

ACCOUNT LITIGATION IN TEXAS

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I. INTRODUCTION¹

This article is meant to be a practical guide for attorneys who must deal with issues concerning account litigation in Texas. That may entail litigation regarding whether an account has rights of survivorship ("JTROS"), who owns the funds in an account, the failure to properly create an account, paying fraudulent requests for funds, and taking action in a retirement account. This paper attempts to address these and other issues that arise from litigating accounts in Texas.

II. VALID SURVIVORSHIP ACCOUNTS

A. Background Regarding Survivorship Accounts

Parties can own property in either joint tenancy or in tenancy in common. *See Holmes v. Beatty*, 290 S.W.3d 852, 857-58 (Tex. 2009). A joint tenancy carries rights of survivorship, whereas tenancy in common does not. *See id.* Joint tenancy is a "[f]orm of ownership where two or more individuals hold shares as joint tenants with right of survivorship. When one tenant dies, the entire tenancy remains to the surviving tenants." *Id.* (citing SEC. TRANSFER ASSOC., Guidelines of the Securities Transfer Association AV-1 (Oct. 2005)). "[A] joint tenancy cannot be held without rights of survivorship; such a joint agreement would be a tenancy in common." *Id.*

However, "the right of survivorship as an essential legal incident of joint ownership has not been favored in this country and consequently has been abolished in most American jurisdictions." *See Stauffer v. Henderson*, 801 S.W.2d 858, 860 (Tex. 1990). Texas eliminated automatic survivorship in 1848. *See id.* "Elimination of the right of survivorship as a necessary, legally imposed

element of joint estates does not prohibit joint owners from agreeing that each will take the other's interest in the property at the other's death." *Id.*

The parties to a joint account at a bank may make a valid and enforceable written agreement that funds deposited by either of them will belong to the survivor. *See id.* at 862-63. But, regarding joint bank accounts, there has historically been "considerable confusion" regarding the effect of particular agreements. *Id.* at 860. As the Texas Supreme Court described:

This confusion is due in part to the very different reasons parties have for opening joint accounts. It is not at all unusual for a person to deposit his or her funds into an account upon which another person is authorized to draw merely for the convenience of the depositor. The owner of the money intends only to facilitate disbursement of the funds for his or her own purposes, not to transfer title to the co-signator on the account. It is no less common for a depositor of funds into a joint account to intend that at some point in time, at the depositor's death if not before, those funds will become the property of the co-signator. Thus, both common experience, as well as the express language of section 46, prohibit an inference from the mere creation of a joint account that the parties intend for ownership of the funds to pass automatically upon the death of one of them.

Id. at 861.

The Texas Estates Code provides that if two or more persons hold an interest in property jointly and one joint owner dies before severance, the interest of the decedent in the

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

joint estate: (1) does not survive to the remaining owner or owners, and (2) passes by will or intestacy from the decedent as if the decedent's interest had been severed. *See* TEX. EST. CODE ANN. §101.002. Notwithstanding this provision, the Code goes on to provide that two or more persons who hold an interest in property jointly may agree in writing that the interest of a joint owner who dies survives to the surviving joint owner or owners. *See id.* at §111.001(a). But, this may not be inferred from the mere fact that property is held in joint ownership. *See id.* at §111.001(b).

B. Texas Estates Code Provides Requirements For The Creation Of Survivorship Accounts

To assist with the confusion regarding joint accounts, the Texas Legislature enacted a statute that dictated the type of language that was required to create survivorship rights. *See* TEX. PROB. CODE ANN. § 439. In 1979, the Legislature added chapter XI entitled "Nontestamentary Transfers" to the Probate Code. *See id.*

It should be noted that the Texas Probate Code was repealed as of January 1, 2014. Those provisions were recodified in the Texas Estates Code. The Texas Estates Code was not intended to make any substantive changes to the Probate Code. *See* TEX. EST. CODE §21.001(a). Moreover, there are very few cases that even cite to the Texas Estates Code at this time. Therefore, references in this article will be to both the Probate Code and the Estates Code.

There are three types of accounts included in the Estates Code: joint accounts, P.O.D. accounts, and trust accounts. *See* TEX. PROB. CODE ANN. § 113.004 (TEX. PROB. CODE ANN. § 436(5)); *Stogner v. Richeson*, 52 S.W.3d 903 (Tex. App.—Fort Worth 2001, pet. denied). A financial institution is authorized to enter into a multiple-party account to the same extent that it may enter into single-party accounts. *See* TEX. EST. CODE ANN. § 113.005.

"Joint account" means an account payable on request to one or more of two or

more parties, regardless of whether there is a right of survivorship." *See* TEX. EST. CODE ANN. § 113.004(2) (TEX. PROB. CODE ANN. § 436(4)). Certificates of deposit (CDs) are accounts and can be joint accounts for purposes of the Estates Code where they are payable on request to one or more of two or more parties. *See Bandy v. First State Bank*, 1992 Tex. LEXIS 37 (Tex. 1992), *opinion withdrawn by, substituted opinion at* 835 S.W.2d 609 (Tex. 1992).

"P.O.D. account" means an account payable on request to (A) one person during the person's lifetime and, on the person's death, to one or more P.O.D. payees, or (B) to one or more persons during their lifetimes and, on the death of all of them, to one or more P.O.D. payees." *See* TEX. EST. CODE ANN. § 113.004(4) (TEX. PROB. CODE ANN. § 436(10)); *Punts v. Wilson*, 137 S.W.3d 889 (Tex. App.—Texarkana 2004, no pet.).

A "Trust account" means:

[A]n account in the name of one or more parties as trustee for one or more beneficiaries in which the relationship is established by the form of the account and the deposit agreement with the financial institution and in which there is no subject of the trust other than the sums on deposit in the account. The deposit agreement is not required to address payment to the beneficiary. The term does not include (A) a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or (B) a fiduciary account arising from a fiduciary relationship, such as attorney-client.

TEX. EST. CODE ANN. § 113.004(5) (TEX. PROB. CODE ANN. § 436(14)); *Stogner v. Richeson*, 52 S.W.3d at 903; *Cweren v. Danziger*, 923 S.W.2d

641, 644 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Isbell v. Williams*, 705 S.W.2d 252, 255 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.); *Otto v. Klement*, 656 S.W.2d 678, 682 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

There is also a convenience account that does not provide for any survivorship effect. See TEX. EST. CODE ANN. § 113.004(1) (TEX. PROB. CODE ANN. § 438A), § 113.105. A party to a convenience account is not considered to have made a gift of the deposit, or any additional deposits or accruals to the deposits, to a convenience signer. See TEX. EST. CODE ANN. § 113.105(b). Any additions to the account by anyone other than a party, and accruals to the addition, are considered to have been made by a party. See *id.* at § 113.105(c).

The Estates Code provides the exclusive means for creating a right of survivorship in joint, P.O.D., and trust accounts in Texas. See *Kirkpatrick v. Cusick*, No. 13-13-00149-CV, 2013 Tex. App. LEXIS 15435 (Tex. App.—Corpus Christi December 19, 2013, pet. denied). This includes checking accounts, savings accounts, certificates of deposit, share accounts, and other like arrangements. See TEX. EST. CODE ANN. § 113.001(1) (TEX. PROB. CODE ANN. §§ 436(1), 450). Regarding joint accounts, the Texas Estates Code currently states:

(a) Sums remaining on deposit on the death of a party to a joint account belong to the surviving party or parties against the estate of the deceased party if the interest of the deceased party is made to survive to the surviving party or parties by a written agreement signed by the party who dies.

(b) Notwithstanding any other law, an agreement is sufficient under this section to confer an absolute right of survivorship on parties to a joint account if the agreement contains a statement substantially similar to the following: "On the death of one

party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate."

(c) A survivorship agreement may not be inferred from the mere fact that the account is a joint account or that the account is designated as JT TEN, Joint Tenancy, or joint, or with other similar language.

(d) If there are two or more surviving parties to a joint account that is subject to a right of survivorship agreement:

(1) during the parties' lifetimes respective ownerships are in proportion to the parties' previous ownership interests under Sections 113.102, 113.103, and 113.104, as applicable, augmented by an equal share for each survivor of any interest a deceased party owned in the account immediately before that party's death; and

(2) the right of survivorship continues between the surviving parties if a written agreement signed by a party who dies provides for that continuation.

TEX. EST. CODE ANN. § 113.151 (TEX. PROB. CODE ANN. § 439(a)).

Regarding P.O.D. accounts, the Texas Estates Code provides:

(a) If the account is a P.O.D. account and there is a written agreement signed by the original payee or payees, on the death of the original payee or on the death of the survivor of two or more original payees, any

sums remaining on deposit belong to:

(1) the P.O.D. payee or payees if surviving; or

(2) the survivor of the P.O.D. payees if one or more P.O.D. payees die before the original payee.

(b) If two or more P.O.D. payees survive, no right of survivorship exists between the surviving P.O.D. payees unless the terms of the account or deposit agreement expressly provide for survivorship between those payees.

TEX. EST. CODE ANN. § 113.152 (TEX. PROB. CODE ANN. § 439(b)).

Regarding Trust Accounts, the Texas Estates Code provides:

(a) If the account is a trust account and there is a written agreement signed by the trustee or trustees, on death of the trustee or the survivor of two or more trustees, any sums remaining on deposit belong to:

(1) the person or persons named as beneficiaries, if surviving; or

(2) the survivor of the persons named as beneficiaries if one or more beneficiaries die before the trustee.

(b) If two or more beneficiaries survive, no right of survivorship exists between the surviving beneficiaries unless the terms of the account or deposit agreement expressly provide for survivorship between those beneficiaries.

TEX. EST. CODE ANN. § 113.153 (TEX. PROB. CODE ANN. § 439(c)).

"Transfers resulting from the application of Sections 113.151, 113.152, 113.153, and 113.155 are effective by reason of the account contracts involved and this chapter and are not to be considered testamentary transfers or subject to the testamentary provisions of this title" TEX. EST. CODE ANN. § 113.158 (TEX. PROB. CODE ANN. § 441); *In re Ernst*, 2011 Tex. App. LEXIS 182 (Tex. App.—San Antonio January 12, 2011, no pet.).

C. Statutory Requirements For Creating Survivorship Accounts

Whether an agreement adequately describes the "survival" language is often an area of litigation. Statutory requirements for the creation of a right of survivorship for an account are that there be (1) a written agreement, (2) signed by the decedent, (3) which makes his interest "survive" to the other party. *See Kennemer v. Fort Worth Community Credit Union*, 335 S.W.3d 843, 846 (Tex. App.—El Paso 2011, pet. denied). The effectiveness of the survivorship language is judged from the account agreement in place at the time of the death of a party. *See* TEX. EST. CODE ANN. § 113.156 (TEX. PROB. CODE ANN. § 440).

Although there must be a written agreement, the bank does not have to retain a copy of the agreement. *See Cweren v. Danziger*, 923 S. W.2d at 644. A copy of an account agreement held by a customer or his or her attorney is still effective. *See id.* Similarly, a party does not have to retain all of the account agreement for it to be effective. *See Allen v. Wachtendorf*, 962 S.W.2d 279, 282 (Tex. App.—Corpus Christi 1998, pet. denied) (bank's electronic version of second page of signature card was sufficient to prove survivorship account even where party did not retain a copy of same).

In 1993, the Texas Legislature enacted a provision entitled "Uniform Single-Party or Multiple-Party Account Form," to provide

acceptable forms of survivorship language. *See* TEX. EST. CODE ANN. § 113.052 (TEX. PROB. CODE ANN. § 439A); *Kennemer*, 335 S.W.3d at 846; *In re Estate of Dellinger*, 224 S.W.3d 434, 438 (Tex. App.—Dallas 2007, no pet.). Although it provides form language to establish particular types of accounts, it also states that a financial institution may vary the format of the form and "make disclosures in the account agreement or in any other form which adequately discloses the information provided in this subsection." TEX. EST. CODE ANN. § 113.053 (TEX. PROB. CODE ANN. § 439A(c)). This provision is a "supplement to section 439(a), adding alternative acceptable forms of survivorship language." *Allen v. Wachtendorf*, 962 S.W.2d at 283.

D. *Stauffer v. Henderson: Party Cannot Use Parol Or Extraneous Evidence To Create Survivorship Account*

The issue of adequate "survival" language comes up when the parties diverge from the statutorily approved forms. The leading case interpreting survivorship accounts is the Texas Supreme Court's opinion in *Stauffer v. Henderson*, 801 S.W.2d 858 (Tex.1990). In that case, the Court held that language on a signature card did not create rights of survivorship. *See id.* The Court noted that the legislature has made a written agreement necessary to create a right of survivorship in a joint account and that it has undertaken to specify language that will meet its requirement. *See id.* The Court said: "First, section 439 provides the exclusive means for creating a right of survivorship in joint accounts.... Second, the necessity of a written agreement signed by the decedent to create a right of survivorship in a joint account is emphatic...." *Id.* at 862-63. If the agreement is unambiguous and complete, parol evidence is inadmissible to establish the intent of the parties. *See id.* at 863-64. The Court held that under Probate Code Section 439(a), concerning survivorship rights between non-spouses, parties could only establish survivorship using the statute's language (or language "substantially" similar to it), and a court could not consider other evidence to

ascertain the parties' intent. *See Stauffer*, 801 S.W.2d at 863-65.

Regarding the use of extraneous evidence of intent, the Court stated:

Section 439(a) makes a written agreement determinative of the existence of a right of survivorship in a joint account. If such agreement is complete and unambiguous, then parol evidence is inadmissible, as with written agreements generally, to vary, add to or contradict its terms. Furthermore, no presumption can be created to contradict the agreement or to supply a term wholly missing from its provisions. Any such presumption would violate both the parol evidence rule by necessitating admission of extrinsic evidence to rebut the presumption, and the express prohibition of section 439(a) against inferring a right of survivorship from the mere creation of a joint account. Thus, if the terms of an agreement pertaining to a joint account are clear, the parties may not introduce extrinsic evidence of the parties' intent. Section 439(a) effectively overrules prior case law to the contrary.

Id. at 863-64. *See also See Kirkpatrick v. Cusick*, 2013 Tex. App. LEXIS 15435, *13-14; *Clark v. Wells Fargo Bank, N.A.*, 2008 Tex. App. LEXIS 2211 (Tex. App.—Houston [1st Dist.] Mar. 27, 2008, no pet.) ("Claimants cannot use extrinsic evidence in an attempt to get around the four corners of the ... CDs."). *But see In re Estate of Graffagnino*, 2002 Tex. App. LEXIS 6930, at *5 (Tex. App.—Beaumont Sept. 26, 2002, pet. denied) (court of appeals affirmed trial court's determination that account with appropriate survivorship language was

estate property due to parol evidence by beneficiary); *Richardson v. Laney*, 911 S.W.2d 489 (Tex. App.—Texarkana 1995, no writ) (without discussing *Stauffer* or Section 439(a), court affirmed a jury finding that father did not intend to gift funds in JTROS accounts to children listed on account agreements).

At least one court has interpreted the *Henderson* opinion as abrogating all basic contract principles such that only the statute controls the interpretation of a survivorship agreement relating to a joint account. *See Shaw v. Shaw*, 835 S.W.2d 232, 234 (Tex. App.—Waco 1992, writ denied) (citing Philip M. Green, Note, *Extrinsic Evidence Is Not Admissible To Determine Parties' Intent Regarding Right Of Survivorship On Joint Bank Accounts: Stauffer v. Henderson*, 801 S.W.2d 858 (Tex. 1990), 22 TEX. TECH L. REV. 1237, 1251 (1991)). The court held that the language of an account agreement either does or does not create a right of survivorship as a matter of law, and that a determination of ambiguity is not allowed. *See id.*

Accordingly, under that theory, oral statements by bank representatives or others that an account had rights of survivorship are not admissible. *See Estate of Brown*, No. 04-11-00541-CV, 2012 Tex. App. LEXIS 5087 (Tex. App.—San Antonio June 27, 2012, pet. denied) (affidavit of bank representative that 0% beneficiary designation was a computer glitch was properly excluded); *Nipp v. Broumley*, 285 S.W.3d 552 (Tex. App.—Waco 2009, no pet.); *Punts v. Wilson*, 137 S.W.3d 889, 893 (Tex. App.—Texarkana 2004, no pet.) (parol evidence is inadmissible to vary, add to, or contradict an account agreement's terms); *Kitchen v. Sawyer*, 814 S.W.2d 798, 801 (Tex. App.—Dallas 1991, writ denied) (holding that extrinsic evidence from bank officer that all the bank's joint accounts were required to be JTROS could not be used to prove intent where signature card did not have box for JTROS marked).

Another court has held that normal rules of contract construction apply to account agreements. *See Evans v. First Nat'l Bank*, 946 S.W.2d 367 (Tex. App.—Houston [14th Dist.]

1997, writ denied). That court noted that "the Texas Supreme Court did not address in *Stauffer* the reciprocal question of whether extrinsic evidence may be introduced when the joint account agreement is ambiguous." *Id.* at 375 (citing Robert N. Virden, *The Final(?) Word on Joint Tenancy with Right of Survivorship Accounts*, 55 TEX. B.J. 24, 26 (1992)). The court held:

[A]greements relating to joint accounts are to be interpreted according to contract rules generally. Where no ambiguity exists, parol evidence is improper. Extrinsic evidence is permissible, however, to explain an ambiguity where the signature card or other agreement is unclear as to some aspect of the parties' agreement, other than their intent to create a survivorship account.

Id. The court then limited its holding to situations where the intent to create a survivorship account is clear and unambiguous, but what funds are subject to the survivorship agreement is ambiguous: "We hold that extrinsic evidence may be considered, however, to determine which CDs are subject to the survivorship agreement. Our holding in this case is limited to circumstances such as these where a party has expressed a clear intent to create a survivorship account, but additional evidence is required to determine what funds are properly subject to the survivorship agreement." *Id.* (citing *In re Estate of Gibson*, 893 S.W.2d 749, 753 (Tex. App.—Texarkana 1995, no writ) (holding that a signature card created a survivorship account and remanding for a determination of which funds in the account were after-acquired separate property not subject to a joint will and could pass by nontestamentary transfer to joint tenants)). After reviewing extrinsic evidence, the court determined that there was a fact issue on whether certain CDs were covered by the survivorship agreement. *See id.*

Similarly, in *Cummings v. Cummings*, the court of appeals reversed a summary judgment based on a signature card not containing sufficient language to create survivorship status. 923 S.W.2d 132 (Tex. App.—San Antonio 1996, writ denied). The court held that the signature card was ambiguous where it indicated that it was an "individual" account but also listed a person for payable on death status. *See id.* The court did not address whether an account agreement could be ambiguous for the purposes of survivorship status and seemingly made a distinction between joint accounts with rights of survivorship and payable on death accounts that were created before the amendment to Section 439(a) and 239(b). *See id.*

In *Stogner v. Richeson*, the court of appeals held that an account agreement was ambiguous as to whether it was a trust account and affirmed a jury's verdict that the party setting up the account intended it to be a trust account. 52 S.W.3d 903 (Tex. App.—Fort Worth 2001, pet. denied). The court noted that:

N.E. did not check the printed box on the agreement specifically providing that the account was a trust account. Nor did N.E. specifically designate Richeson as the beneficiary in the box provided on the form. Instead, N.E. checked the "OTHER" box and typed in "TRUST."

...

[T]he trial court determined that an ambiguity existed in the language of the deposit agreement. Neither party argues on appeal that the language was unambiguous. Therefore, a question of fact exists as to the interpretation of the agreement's true meaning.

Here, the face of the deposit agreement was entitled: "N E STOGNER IN TRUST FOR BETTIE RICHESON." N.E. also provided in the deposit agreement's account ownership section that the account was established as a "TRUST." Campbell testified that, at the time N.E. established his CD, the bank used the "OTHER" category on the depository agreement to allow customers to be insured by FDIC insurance. However, on cross-examination, Campbell conceded that it was possible that typing "TRUST" in the "OTHER" category could be used to form true trusts aside from the FDIC insurance. Campbell also testified that there was nothing magical about the bank's deposit agreement form in setting up trust accounts and there were a lot of forms a customer could use to set up a trust account.

