather, the contrary is often more accurate. The modest size of a trust may limit or even prevent all of its purposes from being accomplished. When this occurs, the trustee may be faced with selecting between the short and long term needs of current beneficiaries.

VII. WAYS TO REDUCE CONFLICT DURING ADMINISTRATION

A. Overview

Once a fiduciary accepts an appointment, the fiduciary relationship must be continuously monitored. Liability starts with acceptance of the appointment. Although it is difficult to predict the issues and claims that can arise, there are several basic actions that consistently reduce disappointment and the chances of a lawsuit.

B. Review Governing Documents

Estate planning documents such as wills, trusts, and powers of attorney typically set forth the duties, powers, and obligations of the fiduciary. Governing instruments provide the terms of the fiduciary's contract with the testator, settlor, or principal. By agreeing to serve, the fiduciary ostensibly agrees to follow and adhere to these terms. Thus, one of the first actions of a fiduciary should be to read the governing documents. These documents give direction and provide a roadmap, which enables the fiduciary to stay on course. If the terms or provisions are unclear, the fiduciary should consider filing a declaratory judgment action to seek judicial construction.

C. Understand Applicable Standard of Care

A trustee must invest and manage the trust in compliance with the prudent investor rule.[139] Personal representatives must act as a prudent person would in caring for their own property.[140] A guardian of the estate has the duty to act and manage the ward's estate as a prudent person would manage his or her own property, except as otherwise provided by the Texas Probate Code.[141] The Texas Probate Code sections dealing with powers of attorney do not specify a standard of care for an agent.[142] The statute does, however, set out specific rules of construction and general powers as they pertain to real estate; tangible

139. *See* TEX. PROP. CODE ANN. § 117.003 (West 2007).
140. *See* TEX. PROB. CODE ANN. § 230 (West 2003).
141. *See* TEX. PROB. CODE ANN. § 768 (West 2003).
142. *See* TEX. PROB. CODE ANN. § 491–504 (West 2003).

personal property; stocks and bonds; commodities and options; banks and other financial institutions; business operations; insurance, estates, trusts and other beneficiary transactions; claims and litigation; personal and family maintenance; governmental programs; military service; retirement plans; and tax matters.[143] In at least one other state, courts have described an agent as "a fiduciary who must observe the standards of care applicable to trustees."[144] Further, if the exercise of the power of attorney is improper, the agent is liable to interested persons for damage or loss resulting from the breach of fiduciary duty to the same extent as the trustee of an express trust.[145] It is possible that the definition set forth in the Florida statute will be adopted in Texas.

D. Balance Multiple Interests

Executors and trustees are often faced with the task of balancing various, divergent interests.[146] A fiduciary should be careful not to favor one interest over another unless expressly authorized by the governing instrument.[147] A classic example arises when a fiduciary considers investment decisions and returns on investments.[148] Sometimes an investment may generate a larger degree of return for the income beneficiary and a smaller return for the remaindermen.[149]

Trustees generally do not owe fiduciary duties to third parties or those that may indirectly benefit from the terms of the instrument, such as an individual to whom a beneficiary owes a duty of support.[150] Therefore, in exercising the fiduciary's discretion, the fiduciary's primary concern should be what is in the best interest of the beneficiaries of the instrument.[151]

E. Exercise Discretion

Paramount to the exercise of discretion is that trustees must actually act to "exercise" their discretion.[152] Fiduciaries who establish a process of

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143. *See id.*

144. Conseco Ins. Co. v. Clark, No. 8:06-CV-462-T-30EAJ, 2006 WL 2024401, at *3 (M.D. Fla. July 17, 2006) (unpublished opinion).

145. *See id.*

146. *See generally* TEX. PROP. CODE ANN. § 17.008 (West 2007).

147. *Id.* ("[T]he trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.").

148. TEX. PROP. CODE ANN. § 113.006 (West 2007).

149. *See, e.g.*, O'Malley v. Stratman, 83 S.W.2d 35, 37 (Tex. App.—El Paso 1992, no writ).

150. Elder v. Calvery Credit Corp., No. 14-96-00099-CV, 1997 WL 528990, at *3 (Tex. App.—Houston [14th Dist.] Aug. 18, 1997, no writ).

151. *See* PROP. § 117.008 ("[T]rustee shall invest and manage the trust assets solely in the interest of the beneficiaries.").

152. *See* Sassen v. Tanglegrove Townhouse Condo. Ass'n, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied) (explaining agent is required to exercise reasonable discretion). *See also* Doherty v. JPMorgan Chase Bank, No. 01-08-00682-CV, 2010 WL 1053053, at *7 (Tex. App.—Houston [1st Dist.] Mar. 11, 2010).

determining how they intend to exercise their discretion are less often subjected to challenge than fiduciaries with no process in place. Thus, trustees who can present a well-thought out and reasonable decision-making process for distributions are often victorious, even if their decisions could be questioned in hindsight.[153]

1. Gather Relevant Information

To properly exercise their discretion, fiduciaries cannot make decisions in a vacuum. The fiduciary will generally need to obtain information from the beneficiary to make a fully informed distribution decision.[154] Further, a beneficiary may require certain information from the fiduciary to properly assess whether to make a distribution request and to understand the manner in which the fiduciary decides to exercise discretion.[155]

a. Information from Beneficiary

Perhaps one of the more difficult issues is the information that a trustee needs from a beneficiary to justify a distribution.[156] Some trustees want to obtain extensive information from the beneficiary to paper their files.[157] But this can lead to feelings of ill-will and invasion of privacy towards the trustee.[158] Other trustees go to the opposite extreme and request no information.[159] This can lead to claims of breach of fiduciary duty against the trustee by the other beneficiaries who may eventually request that the trustee justify the prior distributions.[160]

In acting, the Restatement's position is that "[t]he trustee generally may rely on the beneficiary's representations and on readily available, minimally intrusive information requested of the beneficiary."[161] But when the trustee has reason to believe that the information is incomplete or inaccurate, the trustee should then request additional information.[162]

Relevant information may include the beneficiary's living and (under the general rule of construction) other resources that are reasonably available to the beneficiary for his support.[163] Trustees commonly request income and cash

153. *See* Penix v. First Nat'l Bank of Paris, 260 S.W.2d 63, 65 (Tex. Civ. App.—Texarkana 1953, writ ref'd); *see also* Coffee v. Rice, 408 S.W.2d 269, 282 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.) (stating that the trustee's decision appears to contradict the clear intent of the settlor).

154. RESTATEMENT (THIRD) OF TRUSTS § 77 cmt. b (2003).

155. *Id.* § 82(1).

156. *Id.* § 77 cmt. b.

157. *Id.* § 79 cmt. d.

158. *Id.* § 82 cmt. e.

159. *Id.* § 82 cmt. a.

160. *Id.* § 82(2).

161. *Id.* § 50 cmt. e(1).

