

TRUSTEES' ABILITY TO RETAIN AND COMPENSATE ATTORNEYS IN TEXAS

David F. Johnson *

I.	INTRODUCTION	98
II.	RIGHT TO RETAIN ATTORNEYS	98
III.	SUGGESTIONS FOR TRUSTEES RETAINING ATTORNEYS.....	101
	A. <i>Introduction</i>	101
	B. <i>Selecting Counsel</i>	101
	C. <i>Engagement Letters</i>	103
	D. <i>Rates</i>	103
	E. <i>Communication</i>	105
	F. <i>Attorney-Client Privilege</i>	106
	1. <i>Basis for Privilege and No Fiduciary Exception in Texas</i>	107
	2. <i>Privilege Includes Client's Representatives</i>	110
	3. <i>Successor Trustee's Ownership of Attorney-Client Privilege</i>	111
	4. <i>Joint Client Privilege Issues</i>	113
	G. <i>Advice-of-Counsel Defense</i>	117
	H. <i>Inadvertent Attorney-Client Relationships</i>	118
IV.	CO-TRUSTEES MANAGING TRUSTS	120
	A. <i>Co-Trustees Must Jointly Manage Trusts</i>	120
	B. <i>Duty to Sue a Co-Trustee</i>	122
V.	COMPENSATING ATTORNEYS	123
	A. <i>General Compensation Authority</i>	123
	1. <i>Trust Language</i>	123
	2. <i>Statutory Authority</i>	124
	3. <i>Common Law Authority</i>	131
	B. <i>Trustees Paying Attorneys in the Interim</i>	137
	1. <i>Trustee as Plaintiff</i>	138
	2. <i>Beneficiary as Plaintiff</i>	138
	3. <i>Argument Under Property Code Subsection 114.008(a) for Payment of a Party's Attorney's Fees in the Interim</i> ...	140
	4. <i>Trustee as Defendant: Texas Precedent</i>	141
	5. <i>Trustee as Defendant: Precedent from Other Jurisdictions</i>	145

* The Author is the managing shareholder of Winstead PC's Fort Worth Office and has a fiduciary litigation practice. The Author would like thank his wife Ashley and his daughter Anna for their love and support.

6. <i>Estate's Code Authority on Paying Fiduciary in the Interim</i>	150
C. <i>Methods to Prevent a Trustee from Paying an Attorney in the Interim</i>	152
1. <i>Motion Under Property Code Section 114.008</i>	152
2. <i>Injunction General Requirements</i>	154
3. <i>Probable Right to Recovery</i>	155
4. <i>Irreparable Harm</i>	156
VI. DUTY TO DISCLOSE ATTORNEY'S FEES PAYMENTS	160
VII. ALLOCATION OF FEES TO BENEFICIARY'S SHARE OF TRUST	161
VIII. CONCLUSION	163

I. INTRODUCTION

Trustees are often called upon to retain counsel to assist in trust administration issues, pursue claims by a trustee, and defend claims filed against a trustee.¹ Trustees are bombarded by attorneys who want to be retained, though they may not be qualified or the best option for the assignment.² Further, once an attorney is retained, the trustee has to pay them.³ There are different statutory provisions in Texas dealing with the payment of attorneys.⁴ This Article is intended to give practical advice concerning the retention of attorneys by trustees and also address the legal issues involved with compensating attorneys.⁵

II. RIGHT TO RETAIN ATTORNEYS

Trustees have the statutory and common law right to retain attorneys for a variety of matters.⁶ The first place to look regarding a trustee's right to retain counsel is the trust document itself.⁷ "The trustee shall administer the trust in good faith according to its terms and the Texas [Property] Code."⁸ Additionally, "[t]he nature and extent of a trustee's duties and powers are primarily determined by the terms of the trust."⁹ If the language of the trust instrument unambiguously expresses the intent of the settlor, the instrument

1. David F. Johnson, *Trustees' Ability to Retain and Compensate Attorneys in Texas*, STATE BAR TEX. 1, 1 (Dec. 2020), <https://www.fiduciaryliterator.com/files/2020/12/Trustees-Ability-to-Retain-and-Compensate-Attorneys-in-Texas.pdf> [<https://perma.cc/5m3T-Z8MF>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Tolar v. Tolar, No. 12-14-00228-CV, 2015 WL 2393993, at *3 (Tex. App.—Tyler May 20, 2015, no pet.).

9. RESTATEMENT (THIRD) OF TRS. § 90 cmt. b (AM. L. INST. 2007); see also Stewart v. Selder, 473 S.W.2d 3, 7 (Tex. 1971); Beaty v. Bales, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, no writ).

itself confers the trustee's powers and neither the trustee nor the courts may alter those powers.¹⁰ Moreover, a court may remove a trustee when "the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust."¹¹

Normally, trust documents expressly allow trustees to retain counsel.¹² If a trust document states that a trustee does not have the power to retain attorneys, then a trustee should either: (1) seek to modify or reform the trust to allow that common right, or (2) seek to resign because a trustee may not be able to meet many of its duties to manage and protect the trust without retaining attorneys.¹³

After reviewing the trust document, a trustee should be aware of statutory law governing its powers to retain counsel.¹⁴ To the extent the trust instrument is silent, the provisions of the trust sections of the Property Code govern.¹⁵ Under the Texas Property Code, "[a] trustee may employ attorneys, accountants, agents, including investment agents, and brokers reasonably necessary in the administration of the trust estate."¹⁶ A trustee has the statutory authority to retain attorneys and other professionals as it deems appropriate.¹⁷ The Texas Property Code also states: "The powers, duties, and responsibilities under this subtitle do not exclude other implied powers, duties, or responsibilities that are not inconsistent with this subtitle."¹⁸ A trustee generally has any power that is necessary or appropriate to carry out the purposes of the trust.¹⁹

The Texas Property Code expressly instructs parties to look to common law regarding a trustee's duties.²⁰ A trustee has the duty to administer the trust with the skill and prudence which an ordinary, capable, and careful person would use in the conduct of their own affairs: "The trustee has a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law."²¹ Moreover,

10. *Jewett v. Cap. Nat'l Bank of Austin*, 618 S.W.2d 109, 112 (Tex. App.—Waco 1981, writ ref'd n.r.e.); *Corpus Christi Nat'l Bank v. Gerdes*, 551 S.W.2d 521, 523 (Tex. App.—Corpus Christi—Edinburg 1977, writ ref'd n.r.e.).

11. TEX. PROP. CODE ANN. § 113.082(a)(1).

12. *Johnson*, *supra* note 1, at 12.

13. *Id.*

14. *Id.*

15. PROP. § 113.001; *Conte v. Conte*, 56 S.W.3d 830, 832 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

16. PROP. § 113.018.

17. *Id.* § 114.063.

18. *Id.* § 113.024.

19. *Id.* § 113.002.

20. *Id.* § 113.051.

21. RESTATEMENT (THIRD) OF TRS. § 76 (AM. L. INST. 2007).

In administering the trust, the trustee's responsibilities include performance of the following functions: . . . collecting and protecting trust property. The duty of protecting the trust estate includes taking reasonable steps to enforce or realize on other claims held by the trust and to defend actions that may result in a loss to the trust estate. Reasonable steps may include taking an appeal to a higher court, compromise or arbitration of claims by or against the trust, or even abandoning a valid claim or not resisting an unenforceable claim if the costs and risk of litigation make such a decision reasonable under all the circumstances.²²

It is not the duty of the trustee to bring an action to enforce a claim which is a part of the trust property if it is reasonable not to bring such an action, owing to the probable expense involved in the action or to the probability that the action would be unsuccessful or that if successful the claim would be uncollectible owing to the insolvency of the defendant or otherwise.²³

So, whether under the trust document, statute, or common law, a trustee normally has the power to retain attorneys to assist in trust-related matters when they deem that a prudent course of action.²⁴

One specific example when a trustee has the power to retain counsel is to seek instructions from a court.²⁵ The Restatement (Third) of Trusts provides: "A trustee or beneficiary may apply to an appropriate court for instructions regarding the administration or distribution of the trust if there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust provisions."²⁶ Regarding the payment of fees associated with seeking instructions, the Restatement provides:

Expenses incurred by a trustee in applying to the court for instructions are payable from the trust estate unless the application for instructions was plainly unwarranted, there being no reasonable uncertainty about the powers or duties of the trustee or about the relevant law or proper interpretation of the trust. In such a case it is normally improper for a trustee to incur the expenses of making the application . . . Expenses incurred by the trustee as a result of a beneficiary's application for instructions are payable or reimbursable from the trust estate, provided the expenses and the trustee's conduct were reasonable and appropriate to the trustee's fiduciary duties.²⁷

The Texas Property Code and the Uniform Declaratory Judgment Act both have provisions that expressly allow a trustee to seek instructions from a

22. *Id.*

23. RESTATEMENT (THIRD) OF TRS. § 177 cmt. c (AM. L. INST. 2007).

24. Johnson, *supra* note 1, at 2.

25. RESTATEMENT (THIRD) OF TRS. § 71 cmt. a (AM. L. INST. 2007).

26. *Id.* § 71.

27. *Id.* § 71 cmt. e.

court regarding various trust administration issues.²⁸ If a trustee has the power to seek court instructions, it has the power to retain an attorney to obtain that relief.²⁹

III. SUGGESTIONS FOR TRUSTEES RETAINING ATTORNEYS

A. Introduction

Trustees owe duties to their beneficiaries to retain effective and cost-appropriate outside counsel.³⁰ It is important to have a good working relationship between a trustee and counsel to effectively meet the trust's needs.³¹ The following are suggestions in the selection of counsel and in working with counsel to obtain a positive relationship.³²

B. Selecting Counsel

How should a trustee hire its counsel?³³ There is no one right answer.³⁴ A trustee should consider the legal work that needs to be accomplished.³⁵ Is it highly complex or more routine?³⁶ Does the assignment require expertise that justifies a higher rate or expense?³⁷ Does the matter better fit a contingency fee attorney or one that charges by the hour?³⁸ A trustee should determine what type of attorney is necessary.³⁹ A trustee should then determine who the attorneys with the necessary experience and education to efficiently handle the assignment are.⁴⁰ Attorneys are becoming more specialized, and trustees should take advantage of that fact.⁴¹ Is industry knowledge necessary or helpful?⁴² Trustees should utilize networking with other trustees and organizations to assist in identifying qualified counsel.⁴³ A trustee may consider the following factors: ethics; reputation; expertise in the area of law (thought leaders in the area); track record; firm size, resources, and location; knowledge of forum and judge; rates; willingness to consider

28. TEX. PROP. CODE ANN. § 115.001; TEX. CIV. PRAC. & REM. CODE ANN. § 37.005.

29. RESTATEMENT (THIRD) OF TRS. § 71 cmt. a (AM. L. INST. 2007).

30. Johnson, *supra* note 1, at 2.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

alternative billing arrangements; team and support; diversity; and responsiveness.⁴⁴

In Texas, there is the Texas Board of Legal Specialization (TBLS) that certifies attorneys in numerous legal areas.⁴⁵ There are specializations in many areas, including, but not limited to, oil and gas, real estate, employment, insurance, estate planning, civil trial law, etc.⁴⁶ To be board certified, an attorney has to be qualified, meaning they have a certain amount of experience in the specialty area; devote a substantial amount of their practice to that specialty; and pass a rigorous written exam.⁴⁷ The TBLS has a website that contains a search function to find attorneys by specialization area.⁴⁸ Another great organization to find qualified attorneys in the trust and estate area is the American College of Trust and Estate Counsel (ACTEC).⁴⁹ ACTEC is a national organization that holds conferences in trust and estate law and focuses on trends in those specialties.⁵⁰ To be a member, an attorney has a rigorous application process that focuses on substantial articles and speaking engagements in trust and estate law.⁵¹ ACTEC fellows are not just attorneys that practice trust and estate law, they are thought leaders and show a continuing dedication to expanding trust and estate law.⁵²

Selection of appropriate counsel and appropriate compensation are part of a trustee's fiduciary duty of prudence.⁵³ The Restatement (Third) of Trusts, provides:

Abuse of discretion may also be found in failure to exercise prudence in the degree or manner of delegation. Prudence thus requires the trustee to exercise reasonable care, skill, and caution in the selection and retention of agents and in negotiating and establishing the terms of the delegation. Significant terms of a delegation range from matters of agent compensation, and matters relating to the duration, termination, and other conditions of the delegation, to providing the agent with substantive direction and guidance consistent with the terms and purposes of the trust. Significant terms also include those providing the arrangements for supervision or for reporting and reviewing the agent's activities, and perhaps a provision securing the agent's consent to the jurisdiction of a particular court. The trustee then has

44. *Id.*

45. *About TBLS*, TEX. BD. OF LEGAL SPECIALIZATION, <https://www.tbls.org/about> (last visited Oct. 3, 2023) [<https://perma.cc/U5X8-DDPK>].

46. *Id.*

47. *Standards for Attorney Certification*, TEX. BD. OF LEGAL SPECIALIZATION, <https://content.tbls.org/pdf/attstdcr.pdf> (Nov. 8, 2018) [<https://perma.cc/T4DN-6HRV>].

48. *Why Choose a Board Certified Lawyer?*, TEX. BD. OF LEGAL SPECIALIZATION, <https://www.tbls.org/findlawyer> (last visited Oct. 3, 2023) [<https://perma.cc/447W-4MET>].

49. *See* THE AM. COLL. OF TR. & EST. COUNS., <http://www.actec.org> (last visited Oct. 4, 2023) [<https://perma.cc/E683-MDAY>].

50. *See id.*

51. *See id.*

52. *See id.*

53. RESTATEMENT (THIRD) OF TRS. § 80 cmt. d (AM. L. INST. 2007).

a further duty to act with prudence in supervising or monitoring the agent's performance and compliance with the terms of the delegation. Upon discovering a breach of duty by the agent (Comment g), the trustee has a duty to take reasonable steps to remedy it.⁵⁴

Therefore, if a trustee retains counsel that is too expensive or not qualified, they may be liable for breach of fiduciary duty.⁵⁵

C. Engagement Letters

Engagement letters are very important to both trustees and counsel.⁵⁶ These are the contracts that set the stage for all future work and disputes.⁵⁷ The use of properly drafted engagement letters is not only a critical risk management tool but also forms the foundation of client communication and trust.⁵⁸ A trustee should seek different engagement letters for different assignments.⁵⁹ Engagement letters should include as follows: identification of the client (and who is not the client); rates/fee arrangement; retainer; who pays bills and retainer; billing and payment; scope of assignment (and limitations); multi-party issues; termination; technology and hacking; conflicts of interest and waivers; business conflicts; rules of ethics; no guarantee on results or cost; and dispute resolution terms.⁶⁰

D. Rates

At the outset of all legal assignments, there should be an agreement and understanding of the fees and compensation.⁶¹ A written agreement is required for contingency fee cases.⁶² A written agreement should be executed for all assignments.⁶³ The trustee has a duty to obtain reasonable compensation for its agents and to not overcompensate those agents.⁶⁴ The Restatement (Third) of Trusts provides:

A trustee is not limited to incurring expenses that are “necessary” or essential, but may incur expenses that, in the exercise of fiduciary judgment, are reasonable and appropriate in carrying out the purposes of the trust, serving the interests of the beneficiaries, and generally performing the

54. *Id.* § 80 cmt. d(2).

55. *See What is a Trustee? 8 Trustee Power Explained Super Simply!*, OPELON LLP, <https://opelon.com/what-is-a-trustee/> (last visited Oct. 3, 2023) [<https://perma.cc/4A7D-URD4>].

56. Johnson, *supra* note 1, at 2.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

functions and responsibilities of the trusteeship. For example, the trustee can properly incur expenses appropriate to the collection and protection of the trust property and to making the property productive. Although a trustee is expressly or impliedly authorized or required to incur a particular type of expense, the trustee has a duty to exercise such care and skill as a person of ordinary prudence would exercise in incurring the expense.⁶⁵

Specifically, regarding attorneys, the Restatement provides: “The trustee can properly incur *reasonable* expenses in employing lawyers, brokers, or other agents or advisors so far as such employment is appropriate to the sound administration of the trust.”⁶⁶

A trustee should consider the market rates for the level of attorney expertise required and the locality of the work.⁶⁷ A trustee should consider different rates for different types of work, even for the same counsel.⁶⁸ A trustee should consider alternate billing arrangements such as a lower rate or a partial contingency.⁶⁹ A trustee should also consider whether there are any insurance issues, panel requirements, or fee limitations.⁷⁰ If a trustee is giving a volume of work to a firm, they should expect a discount on rates.⁷¹

Corporate trustees often use the same firm for multiple types of work.⁷² When a corporate trustee pays for counsel out of its own funds, they commonly negotiate lower rates (bank-pay work).⁷³ When the corporate trustee retains counsel and has the customer or trust pay, they commonly allow higher rates.⁷⁴ While this is acceptable for non-fiduciary work (loans, etc.), this practice of having two sets of rates is problematic in the fiduciary area.⁷⁵ A trustee has a fiduciary duty to the trust beneficiaries to obtain the best rates possible for legal work, and if the trustee allows a higher rate when the trust pays for attorney’s fees than when the corporate trustee pays, that can be a potential breach of fiduciary duty.⁷⁶ So, corporate trustees should be consistent and use the same rates for outside counsel whether it is a bank-pay or trust-pay matter.⁷⁷

65. RESTATEMENT (THIRD) OF TRS. § 88 cmt. b (AM. L. INST. 2007).

66. *Id.* at cmt. c (emphasis added).

67. Johnson, *supra* note 1, at 2.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. See *Understanding Corporate Trustees*, EST. PLAN. (Oct. 16, 2020), <https://www.estateplanning.com/understanding-corporate-trustees> [<https://perma.cc/Z9BR-9XTS>].

74. See *id.*

75. See *id.*

76. See Adam Barone, *What Is a Trustee? Definition, Role, and Duties*, INVESTOPEDIA, <https://www.investopedia.com/terms/t/trustee.asp> (Sept. 18, 2022) [<https://perma.cc/N97N-RZK2>].

77. See *Understanding Corporate Trustees*, *supra* note 73.

Warning: What a client is willing to pay counsel may not correlate to reasonable fees for the purposes of a recovery in a court of law.⁷⁸ Where a court has determined that a trustee's attorneys' fees are not reasonable or necessary, and yet the trustee has already paid those fees, that may be evidence that a trustee has breached its fiduciary duty to retain reasonable counsel and to compensate counsel fairly.⁷⁹

E. Communication

A trustee should demand constant, clear communication from counsel.⁸⁰ Once again, part of a trustee's fiduciary duty of prudence involves monitoring and managing its agents, which requires communication.⁸¹

The first step is to set an understanding of what communication is expected, how often, and in what medium.⁸² The trustee should communicate whether he or she prefers emails, texts, or phone calls.⁸³ A trustee and counsel should communicate about expectations at the outset.⁸⁴ They should discuss: timing considerations; budget and expense considerations; formal written budget (update requirements); rate issues; aggressiveness for matter; staffing expectations; experience requirements; confidentiality or privacy concerns related to the issue; and any internal political issues that counsel should know about.⁸⁵

Billing is often a difficult topic to communicate about, but it is one of the most important topics.⁸⁶ A trustee and counsel should communicate about rates, what entries should not be on a bill, whether block billing is allowed, and whether counsel should use task codes, etc.⁸⁷

There should be an understanding early on, and throughout a relationship, regarding which attorneys the outside counsel should use on their team.⁸⁸ Staffing is a very important issue as the attorney that is hired will often not do every task involved in the matter.⁸⁹ The trustee and counsel should discuss whether the team will include younger, less expensive attorneys or older, higher rate attorneys; expertise requirements; personality issues; diversity issues; and what task will be handled by what attorney.⁹⁰

78. Johnson, *supra* note 1, at 2.

79. *Id.*

80. *Id.*

81. *See id.* at 2–3.

82. *Id.* at 2.

83. *Id.*

84. *Id.*

85. *Id.* at 2–3.