Id. at 906-07. Based on this evidence, the court affirmed the judgment finding it was a trust account.

E. Interpretation Of Bank Agreements

Under Texas Estates Code Section 113.151-113.153, a survivorship agreement will not be inferred from the mere fact that the account is a joint account. *See* TEX. EST. CODE ANN. § 113.151-153 (TEX. PROB. CODE ANN. § 439); *Ephran v. Frazier*, 840 S.W.2d 81 (Tex. App.—Corpus Christi 1992, no writ); *Otto v. Klement*, 656 S.W.2d 678 (Tex. App.—Amarillo 1983, writ ref'd n.r.e). The agreement established must show the clear and unequivocal intent of the parties to create a joint account with rights of survivorship. *See Estate of Wilson*, 213 S.W.3d 491 (Tex. App.—Tyler 2006, pet. denied).

An account signature card, being a type of contract, must be "read, considered, and

construed in its entirety in keeping with the general principles of contract interpretation." *Allen v. Wachtendorf*, 962 S.W.2d 279, 282 (Tex. App.—Corpus Christi 1998, pet. denied). See also *Kennemer*, 335 S.W.3d at 846; *Estate of Dellinger*, 224 S.W.3d 434 (Tex. App.—Dallas 2007, no pet.); *Whitney Nat'l Bank v. Baker*, 122 S.W.3d 204, 208 (Tex. App.—Houston [1st Dist.] 2003, no pet.). When construing a contract, courts must strive to give effect to the written expression of the parties' intent. See *In the Estate of Wilson*, 213 S.W.3d 491 (Tex. App.—Tyler 2006, pet. denied) (citing *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995)). To do so, they must read all parts of a contract together. See *id.* Courts must be particularly wary of isolating from its surroundings or considering apart from other provisions a single phrase, sentence, or section of a contract. See *id.*

In *Allen v. Wachtendorf*, the court scrutinized an account signature card on which a box was checked for a "Multiple-Party Account-With Survivorship." 962 S.W.2d at 283. The definition for this term was provided on a second page. See *id.* at 282. The court reasoned that a contract must be "read, considered, and construed in its entirety" in accordance with general principles of contract construction. *Id.* Accordingly, the court held the combined language from the two pages of the account signature card established a joint account including a right of survivorship. See *id.*

In *Kennemer*, the court determined that appropriate rights of survivorship language in an application for membership card was sufficient to create survivorship rights in every account created under that agreement. 335 S.W.3d at 846. See also *Armstrong v. Roberts*, 211 S.W.3d 867, 872-73 (Tex. App.—El Paso 2006, pet. denied) (the nature of a joint account with survivorship rights was explained on the back of the signature card as an account owned by more than one individual and that upon an individual's death, all the money in the account passes to the survivor(s)); *McNeme v. Estate of Hart*, 860 S.W.2d 536, 539 (Tex. App.—El Paso 1993, no writ) (language in the account expressing that sums shall be owned jointly with rights of

survivorship established ownership of the funds in the survivor); *Shaw v. Shaw*, 835 S.W.2d 232, 235 (Tex. App.—Waco 1992, writ denied) (the example given by Section 439(a) need not be followed exactly, but must be "substantially" followed to create a joint account with rights of survivorship).

In *Punts v. Wilson*, the court held that the account was a valid P.O.D. account. 137 S.W.3d 889 (Tex. App.—Texarkana 2004, no pet.). The payee initialed beneath the language of the bank agreement that designated the ownership of the account as P.O.D. and signed the member application and agreement at the bottom. See *id.* The box that designated the account as "SINGLE-PARTY ACCOUNT WITH 'P.O.D.' (Payable on Death) DESIGNATION" was checked, and a person was listed as the P.O.D. beneficiary. See *id.* Later language in the agreement also described P.O.D. accounts with the statutorily required language. See *id.* The court concluded that "[t]his agreement created a valid P.O.D. account with Wilson as the beneficiary. As the P.O.D. beneficiary, any sums remaining on deposit at Kelly's death belonged to Wilson and were not part of Kelly's estate." *Id.*

In *Ivey v. Steele*, the signature card signed by decedent specified that upon the death of one of the parties the account was owned by the survivor. 857 S.W.2d 749, 751 (Tex. App.—Houston [14th Dist.] 1993, no writ). The court of appeals held that this language was sufficient to create a right of survivorship. The court rejected the argument that an account agreement had to use the "operative words" that the account "vests in and belongs to" the surviving party "as his or her separate property and estate." *Id.* The statute does not create any magic words.

In *Dawson v. Lowrey*, the account application/signature card included nine choices whereby the creator of the account could specify the particular type of account to be created, and the customer selected "SINGLE PARTY ACCOUNT WITH 'P.O.D.' (Payable on Death) DESIGNATION" by placing an "x" in the box next to this account designation. No. 06-13-

00107, 2014 Tex. App. LEXIS 8136 (Tex. App.—Texarkana July 29, 2014, no pet.). The new account application/signature card also included a notice that the type of account selected may determine how property passes on the death of the account holder. The names of the four account beneficiaries were specifically named and listed on the card. The court held that this was sufficient to create a survivorship account:

The selection of a P.O.D. account with a listing of account beneficiaries, together with the referenced notice, indicates Pat's intent to create an account with a right of survivorship in the listed account beneficiaries. Further, this information, together with the notice language utilized on the new account application/signature card, adequately discloses the information provided in Section 439A of the Probate Code. Accordingly, the trial court erred in impliedly finding that the language utilized to set up the P.O.D. account did not comply with the provisions of Section 439A of the Texas Probate Code.

Id. at *18.

Moreover, when the signature card incorporates a deposit agreement, that agreement is also a part of the deposit contract between the parties. *See* TEX. FIN. CODE § 34.301(a); *In the Estate of Wilson*, 213 S.W.3d 491 (Tex. App.—Tyler 2006, pet. denied). "[I]t is uniformly held that an unsigned paper may be incorporated by reference in the paper signed by the person sought to be charged." *See McNeme v. Estate of Hart*, 860 S.W.2d 536, 541 (Tex. App.—El Paso 1993, no writ) (citing *Owen v. Hendricks*, 433 S.W.2d 164, 166 (Tex. 1968)). Therefore, if an account signature card references and incorporates another document, that document must also be reviewed to determine whether appropriate rights of survivorship language

exist. *See In re Estate of Dellinger*, 224 S.W.3d 434 (Tex. App.—Dallas 2007, no pet.); *In the Estate of Wilson*, 213 S.W.3d 491, 494 (Tex. App.—Tyler 2006, pet. denied); *Herring v. Johnson*, No. 14-03-00266-CV, 2004 Tex. App. LEXIS 2087 (Tex. App.—Houston [14th Dist.] Mar. 4, 2004, pet. denied).

In *Estate of Dellinger*, the court found that an account signature card and an account agreement, incorporated into the signature card, created rights of survivorship. 224 S.W.3d at 439-40. The agreement stated that unless otherwise provided, joint accounts would be with rights of survivorship and then defined what that meant. *See id.* The court rejected that the payee's omission of a payable on death beneficiary meant that he did not want survivorship effect. *See id.* The court reasoned that a joint account with rights of survivorship and a payable on death designation were different issues in the account agreement, and therefore the lack of a payable on death beneficiary did not indicate that the account was to not have survivorship effect. *See id.*

A decedent need not make a declarative sentence describing the survivorship intention. *See In the Estate of Wilson*, 213 S.W.3d at 494. Rather, a joint account with rights of survivorship can be established by placing an "X" in the box next to that statement on the signature card. *See id.* In *Estate of Wilson*, the account agreement defined what right of survivorship meant, and stated "[r]ight of survivorship means that when a co-owner dies, the balance in the account belongs to the surviving co-owner(s), subject to our right to charge the account for any amount the deceased co-owner or a surviving co-owner owes us." *Id.* The court held that that statement expanded upon what the payee meant when he put the "X" in the box with "Joint with Right of Survivorship." *Id.*

Moreover, in *Banks v. Browning*, the court held that a party does not need to prove when the "X" was placed on the agreement or that the signer knew and intended that the "X" create a survivorship account – indeed, that would be impermissible extrinsic evidence. 873

S.W.2d 763, 765 (Tex. App.—Fort Worth 1994, writ denied).

However, the decedent must affirmatively place an "X" by the appropriate survivorship option. *See In re Estate of Graffagnino*, 2002 Tex. App. LEXIS 6930, at *5 (Tex. App.—Beaumont Sept. 26, 2002, pet. denied). For example, in one case on the back of the signature card there were three boxes for the account holder to check to indicate whether the account was to be single party, multiple party with survivorship, or multiple party without survivorship. *See id.* None of the boxes were checked. *See id.* Rather, a signature appeared on one line, to the right of the boxes, to the right of the box marked "Multiple Party with Survivorship." *Id.* The court held that the decedent "may or may not have intended to designate the account as a joint account with right of survivorship." *Id.* "On its face the card is not a clear written contract establishing the right of survivorship, as required by section 439(a) of the Probate Code." *Id.* The court also held that placing an "X" above a box for survivorship option was not sufficient to create a survivorship account. *See id.*

Moreover, a bank's sua sponte decision to amend its account agreement years after the account has been created may clarify that that account does have right of survivorship effect. In *Mims – Brown v. Brown*, a mother was the executrix of father's estate and distributed real property to the son. No. 05-12-01132-CV, 2014 Tex. App. LEXIS 3754 (Tex. App.—Dallas, March 31, 2014). The son sold the property and deposited the proceeds into an account called "JTWROS" with the mother as co-applicant in 2003. The account agreement had no language describing what JTWROS was but stated that the bank could amend the agreement in the future without notice. In 2007, the bank amended the agreement to have an adequate legal description for "JTWROS." In 2008, the son died, and the mother received the proceeds from the account. The son's wife sued the mother for the funds, and the court held that the bank's amendment and addition of adequate "JTWROS" language was effective.

Court also held that former Probate Code section 440, which held that a JTWROS form may be altered by written order given by a party to the banks and that the order must be signed by the party and received by the bank during the party's lifetime, did not apply because the son and mother were not trying to change the account.

F. Decedent (Payee) Must Sign The Account Agreement

The statute requires that the original payee or payees sign the account agreement. *See* TEX. EST. CODE ANN. § 113.151-.153 (TEX. PROB. CODE ANN. § 439(b)); *Armstrong v. Roberts*, 211 S.W.3d 867 (Tex. App.—El Paso 2006, pet. denied). Where a decedent fails to sign the required deposit agreement, the decedent never creates an account that passes the funds outside of probate and to other parties to the account. *See Parker v. JPMorgan Chase Bank*, 95 S.W.3d 428, (Tex. App.—Houston 1st Dist. 2002, no pet.).

For example, in *Parker*, the court granted a summary judgment holding that the estate owned the proceeds of accounts that were presumed to be P.O.D. accounts where the signature cards did not evidence the decedent's signature. 95 S.W.3d at 428. The court stated:

Parker argues that the trial court erred in granting the motion for summary judgment because Chase failed to establish that the "defendant [Chase] did not sign the certificates of deposit as a matter of law." Parker concludes that, because "an action was taken by Ms. Eva Lee Burrell to establish a P.O.D. account, . . . the Defendant established the accounts."

Chase argues that a P.O.D. account was never created because the decedent failed to sign the required P.O.D. agreement. We agree. . . .

Chase presented summary judgment proof that decedent did not sign any agreement and, thus, did not fulfill the statutory requirements necessary to create a P.O.D. account. The summary judgment evidence, thus, disproves as a matter of law at least one element of Parker's cause of action. As a result, the burden shifted to Parker to present evidence creating a fact issue.

To support her argument, Parker reasserts Chase's original claim that decedent created a P.O.D. account. Parker argues that, "Based upon the pleadings of the defendants, the plaintiffs could only assume that there was a valid 'P.O.D.' account." Further, Parker notes that "Upon establishing the account and subsequent death of Ms. Burrell [decedent], Defendants [Chase] made judicial assertions that the P.O.D. accounts were established and they were mistakenly closed."

The intent of the decedent must be determined from the agreement, and extrinsic evidence may not be offered to prove intent. Therefore, in making our decision, we do not consider Parker's arguments that she could "only assume that there was a valid 'P.O.D.' account," and that Chase "made judicial assertions that the P.O.D. accounts were established and they were mistakenly closed." Parker's argument, thus, must be restricted to the information contained within the P.O.D. agreement itself. . . . After indulging every reasonable inference in favor of Parker, we

hold that she has not met her burden to present evidence creating a fact issue about whether a P.O.D. account was created.

Id. at 431-32.

Even if the decedent signs the signature card, if she does not sign in a space provided next to the survivorship option, the account will not be a survivorship account. *See Herring v. Johnson*, No. 14-03-00266-CV, 2004 Tex. App. LEXIS 2087 (Tex. App.—Houston [14th Dist.] Mar. 4, 2004, pet. denied). "Not only does the signature card require a signature to create a joint account with right of survivorship, but both Sections 439(a) and 439A require a signature or initials by the deceased party to create a right of survivorship." *Id.*

However, a party does not need to sign a new account agreement every time an account is renewed. *See In re Estate of Patterson*, No. 11-03-00070-CV, 2003 Tex. App. LEXIS 8480 (Tex. App.—Eastland Oct. 2, 2003, no pet.). One court held that the original account agreements concerning CDs were valid as to renewed CDs. *See id.* The court stated: "Nothing in the record suggests that a new signature card would be required upon renewal of the certificates of deposit, nor can we find any statute or precedent imposing any such requirement." *Id.* at *2-3.

The original payee must sign the agreement, and a party with the original payee's power of attorney cannot create a survivorship account or designate beneficiaries. *See Armstrong v. Roberts*, 211 S.W.3d at 870-71.

One court has held that a party does need to create a new account agreement if a new party to the account is added. *See Rogers v. Shelton*, 832 S.W.2d 709 (Tex. App.—Eastland 1992, writ denied). In *Rogers*, a couple entered into a valid joint account with rights of survivorship. *See id.* Six years later, their son's name was typed onto the signature card and the son signed the card. *See id.* The court held that the son was not a valid party to the account and

the survivorship language was not operative as to him. *See id.*

Further, where there is sufficient evidence to prove that an account had been renamed or renumbered, the original account agreement will be sufficient to create survivorship effect. *See Estate of Dillard*, 98 S.W.3d 386, 396-97 (Tex. App.—Amarillo 2003, pet. denied).

What constitutes a signature is not all that strict. *See* TEX. BUS. & COM. CODE ANN. § 1.201(39). In one case, the court held that the account agreement was "signed" where the party simply initialed the signature card. *See McNeme v. The Estate of Anna Mae Hart*, 860 S.W.2d 536 (Tex. App.—El Paso 1993, no writ).

G. Absent Appropriate Language, An Account Will Not Have Survivorship Effect

Unless an account is a joint account with right of survivorship, a pay-on-death account, or a trust account, "the death of any party to [the] account ... has no effect on beneficial ownership of the account, other than to transfer the rights of the deceased party as part of the deceased party's estate." *See* TEX. EST. CODE ANN. § 113.155 (TEX. PROB. CODE ANN. § 439(d)). Accordingly, at a depositor's death, his or her account passes to his or her estate unless another party establishes the account is one of the types encompassed by sections 113.151-153. *See id.* Absent the appropriate language, the funds in an account will not transfer to the surviving member of the account, but will transfer to the original owner's estate. *See, e.g., Stauffer v. Henderson*, 801 S.W.2d 858 (Tex. 1990); *Koonce v. First Vict. Nat'l Bank*, 2011 Tex. App. LEXIS 7198 (Tex. App.—Corpus Christi Aug. 31 2011, no pet.); *Malone v. Malone*, No. 10-04-00011-CV, 2005 Tex. App. LEXIS 4254 (Tex. App.—Waco June 1, 2005, pet. denied) (the words, "'or' with right of survivorship" in a signature card was insufficient); *See In re Estate of Graffagnino*, 2002 Tex. App. LEXIS 6930, at *5 (Tex. App.—Beaumont Sept. 26, 2002, pet. denied); *Banks v. Browning*, 873 S.W.2d 763, 765 (Tex. App.—Fort Worth 1994,

writ denied); *Mbank Corpus Christi, N.A. v. Shiner*, 840 S.W.2d 724, 1992 Tex. App. LEXIS 2651 (Tex. App.—Corpus Christi 1992, no writ); *Ephran v. Frazier*, 840 S.W.2d 81, 83 (Tex. App.—Corpus Christi 1992, no writ); *Shaw v. Shaw*, 835 S.W.2d 232 (Tex. App.—Waco 1992, writ denied) (a bank signature card that used the language "Joint with Survivorship," was insufficient to create an ownership interest); *Kitchen v. Sawyer*, 814 S.W.2d 798 (Tex. App.—Dallas 1991, writ denied); *Martinez v. Martinez*, 805 S.W.2d 873 (Tex. App.—San Antonio 1991, no writ).

For example, one court held that where the agreement merely stated that an account was a "Joint Account with Right of Survivorship," that language alone did not substantially comply with Section 439(a) (now Section 133.151) and was insufficient to establish rights of survivorship. *See Ivey v. Steele*, 857 S.W.2d 749, 751 (Tex. App.—Houston [14th Dist.] 1993, no writ).

In *Pressler v. Lytle State Bank*, a party attempted to prove that funds in a joint account belonged to her instead of the estate of the deceased joint owner due to right of survivorship language on the signature card. 982 S.W.2d 561 (Tex. App.—San Antonio 1998, no pet.). The signature card had the survivorship language marked with an "X" on the card, but there was no evidence that the deceased owner marked the "X". *See id.* A jury held that the funds were the property of the estate, and the other owner appealed. *See id.* The court of appeals affirmed the judgment awarding the funds to the estate.

In *Norman v. Finley*, the court held that where there was no signature card for an alleged survivorship account, the funds therein belonged to the estate despite after-the-fact research showing that the account was set up as a survivorship account:

Kimberly contends that the only evidence presented regarding ownership was Kimberly's testimony that based on her research, the account was a joint account with right of

survivorship. Because no contrary evidence was presented, Kimberly asserts that the probate court could not disregard her testimony. The appellees counter that the probate court was free to disregard Kimberly's testimony based on her failure to produce the written joint account agreement.

Section 439 of the Texas Probate Code governs the right of survivorship in accounts. Section 439 provides that sums remaining on deposit will belong to the surviving party against the estate only if the interest of the decedent is made to survive to the surviving party by a written agreement. Accordingly, "for proving a right of survivorship in a joint account ... the Legislature has determined that ... a written agreement signed by the decedent is required." Because Kimberly failed to introduce a written agreement signed by Theresa into evidence, she failed to establish a right of survivorship in the account.

No. 04-01-00394-CV, 2002 Tex. App. LEXIS 1646 (Tex. App.—San Antonio March 6, 2002, no pet.) (not. design. pub.) (internal citation omitted).

H. Method To Revoke Or Amend Survivorship Accounts

Once a survivorship agreement is in place, the only means of revoking it is through a subsequent written agreement or a disposition of the assets covered by the agreement. *Holmes v. Beatty*, 290 S.W.3d 852, 861-62 (Tex. 2009). See also TEX. PROB. CODE ANN. § 455 (revocation of agreement to create survivorship rights in community property); *Asafi v. Rauscher*, No. 14-10-00606-CV, 2011 Tex.

App. LEXIS 7424, at *13(Tex. App.—Houston [14th Dist.] Sept. 13, 2011, pet. denied). Moreover, Section 113.156 and 113.157 state:

Sections 113.151, 113.152, 113.153, and 113.155 as to rights of survivorship are determined by the form of the account at the death of a party.