162. *See id.*

163. *See id.*

flow information; financial statements; copies of all trust documents under which the beneficiary has a right to funds or a right to request a distribution; copies of tax returns; copies of all tuition and similar agreements relating to the beneficiary's education and maintenance; copies of receipts or invoices as to any amounts to be reimbursed; information regarding a beneficiary's employment status and efforts to obtain such employment; status of the beneficiary's housing, medical insurance, and any other information regarding the beneficiary's support that the trustees deem relevant; and notification of any significant changes in the beneficiary's housing, education, development, or medical needs.[164]

Although the preceding is not intended to be an exhaustive list or required in all situations, it provides a general list of information that a trustee may periodically request to consider distribution requests and carry out the terms of the trust.[165]

b. Information from Trustee

Information regarding distributions is a two-way street. Just as a trustee may seek information to support a distribution, a beneficiary is entitled to request a distribution or to justify a trustee's decisions whether to make a distribution.[166] The Restatement of Trusts provides that among a trustee's fiduciary duties is the general duty to act reasonably informed with impartiality among the various beneficiaries and interests and the duty to provide the beneficiaries with "information concerning the trust and its administration."[167] The Restatement concludes, "[t]his combination of duties entitles the beneficiaries (and also the court) not only to accounting information but also to relevant, general information concerning the bases upon which the trustee's discretionary judgments have been or will be made."[168]

2. Understand Applicable Distribution Standards

Any trustee should understand the applicable distribution standard or standards of the trust. They may range from a mandatory distribution standard, which does not require the exercise of a trustee's discretion, to discretionary distribution standards, which are either ascertainable or unascertainable.

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164. *See id.*
165. *See id.*
166. *See id.* § 82(1).
167. *See id.* §§ 79(1), 82(2).
168. *See id.* § 50 cmt. b (stating general observations on relevant factors in the interpretation of discretionary powers).

F. Comply with Applicable Statutory Guidelines

1. Texas's Uniform Principal and Income Act

Effective January 1, 2004, Texas enacted the Uniform Principal and Income Act.[169] It applies to both existing trusts and trusts established after January 1, 2004.[170] Do not be deceived by its title. Like the new Uniform Prudent Investor Act, some provisions mirror the Uniform Acts, whereas other provisions are tailored to Texas.[171] Trustees and their advisors should be familiar with these requirements.

In short, the Texas Principal and Income Act imposes extensive rules.[172] And while clear directions in the trust agreement may override these new provisions, preemption will be difficult to establish with regard to trusts drafted prior to its enactment.[173] For example, the new adjustment provisions provide that trust provisions relating to adjustments of principal and income do not affect the new adjustment powers unless the terms "are intended to deny the trustee the power of adjustment conferred by Subsection (a)."[174]

The ability to make adjustments to principal and income rules is included in the new provisions. Specifically, Texas Property Code section 116.005 permits the trustee to make adjustments between principal and income when the following requirements are met:

> [T]he trustee considers the adjustment necessary; the trustee invests and manages trust assets as a prudent investor; the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income; and the trustee determines, after applying the rules in Section 116.004(a) [relating to a trustee's fiduciary duties], that the trustee is unable to comply with Section 116.004(b) [i.e., impartiality except as modified by trust].[175]

In determining whether and to what extent to exercise the adjustment power, a trustee is required to consider all factors relevant to the trust and its beneficiaries, including the following statutory factors to the extent they are applicable:

> The nature, purpose, and expected duration of the trust; the intent of the settlor; the identity and circumstances of the beneficiaries; the needs for liquidity, regularity of income, and preservation and appreciation of capital;

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169. *See* TEX. PROP. CODE ANN. §§ 116.001–.206 (West 2007).
170. *See* PROP. § 116.001
171. *See generally* PROP. §§ 116.001–.206.
172. *See id.*
173. *See id.*
174. PROP. § 116.005.
175. *Id.*

> the assets held in the trust . . . ; the net amount allocated to income under the other sections of [the new Principal and Income Act] and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available; whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income; the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and the anticipated tax consequences of an adjustment.[176]

The Act also provides limitations on the power to adjust.[177] These limitations are generally imposed to prevent the loss of certain tax opportunities.[178] Specifically, a trustee may not make an adjustment that does the following:

> [R]educes the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion; changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets; [relates to an] amount that is permanently set aside for charitable purposes under a will or the terms of a trust, unless both income and principal are so set aside; [will cause] an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment; and [will] cause all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment.[179]

Finally, fiduciaries and their advisors should be familiar with Texas Property Code sections 116.151 through 116.206, which address the receipt and distribution of a number of specific assets and distributions.[180] These provisions should be reviewed carefully to confirm understanding of these new default provisions. A brief summary of the more common receipts is included in the following discussion. Section 116.151 addresses receipts from business entities.[181] Because the new provisions characterize some receipts as income and others as principal, trustees should exercise care when they receive money

176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. TEX. PROP. CODE ANN. § 116.151–.206 (West 2007).
181. PROP. § 116.151.

or cash from an entity.[182] Money is allocated to income unless it is related to a partial or total liquidation or it meets certain capital gain requirements.[183] Other receipts are generally allocated to principal.[184] Section 116.152 addresses receipts from a different type of estate or trust.[185] It provides that "a distribution of income from a trust or an estate in which the trust has an interest, other than a purchased interest, shall allocate to income an amount received as a distribution of principal from such a trust or estate."[186] Section 116.162 provides for the allocation of receipts from rental property.[187] Generally, it provides that rents related to real or personal property and "amount received for cancellation or renewal of a lease are allocated to income."[188] "An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods are allocated as principal."[189] Section 116.163 provides for the allocation of receipts from debt or similar obligations.[190] It provides the following: "An amount received as interest, whether determined at a fixed, variable, or floating rate including an amount received as consideration for prepaying principal[,] must be allocated to income without any provision for amortization of premium."[191]

Distributions allocated to principal include those regarding obligations held for more than one year, "an amount received from the sale, redemption, or other disposition of [a debt] obligation, including an obligation whose purchase price or value when it is acquired is less than its value at maturity," and those regarding obligations held for less than one year, an amount equal to the purchase price or original debt obligation.[192] Section 116.172 provides that distributions of up to 4% of the value of the plan or IRA in any one year are income and any excess is principal.[193] Section 116.174 provides that a trustee is required to allocate these receipts "equitably," and allocating in accordance with the available federal tax depletion deduction is presumed to be equitable—provided, however, an exception exists for existing trusts.[194] Trustees of existing trusts may continue to apply the old allocation rules of 72-½% of royalties being allocated to income and the remaining 27-½% to principal.[195]

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182. *See generally id.*
183. *See id.*
184. *See id.*
185. PROP. § 116.152.
186. *Id.*
187. TEX. PROP. CODE ANN. § 116.162 (West 2007).
188. *Id.*
189. *Id.*
190. TEX. PROP. CODE ANN. § 116.163 (West 2007).
191. *Id.*
192. *Id.*
193. TEX. PROP. CODE ANN. § 116.172 (West 2007).
194. TEX. PROP. CODE ANN. § 116.174 (West 2007).
195. GERRY W. BEYER, TEXAS TRUST LAW CASES AND MATERIALS 145 (AuthorHouse, 2d ed. 2009).

2. Texas's Uniform Prudent Investor Act

Effective January 1, 2004, Texas enacted the Uniform Prudent Investor Act.[196] Like the new Uniform Principal and Income Act, some provisions mirror the Uniform Act, while others are tailored to Texas.[197] Trustees and their advisors should be familiar with these requirements.