86. *Id.* at 3.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

There should not be just one conversation about these issues.⁹¹ Rather, a trustee and counsel should communicate during the engagement as well.⁹² They should discuss whether the assignment is proceeding on schedule; whether the assignment is on budget (if not, then why not); whether the attorneys on the team are acting within expectations or whether new team members should be considered; and whether there are any changes in goals and strategy.⁹³

Litigation can be especially stressful on the relationship between the trustee and counsel.⁹⁴ There should be open communication about the following: what is the trustee and counsel's philosophy about trying or defending cases; the big picture; what does the trustee need to report to others in the organization; and how involved does the trustee want to be in litigation decisions and course of the case.⁹⁵

A trustee and counsel should communicate after the assignment is over.⁹⁶ They should discuss whether the outcome was consistent with the goal and expectations (if not, why not); any work product issues that arose; budgeting, timing, and staffing concerns; and any issues for the next project that could be improved.⁹⁷

Warning: A trustee should demand that counsel is honest with them.⁹⁸ There are several different types of outside counsel: Debbie Downer—your case is terrible, and maybe counsel can salvage it for you—or White Knight—your case is great, and counsel will vindicate you.⁹⁹ Honesty is important and also part of counsel's fiduciary duty.¹⁰⁰ A trustee should not accept anything less.¹⁰¹ However, there are some limitations on what outside counsel can forecast—a trustee should not ask for a percentage of chance of success or failure.¹⁰² Litigation is not generally a matrix- or formula-friendly venture.¹⁰³

F. Attorney-Client Privilege

The substance of communications between counsel and the trustee is very important and is entitled to protection from disclosure to opposing parties and even to the trust's own beneficiaries.¹⁰⁴

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

1. Basis for Privilege and No Fiduciary Exception in Texas

The attorney-client privilege protects confidential communications between a client and their attorney “made for the purpose of facilitating the rendition of professional legal services to the client” from disclosure.¹⁰⁵

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client: (A) between the client or the client’s representative and the client’s lawyer or the lawyer’s representative; (B) between the client’s lawyer and the lawyer’s representative; (C) by the client, the client’s representative, the client’s lawyer, or the lawyer’s representative to a lawyer representing another party in a pending action or that lawyer’s representative, if the communications concern a matter of common interest in the pending action; (D) between the client’s representatives or between the client and the client’s representative; or (E) among lawyers and their representatives representing the same client.¹⁰⁶

The privilege protects confidential communications.¹⁰⁷ A communication is “confidential” if it is not intended to be disclosed to third persons other than those persons to whom disclosure is made to further the rendition of professional legal services to the client or those persons reasonably necessary to transmit the communication.¹⁰⁸

Recognized as “the oldest of the privileges for confidential communications known to the common law,” the attorney-client privilege “promotes free discourse between an attorney and their client which advances the effective administration of justice.”¹⁰⁹ In Texas, the attorney-client privilege has been characterized as sacrosanct and has long been recognized and zealously protected in our Anglo-American jurisprudence.¹¹⁰ This privilege allows “unrestrained communication and contact between an attorney and client in all matters in which the attorney’s professional advice or services are sought, without fear that these confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding.”¹¹¹ The privilege thus “promote[s] effective legal services

105. *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49 (Tex. 2012).

106. TEX. R. EVID. 503(b)(1).

107. *See id.*

108. *Id.* at 503(a)(5); *see e.g.*, *Boring & Tunneling Co. of Am. v. Salazar*, 782 S.W.2d 284, 289–90 (Tex. App.—Houston [1st Dist.] 1989, no writ) (finding the letter to adjuster from attorney was clearly made to facilitate rendition of legal services and not intended for disclosure).

109. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *In re XL Specialty Ins. Co.*, 373 S.W.3d at 49.

110. *Paxton v. Dallas*, 509 S.W.3d 247, 249 (Tex. 2017).

111. *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978).

[which] in turn promotes the broader societal interest of the effective administration of justice.”¹¹²

In some jurisdictions, there is a fiduciary exception to the attorney-client communication privilege.¹¹³ The fiduciary exception has its origins in English trust law, which long ago recognized that the fiduciary nature of the relationship between a trustee and a beneficiary of a trust provides an exception to the privilege with respect to communications between the trustee and the trust’s attorney.¹¹⁴ The theory is that when a trustee seeks legal advice in executing their fiduciary duties, they are acting on behalf of the beneficiaries of the trust and, accordingly, cannot cloak their actions from the beneficiaries, the attorney’s “real clients.”¹¹⁵

Understood in this fashion, the fiduciary exception is not an “exception” to the attorney-client privilege at all. Rather, it merely reflects the fact that, at least as to advice regarding [trust] administration, a trustee is not ‘the real client’ and thus never enjoyed the privilege in the first place.¹¹⁶

In *Riggs National Bank of Washington D.C. v. Zimmer*, the court focused on three factors to identify the beneficiaries as the “real” clients: (1) the trustees had sought legal advice that would only benefit the trust, not the trustees personally; (2) the trustees had paid for that advice with trust funds, not the trustees’ personal funds; and (3) there was no adversarial proceeding pending against the trustees, which presumably meant that there was no need for the trustees to seek advice in a personal capacity.¹¹⁷ Another rationale to adopt the fiduciary exception is that a trustee’s duty to furnish information about the trust to its beneficiaries includes the trustee’s attorney-client communications.¹¹⁸ “Viewed in this light, the fiduciary exception can be understood as an instance of the attorney-client privilege giving way in the face of a competing legal principle.”¹¹⁹ However, the rationales underlying the fiduciary exception are not present when a trustee seeks legal advice in a personal capacity on matters not of trust administration, as opposed to a fiduciary capacity on matters of trust administration.¹²⁰

112. Republic Ins. Co. v. Davis, 856 S.W.2d 158, 160 (Tex. 1993).

113. See Craig C. Martin & Matthew H. Metcalf, *The Fiduciary Exception to the Attorney-Client Privilege*, 34 TORT & INS. L. J. 827, 832–33 (1999); *Riggs Nat’l Bank of Wash., D.C. v. Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976).

114. Martin & Metcalf, *supra* note 113.

115. *Id.*; *Zimmer*, 355 A.2d at 713–14.

116. *United States v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999).

117. *Zimmer*, 355 A.2d at 711–12.

118. *Id.* at 712; see also RESTATEMENT (THIRD) OF TRS. § 82 cmt. f (AM. L. INST. 2007) (“[L]egal consultations and advice obtained in the trustee’s fiduciary capacity concerning decisions or actions to be taken in the course of administering the trust . . . are subject to the general principle entitling a beneficiary to information that is reasonably necessary to the prevention or redress of a breach of trust or otherwise to the enforcement of the beneficiary’s rights under the trust.”).

119. *Mett*, 178 F.3d at 1063.

120. See *id.* (“On either rationale, however, it is clear that the fiduciary exception has its limits—by agreeing to serve as a fiduciary, an ERISA trustee is not completely debilitated from enjoying a

Texas does not have a fiduciary exception and allows a trustee to retain counsel and maintain the attorney-client privilege against the trust's beneficiaries.¹²¹ This privilege allows "unrestrained communication and contact between an attorney and client in all matters in which the attorney's professional advice or services are sought, without fear that these confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding."¹²² As mentioned above, the privilege thus "promotes effective legal services [which] in turn promotes the broader societal interest of the effective administration of justice."¹²³

Aside from the exception, the trustee has no duty to disclose attorney-client communications to beneficiaries.¹²⁴ In *Huie v. DeShazo*, a beneficiary argued that communications between the trustee and their counsel should be disclosed to the beneficiaries because the trustee had a general duty to disclose.¹²⁵ The Texas Supreme Court disagreed:

The communications between Ringer and Huie made confidentially and for the purpose of facilitating legal services are protected. The attorney-client privilege serves the same important purpose in the trustee-attorney relationship as it does in other attorney-client relationships. A trustee must be able to consult freely with his or her attorney to obtain the best possible legal guidance. Without the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second-guessing the trustee's actions. Alternatively, trustees might feel compelled to blindly follow counsel's advice, ignoring their own judgment and experience.¹²⁶

Texas Rule of Evidence 503(b) protects not only confidential communications between the lawyer and client but also the discourse among their representatives.¹²⁷

confidential attorney-client relationship."); see also RESTATEMENT (THIRD) OF TRS. § 82 cmt. f (AM. L. INST. 2007) ("A trustee is privileged to refrain from disclosing to beneficiaries or co-trustees opinions obtained from, and other communications with, counsel retained for the trustee's personal protection in the course, or in anticipation, of litigation (e.g., for surcharge or removal). This situation is to be distinguished from legal consultations and advice obtained in the trustee's fiduciary capacity concerning decisions or actions to be taken in the course of administering the trust.").

121. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996).

122. *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978).

123. *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex. 1993).

124. *Johnson*, *supra* note 1, at 3.

125. *Huie*, 922 S.W.2d at 923–24.

126. *Id.*; see also *Poth v. Small, Craig & Werkenthin, L.L.P.*, 967 S.W.2d 511, 515 (Tex. App.—Austin 1998, pet. denied).

127. TEX. R. EVID. 503(b).

2. Privilege Includes Client's Representatives

“The attorney-client privilege protects confidential communications between a lawyer and a client or their respective representatives made to facilitate the rendition of professional legal services to the client.”¹²⁸ This privilege is not limited to communications made in anticipation of litigation.¹²⁹ Thus, Rule 503(b) protects not only confidential communications between the lawyer and client but also the discourse among their representatives.¹³⁰ Rule 503(a)(2) defines “client representative” as “a person who has authority to obtain professional legal services for the client or to act for the client on the legal advice rendered,” or “any other person who, to facilitate the rendition of professional legal services to the client, makes or receives a confidential communication while acting in the scope of employment for the client.”¹³¹

Clients are entitled to hire third parties to provide professional guidance and to include those professionals in attorney-client communications when they provide legal services to the client.¹³² This is common in situations involving complex financial circumstances when the specialized knowledge of financial professionals aids both the attorney and the client in addressing legal issues.¹³³ For example, in *In re Stephens Inc.*, Consert Inc. (Consert) engaged a third party, Stephens Inc. (Stephens), to provide professional guidance in connection with a proposed business transaction involving Consert and a purchaser.¹³⁴ Stephens was included on communications between Consert and its counsel and was also provided access to confidential attorney-client communications between Consert and its counsel.¹³⁵ When litigation subsequently ensued with former shareholders of Consert, the former shareholders tried to compel production of these documents arguing that the presence of Stephens waived privilege.¹³⁶ The court of appeals disagreed and found that Stephens squarely fell within the definition of client representative under Rule 503(a)(2)(B).¹³⁷ Moreover, the court clarified that those communications between Consert and Stephens which transmitted legal advice were also protected; “because communications ‘between representatives of a client’ are protected if they otherwise meet the

128. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, pet. denied).

129. *Id.*

130. TEX. R. EVID. 503(b)(1)(A); see *In re Hicks*, 252 S.W.3d 790, 794 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (“The [attorney-client] privilege covers not only direct communications between lawyer and client but also communications involving the client’s representatives and the lawyer’s representatives so long as they were made for the purpose of facilitating legal services to the client.”).

131. TEX. R. EVID. 503(a)(2)(A)–(B).

132. See e.g., *In re Stephens Inc.*, 579 S.W.3d 438, 441 (Tex. App.—San Antonio 2019, no pet.).

133. *Id.*

134. *Id.* at 443.

135. *Id.* at 441–42.

136. *Id.* at 441.

137. *Id.* at 447.

requirements of the Rule, a lawyer need not be involved as an author or recipient.”¹³⁸

For a further example, in *In re Segner*, a trustee hired a consultant to assist in the management of a trust, including supervising employees and assisting with attorneys.¹³⁹ In litigation, the trustee designated the consultant as an expert and disclosed the file and everything that was provided to the trustee, reviewed and prepared by the trustee, or prepared for the trustee “in anticipation of [their] expert’s testimony.”¹⁴⁰ The opposing party sought production of much broader information from the consultant, which the trial court granted.¹⁴¹ The court of appeals granted mandamus relief because the information was protected by the attorney-client privilege.¹⁴² The court focused on the consultant’s testimony that “sent and received confidential communications with the [t]rust’s attorneys for the purposes of effectuating legal representation for the [t]rust.”¹⁴³

Warning: A client and their attorney should document early in the case (either in the engagement letter or some separate writing) that the client has representatives for the facilitation of legal services, expressly name those representatives, and have the client and the representatives sign the document.¹⁴⁴ Otherwise, there may be challenges to the representatives’ capacity and the application of the attorney-client privilege.¹⁴⁵ There has been at least one trust lawsuit in which a co-trustee’s attorney-client communications were compelled to be produced when the client’s representative had been copied on the communications, and the trial court found that the representative did not expressly agree to the representative position.¹⁴⁶

3. Successor Trustee’s Ownership of Attorney-Client Privilege

Attorneys that represent trustees should be aware that a successor trustee may own the privilege and be able to access communications between the attorney and a previous trustee.¹⁴⁷ For example, in *Moeller v. Superior Court*, the Supreme Court of California held that “the power to assert the

138. *Id.* at 445 (quoting *In re Monsanto Co.*, 998 S.W.2d 917, 929–30 (Tex. App.—Waco 1999, no pet.)).

139. *In re Segner*, 441 S.W.3d 409, 412 (Tex. App.—Dallas 2013, no pet.).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Author’s original thought.

145. *Id.*

146. See *In re Alexander*, 580 S.W.3d 858, 861 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

147. See EDWARD J. IMWINKELRIED, *THE NEW WIGMORE A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 6.5.2 (Wolters Kluwer 2015) (“[A] successor trustee inherits from a predecessor trustee the power to determine whether to assert the attorney-client privilege. The power automatically passes to the new trustee upon his or her assumption of the office of trustee.”).

attorney-client privilege with respect to confidential communications a predecessor trustee has had with its attorney on matters concerning trust administration passes from the predecessor trustee to its successor upon the successor's assumption of the office of trustee."¹⁴⁸ The *Moeller* court reasoned that because a successor trustee succeeds to all the rights, duties, and responsibilities of the predecessor trustee, the trustee's powers must be inherent to the office of the trustee rather than personal to any particular trustee.¹⁴⁹ The court justified its holding by focusing on the practicalities of a trustee's affairs:

It is likely, then, that in performing their day-to-day duties, trustees regularly have confidential communications with their attorneys about trust business (e.g., potential acquisitions and dispositions of property, lawsuits involving trust property). At any given time, therefore, many privileged communications that involve pending trust transactions are in existence. To allow for effective continuous administration of a trust, the right of access to these communications and the privilege to prevent their disclosure must belong to the person presently acting as trustee, because that person has the duty to conduct all pending trust business. Therefore, for a trust to continue to operate smoothly when a change in trustee occurs, the power to assert the attorney-client privilege must pass from the predecessor trustee to the successor.¹⁵⁰

The court also reasoned that a successor trustee must have access to a predecessor trustee's legal files to avoid liability and harm to the beneficiaries, though the court recognized the trust instrument may exculpate the successor trustee from liability for a predecessor trustee's breach of trust.¹⁵¹ However, when a trustee communicates with an attorney in the trustee's personal capacity on matters not of trust administration, disclosure of that communication may not be compelled by a successor trustee.¹⁵²

Texas Rule of Evidence 503 does not provide any real clarity on this issue.¹⁵³ The Rule defines a client as "a person, public officer, or corporation, association, or other organization or entity—whether public or private—that: (A) is rendered professional legal services by a lawyer; or (B) consults a lawyer with a view to obtaining professional legal services from the

148. *Moeller v. Superior Ct.*, 947 P.2d 279, 288 (Cal. 1997); see also *In re Estate of Fedor*, 811 A.2d 970, 972 (N.J. Super. Ct. Ch. Div. 2001) ("[T]he power to waive the privilege passes to the new trustee.").

149. *Moeller*, 947 P.2d at 283.

150. *Id.* at 284.

151. See *id.* at 287–88.

152. *Borisssoff v. Taylor & Faust*, 93 P.3d 337, 343–44 (Cal. 2004) ("A successor fiduciary becomes the holder of the attorney-client privilege 'only as to those confidential communications that occurred when the predecessor, in [its] fiduciary capacity, sought the attorney's advice for guidance in administering the trust.' Conversely, a successor fiduciary does not become the holder of the privilege for confidential communications that occurred when a predecessor fiduciary in [its] personal capacity sought an attorney's advice.") (emphases omitted) (quoting *Moeller*, 947 P.2d at 285).

153. See TEX. R. EVID. 503.

lawyer.”¹⁵⁴ This does not expressly state that a client includes successors, but it does not exclude that possibility either.¹⁵⁵ The Rule also states who may claim the privilege and provides: “The privilege may be claimed by: (1) the client; (2) the client’s guardian or conservator; (3) a deceased client’s personal representative; or (4) the successor, trustee, or similar representative of a corporation, association, or other organization or entity—whether or not in existence.”¹⁵⁶ This provision does state that an estate representative can assert the privilege and presumably have access to those communications.¹⁵⁷ It also states that the successor or trustee of an organization or entity can have access to privileged communications.¹⁵⁸ The Rule does not state, however, that a successor trustee has the right to claim the privilege.¹⁵⁹ A trustee is different from an estate representative and an entity.¹⁶⁰ However, a Texas court may consider the roles sufficiently similar to allow a successor trustee to claim the previous trustee’s privilege and access those communications.¹⁶¹ Further, the Rule lists exceptions to the privilege but does not state that successors are allowed an exception.¹⁶²

Texas has not directly addressed whether a successor trustee is entitled to view its predecessor’s privileged communications with attorneys, no matter the scope.¹⁶³ Once again, the Texas Supreme Court has held that the fiduciary exception does not apply such that a beneficiary is entitled to access privileged communications.¹⁶⁴ In Texas, a trust is not an entity and cannot be the client; rather, the trustee (in its capacity as trustee) is the party that is the client.¹⁶⁵ There are arguments on both sides of the issue of whether a successor trustee should have access to a previous trustee’s communications.¹⁶⁶

4. Joint Client Privilege Issues

Co-trustees can jointly retain counsel and assert attorney-client privilege.¹⁶⁷ The “joint client” or “co-client” doctrine applies in Texas

154. *Id.* at 503(a)(1).

155. *See id.*

156. *Id.* at 503(c).

157. *Id.*

158. *Id.*

159. Antonoplos & Assocs, *The Difference Between a Trustee and Personal Representative*, ANTONOPLS & ASSOCS. (Mar. 16, 2020), <https://www.antonlegal.com/blog/how-to-select-a-trustee-or-personal-representative-for-your-trust-or-will/> [<https://perma.cc/G2G7-GF7N>].

160. *Id.*

161. Author’s original thought.

162. TEX. R. EVID. 503(d).

163. Author’s original thought.

164. *Huie v. DeShazo*, 922 S.W.2d 920, 920 (Tex. 1996).

165. *Id.* at 925.

166. Author’s original thought.

167. *See In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 50 (Tex. 2012).

“[w]hen the same attorney simultaneously represents two or more clients on the same matter.”¹⁶⁸ “Joint representation is permitted when all clients consent and there is no substantial risk that the lawyer’s representation of one client would be materially adversely affected by the lawyer’s duties to the other.”¹⁶⁹ “Where [an] attorney acts as counsel for two parties, communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients.”¹⁷⁰ When more than one person seeks consultation with an attorney on a matter of common interest, the parties and the attorney may reasonably presume the parties are seeking representation of a common matter.¹⁷¹

So, when co-trustees jointly retain counsel, their communications with their attorney are privileged as against third parties, such as beneficiaries.¹⁷² However, if the co-trustees themselves have a dispute, there is no privilege and the communication between the attorney and either one of the co-trustees is open to discovery by the other co-trustee.¹⁷³ Texas Rule of Evidence 503(d)(5) provides that the following is an exception to the privilege: “If the communication: (A) is offered in an action between clients who retained or consulted a lawyer in common; (B) was made by any of the clients to the lawyer; and (C) is relevant to a matter of common interest between the clients.”¹⁷⁴

For example, in *In re Alexander*, a beneficiary filed suit against the trustee based on multiple allegations of breach of fiduciary duty, including an allegation that the trustee attempted to transfer the trustee position to successors in violation of the trust’s terms.¹⁷⁵ The beneficiary filed a motion to compel trust documents and emails regarding the same that were drafted by an attorney but were never executed.¹⁷⁶ After the trial court granted the motion to compel, the trustee filed a petition for writ of mandamus, challenging the order on the basis of the attorney-client privilege and attorney work-product doctrine.¹⁷⁷

The court stated that the trustee filed affidavits proving that the drafts and communications were prepared in the course of the attorney’s

168. PAUL R. RICE ET AL., ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:30 (2022–2023 ed. 2011).

169. *In re XL Specialty Ins. Co.*, 373 S.W.3d at 50 (citing RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 128 (AM. L. INST. 2000)).