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

See TEX. EST. CODE ANN. § 113.156-.157 (TEX. PROB. CODE ANN. §440); *Rogers v. Shelton*, 832 S.W.2d 709 (Tex. App.—Eastland 1992, no writ) (survivorship effect did not apply to a party later added to account where neither of the original parties to the account, prior to their deaths, had ever given the bank a written order changing the form of the account to include the heir).

In *Mims – Brown v. Brown*, a mother was the executrix of a father's estate and distributed real property to their son. No. 05-12-01132-CV, 2014 Tex. App. LEXIS 3754 (Tex. App.—Dallas, March 31, 2014). The son sold the property and deposited the proceeds into an account called "JTWROS" with the mother as co-applicant in 2003. The account agreement had no language describing what JTWROS was but stated that the bank could amend the agreement in the future without notice. In 2007, the bank amended the agreement to have an adequate legal description for "JTWROS." In 2008, the son died, and the mother received the proceeds from the account.

The son's wife sued the mother for the funds, and the court held that the bank's amendment and addition of adequate "JTWROS" language was effective. Court also held that Probate Code section 440 did not apply because the son and mother were not trying to change the account. Section 440 states that a JTWROS form may be altered by written order given by a party to the banks and that the order must be signed by the party and received by the bank during the party's lifetime.

The son's wife also alleged that the mother breached fiduciary duties as she was the executrix and the son was a beneficiary. The court held that the mother did not breach a fiduciary duty by entering into the account agreement with the son. The court held that after the land was distributed to the son, it was no longer a part of the estate. When the mother signed the account agreement and received the proceeds, neither "occurred in the context of" the administration of the estate. The court found no law that would continue the fiduciary's obligation with regard to estate property years after it was distributed and after it had changed to a non-probate asset.

III. JOINT ACCOUNTS BETWEEN SPOUSES

Texas has not always allowed spouses to create rights of survivorship in community property. In *Hilley v. Hilley*, the Texas Supreme court held that it was unconstitutional for spouses to hold community property with rights of survivorship. 342 S.W.2d 565, 568 (Tex. 1961). See also *Allard v. Frech*, 754 S.W.2d 111, 115 (Tex. 1988) ("This holding is based on a firmly rooted principle of community property law which requires the actual partition of community property before a valid joint tenancy with the right of survivorship can be created."); *Maples v. Nimitz*, 615 S.W.2d 690, 695 (Tex. 1981) (same); *Williams v. McKnight*, 402 S.W.2d 505, 508 (Tex. 1966) (any statutory attempt to grant survivorship rights in community property would be unconstitutional). The only way for a couple to create survivorship rights was to partition their community property into separate property and then execute

survivorship agreements for that separate property. See *Williams*, 402 S.W.2d at 508. This process came to be known among practitioners as the "Texas Two-Step." See, e.g., Robert N. Virden, *Joint Tenancy with Right of Survivorship & Community Property with Right of Survivorship*, 53 TEX. B.J. 1179, 1179 (1990).

In 1987, Texas approved a constitutional amendment authorizing rights of survivorship in community property. See *Holmes v. Beatty*, 290 S.W.3d 852, 855 (Tex. 2009). The amendment provided that "spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse." *Id.* (citing TEX. CONST. art. XVI, § 15). Two years later, the Legislature amended the Probate Code to reflect this change. See *id.* This new section governs "[a]greements between spouses regarding rights of survivorship in community property." TEX. PROB. CODE § 46(b).

Texas Estates Code section 112.051 states: "At any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse." TEX. EST. CODE § 112.051 (TEX. PROB. CODE § 451). Section 112.052 provides the formalities of effectuating section 112.051:

(a) A community property survivorship agreement must be in writing and signed by both spouses.

(b) A written agreement signed by both spouses is sufficient to create a right of survivorship in the community property described in the agreement if the agreement includes any of the following phrases:

(1) "with right of survivorship";

(2) "will become the property of the survivor";

(3) "will vest in and belong to the surviving spouse"; or

(4) "shall pass to the surviving spouse."

(c) Notwithstanding Subsection (b), a community property survivorship agreement that otherwise meets the requirements of this chapter is effective without including any of the phrases listed in that subsection.

(d) A survivorship agreement may not be inferred from the mere fact that the account is a joint account or that the account is designated as JT TEN, Joint Tenancy, or joint, or with other similar language.

TEX. EST. CODE § 112.052. An agreement under this provision is enforceable without an adjudication. *See id.* at 112.053.

The purpose of the amendment and accompanying legislation "was to provide '[a] simple means . . . by which both spouses by a written instrument can provide that the survivor of them may be entitled to all or any designated portion of their community property without the necessity of making a will for that purpose.'" *Holmes*, 290 S.W.3d at 856. "[M]any banks and savings and loans associations have often failed to provide forms by which their customers can create effective joint tenancies out of community property," and the amendment addressed these concerns by removing the constitutional hurdles to creating rights of survivorship in community property. *Id.*

After the amendment, spouses' attempts to create joint accounts with rights of survivorship were enforced. *See Haas v. Voight*, 940 S.W.2d 198 (Tex. App.—San Antonio 1996, writ denied). However, nonspouses can still not create a joint account with rights of survivorship over community funds. *See id.* To do so, the property must first be partitioned or

gifted and thus transitioned into separate property. *See id.* So, for example, a father and son cannot create a survivorship account based out of community funds owned by the father and mother. *See id.*

In *Holmes v. Beatty*, there was a dispute regarding whether certain accounts with spouses listed on them had survivorship effect. 290 S.W.3d 852 (Tex. 2009). The court of appeals had held that the strict parol evidence rule set forth in *Stauffer v. Henderson* would apply to this dispute: "if we must look outside the written instrument to determine that a term used therein means 'right of survivorship,' the parties have not expressed their intent within the written instrument." *Id.*

The Texas Supreme Court disagreed. *See id.* at 858. It held that section 439(a) required that a survivorship agreement between non-spouses use either the statute's language or a substitute that is "in substantially the [same] form." *Id.* Therefore, the Court noted that section 452 is less restrictive, presumably because agreements between spouses are less vulnerable to fraud. *See id.* The Court also stated that "the constitutional amendment permitting survivorship agreements in community property was intended to facilitate the creation of such agreements . . . and the Legislature's use of less confining language comports with that goal." *Id.*

The Court found that a "Joint (WROS)" designation on an account was sufficient to create rights of survivorship in community property. *See id.* Because the agreements' survivorship language conferred survivorship rights in the securities certificates until the decedents' disposed of them, the certificates passed to the surviving spouse pursuant to those rights. *See id.*

In *Phillips v. Ivy*, there was a dispute between a daughter and a surviving spouse regarding funds from eleven CDs. No. 10-02-00266-CV, 2004 Tex. App. LEXIS 7539 (Tex. App.—Waco Aug. 18 2004, pet. denied). The jury found that eleven CDs had rights of survivorship effect and that the funds should go

to the surviving spouse. *See id.* On appeal, the surviving spouse pointed to no evidence, documentary or otherwise, that suggested any agreement connected to the eleven CDs was signed by the deceased spouse. *See id.* Given those facts, the appellate court concluded that the jury could not reasonably have formed a firm belief or conviction that any of the eleven CDs were joint tenancies with rights of survivorship. *See id.* The court of appeals held for the daughter.

So, property owned by spouses as joint tenants with a right of survivorship is a nontestamentary asset and is governed by chapter 112 of the Estates Code concerning nontestamentary transfers. *See Rowsey v. Matetich*, No. 03-08-00727-CV, 2010 Tex. App. LEXIS 6532, at *23 (Tex. App.—Austin Aug. 12, 2010, no pet.). And, the standard for proving right of survivorship for those accounts is much less strict than for accounts involving non-spouses. *See Willy v. Winkler*, No. 01-10-00115-CV, 2010 Tex. App. LEXIS 10118, n.3 (Tex. App.—Houston [1st Dist.] Dec. 23, 2010, no pet.).

The statute does provide that both spouses have to sign the account agreement. Where only one spouse signs the agreement, a court will not give the account survivorship effect. *See Phillips v. Ivy*, No. 10-02-00266-CV, 2004 Tex. App. LEXIS 7539 (Tex. App.—Waco August 18, 2004, pet denied).

Further, a community property survivorship agreement may be revoked in accordance with the terms of the agreement. *See id.* at 112.054(a). If the agreement is silent on revocation, then the statute allows the parties to revoke it by an instrument signed by both spouses or signed by one spouse and delivered to the other spouse. *See id.* at 112.054(b).

After the death of a spouse, the surviving spouse or the decedent's estate's representative may apply to a court for an order stating that the community property survivorship agreement satisfies the requirements of the statute and is effective to create a right of survivorship in community property. *See id.* at

112.101. The application must be filed in the county of proper venue for administration of the decedent's estate. *See id.* And the agreement must be filed with the application. *See id.* The statute specifies the methods of proving the spouses' signatures and the proof required by the court. *See id.* at 112.102-.103. If the court is satisfied that the requisite proof has been made, the court shall enter an order adjudging the agreement valid, which may be used as evidence in court. *See id.* at 112.104.

IV. BURDEN OF PROVING ENFORCEABLE SURVIVORSHIP ACCOUNTS

Funds in an account that were owned by a decedent are presumed to be assets of the decedent's estate, and a party asserting a right to funds from an account has the burden to prove otherwise by producing a valid and enforceable agreement. *See Pressler v. Lytle State Bank*, 982 S.W.2d 561 (Tex. App.—San Antonio 1998, no pet.) (citing *Union City Transfer v. Adams*, 248 S.W.2d 256, 260 (Tex. Civ. App.—Fort Worth 1952, writ ref'd n.r.e.)). The burden is by a preponderance of the evidence. In *Pressler*, the court stated:

Pressler concedes J.D. Weaver owned the funds in Account 508845 before his death. Accordingly, at Weaver's death, if there were no evidence the account was a joint account with a right of survivorship, the funds in the account would pass to his estate. As a result, a party who claims to own an account as the survivor of a joint account with right of survivorship bears the burden of proving her claim. Pressler was therefore correctly made to bear the burden of proving the facts necessary to establish her ownership of the account.

In short, Pressler was no more entitled to a presumption that Account 508845 was a joint

account with a right of survivorship because she was in possession of the funds than was Mary K. Stauffer, who also withdrew funds shortly after her co-signatory's death. Regardless of who possessed the funds, they belonged to the Estate of J.D. Weaver unless Pressler introduced a valid written agreement creating a joint account with right of survivorship. Pressler was thus properly made to bear the burden of proving the validity of the agreement by which she contended she owned the account.

Id. at 264-65.

Lost documents provide a wrinkle to the burden of proof. One court held that to prove the contents of a lost bank agreement, the plaintiff has the burden to establish same by clear and convincing evidence: "When a written, signed contract is lost or destroyed such that the party seeking to prove or enforce the agreement is unable to produce the written agreement in court, the existence and terms of the written contract may be shown by *clear and convincing* parole evidence." *See Bank of America, N.A. v. Haag*, 37 S.W.3d 55, 58 (Tex. App.—San Antonio 2000, no writ) (emphasis added).

In *Phillips v. Ivy*, the court of appeals questioned whether the clear and convincing standard should apply to an agreement that does not involve real property. No. 10-02-00266-CV, 2004 Tex. App. LEXIS 7539, at *5-6 (Tex. App.—Waco Aug. 18 2004, pet. denied). Because the parties submitting the issue of the lost account documents in the charge based on a clear and convincing evidence standard, the court applied that standard. *See id.* The court set forth that standard as follows:

[B]ecause the burden of proof at trial was clear and convincing evidence, on appeal we apply a higher standard of legal

sufficiency review than is ordinarily employed in civil cases. In reviewing the evidence for legal sufficiency, we must determine "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction" that each account had a right of survivorship provision. We must review all the evidence in the light most favorable to the finding and judgment. This means that we must assume that the factfinder resolved any disputed facts in favor of its finding if a reasonable factfinder could have done so. We must also disregard all evidence that a reasonable factfinder could have disbelieved. We must consider, however, undisputed evidence even if it does not support the finding.

Id. (internal citation omitted).

V. PROVING CONTENTS OF LOST BANK AGREEMENTS

The rule excluding extrinsic evidence to prove the survivorship effect of a bank agreement may not apply where the agreement is a lost document. In *Bank of America, N.A. v. Haag*, a depositor created a trust account for his son's education, but the signature card was lost. 37 S.W.3d 55, 58 (Tex. App.—San Antonio 2000, no writ). Later, his son withdrew all of the money in the account without the depositor's permission. *See id.* The depositor testified that he signed a signature card and testified to its contents, i.e., he was the only one on the signature card and that his son was not allowed to withdraw the money. *See id.* The trial court awarded judgment to the depositor and against the bank. *See id.* The bank appealed and argued that its statements and after-the-fact documents proved that the account allowed the son to withdraw funds from the account. *See id.* The

court of appeals, however, dismissed this argument:

Bank of America seeks to rely on the account statements that commenced in 1990 as an unambiguous written agreement which the parol evidence rule prohibits from being contradicted or varied by extrinsic evidence. However, the account statements do not evidence the creation of the account, but simply record the information that was transferred to Bank of America's system from University Savings' system. The account statements are not the operative legal document that created the account.

Id. at 58. The court of appeals approved the trial court's admission of Haag's parol testimony because there was evidence that a signature card existed at one time but was lost. *See id.* The court stated: "When a written, signed contract is lost or destroyed such that the party seeking to prove or enforce the agreement is unable to produce the written agreement in court, the existence and terms of the written contract may be shown by clear and convincing parol evidence." *Id.* (citing *EP Operating Co. v. MJC Energy Co.*, 883 S.W.2d 263, 267 n.1 (Tex. App.—Corpus Christi 1994, writ denied); *Chakur v. Zena*, 233 S.W.2d 200, 202 (Tex. Civ. App.—San Antonio 1950, no writ); Mark K. Glasser & Keith A. Rowley, *On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657, 734-35 (1997)). The court concluded: "Because the written contractual documents evidencing the creation of Haag's account were not introduced into evidence, the trial court did not err in admitting Haag's testimony regarding the terms of the account." *Id.* Based on the testimony of the plaintiff, the court affirmed the jury's verdict that a trust account had been created and that the beneficiary had no right to withdraw the funds as the only person that may

withdraw money from a trust account is the person claiming to be the trustee unless that person dies. *See id.* (citing TEX. FIN. CODE ANN. § 65.106(a)). *See also Armstrong v. Roberts*, 211 S.W.3d 867 (Tex. App.—El Paso 2006, pet. denied) (testimony of bank's representative regarding contents of missing second page of account agreement was sufficient to support trial court's finding that account had survivorship effect).

In *Phillips v. Ivy*, the bank destroyed the CD after a spouse cashed it after the death of the other spouse. No. 10-02-00266-CV, 2004 Tex. App. LEXIS 7539 (Tex. App.—Waco Aug. 18 2004, pet. denied). At trial, the surviving spouse was allowed to admit an "exemplar" CD of the type used during the relevant time. *See id.* at *10-11. But, the court of appeals ultimately ruled for the estate because there was no evidence, documentary or testimonial, that the deceased spouse ever signed the original agreement. *See id.* *See also In re Estate of Berger*, 174 S.W.3d 845, 846 (Tex. App.—Waco 2005, no pet.) (parol evidence admissible to prove contents of a trust agreement). Even though the surviving spouse testified that all of the CDs were joint with rights of survivorship, her testimony was conclusory in that she did not testify that she had knowledge of all of the required elements for survivorship effect. *See id.* (Grey, J., concurring).

In *A.G. Edwards & Sons Inc. v. Breyer*, the Texas Supreme Court upheld the trial court's and the court of appeals' holding that allowed the plaintiff to introduce extrinsic evidence that proved the existence of a missing account agreement to establish the defendant bank breached a contract. 235 S.W.3d 704, 708 (Tex. 2007). The Texas Supreme Court allowed extrinsic evidence to prove a breach of contract claim when defendant bank was responsible for losing the agreement. *See id.* at 709.

VI. OWNERSHIP OF FUNDS IN A JOINT ACCOUNT

Disputes can arise between parties to an account regarding the right to withdraw money from the account. Initially, either party to a joint

account has the authority to withdraw or encumber the account. See TEX. EST. CODE §113.251 (TEX. PROB. CODE ANN. §442); *McConathy v. McConathy*, No. 05-95-01036-CV, 1997 Tex. App. LEXIS 1592 (Tex. App.—Dallas April 1, 1997, no writ) (not design. for pub.); *Fain v. Texas Commerce Bank N.A.*, No. 05-95-01085, 1996 Tex. App. LEXIS 5860 (Tex. App.—Dallas December 4, 1996, writ denied). But see *Miller v. Unger*, No. 03-10-00795-CV, 2011 Tex. App. LEXIS 6125 (Tex. App.—Austin August 4, 2011, no pet.) (payable on death beneficiary has no right to withdraw funds from CD). Therefore, a third party can rely on the fact that a party to an account has authority to dispose of the funds. See *Fain*, 1996 Tex. App. LEXIS 5860. But, that does not answer the question: between the parties to the account, who owns the funds?

Joint accounts are considered "multiple-party accounts." TEX. EST. CODE §113.004 (TEX. PROB. CODE ANN. § 436(5)). A "party" to such an account is defined as "a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account." *Id.* at TEX. EST. CODE §113.002 (TEX. PROB. CODE ANN. §436(7)). "During the lifetime of all parties to a joint account, the account belongs to the parties in proportion to the net contributions by each party to the sums on deposit unless there is clear and convincing evidence of a different intent." *Id.* See *Bechem v. Reliant Energy Retail Servs., LLC*, No. 14-13-00729-CV, 2014 Tex. App. LEXIS August 5, 2014 (Tex. App.—Houston [14th Dist.] August 5, 2014, no pet.). A party's net contribution is "the sum of all deposits made to that account by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance."

Section 113.101 explains that the pertinent statutes concern only the beneficial ownership of such accounts and have no bearing on the right of withdrawal:

The provisions of this subchapter and Subchapters B

and D that relate to beneficial ownership between parties, or between parties and P.O.D. payees or beneficiaries of multiple-party accounts: (1) are relevant only to controversies between those persons and those persons' creditors and other successors; and (2) do not affect the withdrawal power of those persons under the terms of an account contract.

TEX. EST. CODE §113.101 (TEX. PROB. CODE ANN. §437).

For example, in *Nipp v. Broumley*, the case involved whether an estate or the son of the decedent owned funds that were in CDs that the son withdrew days before the decedent's death. 285 S.W.3d 552 (Tex. App.—Waco 2009, no pet.). Walterine Broumley purchased three CDs. They were payable to her or Terry Broumley, her son. See *id.* Eight days before her death, Terry cashed in all three CDs, worth about \$76,000. See *id.* Walterine Broumley's daughter, Nipp, learned about the existence of the CDs while caring for her mother. See *id.* After Nipp discovered that the CDs were not listed on the estate's inventory, she filed suit seeking a declaration that the CDs were property of the estate and an order requiring Terry to reimburse the estate for their value. See *id.* The trial court ruled for Terry after a bench trial. Nipp appealed. See *id.*

The court of appeals began its analysis by discussing the rules for ownership over the money in accounts. See *id.* After citing various Probate Code and UCC provisions, the court of appeals noted that it was undisputed that Mrs. Broumley was the sole source of the funds in the CDs, and therefore, she retained beneficial ownership of these funds at the time of the withdrawal unless Terry Broumley could prove that she gifted these funds to him. See *id.*

The elements for a gift are: (1) the donor's intent to make a gift; (2) delivery of the property; and (3) acceptance of the property. Donative intent must exist at the time of the

transfer, not at the time of a subsequent event. *See id.* Terry Broumley's burden was to prove a gift by clear and convincing evidence. *See id.* The requisite donative intent is established by, among other things, evidence that the donor intended an immediate and unconditional divestiture of his or her ownership interests and an immediate and unconditional vesting of such interests in the donee. *See id.*

The evidence showed that Terry testified that there were several instances over the years when his mother discussed with him her intent that he have the funds from the CDs to use as he needed or as he pleased. *See id.* The last time that they had such a conversation was an unspecified time before the bad days of her illness, when she started receiving hospice care. *See id.* Terry admitted that during this same time period, his mother retained the authority to cash the CDs herself. In fact, she kept the CDs in a lock box in her house where they remained until Terry retrieved them and cashed them at the bank. *See id.*

The court determined that this was not sufficient evidence to support a gift. *See id.* First, the evidence established that days or weeks passed between the date of Terry's last conversation with his mother about the CDs and the date he cashed them. *See id.* And second, his mother retained control over the funds until the date Terry withdrew them. *See id.* Thus, the court concluded that no reasonable factfinder could have formed a firm belief or conviction that an immediate and unconditional divestiture of his mother's ownership occurred on the occasion of their last conversation regarding her intentions about the CDs. *See id.* Therefore, the court reversed the trial court's judgment awarding the funds to Terry and rendered that the funds from the CDs were the property of the estate. *See id.*

Assertions of gifts often arise in the context of a joint account. *See Castelnovo v. Faieta*, No. 11-12-00085-CV, 2014 Tex. App. LEXIS 9250 (Tex. App.—Eastland August 21, 2014, no pet.) (transfer from joint account was wife's separate property because husband had no

evidence of any intent to give gift of half of funds to him).