Texas Property Code section 117.004 sets forth the general duties and considerations of a prudent investor as follows:

> (a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.
> (b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.
> (c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:
> (1) general economic conditions;
> (2) the possible effect of inflation or deflation;
> (3) the expected tax consequences of investment decisions or strategies;
> (4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
> (5) the expected total return from income and the appreciation of capital;
> (6) other resources of the beneficiaries;
> (7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and
> (8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.
> (d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.
> (e) Except as otherwise provided by and subject to this subtitle, a trustee may invest in any kind of property or type of investment consistent with the standards of this chapter.

196. TEX. PROP. CODE ANN. § 116.151–.206 (West 2007).

197. *See* Gerry W. Beyer, *Trust Investment and Allocation Rules: Texas Enters a New Era*, PROFESSORBEYER.COM (2004), http://www.professorbeyer.com/Articles/UPIA_Twins.html.

> (f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.[198]

Now, section 117.005 requires a trustee to diversify investments "unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying."[199] Further, a trustee has an affirmative duty to "review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this chapter" within a reasonable period of being appointed or receiving additional assets.[200]

G. Understand the Delegation Limitations

1. The "General Rule"

Generally, the trustee's duty of competence includes restrictions on delegating fiduciary duties.[201] Except as allowed by the instrument or law, the trustee is under an obligation to personally administer the trust and under a duty not to delegate acts that the trustee should personally perform.[202] Unless the trust instrument provides otherwise, trustees may delegate certain functions to their co-trustees.[203]

Texas's rule is consistent with the Restatement (Third) of Trusts regarding duties respecting delegation. The Restatement states the following:

> (1) A trustee has a duty to perform the responsibilities of the trusteeship personally, except as a prudent person of comparable skill might delegate those responsibilities to others.
> (2) In deciding whether, to whom, and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising or monitoring agents, the trustee has a duty to exercise fiduciary discretion and to act as a prudent person of comparable skill would act in similar circumstances.[204]

198. TEX. PROP. CODE ANN. § 117.004 (West 2007).
199. TEX. PROP. CODE ANN. § 117.005 (West 2007).
200. TEX. PROP. CODE ANN. § 117.006 (West 2007).
201. TEX. PROP. CODE ANN. § 113.051 (West 2007).
202. *Id.*
203. TEX. PROP. CODE ANN. § 113.085(e) (West 2007).
204. RESTATEMENT (THIRD) OF TRUSTS § 80 (2007).

2. Delegation Between Co-Trustees and Non-Trustees

Trustees may delegate the performance of certain functions to their co-trustees unless the trust prohibits such delegation.[205] Section 113.085 has been amended several times during the last decade, thus it is important to consider the statute in effect during the relevant time.[206] For example, effective September 1, 2007, section 113.085(a) was amended to remove the words "that are unable to reach a unanimous decision," as there was a concern it changed pre-2005 law and thus it was revised to state "cotrustees may act by majority decision."[207] In 2009, section 113.085 was again amended to address situations in which a co-trustee is suspended or disqualified, or when an action is needed because a co-trustee is unable to participate.[208]

Thus, section 113.085, as in effect since September 1, 2009, provides as follows:

> (a) Cotrustees may act by majority decision.
> (b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.
> (c) A cotrustee shall participate in the performance of a trustee's function unless the cotrustee:
>
> (1) is unavailable to perform the function because of absence, illness, suspension under this code or other law, disqualification, if any, under this code, disqualification under other law, or other temporary incapacity; or
>
> (2) has delegated the performance of the function to another trustee in accordance with the terms of the trust or applicable law, has communicated the delegation to all other cotrustees, and has filed the delegation in the records of the trust.
>
> (d) If a cotrustee is unavailable to participate in the performance of a trustee's function for a reason described by Subsection (c)(1) and prompt action is necessary to achieve the efficient administration or purposes of the trust or to avoid injury to the trust property or a beneficiary, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.
> (e) A trustee may delegate to a cotrustee the performance of a trustee's function unless the settlor specifically directs that the function be performed jointly. Unless a cotrustee's delegation under this subsection is irrevocable, the cotrustee making the delegation may revoke the delegation.[209]

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205. *See* PROP. § 113.085(e).

206. TEX. PROP. CODE ANN. § 113.085 (West 2011), *amended by* Acts effective Jan. 1, 2006, 79th Leg., ch. 148, § 17; Acts effective Sept. 1, 2007, 80th Leg., ch. 451, § 7; Acts effective Sept. 1, 2009, 81st Leg., ch. 973, § 1.

207. TEX. PROP. CODE ANN. § 113.085(a) (West 2011), *amended by* Acts effective Sept. 1, 2007, 80th Leg., ch. 451, § 7.

208. TEX. PROP. CODE ANN. § 112.085(c)–(d) (West 2011), *amended by* Acts effective Sept. 1, 2009, 81st Leg., ch. 973, § 1.

209. TEX. PROP. CODE ANN. § 113.085 (West 2007 & Supp. 2012).

Therefore, when naming co-trustees the settlor should keep in mind that one co-trustee may appoint another to function as an agent for those duties that may lawfully be delegated, unless he or she expressly prohibits delegation as between co-trustees.[210] For example, if only one of several trustees qualifies to act as an agent, a deed by that one alone will pass title to a purchaser under Texas law.[211]

Subject to certain limitations and conditions, section 117.011 permits a trustee to delegate investment and management decisions to an agent.[212] The trustee is not responsible for the decisions of the agent provided the trustee exercises the appropriate judgment and care in selecting the agent and meets the statutory requirements.[213] This includes establishing the scope and terms of the authority delegated to the agent, investigating the agent's credentials (including the agent's performance history, experience, and financial stability), verifying the agent's professional license and registration, and confirming that the agent is bonded and insured.[214] To have protection, a trustee should at a minimum do the following:

> (1) [select] an agent with reasonable care, skill and caution;
> (2) [establish] the scope and terms of the delegation consistent with the purposes and terms of the trust; and
> (3) periodically [review] the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.[215]

3. Liability for Acts of Co-Trustees

Unless the instrument provides otherwise, Texas Property Code section 114.006 addresses when a co-trustee is liable for the acts of other co-trustees.[216] Section 114.006 provides as follows:

> (a) A trustee who does not join in an action of a cotrustee is not liable for the cotrustee's action, unless the trustee does not exercise reasonable care as provided by Subsection (b).
> (b) Each trustee shall exercise reasonable care to:
> (1) prevent a cotrustee from committing a serious breach of trust; and
> (2) compel a cotrustee to redress a serious breach of trust.
> (c) Subject to Subsection (b), a dissenting trustee who joins in an action at the direction of the majority of the trustees and who has notified any cotrustee of

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210. TEX. PROP. CODE ANN. § 113.085(e) (West 2007), *amended by* Acts effective Sept. 1, 2007, 80th Leg. ch. 451 § 7. *See also* Bunn v. City of Laredo, 213 S.W. 320, 322 (Tex. Civ. App.—San Antonio 1919, no writ).

211. *See Bunn*, 213 S.W. at 322.