170. *In re JDN Real Estate-McKinney L.P.*, 211 S.W.3d 907, 922 (Tex. App.—Dallas 2006, no pet.).

171. *Id.*

172. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 75 (AM. L. INST. 2000).

173. TEX. R. EVID. 503(d)(5) (noting that communications made by two or more clients to a lawyer retained in common are not privileged “when offered in an action between or among any of the clients”).

174. *Id.*

175. *In re Alexander*, 580 S.W.3d 858, 858 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

176. *Id.* at 863.

177. *Id.* at 860.

representation of the trustee and were for legal advice.¹⁷⁸ The court then discussed the concept of a trustee's communications with its counsel being privileged:

In *Huie*, the [Texas Supreme Court] considered whether the attorney-client privilege protects communications between a trustee and his or her attorney relating to the administration of a trust from discovery by a trust beneficiary. There, a trust beneficiary sued the trustee, alleging that he had mismanaged the trust, engaged in self-dealing, diverted business opportunities from the trust, and commingled and converted trust property. The beneficiary noticed the deposition of the trustee's attorney, who appeared but refused to answer questions about the management and business dealings of the trust. After an evidentiary hearing, the trial court held that the attorney-client privilege did not prevent the beneficiary from discovering the attorney's pre-lawsuit communications. The court in *Huie* observed that trustees "owe beneficiaries 'a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiaries'] rights.'" Furthermore, this duty exists independently of the rules of discovery and applies even if no litigious dispute exists between the trustee and beneficiaries. While the attorney-client privilege protects confidential communications between a client and the attorney made for the purpose of facilitating the rendition of professional legal services to the client, a person cannot cloak a material fact with the attorney-client privilege merely by communicating it to an attorney. The *Huie* court illustrated the point with the following hypothetical:

Assume that a trustee who has misappropriated money from a trust confidentially reveals this fact to his or her attorney for the purpose of obtaining legal advice. The trustee, when asked at trial whether he or she misappropriated money, cannot claim the attorney-client privilege. The act of misappropriation is a material fact of which the trustee has knowledge independently of the communication. The trustee must therefore disclose the fact (assuming no other privilege applies), even though the trustee confidentially conveyed the fact to the attorney. However, because the attorney's only knowledge of the misappropriation is through the confidential communication, the attorney cannot be called on to reveal this information.

Nonetheless, the court flatly rejected the beneficiary's argument that a trustee's duty of disclosure extends to any and every communication between the trustee and his attorney. The court explained that (1) its holding did not affect the trustee's duty to disclose all material facts and to provide a trust accounting to the beneficiary, even as to information conveyed to the attorney; (2) the beneficiary could depose the attorney and question him about his handling of trust property and other factual matters involving the trust; and (3) the attorney-client privilege did not bar the attorney from testifying about factual matters involving the trust, so long as he was not called on to reveal confidential attorney-client communications.

178. *Id.* at 869.

Although a trustee owes a duty to a trust beneficiary, the trustee in *Huie* did not retain the attorney to represent the beneficiary but to represent himself in carrying out his fiduciary duties. Contrary to Preston's point, the *Huie* court recognized that communications between a trustee and the trustee's attorney made confidentially and for the purpose of facilitating legal services remain protected. The hypothetical in *Huie* involved the trustee's misappropriation of trust funds, which he revealed to his attorney for purpose of obtaining legal advice. The trustee's misappropriation was a material fact of which the trustee knew independent of the communication.

In contrast to the circumstances in *Huie*, and as explained above, HHS and all the Co-Trustees had an attorney-client relationship at the relevant time, and any communications among HHS and their joint clients regarding the contents of the draft documents were made for the purpose of obtaining legal services from HHS, and the Co-Trustees' knowledge of the draft documents was not gained independent of receiving legal advice. Accepting Preston's view of the discoverability of the subject documents would strip the attorney-client privilege and joint-client doctrine of their core purpose and meaning. Therefore, relators had no duty under *Huie* to disclose the draft documents to Preston.¹⁷⁹

The court also held that the trustee had not waived the privilege by testifying in a deposition about the drafts of the documents.¹⁸⁰ The court held that the testimony was not specific enough to constitute a waiver.¹⁸¹ The court granted the petition and ordered the trial court to reverse its order compelling production of the documents and communications.¹⁸²

Where one co-trustee hires counsel, may the trustee produce attorney-client communications to its non-client co-trustee and maintain the privilege?¹⁸³ Generally, there should be extreme caution applied in this circumstance outside of litigation.¹⁸⁴ Confidential communications to which the attorney-client privilege applies include those "by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action for that lawyer's representative, if the communications concern a matter of common interest in the pending action."¹⁸⁵ This rule, often referred to as the "common interest" privilege, is an exception to the general rule that no attorney-client privilege attaches to communications that are made in the presence of, or disclosed to, a third party.¹⁸⁶ The Texas Supreme Court has addressed the "pending action"

179. *Id.* at 867–69.

180. *Id.* at 870.

181. *Id.* at 869.

182. *Id.* at 870.

183. Johnson, *supra* note 1, at 5.

184. *Id.*

185. TEX. R. EVID. 503(b)(1)(C).

186. *In re JDN Real Estate-McKinney L.P.*, 211 S.W.3d 907, 922–23 (Tex. App.—Dallas 2006, no pet.).

requirement of the rule and concluded that the “common interest” privilege is more accurately described as an “allied litigant” privilege.¹⁸⁷ This is because the privilege does not extend beyond litigation, and it applies to any parties—not just the defendants—to a pending action.¹⁸⁸ Because of the pending action requirement, “no commonality of interest exists absent actual litigation.”¹⁸⁹

G. Advice-of-Counsel Defense

A trustee should be careful, however, of using advice of counsel as a defense to a claim.¹⁹⁰ True, advice of counsel is a factor in evaluating a trustee’s prudence.¹⁹¹ But, if a trustee raises advice of counsel as a defense, then the trustee will likely waive its attorney-client communication privilege.¹⁹² If a party introduces any significant part of an otherwise privileged matter, that party waives the privilege.¹⁹³ If a defendant voluntarily introduces its communications with counsel as a defense to claims, it cannot also seek to keep other aspects of the communications privileged.¹⁹⁴ A Delaware court reviewed a similar fact pattern and found that the privilege was waived.¹⁹⁵ In *Mennen v. Wilmington Trust Co.*, a trustee was sued for breach of fiduciary duty.¹⁹⁶ One of the trustee’s defenses was that they received bad legal advice from counsel.¹⁹⁷ The trustee attempted to block production of the alleged bad advice from counsel, citing attorney-client privilege.¹⁹⁸ The court was unpersuaded by the trustee’s invocation of the privilege, stating that “[a] party’s decision to rely on advice of counsel as a defense in litigation is a conscious decision to inject privileged communications into the litigation.”¹⁹⁹

The Texas Rules of Evidence, and courts nationwide, agree that when privileged communications are voluntarily introduced in litigation, they are no longer privileged.²⁰⁰ The Texas Supreme Court has declared that a party cannot use the privilege as a sword to promote or protect its own affirmative

187. *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 52 (Tex. 2012).

188. *Id.*

189. *Id.*

190. Johnson, *supra* note 1, at 6.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Mennen v. Wilmington Tr. Co.*, No. 8432-ML, 2013 WL 5288900, at *1–13 (Del. Ch. Sept. 18, 2013).

196. *Id.* at *3.

197. *Id.* at *5.

198. *Id.*

199. *Id.*

200. Johnson, *supra* note 1, at 6.

claims or further the relief it seeks.²⁰¹ In fact, the Texas Supreme Court would later expand upon the “offensive use” doctrine and acknowledge that a party has waived the assertion of a privilege if the court determines that:

(1) the party asserting the privilege is seeking affirmative relief; (2) the privileged information sought is such that, if believed by the fact finder, in all probability it would be outcome determinative of the cause of action asserted; and (3) disclosure of the confidential information is the only means by which the aggrieved party may obtain the evidence.²⁰²

The Texas Supreme Court has explained that with regard to the second prong, “[t]he confidential communication must go to the very heart of the affirmative relief sought.”²⁰³ “When a party uses a privilege as a sword rather than a shield, [they] waive[] the privilege.”²⁰⁴ Accordingly, a trustee should be careful and weigh the risk and reward of injecting attorney-client communications into a dispute.²⁰⁵

H. Inadvertent Attorney-Client Relationships

A trustee and its counsel should be careful to appropriately communicate with the beneficiary so that the beneficiary does not believe that they are a client of the trustee’s attorney.²⁰⁶ Certainly, an attorney can represent more than one party; in fact, that is very common.²⁰⁷ For example, a law firm may represent both spouses in the sale of real property, the leasing of minerals, or estate planning.²⁰⁸ So, a reasonably prudent attorney should identify who they represent and clarify that they do not represent a party when they first communicate with a party regarding a legal matter.²⁰⁹ Though not dispositive, a “trier of fact may consider the construction of a relevant rule of professional conduct that is designed for the protection of persons in the claimant’s position as evidence of the standard of care and breach of the standard.”²¹⁰

The downside of this issue for the attorney is that the attorney may inadvertently create an attorney-client relationship and be held to fiduciary duties that are not anticipated by them.²¹¹ To have an attorney-client relationship there does not have to be a formal agreement.²¹² “While it is

201. *Id.*

202. *Transamerican Nat. Gas Corp. v. Flores*, 870 S.W.2d 10, 11–12 (Tex. 1994).

203. *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993).

204. *Alford v. Bryant*, 137 S.W.3d 916, 921 (Tex. App.—Dallas 2004, pet. denied).

205. *Johnson*, *supra* note 1, at 6.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. WILLIAM V. DORSANEO III, *Texas Litigation Guide* § 322.02 (Matthew Bender Elite Products eds., 1977) (citing RESTATEMENT (THIRD) OF L. GOVERNING LAWS. § 52, cmt. f).

211. *Johnson*, *supra* note 1, at 5–6.

212. *Id.*

generally a relationship created by contract, an attorney-client relationship can be implied based on the conduct of the parties.”²¹³ “The attorney-client relationship may be implied if the parties by their conduct manifest an intent to create such a relationship.”²¹⁴ For the relationship to be established, “the parties must explicitly or by their conduct manifest an intention to create it. To determine whether there was a meeting of the minds, [courts] use an objective standard examining what the parties said and did and do not look at subjective states of mind.”²¹⁵ “More specifically, an attorney-client relationship can be implied from the attorney’s gratuitous rendition of professional services.”²¹⁶

It should also be noted that an attorney may be liable for not informing a party that they are not representing the party.²¹⁷ The *Querner* court stated:

Although an attorney hired by an executor generally represents the executor and not the beneficiary, an attorney for an executor may undertake to perform legal services as attorney for one or more beneficiaries. An attorney-client relationship may develop between the attorney retained by the executor and the beneficiaries either expressly or impliedly. Even absent an attorney-client relationship, an attorney may be held negligent for failing to advise a party that he is not representing the party. “If circumstances lead a party to believe that they are represented by an attorney,” the attorney may be held liable for such a failure to advise.²¹⁸

So, to avoid confusion, the attorney should always have a written engagement letter that expresses the identity of the client or clients, that the attorney is not representing any other party not expressly mentioned, the scope of the engagement, and when the engagement will be terminated.²¹⁹ Further, if appropriate, the attorney should follow up and orally tell those that they are not representing but with whom the attorney often communicates, that they are not representing them and are only representing their client(s).²²⁰ Further, individuals should also seek clarification and ask the attorney who

213. *Sotello v. Stewart*, 281 S.W.3d 76, 80 (Tex. App.—El Paso 2008, pet. denied) (citing *Suttin v. Est. of McCormick*, 47 S.W.3d 179, 182 (Tex. App.—Corpus Christi–Edinburg 2001, no pet.); *accord Mellon Serv. Co. v. Touche Ross & Co.*, 17 S.W.3d 432, 437 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

214. *Daves v. Comm’n for Law. Discipline*, 952 S.W.2d 573, 577 (Tex. App.—Amarillo 1997, pet. denied).

215. *Roberts v. Healey*, 991 S.W.2d 873, 880 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

216. *Sotello*, 281 S.W.3d at 80–81 (citing *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi–Edinburg 1991, writ denied)).

217. *Johnson*, *supra* note 1, at 5–6.

218. *Querner v. Rindfuss*, 966 S.W.2d 661, 667–68 (Tex. App.—San Antonio 1998, pet. denied) (recognizing that an attorney’s advice may give rise to an informal fiduciary duty even when no formal attorney-client relationship is formed); *see also Vinson & Elkins v. Moran*, 946 S.W.2d 381, 400–02 (Tex. App.—Houston [14th Dist.] 1997, writ denied); *Burnap v. Linnartz*, 914 S.W.2d 142, 148 (Tex. App.—San Antonio 1995, writ denied).

219. *Johnson*, *supra* note 1, at 7.

220. *Id.*

they represent and whether the individual should retain their own attorney.²²¹ Everyone should strive to be on the same page regarding who is the attorney and who is the client.²²²

IV. CO-TRUSTEES MANAGING TRUSTS

A. Co-Trustees Must Jointly Manage Trusts

Retaining attorneys can be more complicated with a trust administered by co-trustees.²²³ Co-trustees each owe fiduciary duties, but they should exercise their duties jointly.²²⁴ So, one co-trustee should not take any action without the consent of the other co-trustees.²²⁵ For example, if a trust calls for two co-trustees, it cannot operate with just one.²²⁶

At common law, the co-trustees had to act with unanimity: “The traditional rule, in the case of private trusts, was that if there were two or more trustees, all had to concur in the exercise of their powers.”²²⁷ However, the Texas Property Code provides that, in the absence of trust direction, co-trustees typically act by majority decision.²²⁸ So, the Texas Property Code establishes the general rule that if the trust names two co-trustees, they must act jointly in order to bind the trust, and one cannot act on behalf of the trust without the consent of the other unless the trust agreement specifically authorizes the co-trustee to act unilaterally.²²⁹

For example, in *Conte v. Conte*, the court of appeals affirmed a trial court’s order denying a co-trustee’s request for reimbursement for attorney’s fees expended in connection with a declaratory judgment action brought by another co-trustee.²³⁰ The court noted that the trust expressly provided that “any decision acted upon shall require unanimous support by all [c]o-[t]rustees then serving,” and “[c]learly, Joseph Jr.’s decision to employ counsel to defend against [the] co-trustee’s declaratory judgment action was not the subject of unanimous support by all co-trustees.”²³¹ Thus, the trustee was not entitled to reimbursement from the trust for the attorneys’ fees,

221. *Id.*

222. *Id.*

223. *Id.* at 11.

224. *Id.*

225. *Id.*

226. *Id.*

227. AUSTIN W. SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS, § 18.3 (5th ed. 2006); *see, e.g.*, *Brown v. Donald*, 216 S.W.2d 679, 683 (Tex. App.—Fort Worth 1949, no writ); *Hart v. First State Bank of Seminole*, 24 S.W.2d 480, 482 (Tex. App.—El Paso 1930, writ ref’d); *Dodge v. Lacey*, 216 S.W. 400, 402 (Tex. App.—Fort Worth 1919, writ dism’d w.o.j.).

228. TEX. PROP. CODE ANN. § 113.085(a); *Duncan v. O’Shea*, No. 07-19-00085-CV, 2020 WL 4773058, at *6 (Tex. App.—Amarillo Aug. 17, 2020, no pet.); *see* RESTATEMENT (THIRD) OF TRS. § 39 (AM. L. INST. 2007).

229. PROP. §§ 111.0035, 113.085.

230. *Conte v. Conte*, 56 S.W.3d 830, 835 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

231. *Id.* at 834.

despite the trust's provision that "[e]very trustee shall be reimbursed from the trust for the reasonable costs and expenses incurred in connection with such [t]rustee's duties."²³² In a footnote, the court also noted that the other co-trustee had paid for the attorneys from the trust without the consent of the other co-trustee and this was an issue that the successor trustee or beneficiary could raise in a later proceeding.²³³

Accordingly, if the trust document does not require unanimous action, a majority of the co-trustees can vote to retain counsel and pay from the trust.²³⁴ Conversely, a co-trustee in the minority may not retain counsel and pay from the trust.²³⁵ For example, in *Berry v. Berry*, one co-trustee sued the other three co-trustees regarding the administration of trust.²³⁶ The court held that the co-trustee in the minority had no authority to sue the other co-trustees for damages:

Kenneth first contends that, as a trustee, he can bring claims on behalf of the Trust against third parties. Kenneth is correct that a "trustee" is generally an "interested person" who may "bring an action under Section 115.001." But the claims at issue seek to vindicate the rights of the Trust, and the Trust has four co-trustees, three of whom oppose Kenneth's desire to assert the Trust's rights as he has. The question, then, is how to determine who may bring claims on behalf of a trust when co-trustees disagree. The Legislature has provided an unsurprising default rule: "Co-trustees may act by majority decision."

Naturally, the other trustee brothers do not want the claims asserted by Kenneth on behalf of the Trust to proceed. In fact, the Consent Agreement they signed after the lawsuit was filed released any such claims and stated that the other trustees believe it is not in the best interests of the Trust for such claims to proceed. Faced with what amounts to a 3-1 vote of the trustees against him, Kenneth has no unilateral power to act for the Trust in court against the wishes of a majority of the trustees.

Kenneth argues that trustees in his situation must have some recourse when, as alleged here, the other trustees have conspired with the non-trustee defendants to injure the Trust. But Kenneth does have recourse. He can seek removal of the other trustees, as he did in this suit. The defendants do not contest his authority to seek such relief. Further, the defendants do not dispute that Kenneth was permitted as a beneficiary to sue his brothers for breach of fiduciary duty. They oppose that claim on limitations grounds, not on the theory that Kenneth lacks the authority to bring it.²³⁷

232. *Id.*

233. *Id.* at n.5.

234. *Berry v. Berry*, 646 S.W.3d 516, 530 (Tex. 2022).

235. *Id.*

236. *Id.* at 521.

237. *Id.* at 530.

However, the minority co-trustee can individually retain and pay for counsel from its own funds and later seek reimbursement in litigation concerning removing the majority co-trustees.²³⁸

B. Duty to Sue a Co-Trustee

The Texas Property Code allows a co-trustee to sue another co-trustee for breach of fiduciary duty, to seek removal of the co-trustee, and to seek forfeiture of compensation.²³⁹ Texas Property Code Section 113.082 provides:

- (a) A trustee may be removed in accordance with the terms of the trust instrument, or, on the petition of an interested person and after hearing, a court may, in its discretion, remove a trustee and deny part or all of the trustee's compensation if:
 - (1) the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust;
 - (2) the trustee becomes incapacitated or insolvent;
 - (3) the trustee fails to make an accounting that is required by law or by the terms of the trust; or
 - (4) the court finds other cause for removal.
- (b) A beneficiary, co-trustee, or successor trustee may treat a violation resulting in removal as a breach of trust.²⁴⁰

The term "interested person" means:

[A] *trustee*, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust. Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.²⁴¹

The term "trustee" means "the person holding the property in trust, including an original, *additional*, or successor *trustee*, whether or not the person is appointed or confirmed by a court."²⁴² So, "additional" trustees are interested persons and may invoke a court's jurisdiction under this statute.²⁴³ For example, in *Ramirez v. Rodriguez*, the court held that three co-trustees could

238. See TEX. PROP. CODE ANN. § 114.064.

239. See *id.* § 113.082.

240. *Id.*

241. *Id.* § 111.004(18) (emphasis added).

242. *Id.* (emphasis added).

243. Johnson, *supra* note 1, at 14.

sue to remove the fourth co-trustee due to hostility between the co-trustees.²⁴⁴ Once again, the Texas Supreme Court has held that a co-trustee in the minority can seek to remove the other co-trustees but cannot sue on behalf of the trust.²⁴⁵

V. COMPENSATING ATTORNEYS

A. General Compensation Authority

1. Trust Language

Generally, trustees have the right to compensate attorneys who do work for a trust.²⁴⁶ Indeed, the power to retain attorneys would be meaningless if trustees did not have the commiserate right to pay them.²⁴⁷ For that reason, trusts often have express provisions allowing a trustee to retain agents, including attorneys, and to pay them from the trust.²⁴⁸ When a dispute arises concerning retaining or compensating attorneys, the trust document is the first place to look for guidance.²⁴⁹ Generally, the trust document governs and should be followed.²⁵⁰ Accordingly, if a trust document provides instructions on the retention and compensation of attorneys, those instructions should be followed.²⁵¹

However, as noted above, a trustee must use any power given in a trust in good faith.²⁵² So, a trustee cannot use the power to hire and pay counsel if it is done in bad faith.²⁵³ One example of bad faith may be when a trustee knows they have violated fiduciary duties and pays for the attorney out of the trust to defend against a reasonable claim of breach of fiduciary duty.²⁵⁴

Drafting Tip: Attorneys that draft trust documents may want to consider adding terms that expressly address a trustee having the right to retain and compensate counsel.²⁵⁵ Specifically, a drafting attorney who wants to include a trustee-friendly provision may want to include an express statement that the trustee can compensate counsel in the interim (before any

244. Ramirez v. Rodriguez, No. 04-19-00618-CV, 2020 WL 806653, at *4 (Tex. App.—San Antonio Feb. 19, 2020, no pet.).

245. Berry v. Berry, 646 S.W.3d 516, 530 (Tex. 2022).

246. Johnson, *supra* note 1, at 14.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. TEX. PROP. CODE ANN. § 111.0035.