In *Oadra v. Stegall*, the second party to a trust account asserted that the first party intended to gift the funds in the account. 871 S.W.2d 882 (Tex. App.—Houston [14th Dist.] 1994, no pet.). The jury returned a verdict that there was no gift. The court of appeals affirmed. The court emphasized that to have a gift there has to be some immediate divestiture of rights of ownership and a release of dominion and control. *See id.* at 890. The court pointed to the following evidence in the record to support the jury's answer: the first party funded the entire account, was a trustee on the account, did not remove his name from the account, and continued to exercise exclusive control over the account. *See id.* Indeed, simply adding someone to a joint account is not sufficient to prove donative intent to create a gift of the funds in the account. *See McNair v. Deal*, No. 13-05-264-CV, 206 Tex. App. LEXIS 10274 (Tex. App.—Corpus Christi November 30, 2006, pet. denied); *McConathy v. McConathy*, 1997 Tex. App. LEXIS 1592. Regarding trust accounts, the death of one party to the trust account does not create survivorship rights in the remaining trustee absent language that expressly so provides. *See Stegall v. Oadra*, 868 S.W.2d 290 (Tex. 1993).

If a joint account is determined to not have survivorship language, then before a court can award the money in the account to an estate, the estate representative has to prove that the funds in the account were all the decedent's funds. *See In re Estate of Graffagnino*, 2002 Tex. App. LEXIS 6930, at *5 (Tex. App.—Beaumont Sept. 26, 2002, pet. denied). Any funds that were deposited by the beneficiary into a joint account without survivorship effect belongs to the beneficiary after a co-party's death. *See id.*

Moreover, if a party withdraws money from a joint account without permission from the true owner, then that party may be criminally charged and convicted of theft. *See Gurrola v. State*, No. 08-01-00107-CR, 2003 Tex. App. LEXIS 8913 (Tex. App.—El Paso October 16,

2003, pet. ref'd) (court affirmed niece's conviction for felony theft from withdrawing aunt's funds from joint account).

It should be noted that an estate may use funds in a joint account where estate assets are not sufficient to pay expenses. *See* TEX. EST. CODE ANN. §113.251-.252 (TEX. PROB. CODE ANN. §442); *Estate of Preston*, 346 S.W.3d 137 (Tex. App.—Fort Worth 2011); *In re Harden*, 2004 Tex. App. LEXIS 6413 (Tex. App.—Fort Worth July 15 2004, original proceeding).

VII. BANK'S ABILITY TO OFFSET FUNDS IN JOINT ACCOUNT

Texas Estate Code section 113.210 provides:

(a) Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, if a party to a multiple-party account is indebted to a financial institution, the financial institution has a right to set-off against the account in which the party has, or had immediately before the party's death, a present right of withdrawal.

(b) The amount of the account subject to set-off under this section is that proportion to which the debtor is, or was immediately before the debtor's death, beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.

TEX. EST. CODE ANN. §113.210 (TEX. PROB. CODE ANN. §449).

Banks have a right to offset and apply a depositor's general deposit to an indebtedness the depositor owes the bank on another account. *See Bandy v. First State Bank*, 835 S.W.2d 609 (Tex. 1992); *First Nat'l Bank v. Winkler*, 139

Tex. 131, 161 S.W.2d 1053, 1056 (1942); *Security State Bank & Trust Co. v. Texas Bank & Trust Co.*, 466 S.W.2d 590, 592 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.). Accordingly, a bank can offset a debt by applying funds in a joint account.

Trust accounts add an additional wrinkle to this analysis. A bank cannot offset a debt owned by one person by funds in an account owned by another. *See Soto v. First Gibraltar Bank*, 868 S.W.2d 400 (Tex. App.—San Antonio 1993, writ ref'd). Texas courts have held that where the trust account is a revocable tentative trust, then the creditor can reach the funds in the account. *See id.* at 402. Even if a settlor intends for a trust account to be a final disposition of property, it is the account agreement that controls. *See id.* at 403-04. If the account agreement states that the trust is a tentative trust where the settlor has the power to withdraw the funds, the bank can use those trust funds to offset other debts owed by the settlor. *See id.*

VIII. SAFE HARBOR PROVISION PROTECTING A FINANCIAL INSTITUTION FOR PAYING FUNDS IN ACCOUNTS

A financial institution has a statutory protection from account holders' claims arising from the bank paying a party to the account. A financial institution may enter into a multiple party account to the same extent as it may enter into a single-party account. *See* TEX. EST. CODE ANN. §113.005 (TEX. PROB. CODE ANN. §444). A financial institution may not be required to inquire, for purposes of establishing net contributions, about (1) the source of funds received for deposit to a multiple-party account or (2) the proposed application of an amount withdrawn from a multiple-party account. *See* TEX. EST. CODE ANN. §113.003(b) (TEX. PROB. CODE ANN. §444). A multiple-party account may be paid, on request, to any one or more of the parties. *See* TEX. EST. CODE ANN. §113.202 (TEX. PROB. CODE ANN. §444).

Moreover, the Estates Code has specific provisions allowing a financial institution to pay

account parties for joint accounts, P.O.D. accounts, and trust accounts. Regarding, joint accounts, the code provides:

(a) Subject to Subsection (b), amounts in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded.

(b) Payment may not be made to the personal representative or heir of a deceased party unless:

(1) proofs of death are presented to the financial institution showing that the deceased party was the last surviving party; or

(2) there is no right of survivorship under Sections 113.151, 113.152, 113.153, and 113.155..

TEX. EST. CODE ANN. §113.203. Regarding P.O.D. accounts, the code provides:

(a) A P.O.D. account may be paid, on request, to any original payee of the account.

(b) Payment may be made, on request, to the P.O.D. payee or to the personal representative or heirs of a deceased P.O.D. payee on the presentation to the financial institution of proof of death showing that the P.O.D. payee survived each person named as an original payee.

(c) Payment may be made to the personal representative or heirs of a deceased original payee if proof of death is presented to the financial institution showing that the deceased original payee was the

survivor of each other person named on the account as an original payee or a P.O.D. payee.

TEX. EST. CODE ANN. §113.204. Regarding trust accounts, the code provides:

(a) A trust account may be paid, on request, to any trustee.

(b) Unless a financial institution has received written notice that a beneficiary has a vested interest not dependent on the beneficiary's surviving the trustee, payment may be made to the personal representative or heirs of a deceased trustee if proof of death is presented to the financial institution showing that the deceased trustee was the survivor of each other person named on the account as a trustee or beneficiary.

(c) Payment may be made, on request, to a beneficiary if proof of death is presented to the financial institution showing that the beneficiary or beneficiaries survived all persons named as trustees.

TEX. EST. CODE ANN. §113.205

Moreover, “[a] financial institution that pays an amount from a joint account to a surviving party to that account in accordance with a written agreement under Section 113.151 is not liable to an heir, devisee, or beneficiary of the deceased party's estate.” *See* TEX. EST. CODE ANN. §113.207.

The Estates Code also expressly states that payment in accordance with these provisions discharges a financial institution from liability. Section 113.209 states:

(a) Payment made in accordance with Section

113.202, 113.203, 113.204, 113.205, or 113.207 discharges the financial institution from all claims for those amounts paid regardless of whether the payment is consistent with the beneficial ownership of the account between parties, P.O.D. payees, or beneficiaries, or their successors.

(b) The protection provided by Subsection (a) does not extend to payments made after a financial institution receives, from any party able to request present payment, written notice to the effect that withdrawals in accordance with the terms of the account should not be permitted. Unless the notice is withdrawn by the person giving the notice, the successor of a deceased party must concur in a demand for withdrawal for the financial institution to be protected under Subsection (a).

(c) No notice, other than the notice described by Subsection (b) or any other information shown to have been available to a financial institution affects the institution's right to the protection provided by Subsection (a).

(d) The protection provided by Subsection (a) does not affect the rights of parties in disputes between the parties or the parties' successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts.

TEX. EST. CODE ANN. §113.209. Therefore, a financial institution cannot be liable for paying funds in an account to a party on the account.

For example, once again, in *Nipp v. Broumley*, the court of appeals noted that the defendant, as a party to the account, had a right to withdraw all of the money in the CDs he held with his mother and that the bank could not be held liable for allowing him to do so even though the son did not have any beneficial ownership in those funds. 285 S.W.3d at 552. The estate's only claims were against the defendant, not the bank. *See id.* *See also Bandy v. First State Bank*, 835 S.W.2d 609, 615-16 (Tex. 1992) (holding bank is not liable for paying funds to one of named holders of a joint account, even after executor of other named holder's estate demanded payment); *Clark v. Wells Fargo Bank, N.A.*, No. 01-08-00887-CV, 2010 Tex. App. LEXIS 4376, at *12-13 (Tex. App.—Houston [1st Dist.] June 10, 2010, no pet.); *MBank Corpus Christi, N.A. v. Shiner*, 840 S.W.2d 724, 727 (Tex. App.—Corpus Christi 1992, no writ) ("Thus, between competing interests in a joint account, the bank is fully discharged from liability when it pays the other party on the account, unless one of the parties gives written notice to the bank that no payment should be made").

IX. ARBITRATION

Most account agreements contain arbitration clauses. Courts routinely require parties to an account agreement to arbitrate disputes that fall within the scope of the arbitration clause. *See Prudential Securities Inc. v. Banales*, 860 S.W.2d 594 (Tex. App.—Corpus Christi 1993, original proceeding).

X. CLAIMS AGAINST BENEFICIARIES OF ACCOUNTS

A. Estate Representative May File Claims

Where there is a dispute regarding the withdrawal of funds in an account or the creation of the account itself, a representative of an estate has a statutory duty to raise claims on behalf of the estate. Texas Estate Code section 351.151 provides that personal representatives of an estate shall use ordinary diligence to collect all claims and debts due the estate and to recover possession of all property of the estate to

which its owners have claim or title. *See* TEX. EST. CODE 351.151 (TEX. PROB. CODE § 233(a)). Moreover, if the personal representative fails to do so, it can be liable to the estate for such failure. *See id.* Further, Texas Estate Code § 351.054 states that suits for the recovery of personal property, debts, or damages and suits for title or possession of lands or for any right attached to or growing out of the same or for injury or damage done thereto may be instituted by executors or administrators appointed in this state. *See* TEX. EST. CODE 351.054 (TEX. PROB. CODE § 233A). Indeed, the representative of a decedent's estate is the correct party to file claims on behalf of the estate. *See Frazier v. Wynn*, 472 S.W.2d 750 (Tex. 1971) (holding that heir did not have standing to file claim of decedent where it was not shown that an administration was not necessary). *But see In re Estate of Graffagnino*, 2002 Tex. App. LEXIS 6930, at *5 (Tex. App.—Beaumont Sept. 26, 2002, pet. denied) (heirs had standing to file declaratory relief claims against account beneficiary regarding survivorship status of account).

Furthermore, the representative of an estate does not owe any duty to a person listed on a joint account as those funds pass outside of probate. *See In re Ernst*, No. 04-10-00319-CV, 2011 Tex. App. LEXIS 182, at *4-5 (Tex. App.—San Antonio Jan. 12, 2011, no pet.).

Rather, the representative owes fiduciary duties to the beneficiaries of the estate. *See Wells Fargo Bank, N.A. v. Crocker*, No. 13-07-00732-CV, 2009 Tex. App. LEXIS 9791 (Tex. App.—Corpus Christi December 29, 2009, pet. denied). An executor owes the same fiduciary duties that are applicable to trustees. *See id.* (citing *Lesiker v. Rappeport*, 33 S.W.3d 282, 296 (Tex. App.—Texarkana 2000, pet. denied)). This includes the duty of full disclosure of all material facts known to it that may affect the beneficiary's rights. *See id.* A fiduciary also "owes its principal a high duty of good faith, fair dealing, honest performance, and strict accountability." *Punts v. Wilson*, 137 S.W.3d 889 (Tex. App.—Texarkana 2004, no

pet.) (citing *Ludlow v. DeBerry*, 959 S.W.2d 265, 279 (Tex. App.—Houston [14th Dist.] 1997, no writ)).

In *Crocker*, the court of appeals affirmed a jury's finding that a corporate executor breached its fiduciary duty by failing to disclose to beneficiaries that there was a joint account with an issue regarding survivorship status. 2009 Tex. App. LEXIS 9791. Ultimately, the executor prevailed because the court held that the beneficiaries did not prove causation, that the account did not have survivorship status and that the estate had a right to the funds. *See id.*

But, an estate representative does not breach a duty to seek the return of funds in a valid survivorship account, as those funds pass outside of probate. *See Punts v. Wilson*, 137 S.W.3d at 893.

B. Representative May Not Obtain Non-Probate Funds Until Proper Determination Is Made

Texas Estate Code section 113.251-.252 authorizes the use of multi-party account funds to pay debts, taxes, and expenses of administration under certain circumstances. *See* TEX. EST. CODE 113.251-.252 (TEX. PROB. CODE ANN. § 442). Three of the circumstances that must exist are that (1) the assets of the estate must be insufficient to pay the debts, taxes, and expenses of administration; (2) the estate's personal representative must have received a written demand by a surviving spouse, a creditor, or one acting for a minor child of the decedent; and (3) a proceeding to assert the liability of a multi-party account to an estate must be commenced no later than two years following the death of the decedent. *See id.* Absent this showing, a trial court has no discretion to require a party to forward joint account funds to an estate's representative. *See In re Harden*, No. 02-04-122-CV 2004 Tex. App. LEXIS 6413 (Tex. App.—Fort Worth July 15, 2004, no pet.).

Moreover, in *In re Harden*, the court of appeals held that a trial court abused its

discretion in allowing an estate to fund the cost of obtaining medical records regarding the issue of whether the decedent was of sound mind to execute joint account agreements. *See id.* at *8-9. "We hold that the trial court abused its discretion by authorizing the Temporary Administrator to expend estate funds to obtain copies of Ellen's medical records to discharge a nonexistent fiduciary obligation concerning nonprobate assets." *Id.*

C. Breach Of Fiduciary Duty Claim

The representative of the estate may raise a breach of fiduciary duty claim against the party improperly creating a joint account with rights of survivorship or improperly withdrawing funds. *See, e.g., Porter v. Denas*, No. 2006 Tex. App. LEXIS 5259 (Tex. App. San Antonio June 21, 2006, pet. denied); *Hooks v. Hooks*, No. 2-03-263-CV, 2004 Tex. App. LEXIS 6679 (Tex. App.—Fort Worth July 22, 2004, pet. denied) (party liable for breach of fiduciary duty and exemplary damages for improperly using joint account); *Evans v. First Nat'l Bank*, 946 S.W.2d 367 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (fact issue on whether party breached fiduciary duty by being named survivorship beneficiary).

There are two types of fiduciary relationships in Texas: (1) a formal fiduciary relationship arising as a matter of law, such as between partners or an attorney and a client, and (2) an informal or confidential fiduciary relationship arising from a moral, social, domestic, or merely personal relationship where one person trusts in and relies upon another. *See Crim Truck & Tractor v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992). For example, a power of attorney creates an agency relationship, which is a fiduciary relationship as a matter of law. *See Vogt v. Warnock*, 107 S.W.3d 778, 782 (Tex. App.—El Paso 2003, no. pet.); *Plummer v. Estate of Plummer*, 51 S.W.3d 840, 842 (Tex. App.—Texarkana 2001, pet. denied); *Sassen v. Tanglegrove Townhouse Condo. Ass'n*, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied). A fiduciary owes her principal a high duty of good

faith, fair dealing, honest performance, and strict accountability. *See Sassen*, 877 S.W.2d at 492.

When the transaction is between the principal and the fiduciary, the fiduciary must show proof of good faith and that the transaction was fair, honest, and equitable. *See Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507-08, 23 Tex. Sup. Ct. J. 149 (Tex. 1980); *Miller v. Miller*, 700 S.W.2d 941, 946-47 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). A transaction is unfair if the fiduciary significantly benefits from it at the expense of the beneficiary, as viewed in the light of circumstances existing at the time of the transaction. *See Miller*, 700 S.W.2d at 947; *Collins v. Smith*, 53 S.W.3d 832, 840 (Tex. App.-Houston [1st Dist.] 2001, no. pet.). "The fiduciary must show proof of good faith and that the transaction was fair, honest, and equitable." *Collins*, 53 S.W.3d at 840.

This presumption of unfairness applies to account transactions. *See, e.g., Porter v. Denas*, 2006 Tex. App. LEXIS 5259 (the court of appeals affirmed a finding that two attorneys breached their fiduciary duty to their client by being listed as beneficiaries of a survivorship account.); *Alford v. Marino*, No. 14-04-00912-CV, 2005 Tex. App. LEXIS 10162 (Tex. App.—Houston [14th Dist.] Dec. 8, 2005, no. pet.) (requiring the fiduciary to rebut the presumption the withdrawals he made from the principal's account during her lifetime were unfair); *Evans v. First Nat'l Bank of Bellville*, 946 S.W.2d 367, 379-80 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (stating that the presumption may apply when ownership of the CDs is resolved); *Townes v. Townes*, 867 S.W.2d 414, 417-18 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (applying the presumption after the fiduciary, and also a signatory on the CDs owned by the decedent, made withdrawals before the decedent's death).

For example, in *Texas Bank and Trust Company v. Moore*, the Texas Supreme Court found, as a matter of law, that a fiduciary relationship existed between a 96-year-old woman and a nephew who was helping handle her financial affairs and that the nephew breached the duties he owed to his aunt. 595

S.W.2d 502 (Tex. 1980). The Court described the facts as follows:

At age 90, in January 1967, Mrs. Littell suffered a broken hip and was hospitalized until March 30, 1967. She was then admitted to a Convalescent Center where she remained, with the exception of an interruption for further hospitalization, until her death on July 12, 1972, at age 96. During this time she was seriously incapacitated with respect to control of her bodily functions; she suffered from impaired hearing and eyesight; and she reached a state of confusion. Moore handled her financial affairs during this period and progressively gained control of the funds in question: first, as her agent under a power of attorney in writing checks on her accounts; then by transfers to him as co-owner of her various accounts. Of specific concern in the posture of the case here, Moore was the beneficiary in the transfer by Mrs. Littell of two of her accounts to him, i. e., as joint tenants with rights of survivorship. He also took possession of her jewelry.