212. TEX. PROP. CODE ANN. § 117.011 (West 2007).

213. *Id.*

214. *Id.*

215. *Id.*

216. TEX. PROP. CODE ANN. § 114.006 (West 2007).

> the dissent in writing at or before the time of the action is not liable for the action.[217]

Unless the terms of the trust instrument provide otherwise, a trustee is entitled to reasonable compensation from the trust for acting as trustee.[218] Section 114.061 provides as follows:

> (a) Unless the terms of the trust provide otherwise and except as provided in Subsection (b) of this section, the trustee is entitled to reasonable compensation from the trust for acting as trustee.
> (b) If the trustee commits a breach of trust, the court may in its discretion deny him all or part of his compensation.[219]

4. Compensation and Reimbursement

The trustee is entitled to compensation even if the trust instrument does not address compensation.[220] Determining what exactly constitutes a reasonable compensation for a trustee remains unclear. Traditionally, a trustee has been compensated based on a certain percentage of the assets contained in the trust and other factors such as the extent of the risk, the responsibilities of the trustee, the degree of difficulty in administering the trust, and the skill and success of the trustee.[221]

Although a trustee is not permitted to profit individually in the course of trust transactions,[222] trustees are not prohibited from being compensated for their services.[223] "[C]ompensation for services actually rendered does not make a trustee a beneficiary of a trust or disqualify him or her from serving" as trustee.[224] But a trustee should make efforts to disclose any compensation received and the basis for such compensation.[225] Disclosure should reduce the likelihood of future claims and attempts to disgorge the compensation as excessive.[226]

Likewise, unless modified by the trust instrument, a trustee is entitled to reimbursement for the following: "(1) advances made for the convenience, benefit, or protection of the trust or its property; (2) expenses incurred while

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217. *See id.*
218. *See* TEX. PROP. CODE ANN. § 114.061 (West 2007).
219. *Id.*
220. *See id. See also* City of Austin v. Austin Nat'l Bank, 488 S.W.2d 586, 590 (Tex. Civ. App.—Austin 1972, writ granted), *aff'd in part and rev'd in part on other grounds*, 503 S.W.2d 759, 759 (Tex. 1973) (holding that trustees are entitled to be paid for their work on behalf of trust estate).
221. RESTATEMENT (SECOND) OF TRUSTS § 242 cmt. b. (1959)
222. *See generally* RESTATEMENT (THIRD) OF TRUSTS § 78 (2007).
223. PROP. § 114.061.
224. *See* McCauley v. Simmer, 336 S.W.2d 872, 882 (Tex. Civ. App.—Houston [1st Dist.] 1960, writ dism'd).
225. *See* RESTATEMENT (THIRD) OF TRUSTS § 83 (2007).
226. *See id.*

administering or protecting the trust or because of the trustee's holding or owning any of the trust property; and expenses incurred for any action taken under Section 113.025."[227]

Although a trustee's attorneys' fees and expenses appear to fall within these statutory provisions or the express provisions of the trust, many beneficiary-litigants will argue to the contrary. They instead insist on being awarded under section 114.064, which provides: "In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just."[228]

H. Keep Good Books and Records

An executor, trustee, guardian, or agent has a duty to maintain complete books and records relating to his or her actions and administration.[229] Therefore, the fiduciary should establish an organized system to maintain the books and records at the onset of the relationship and continue to maintain them during the administration.[230] It is preferable to maintain detailed financial records that reflect all assets on hand, all sources and uses of cash, all receipts, all distributions, and all investments.[231] Utilizing one of the various financial computer programs is one of the most effective and least costly means to maintain up-to-date books and records. Further, the fiduciary should maintain all such information for the duration of the relationship or entity at issues.[232]

I. Provide Periodic Accountings

It is advisable for a fiduciary to provide periodic accountings to all interested persons. Accountings not only allow fiduciaries to comply with their duty of disclosure, but accountings also often start the statute of limitations regarding the transactions that are adequately disclosed on the statements.[233] Corporate fiduciaries generally provide accountings monthly or quarterly.[234] An individual fiduciary should consider providing an accounting at least annually.[235] Regardless of the period covered, an accounting should reflect all receipts and disbursements and allocate each as receipt or expenditure to

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227. TEX. PROP. CODE ANN. § 114.063 (West 2007).

228. TEX. PROP. CODE ANN. § 114.064 (West 2007).

229. *See* RESTATEMENT (THIRD) OF TRUSTS § 83 (2007).

230. *See generally*, GERRY W. BEYER, TEXAS TRUST LAW: CASES AND MATERIALS 151 (AuthorHouse, 2nd ed. 2009).

231. *See generally id.*

232. *See generally id.*

233. *See* Courseview, Inc. v. Phillips Petroleum Co., 312 S.W.2d 197, 205 (Tex. 1957).

234. *See* John T. Rogers Jr., *Avoiding and Managing Litigation (For Planners and Fiduciaries)*, 2011 A.L.I.–A.B.H. ESTATE PLANNING IN DEPTH 791, 805.

235. *See* TEX. PROP. CODE ANN. § 113.151(a) (West 2007).

income or principal.[236] The type of accounting depends on the fiduciary relationship.[237]

1. Trustees

Some trust agreements require a trustee to periodically provide some or all the beneficiaries with a periodic accounting.[238] To the extent required by the terms of the trust, the trustee should provide the requisite beneficiaries an accounting that complies with the time and content of the mandated accounting.[239] The failure to meet these requirements can be held to be a breach of trust.[240]

Further, regardless of whether the trust mandates an accounting requirement, a trust beneficiary may make a written demand on the trustee for an accounting covering all transactions since the last accounting or since the creation of the trust, whichever is later.[241]

Unless a court extends the deadline, a beneficiary may file suit to compel an accounting if a trustee does not deliver the accounting within ninety days of receiving the request.[242] A court can order a trustee to account to all trust beneficiaries if it finds the beneficiaries' interest in the trust "sufficient to require an accounting by the trustee."[243] But a trustee is not required to account more than "once every 12 months unless a more frequent accounting is required by the court."[244] Also, if a beneficiary successfully compels an accounting, the court may, "in its discretion, award all or part of the costs of court and all of the suing beneficiary's reasonable and necessary attorney's fees and costs against the trustee in the trustee's individual capacity or in the trustee's capacity as trustee."[245]

Likewise, "[a]n interested person may file suit to compel the trustee to account to the interested person.[246] A court can compel a trustee to account to an interested person if it finds that an interest in, claim against, or the effect on the trust administration sufficiently affects the interested person.[247]

If requested, the trustee is required to prepare and provide an accounting that complies with section 113.152 of the Texas Property Code.[248] The form of

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236. *See* TEX. PROP. CODE ANN. § 113.152 (West 2007).
237. *See* Hunt Oil Co. v. Moore, 656 S.W.2d 634, 642 (Tex. App.—Tyler 1983, writ ref'd n.r.e).
238. *See generally*, BEYER *supra* note 230, at 150–51.
239. *See generally id.*
240. *See generally id.*
241. *See* TEX. PROP. CODE ANN. § 113.151(a) (West 2007).
242. *See id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *See id.*

the accounting requires a written statement of accounts that shows the following:

> All trust property that has come to the trustee's knowledge or into the trustee's possession, and that has not been previously listed or inventoried as trust property; [a] complete account of receipts, disbursements, and other transactions regarding the trust property for the period covered by the account, including their source and nature, with receipts of principal and income shown separately; [a] listing of all property being administered, with an adequate description of each asset; [t]he cash balance on hand and the name and location of the depository where the balance is kept; and [a]ll known liabilities owed by the trust.[249]

Finally, as previously discussed, a settlor may not limit "any common-law duty to keep a beneficiary of an irrevocable trust who is 25 years of age or older informed at any time during which the beneficiary: (1) is entitled or permitted to receive distributions from the trust; or (2) would receive a distribution from the trust if the trust were terminated."[250] Therefore, any attempts to override the accounting requirement for a person over twenty-five who meets the statutory requirements should be ignored.