253. *Id.*

254. RESTATEMENT (THIRD) OF TRS. § 88 cmt. d (AM. L. INST. 2007).

255. Johnson, *supra* note 1, at 14.

final resolution) from trust assets regarding any breach of fiduciary duty or related claims without the necessity of seeking court approval for the same.²⁵⁶

For example, such a provision may state:

All trustees (whether in the minority or majority) shall be entitled to reimbursement and advancement (payment of fees in the interim and before a final judgment in litigation) for expenses, including attorney's fees, incurred in pursuance of their duties under this Trust at the expense of my Trust in regard to any other matter which might arise during the administration of my Trust.²⁵⁷

2. Statutory Authority

Trust documents generally do not limit a trustee's power to retain and compensate attorneys.²⁵⁸ The Texas Property Code has several provisions that impact a trustee's power to compensate attorneys.²⁵⁹ To the extent the trust instrument is silent, the provisions of the Texas Property Code govern.²⁶⁰

Texas Property Code Section 113.018, which is titled "Employment and Appointment of Agents," provides: "A trustee may employ attorneys, accountants, agents, including investment agents, and brokers reasonably necessary in the administration of the trust estate."²⁶¹ From a fair reading of this statute, one would think that if a trustee has the power to retain an attorney, the trustee has the power to pay for the attorney.²⁶² Indeed, few attorneys will perform their services for free for a trust.²⁶³

The Texas Supreme Court discussed a trustee's ability to hire and pay professionals during the administration of a trust in *Corpus Christi Bank & Trust v. Roberts*.²⁶⁴ In this case, a trustee hired a real estate manager to manage and rent an apartment complex.²⁶⁵ The trustee paid the real-estate manager from trust assets.²⁶⁶ The trust beneficiaries challenged the fees paid to the manager.²⁶⁷ The Texas Supreme Court analyzed Article 742b-25 of the Texas Trust Act, the predecessor to Property Code Section 113.018.²⁶⁸

256. *Id.*

257. Author's original proposal.

258. Johnson, *supra* note 1, at 14.

259. See TEX. PROP. CODE ANN. § 113.018.

260. *Id.* § 113.001; Conte v. Conte, 56 S.W.3d 830, 832 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

261. PROP. § 113.018; see also Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996).

262. Johnson, *supra* note 1, at 14.

263. *Id.*

264. Corpus Christi Bank & Tr. v. Roberts, 597 S.W.2d 752, 753–54 (Tex. 1980).

265. *Id.* at 753.

266. *Id.*

267. *Id.*

268. *Id.* at 754.

Article 7425b-25 provided that a trustee was authorized to “[e]mploy attorneys, accountants, agents, and brokers reasonably necessary in the administration of the trust estate.”²⁶⁹ The trust instrument in the case provided that the trustee had a duty to rent or lease trust assets.²⁷⁰ The Texas Supreme Court held that the trustee had the authority to hire and pay the real-estate manager pursuant to that duty.²⁷¹ According to the court, “under the Texas Trust Act and the terms of the trust agreement the Trustee was granted authority to hire such agents as [the trustee] determined, in [the trustee’s] discretion, were reasonably necessary for the management and control of the rental properties.”²⁷² The court reversed the lower court’s decision ordering the deceased trustee’s estate to reimburse the trust for the fees paid to the real-estate manager.²⁷³ But one court has since held that “Section 113.018 of the Texas Property Code . . . authorizes a trustee to employ an attorney, but it does not address the conditions for reimbursement of attorney’s fees from the trust estate.”²⁷⁴

Note that this provision has an important limitation: “[R]easonably necessary in the administration of the trust estate.”²⁷⁵ Generally, trust administration refers to the trustees’ management of trust property according to the trust document’s terms and for the benefit of the beneficiaries after the settlor’s death.²⁷⁶ So, if a court or jury later finds that it was not “reasonably necessary in the administration of the trust estate” for the trustee to retain an attorney, the trustee may be found in violation of the statute and may be in breach of fiduciary duties.²⁷⁷

One example of such an occasion may be when a trustee has breached their fiduciary duty, and a beneficiary has sued the trustee for that breach.²⁷⁸ A judge or jury may find that a trustee who is defending against a correct breach of fiduciary duty claim did not retain an attorney who was “reasonably necessary for the administration of the trust estate.”²⁷⁹ Of course, the parties may not know until the end of the litigation whether the trustee breached a fiduciary duty and whether the trustee had the right to retain an attorney under this provision.²⁸⁰ For example, in *Stone v. King*, the court of appeals affirmed

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 755; *see also* Slack v. Preuss, No. 06-21-00018-CV, 2022 WL 247824, at *11 (Tex. App.—Texarkana Jan. 27, 2022, no pet.) (finding the trustee had authority to retain account and pay for same in administration of trust).

274. Conte v. Conte, 56 S.W.3d 830, 834 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

275. TEX. PROP. CODE ANN. § 113.018.

276. Johnson, *supra* note 1, at 14.

277. *Id.*

278. *Id.*

279. *Id.*; PROP. § 113.018.

280. *Id.*

a finding that a trustee breached their fiduciary duties in converting trust property to pay for their attorney's fees.²⁸¹

In a different provision, the Texas legislature specifically recognizes the trustee's right to reimbursement from trust funds:

(a) A trustee may discharge or reimburse himself from trust principal or income or partly from both for: (1) advances made for the convenience, benefit, or protection of the trust or its property; (2) expenses incurred while administering or protecting the trust or because of the trustee's holding or owning any of the trust property; . . . (b) The trustee has a lien against trust property to secure reimbursement under Subsection (a).²⁸²

Note that the statute provides reimbursement for "expenses incurred while administering or protecting the trust, *or* because of the trustee's holding or owning any of the property."²⁸³ Moreover, the use of the disjunctive "or" makes it clear that a trustee's right to reimbursement from trust funds for expenses arises when the trustee is administering or protecting the trust or because the trustee is holding or owning any trust property.²⁸⁴ A trustee has a statutory lien against trust property to ensure the trustee is reimbursed for expenses incurred.²⁸⁵

This provision has important limitations that reimbursement is only allowed where the retention of the agent was for "the convenience, benefit, or protection of the trust or its property" or where it was for "administering or protecting the trust or because of the trustee's holding or owning any of the trust property."²⁸⁶ Once again, a judge or jury may find that reimbursement for a trustee retaining counsel to defend against a correct breach of fiduciary duty claim does not comply with these limitations.²⁸⁷

Section 114.063 does not expressly contain a requirement that the reimbursement be for expenses that are "reasonable and necessary" or "equitable and just."²⁸⁸ So, this statute does not appear to require a trustee to prove at the time of reimbursement that the attorney's fees and litigation expenses are reasonable and necessary or equitable and just.²⁸⁹ However, the Texas Property Code requires that a trustee act in good faith, and a jury or judge may determine that reimbursement for unnecessary or unreasonable attorney's fees does not meet the good-faith test.²⁹⁰

281. *Stone v. King*, No. 13-98-022-CV, 2000 WL 35729200, at *8 (Tex. App.—Corpus Christi—Edinburg Nov. 30, 2000, pet. denied).

282. PROP. § 114.063.

283. *Id.* § 114.063(a)(2) (emphasis added).

284. *Id.*

285. *Id.* § 114.063(b).

286. *Id.* § 114.063(a)(1)–(2).

287. *Johnson*, *supra* note 1, at 15.

288. PROP. § 114.063.

289. *See id.*

290. *Id.* § 111.0035(b)(4)(B).

Texas Property Code Section 114.064 provides that “[i]n 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*.”²⁹¹ Texas Property Code Section 114.064 was codified because “the [then] current code [did] not contain a provision allowing the court to award costs and attorney’s fees to a trustee who *prevails* in an action for removal or . . . surcharge.”²⁹² So, when an interested party, including a trustee, files a proceeding under the Texas Property Code, a court may award any party attorney’s fees that the court finds are equitable and just and also necessary and reasonable (the later findings may have to be made by a jury).²⁹³ The Texas Property Code describes the following jurisdiction of district courts regarding trust disputes:

[A] district court has original and exclusive jurisdiction over all proceedings by or against a trustee and all proceedings concerning trusts, including proceedings to: (1) construe a trust instrument; (2) determine the law applicable to a trust instrument; (3) appoint or remove a trustee; (4) determine the powers, responsibilities, duties, and liability of a trustee; (5) ascertain beneficiaries; (6) make determinations of fact affecting the administration, distribution, or duration of a trust; (7) determine a question arising in the administration or distribution of a trust; (8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle; (9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and (10) surcharge a trustee.²⁹⁴

The granting or denying of attorney’s fees to a trustee or beneficiary under Section 114.064 is within the sound discretion of the trial court, and a reviewing court will not reverse the trial court’s judgment absent a clear showing that the trial court abused its discretion by acting without reference to any guiding rules and principles.²⁹⁵ Moreover, unless waived, a party is entitled to a jury finding on whether the fees were reasonable and necessary.²⁹⁶

291. *Id.* § 114.064 (emphasis added); see also *Alpert v. Riley*, 274 S.W.3d 277, 295 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *Hachar v. Hachar*, 153 S.W.3d 138, 142 (Tex. App.—San Antonio 2004, no pet.).

292. Senate Comm. on State Affairs, Bill Analysis, Tex. S.B. 517, 69th Leg., R.S. (1985) (emphasis added).

293. See *In re Ellison Grandchildren Tr.*, 261 S.W.3d 111, 111 (Tex. App.—San Antonio 2008, pet. denied) (affirming award of attorney’s fees to all parties to a trust construction case).

294. PROP. § 115.001(a).

295. *Lee v. Lee*, 47 S.W.3d 767, 793–94 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Lycro Acquisition 1984 Ltd. P’ship v. First Nat’l Bank of Amarillo*, 860 S.W.2d 117, 121 (Tex. App.—Amarillo 1993, writ denied).

296. See *Lesikar v. Moon*, 237 S.W.3d 361, 375 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

The Texas Property Code does not provide any clear guidance as to how Sections 114.063 and 114.064 work together.²⁹⁷ One theory is that a trustee has the right to reimburse itself for any attorney's compensation immediately under Section 114.063.²⁹⁸ That is true even when a trustee has retained an attorney to defend breach of fiduciary duty and related claims.²⁹⁹ Then, at the end of any litigation, a court may make an award of necessary and reasonable attorney's fees that it deems equitable and just and may require the trustee to pay back fees that it paid earlier in the litigation.³⁰⁰ Texas Property Code Section 114.008 provides that a court may order a trustee to restore property upon a finding of a breach of duty.³⁰¹ The downside of this argument is that if the trustee is insolvent, the trustee may not be able to reimburse the trust at the end of the litigation.³⁰²

Another potential theory is that Section 114.063 deals with non-litigation matters.³⁰³ Certainly, a trustee has the right to hire counsel to draft a deed, negotiate an oil and gas lease, and to pay the attorney and seek reimbursement.³⁰⁴ Comparatively, Section 114.064 deals with retaining attorneys in litigation.³⁰⁵ Section 114.064 expressly uses the terms "proceeding under this code" and "award," which seem to imply the payment of fees in the course of litigation.³⁰⁶ Under this theory, a trustee would only be entitled to have a trust pay for litigation fees upon a court order after findings of necessity, reasonableness, equitableness, and justness.³⁰⁷

Yet another theory is that Section 114.063 deals with the retention of attorneys by trustees as between the trust and the trustee.³⁰⁸ Section 114.064 deals with an award of fees in trust-related litigation.³⁰⁹ So, a court can award necessary and reasonable fees to a plaintiff or defendant depending on multiple equitable factors, but that provision does not impact a trustee's private right to reimbursement from a trust for retaining counsel.³¹⁰ Later, if the plaintiff is a beneficiary, and the defendant is the trustee, a court can award the plaintiff fees against the trustee, individually, and make the trustee or its counsel disgorge any fees paid by the trust based on a finding of a breach of fiduciary duty.³¹¹

297. Johnson, *supra* note 1, at 16.

298. *Id.*

299. *Id.*

300. *Id.*

301. TEX. PROP. CODE ANN. § 114.008.

302. Johnson, *supra* note 1, at 16.

303. *Id.*

304. *Id.*

305. PROP. § 114.064.

306. *Id.*

307. Johnson, *supra* note 1, at 16.

308. *Id.*

309. PROP. § 114.064.

310. Johnson, *supra* note 1, at 16.

311. *Id.*

Another theory is that Section 114.063 does not address the payment of attorney's fees at all, just other expenses.³¹² Section 114.064, which specifically provides for the recovery of attorney's fees, was adopted two years after Section 114.063, which makes no reference to attorney's fees.³¹³ If the Texas Legislature had intended Section 114.063 to cover attorney's fees and expenses, why did it later enact Section 114.064 to specifically govern attorney's fees?³¹⁴ The specific Section 114.064 governs the issue of attorney's fees, and the general Section 114.063 does not.³¹⁵

There are some additional Texas Property Code provisions that are more general in nature but support a trustee's power to compensate attorneys.³¹⁶ The Uniform Prudent Investor Act states: "In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the trust assets, the purposes of the trust, and the skills of the trustee."³¹⁷ The statutes provide that a trustee may exercise any power necessary to carry out the purpose of the trust, except to the extent that the terms of the trust conflict with a provision of the Code or expressly limit the trustee's power.³¹⁸ Further, a trustee must manage the property "as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust," and must "exercise reasonable care, skill, and caution" in doing so.³¹⁹ A prudent investor may retain and pay counsel to protect trust assets and investments.³²⁰

Parties must also be aware that a trustee, co-trustee, or beneficiary has a right to file a declaratory judgment claim regarding the administration of a trust.³²¹ Section 37.004 provides:

A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.³²²

312. *Id.*

313. PROP. §§ 114.063–.064.

314. Johnson, *supra* note 1, at 16.

315. PROP. §§ 114.063–.064.

316. Johnson, *supra* note 1, at 16.

317. PROP. § 117.009.

318. *Id.* §§ 113.001–.002.

319. *Id.* § 117.004.

320. Author's original thought.

321. Johnson, *supra* note 1, at 16.

322. TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a).

Section 37.005 provides:

A person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, an infant, mentally incapacitated person, or insolvent may have a declaration of rights or legal relations in respect to the trust or estate: (1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; (2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; (3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or (4) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.³²³

A plaintiff may be entitled to an award of attorney's fees regarding its declaratory judgment request: "In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just."³²⁴ This is not a "prevailing party" statute, and the court can award fees as it determines is equitable and just.³²⁵ For example, in an action declaring that a decedent's adopted grandchildren were not beneficiaries of a trust, it was equitable and just under Texas Civil Practice and Remedies Code Section 37.009 to award fees from the trust to the adopted grandchildren.³²⁶

For further example, in *Estate of Richardson*, a remainder beneficiary of a trust filed a declaratory judgment action to declare that the trust would terminate five years after its creation.³²⁷ After the trustee filed a general denial, the beneficiary filed a motion for summary judgment.³²⁸ The trustee did not file a response to the motion and later conceded that the trust would terminate five years from inception.³²⁹ The trustee argued, however, that the remainder beneficiary was not entitled to any attorney's fees sought in connection to an uncontested matter.³³⁰ The trial court agreed and denied the remainder beneficiary's request for attorney's fees.³³¹ The court of appeals stated that:

[I]n a declaratory judgment action, the trial court may award "reasonable and necessary attorney's fees that are equitable and just." Identifying the amount of attorney's fees that are "reasonable and necessary" presents a

323. *Id.* § 37.005.

324. *Id.* § 37.009.

325. *Hachar v. Hachar*, 153 S.W.3d 138, 142 (Tex. App.—San Antonio 2004, no pet.)

326. *In re Ellison Grandchildren Tr.*, 261 S.W.3d 111, 127 (Tex. App.—San Antonio 2008, no pet.).

327. *In re Estate of Richardson*, No. 14-12-00516-CV, 2013 WL 1091598, at *1 (Tex. App.—Houston [14th Dist.] Mar. 14, 2013, no pet.).

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

question of fact, but determining the amount of those fees that is “equitable and just” to award is a question of law for the trial court's sound discretion. It is within the trial court's discretion to conclude that it is “not equitable or just to award even reasonable and necessary fees.” Whether it is equitable and just to make a reduced award or none at all “is not a fact question because the determination is not susceptible to direct proof, but is rather a matter of fairness in light of all circumstances.”³³²

The court of appeals held that it would not reverse a trial court's denial of a request for attorney's fees unless the complaining party showed a clear abuse of discretion.³³³ The court of appeals affirmed the denial of attorney's fees because the trial court could reasonably have determined that it was equitable and just to not award those fees where the fees may have exhausted the funds in the trust, which would divert the funds from the trust's current beneficiaries.³³⁴ It seems reasonably clear that the Texas Property Code allows a trustee to retain and compensate attorneys for routine trust administration issues such as preparing deeds, negotiating oil and gas leases, filing suit to collect rent or royalties, and more.³³⁵ These payments can be made immediately subject to a beneficiary, successor trustee, or co-trustee later challenging the payment as being a breach of fiduciary duty.³³⁶ For example, if a trustee compensates an attorney for unnecessary work or for rates that are not reasonable, then some party may later allege that the trustee breached its fiduciary duties in making those payments from trust property.³³⁷ But that potential action does not impact a trustee's power to make the payment at the outset.³³⁸

However, regarding claims between a trustee and a beneficiary, the Texas Property Code is less clear as to when, and if, a trustee is allowed reimbursement from the trust for attorney's fees.³³⁹ The most on-point and specific statute is Section 114.064, and that statute requires certain findings before an award or payment can be made.³⁴⁰

3. Common Law Authority

Unless the trust document is limited by itself or a statute, a trustee has the powers recognized by the common law.³⁴¹ The Restatement provides:

332. *Id.*

333. *Id.* at *2

334. *Id.*

335. Johnson, *supra* note 1, at 17.

336. *Id.*

337. *Id.*

338. *Id.*

339. Author's original thought.

340. See TEX. PROP. CODE ANN. § 114.064.

341. *Id.* § 113.002 (“Except as provided by Section 113.001, a trustee may exercise any powers in addition to the powers authorized by this subchapter that are necessary or appropriate to carry out the purposes of the trust.”); *id.* § 113.024 (“The powers, duties, and responsibilities under this subtitle do not exclude other implied powers, duties, or responsibilities that are not inconsistent with this subtitle.”); *id.*

A trustee is not limited to incurring expenses that are necessary or essential, but may incur expenses that, in the exercise of fiduciary judgment are reasonable and appropriate in carrying out the purposes of the trust, serving the interests of the beneficiaries, and generally performing the functions and responsibilities of the trusteeship.³⁴²

The trustee can properly incur expenses appropriate for the collection and protection of trust assets.³⁴³ The trustee has a duty to exercise such care and skill as a person of ordinary prudence would exercise in incurring the expense.³⁴⁴ The trustee can properly incur reasonable expenses in employing lawyers.³⁴⁵ The trustee's right to indemnification "applies even if the trustee is unsuccessful in the dispute, as long as the trustee's conduct was not imprudent or otherwise in violation of a fiduciary duty."³⁴⁶ However:

[I]f expenses that are improper have been paid from the trust estate, the trustee ordinarily has a duty to restore the amount of the improper payment(s) to the trust; if improper expenses have been paid from the trustee's personal funds, the trustee ordinarily is not entitled to reimbursement for those expenditures.³⁴⁷

....