Id. at 505. The administrator of the decedent's estate filed suit for breach of fiduciary duty against the nephew, and the jury found that the decedent did not intend to make a gift to her nephew when she created the survivorship accounts. *See id.* The jury awarded the funds formerly in the accounts to the estate and awarded the estate punitive damages. *See id.*

The Texas Supreme Court affirmed this verdict. *See id.* The Court stated that when the nephew accepted transfers from his aunt to him as joint tenant with rights of survivorship, he consented to have his conduct "measured by the

standard of finer loyalties." *Id.* The Court stated that the defendant did not rebut the presumption of unfairness, and found that allowing him to retain the funds in the accounts would frustrate her intentions as expressed in her will:

These testamentary dispositions of Mrs. Littell will be frustrated if Moore is not held to account for the funds of Mrs. Littell he took over after her death. These funds would constitute a part of the residuary estate of Mrs. Littell devised to other persons, the recovery of which is the stated purpose of the administrator of her estate in this suit.

Id. at 510. The Texas Supreme Court found that the administrator proved a breach of fiduciary duty as a matter of law and affirmed the trial court's judgment on behalf of the administrator recouping the proceeds from the accounts and awarding punitive damages. *See id.*

Similarly, in *Porter v. Denas*, the court of appeals affirmed a finding that two attorneys breached their fiduciary duty to their client by being listed as beneficiaries of a survivorship account. 2006 Tex. App. LEXIS 5259. The court described the facts as follows:

In the judgment, the trial court stated that the Porters breached a fiduciary duty owed to Alice. The record shows that the Porters were named as the IRA beneficiaries on April 5, 1996. However, on this same day, a note was created which stated, "Change Beneficiaries to Stephanie and Steven Porter [on] all CD[s,] IRA...." The evidence suggested that this note was in Stephanie's handwriting, thus attesting to the Porters' knowledge that they were listed as the IRA beneficiaries. It was undisputed

that Alice's intent was to leave nearly everything to James. After James divorced his first wife, Alice had her will changed to omit the trust and provide James with the estate outright. Despite Alice's changes to the will to reflect her intent, the Porters still remained as the IRA beneficiaries. An inventory and list of claims was created regarding Alice's assets which revealed that Alice's estate consisted of nearly \$ 114,000, excluding the \$ 54,000 IRA. However, added together, the IRA amounted to more than 32% of Alice's assets. Witnesses stated that after Alice's death, Stephanie said that the money in the IRA was not hers and even inquired about changing the IRA beneficiary from herself to James.

As the fact finder, the trial court could have believed that the Porters' fiduciary duties included, within the scope of their relationship, advice regarding Alice's IRA. Additionally, the trial court could have determined that the Porters failed to deal fairly or in good conscience with Alice.

Id. at *9-10.

However, every self-dealing transaction does not establish a breach of fiduciary duty as a matter of law. In *Plummer v. Estate of Plummer*, a daughter sued her brother and sister for withdrawing all of the money in a CD, owned by their mother, where the plaintiff was a survivorship beneficiary and depositing those funds in a checking account where the brother and sister were survivorship beneficiaries. 51 S.W.3d 840 (Tex. App.—Texarkana 2001, no writ). The brother and sister owed fiduciary duties to the mother due to having her power of attorney. *See id.* The court described the issue

of whether the brother and sister breached their duty to their mother: "whether ... transferring this money to an account in which they had the right of survivorship used their advantage, the power of attorney, to gain benefit for themselves at the expense of their mother and thus place themselves in a position where their self-interest conflicted with their obligations as a fiduciary." *Id.* The jury found that there was no breach of fiduciary duty. The court of appeals affirmed, finding that there was evidence in the record to support that result. The evidence showed that the brother and sister had made the transfer to consolidate the mother's funds to assist in paying medical and nursing home bills. *See id.* *See also Campbell v. Campbell*, No. 03-07-00672-CV, 2010 Tex. App. LEXIS 4598 (Tex. App.—Austin June 18, 2010, no pet.) (summary judgment in favor of executor on breach of fiduciary duty claim against beneficiary was reversed); *Jackson v. Smith*, 53 S.W.3d 832, 841 (Tex. App.—Houston [1st Dist] 2001, no pet.).

Before a party can be liable for breach of fiduciary duty, the party must owe fiduciary duties.

In *Mims – Brown v. Brown*, a mother was the executrix of a father's estate and distributed real property to their son. No. 05-12-01132-CV, 2014 Tex. App. LEXIS 3754 (Tex. App.—Dallas, March 31, 2014). The son sold the property and deposited the proceeds into an account called "JTWROS" with the mother as co-applicant in 2003. The account agreement had no language describing what JTWROS was but stated that the bank could amend the agreement in the future without notice. In 2007, the bank amended the agreement to have an adequate legal description for "JTWROS." In 2008, the son died, and the mother received the proceeds from the account.

The son's wife sued the mother for the funds, and the court held that the bank's amendment and addition of adequate "JTWROS" language was effective. The son's wife also alleged that the mother breached fiduciary duties as she was the executrix and the son was a beneficiary. The court held that the

mother did not breach a fiduciary duty by entering into the account agreement with the son. The court held that after the land was distributed to the son, it was no longer a part of the estate. When the mother signed the account agreement and received the proceeds, neither “occurred in the context of” the administration of the estate. The court found no law that would continue the fiduciary’s obligation with regard to estate property years after it was distributed and after it had changed to a non-probate asset.

In *In the Estate of Abernethy*, Achor was a certified public accountant who met Abernethy in 1998 and prepared tax returns for Abernethy from then until Abernethy's death in 2008. No. 08-11-00020-CV, No. 08-11-00020-CV, 2012 Tex. App. LEXIS 4272 (Tex. App.—El Paso May 30, 2012, no pet. history). Not only did Abernethy and Achor enjoy a business relationship, they enjoyed a social one. *See id.* Achor visited Abernethy in her home and sent her cards and notes, and likewise, Abernethy sent notes and cards to Achor, expressing Abernethy's gratitude to Achor for being her best friend and so intimately involved in her life. *See id.*

Abernethy designated Achor as the beneficiary of an IRA and several joint multi party bank accounts with right of survivorship. After Abernethy's death, the funds in the bank accounts and IRA passed to Achor, who received approximately \$1.2 million. *See id.* The independent administrator of Abernethy's estate sued Achor, alleging that Achor's relationship with Abernethy created a fiduciary relationship between them and that Achor breached that duty when she became the beneficiary of Abernethy's accounts. *See id.*

In the trial court, Achor moved for summary judgment, and the administrator responded attaching several exhibits, including depositions of witnesses and financial documents. *See id.* After sustaining many objections to the adequacy of the response, the trial court granted Achor's motion for summary judgment, and the administrator appealed. *See id.*

The court of appeals addressed whether Achor owed fiduciary duties to Abernethy. *See id.* The court stated that the term "fiduciary" refers to a person owing a duty of integrity and fidelity, and it applies to any person who occupies a position of peculiar confidence towards another. *See id.* According to the court, there are two types of fiduciary relationships: formal fiduciary relationships that arise as a matter of law, such as attorney client, partnership, trustee, and principal agent relationships, and informal fiduciary relationships or "confidential relationships" that may arise from moral, social, domestic, or personal relationships. *See id.*

The court stated that the accountant client relationship does not always involve a fiduciary duty. *See id.* Whether a fiduciary duty exists in an informal relationship is to be determined from the actualities of the relationships between the persons involved. *See id.* The mere fact that one party subjectively trusts another party does not alone indicate that confidence is placed in another in a sense demanded by fiduciary relationships because something apart from the transaction between the parties is required. *See id.* Rather, a fiduciary relationship may arise if the dealings between the parties have continued for such a period of time and a party is justified in relying on another to act in his best interest. *See id.* A party is justified in placing confidence in the belief that another party will act in his or her best interest only where he or she is accustomed to being guided by the judgment or advice of the other party, and there exists a long association in a business relationship as well as personal friendship. *See id.*

The court found that while it was fairly obvious that Achor and Abernethy had a close personal friendship, the administrator failed to produce summary judgment evidence that they had a fiduciary relationship, informal or otherwise. *See id.* The administrator produced no evidence that Abernethy was accustomed to being guided by Achor's judgment and advice in legal, financial, and accounting matters. *See id.* In the absence of any such evidence, the existence of a lengthy, cordial, and close

relationship between Achor and Abernethy, standing alone, did not establish a confidential relationship arising to the level of a fiduciary relationship. *See id.* The court acknowledged that the evidence that Abernethy designated Achor as a beneficiary of the IRA and established the joint accounts was sufficient to show that Abernethy placed some degree of subjective trust in Achor; however, that evidence did not show the level of trust and reliance necessary to establish the existence of a fiduciary relationship. *See id.* The court of appeals affirmed the judgment in favor of Achor.

In *Morehead v. Gilmore*, the Gilmores named their daughter Patsy as executor of their will and as their attorney-in-fact. 2003 Tex. App. LEXIS 3143, 2003 WL 1848724, *1 (Tex. App.—Houston [1st Dist.] 2003, no pet.). The Gilmores began transferring assets to Patsy, and they named Patsy as a joint tenant with right of survivorship on two certificate of deposit accounts. *Id.* Patsy told her seven siblings that any of their parents' money that was available at their deaths would be split equally among the siblings. *Id.* However, when the Gilmores died, Patsy kept all the funds in the accounts for herself. 2003 Tex. App. LEXIS 3143, [WL] at *2. The court held:

The evidence suggests that Mr. Gilmore and appellees relied on Patsy's assertions that she would assist Mr. and Mrs. Gilmore with their finances, and that the assets were to be managed by Patsy for the benefit of all of the children. We hold that, in this situation, where the evidence shows that, in a family setting, Patsy encouraged appellees to rely on her management of their parents' assets, and where there is evidence that appellees did rely on Patsy to manage the assets, there is some evidence of a fiduciary relationship.

2003 Tex. App. LEXIS 3143, [WL] at *3.

In *Vogt v. Warnock*, Warnock named Vogt, a woman forty years his junior, as his attorney-in-fact; he later transferred several parcels of real property to her. 107 S.W.3d 778, 780 (Tex. App.—El Paso 2003, pet denied). After Warnock died, the executor of his estate sued Vogt, alleging several causes of action. *Id.* at 781. At trial, the estate dropped all of its claims except for the fiduciary duty claim, and it "stipulated that [Warnock] had done what he wanted to do in transferring property, and his competency and undue influence were no longer questions that would be submitted to the jury." *Id.* The trial court ruled as a matter of law that Vogt was Warnock's fiduciary, thereby shifting the burden of proof to Vogt to prove that the property transfers to her were fair. *Id.* The jury then found after trial that some of the transfers were unfair, and the trial court rendered judgment voiding those transfers. *Id.* On Vogt's appeal, the court of appeals affirmed the trial court's legal conclusion that Vogt was a fiduciary solely on the basis of the power of attorney, even though Vogt never actually performed any actions as Warnock's attorney-in-fact. *Id.* at 782.

In *Punts v. Wilson*, J.W. Kelly named Hubert Wilson as pay-on-death beneficiary of several credit union accounts, as one of two residual beneficiaries of his will, and as the executor of his will. 137 S.W.3d 889, 890 (Tex. App.—Texarkana 2004, no pet.). When Kelly died, the other residual beneficiary of his estate, Edward Punts, sued Wilson, claiming that Wilson "breached his fiduciary duty to [Punts] as a beneficiary of the will by paying the [credit union] funds directly to him instead of depositing the funds into Kelly's estate, thereby depriving [Punts] of his fifty percent residual share." *Id.* at 890-91. The court of appeals concluded that Wilson "did not owe any fiduciary duty to Punts with regard to the funds in the Credit Union accounts, as they were not included in Kelly's estate." *Id.* at 892. The court further held that, although there was evidence that Kelly told Punts of his intent that Punts have half of the funds under the residual clause of his will, "extrinsic evidence may not be offered to prove intent" of a decedent where the

terms of a survivorship account are "complete and unambiguous." *Id.* at 893.

In *Kirkpatrick v. Cusick*, the court held that a daughter had standing to assert a breach of fiduciary duty claim for a brother-in-law having the mother name him as a joint tenant with right of survivorship on the two accounts. No. 13-13-00149-CV, 2013 Tex. App. LEXIS 15435 (Tex. App.—Corpus Christi December 19, 2013, pet. denied). The court also remanded for trial so that a jury could determine the merits of the daughter's claim.

D. Mental Competence And Undue Influence

An estate representative can assert that a decedent did not have the mental capacity to execute bank agreements creating survivorship effect or can allege that a third-party unduly influenced the decedent. *See Dubree v. Blackwell*, 67 S.W.3d 286 (Tex. App.—Amarillo 2001, no pet.). Absent proof and determination of mental competence, a person who signs a document is presumed to have read and understood the document. *See id.* Elderly persons are not presumptively incompetent. *See id.* (citing *Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539, 545 (Tex. 1998)). A person may be incompetent at one time and competent at other times. *See id.*

In deciding whether undue influence resulted in execution of a document, three factors are to be considered: (1) the existence and exertion of an influence; (2) whether the influence operated to subvert or overpower the grantor's mind when the document was executed; (3) whether the grantor would not have executed the document but for the influence. *See id.* (citing *Dulak v. Dulak*, 513 S.W.2d 205, 209 (Tex. 1974)).

For example, in *Dubree*, the court of appeals affirmed a jury's determination that a decedent had mental competence when she created a survivorship account. *See id.* The court noted that no one testified regarding the decedent's mental competence at the time that she signed the account agreement. *See id.*

Though experts testified that the decedent had diminished capacity in general, they admitted that persons in that condition could have periods of lucidity. *See id.* at 290. There was also conflicting lay testimony regarding the decedent's mental competence and ability to handle her financial affairs. *See id.* The court held that this was sufficient to support the jury's finding of competence. *See id.*

The court also affirmed the jury's finding that the decedent was not unduly influenced. *See id.* at 291. The evidence showed that the bank agreement was presented to the decedent by third parties, and there was no evidence of the decedent's mental incompetence at the time the agreement was signed. *See id.*

More recently, in *In the Estate of Minton*, the court of appeals affirmed a jury's finding that the decedent did not have mental competence to execute a POD agreement with the bank naming a non-family member as a beneficiary. No. 13-12-00026-CV, 2014 Tex. App. LEXIS 1061 (Tex. App.—Corpus Christi, January 30, 2014, pet. denied). On December 2, 2010, Minton passed away, intestate, leaving a checking account and four C.D.s totaling \$430,000. On March 25, prior to his death, Minton entered into POD contracts where he designated Garza, a retired law enforcement officer who had been friends with Minton since February 2007, as the beneficiary. After his death, the administrator of his estate and his heirs sued Garza for a declaration that the POD contract was void due to undue influence and mental incompetence. The court dismissed the undue influence claim due to a lack of evidence, and the mental competence claim went to a jury. The jury found that the decedent was not mentally competent.

Garza challenged the sufficiency of the evidence to support the jury's finding of mental incompetence. The court of appeals held that the burden of proof rests with the party seeking to set aside a contract for lack of mental capacity. It also held that the legal standards for determining the existence of mental capacity for the purposes of executing a will or deed are

substantially the same as the standards for mental capacity to execute a contract.

The court held that to possess “mental capacity” to contract, the decedent, at the time of contracting, must have “appreciated the effect of what he was doing and understood the nature and consequences of his acts and the business he was transacting.” *Id.* It also stated that mental capacity, or lack thereof, may be shown by “circumstantial evidence, including: (1) a person’s outward conduct, manifesting an inward and causing condition; (2) any pre-existing external circumstances tending to produce a special mental condition; and (3) the prior or subsequent existence of a mental condition from which a person’s mental capacity (or incapacity) at the time in question may be inferred.” *Id.*

The court first dealt with an argument by Garza that evidence before or after the date that the POD agreement was signed was irrelevant. He argued that because there was evidence that the decedent was mentally competent on the day that he signed the POD agreement, that evidence from other time periods was not relevant. The court disagreed:

Garza cites no case precluding the jury from considering or giving weight to evidence under any circumstance, much less solely because the party seeking to uphold the contract presents its own testimony of competence. Accordingly, we hold that the jury was entitled to consider evidence of Minton’s mental capacity prior and subsequent to the execution of the P.O.D. contracts if the trial court could have considered it probative and relevant to his mental state on March 25, 2010.

Id. at *19. Consistently, the court later held that the trial court did not err in admitting the evidence of competence from time periods before and after the execution of the POD agreement.

The court then held that sufficient evidence supported the jury’s determination that a decedent lacked mental capacity on the day he executed the POD agreement because in the month of, and the months before and after, he signed the POD agreement, the decedent refused medical treatment even though he was bed-ridden and needed it, spoke to people who were not there, sat for hours in his own feces and urine, and medical providers indicated he was confused and senile. This evidence came from medical records, care givers, former friends of the decedent, and a retained expert. The court held that the jury was entitled to infer that evidence of the decedent’s irrationality and dementia in the months preceding and following the signing of the contracts was probative of his capacity to contract on the date at issue. There was contradicting evidence that showed that the decedent was competent on the day that he signed the agreement, including evidence by the beneficiary, two bank representatives, a care giver, and a retained expert. The court held that this evidence merely created a fact question that was resolved by the jury: “while Garza elicited testimony from witnesses who claimed Minton was competent on the date the contract was signed, it was the jury’s responsibility to judge the credibility of the witnesses and determine the weight to be given their testimony.” *Id.* at *21.

One interesting aspect of this case is the holding that the legal standards for determining the existence of mental capacity for the purposes of executing a will or deed are substantially the same as the standards for mental capacity to execute a contract. Historically, however, courts have held that less mental capacity is required to enable a testator to make a will than for him to make a contract. *See, e.g., Burk v. Mata*, 529 S.W.2d 591 (Tex. Civ. App.—San Antonio 1975, writ ref’d n.r.e.); *Smith v. Welch*, 285 S.W.2d 823 (Tex. Civ. App.—Texarkana 1955, writ ref’d n.r.e.); *Rudersdorf v. Bowers*, 112 S.W.2d 784 (Tex. Civ. App.—Galveston 1938, writ dismissed). *But see Bach v. Hudson*, 596 S.W.2d 673 (Tex. Civ. App.—Corpus Christi 1980, no writ).