2. Personal Representatives

Beneficiaries may demand an accounting fifteen months after the trustee's appointment.[251] After receiving a request, independent personal representatives have sixty days to prepare and provide an accounting that complies with section 149A of the Texas Probate Code.[252] The accounting must be sworn and subscribed by the independent personal representative and set forth in detail the following information: the property belonging to the estate that has come into the executor's hands; the disposition that has been made of such property; the debts that have been paid; the debts and expenses, if any, still owing by the estate; the property of the estate, if any, still remaining in the executor's hands; such other facts as may be necessary to a full and definite understanding of the exact condition of the estate; and such facts, if any, that show why the administration should not be closed and the estate distributed.[253]

Until discharged, dependent personal representatives must file an annual accounting, which requires the following information:

> (1) All property that has come to his knowledge or into his possession not previously listed or inventoried as property of the estate;

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249. TEX. PROP. CODE ANN. § 113.152 (West 2007).
250. Tex. PROP. CODE ANN. § 111.0035(c) (West 2007 & Supp. 2012).
251. *See* TEX. PROB. CODE. ANN. § 149A(a) (West 2007).
252. *See* PROB. § 149A(b).
253. *See* PROB. § 149A.

> (2) [a]ny changes in the property of the estate which have not been previously reported;
> (3) [a]ny complete account of receipts and disbursements for the period covered by the account, and the source and nature thereof, with receipts of principal and income to be shown separately;
> (4) [a] complete, accurate and detailed description of the property being administered, the condition of the property and the use being made thereof, and, if rented, the terms upon and the price for which rented.
> (5) [t]he cash balance on hand and the name and location of the depository wherein such balance is kept; also, any other sums of cash in savings accounts or other form, deposited subject to court order, and the name and location of the depository thereof.
> (6) [a] detailed description of personal property of the estate, which shall, with respect to bonds, notes, and other securities, include the names of obligor and obligee, or if payable to bearer, so state; the date of issue and maturity; the rate of interest; serial or other identifying numbers; in what manner the property is secured; and other data necessary to identify the same fully, and how and where held for safekeeping;
> (7) [a] statement that, during the period covered by the account, all due tax returns have been filed and that all taxes due and owing have been paid and a complete account of the amount of the taxes, the date the taxes were paid, and the governmental entity to which the taxes were paid;
> (8) [i]f any tax return due to be filed or any taxes due to be paid are delinquent on the filing of the account, a description of the delinquency and the reasons for the delinquency;
> (9) [a] statement that the personal representative has paid all the required bond premiums for the accounting period.[254]

3. Agents

An agent has a duty to account to his or her principal regarding actions taken on the principal's behalf.[255] Due to ongoing concerns, the Texas Legislature enacted Texas Probate Code section 489(B) in 2001 to impose a statutory duty to account.[256] Section 489(B) provides as follows:

> (a) The attorney in fact or agent is a fiduciary and has a duty to inform and to account for actions taken pursuant to the power of attorney.
> (b) The attorney in fact or agent shall timely inform the principal of all actions taken pursuant to the power of attorney. Failure of the attorney in fact or agent to inform timely, as to third parties, shall not invalidate any action of the attorney in fact or agent.

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254. *Id.*
255. *See* Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 200 (Tex. 2002).
256. *See* TEX. PROB. CODE ANN. § 489B (West 2007). *See also* Tex. H.B. 1883, 77th Leg., R.S. (2001).

(c) The attorney in fact or agent shall maintain records of each action taken or decision made by the attorney in fact or agent.
(d) The principal may demand an accounting by the attorney in fact or agent. Unless otherwise directed by the principal, the accounting shall include:

(1) the property belonging to the principal that has come to the attorney in fact's or agent's knowledge or into the attorney in fact's or agent's possession;

(2) all actions taken or decisions made by the attorney in fact or agent;

(3) a complete account of receipts, disbursements, and other actions of the attorney in fact or agent, including their source and nature, with receipts of principal and income shown separately;

(4) a listing of all property over which the attorney in fact or agent has exercised control, with an adequate description of each asset and its current value if known to the attorney in fact or agent;

(5) the cash balance on hand and the name and location of the depository where the balance is kept;

(6) all known liabilities; and

(7) such other information and facts known to the attorney in fact or agent as may be necessary to a full and definite understanding of the exact condition of the property belonging to the principal.

(e) Unless directed otherwise by the principal, the attorney in fact or agent shall also provide to the principal all documentation regarding the principal's property.
(f) The attorney in fact or agent shall maintain all records until delivered to the principal, released by the principal, or discharged by a court.
(g) If the attorney in fact or agent fails or refuses to inform the principal, provide documentation, or deliver the accounting within 60 days (or such longer or shorter time that the principal demands or a court may order), the principal may file suit to compel that the principal demands or a court may order), the principal may file suit to compel the attorney in fact or agent to deliver the accounting, to deliver the assets, or to terminate the power of attorney.
(h) This section shall not limit the right of the principal to terminate the power of attorney or to make additional requirements of or to give additional instructions to the attorney in fact or agent.
(i) Wherever in this chapter a principal is given an authority to act that shall include not only the principal but also any person designated by the principal, a guardian of the estate of the principal, or other personal representative of the principal.
(j) The rights set out in this section and chapter are cumulative of any other rights or remedies the principal may have at common law or other applicable statutes and not in derogation of those rights.[257]

Section 489(B) was not intended to limit the principal's ability to impose additional requirements on, or instructions to, the principal's attorney-in-fact.[258]

257. TEX. PROB. CODE ANN. § 489B (West 2003) (emphasis added).

Therefore, a durable power of attorney may also include additional provisions relating to his or her agent's duty to account and inform.[259] For example, a client may require his agent to account not only to the client's representatives but also to his or her spouse and the spouse's representatives, including the spouse's guardian or attorney-in-fact.[260] An agent may also be required to keep certain family members, financial advisors, or other individuals designated by the client informed and apprised of the agent's activities on behalf of the principal.[261] The power of attorney should be reviewed to determine if any additional reporting or accounting requirements were included.

J. Consistency Matters

A fiduciary should be consistent when carrying out his or her duties and responsibilities to avoid claims of unauthorized preference or abuse of discretion. For example, a trustee is often required to exercise his or her "discretion" when managing assets or deciding whether to distribute assets to or between one or more beneficiaries.[262] The governing instrument may provide some guidance by setting out a distribution standard.[263] Even so, the fiduciary should generally attempt to be consistent regarding determinations between beneficiaries (such as what is appropriate for health, education, support, or maintenance) unless the instrument expressly provides otherwise.

K. Document, Document, Document

Almost every fiduciary has a duty to account for his or her actions if called on to do so.[264] Many trusts impose standards that require the trustee to determine the beneficiary's current or past standard of living to set a benchmark for trust distributions, assets available for his or her support, or income available for support.[265] To provide adequate accounts or defend prior decisions, fiduciaries should maintain detailed files on their actions and decisions. Requests for distributions should be made in writing and include a description of the reason for the requested distribution. Written invoices should support expenses paid by the trust. When appropriate, the fiduciary should place a memo or note in the file to document notable issues. All records should be maintained until the fiduciary is released or discharged.