The trustee cannot properly incur expenses, however, in employing agents or others to do acts if the employment would involve a violation of the trustee's duties as defined either by law or by the terms of the trust.³⁴⁸

In *Moody Foundation v. Estate of Moody*, the court of appeals reviewed a trial court's order allowing a trustee's request for reimbursement.³⁴⁹ During the trustee's lifetime, the trustee served as a trustee of a charitable trust foundation (Foundation) for over thirty years until their removal following an indictment for fraud.³⁵⁰ Both a criminal prosecution for fraud and an Internal Revenue Service action for acts of self-dealing ensued, and the trustee incurred legal fees in excess of one million dollars.³⁵¹ Following the trustee's death, their estate (Estate) sued the Foundation for reimbursement, and the probate court granted that reimbursement.³⁵² The court of appeals described a trustee's right to reimbursement as follows:

§ 113.051 ("In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust the trustee shall perform all of the duties imposed on trustees by the common law.").

342. RESTATEMENT (THIRD) OF TRS. § 88 cmt. b (AM. L. INST. 2007).

343. Johnson, *supra* note 1, at 17.

344. *Id.*

345. *Id.*

346. RESTATEMENT (THIRD) OF TRS. § 88 cmt. d (AM. L. INST. 2007).

347. *Id.* at cmt. a.

348. *Id.* at cmt. c.

349. *Moody Found. v. Est. of Moody*, No. 03-99-00034-CV, 1999 WL 1041541, at *1-2 (Tex. App.—Austin Nov. 18, 1999, pet. denied).

350. *Id.* at *1.

351. *Id.*

352. *Id.* at *2.

Generally speaking, a trustee may incur expenses that are necessary to carry out the purposes of the trust. For example, it is appropriate for a trustee to incur expenses for costs in maintaining or defending a judicial proceeding for the benefit of the trust estate, such as litigation to resist claims that may result in a loss to the trust estate. When a trustee properly incurs expenses, he is entitled to reimbursement out of the trust estate for such expenses. Where an expense is not properly incurred, however, the trustee is not entitled to reimbursement from the estate. A trustee is not entitled to reimbursement for expenses that do not confer a benefit upon the trust estate, such as those expenses related to litigation resulting from the fault of the trustee.

....

The Texas Trust Code authorizes the reimbursement of a trustee from trust principal or income and specifically provides for awards of attorney's fees. Section 114.063, entitled "General Right to Reimbursement," provides that "[a] trustee may discharge or reimburse himself from trust principal or income or partly from both for . . . advances made for the convenience, benefit or protection of the trust or its property" and for "expenses incurred while administering or protecting the trust or because of the trustee's holding or owning any of the trust property." Section 114.064 of the Code 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."

....

It is clear that under [S]ection 114.064, the grant or denial of attorney's fees is within the sound discretion of the trial court. We will not reverse the trial court judgment unless there is a clear showing that the trial court abused its discretion. The test for abuse of discretion is whether the trial court acted unreasonably or without reference to any guiding rules or principles.

Under Texas law, a trustee may charge the trust for attorney's fees the trustee, acting reasonably and in good faith, incurs defending charges of breach of trust. The Estate, as the plaintiff seeking reimbursement from the Foundation, bore the burden in the probate court of establishing that Moody was acting reasonably and in good faith when he engaged in the conduct underlying the federal indictment and the tax court proceeding.³⁵³

While the appellate court acknowledged that a trustee, acting in good faith, was entitled to reimbursement, the fact that the criminal convictions were overturned was insufficient to support findings that the deceased's conduct was reasonable:

Having reviewed the Fifth Circuit's opinion concerning Moody's conduct underlying the criminal case, we conclude that the evidence is insufficient to support the probate court's finding that Moody acted reasonably and in

353. *Id.* at *3–5.

good faith as to 100% of the conduct alleged. The Estate bears the burden of establishing that Moody's conduct was reasonable and in good faith, and nothing in the Fifth Circuit's opinion satisfies this burden.

....

The Estate may be reimbursed for legal expenses incurred by Moody in the tax case if it establishes that Moody's conduct underlying the case was reasonable and in good faith. To meet its burden, the Estate relies solely upon the opinion of the tax court. The court determined that Moody did not personally benefit from most Foundation grants. Thus, the court concluded that in most instances Moody had not engaged in self-dealing as defined by the Internal Revenue Code. This conclusion does not establish that Moody's actions as a trustee were reasonable. Many of Moody's acts, while they may not have constituted self-dealing under the Internal Revenue Code, cannot be considered reasonable conduct for a foundation trustee.

....

While Moody may not have personally, directly or indirectly, benefitted from these transactions, his conduct was not shown to be reasonable. He breached his duty of loyalty as a trustee by failing to use the skill and prudence of a reasonable person in administering the trust. His naivete and lack of business acumen resulted in the Foundation funding projects of dubious value. Where reasonable conduct is lacking, it is irrelevant that, for the most part, the tax court found that Moody did not knowingly abuse the trust or act in bad faith. Thus, the probate court erred in finding that Moody acted reasonably and in good faith as to 93.99% of the conduct alleged in the tax court case.³⁵⁴

Because the trustee's conduct clearly fell short of the standard required of trustees, the court of appeals held that the weight of the evidence was so contrary to the probate court's finding as to render the judgment clearly wrong.³⁵⁵ The court of appeals reversed and held that the trustee's estate was not entitled to reimbursement.³⁵⁶

In *American National Bank of Beaumont v. Biggs*, the court considered a trustee's reimbursement request for attorney's fees under equitable grounds.³⁵⁷ The court held that such a payment would depend on the circumstances, including the trustee's good faith and the reasonableness of their actions:

There are some incidental matters yet to be discussed, but it is our conclusion, which we will announce at this point, that under the facts concerning the actions of the trustees Leon Mitchell and Vick Mitchell, that is, their good faith, the reasonableness of their actions, their reliance on advice of counsel, their attempt at performance of a duty, and the ambiguity

354. *Id.* at *7-9.

355. *Id.* at *9.

356. *Id.*

357. *Am. Nat'l Bank of Beaumont v. Biggs*, 274 S.W.2d 209, 216 (Tex. App.—Beaumont 1954, writ ref'd n.r.e.).

of the will as the source of their actions, the trial court, on the basis of equitable considerations, was authorized . . . to charge this fee to the entire trust estate, remaindermen as well as life tenants, that is, to the principal of the estate.³⁵⁸

Under the common law, it seems reasonably clear that a trustee can retain and compensate attorneys for routine trust administration issues if doing so is reasonable.³⁵⁹ This analysis, however, does not necessarily apply to beneficiaries or a co-trustee suing another trustee for breaching duties.³⁶⁰ The Restatement provides:

More complicated issues are presented by costs incurred by trustees in controversies, or in anticipation of possible litigation, involving allegations of breach of trust and thus exposing the trustee personally to risks such as surcharge or removal. To the extent the trustee is successful in defending against charges of misconduct, the trustee is normally entitled to indemnification for reasonable attorneys' fees and other costs; to the extent the trustee is found to have committed a breach of trust, indemnification is ordinarily unavailable. Ultimately, however, the matter of the trustee's indemnification is within the discretion of the trial court, subject to appeal for abuse of that discretion.³⁶¹

There is no question that, at the end of the litigation, a court can award fees from the trust or from a trustee, individually, as it deems equitable and just.³⁶² Of course, the converse is also true; courts have denied trustees the right to recover fees from trusts where they have been unsuccessful in the litigation.³⁶³

In *Benge v. Roberts*, a beneficiary sued co-trustees for not raising claims against a prior trustee based on earlier litigation between the beneficiary and the prior trustee.³⁶⁴ The beneficiary argued that the co-trustees were breaching duties by incurring attorneys' fees in an appeal of the underlying suit between the beneficiary and the prior trustee.³⁶⁵ The court held that if the beneficiary "is successful on appeal, the cause is remanded, and Benge is ultimately successful after a trial on the merits (and any further appeal), the Trust would not be responsible for the co-trustees' legal fees."³⁶⁶ A fiduciary cannot recover attorney's fees for conducting unreasonable or unnecessary litigation against their beneficiary.³⁶⁷ "[W]hen the fiduciary's omission or malfeasance

358. *Id.* at 222.

359. Johnson, *supra* note 1, at 17–18.

360. *Id.* at 18.

361. RESTATEMENT (THIRD) OF TRS. § 88 cmt. d (AM. L. INST., 2007).

362. Johnson, *supra* note 1, at 18.

363. *Id.*

364. *Benge v. Roberts*, No. 03-19-00719-CV, 2020 WL 4726688, at *1 (Tex. App.—Austin Aug. 12, 2020, no pet.).

365. *Id.* at *3.

366. *Id.* at n.9.

367. Johnson, *supra* note 1, at 18.

is at the root of the litigation, the estate will not be required to reimburse the fiduciary for [the trustee's] attorneys' fees."³⁶⁸ So, whether a trustee is entitled to reimbursement from the trust for prosecuting or defending a breach of fiduciary duty claim is largely dependent on the outcome of the claim.³⁶⁹ In *duPont v. Southern National Bank of Houston*, a federal court in Texas held as follows:

A trustee can properly incur such expenses as are expressly authorized by the terms of the trust and such expenses as, although not expressly authorized, are necessary or appropriate to carry out the purposes of the trust. Where a trustee properly incurs expenses, he can pay them out of the trust estate and is entitled to a credit for such payments in his accounts. On the other hand, where an expense is not properly incurred the trustee is not entitled to reimbursement out of the trust estate.

It is the duty of the trustee to defend claims against the trust estate, which if successful would cause loss to the trust estate. Specifically, it is the duty of the trustee to the beneficiaries to prevent the destruction of the trust. Thus, where the settlor seeks to rescind the trust on the ground that the settlor was induced by mistake to create the trust, it is the duty of the trustee to defend the trust, and resist proceedings to the extent to which it is reasonable to require him to do so. Reasonable expenses, including those incurred in the employment of attorneys, in defending a trust against an unjustified attack, are payable out of the trust property.

Generally, an expense is properly incurred when it can be shown that the expense (i) is not excessive in amount, (ii) is beneficial to the beneficiaries and the trust estate and not solely for the benefit of the trustee; and (iii) is not caused by the personal fault or error of the trustee. Generally, a fiduciary is under a duty to protect an estate from unnecessary expense. Specifically, in the case of attorney fees, a trustee is entitled only to reimbursement from the trust estate for fees which constitute "a fair allowance for the professional work necessary to be done in the proper protection of the trustee's interests."

DuPont III argues that a trustee may not obtain reimbursement for litigation expenses from the trust estate where those expenses are incurred not for the benefit of the trust estate but for the benefit of the trustee individually. Although a litigation expense incurred to prevent the Defendant's removal as trustee is a proper expense performed on behalf of the Trust, where legal fees are paid to counsel whose efforts are principally directed towards protecting the trustee from an expense which does not benefit the trust—in this case it is alleged that Brady has incurred litigation expenses to defend against an allegation of negligence—those fees must be paid by the trustee, without reimbursement from the trust estate.

Additionally, where litigation results from the fault of the trustee, he is not entitled to charge the expenses of litigation against the trust estate.

368. *Tindall v. State By & Through Tex. Dep't of Mental Health & Mental Retardation*, 671 S.W.2d 691, 693 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.)

369. *Johnson*, *supra* note 1, at 18.

Thus, where a trustee is found to have committed a breach of trust, the trustee is not entitled to attorney's fees for defending the suit, or where the trustee engages in obstructive tactics in order to prolong litigation, his legal fees must be borne by him individually. Finally, where the trustee engages in such conduct which requires his removal, he is not entitled to reimbursement from the trust estate for attorney's fees in connection with his resistance to such action.

As previously found, duPont III's contentions are not supported by the evidence in this case. Specifically, there is no evidence other than duPont III's conjecture that legal fees paid to counsel to defend Brady against future litigation were incurred in bad faith or for a purpose other than for the benefit of the Trust. Additionally, there is insufficient evidence in the record upon which to sustain a finding that Brady (or SNB or Garner) engaged in obstructive tactics or conduct which would entitle Plaintiff to relief. Accordingly, Plaintiff is not entitled to recovery of attorney fees.³⁷⁰

In conclusion, under the common law, a trustee may retain and pay counsel for routine services that benefit the trust when doing so is reasonable.³⁷¹ However, if the payments are not reasonable, the trustee likely breaches fiduciary duties in making those payments.³⁷² Further, when the litigation involves claims that the trustee breached fiduciary duties, whether a trustee is entitled to have the trust pay for the fees is largely dependent on if the trustee is successful in defending the claim; successful trustees are likely entitled to reimbursement while unsuccessful trustees are not.³⁷³

B. Trustees Paying Attorneys in the Interim

Paying attorney's fees and litigation expenses is a more complicated issue in disputes between beneficiaries and trustees or co-trustees concerning an alleged breach of trust when the trustee wants to pay its attorneys in the interim and before a final resolution of the claims.³⁷⁴ In other words, can a trustee pay its attorneys from trust assets in defending against a claim of breach of fiduciary duty before a court or jury finds for the trustee?³⁷⁵

370. See *duPont v. S. Nat'l Bank of Hous.*, 575 F. Supp. 849, 849 (S.D. Tex. 1983).

371. See *id.*

372. *Id.*

373. *Id.*

374. Author's original thought.

375. *Id.*

1. Trustee as Plaintiff

There is authority that a trustee bringing the claim (policing its co-trustee) should have access to trust assets to pay for that activity.³⁷⁶ The Restatement provides:

In hiring counsel for the trustees in their fiduciary capacity, the selection is ordinarily made by majority vote of the co-trustees, with all of the trustees entitled to participate in meetings and other aspects of the counseling process and to have access to communications from the trustees' counsel. If separate counsel is reasonably needed to aid a trustee in the performance of a fiduciary duty, as may be necessary under Subsection (2), appropriate attorney fees are payable or reimbursable from the trust estate. . . .

[Subsection (2)]. When a trust has multiple trustees, each trustee ordinarily (cf. Comment b) has a duty to exercise reasonable care to prevent a co-trustee from committing a breach of trust. Thus, for example, it is a breach of trust for a trustee knowingly to allow a co-trustee to commit a breach of trust. And, if a breach occurs, the trustee must take reasonable steps seeking to compel the co-trustee to redress the breach of trust. *If a trustee needs independent counsel to fulfill these duties, reasonable attorney fees may be paid or reimbursed from the trust.*³⁷⁷

By stating that the reasonable attorney's fees may be paid or reimbursed from the trust, the plaintiff trustee may have the trust pay for fees upfront or reimburse the co-trustee later.³⁷⁸

2. Beneficiary as Plaintiff

Generally, when a beneficiary sues a trustee, the trust should not pay the beneficiary's attorneys' fees unless a court awards them.³⁷⁹ The Restatement provides:

A trustee cannot properly pay costs incurred by a beneficiary in a judicial or other proceeding involving the administration of the trust or the beneficiary's interests in the trust, except pursuant to a court order. A court may, in the interest of justice, make an award of costs from the trust estate to a beneficiary for some or all of his or her attorney fees and other expenses. Ordinarily, however, awards of this type are limited to situations in which the beneficiary's participation in the proceeding is beneficial to the trust, usually either because of a recovery that benefits the trust's beneficiaries

376. WALTER L. NOSSAMAN & JOSEPH L. WYATT, JR., TRUST ADMINISTRATION AND TAXATION, § 32.007 (2d rev. ed. 2004) (“[A] trustee suing co-trustees for their breach of trust may be allowed attorneys’ fees for his efforts.”).

377. RESTATEMENT (THIRD) OF TRS. § 81 cmt. c (AM. L. INST. 2007) (emphasis added).

378. *See id.*

379. *See Jernigan v. Jernigan*, 677 S.W.2d 137, 142 (Tex. App.—Dallas 1984, no writ).

generally (rather than merely the beneficiary in question) or by clarifying a significant uncertainty in the terms of the trust.³⁸⁰

Of course, this quote does not address a support trust in which a trustee has discretion to make distributions for the beneficiary's support and maintenance, which may include making distributions to the beneficiary for the beneficiary to retain and pay for counsel.³⁸¹ Certainly, the expense of attorney's fees could factor into a beneficiary's support needs.³⁸²

It would be an unusual trustee, however, who decides that it is appropriate to make support and maintenance distributions for attorneys' fees expenses to a beneficiary who is suing the trustee.³⁸³ A trustee could reasonably determine that the beneficiary is not entitled to a distribution for an attorney's fees expense under the distribution language of a trust.³⁸⁴ Further, in a trust with multiple beneficiaries, a trustee could reasonably determine that the beneficiary's claim solely benefits that beneficiary and not all of the beneficiaries of the trust, such that it would be unfair to tax the trust with those fees.³⁸⁵ Further, a trustee may consider that the beneficiary's attorney fees expense is a debt or liability and that a trust's spendthrift clause prohibits the payment of the same.³⁸⁶ For example, in *Estate of Richardson*, a trial court denied an award of attorney's fees to a successful remainder beneficiary of a trust who filed a declaratory judgment action because of a spendthrift clause in the trust, which was affirmed on appeal on other grounds.³⁸⁷

Otherwise, as stated earlier, a court could award the beneficiary attorney's fees at the conclusion of the litigation against the trust or the trustee, individually, under Section 114.064.³⁸⁸ The granting or denying of attorney's fees to a trustee or beneficiary under Section 114.064 is within the sound discretion of the trial court, and a reviewing court will not reverse the trial court's judgment absent a clear showing that the trial court abused its

380. RESTATEMENT (THIRD) OF TRS. § 88 cmt. d; *see also* Est. of Bonaccorsi, 82 Cal. Rptr. 2d 604, 611 (Cal. Ct. App. 1999) (noting trust beneficiaries must ordinarily pay their own attorney fees in challenging the trustee's conduct, even when they are successful.).

381. Johnson, *supra* note 1, at 31; *see also* Wing v. Goldman Sachs Tr. Co., 876 S.E.2d 390, 405–06 (N.C. 2022) (discussing trial court's order to pay beneficiary's attorney's fees).

382. Author's original thought.

383. *Id.*

384. David F. Johnson, *Trust Distributions in Texas Part I*, WINSTEAD PC 1, 20, <https://m.winstead.com/portalresource/lookup/poid/Z1tOI9NPluKPtDNIqLMRVPMQILsSw4JCo03D/document.name=/Trust%20Distribution%20Article%20Part%20One.pdf> (last visited Dec. 26, 2023) [<https://perma.cc/C999-YUKR>]; *see* TEX. PROP. CODE ANN. § 113.051.

385. *In re* Est. of Richardson, No. 14-12-00516-CV, 2013 WL 1091598, at *2 (Tex. App.—Houston [14th Dist.] Mar. 14, 2013, no pet.).

386. *See* Johnson, *supra* note 384.

387. *In re* Est. of Richardson, 2013 WL 1091598, at *2.

388. PROP. § 114.064 (“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.”).

discretion by acting without reference to any guiding rules and principles.³⁸⁹ A beneficiary may also be entitled to an award of attorney's fees regarding its declaratory judgment request.³⁹⁰ This is not a prevailing party statute, and the court can award fees as it determines what is equitable and just.³⁹¹ For example, in an action declaring that a decedent's adopted grandchildren were not beneficiaries of a trust, it was equitable and just under Texas Civil Practice and Remedies Code Section 37.009 to award fees from the trust to the adopted grandchildren.³⁹²

3. Argument Under Property Code Subsection 114.008(a) for Payment of a Party's Attorney's Fees in the Interim

Potentially, a plaintiff co-trustee or beneficiary could seek an order from a court requiring the trust to pay their attorney's fees from the trust in the interim of the case and before the judgment is final.³⁹³ Texas Property Code subsection 114.008(a) states: "To remedy a breach of trust that has occurred or might occur, the court may: . . . (10) order any other appropriate relief."³⁹⁴

A plaintiff co-trustee or beneficiary could potentially file a motion and have a hearing in which the beneficiary has a showing that the defendant trustee breached fiduciary duties or might breach fiduciary duties, they have incurred attorney's fees in attempting to remedy these breaches, they are not capable of paying those fees moving forward, their attorney may have to withdraw due to nonpayment, and that but for an order requiring the trust to pay the co-trustee or beneficiary's fees, the trustee may not have to answer for its conduct.³⁹⁵ In this circumstance or other like circumstances, a trial court may decide that it is appropriate to "order any other appropriate relief" and require the trust to pay the plaintiff co-trustee or beneficiary's fees in the interim.³⁹⁶

389. *Lee v. Lee*, 47 S.W.3d 767, 793–94 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Lyclo Acquisition 1984 Ltd. P'ship v. First Nat'l Bank of Amarillo*, 860 S.W.2d 117, 121 (Tex. App.—Amarillo 1993, writ denied); *see also* *Est. of Richardson*, No. 14-12-00516-CV, 2013 Tex. App. LEXIS 2664 (Tex. App.—Houston [14th Dist.] Mar. 14, 2013, no pet.) (noting the appellate court affirmed denial of attorney's fees to successful beneficiary where the trial court could reasonably have determined that it was equitable and just to not award those fees where the fees may have exhausted the funds in the trust, which would divert the funds from the trust's current beneficiaries).

390. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 ("In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just.").

391. *Hachar v. Hachar*, 153 S.W.3d 138, 140 (Tex. App.—San Antonio 2004, no pet.).

392. *In re Ellison Grandchildren Tr.*, 261 S.W.3d 111, 127 (Tex. App.—San Antonio 2008, no pet.).

393. *Who Pays Trustee's Legal Fees in Trust Litigation?*, STIMMEL L., <https://www.stimmel-law.com/en/articles/who-pays-trustees-legal-fees-trust-litigation> (last visited Oct. 9, 2023) [<https://perma.cc/HN3Z-55VZ>].

394. TEX. PROP. CODE ANN. § 114.008(a)(10).

395. *Id.*; *see* *McDevitt v. Wellin*, No. 2:13-cv-3595-DCN, 2016 WL 199626, at *1–6 (D.S.C. Jan. 15, 2016) (noting a trustee's motion for interim payment of fees was denied where there was no showing of irreparable harm).

396. PROP. § 114.008(a)(10).

Similarly, a trustee who is a defendant may want to seek court instruction and permission to use trust assets to pay its attorney's fees in the interim.³⁹⁷ If granted, the trustee should be insulated from a breach of fiduciary duty claim arising out of the use of trust assets to pay those fees even if the trustee is ultimately unsuccessful and ordered to reimburse those fees to the trust.³⁹⁸

4. Trustee as Defendant: Texas Precedent

There is very little authority in Texas directly on point on whether a trustee is entitled to compensate attorneys from trust assets in defending claims of breach of fiduciary duty in the interim (i.e., before the end of the litigation).³⁹⁹

Some authority seems to suggest that a trustee has the ability to do so.⁴⁰⁰ In *In the Guardianship of Hollis*, a special needs trust's trustee used \$67,000 to build a pool on the beneficiary's parent's property.⁴⁰¹ The trial court ordered show-cause hearings to determine the appropriateness of the expense.⁴⁰² The trustee then spent \$23,000 in attorney's fees to defend themselves in the show-cause hearings.⁴⁰³ The trial court removed the trustee because they sought reimbursement from trust funds for defending their actions.⁴⁰⁴ The trustee appealed the order removing it.⁴⁰⁵ The court of appeals reversed.⁴⁰⁶ The court held that one ground for removal is being guilty of gross misconduct or mismanagement, which the court noted meant more than ordinary misconduct and implied serious and willful wrongdoing.⁴⁰⁷ The appellate court reversed the removal, stating that the trustee had the right to reimburse itself for reasonable costs and expenses in connection with administering or protecting the trust.⁴⁰⁸

However, there is authority that a trustee defending against a breach of duty claim should not have access to trust assets to pay for its defense until a court determines that it did not violate a duty.⁴⁰⁹ "[W]here a trustee is found to have committed a breach of trust, the trustee is not entitled to attorney's fees for defending the suit"⁴¹⁰ Commentators have stated that a trustee

397. See *infra* Section V.B.

398. *Wing v. Goldman Sachs Tr. Co.*, 876 S.E.2d 390, 406 (N.C. 2022) (holding that trustee can follow trial court's order to pay attorney's fees even if that order is later reversed).

399. *Johnson*, *supra* note 1, at 19.

400. *Id.*

401. *In re Guardianship of Hollis*, No. 14-13-00659-CV, 2014 WL 5685570, at *1 (Tex. App.—Houston [14th Dist.] Nov. 4, 2014, no pet.).

402. *Id.*

403. *Id.*

404. *Id.* at *2.

405. *Id.* at *3.

406. *Id.* at *5.

407. *Id.*

408. *Id.*

409. *Johnson*, *supra* note 1, at 20.

410. *duPont v. S. Nat'l Bank of Hous.*, 575 F. Supp. 849, 849 (S.D. Tex. 1983).

cannot rely on Section 114.063 to authorize the payment of attorney fees in the interim arising from the defense of a breach of fiduciary duty claim.⁴¹¹

For example, in *Wells Fargo, N.A. v. Clower*, a trustee filed suit for declaratory relief regarding its discretion to make income distributions.⁴¹² The beneficiaries filed counterclaims for breach of fiduciary duty.⁴¹³ The trial court ordered the trustee to pay into the registry of the court over \$250,000 for attorney's fees they had paid out of the trust and ordered the trustee to no longer pay the attorneys from the trust.⁴¹⁴

In *In re Cousins*, a trustee filed a mandamus proceeding to challenge a trial court's denial of a motion to pay attorney's fees from the trust.⁴¹⁵ A co-trustee sued the other co-trustee for a number of causes of action related to alleged breaches of fiduciary duty.⁴¹⁶ The plaintiff filed a motion for court ordered payment of their legal fees and litigation expenses from the trust based on Section 114.063 of the Texas Property Code.⁴¹⁷ At a hearing on the motion, the plaintiff's counsel argued that the Texas Property Code and the trust agreement authorized reimbursement for attorney's fees.⁴¹⁸ The counsel stated: "We're not asking you to award us attorney fees we're asking for access to the trust to pay our ongoing legal expenses."⁴¹⁹ The plaintiff incurred fees totaling just over \$650,000 and argued that "[i]t's not our burden today when seeking interim attorney's fees to do any proof to show what's reasonable and necessary at this stage in the game."⁴²⁰ The trial court denied the request, and the plaintiff filed a petition for writ of mandamus seeking an order from the court of appeals to order the trial court to grant the motion.⁴²¹

The plaintiff relied on Section 114.063 of the Texas Property Code, arguing that the trial court's order denies him "this statutory right to ongoing reimbursement."⁴²² The court of appeals stated:

Section 114.063 provides, in pertinent part, that a trustee may discharge or reimburse himself from trust principal or income or partly from both for expenses incurred while administering or protecting the trust or because of the trustee's holding or owning any of the trust property. The trustee has a lien against trust property to secure reimbursement. In any proceeding under the Texas Trust Code, "the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just."⁴²³

411. Johnson, *supra* note 1, at 20.

412. *Wells Fargo, N.A. v. Clower*, No. 02-20-00058-CV, 2021 WL 4205056, at *3 (Tex. App.—Fort Worth Sept. 16, 2021, no pet.).

413. *Id.*

414. *Id.* at *4.

415. *In re Cousins*, 551 S.W.3d 913, 915 (Tex. App.—Tyler 2018, no pet.).

416. *Id.* at 916.

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.* at 917.

423. *Id.* at 917–18.

According to the plaintiff, Section 114.063 applies to reimbursement during the lawsuit and Section 114.064, not Section 114.063, applies at the end of the litigation.⁴²⁴ The trustee argued that absent mandamus review, Section 114.063's application evades appellate review and the trustee will be forced to pursue litigation with their personal funds, which is "particularly egregious here when the trial court has already found a breach of fiduciary duty and thus validated some of Cousins's claims."⁴²⁵ The court of appeals disagreed that mandamus relief was appropriate.⁴²⁶ The court stated:

According to Cousins, "[p]roceeding forward with the litigation without mandamus relief jeopardizes Cousins's ability to diligently pursue his breach-of-fiduciary-duty lawsuit against [James], as Cousins is obligated by statute to do." However, the denial of Cousins' motion does not deprive him of a reasonable opportunity to develop the merits of his case, such that the proceedings would be a waste of judicial resources. An example of one such case arises "when a trial court imposes discovery sanctions which have the effect of precluding a decision on the merits of a party's claims—such as by striking pleadings, dismissing an action, or rendering default judgment—a party's remedy by eventual appeal is inadequate, unless the sanctions are imposed simultaneously with the rendition of a final, appealable judgment."⁴²⁷

The court of appeals held that the trial court's denial of the motion is not the type of ruling that has the effect of precluding a decision on the merits.⁴²⁸ "Cousins may still pursue his claims against James, including a claim for reimbursement under Section 114.063, and the eventual outcome has not been pre-determined by Respondent's ruling."⁴²⁹ The court also held that mandamus review was not so essential to give needed and helpful direction regarding Section 114.063 that would otherwise prove elusive in an appeal from a final judgment.⁴³⁰ The court stated:

Section 114.063 was added in 1983 and amended in 1993, and few appellate courts have cited to or substantially analyzed that section. Additionally, the Texas Trust Code expressly authorizes a court to "make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." We see no reason why a trial court's authority to award costs and attorney's fees would not encompass claims to reimbursement under Section 114.063. Thus, although Cousins' petition may present a question of first impression, we cannot conclude that the petition involves a legal issue that is likely to recur such that mandamus review, as opposed to a

424. *Id.* at 918.

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.* at 919.

429. *Id.*

430. *Id.*

direct appeal from a final judgment, is necessary. Should Cousins find the verdict on his reimbursement claim to be unsatisfactory, he may appeal from the final judgment on that claim and nothing prevents him from relying on Section 114.063 in a direct appeal.⁴³¹

The plaintiff also argued that having to utilize personal funds to pursue the litigation is tantamount to an assertion that doing so makes the proceeding more costly or inconvenient.⁴³² The court held that this fact, standing alone, did not warrant mandamus review.⁴³³ “This is particularly true given that, as previously discussed, the denial does not preclude Cousins from presenting a claim for reimbursement at trial and, consequently, Respondent’s failure to grant the motion does not result in an irreversible waste of resources.”⁴³⁴ The court of appeals denied the petition for writ of mandamus, concluding that an ordinary appeal of the order denying the motion served as a plain, adequate, and complete remedy.⁴³⁵

If a trustee uses trust assets to pay for its attorney’s fees in the interim, it risks a finding of breach of fiduciary duties where the trustee is later found liable on the underlying claim.⁴³⁶ For example, in *Stone v. King*, the court of appeals affirmed a finding that a trustee breached their fiduciary duties in converting trust property to pay for their attorneys’ fees.⁴³⁷ The court of appeals held:

The trial court also found Stone breached his fiduciary duties as trustee and the PMLA by converting \$37,000 in trust funds held by KSP for his own use. Stone contends he was entitled to engage the services of an attorney to represent the interests of the trust and himself in his capacity as trustee, with attorney’s fees constituting a trust expense. In support of his argument, Stone cites [S]ection 113.018 of the Texas Trust Code. Section 113.018 provides “[a] trustee may employ attorneys . . . reasonably necessary in the administration of the trust estate.” Stone argues King’s effort to remove him as trustee was an attack on the trust, which he had a duty to defend.

King argues that by taking trust funds from KSP to pay lawyers without his approval, Stone violated the trust provision requiring all actions to be taken jointly. He further argues Stone did not use the funds to defend the trust, but rather, to pay for an attorney to sue King.

The trial court concluded Stone converted \$37,000 of KSP funds for his own use. Conversion is the wrongful exercise of dominion and control over another’s property in denial of, or inconsistent with, his rights. It is undisputed that Stone took approximately \$37,000 from the KSP account for attorneys’ fees without King’s consent. It is also undisputed that the trust

431. *Id.*

432. *Id.* at 919–20.

433. *Id.* at 920.

434. *Id.*

435. *Id.*

436. See *Stone v. King*, No. 13-98-022-CV, 2000 WL 35729200, at *8 (Tex. App.—Corpus Christi—Edinburg Nov. 30, 2000, pet. denied).

437. *Id.*

owned ninety-nine percent of KSP and King individually owned one percent.

Under Texas law, a trustee may charge the trust for attorney's fees that the trustee, acting reasonably and in good faith, incurs defending charges of breach of trust. A trustee is not entitled to reimbursement for expenses that do not confer a benefit upon the trust estate, such as those expenses related to litigation resulting from the fault of the trustee. We have concluded that Stone breached his fiduciary duties by failing to distribute trust funds after being directed to do so by King's attorney and by adding D'Unger as a signatory to the trust account. Thus, the trial court could reasonably have concluded that the litigation seeking to remove Stone as trustee resulted from Stone's improper actions, that Stone did not act reasonably and in good faith in incurring the attorney's fees, and was, therefore, not entitled to charge the trust for the fees. Viewed in the light most favorable to the trial court's judgment, we hold the evidence is legally and factually sufficient to support the conclusion that Stone breached his fiduciary duties by converting \$37,000 in trust funds for his own use.⁴³⁸

5. Trustee as Defendant: Precedent from Other Jurisdictions

Though not binding, authority from other jurisdictions can be persuasive authority to Texas courts.⁴³⁹ Courts from other jurisdictions would support the position that a trial court should make some finding of a good-faith defense before a trustee can pay for attorneys from the trust for defending breach claims.⁴⁴⁰

In analyzing the availability of injunctive relief to safeguard the estate from its trustees during litigation, the Eastern District of Texas noted that "[i]n *Snook*, the Eleventh Circuit found a likelihood of success on the plaintiff's position that the trust should not be charged for attorney's fees until the merits are resolved"⁴⁴¹ When considered more fully, the reasoning behind this holding is clear as:

It does not appear that the settlors' intent is furthered by allowing the trustees to charge the trust for attorney expenses before they have demonstrated to a court that they are not at fault and that the expenses are reasonable. To conclude otherwise would be to say, in effect, that the settlors intended for the trustees to have their attorney expenses paid by trust funds in all litigation, even when the trustees are guilty of maladministration and have incurred attorney expenses in clearly unreasonable amounts.

Thus, we conclude that the plaintiffs are substantially likely to prevail on the merits of their claim that the trustees have no authority absent prior

438. *Id.* at *7–8.

439. *See generally* Alexander v. Martin, No. 2:08-CV-400-DF, 2010 WL 11530306, at *5 (E.D. Tex. Aug. 23, 2010) (stating other jurisdictions can be persuasive authority).

440. Johnson, *supra* note 1, at 26.

441. Alexander, 2010 WL 11530306, at *4.

judicial authorization to use trust funds to pay their attorney's fees in the present case⁴⁴²

In *People ex rel. Harris v. Shine*, the trustee petitioned for advance fees from the trust for defense of a petition for removal subject to repayment if the trustee was ultimately found not entitled to indemnity.⁴⁴³ The court noted that the issue was the trustee's "entitlement to *interim or pendente lite* fees (i.e., fees for ongoing litigation not yet resolved on the merits)."⁴⁴⁴ The court noted that this issue is not well developed in the case law.⁴⁴⁵ The court stated the following standard:

We think in an ordinary case, where the trust instrument is silent on interim fees, the *grant* of interim fees should be governed by the following: the court must first assess the probability that the trustee will ultimately be entitled to reimbursement of attorney fees and then balance the relative harms to all interests involved in the litigation, including the interests of the trust beneficiaries. An assessment of the balance of harms requires at least some inquiry into the ability of the trustee or former trustee to repay fees if ultimately determined not to be entitled to costs of defense.⁴⁴⁶

In *Wells Fargo Bank v. Superior Court*, the court held "a trustee has a right to charge the trust for the cost of successfully defending against [suits] by beneficiaries. The better practice may be for a trustee to seek reimbursement after any litigation with beneficiaries concludes, initially retaining counsel with personal funds."⁴⁴⁷

In *Salmon v. Old National Bank*, the court examined a request for injunctive relief that mirrors the one brought by the plaintiff and held that "a claim against a trustee for mismanagement raises the question of the trustee's personal liability" and fees incurred in such a case are not for the benefit of the trust.⁴⁴⁸ Additionally, the court noted that "courts generally do not allow the trustee to charge attorney's fees against the trust estate before they have successfully defended those claims."⁴⁴⁹ The court went so far as to state that "[t]he better practice may be for a trustee to seek reimbursement after any litigation with beneficiaries concludes, initially retaining separate counsel with personal funds."⁴⁵⁰

442. *Id.* at *4-5.

443. *People ex rel. Harris v. Shine*, 224 Cal. Rptr. 3d 380, 382 (Cal. Ct. App. 2017).

444. *Id.* at 390.

445. *Id.*

446. *Id.* at 392.

447. *Wells Fargo Bank v. Superior Ct.*, 990 P.2d 591, 599 n.4 (Cal. 2000).

448. *Salmon v. Old Nat'l Bank*, No. 4:08CV-116-M, 2010 WL 1463196, at *2 (W.D. Ky. Apr. 8, 2010) (granting injunction against trustee's paying attorneys' fees from estate prior to judicial order allowing same) (emphasis omitted).

449. *Id.* (citing *Snook v. Tr. Co. of Ga. Bank of Savannah, N.A.*, 909 F.2d 480, 486 (11th Cir. 1990)).

450. *Id.* (quoting *Wells Fargo Bank*, 990 P.2d at 599 n.4 (Cal. 2000)).

The court in *Sierra v. Williamson* agreed, stating that:

[T]he Court cannot determine whether Defendants will be successful in defending this action. Nor is the Court in a position to determine whether Defendants' litigation expenses are reasonable. Therefore, the Court believes that the proper procedure is to allow Defendants to seek reimbursement from the Trust after the conclusion of this case, assuming Defendants are successful and their expenses reasonable. As a final matter, Defendants argue that not allowing a trustee to pay attorney's fees from the trust corpus would discourage or prevent otherwise qualified persons or entities from undertaking such a role. Judge McKinley briefly addressed this argument in *Salmon*. Noting that there is a disincentive for beneficiaries to file suit against trustees because all litigation expenses may be paid out of the trust property, Judge McKinley held that "the need to protect beneficiaries from self-interested trustees outweighs the innocent trustee's need for immediate payment of its attorney's fees."⁴⁵¹

In *In re Louise v. Steinhofel Trust*, beneficiaries appealed a trial court's award of attorney's fees to a trustee in the interim.⁴⁵² The trial court later determined that the trustee did breach their fiduciary duty.⁴⁵³ The court of appeals vacated the interim awards and remanded:

The county court approved Steffensmeier's applications for interim attorney fees and costs on September 1, 2009, in the amount of \$44,693.29 and on September 28, 2011, in the amount of \$62,481.57. The trustee incurred these fees in connection with his preparation and filing of an accounting and in connection with the litigation from which this appeal stems. The county court approved these applications prior to its determination that Steffensmeier breached his fiduciary duty but after the complaints had been filed against him. Because the county court ordered the interim fees prior to its determination that Steffensmeier breached his fiduciary duty, we vacate the award of the interim fees and remand the matter to the county court to determine whether justice and equity require that the trust bear the cost of these fees.⁴⁵⁴

In *Ball v. Mills*, an appellate court reversed an order by a trial court allowing a trustee attorney's fees from a trust in the interim.⁴⁵⁵ The court stated:

We cannot agree with appellants that recovery of attorney's fees in litigation by one trustee against another is dependent upon whether the complaining

451. *Sierra v. Williamson*, 784 F. Supp. 2d 774, 776–78 (W.D. Ky. 2011).

452. *In re Louise v. Steinhofel Tr.*, 854 N.W.2d 792, 796 (Neb. Ct. App. 2014).

453. *Id.* at 799.

454. *Id.* at 803.

455. *Ball v. Mills*, 376 So. 2d 1174, 1183 (Fla. Dist. Ct. App. 1979).

trustee has prevailed in the action. Neither can we agree that under no circumstances may an award of interim attorney's fees be made prior to conclusion of the litigation. But we do agree with appellants' final contention that in this case the complaining trustee, Mills, has failed to offer proof which would justify the award of interim attorney's fees, and that his application for attorney's fees was deficient in that the basis for the award in terms of the services rendered, and the time devoted to the various steps in these proceedings, has not been shown.