E. Standing Issues

Challenging the creation of an account or the change in beneficiary status can lead to interesting standing issues. In *In re Estate of Wallis*, Ronald Ray Wallis had designated Valerie Lewis as his attorney-in-fact and as the independent executrix of his estate. No. 12-07-00022-CV, 2010 Tex. App. LEXIS 3710, 2010 WL 1987514 (Tex. App.—Tyler May 19, 2010, no pet.). Wallis bequeathed his residuary estate to Lewis and designated her as the beneficiary of his 401(k) retirement plan and his life insurance policy (both held by him through his employer). *Id.* Wallis later executed a new will naming Richard Shomaker as his independent executor and bequeathing his entire estate to David Lomax. *Id.* At the same time, Wallis designated Lomax as the beneficiary of his retirement plan and his life insurance policy. *Id.* Against Wallis' specific instructions, someone with Wallis's employer informed Lewis of the changes in the beneficiaries of the retirement plan and the insurance policy. *Id.* Upon learning of these changes, Lewis used the powers granted her under the power of attorney and re-designated herself (without consulting Wallis) as the beneficiary of both the retirement plan and the life insurance policy. *Id.* On Wallis' death, Lomax and Shomaker sued Lewis, asserting that the change of beneficiary was outside the scope of authority granted by the power of attorney, constituted a breach of her fiduciary duty to Wallis, and resulted in Lewis' unjust enrichment. *Id.* The trial court declared the beneficiary designation forms Lewis signed void and ordered that a constructive trust be imposed on the funds from the retirement plan and the life insurance policy. *Id.*

On appeal, Lewis challenged Shomaker's and Lomax' standing to seek the imposition of a constructive trust, alleging that the fiduciary relationship that existed between her and Wallis did not "vest or somehow pass" from Wallis to Shomaker and Lomax. 2010 Tex. App. LEXIS 3710, [WL] at *2. In its application of common-law standing requirements to determine whether Shomaker and Lomax could sue for the imposition of a constructive trust, the court was "concerned with whether Shomaker

and Lomax pleaded an injury that can be redressed through an equitable action for a constructive trust." *Id.*

In its analysis, the court recognized that the funds from Wallis' retirement plan and life insurance policy were nontestamentary, and there was no instrument relating to them which required probate proceedings to be prosecuted in order to take effect. *Id.* The court further took the position that "the beneficiary of a life insurance policy has at least an estate in anticipation sufficient to authorize the beneficiary to raise the issue of the decedent's mental capacity to change the designation." 2010 Tex. App. LEXIS 3710, [WL] at *3. Further, the court stated that "equity may entertain jurisdiction of a suit by an original beneficiary of a life insurance policy to set aside a decedent's change to another beneficiary on the ground of undue influence and to enjoin payment of the policy to the latter." *Id.* (citing *Tomlinson v. Jones*, 677 S.W.2d 490, 492-93 (Tex. 1984)). Because Shomaker, as the executor of the will, was a designated beneficiary of neither the retirement plan nor the life insurance policy, he had no legal claim to the funds. *Id.* Accordingly, Shomaker did not have standing to file a suit for imposition of a constructive trust. *Id.* In contrast, Lomax, as a beneficiary, "had at least an estate in anticipation" in the proceeds of the retirement plan and insurance policy. *Id.* The court determined that this "estate in anticipation" was sufficient to authorize Lomax, as the beneficiary designated by Wallis himself, to challenge the later beneficiary designation made by Lewis under the power of attorney granted to her by Wallis. *Id.* Finally, Lomax pleaded the type of injury that could be redressed through an action for a constructive trust because "[a] court of equity has jurisdiction to reach the property in the hands of a wrongdoer whenever legal title to property has been obtained through fraud, misrepresentations, concealments, or under similar circumstances that render it unconscionable for the holder of legal title to retain the interest." *Id.*

In *Dawson v. Lowrey*, the court expressly disagreed with the Wallis court. No.

06-13-00107-CV, 2014 Tex. App. LEXIS 8136 (Tex. App.—Texarkana July 29, 2014, no pet.). The court held: “We, therefore, decline to recognize, in this case, the existence of ‘an estate in anticipation’ in a P.O.D. bank account. Indeed, we find no Texas authority to support the proposition that a P.O.D. account beneficiary has ‘an estate in anticipation’ of the proceeds of that account.” *Id.* The court concluded:

In essence, Dawson claims that even though he is a stranger to the durable power of attorney, he is nevertheless legally entitled to question Lowrey's actions taken pursuant to that power. We find no persuasive authority for this position. The statute specifically addresses the right to demand an accounting and limits that right to the principal. If the Legislature wanted to expand this right, it could have easily done so. To hold that a stranger to a durable power of attorney has the right (and thus standing) to question the actions of the attorney-in-fact would result in an expansion of the law. The function of the courts is to interpret and apply the law as written by the Legislature. Because we find no legal basis for Dawson to question the actions of Lowrey in acting as the lawfully appointed attorney-in-fact for Pat, we conclude that Dawson lacks standing to sue for the imposition of a constructive trust.

Id. at *31-32 (internal citation omitted).

F. Statute Of Limitations

Most claims regarding the proceeds from a joint account are raised by estate representatives. Section 16.003(a) of the Texas Civil Practice and Remedies Code provides that a suit for injuries caused to an estate or property

of another must be brought within two years after the day the cause of action accrued. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(a); *Washington v. Lackland Federal Credit Union*, No. 04-04-00416, 2004 Tex. App. LEXIS 10987 (Tex. App.—San Antonio December 8, 2004, no pet.) (statute of limitations barred representative's claim); *Estate of Lowrey*, No. 11-07-00033-CV, 2008 Tex. App. 9414 (Tex. App.—Eastland December 18, 2008, no pet.) (same). *But see Oadra v. Stegall*, 871 S.W.2d 882, 887 (Tex. App.—Houston [14th Dist.] 1994, no writ) (court stated that it was not necessary for an estate to file suit to claim what was, as a matter of law, its own property). Other individuals may have other statutes of limitations that apply depending upon the claims asserted.

In applying the statute of limitations, a cause of action accrues when facts come into existence that gives a claimant the right to seek a remedy in the courts. *See Estate of Lowrey*, 2008 Tex. App. LEXIS 9414 at *4. Regarding appropriating the funds in CD, one court held that the estate representative's claim accrued when the defendant cashed the CDs. *See id.*

One court has held that the discovery rule did not apply where the plaintiff had access to bank records and could have discovered the withdrawal of the funds. *See Urbanczyk v. Urbanczyk*, No. 07-07-0077-CV, 2009 Tex. App. LEXIS 587 (Tex. App.—Amarillo January 29, 2009, no pet.). For the same reason, the court also rejected a fraudulent concealment allegation. *See id.*

XI. CLAIMS BY BENEFICIARIES AGAINST FINANCIAL INSTITUTIONS FOR NOT PAYING FUNDS IN THE ACCOUNT

Often a bank will have notice that various parties are fighting over the funds in an account. In that circumstance, the bank may elect to freeze the account and not pay those funds to any party. It may also elect to interplead the funds into the registry of the court. When it elects to not pay those funds to a

demanding party to the account, the demanding party may assert claims.

A. Breach Of Contract Claims

Whether a bank has breached a depository agreement is controlled by the language of the depository agreement. *See e.g., Rodriguez v. NBC Bank*, 5 S.W.3d 756, 764-65 (Tex. App.—San Antonio 1995, no pet.) (affirmed summary judgment for bank where depository agreement allowed bank to perform the challenged actions). For example, account agreements normally state that the bank has the right to withhold payment of funds from the accounts if it has oral or written notice of a claim against the accounts. The following is an example of such language:

This booklet contains the rules and regulations governing consumer and business accounts at bank. By signing a services application or deposit account signature card, or by otherwise opening or maintaining an account with bank, you accept and agree to be bound by the terms and conditions of this deposit account agreement.

Adverse Claims

Upon receipt of oral or written notice from any party of a claim regarding the account, the bank may place a hold on the account and shall be relieved of any and all liability for its failure or refusal to honor any item drawn on your account or any other withdrawal instruction.

Powers of Attorney

[T]he bank reserves the right to refuse to follow the instruction of an attorney-in-fact to designate the attorney-in-fact as a POD beneficiary to the account.

Legal Proceedings and Expenses

The bank may restrict the use of your account if the account is involved in any legal proceeding or, unless the laws of your state provide otherwise, if the bank reasonably deems such action necessary to avoid a loss. All expenses incurred by the bank as a result of any legal proceeding affecting your account including, but not limited to, court costs and attorney fees, may be charged against your account or billed to you separately.

After a bank learns of competing claims, it may put a hold on the disputed accounts, and in doing so, will not breach the contract.

B. Tortious Interference With Inheritance

A beneficiary may assert a claim for tortious interference with inheritance because the bank "interfered" with her inheritance rights by failing to forward the funds to her. This tort cause of action has had little discussion in Texas courts and has not yet been approved by the Texas Supreme Court. The first court to recognize the tort was in *King v. Acker*, 725 S.W.2d 750, 754 (Tex. App.—Houston [1st Dist.] 1987, no writ). In *Acker*, the court of appeals cited the Restatement (Second) of Torts 774B, which provided: "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." *Id.*

In a similar claim, a party is not liable for tortious interference with contractual relations if the alleged interference was justified. *Friendswood Dev. v. McDade Co.*, 926 S.W.2d 280, 282-83 (Tex. 1996). The Texas Supreme Court held that justification is established as a matter of law when the defendant's acts, which the plaintiff claims constitute tortious

interference, are merely done in the defendant's exercise of its own contractual rights, regardless of motive:

[I]f the trial court finds as a matter of law that the defendant had a legal right to interfere with a contract, then the defendant has conclusively established the justification defense . . . and the motivation behind assertion of that right is irrelevant. Improper motives cannot transform lawful actions into actionable torts. "Whatever a man has a legal right to do, he may do with impunity, regardless of motive, and if in exercising his legal right to a legal way, damage results to another, no cause of action arises against him because of a bad motive in exercising the right."

Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 211 (Tex. 1996). See also *Fin. Review Servs. Inc. v. Prudential Ins. Co. of Am.*, 50 S.W.3d 495, 504 (Tex. App.—Houston [14th Dist.] 2000), *aff'd*, 29 S.W.3d 74 (Tex. 2000); *Abraham v. Ryland Mortg. Co.*, 995 S.W.2d 890, 895 (Tex. App.—El Paso 1999, no pet.).

It is unlikely that a beneficiary will be able to prove that the bank committed interference that constituted tortious conduct by failing to pay funds in an account where there is a dispute over the ownership of those funds. Where a bank acts pursuant to the parties' account agreement in withholding the funds after being advised that there were competing claims, the bank has a right to withhold payment and was justified in doing so.

Furthermore, a bank should be liable for tortious interference in filing a judicial proceeding (interpleader or declaratory judgment action). In *In re Estate of Valdez*, the court of appeals held that a party cannot assert a tortious interference with inheritance claim solely based

on filing a will contest. 406 S.W.3d 228 (Tex. App.—San Antonio 2013, pet. denied). After a proponent filed an application to probate a will, a contestant filed a contest. The proponent then asserted a tortious interference with inheritance claim against the contestant. The trial court granted the contestant a summary judgment on that claim.

The court of appeals affirmed for the contestant. The court first discussed the claim of tortious interference with inheritance rights. "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." *Id.* The court held that in addition to the tortious conduct, "we have described the elements of this cause of action as the following: '(1) that an interference with one's property or property rights occurred; (2) such interference was intentional and caused damage; and (3) the interference was conducted with neither just cause nor legal excuse.'" *Id.* The court then cited to tortious interference with contract precedent that held that "[b]ringing suit to determine one's rights under a contract is a proper exercise of a legal right and cannot form the basis for a claim of tortious interference." *Id.*

The court cited to Texas Probate Code section 10C and held that the contestant could not be held liable because his act in filing the contest was allowed by the statute and was not tortious conduct:

The language of the Texas Probate Code is clear that "[t]he filing or contesting in probate court of any pleading relating to a decedent's estate does not constitute tortious interference with inheritance of the estate." Thus, Robertson's mere filing of a will contest in this case did not constitute a tortious interference with inheritance of Martha Jane's estate. Valdez provides no authority to show how

Robertson's alleged lack of standing would affect Robertson's statutory right under Texas Probate Code section 10C to file a will contest. Thus, Robertson's summary judgment evidence conclusively established that Valdez's cause of action for tortious interference failed as a matter of law. Because Valdez failed to raise a genuine issue of material fact as to the tortious nature of Robertson's actions, as a matter of law, the will contest cannot be considered a proper basis for Valdez's claim for tortious interference.

Id.

C. Conversion

The tort of conversion is defined as the unauthorized and wrongful assumption and exercise of dominion and control over the property of another, to the exclusion of and inconsistent with the owner's rights. *See Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 446 (Tex. 1971); *Cont'l Credit Corp. v. Wolfe City Nat'l Bank*, 823 S.W.2d 687, 688 (Tex. App.—Dallas 1991, no writ). Once again, if the account agreement gives the bank the contractual right to withhold the funds, the bank does not misappropriate the funds by following its agreement.

Moreover, a general deposit of money with a bank creates a creditor-debtor relationship between the depositor and the bank, and title to the money passes to the bank, subject to the depositor's demand for payment as a creditor. *See Mesquite State Bank v. Professional Inv. Corp.*, 488 SW.2d 73, 75 (Tex. 1972); *City Nat'l. Bank of Bryan v. Gustavus*, 106 S.W.2d 262 (Tex. 1937); *Hodges v. Northern Trust Bank of Texas N.A.*, 54 S.W.3d 518, 522 (Tex. App.—Eastland 2001, pet. denied); *Newsome v. Charter Bank Colonial*, 940 S.W.2d 157, 161 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

A suit for conversion will not lie where a debtor-creditor relationship is created by general deposit of money. *See Mauriceville Nat. Bank v. Zernial*, 892 S.W.2d 858, 860 (Tex. 1995); *Hodges*, 54 S.W.3d at 522 ("The designation of a deposit has great significance in an attempted action for conversion. Because a general deposit becomes the property of the bank, the depositor has no action for conversion when the bank wrongfully pays out the deposit"); *First Nat'l. Bank of Bellaire v. Hubbs*, 566 S.W.2d 375, 377 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); *Collin County Savings & Loan v. Miller Lumber Co.*, 653 S.W.2d 114 (Tex. App.—Dallas 1983); *Williams v. Stansbury*, 634 S.W.2d 924, 928 (Tex. App.—El Paso 1982, no writ); *Crenshaw v. Swenson*, 611 S.W.2d 886, 891 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.); *Graham v. Turner*, 472 S.W.2d 831, 839 (Tex. Civ. App.—Waco 1971, no writ); *Hull v. Freedman*, 383 S.W.2d 236, 238 (Tex. Civ. App.—Fort Worth 1964, writ ref'd n.r.e.); *Story v. Palmer*, 284 S.W. 331 (Tex. Civ. App.—El Paso 1926, no writ). *See also McNair v. Deal*, No. 13-05-264-CV, 206 Tex. App. LEXIS 10274 (Tex. App.—Corpus Christi November 30, 2006, pet. denied);

For example, in *Sam Texas v. Chase Securities of Texas, Inc.*, the court held that a depository was not liable under a conversion theory to a plaintiff for failing to pay funds from an account:

Although the testimony is conflicting as to what actually occurred on the day appellant requested liquidation of the account, it is undisputed that the account established at Chase Bank was for the purchase of mutual funds. The evidence shows the money was not required or intended to be kept segregated, nor was it deposited under a special agreement having the characteristics of a bailment contract or held in trust. Where no agreement requires money to be segregated or kept in a particular form, the

requirements for "specific money" giving rise to a cause of action for conversion are not met. Therefore, no claim for conversion lies for the funds in the mutual account.

No. 14-00-01078-CV, 2002 Tex. App. LEXIS 194 (Tex. App.—Houston [14th Dist.] January 10, 2002, pet. denied) (not desig. for pub.). Where the accounts in dispute are general depository accounts a plaintiff cannot maintain a claim for conversion.

Furthermore, one court has held that where the parties' relationship is governed by a contract, that a party may not assert a conversion claim:

In the instant case, the JOAs and their appended GBAs state explicitly and in great detail the rights and duties of the parties with reference to the gas and gas condensate production and gas balancing. They contain express provisions that deal with the circumstances of this case. "If [as here,] a party must prove the contents of its contract and relies on the duties created therein, the action is in substance an action on the contract." *Morriss v. Enron Oil & Gas Co.*, 948 S.W.2d 858, 869 (Tex. App.—San Antonio 1997, no writ). In the case at bar, the Long Trusts' loss was entirely economic loss to the subject matter of the contracts, the JOAs. The Long Trusts have not alleged or proven fraud. Consequently, we conclude that the Long Trusts are not entitled to recover on the theory of conversion. Castle's first issue is sustained.

Castle Texas Prod. L.P. v. Long Trusts, No. 12-0-00192, 2003 Tex. App. LEXIS 6640 (Tex. App.—Tyler July 31, 2003, pet. denied).

Because the relationship between a depositor and a bank is controlled by a contract that addresses the bank's ability to withhold funds in accounts, a party should not be able to assert a tort conversion cause of action.

D. Breach Of Fiduciary Duty

A party to an account may attempt to raise a breach of fiduciary duty claim for the bank's refusal to forward funds in an account. Fiduciary relationships arise when a party occupies a position of confidence toward another. *See Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.*, 715 S.W.2d 408, 416 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). A fiduciary relationship arises as a matter of law out of certain formal relationships, such as attorney-client, partners, and joint venturers. *See Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). Fiduciary relationships "may arise outside these usual situations when the dealings between the parties have continued for such a period of time that one party is justified in relying on the other to act in [its] best interest." *Blue Bell, Inc.*, 715 S.W.2d at 416. Generally, a lender has no fiduciary duty to its borrowers. *See Bishop v. First Interstate Bank, N.A.*, 1996 Tex. App. LEXIS 4109 (Tex. App.—Houston [14th Dist.] Sept. 12, 1996); *Nautical Landings Marina, Inc. v. First Nat'l Bank*, 791 S.W.2d 293, 299 (Tex. App.—Corpus Christi 1990, writ denied); *Thomas v. First City*, 1992 Tex. App. LEXIS 1629 (Tex. App.—Houston [14th Dist.] June 18, 1992). Additionally, as a general rule, the relationship between a bank and its customers does not create a special or fiduciary relationship. *See Thigpen*, 363 S.W.2d at 247; *Bank One N.A. v. Stewart*, 967 S.W.2d 419 (Tex. App.—Houston [14th Dist.] 1999, pet denied); *Farah v. Mafrige & Kormanik, P.C.*, 927 S.W.2d 663, 675 (Tex. App.—Houston [1st Dist.] 1996, no writ); *Crutcher v. Continental Nat'l Bank*, 884 S.W.2d 884 (Tex. App.—El Paso 1994, writ denied); *Manufacturers Hanover Trust Co. v. Kingston Investors Corp.*, 819 S.W.2d 607, 610 (Tex. App.—Houston [1st Dist.] 1991, no writ); *Victoria Bank & Trust Co. v. Brady*, 779 S.W.2d 893, 902 (Tex. App.—Corpus Christi 1989), *aff'd in part, rev'd on other grounds*, 811 S.W.2d 931 (Tex. 1991).

The only instances in which a court has found a special relationship between a borrower and lender have involved extraneous facts and conduct, such as excessive lender control over, or influence in, the borrower's business activities. See *Greater S.W. Office Park, Ltd. v. Texas Commerce Nat'l Bank*, 786 S.W.2d 386, 391 (Tex. App.—Houston [1st Dist.] 1990, writ denied). Therefore, it would be highly unlikely that a customer could assert a breach of fiduciary duty claim against a bank for failing to pay funds in an account where there is a dispute regarding the ownership of those funds.

E. Bad Faith

A party to an account may attempt to raise a bad faith claim for the bank's refusal to forward funds in an account. Ordinarily, when a depositor deposits funds into a bank account, a relationship of debtor and creditor arises. *Mauriceville Nat'l. Bank v. Zernial*, 892 S.W.2d 858, 860 (Tex. 1995); *Bandy v. First State Bank, Overton, Tex.*, 835 S.W.2d 609, 618-19 (Tex. 1992). The duty of good faith and fair dealing does not exist in Texas unless intentionally created by express language in a contract or unless a special relationship of trust and confidence exists between the parties to a contract. See *Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41, 47, 52 (Tex. 1998) (there is no general duty of good faith and fair dealing in ordinary, arms-length commercial transactions); *Arnold v. Nat. County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987); *Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984).

Specifically, no general duty of good faith and fair dealing exists between a lending institution and its borrower. See, e.g., *Federal Deposit Ins. Corp. v. Coleman*, 795 S.W.2d 706, 709 (Tex. 1990) (where the court determined, among other things, that neither a secured creditor nor the FDIC owed guarantors a duty of good faith and fair dealing to foreclose promptly after default); *Eller v. NationsBank of Tex.*, 975 S.W.2d 884 (Tex. App. El Paso 1994, no writ); *Herndon v. First National Bank*, 802 S.W.2d 396, 399 (Tex. App.—Amarillo 1991, writ denied) (no duty of good faith between lender

and customer under a note); *Thomas v. First City*, 1992 Tex. App. LEXIS 1629 (Tex. App.—Houston [14th Dist.] June 18, 1992). Therefore, it would be highly unlikely that a customer could assert a bad faith claim against a bank for failing to pay funds in an account where there is a dispute regarding the ownership of those funds.