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258. *See* PROB. § 489B(h).

259. PROB. § 489B(a).

260. *See* discussion *supra* Part II.C.

261. Penix v. First Nat'l Bank of Paris, 260 S.W.2d 63, 66 (Tex. Civ. App.—Texarkana 1953, writ ref'd).

262. *See* Coffee v. William Marsh Rice Univ., 408 S.W.2d 269, 284 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.).

263. *Id.* at 282.

264. *See* Keisling v. Landrum, 218 S.W.3d 737, 744 (Tex. App.—Fort Worth 2007, pet. denied).

265. *Id.* at 745.

L. Communicate, Communicate, Communicate

Communication is perhaps the most effective tool to avoid misunderstandings that lead to claims and lawsuits against fiduciaries.[266] Many lawsuits are filed because a fiduciary failed to inform a beneficiary of his or her interest, meet with beneficiaries, discuss the basis for his or her decisions, provide status reports, or disclose relevant information and periodic accounts during the relationship.[267]

Although a fiduciary does not need to involve the beneficiaries or principal in every decisions, fiduciaries should, at a minimum, advise beneficiaries of the beneficiaries' interest, provide a means to contact the fiduciary, provide periodic information, and advise all interested persons of significant events in a timely manner. If possible, a fiduciary should periodically meet with each beneficiary to address any issues or concerns. By building a personal relationship, the fiduciary can both better fulfill his or her job while also mitigating potential litigation. However, the fiduciary's counsel should not engage in communications that even appear to create an attorney-client relationship between the beneficiary and the fiduciary's attorney.

M. Understand Standards of Judicial Review

Likewise, it is important to recognize how a decision may be reviewed if it becomes the subject of litigation.

1. Common Law

There are two basic principles that can be derived from the case law in Texas. These principles allow courts the latitude to take the action they deem necessary according to the facts in each situation. The first principle is that courts will not second-guess the fiduciary unless there is an "abuse of discretion."[268] This rule is still valid today: "Texas courts . . . [are] prohibited by law from interfering with the discretion of the trustee absent a clear showing of fraud or other egregious conduct."[269] The second principle is that any decision by the fiduciary that subverts the "intent of the settlor" will be overturned.[270]

The logical conclusion to be drawn from these two principles is that the "intent of the settlor" is the paramount consideration when a fiduciary is

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266. *See* Chien v. Chen, 759 S.W.2d 484, 494 (Tex. App.—Austin 1988, no writ).

267. *See id.*

268. Coffee v. William Marsh Rice Univ., 408 S.W.2d 269, 284 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.).

269. *In re* Bass, 171 F.3d 1016, 1029 (5th Cir. 1999).

270. *See* State v. Rubion, 308 S.W.2d 4, 9 (Tex. 1957).

exercising its discretion.[271] A closer look at these seemingly clear principles reveals that the courts have not provided any real guidance. The case law only leads the fiduciary to the place in which it started. After all, if the settlor's intent is abundantly clear to all parties, there would be no need for court intervention in the first place.[272] Furthermore, the settlor's intent often plays second fiddle to the trustee's discretion.[273] While this line of thinking does not serve those of us who would like better guidance in this area, it allows the courts the freedom to evaluate either principle on a case-by-case basis.[274] This standard grants the courts authority to decide whether to uphold either the trustee's decision or the complaining plaintiff's allegation of foul play.[275]

Currently, fiduciaries have only one clear mandate: A fiduciary should act in conformity with the creator's intent, as expressed in the governing instrument.[276] Unfortunately, determining the creator's intent is a difficult undertaking. As discussed earlier, the primary source for determining a creator's intent is the governing instrument.[277] Yet courts will consider other factors when the instrument itself is not clear.[278]

The lack of clarity in this area does not make life any easier for a fiduciary faced with a tough decision. The entire purpose for having a fiduciary of a "discretionary trust" is to burden the fiduciary with the responsibility of making decisions based on future events and to have the benefit of the fiduciary's judgment and discretion.[279] The lack of clarity also explains why the case law is so sparse. Trial courts have wide latitude under the rules as they stand now, and appellate courts have not devised any better guidance.[280]

a. Context of Review

Generally, the review arises in the context of either a beneficiary seeking to compel or prohibit distributions[281] or a creditor seeking to reach the assets of the trust.[282]

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271. *See id.*
272. *See id.*
273. *See Coffee*, 408 S.W.2d at 273.
274. *Id.* at 285.
275. *Id.*
276. *See id.* at 273.
277. *See* discussion *supra* Part VII.B.
278. *See* discussion *supra* Part VII.B.
279. *In re* Shea's Will, 254 N.Y.S. 512, 516 (1931).
280. *See id.* at 518.
281. *See generally*, State v. Rubion, 308 S.W.2d 4, 8 (Tex. 1957).
282. *See* Penix v. First Nat'l Bank of Paris, 260 S.W.2d 63, 64 (Tex. Civ. App.—Texarkana 1953, writ ref'd).

b. Extent of Review

The extent that courts intervene in the administration of a trust is dictated by the two principles of law discussed above. Courts in Texas are free to intervene in the administration of trusts under *Rubion* and are free to wash their hands of trust administration when they see fit under *Coffee v. William Marsh Rice University*.[283] Therefore, it can reasonably be inferred that courts are likely to intervene when the facts of a particular case offend the court's sensibilities and likely to cite *Coffee* or its progeny when the courts are agreeable to the decisions the trustee has made.[284]

2. Texas Property Code

Until the enactment of Texas's version of the Uniform Principal and Income Act in 2004, there was limited statutory authority for a court to review a trustee's distribution decisions.[285] For example, the Texas Property Code provides that a district court (or a statutory probate court) had jurisdiction over all proceedings concerning trusts, including those relating to making determinations of fact that affect distributions from a trust, determining a question arising in the distribution of a trust, and "reliev[ing] 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."[286] The Texas Property Code, however, did not provide any additional guidance.[287] Thus, trustees and beneficiaries generally sought relief under the declaratory judgment provisions set forth in the Texas Civil Practice and Remedies Code.[288]

Today's Texas Property Code section 116.006 provides for judicial review of a trustee's decisions relating to adjustments to income, which may directly or indirectly affect a trustee's distribution decisions.[289] Section 116.006 allows a trustee to seek a court declaration (in certain cases) that a contemplated adjustment will not be a breach of trust.[290] However, there are limitations on a trustee's right to pursue such a determination.[291] Furthermore, section 116.006 addresses the payment of a trustee and the beneficiary's legal fees relating to a

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283. Coffee v. William Marsh Rice Univ., 408 S.W.2d 269, 269 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.); *Rubion*, 308 S.W.2d at 8.

284. *See Coffee*, 408 S.W.2d at 269; *Rubion*, 308 S.W.2d at 8.

285. *See* TEX. PROP. CODE ANN. § 115.001 (West 2007); Uniform Principal and Income Act § 116 (2000).

286. PROP. § 115.001.

287. *See id.*

288. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.005 (West 2012) (stating that a person interested in a trust may seek judicial declaration of rights or legal relations to direct the trustees to do or abstain from doing any particular act in their fiduciary capacity or determine any question arising in administration of trust).

289. *See* TEX. PROP. CODE ANN. § 116.006 (West 2007).

290. *See* PROP. § 116.006(d).