The trust is entitled to have notice of the amount claimed and the specific services for which compensation is claimed, and to have the court make a determination of the reasonableness and necessity for the charges. A mere statement indicating the expenditure of a certain number of hours and a demand for payment based upon the number of hours times the hourly rate, is not sufficient. The reasonableness and necessity of the services generally, and the reasonableness and necessity of the time devoted to each step in the proceeding must be determined by the trial judge, and it must be determined, as well, that all of the claimed services were rendered for the benefit of the trust itself, and not for some other purpose. Otherwise, it is a matter of mere speculation and conjecture as to what services are being compensated, and whether the same would actually qualify for reimbursement from the trust.⁴⁵⁶

In *Kemp v. Kemp*, an appellate court reversed a trial court's award of attorney's fees to a beneficiary in the interim against a trustee even though the trustee admitted to breaches of fiduciary duty at the hearing.⁴⁵⁷ The court stated:

And while no Georgia case specifically addresses whether OCGA § 53-12-302 (a)(4) authorizes an "interim-fee award" (such as the one in this case), the plain language of the statute provides that attorney fees and costs of litigation may be included in an award of damages resulting from a trustee's breach of trust or threat of such breach. And because this litigation is still pending, no damages have been awarded for Alexander's breach-of-trust claim. As a result, the instant fee award could not have been included in any such damages. To the contrary, Alexander was awarded fees incurred in pursuing his successful request for injunctive relief; and it is worth noting that even the trial court's grant of injunctive relief, including its removal of Sandra as trustee of the Kemp Trusts, is only temporary.

Furthermore, in addressing a former, nearly identical, version of OCGA § 53-12-302 (a)(4), we explained that "there can be no recovery of any kind under this statute, including attorney fees, without a finding of a breach of trust." Specifically, we held that, in the case of a jury trial, the trial court erred in awarding fees under this prior statute when there was no verdict form presenting the jury with the question of whether the defendants

456. *Id.*

457. *Kemp v. Kemp*, 788 S.E.2d 517, 524 (Ga. Ct. App. 2016).

breached a fiduciary duty. But here, at this stage in the proceedings, we are not at liberty to presume that a judge or jury will enter a judgment or verdict answering that question.

In its order granting attorney fees, the trial court noted that it was necessary for Alexander to file the instant action and seek Sandra's temporary removal as trustee because of the "established breaches of her fiduciary duty" and evidence that there were real and realistic threats of continued and additional breaches of such duties. Nevertheless, even if it was necessary for Alexander to seek temporary injunctive relief, there has been no official adjudication of Alexander's breach-of-trust claim on the merits, either through the grant of summary judgment or by a jury verdict.⁴⁵⁸

Paying fees before a trial court awards them, or self-help, has led to serious results.⁴⁵⁹ In *In re Baylis*, the court held:

The probate court found that although the trust had no obligation to defend Baylis on the fraud charges brought against him personally or to indemnify him, Baylis caused fees for his defense to be paid by the Trust.

. . . . Baylis's actions were in violation of his duty of loyalty.

. . . . Given Baylis's active role in creating the conflict . . . , he should have requested permission from the probate court before he used trust assets to defend himself against the personal aspects of the . . . lawsuit. He did not do so. Instead, he proceeded to use trust assets to defend himself, an extremely reckless thing to do in light of his duty of loyalty.

Given this combination of the fiduciary breach . . . and the self-dealing to defend against it, we find that Baylis's actions here constitute defalcation under 11 U.S.C. § 523(a)(4). Thus, . . . the judgment debt relating to these actions is non-dischargeable.⁴⁶⁰

At the very least, a trustee may have the responsibility to reimburse a trust for expenses it has improperly caused the trust to incur, such as requiring a trustee to reimburse a trust for the trustee's own legal expenses when the defense was not successful.⁴⁶¹ Accordingly, there is precedent from other jurisdictions that would not allow a payment from the trust for a trustee's attorney's fees until the final resolution of the underlying breach of fiduciary duty claim.⁴⁶²

458. *Id.* at 523.

459. Johnson, *supra* note 1, at 27.

460. *In re Baylis*, 313 F.3d 9, 22 (1st Cir. 2002).

461. See, e.g., *Snook v. Tr. Co. of Ga. Bank of Savannah, N.A.*, 909 F.2d 480, 487 (11th Cir. 1990); *Garwood v. Garwood*, 233 P.3d 977, 982–83, 986–87 (Wyo. 2010); *Hamilton ex rel. Slate-Hamilton v. Connally*, 959 So. 2d 640, 641–42 (Ala. 2006).

462. See, e.g., *Snook*, 909 F.2d at 487; *Garwood*, 233 P.3d at 982–83, 986–87; *Connally*, 959 So. 2d at 641–42.

6. Estate's Code Authority on Paying Fiduciary in the Interim

Though not controlling for trust lawsuits, the Texas Estates Code has a provision covering the payment of attorney's fees in suits to remove an executor in which the suit has been interpreted as not allowing an executor to use estate funds to pay attorneys in the interim.⁴⁶³ In *In re Nunu*, an estate beneficiary sued the executor to have them removed due to alleged breaches of fiduciary duty and also sought to have the court refuse to pay the executor's attorneys for representing them in a removal action and to have those fees forfeited.⁴⁶⁴ Texas Estates Code Section 404.0037 provides: "An independent executor who defends an action for the independent executor's removal in good faith, whether successful or not, shall be allowed out of the estate the independent executor's necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings."⁴⁶⁵ The executor used estate funds to pay at least some of the attorneys' fees incurred in their defense in this suit.⁴⁶⁶ The beneficiary challenged the payment of the attorneys' fees.⁴⁶⁷

The court of appeals discussed Texas Estates Code Section 404.0037, which states that if an independent executor defends a removal action in good faith, the reasonable and necessary attorney's fees for the defense "shall be allowed out of the estate."⁴⁶⁸ The court noted that good faith is an issue on which the independent executor bears the burden of proof.⁴⁶⁹ The court held:

"[A]n executor acts in good faith when he or she subjectively believes his or her defense is viable, if that belief is reasonable in light of existing law." Good faith is established as a matter of law if reasonable minds could not differ in concluding from the undisputed facts that the person in question acted in good faith. Because it is an incontrovertible fact that Paul nonsuited his removal action against Nancy with prejudice, whether Nancy defended the action in good faith is a question of law. As a matter of law, "a dismissal or nonsuit with prejudice is 'tantamount to a judgment on the merits.'" Moreover, a party who voluntarily nonsuits his claims generally cannot obtain reversal of the order on appeal. And where, as here, the party seeking the executor's removal voluntarily and unilaterally nonsuits all such claims with prejudice on the third day of a jury trial, reasonable minds could not differ in concluding that the executor's "efforts cause[d] [her] opponents to yield the playing the field." Thus, when Paul irreversibly conceded his claim for Nancy's removal, the viability and reasonableness of Nancy's defense were established as a matter of law. Although Paul points out that the trial

463. TEX. EST. CODE ANN. § 404.0037(a).

464. *In re Nunu*, 542 S.W.3d 67, 71 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

465. EST. § 404.0037(a).

466. *In re Nunu*, 542 S.W.3d at 75.

467. *Id.*

468. *Id.*

469. *Id.* at 81.

court made no finding that Nancy resisted her removal in good faith, a finding is unnecessary if a matter is established as a matter of law. Paul now attempts to resurrect the same grounds on which he sought Nancy's removal as grounds for challenging Nancy's good faith in defending the action; in essence, he contends that Nancy could not have resisted her removal in good faith because Paul would have prevailed on the merits. Those arguments must fail because his voluntary nonsuit of his removal claims with prejudice constitutes a judgment against him on the merits, and he does not (and cannot) challenge that portion of the judgment on appeal.⁴⁷⁰

The court held that the executor did not have the authority to pay the attorneys from estate funds in the interim before the court allowed such an award after the removal issue was resolved:

There is no such order in the record, and the trial court could not properly have approved payments made before the removal action had been decided.

Although Nancy appears to have assumed that she could pay her legal fees without first obtaining findings that the fees were both necessary and reasonable, the statute does not authorize such a procedure.⁴⁷¹

The court sustained the beneficiary's issue in part and remanded to the trial court the determination of the amount to be paid from the estate for the executor's "necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings."⁴⁷²

Similarly, in *Klein v. Klein*, the court of appeals dismissed an executor's claims for attorneys' fees and expenses as premature because the removal action was still pending.⁴⁷³ The court held:

[T]he executor's claim for expenses in defending the removal motion could not properly be determined without also determining the other issues raised by the amended pleading. The amount of expenses allowed to the executor could not properly be fixed without deciding whether the renewal commissions were assets of the estate. If they are found to be assets of the estate, an issue may be raised concerning the executor's good faith in defending, as required by article 149C of the Probate Code. The question of necessity and reasonableness of the expenses and their proper allocation as between the several issues would also be affected. Consequently, we hold that the trial court's award of attorneys' fees to the executor was premature.⁴⁷⁴

470. *Id.* at 81–82.

471. *Id.* at 83.

472. *Id.* at 84.

473. *Klein v. Klein*, 641 S.W.2d 387, 387 (Tex. App.—Dallas 1982, no writ).

474. *Id.* at 390.

*C. Methods to Prevent a Trustee from Paying an Attorney in the Interim**1. Motion Under Property Code Section 114.008*

Potentially, a plaintiff co-trustee or beneficiary could seek an order from a court requiring the trustee pay their attorney's fees in the interim of the case before it is final.⁴⁷⁵ Texas Property Code subsection 114.008(a) states:

To remedy a breach of trust that has occurred or might occur, the court may: (1) compel the trustee to perform the trustee's duty or duties; (2) enjoin the trustee from committing a breach of trust; (3) compel the trustee to redress a breach of trust, including compelling the trustee to pay money or to restore property; . . . or (10) order any other appropriate relief.⁴⁷⁶

A plaintiff co-trustee or beneficiary could potentially file a motion and have a hearing in which the plaintiff argues that the trustee is breaching a fiduciary duty by paying for their attorney's fees from the trust before the resolution of the claims and the court should enter an order not allowing that to continue.⁴⁷⁷ The trustee could argue that this type of order is an injunction order that has the normal requirements for injunctive relief: probable right of recovery and irreparable harm.⁴⁷⁸

There is authority, however, that relief under Section 114.008 does not require a petitioning party to meet the common law elements for such relief.⁴⁷⁹ Under this statute, courts issue orders giving injunctive-type relief.⁴⁸⁰ This statute does not expressly require any other equitable or legal elements to be proven; one interpretation is that a court can grant the enumerated relief upon showing that a trustee breached or might breach a trust.⁴⁸¹ When injunctive relief is provided by a specific statute, an applicant may not need to prove these common law elements to obtain temporary

475. See TEX. PROP. CODE ANN. § 114.008(a).

476. *Id.*

477. See *id.*

478. See *id.*

479. See *id.*

480. See *In re Bumstead Fam. Irrevocable Tr.*, No. 13-20-00350-CV, 2022 WL 710159, at *16–17 (Tex. App.—Corpus Christi–Edinburg Mar. 10, 2022, pet. denied); see also *In re Mendell*, No. 01-20-00750-CV, 2021 WL 1181198, at *1 (Tex. App.—Houston [1st Dist.] Mar. 30, 2021, no pet.) (issuing permanent injunction under § 114.008); *Bates Energy Oil & Gas, LLC v. Complete Oil Field Servs., LLC*, No. SA-17-CA-808-XR, 2017 WL 4051569, at *7 (W.D. Tex. Sept. 13, 2017) (citing to statute in support of order not allowing funds in escrow to be depleted).

481. See PROP. § 114.008(a).

relief.⁴⁸² In such cases, an appellate court reviews the trial court's decision on a temporary injunction application for an abuse of discretion.⁴⁸³

For example, in *In re Estate of Benson*, a beneficiary sought and obtained a receivership under Section 114.008 against a trustee.⁴⁸⁴ The trustee appealed and argued that the beneficiary did not establish the equitable elements for a receivership.⁴⁸⁵ The appellate court held that the beneficiary did not have to establish non-statutory elements for a receivership:

Renee requested the appointment of a receiver pursuant to [S]ection 114.008(a)(5) of the Texas Property Code, not based on equity. Section 114.008(a)(5) authorizes the appointment of a receiver to take possession of trust property and administer the trust so long as the court finds that “a breach of trust has occurred or might occur.” Thus, Renee was not statutorily required to produce evidence showing irreparable harm or lack of another remedy. The appointment of a receiver is listed as one of many other equally available remedies that an applicant can request. Accordingly, Renee was only required to produce evidence satisfying the statutory requirements of [subs]ection 114.008(a)(5), and as discussed above, there was some evidence establishing a breach of trust occurred so as to support the probate court's discretionary decision to appoint co-receivers to oversee the Trust.⁴⁸⁶

Texas Property Code Section 114.008 may allow a court to order a trustee to not sell, spend, or otherwise dissipate any assets belonging to the trust to pay for any attorney's fees or expenses related to litigation during the pendency of the litigation until further order of the court without the need for the applicant to meet the traditional elements for injunctive relief.⁴⁸⁷

Alternatively, nothing in the Texas Property Code indicates that the Texas Legislature intended to abandon the traditional requirements for an injunction or receivership when it authorized courts to enter orders as a remedy for a breach of trust—especially not in the context of preliminary relief, when the liability allegations have not been fully litigated, and the only justification for temporary relief is protection of the status quo.⁴⁸⁸ Some

482. See, e.g., *Cook v. Tom Brown Ministries*, 385 S.W.3d 592, 599 (Tex. App.—El Paso 2012, pet. denied); see also *8100 N. Freeway Ltd. v. Hous.*, 329 S.W.3d 858, 861 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *Marauder Corp. v. Beall*, 301 S.W.3d 817, 820 (Tex. App.—Dallas 2009, no pet.).

483. *Hughs v. Dikeman*, 631 S.W.3d 362, 383 (Tex. App.—Houston [14th Dist.] 2020, no pet.); *8100 N. Freeway Ltd.*, 329 S.W.3d at 861.

484. *In re Est. of Benson*, No. 04-15-00087-CV, 2015 WL 5258702, at *7–8 (Tex. App.—San Antonio Sept. 9, 2015, pet. dism'd).

485. *Id.* at *7.

486. *In re Est. of Benson*, 2015 WL 5258702, at *19–20; see *Moody Nat'l Bank v. Moody*, No. 14-21-00096-CV, 2022 WL 14205534, at *6 (Tex. App.—Houston [14th Dist.] Oct. 25, 2022, pet. denied) (affirming receivership order after holding that traditional requirements for the same were not applicable under § 114.008).

487. TEX. PROP. CODE ANN. § 114.008(a).

488. *Id.*

courts hold that even if a specific statutory provision authorizes equitable relief (such as a receivership), a trial court should not enter the same without a finding of harm or danger and only in the absence of another remedy, either legal or equitable.⁴⁸⁹ Accordingly, it is unclear whether a party and court can rely on Section 114.008 in entering an order requiring a trustee to not access trust assets without requiring the traditional elements for injunctive relief.⁴⁹⁰

2. Injunction General Requirements

A plaintiff may want to seek immediate relief from a court to prevent a trustee from using trust assets to pay its attorneys to defend a breach of fiduciary duty claim and may frame that relief as “injunctive relief.”⁴⁹¹ A court has the authority to enter temporary injunctive relief to protect a breach-of-fiduciary-duty plaintiff from irreparable injury and to maintain the status quo.⁴⁹²

A temporary restraining order serves to provide emergency relief and to preserve the status quo until a hearing may be had on a temporary injunction.⁴⁹³ The purpose of a temporary injunction is to preserve the status

489. See, e.g., *In re Est. of Hallmark*, 629 S.W.3d 433, 437 (Tex. App.—Eastland 2020, no pet.) (“Even if a specific statutory provision authorizes a receivership, a trial court should not appoint a receiver if another remedy exists, either legal or equitable. ‘Rather, receivership is warranted only if the evidence shows a threat of serious injury to the applicant.’”); see also *Elliott v. Weatherman*, 396 S.W.3d 224, 228 (Tex. App.—Austin 2013, no pet.) (addressing receivership against co-trustees and holding: “Even if a specific statutory provision authorizes a receivership, a trial court should not appoint a receiver if another remedy exists at law or in equity that is adequate and complete” and also requiring showing of “great emergency or imperative necessity”); *Benefield v. State*, 266 S.W.3d 25, 31 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (“Even if a specific statutory provision authorizes a receivership, as in this case, a trial court should not appoint a receiver if another remedy exists, either legal or equitable. Rather, receivership is warranted only if the evidence shows a threat of serious injury to the applicant.”); *Fortenberry v. Cavanaugh*, No. 03-04-00816-CV, 2005 WL 1412103, at *2 (Tex. App.—Austin June 16, 2005, no pet.) (“[A] receiver will not be appointed if another remedy exists at law or in equity that is adequate and complete, even if receivership is authorized under a specific statutory provision, as in this case.”).

490. PROP. § 114.008.

491. Author’s original thought.

492. See, e.g., *Glassman v. Goodfriend*, 347 S.W.3d 772, 347 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (signing a temporary injunction and order removing the trustee, terminating the trust, and appointing a successor trustee to wind up the trust); *Ryals v. Ogden*, No. 14-07-01008-CV, 2009 WL 2589429, at *1 (Tex. App.—Houston [14th Dist.] Aug. 25, 2009, no pet.) (granting temporary injunction against trustee from selling trust property); *In re Holland*, No. 14-09-00656-CV, 2009 WL 3154479, at *1 (Tex. App.—Houston [14th Dist.] Oct. 1, 2009, no pet.) (granting temporary injunction against executor from interfering with trial court’s orders); *Twyman v. Twyman*, No. 01-08-00904-CV, 2009 WL 2050979, at *1 (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet.) (granting temporary injunction against trustee from withdrawing any additional funds from the trust while litigation was pending); *Farr v. Hall*, 553 S.W.2d 666, 672 (Tex. App.—Amarillo 1977, writ ref’d n.r.e.) (issuing an injunction to prohibit executor from proposed stock redemption).

493. Johnson, *supra* note 1, at 28.

quo pending a full trial on the merits.⁴⁹⁴ The status quo is the last actual peaceable, uncontested status that preceded the controversy.⁴⁹⁵

The principles governing courts of equity govern injunction proceedings unless superseded by specific statutory mandate. In balancing the equities, the trial court must weigh the harm or injury to the applicant if the injunctive relief is withheld against the harm or injury to the respondent if the relief is granted.⁴⁹⁶

To be entitled to temporary injunctive relief, a plaintiff must plead a cause of action, prove a probable right to relief, and prove an immediate, irreparable injury if temporary relief is not granted.⁴⁹⁷ For example, in *183/620 Group Joint Venture v. SPF Joint Venture*, the court of appeals affirmed a temporary injunction prohibiting the defendants from using funds held by them as fiduciaries for the payment of attorney's fees and expenses in defending the breach of fiduciary duty lawsuit.⁴⁹⁸

3. Probable Right to Recovery

To show a probable right of recovery, an applicant need not establish that they will finally prevail in the litigation; rather, they must only present some evidence that, under the applicable rules of law, tends to support their cause of action.⁴⁹⁹ It is important to note that in a fiduciary case, there is authority that the usual burden of establishing a probable right of recovery does not apply if the gist of the complaint is that a fiduciary is guilty of self-dealing.⁵⁰⁰

In a fiduciary self-dealing context, the "presumption of unfairness" attaches to the transactions of the fiduciary, shifting the burden to the defendant to prove that the plaintiff will not recover.⁵⁰¹ If the presumption cannot be rebutted at the temporary injunction stage, then the injunction should be granted as the plaintiff, by simply presenting a prima facie case of the existence of a fiduciary relationship and a probable breach of that duty, has adduced sufficient facts tending to support the right to recover on the merits.⁵⁰²

494. *Id.*

495. *Id.*

496. *Seaborg Jackson Partners v. Beverly Hills Sav.*, 753 S.W.2d 242, 245 (Tex. App.—Dallas 1988, writ diss'd).

497. *Johnson*, *supra* note 1, at 28.

498. *183/620 Grp. Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901, 904 (Tex. App.—Austin 1989, writ diss'd w.o.j.).

499. *Johnson*, *supra* note 1, at 28.