XII. TEXAS SUPREME COURT OPENS DOOR TO A FINANCIAL INSTITUTION'S POTENTIAL LIABILITY FOR FAILING TO CORRECTLY OPEN AN ACCOUNT

Customers raise claims against banks for failing to properly create an account with rights of survivorship language. See, e.g., *Cweren v. Texas Capital Bank, N.A.*, No. 01-94-00995-CV, 1996 Tex. App. LEXIS 3319 (Tex. App.—Houston [1st Dist.] August 1, 1996, writ denied) (not design. for pub.). Historically in Texas, a customer, who allegedly was a party to a joint tenancy account with rights of survivorship, could not sue a bank for the funds in the joint account without tendering a valid written bank agreement with the appropriate language contained therein. *Stauffer v. Henderson* is the leading case on interpreting JTROS accounts. 801 S.W.2d 858 (Tex. 1990). In that case, the Texas Supreme Court held that language on a signature card did not create rights of survivorship and noted that under Texas Probate Code section 439(a), the Texas Legislature made a written agreement necessary to create a JTROS account. See *id.* The Court held that "the necessity of a written agreement signed by the decedent to create a right of survivorship in a joint account is emphatic...." *Id.* at 862-63. Furthermore, the Court found that a party could not introduce parol evidence, documents and oral communications before the account agreement was created, in an attempt to prove that the account was intended to be a JTROS account. Numerous Texas courts of appeals have applied this rather black-and-white rule to bar claims as to the ownership of funds in an account. But, does this rule stop claims against banks for failing to set up JTROS accounts? The answer is "no," it does not.

A. A.G. Edwards Opinion – A Customer May Sue For Not Properly Creating A JTROS Account

In *A.G. Edwards & Sons Inc. v. Maria Alicia Beyer*, the Texas Supreme Court held that a customer can potentially raise a claim against a financial institution for failing to create a JTROS account. 235 S.W.3d 704 (Tex. 2007). The plaintiff was a daughter of a man who attempted to transfer the funds in a previous account into a new JTROS account with A.G. Edwards ("Bank"). *See id.* The daughter and father discussed the creation of a JTROS account with a Bank representative. *See id.* After the representative recommended that they create a new JTROS account, the daughter and father delivered all of the documentation necessary to create such an account. *See id.* However, the Bank lost the documentation and before new documents could be signed, the father fell into a coma and later died. *See id.* The Bank paid the funds, which it held in an older account that was not a JTROS account, to the father's estate. *See id.* The daughter sued the Bank for conversion, negligence, fraud, breach of contract, and breach of fiduciary duty. The jury found for the daughter and awarded her damages and attorney's fees, and the Bank appealed. *See id.*

In the Texas Supreme Court, the principal issue was whether Texas Probate Code section 439(a) (now Estates Code section 113.151-.153) barred extrinsic evidence regarding the creation of a JTROS account. *See id.* The daughter argued that the section only applied to multiple party disputes as to the ownership of the funds in a JTROS account and did not apply to disputes alleging a bank's malfeasance in failing to properly set up such an account. *See id.* The Texas Supreme Court agreed with the daughter: "Section 439(a) does not govern [the daughter's] claim against [the bank]. [The Bank's] failure to take sufficient steps to create the JTROS account necessary to establish [the daughter's] right of survivorship is a breach of a separate duty owed to [the daughter]." *Id.* The Court did not specify what "duty" it was referring to, but allowed extrinsic evidence of the bank's failure to create the account. *See id.*

The Court found that the evidence was sufficient to establish that the Bank had promised to create a JTROS account but failed to do so. *See id.* The Court then limited its prior Stauffer opinion to "ownership disputes over a joint account" and held that it did not apply to claims against a bank for failing to create a JTROS account. *Id.*

B. Courts Of Appeals' Application Of A.G. Edwards

In *Clark v. Wells Fargo Bank, N.A.*, the court of appeals held that a bank did not tortiously interfere with inheritance rights or act with negligence with respect to CDs. No. 01-08-00887–CV, 2010 Tex. App. LEXIS 4376 (Tex. App.—Houston [1st District] June 10, 2010, no pet.). In this case, in the 1990s, Parker Williams purchased six CDs that totaled over \$1.2 million and were marked as multi-party accounts with rights of survivorship. *See id.* These CDs listed multiple parties with rights of ownership. *See id.* In July 2004, the defendant informed Williams that the CDs were not fully covered by FDIC insurance. *See id.* Williams then purchased six new fully insured CDs that were set up in her name only and did not have any right of survivorship language on the account agreements. *See id.*

Williams then died intestate approximately one month later. *See id.* The plaintiffs were not Williams's heirs under the laws of intestate succession and would not receive any of the funds from the new CDs. *See id.* The plaintiffs filed claims for tortious interference with inheritance rights and negligence against the defendant bank. The trial court granted the defendant bank a summary judgment. *See id.*

The court of appeals first held that under Texas Probate Code Section 448, the plaintiffs had no claim regarding Williams cashing in the original CDs. *See id.* Texas Probate Code Section 448 provides that "payments made from a multi-party account to one or more of the individuals listed on the account discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent

with the beneficial ownership of the account as between the parties." TEX. PROB. CODE ANN. § 448. The appellate court held that the bank was discharged from claims for the payment it made to Parker as a joint owner when it closed the original CDs: "To the extent that any of claimants' causes of action relate to those original CDs or to actions taken before the original CDs were closed, those claims are ruled by Section 448." *Clark*, 2010 Tex. App. LEXIS 4376 at *12-13. The court then turned to the plaintiffs' tort claims based on the bank's actions that occurred after the original CDs were closed. *See id.*

The court acknowledged that a claimant can have a tortious interference with an inheritance claim: "[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." *Id.* at *14. The court held that in order to have this cause of action the claimant must present some evidence that he or she would in fact inherit or receive the property at issue but for the interference. *See id.* The court held that the plaintiffs did not provide any evidence that they actually had an interest in the new CDs such that they could sustain a cause of action for tortious interference. *See id.* The court also held that the claimants provided no evidence that Wells Fargo acted with intentional tortious conduct. *See id.* The court therefore sustained the summary judgment on the tortious interference with inheritance claim. *See id.*

The plaintiffs also claimed that the bank was negligent when it failed to take sufficient steps to protect their inheritance rights when it opened the new CDs. *See id.* The court held that the plaintiffs did not establish that the bank owed them a duty: "Claimants' pleadings reveal that all of the actions for which Claimants seek to recover on their negligence cause of action were directed at Parker Williams and related to the duties the bank owed to Williams." *Id.* at *17. The court concluded that there was no evidence that the bank owed any duties to the plaintiffs. *See id.*

The court distinguished *A.G. Edwards & Sons v. Beyer*, 235 S.W.3d 704 (Tex. 2007). The court noted that in *A.G. Edwards & Sons*, the father and daughter both sought to open a joint account and both signed the account agreement with right of survivorship. "The context of the language in the opinion makes it clear that the Court was referring to the duties arising out of the contract signed by Alicia and her father." *Clark*, 2010 Tex. App. LEXIS 4376 at *18. In contrast, the court held that the claimants did not have any contractual relationship with the bank: "There is no evidence that they ever participated in the opening of the CDs or, as in *Beyer*, jointly executed any documents with Williams that would have given them any rights to the funds at issue." *Id.* at *19. Therefore, the appellate court affirmed the trial court's summary judgment. *See id.*

In *Koonce v. First Victoria Nat'l Bank*, the court of appeals reversed a summary judgment in part and found that there was a fact issue as to whether a bank breached a contractual duty to set up a POD account. No. 13-10-00282-CV, 2011 Tex. App. LEXIS 7198 (Tex. App.—Corpus Christi, August 31, 2011, no pet.). Robert Koonce opened a certificate of deposit account at the bank, and approximately two years later instructed the bank to change the CD to a POD account and to designate his son as the beneficiary. *See id.* The bank had Robert sign a file maintenance form that included the sole notation: "Add Beneficiary: Kenneth B. Koonce." *See id.* Two years later, Robert died, and his son took the CD to the bank, the bank distributed the funds of the CD to the son. *See id.* Robert's daughter later sued her brother and the bank claiming that the funds distributed to the son were an asset of Robert's estate and that there was no POD effect. *See id.* The trial court granted summary judgment in favor of the sister, determining that the CD funds were an estate asset. *See id.* Later, the son sued the bank in connection with that judgment alleging that the bank breached its contract with Robert, and with the son as third party beneficiary by failing to change the CD to a POD account. *See id.* He also alleged that the bank was negligent for failing to change the account designation as

directed by Robert and violated the DTPA by breaching its warranty that the account designation would be changed as directed by Robert. *See id.* The trial court granted the bank's motion for summary judgment on all of the son's claims. *See id.*

Regarding the breach of contract claim, the bank initially argued that the file maintenance form was sufficient to create a POD account. *See id.* The court of appeals disagreed stating that the probate code requires a "specific, definite written agreement before such property is allowed to pass outside a testamentary instrument." *Id.* The court found that there was no such specificity present. *See id.* The term "Payment on Death" or "POD" appeared nowhere on the form. *See id.* The term, "Add Beneficiary" on the file maintenance form could have referred to several different matters, and thus, the file maintenance form was simply too vague and ambiguous to comply with the written agreement requirement of the probate code. *See id.*

The court noted that in cases where the issue is ownership of the funds on deposit, the plaintiff may not use extrinsic evidence to show whether the account is a valid right of survivorship or a POD account. *See id.* However, in cases where the issue is whether the financial institution breached its agreement with the decedent in failing to set up the requested account, the plaintiff may utilize extrinsic evidence to prove its claim. *See id.* The court concluded that the bank failed to negate the breach element as a matter of law and that a fact issue existed on this element. *See id.* Therefore, the court of appeals held that the trial court erred in granting summary judgment on the son's breach of contract claim. *See id.*

The bank also challenged the son's negligence claim and asserted that there was no evidence that the bank owed any common-law negligence duty to the son. *See id.* The court of appeals stated: "If the defendant's conduct . . . would give rise to liability only because it breaches a party's agreement, the plaintiff's claim ordinarily sounds only in contract." *Id.* More specifically, "In the absence of a duty to

act apart from the promise made," mere nonfeasance under a contract creates liability only for breach of contract. *Id.* The court of appeals noted that it was the son's own contention that the bank owed him a duty arising out of its agreement with Robert to change the CD to a POD account with the son as a beneficiary. *See id.* The court held that the son had identified no duty separate from the contract and had produced no evidence of any such duty. *See id.* The court of appeals affirmed the trial court's summary judgment on the son's negligence claim. *See id.*

Finally, the court of appeals addressed the son's DTPA claim based upon the bank's failure to properly create the POD account. *See id.* The son contended that because he was a creditor beneficiary of Robert's account, he was a consumer as defined by the DTPA. *See id.* The court assumed, for the sake of argument, without deciding same, that a creditor beneficiary was a DTPA consumer but found that the son produced no evidence that he was a creditor beneficiary. *See id.* The court noted that the son produced no evidence that Robert made him a beneficiary of the CD account out of any legally enforceable duty by Robert to appellant, such as the satisfaction of a debt or contractual obligation. *See id.* The court of appeals thus affirmed the trial court's granting of summary judgment on the son's DTPA claim. *See id.*

C. Conclusion On A.G. Edwards

The *A.G. Edwards* opinion is a dangerous precedent for financial institutions. Because extrinsic evidence is not allowed, the issue of whether an account belongs to an estate or belongs to a listed beneficiary should be a rather straight-forward analysis. The issue is whether the appropriate language exists on the forms creating the account. If it does not, the money goes to the estate. Then the beneficiary can seek a damage award against the bank. So, in essence, the depositors' heirs will get a double recovery, the estate gets the money and a particular beneficiary also gets the money.

On what basis did the Texas Supreme Court create such a potentially unfair liability? Although the Texas Supreme Court did not clarify what "duty" the bank breached, a fair reading of *A.G. Edwards* would only support a potential breach of contract claim by a customer. The courts of appeals applying *A.G. Edwards* would agree with that conclusion. The end result of *A.G. Edwards* is that customers will now raise their claims arising out of alleged survivorship accounts against banks instead of other family members and will couch those claims in terms of the banks breaching agreements to create survivorship accounts. However, because the language in *A.G. Edwards* is somewhat ambiguous, plaintiffs may attempt to open the door to other tort-based claims, such as negligence and breach of fiduciary duty. If that were allowed, it would be an expansion of existing law.

Banks doing business in Texas should make every effort to properly handle survivorship account documents. Further, banks should revisit their account agreements so that defensive contractual and tort-based clauses may be implemented, such as no-prior representations clauses, arbitration clauses, damage waivers, etc.

D. Failure To Properly Create Retirement Account

A financial institution may also be held liable for not properly setting up a retirement account. *See McDade v. Texas Commerce Bank, Nat'l Ass'n*, 822 S.W.2d 713 (Tex. App.—Houston [1st Dist.] 1991, writ denied). In *McDade*, eight months after retiring from defendant's employ, plaintiff discovered that defendant had invested plaintiff's retirement funds in a taxable money market account rather than a nontaxable money market IRA account, as plaintiff had requested. The mistake cost plaintiff \$ 228,000 in federal taxes. The jury found for plaintiff on claims of negligence, breach of contract, and breach of an express warranty under the Texas Deceptive Trade Practices Act (DTPA). The trial court directed verdict for the bank.

The court of appeals held that more than a scintilla of evidence was introduced to prove that defendant breached an express warranty to plaintiff and violated the DTPA because the conduct of defendant's investment specialist supported plaintiff's version of events. The court held that the plaintiff qualified as a consumer eligible for redress under the DTPA because he sought defendant's services. The court reversed, reinstating the jury verdict awarding plaintiff \$ 228,000 in actual damages, a statutory penalty, and attorney fees.

XIII. PAYMENT OF FRAUDULENT REQUESTS

It is not uncommon for a bank to transfer funds from an account based on an account holders' apparent instructions where the instructions were fraudulent and sent by an unauthorized third party. In this circumstance, who is responsible for the lost funds?

The default rule is that financial institutions are liable for unauthorized funds transfers. However, financial institutions can raise an affirmative defense that it followed a commercially reasonable security procedure, and accepted the payment order in good faith. *See* TEX. BUS. & COM. CODE §4A.202. This provision states:

(a) A payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law of agency.

(b) If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not

authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.

(c) Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if: (1) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for the customer; and

(2) the customer expressly agreed in writing to be bound by

any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer.

(d) The term "sender" in this chapter includes the customer in whose name a payment order is issued if the order is the authorized order of the customer under Subsection (a) or it is effective as the order of the customer under Subsection (b).

(e) This section applies to amendments and cancellations of payment orders to the same extent it applies to payment orders.

(f) Except as provided in this section and in Section 4A.203(a)(1), the rights and obligations arising under this section or Section 4A.203 may not be varied by agreement.

TEX. BUS. & COM. CODE §4A.202.

When this affirmative defense is established, the burden shifts to the customer who will be liable for the loss unless the customer can prove that the loss was not caused by any person who was ever entrusted with duties related to the payment orders or the security procedure; and the person who obtained access to make the unauthorized payment order did not gain access from a source controlled by the customer. *See id.* §4A.203. Section 4A.203 provides:

(a) If an accepted payment order is not, under Section 4A.202(a), an authorized order of a customer identified as sender, but is effective as an order of the customer pursuant to Section 4A.202(b), the following rules apply: (1) By

express written agreement, the receiving bank may limit the extent to which it is entitled to enforce or retain payment of the payment order.

(2) The receiving bank is not entitled to enforce or retain payment of the payment order if the customer proves that the order was not caused, directly or indirectly, by a person:(A) entrusted at any time with duties to act for the customer with respect to payment orders or the security procedure; or

(B) who obtained access to transmitting facilities of the customer or who obtained, from a source controlled by the customer and without authority of the receiving bank, information facilitating breach of the security procedure, regardless of how the information was obtained or whether the customer was at fault. Information includes any access device, computer software, or the like.

(b) This section applies to amendments of payment orders to the same extent it applies to payment orders.

TEX. BUS. & COM. CODE §4A.203.

The financial institution is in the best position when the customer expressly agrees to a specific security procedure; the financial institution follows that procedure; and the procedure follows the guidelines of the Federal Financial Institutions Examination Council (“FFIEC”) and consists of a multifactor authentication for the financial institution’s online banking customers.

In Texas, the most recent decision discussing these provisions held for the financial

institution. In *All Am. Siding & Windows, Inc. v. Bank of Am., N.A.*, the court determined the financial institution was entitled to summary judgment as a matter of law because it had established its affirmative defense of following an agreed commercially reasonable security procedure. 367 S.W.3d 490 (Tex. App. Texarkana 2012, pet. denied). The court found that the financial institution established the defense through the contracts entered into between the financial institution and the customer; application of section 4A.202; and the addition of an affidavit indicating the financial institution “follow[ed] the guidelines of the [FFIEC] and requires multifactor authentication for its online banking customers.” *See id.*

In analyzing the contracts the Court specifically noted the following provisions as relevant:

* Treasury Services Terms and Conditions stated:

Each time you use a Service, you represent and warrant that, in view of your requirements, the Security Procedure is a satisfactory method of verifying the authenticity of Entries and Reversal/Deletion Requests. You agree we may act on any Entries or Reversal/Deletion Requests after we have verified its authenticity through use of the Security Procedure.

* Authorization and Agreement for Treasury Services:

The Client has received and reviewed Bank of America's Treasury Services Terms and Conditions Booklet...and the Client agrees to adhere to the Booklet and any applicable User Documentation provided by Bank of America.

* The Treasury Services Terms and Conditions:

You have sole responsibility for determining the level of security you require and assessing the suitability of the security procedures for these Services. We have no duty to investigate the authenticity of any application, instruction or other communication you provide us using an Electronic Trade Service. Also, we have no liability to you for acting upon any application, amendment or other communication purportedly transmitted by you, even if such application, amendment or message:

- Contains inaccurate or erroneous information.
- Constitutes unauthorized or fraudulent use of an Electronic Trade Service.
- Includes instructions to pay money or otherwise debit or credit any account.
- Relates to the disposition of any money, securities, or documents...

We are authorized, but not obliged, to rely upon and act in accordance with any application, instruction, consent or other communication by fax or other electronic transmission (including without limitation any transmission by use of our Software or the Internet) received by us purporting to be a communication on your behalf without inquiry on our part as to the source of the transmission or the identity of the person purporting to send such communication...

We are liable to you only for actual damages incurred as a direct result of our failure to exercise reasonable care in providing a Service.

In no event will we be liable for any indirect...loss or damage... even if advised of the possibility of such loss...

We will not be responsible for the acts or omissions of...any other person...

The agreement stated it could not be changed by oral agreement. It provided:

NOTICE OF FINAL AGREEMENT. THIS WRITTEN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

We have no obligation to cancel or amend any Entry after we have received it. If you send us a Reversal/Deletion Request and we are able to verify the authenticity of the Reversal/Deletion Request using the Security Procedure, we will make a reasonable effort to act on your Reversal/Deletion request. We will not be liable to you if such Reversal/Deletion Request is not effected. You agree to indemnify us in connection with any such Reversal/Deletion Request as provided by UCC 4A.

* Deposit Agreement and
Disclosures:

From time to time, originators that you authorize may send automated clearing house (ACH) credits or debits for your account. For each ACH transaction, you agree that the transaction is subject to the National Automated Clearing House Association (NACHA) Operating Rules and any local ACH operating rules then in effect...

Your role is extremely important in the prevention of wrongful use of your account. If you find that your records and ours disagree or if you suspect any problem or unauthorized activity on your account...call us immediately...We may require written confirmation of your claim, including an affidavit signed by you on a form acceptable to us...

You agree that we have a reasonable period of time to investigate the facts and circumstances surrounding any claimed loss and that we have no obligation to provisionally credit your account. Our maximum liability is the lesser of your actual damages proved or the amount of the missing deposit or the forgery, alteration or other unauthorized withdrawal, reduced in all cases by the amount of the loss that could have been avoided by your use of ordinary care...