291. *See id.*

judicial proceeding.[292] Section 116.006 requires the trustee to advance attorney's fees related to the proceeding from the trust; however, this section also permits the court to charge these fees between or among the trust, the trustee, or one or more beneficiaries at the conclusion of the proceeding based on the circumstances.[293]

Before a trustee considers initiating a judicial proceeding, it is advisable to determine if a non-judicial means exists to resolve any issues involving a contemplated principal/income adjustment. Before a trustee may initiate a judicial proceeding, the trustee must make reasonable disclosures to all beneficiaries and have a reasonable belief that a beneficiary will object to the proposed allocation.[294] Means to determine if an objection exists may include the following: written notifications of the proposed allocation to all trust beneficiaries including clear communication as to the effect of the allocation (reduced principal, etc.); requests that the beneficiary advise the trustee if he objects or consents to the distribution; request that the beneficiary indicate his or her consent in writing (perhaps provide written consent forms); and informing beneficiaries that if they have any questions, they should seek counsel before signing any documents or responses. Note the refusal of a beneficiary to sign a waiver or release is not reasonable grounds for a trustee to claim that the beneficiary will object to the adjustment or allocation.[295]

N. Consider if a Change in the Trust Principal Office or Situs Is Appropriate

Typically, the domicile of the grantor controls the rules related to the trust.[296] However, a grantor is free to choose the law that affects the rules related to the rights of the trustee, including the rights related to jury trials, arbitrations, creditors, and taxes.[297] The Restatement of Conflict of Laws section 272 comment (d) provides as follows:

> If the settlor has not manifested an intention that the trust should be administered in a particular state, and has not designated the law to control [it], the administration of the trust will be determined by the local law of the state to which the administration is most substantially related. Contacts determining this state include the state of the domicile of the settlor, the state where the trust instrument was executed and delivered, the state where the trust assets [are] located, and the state of the domicile of the beneficiaries.[298]

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292. *See id.*
293. *See id.*
294. *Id.*
295. *See id.*
296. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 (1971).
297. *See id.*
298. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 272 cmt. d (1971).

O. Terminating the Relationship

A fiduciary relationship may terminate due to the removal of the fiduciary, the fulfillment of the terms of the trust or estate, or the resignation of the fiduciary.[299] Regardless, once the relationship is terminated, the former fiduciary should seek to settle his or her accounts and, if possible, resolve any pending issues. For example, the Restatement of Trusts provides that a former trustee is authorized to windup his or her affairs and to retain authority to do so.[300] Therefore, a former fiduciary should consider whether he or she has entered into any contractual relationships that need to be resolved. Further, if a trustee is removed, the trustee should consider notifying the other trust beneficiaries so that they will know whom to contact regarding trust matters.

P. Consider Possible Defenses

While a trust relationship cannot be administered purely on a defensive nature, a fiduciary should be aware of possible defenses available in a future proceeding. Some defenses include the following: no fiduciary relationship or breach fell within scope of fiduciary role,[301] res judicata,[302] accord and satisfaction,[303] release,[304] estoppel, [305] waiver,[306] ratification,[307] laches,[308] avoidance or exculpatory clauses,[309] and the statute of limitations.[310]

Q. Settling Fiduciary Accounts

Fiduciaries are generally not required to wait years to determine if someone is going to bring a claim against them relating to their administration.[311] Rather, fiduciaries can seek to settle their accounts with the successor trustees, beneficiaries, or other appropriate people or entities.[312] This can be accomplished in a non-judicial manner by accounting to the appropriate

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299. *See* RESTATEMENT (FIRST) OF TRUSTS §§ 334–39 (1935).

300. RESTATEMENT (FIRST) OF TRUSTS § 334.

301. *See* Blieden v. Greenspan, 751 S.W.2d 858, 860–61 (Tex. 1988).

302. *See* Coble Wall Trust Co. v. Palmer, 859 S.W.2d 475, 480 (Tex. App.—San Antonio 1993, writ denied).

303. *See* King v. Cliett, 31 S.W.2d 350, 354 (Tex. Civ. App.—Waco 1930, no writ).

304. *See* TEX. PROP. CODE ANN. § 114.005 (West 2011).

305. *See* Langford v. Shamburger, 417 S.W.2d 438, 446 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.).

306. *See* Ford v. Culbertson, 308 S.W.2d 855, 857–58 (Tex. 1958).

307. *See* Burnett v. First Nat'l Bank of Waco, 536 S.W.2d 600, 604 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.).

308. *See* Fitzgerald v. Hull, 237 S.W.2d 256, 265 (Tex. 1951).

309. *See* Moulton v. Alamo Ambulance Serv., Inc., 414 S.W.2d 444, 449 (Tex. 1967).

310. TEX. CIV. PRAC. & REM. CODE § 16.004 (West 2011); Peek v. Berry, 184 S.W.2d 272, 275 (Tex. 1944). *But see* Estate of Degley, 797 S.W.2d 299, 302 (Tex. App.—Corpus Christi 1990, no writ).

311. *See* CIV. PRAC. & REM. § 16.004(a)(5).

312. *See e.g.*, TEX. PROP. CODE ANN. § 114.032(a) (West 2011).

person and seeking a non-judicial release. For example, the Texas Property Code was amended as of September 1, 1999, to allow trust beneficiaries to enter into binding releases.[313] When a trustee is settling an account, the trustee should consider the types of actions for which release is being sought and whether the statements or accountings fully and fairly disclose the transactions. Trustees should also examine the signatures on the document, including whether all necessary and proper parties signed, whether all beneficiaries had the capacity to sign, and whether the successor trustees signed the release. Additionally, trustees must think about potential litigation and consider whether the agreement required any court involvement, whether the trustee's and attorney's fees are addressed, whether indemnity is appropriate, and whether the agreement addresses future disputes. Trustees should also consider whether the agreement addresses distribution or transfer of trust assets and any access or transfer of trust records. Further, the trustee will want to consider whether a successor has power or duty to redress, whether beneficiaries disclaim reliance and acknowledge access to information, and how the agreement will be enforced.

However, if the beneficiary or other persons have raised claims regarding the accounting or refuse to execute the requested releases, fiduciaries may choose to seek to judicially settle their accounts. A trustee may do so pursuant to the Texas Property Code and the Civil Practice and Remedies Code.[314] An independent executor may also do so pursuant to recent amendments to the Texas Probate Code.[315]

VIII. OTHER CONSIDERATIONS

A. Recognize that Almost Anything May be Discoverable and Act and Write Accordingly

Because of the nature of the fiduciary relationship, it is possible that virtually any document could be discovered (rightly or wrongly) in litigation.[316] Thus, it should never be presumed that any written communication would be protected from disclosure. Perhaps no form of communication has raised more issues in the last few years than emails.[317] As this form of communication is rapidly becoming the norm with many clients, it has become a favorite of

313. *Id.*

314. *See* TEX. PROP. CODE ANN. § 114.008 (West 2011).

315. *See* TEX. PROB. CODE ANN. § 149E (West 2011).

316. *See* Paul Bergman, *Formal Discovery Gathering Evidence for Your Lawsuit*, NOLO, http://www.nolo.com/legal-encyclopedia/formal-discovery-gathering-evidence-lawsuit-29764.html (last visited Nov. 9, 2011).