500. *Id.*

501. *Id.*

502. *Id.*

4. Irreparable Harm

Generally, to be entitled to a temporary injunction, the applicant must show a probable, imminent, and irreparable injury in the interim.⁵⁰³ “Imminent” means that the injury is relatively certain to occur rather than being remote and speculative.⁵⁰⁴ Evidence that the defendant does not have sufficient assets to cover the amount of damages that the plaintiff will incur will support a finding that an applicant has no adequate remedy at law.⁵⁰⁵

If there is evidence that the defendant will secret away funds and attempt to avoid payment, a trial court has discretion to award injunctive relief.⁵⁰⁶ For example, injunctive relief was proper in a case in which the defendants had followed a pattern of transferring funds to corporations that were under their control.⁵⁰⁷ The court found that the fact that damages are calculable is irrelevant if, absent injunction, defendants would be able to dissipate specific funds contributed by members of a plaintiff class that would otherwise be available to pay judgments.⁵⁰⁸ For further example, in *R.H. Sanders v. Haves*, the court found there was no adequate remedy at law when the plaintiff established that the defendant diverted corporate assets for personal use, removed funds from the corporation, drew excessive sums for travel, and was stripping the corporation of its assets.⁵⁰⁹

In *Gatlin v. GXG, Inc.*, the court of appeals affirmed a temporary injunction against a fiduciary, and regarding the irreparable injury requirement, the court stated:

Appellees’ evidence at the hearing revealed a long history of Gatlin transferring funds from Knox and GXG accounts to his own personal or company accounts, and vice versa. In addition, Jan Farmer, Southwest

503. *Id.*

504. *Id.*

505. *Hartwell v. Lone Star, PCA*, 528 S.W.3d 750, 752 (Tex. App.—Texarkana 2017, pet. dism’d); *Loye v. Travelhost, Inc.*, 156 S.W.3d 615, 618 (Tex. App.—Dallas 2004, no pet.); *Ohlhausen v. Thompson*, 704 S.W.2d 434, 440 (Tex. App.—Houston [14th Dist.] 1986, no writ) (affirming injunction precluding use of funds against defendant who withdrew funds from account where defendant admitted he spent some of funds and did not own otherwise could not make restitution).

506. *Hartwell*, 528 S.W.3d at 758.

507. *Minexa Ariz., Inc. v. Staubach*, 667 S.W.2d 563, 567–68 (Tex. App.—Dallas 1984, no writ).

508. *Id.*

509. *R.H. Sanders Corp. v. Haves*, 541 S.W.2d 262, 265 (Tex. App.—Dallas 1976, no writ); see *TCA Bldg. Co. v. Nw. Res. Co.*, 890 S.W.2d 175, 179 (Tex. App.—Waco 1994, no writ); see also *Ohlhausen*, 704 S.W.2d at 437 (holding that no adequate remedy of law where party spent part of funds in controversy); *Abramov v. Royal Dall., Inc.*, 536 S.W.2d 388, 391 (Tex. App.—Dallas 1976, no writ) (affirmed injunction requiring party to deposit funds in registry of court where evidence showed party had no ability to pay damages); *Baucum v. Texam Oil Corp.*, 423 S.W.2d 434, 442 (Tex. App.—El Paso 1967, writ ref’d n.r.e.) (upholding temporary injunction restraining defendant from disposing of a number of different kinds of assets and properties in order to maintain status quo, and explaining that “the mere fact that there exists a remedy at law is not conclusive, but the remedy at law must be complete, practical and efficient, and subject to prompt administration. This means, of course, that equity will step in with its injunctive processes where the remedy at law may not be sufficient or effective . . .”).

Industrial's comptroller, testified that Gatlin frequently transferred large sums of money between his companies for reasons she could not explain, and that the documentation relating to these transfers, as well as to the subsidiary companies generally, were poorly maintained. This evidence, coupled with the testimony that Gatlin had in the past generated and backdated letters to himself and that he had been uncooperative when Knox sought the return of her records, was sufficient to justify the trial court's conclusion that, if not restrained, Gatlin might continue to divert and conceal assets in his possession pending trial.

We have previously recognized that a legal remedy may be considered inadequate when there is a danger that a defendant's funds will be reduced or diverted pending trial. As we noted in *Minexa*, the fact that damages may be subject to the most precise calculation becomes irrelevant if the defendants in a case are permitted to dissipate funds that would otherwise be available to pay a judgment. A number of our sister courts have likewise found a party's remedy at law to be inadequate when a defendant's funds will be reduced, pending final hearing, and will not be available in their entirety in the interim. Because there was at least some evidence from which it would be reasonable to infer that appellants' funds would be diverted or dissipated pending trial, we conclude that the trial court did not abuse its discretion in finding appellees' remedy at law inadequate and granting the temporary injunction.⁵¹⁰

In a fiduciary case, there is also authority that the plaintiff is not required to show that they have an inadequate remedy at law.⁵¹¹ In *183/620 Group Joint Venture*, the appellee and other landowners entrusted a large sum of money to the appellants to be held by them as fiduciaries and expended according to the parties' contracts.⁵¹² Pursuant to the contracts, the appellants were to serve as "project managers" of the landowners' properties and expend the money to improve the properties.⁵¹³ The appellee subsequently sued the appellants, asserting that the appellants failed to properly manage the construction improvement projects.⁵¹⁴ The appellee sought an injunction to require the appellants to repay funds expended in defense of the pending lawsuit and to restrain the appellants from any future expenditures for the same purpose.⁵¹⁵ The trial court found that the parties' contracts did not

510. *Gatlin v. GXG, Inc.*, No. 05-93-01852-CV, 1994 WL 137233, at *7-8 (Tex. App.—Dallas Apr. 19, 1994, no pet.); *see also* *Coffee v. Hermann Hosp. Est.*, No. 01-85-00520-CV, 1986 Tex. App. LEXIS 12878, at *3 (Tex. App.—Houston [1st Dist.] May 1, 1986, no pet.) (holding that irreparable injury was shown where "[t]here was testimony from which it might reasonably have been inferred that the Coffees were not cooperative in accounting for assets of the Estate, and that to insure the preservation of the Estate's assets, temporary injunctive relief was necessary.").

511. *Johnson*, *supra* note 1, at 29.

512. *183/620 Grp. Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901, 902-03 (Tex. App.—Austin 1989, writ dismissed w.o.j.).

513. *Id.* at 902.

514. *Id.*

515. *Id.* at 902-03.

authorize the appellants to use the money entrusted to them for their defense.⁵¹⁶ The trial court further found that a temporary injunction was necessary to maintain the existing status of the trust funds even though there was no showing that appellants would be unable to pay a judgment for damages that might be based on their misappropriation of the funds.⁵¹⁷

The court of appeals initially noted that an inadequate legal remedy must generally be shown before a trial court can grant a temporary injunction.⁵¹⁸ The court reasoned, however, that such a showing “is only an ordinary requirement; it is not universal or invariable.”⁵¹⁹ Where the injunction seeks to restrain a party from expending sums held by them as fiduciaries, the court held that damages would not be an adequate remedy “because the funds will be reduced, pending final hearing, so they will not be available in their entirety, in the interim, for the purposes for which they were delivered to the holder in the first place.”⁵²⁰ Since a breach of fiduciary duty claim is by nature an “equitable” action, even in cases where damages may be sought, if the fiduciary relationship is still continuing, the beneficiary has an equitable right to be protected from further harm.⁵²¹ Thus, there is authority that there is never an adequate remedy at law for a breach of fiduciary duty claim.⁵²²

In *Zaffirini v. Guerra*, beneficiaries sued the trustees of a trust for breach of fiduciary duty and removal.⁵²³ The trustees paid their attorneys from the trust to defend the suit.⁵²⁴ The beneficiaries obtained a temporary injunction preventing the payment of fees from the trust.⁵²⁵ The court of appeals reversed the injunction, holding there was no evidence of irreparable harm: the trustees could not pay back the money.⁵²⁶

In *In re McIntire*, trust beneficiaries sued a trustee for multiple allegations of breach of fiduciary duty.⁵²⁷ The trust beneficiaries sought an order requiring the trustee to reimburse trust assets used to pay their attorneys and directing them to deposit trust assets into the registry of the court.⁵²⁸ The trial court denied those motions, and the beneficiaries filed a petition for writ of mandamus.⁵²⁹ The beneficiaries argued that there was not an adequate

516. *Id.* at 903.

517. *Id.*

518. *Id.*

519. *Id.*

520. *Id.* at 904 (emphasis omitted).

521. *See id.*

522. *See id.*

523. *Zaffirini v. Guerra*, No. 04-14-00436-CV, 2014 WL 6687236, at *1 (Tex. App.—San Antonio Nov. 26, 2014, no pet.).

524. *Id.*

525. *Id.*

526. *Id.* at *4.

527. *In re McIntire*, No. 07-22-00249-CV, 2023 Tex. App. LEXIS 60, at *1–12 (Tex. App.—Amarillo Jan. 5, 2023, orig. proceeding).

528. *Id.* at *5.

529. *Id.*

remedy at law (which is a requirement for mandamus relief) because the trustee did not have sufficient personal assets to reimburse the trust if they lost the case.⁵³⁰ The court disagreed with the factual component of this argument:

Assuming the temporary injunction lens to be an appropriate means of analyzing a mandamus question, the McIntires' argument would seem influential only if Jahnel could not respond to an award of damages. Logically, if he could so respond, then there would be no need to act in the interim. In other words, assets would be available to pay what they fear would be lost. Yet, the McIntires directed us to no evidence indicating Jahnel lacked the ability to reimburse the attorney's fees paid or to be paid as the trial progressed. Nor did we find any. Indeed, at the hearing below, they represented to the trial court that they do not know if he could or could not so respond. That means the financial risk they claim to face is mere speculation, and, speculation does not prove impending injury.⁵³¹

Regarding a clear abuse of discretion element for mandamus relief, the court of appeals noted that the authority cited by the beneficiaries allowed a court to provide the requested relief, but did not require it:

Their effort to carry that burden consisted of citing authority recognizing a trial court's ability to act. Yet, the two statutes they mentioned speak of what the trial court "may" do to "remedy a breach of trust." Neither specify what a court must do. Nor do they mandate a court to sequester the trust estate, order the reimbursement of previously paid fees, and effectively place the trustee in the position of funding his own defense against claims which may ultimately prove baseless. In short, the implementation of any remedies mentioned in the two statutes is discretionary, and none required the court to grant the relief sought by the McIntires.⁵³²

In conclusion, the court also held that, absent a finding of a breach, the trial court did not err in refusing the interim relief sought by the beneficiaries:

[T]here had and has been no formal adjudication that any breach occurred. So, given the rule that "a trustee may charge the trust for attorney's fees the trustee, acting reasonably and in good faith, incurs defending charges of breach of trust," a finding of breach would seem a prerequisite to barring a trustee from turning to the trust for payment. In short, the legal authority offered does not establish that the trial court had but one choice, which was to grant the specific relief sought by the McIntires. This is not to say the court is unable to fashion other relief which protects all involved as this aging suit winds its way to final disposition. It is to say that the McIntires

530. *Id.* at *6–7.

531. *Id.* at *7.

532. *Id.* at *9.

failed to prove their entitlement to a writ of mandamus when the trial court denied their motion below.⁵³³

Accordingly, there is a conflict in the courts of appeals of Texas at this time on whether a beneficiary has to show an irreparable injury to obtain a temporary injunction to prevent a trustee from paying attorneys from a trust to defend breach of fiduciary duty claims.⁵³⁴ If there is such a requirement, it would seem that a beneficiary would never be able to obtain an injunction against a corporate fiduciary as a corporate fiduciary would always have sufficient assets to reimburse a trust for those fees if it is later determined to have paid them from the trust wrongfully.⁵³⁵ However, a beneficiary may be able to show an irreparable injury where the trustee is an individual and may not have sufficient resources to later reimburse the trust.⁵³⁶

VI. DUTY TO DISCLOSE ATTORNEY'S FEES PAYMENTS

Full disclosure is very important on all material decisions.⁵³⁷ The Texas Supreme Court has stated that trustees and executors have "a fiduciary duty of full disclosure of all material facts known to them that might affect the beneficiaries' rights."⁵³⁸ Further, the Restatement (Third) of Trusts Section 82 provides that a trustee has a duty to keep beneficiaries reasonably informed about significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests.⁵³⁹

The duty to disclose includes a co-trustee.⁵⁴⁰ A trustee, "particularly one empowered to exercise greater control or having greater knowledge of trust affairs" is under a duty "to inform each co-trustee of all material facts that have come to [the trustee's] attention and that are relevant to the administration of the trust."⁵⁴¹ Even though a majority of trustees are authorized to act for all trustees, each trustee is entitled to access to trust records and to information regarding the administration of the trust, including investment decisions.⁵⁴² Accordingly, a trustee has the duty to disclose to the beneficiaries and co-trustees that they have retained counsel, the amount of fees that have been incurred or paid, and how such fees are being paid.⁵⁴³

533. *Id.* at *11–12.

534. Johnson, *supra* note 1, at 30.

535. *Id.*

536. *Id.*

537. *Id.* at 33.

538. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984).

539. RESTATEMENT (THIRD) OF TRS. § 82(1) (AM. L. INST. 2007).

540. Johnson, *supra* note 1, at 33.

541. GEORGE GLEASON BOGERT ET AL., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 584 (2023).

542. Johnson, *supra* note 1, at 33.

543. *Id.*

However, as noted earlier, a trustee has no duty to disclose attorney-client communications to beneficiaries.⁵⁴⁴

VII. ALLOCATION OF FEES TO BENEFICIARY'S SHARE OF TRUST

When a trustee faces litigation, they have to retain counsel.⁵⁴⁵ When the trustee is successful, they should have the expense associated with the litigation paid by the trust.⁵⁴⁶ It can be unfair to other beneficiaries who have an interest in the trust when one beneficiary files meritless claims.⁵⁴⁷ One potential solution to this unfairness is for the trustee to allocate the litigation expense solely to the litigating beneficiary's interest in the trust.⁵⁴⁸

If the beneficiary causes harm to the trust due to their activities, a trustee may have a claim against the beneficiary.⁵⁴⁹ Texas Property Code Section 114.031 provides:

A beneficiary is liable for loss to the trust if the beneficiary has: (1) misappropriated or otherwise wrongfully dealt with the trust property; (2) expressly consented to, participated in, or agreed with the trustee to be liable for a breach of trust committed by the trustee; (3) failed to repay an advance or loan of trust funds; (4) failed to repay a distribution or disbursement from the trust in excess of that to which the beneficiary is entitled; or (5) breached a contract to pay money or deliver property to the trustee to be held by the trustee as part of the trust.⁵⁵⁰

So, if a beneficiary has caused loss to the trust due to wrongfully dealing with trust property, a trustee has a claim against the beneficiary, who is liable for the loss.⁵⁵¹

The Texas Property Code also has a provision that allows a trustee to offset any distributions to the beneficiary due to a loss:

Unless the terms of the trust provide otherwise, the trustee is authorized to offset a liability of the beneficiary to the trust estate against the beneficiary's interest in the trust estate, regardless of a spendthrift provision in the trust.⁵⁵²

Therefore, if a trustee establishes a claim against the beneficiary, the trustee can then simply payoff that debt by offsetting distributions otherwise due to the beneficiary from the trust.⁵⁵³ Whereas a statute of limitations might bar a

544. *Id.*

545. *See* discussion *supra* Section III.A.

546. *See supra* text accompanying note 377.

547. *See supra* text accompanying notes 388–91.

548. *See id.*

549. *See* TEX. PROP. CODE ANN. § 114.031(a).

550. *Id.*

551. *Id.*

552. *Id.* § 114.031(b).

553. *See id.*

lawsuit against the beneficiary, limitations may not apply to offsetting a beneficiary's interest in the trust.⁵⁵⁴

Further, Texas Property Code subsection 115.001(a) provides that a court has jurisdiction to "make determinations of fact affecting the administration, distribution, or duration of a trust."⁵⁵⁵ Therefore, a trustee may seek an instruction from a court to determine whether the beneficiary raised claims in bad faith and whether the trustee can or should allocate the expense of the litigation solely to the beneficiary's future distributions or interest in the trust.⁵⁵⁶

Some jurisdictions have held that if an action brought by a trust beneficiary is determined to be "groundless," "vexatious," or otherwise lacking in merit, legal fees incurred by the trustee can be ordered and assessed against the beneficiary's share in the trust rather than against the entire corpus of the trust.⁵⁵⁷ In *Webbe*, a beneficiary sued the trustee for breach of fiduciary duty, mismanagement, and for failing to transfer the trust to the beneficiary. In entering judgment against the beneficiary, the trial court declared:

The general rule is that a trustee found to be without fault is entitled to reimbursement from the trust fund for all expenses properly incurred in administering and defending the trust. Such rule does not condition assessment of fees and costs upon the outcome of litigation or allow charging them against the unsuccessful party, unless the claim defended against was groundless or vexatious.

. . . .

When one of several beneficiaries brings essentially groundless and unsuccessful litigation against a trustee the purpose of which was to benefit only himself, no reason suggests itself why the other beneficiaries, who did not join with him, sought no relief and had no voice in the conduct of the case, should share the expense with the initiating beneficiary. If such were not the case, a beneficiary could assault will and trust provisions attempting to increase his individual shares secure in the knowledge that, if he was unsuccessful, the cost would be borne by the other beneficiaries equally and

554. See, e.g., *Cook v. Cook*, 99 Cal. Rptr. 3d 913, 918–19 (Cal. Ct. App. 2009) (allowing recourse, despite the running of the statute of limitations, because the settlor "expressed intent to offset unpaid debts to implement a testamentary plan to treat each beneficiary equally").

555. PROP. § 115.001(a).

556. See *id.*

557. See, e.g., *Childs v. Nat'l Bank of Austin*, 575 F. Supp. 634, 637 (N.D. Ill. 1983); *Rudnick v. Rudnick*, 102 Cal. Rptr. 3d 493, 495 (Cal. Ct. App. 2009); *Conley v. Waite*, 25 P.2d 496, 496; *In re Est. of Leslie v. Leslie*, 886 P.2d 284, 286–87 (Colo. App. 1994); *In re Est. of Campbell*, 382 P.2d 920, 954 (Haw. 1963); *Patterson v. N. Tr. Co.*, 122 N.E. 55, 56 (Ill. 1919); *Pellico v. Pellico*, 2018 IL App (2d) 160935-U ¶¶7, 2018 Ill. App. Unpub. LEXIS 2116; *Webbe v. First Nat'l Bank & Tr. Co.*, 487 N.E.2d 711, 714 (Ill. App. Ct. 1985); *Bos. Safe Deposit & Tr. Co. v. Stone*, 203 N.E.2d 547, 554 (Mass. 1965); *Klinkerfuss v. Cronin*, 199 S.W.3d 831, 843–44 (Mo. App. E.D. 2006); *In re Feinberg's Est.*, 82 N.Y.S.2d 879, 880–81 (N.Y. Sur. 1948); see also GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES*, § 525, p. 46 (Rev. 2d ed. 1993).

not recovered solely out of the share of the party seeking to further his own ends. This would not seem just.⁵⁵⁸

The only Texas case on this issue is *Zapalac v. Cain*, where a court of appeals held that an unsuccessful party regarding a will contest that was done in good faith was entitled to an award of fees from the estate and not from their portion of the estate.⁵⁵⁹ The court held:

The Zapalacs argue alternatively that, should this Court find that Cain was entitled to attorney's fees, both their own and Cain's attorney's fee awards should be charged against Cain's share of the decedent's estate because her claims were groundless. They cite cases from other states applying this approach to groundless and unsuccessful litigation brought by an obstreperous beneficiary. However, appellants have not cited (nor has our research found) any Texas case that has charged an award of attorney's fees under Section 243 against only the portion of the estate belonging to a party who unsuccessfully attempted, in good faith, to admit another will to probate. Section 243 expressly provides that, when an unsuccessful party in good faith defends a will or attempts to introduce it to probate, his necessary attorney's fees "may be allowed out of the estate." To judicially engraft the words "out of the unsuccessful party's portion of the estate" would contravene the explicit wording of the Section 243.⁵⁶⁰

The *Zapalac* case, however, likely does not apply to a trust dispute as *Zapalac* dealt with a specific statute in a will contest.⁵⁶¹ Accordingly, there is an argument in Texas that a trustee could allocate the litigation expenses associated with a beneficiary's unsuccessful litigation to that beneficiary's portion of the trust or future distributions.⁵⁶²

VIII. CONCLUSION

Retaining attorneys can be a difficult process.⁵⁶³ This Article attempted to provide some practical and helpful suggestions in identifying, retaining, and communicating with counsel.⁵⁶⁴ Further, a trustee's power to retain and compensate attorneys is a ripe area for disputes.⁵⁶⁵ This Article attempted to provide a current view of the law in Texas on the important considerations

558. *Webbe*, 487 N.E.2d at 713–14 (citations omitted).

559. *Zapalac v. Cain*, 39 S.W.3d 414, 421 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

560. *Id.*

561. *See id.*

562. *See id.*

563. Author's original thought.

564. *Id.*

565. *Id.*

surrounding these issues.⁵⁶⁶ The author hopes that this Article assists parties in Texas to understand their rights and remedies in this area.⁵⁶⁷

566. *Id.*

567. *Id.*