317. *See* Tom Yencho, *Studies Show More Frequent and Calculated Abuse of the Truth Online Than Traditional Pen and Paper Communications*, MED. NEWS TODAY (Sept. 28, 2008), http://www.medicalnewstoday.com/releases/123185.php.

litigators.[318] Further, individuals have a tendency to say things in email that they would not say in formal communications, including personal comments that can be taken out of context in subsequent litigation.[319] Thus, every document should be written in a manner that assumes that a potential adverse litigant may read it in the future.[320]

B. Be Clear Who the Advisor Represents

Regarding attorneys, the existence of an attorney-client relationship may be either express or implied from the parties' conduct.[321] Once established, the attorney-client relationship creates corresponding duties on the attorney's part.[322] Thus, an advisor engaged by a fiduciary should be careful to avoid creating the impression (unintentionally or intentionally) that he or she represents or is advising a beneficiary, creditor, or other third party. These impressions can be formed via meetings, letters, and other communications with third parties.

There are a number of ways to reduce such potential claims. Any meetings should be preceded with a statement that the advisor only represents the fiduciary, a written notice of non-representations can be given to any potential beneficiaries and creditors in the initial letter or contact, an acknowledgement of no representation may be requested before any meetings with the third parties, the advisor should not generally answer any questions regarding the third parties' rights, and documents to be signed by the third party should not be prepared by the advisor, if possible.

Although the preceding list is not exclusive or mandatory, it reflects efforts to reduce claims made in actual proceedings over the past few years.

C. Be Careful in All Written Communications with Beneficiaries and Third Parties

It is common when representing a fiduciary to communicate with the beneficiaries of the estate or trust on the fiduciary's behalf. However, these contacts may create a claim that the beneficiary, creditor, etc., believed that the professional advisor owed a duty to the beneficiary, creditor, etc. Thus, it is suggested that any written communication with any potential non-client reiterates whom the advisor represents and that the advisor does not represent the recipient.[323]

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318. *See* Alvin I. Frederick & Erin A. Cohn, *The Joys and Dangers of Emailing*, MD ST. B. ASS'N 8, 8 (Feb. 2012), http://www.msba.org/sec_comm/sections/litigation/newsletters/LitigationJan2012.pdf.

319. *Id.* at 25.

320. *Id.* at 26.

321. *See* Perez v. Kirk, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied).

322. *Id.*

323. *See* Julie E. Bennett, *You Do Not Represent the Estate*, LAW. PROF. RESP. BOARD 1, 2 (Sept. 7, 2009), http://lprb.mncourts.gov/articles/Articles/You%20Do%20Not%20Represent%20the%20Estate.pdf.

Further, it is advisable for fiduciary advisors to avoid preparing documents such as waivers or disclaimers for non-clients. However, given the realities of the estate and trust area, it is sometimes necessary for the fiduciary's advisor to prepare such documents to expedite his or her appointment or the settlement of the estate or trust. If the attorney is providing the non-client a document for execution, the correspondence should clearly suggest that the recipient have the document reviewed by his or her own advisors. Finally, any letter to a potential beneficiary should be written, if possible, in a manner that confirms each time that the advisor is not providing advice to the recipient.

D. Avoid Making Alleged Representations and Use Disclaimers of Reliance When Appropriate

It is common for interested parties to request that a fiduciary make certain express representations to verify certain facts or conditions. Representations may be used to confirm assets, liabilities, past events, or other matters that an interested party deems relevant to an estate or trust. While such information may be needed or even mandatory to meet certain fiduciary duties, the attorney or other advisor for the fiduciary should avoid being the one making such representations. When he or she does and it turns out to be incorrect, the attorney or other advisor may face claims of negligent misrepresentation.

Further, the Texas Supreme Court has sanctioned the use of disclaimers of reliance in documents to mitigate potential claims of reliance or negligent misrepresentation.[324] A disclaimer of reliance may provide as follows: Each party confirms and agrees that such party (i) has relied on his or her own judgment and has not been induced to sign or execute this Agreement by promises, agreements or representations not expressly stated herein, (ii) has freely and willingly executed this Agreement and hereby expressly disclaims reliance on any fact, promise, undertaking or representation made by the other party, save and except for the express agreements and representations contained in this Agreement, (iii) waives any right to additional information regarding the matters governed and effected by this Agreement, (iv) was not in a significantly disparate bargaining position with the other party, and (v) has been represented by legal counsel in this matter.

E. Consider the Possible Rights of Successor Fiduciaries

Attorneys and other advisors representing a fiduciary should consider that an issue exists regarding the right and privity of a successor fiduciary to the agents of the prior fiduciary. When a fiduciary has been removed or died, a

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324. *See* Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 181 (Tex. 1997); Atlantic Lloyds Ins. Co. v. Butler, 137 S.W.3d 199, 217 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (stating that the disclaimer of reliance in the settlement agreement conclusively negated other parties alleged reliance on any representations or lack of disclosure by other parties).

successor fiduciary is generally imposed with a duty to redress his or her predecessor's actions.[325] When counsel represents a fiduciary, the question then becomes whether the successor is entitled to the predecessor's legal files. Although the Texas Supreme Court decision of *Huie v. DeShazo* seems to imply that the attorney only represented that fiduciary, no Texas court has clearly addressed this issue in the context of an estate or guardianship, and at least one trial court has ordered the turnover of the prior attorney's files.[326]

Until this issue is decided, attorneys or other advisors for former fiduciaries should request the consent of the client or the client's representative before releasing their files to a successor fiduciary. If consent cannot be obtained, the advisor should request a court order compelling the turn over.

F. Be Cognizant of the Discovery Rule

While the standard statute of limitation on breach of fiduciary duty is four years, the discovery rule can toll this applicable period for years into the future.[327] The Texas Supreme Court has twice held a fiduciary's misconduct to be inherently undiscoverable.[328] The discovery of such claims may relate to the fiduciary's actions or inactions. As a result, consideration should be given to retaining files and other information or documentation relevant to these engagements far beyond the standard period.

G. Take the High Road

Finally, common sense probably provides the best guide to avoiding fiduciary-related litigation. When representing a fiduciary, both the fiduciary and the attorney (as the fiduciary's agent) appear to be held to a higher standard. Thus, care should be taken in carrying out their respective roles. Some final suggestions include avoiding "Rambo" litigation, being cognizant of a fiduciary's duties of disclosure, not allowing a fiduciary-client to use attorney's services to enable a clear breach of his or her duties, considering when to put matters in writing and when not to—even to the fiduciary, and making appropriate payment and segregation of fees and expenses.

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325. *See* TEX. FIN. CODE ANN. § 186.0005 (West 2010).

326. *See* Huie v. DeShazo, 922 S.W.2d 920, 925–26 (Tex. 1996).

327. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(5) (West 2011). *See also* Little v. Smith, 943 S.W.2d 414, 420 (Tex. 1997).

328. *See* Willis v. Maverick, 760 S.W.2d 642, 547 (Tex. 1988) (stating that the attorney-malpractice actions are subject to the discovery rule because of the fiduciary relationship between attorney and client and client's lack of actual or constructive knowledge of injury); Slay v. Burnett Trusts, 187 S.W.2d 377, 394 (1945).

IX. CONCLUSION

In short, fiduciary litigation will never be eliminated. Careful fiduciaries and their advisors can often reduce potential litigation through careful planning and by taking certain actions during the duration of the fiduciary relationship. Hopefully, the proceeding discussion provides some guidance during the process.