[W]e may receive ACH debits to your account from senders you previously authorized to debit your account. You may ask us to stop payment on a

future ACH debit to your account if the item has not already been paid...

The ACH stop payment takes effect within three business days.

It was uncontroverted that the fraudulent transactions were completed through use of a company ID and password and were confirmed through the digital certificate. There was also evidence that this method was the security procedure in place for AAS and EagleOne for ACH transactions.

XIV. RETIREMENT ACCOUNT LITIGATION

Financial institutions take on the responsibility of acting as the custodian of a customer's 401K account. If actions are taken that result in losses to the account, the customer may sue the financial institution for various claims, including breach of contract, breach of fiduciary duty, negligence, conversion, etc. There is one very important initial step in analyzing the financial institution's liability: what duties are owed by the financial institution.

A. Self-Directed IRA Accounts

A self-directed IRA account agreement generally provides that the customer retains the right to invest the proceeds and that the financial institution has no discretion and shall invest as directed by the customer. Typical agreements severely limit custodian duties and in most instances the only remaining duty is the duty to transfer funds as directed by investor. *See, e.g., Tucker v. Soy Capital Bank & Trust Co.*, 2012 IL App (1st) 103303 (Ill. App. Ct. 1st Dist. 2012). Further, there are generally releases regarding the financial institution actin in conformity with the customer's directives.

"In a non-discretionary account, the agency relationship begins when the customer places the order and ends when the broker executes it because the broker's duties in this type of account, unlike those of an investment

advisor or those of a manager of a discretionary account, are "only to fulfill the mechanical, ministerial requirements of the purchase or sale of the security or future[s] contracts on the market." *Hand v. Dean Witter Reynolds Inc.*, 889 S.W.2d 483, 493 (Tex. App.—Houston [14th Dist.] 1994, writ denied). "As a general proposition, a broker's duty in relation to a non-discretionary account is complete, and his authority ceases, when the sale or purchase is made and the receipts therefrom accounted for." *Id.*

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

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

custodians, it did make clear that contractual limitations would impact duties owed between parties.

In *Scionti v. First Trust Corp.*, a federal district court in Texas granted summary judgment in favor of First Trust, an self-directed IRA custodian, regarding multiple claims brought by an investor whose IRA investments were allegedly worthless because an agent of First Trust did not properly list Scionti on a real estate deed. 1999 U.S. Dist. LEXIS 23253 (S.D. Tex. June 23, 1999). Scionti, the investor, brought several federal and Texas common law claims against the custodian bank, including claims of negligence per se, negligence, breach of fiduciary duty, breach of contract, and a claim for a prohibited transaction in violation of §4975 of the Internal Revenue Code. *Id.* at *17-*18. According to Scionti, First Trust failed to perform obligations under the agreement to confirm investment asset values, allowed its agents to fraudulently misrepresent facts, and failed to maintain proper internal and account control procedures mandated under GAAP trust account rules, among other allegations. *Id.* at *22.

First Trust motioned for summary judgment on all claims and presented three arguments specifically for the prohibited transaction in violation of §4975 of the I.R.C. claim. *Id.* at *61-*64. First Trust argued that the investor represented that the investment was not prohibited through an initialed statement, that it had no duty to inquire whether Scionti's investment was a prohibited transaction under §4975 of the I.R.C., and that no private action for an alleged breach of the I.R.C. exists. *Id.* The investor eventually conceded First Trust's third point while alleging his negligence per se claim. *Id.* at *87. First Trust urged the court to follow Metz and prevent the investor from "foist[ing] responsibility ... onto a nondiscretionary trustee ... merely by claiming that [the custodian] had a duty to admonish [the investor] that his representation was incorrect." *Id.* at *62-*63.

The court granted summary judgment in favor of First Trust, acknowledging that it was

“sympathetic to Scionti's plight in the loss of his savings and can understand his anger and frustration, but merely desiring to strike out, sue, and prevail over any person or entity involved in any way with his voluntary transferring of his assets does not make that defendant liable. . . .” *Id.* at *126. The court held that the negligence per se claims failed because: 1) no private cause of action existed under the tax code, 2) Scionti represented that the investment did not constitute a prohibited transaction, and 3) Scionti's produced no evidence that Intrust's failure to oversee and prevent a transaction in violation of Internal Revenue Code § 4975 constituted negligence per se. *Id.* at *135-*36.

The court also held that no fiduciary duties existed between the parties and dismissed all related claims against the custodian. *Id.* at *131. Evidence reflected that Scionti's investment advisor selected and made the investment, and no evidence showed that First Trust participated in any investment decisions or discretionary matters regarding the investment of Scionti's IRA funds. *Id.* The court mentioned that the agreement expressly limited First Trust's duties to non-discretionary matters only. *Id.* at *132. Scionti is a good example of how courts treat the wide range of claims brought by bitter investors against custodians for negligence, breach of fiduciary duties, breach of contract, failure to comply with the Internal Revenue Code. The holding follows the weight of authority that there are no fiduciary duties, duties to alert the customer as to the soundness of their investment exists, or duties to maintain compliance with tax provisions, where the role of the custodian is non-discretionary.

In *Tapia v. Chase Manhattan Bank, N.A.*, an investor sued his bank over various investments under various claims. 149 F.3d 404, 412 (5th Cir. 1998). The bank raised statute of limitations as a defense, and the investor stated that the statute of limitations was tolled due to the fiduciary status of the bank. The district court granted the bank a motion for summary judgment. The Fifth Circuit affirmed and held:

while the nature of the duty owed by a broker will vary depending on the relationship between the broker and the investor, where the investor controls a nondiscretionary account and retains the ability to make investment decisions, the scope of any duties owed by the broker will generally be confined to executing the investor's order. Our review of the summary judgment record reveals that none of the Defendants possessed the authority to act without [the investor's] direction. The Management Agreement between [the investor] and [the bank] provided that funds would only be invested on the advice of [the investor]. Nothing in the summary judgment record suggests that [the investor] gave [the bank's employees] any discretionary investment authority. We therefore agree with the district court that any fiduciary relationship between [the investor] and the [bank] was limited to making investments approved by [the investor].

Id. at 412. Therefore, the Fifth Circuit has held that the fiduciary duties between an investor and his broker can be limited by the parties' agreement. *See also Art v. Stifel, Nicolaus & Co.*, 86 F.3d 973, 978 (9th Cir. 1996) (where broker had nondiscretionary authority in the sale of client's shares, the fiduciary duty owed by the broker to the client was "to carry out the ordered sale with due care and loyalty and not to make unauthorized sales"); *Puckett v. Rufenacht, Bromagen & Hertz, Inc.*, 949 F.2d 789 (5th Cir. 1992); *Hotmar v. Lowell H. Listrom & Co.*, 808 F.2d 1384, 1385-87 (10th Cir. 1987) (in the absence of evidence that broker exercised control over account, no fiduciary duty was imposed on broker beyond executing requested transactions); *Commodity Futures Trading*

Comm'n v. Heritage Capital Advisory Servs., Ltd., 823 F.2d 171, 173 (7th Cir. 1987) (only a broker operating a discretionary account-in which the broker determined which investments to make-is viewed as a fiduciary); *Romano v. Merrill Lynch, Pierce, Fenner & Smith*, 834 F.2d 523, 530 (5th Cir. 1987); *Hill v. Bache Halsey Stuart Shields Inc.*, 790 F.2d 817, 825 (10th Cir. 1986) ("fiduciary duty in the context of a brokerage relationship is only an added degree of responsibility to carry out pre-existing, agreed-upon tasks properly"); *Limbaugh v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 732 F.2d 859, 862 (11th Cir. 1984) ("duty owed by the broker was simply to execute the order"). Texas precedent seems to be consistent. See e.g. *Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539 (Tex. 1998).

There are multiple cases from other jurisdictions that hold that the custodian is not liable for simply following the customer's directions.

In *Metz v. Serfling*, an IRA accountholder loaned his IRA funds to his investment advisor, Serfling, who subsequently took off with over \$300,000 of the investor's money. 1992 U.S. Dist. LEXIS 1164 (N.D. Ill. Feb. 5, 1992). Metz, the investor, sued Sterling, the thief/advisor but also included the self-directed IRA custodian, Intrust, in the suit on claims that Intrust should have discovered that Serfling was deemed to be unfit to handle customer funds, that Intrust should have known that Serfling, as a fiduciary investment advisor, was a "disqualified person" under § 4975 of the Internal Revenue Code, and that Intrust should have notified Metz that the transaction was "prohibited" under § 4975(c). *Id.* at *5-*6.

The court cited the parties' agreement as a clear indication that Intrust had a limited, non-discretionary duty to hold trust funds until directed by an authorized person to disperse the funds. See *id.* at *11. Metz also verified to Intrust that the transaction at issue did not violate § 4975 of the tax code upon authorization. First, in determining Intrust's fiduciary duty to investigate Serfling, the court held:

Based on the clear and unequivocal language of the [agreement], Metz was completely responsible for releasing the funds to Serfling, and Intrust had no such responsibility. Intrust had no duty to investigate Serfling's background or refuse to release the funds to Serfling. In fact, if Intrust had not released the funds upon Metz's direction, it would have violated the trust agreement. . . . Metz confirmed that the release of funds was proper. Intrust fulfilled its duty by holding the funds until directed by Metz and then releasing them at Metz's direction. Metz cannot now blame Intrust for his own failure to investigate Serfling's background. Under the trust agreement, Metz bore the responsibility to discover the fact that Serfling's trading license had been revoked three weeks earlier, and not Intrust.

Id. at *11-*12. The court then analogized to the general rule that brokers cannot be held liable for a breach of fiduciary duty when the investor directs an investment be made. The court held that a fiduciary relationship exists when the broker has discretion in handling an investor's money. *Id.*

The court dismissed Metz's claim that Intrust had a duty to prevent authorization of a transaction prohibited under I.R.C. § 4975, stating that Metz's argument has several "serious flaws." *Id.* at *15. The court cites Metz's personal certification that his transaction did not constitute a prohibited transaction under the tax code, stating:

Metz cannot foist responsibility for his tax decisions onto a non-discretionary trustee under the prudent person rule merely by claiming that Intrust had a duty

to admonish Metz that his representation was incorrect. Intrust was not hired to act as Metz's tax advisor. For these reasons, the Court holds that a trustee of a non-discretionary trust has no duty under the prudent person rule to inform the settlor of the tax consequences of a loan of the trust funds directed by the settlor absent some language to that effect in the trust agreement.

Id. The court held that Intrust did not exceed its authority under the agreement by authorizing the transaction in violation of the tax code, nor did Intrust have a duty to alert Metz as to the prohibited nature of the transaction under I.R.C. § 4975. *Id.*

The court applied an elevated prudent person standard to Intrust, in a custodial role, but still determined that no duty existed to give tax advice or to investigate an advisor's background. *Id.* at *15-*16. The prudent person standard mentioned above by the court is part of Illinois statutory scheme governing the actions of trustees. The rule requires trustees to "exercise the judgment and care under the circumstances then prevailing, which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital." *Id.* at *15. While the prudent person rule applies to trustees, most jurisdictions do not consider custodians to be "trustees," as such title implies the existence of a fiduciary relationship.

On appeal, the Seventh Circuit affirmed summary judgment for Intrust. *Metz v. Independent Trust Corp.*, 994 F.2d 395 (7th Cir. 1993). Regarding Intrust's alleged duty to speak up about a violation of I.R.C. § 4975, the court rejected the argument because "[c]ommon sense and logic also dictate the conclusion that Metz may not hold Intrust liable for following Metz's

explicit direction to loan the trust funds to Serfling. Metz did not engage Intrust as an investment counsellor or tax adviser. . . ." *Id.* at 402. The court stated that Metz attempted to shift the responsibility onto Intrust when Serfling fled with his money, "[t]hus Metz's complaint falls on deaf ears." *Id.* at 403.

In *Grund v. Delaware Charter Guarantee & Trust Co.*, a class of investors brought claims against the defendant-custodian of negligence, breach of contract, and breach of fiduciary duties that survived a motion to dismiss. 788 F. Supp. 2d 226, 246 (S.D.N.Y. 2011). The negligence claims survived due to language in the parties' agreement acknowledging a basis of custodial liability for negligence, stating that "[t]he [custodian] shall not be liable for any act or omission made in connection with the Trust except for its intentional misconduct or negligence." *Id.* at 248. The court held that because the negligence claims focused on duties outside of the contract, they were not precluded by separate breach of contract claims made by the class. *Id.*

The breach of contract claims similarly survived, as those claims were supported by obligatory language in letters allegedly sent from the custodian to investors expanding the custodian's duties. *Id.* at 246. Fiduciary duty claims survived dismissal due to inadvisable actions on behalf of the custodian, who allegedly acknowledged through various IRA account documents and written materials that the custodian had "fiduciary obligations to monitor and safeguard the investments of Plaintiffs and Class Members." *Id.* at 249. While *Grund* is unfavorable to the custodian, the court's opinion is not necessarily inconsistent with other holdings because of the distinct nature of the custodian's actions and language in the parties' agreement.

In a New York appellate court, summary judgment was granted in favor of a self-directed IRA custodian arguing that no duty of due diligence was owed to investors who directed the custodian to invest in a subsequently exposed Ponzi scheme. *See Winick v. Van Zandt*, 2012 N.Y. Misc. LEXIS 4216 (N.Y. Sup.

Ct. Aug. 2, 2012). Negligence and breach of fiduciary duty claims were dismissed because the custodian had “no duty to act for plaintiffs or give them advice with respect to the [SDIRA] accounts.” *Id.* at *8. The court continued by stating, “[t]here can be no negligence or breach of contract on the part of an investment management company, with respect to a [self-directed IRA], unless the investment company disregards the customer’s instructions.” *Id.*

In *Tarquinio v. Equity Trust Company*, an Ohio court of appeals held that when self-directed IRA investors and custodians enter into standard business relationships via an arm’s-length contract, self-directed IRA custodians have no duties independent of those contracts. 2007 Ohio App. LEXIS 3061 (Ohio Ct. App., Lorain County June 29, 2007). Because no duty could be established outside of the agreement, the negligence tort claim was dismissed. *Id.*; see also *Lamm v. State St. Bank & Trust Co.*, 889 F. Supp. 2d 1321, 1331-32 (S.D. Fla. 2012) (“[P]arties to a contract can only seek tort damages if the alleged tortious conduct constitutes a tort distinct from the parties’ contractual rights and obligations.”). The court held that no fiduciary relationship or duty exists between IRA custodians (self-directed or otherwise) and investors outside of those created by contract or statute. *Id.* at *16. The custodian did not breach its contract with the investor, as it did not distribute any of the investor’s funds in a manner inconsistent with investor’s instructions. *Id.* at *17-*20.

In *Matkin v. Fidelity National Bank*, a South Carolina federal court granted summary judgment in favor of an self-directed IRA custodian regarding negligence and breach of fiduciary duty claims. 2002 U.S. Dist. LEXIS 27571 (D.S.C. July 11, 2002). The plaintiff alleged negligence by the self-directed IRA custodian-defendant for allowing funds to be invested in a pyramid scheme, but the court held that any duties owed by the custodian were contractually defined and that no provisions governing the relationship were breached. *Id.* at *7-*8. The duty of care typically imposed on trustees was not imputed onto the custodian because the custodian’s only obligations under

the agreement was to properly maintain the funds and issue the funds pursuant to the investor’s directions. *Id.* at *7-*9. The custodian had no duty to protect the funds or question the plaintiff-investor’s investment decisions. *Id.* at *9.

The plaintiff’s breach of fiduciary duty claim was dismissed despite evidence that a custodian’s employee offered verbal opinions on investments, allegedly establishing a fiduciary relationship. The court held that the relationship was limited by the agreement and no indication existed that the custodian exceeded the scope of its custodial agreement by saying an investment “appeared to be a good deal.” *Id.* at *10-*11 (“[A] party cannot impose a fiduciary duty through its own unilateral action.”).

In *Mandelbaum v. Fiserv, Inc.*, account holders, victims of the Bernie Madoff Ponzi scandal, brought a punitive class action suit against a custodian bank that provided only limited administrative services, made no valuations, gave no advice, and did no due diligence regarding plaintiffs’ investments. 787 F. Supp. 2d 1226, 1232 (D. Colo. 2011). The class contended that the custodian owed duties, beyond the relevant agreements, to retain possession of the trust assets, verify how Madoff held the assets, oversee the investments, and alert investors to information received regarding the questionable nature of Madoff’s operations, among other claims. *Id.* at 1233. The court held, “[p]laintiffs have failed to identify any duties that exist independent of the IRA Agreements. . . . Accordingly, the Court finds that Defendants’ at-issue duties of care do not have an existence independent of the IRA Agreements, themselves.” *Id.* at 1240.

The court held that the underlying IRA agreements between the parties exculpated the defendant custodian from any fiduciary duty to investors. *Id.* at 1238. “To the extent that Defendants might have had a pre-existing duty to provide accurate account statements, investigate red flags, and retain control over the trust assets, the IRA Agreements exculpate Defendants of any such duties. Thus, Plaintiffs’

negligence and breach of fiduciary duty claims fail as a matter of law.” *Id.* at 1241.

In *Hines v. FiServ, Inc.*, the plaintiff-investors sued the non-discretionary custodian, alleging negligence, breach of fiduciary duty, and breach of contract, along with other fraud claims. 2010 U.S. Dist. LEXIS 39896 (M.D. Fla. Mar. 25, 2010). The investors claimed the custodian breached a duty of care by violating certain FDIC imposed regulations, but the investors never allege how those regulations apply to a non-discretionary custodian with no advisory role. *Id.* at *12-*14. The investors also alleged a breach of contract claim, based partially on a requirement that the investments meet IRS and I.R.C. standards, but did not support that claim with evidence of a contractual provision. *Id.* at *14. Interestingly, the court dismissed the negligence and breach of contract claims without prejudice due to a pleading deficiency, instead of holding that no duties existed as a matter of law. *Id.* at *14.

Hines, is an example of an unsuccessful attempt by plaintiffs to establish a fiduciary duty by relying on the incorporation of Section 408 of the I.R.C. into the agreement with the custodian. 2010 U.S. Dist. LEXIS 39896 (M.D. Fla. Mar. 25, 2010). In *Hines*, the plaintiffs argued that I.R.C. § 408 imposes fiduciary duty by incorporation into the agreement, even though the agreement expressly disclaimed any fiduciary duties owed by the custodian. *Id.* at *8. The plaintiffs also admitted that no private right of action under I.R.C. § 408 existed. *Id.* The court rejected the plaintiffs’ attempted breach of duty claim arising out of the tax code, holding:

I.R.C. § 408(h) recognizes that custodial IRAs, such as the Plaintiffs’ accounts here, are not trusts. They are only treated as trusts for tax deferral purposes. Courts applying this section of the code in relation to custodial IRA accounts have held that I.R.C. § 408 and the corresponding regulations do not create any fiduciary or other

duties of care. . . . The IRA contract here is unambiguous and does not contradict itself. I.R.C. § 408 imposes no duties on IRA custodians and the IRA contract expressly provides that [custodian] owes no fiduciary duties to the plaintiffs. Plaintiffs cannot maintain a claim for a breach of fiduciary duty where no duty exists.

Id. at *7-*8.

In *Brown v. California Pension Administrators & Consultants, Inc.*, investors in self-directed IRAs brought an action to recover funds based on the failure of the administrator of their IRAs to notify plaintiffs that the borrower of their funds had defaulted in payments to other investors. 45 Cal. App. 4th 333 (Cal. Ct. App. 1996). The plaintiffs filed claims for breach of contract, negligence, and breach of fiduciary duty. Using state law, the California Court of Appeals held that the agreements between plaintiffs and the administrator limited the administrator’s contractual and common law duties, absolving it of any duty to investigate, select, or monitor plaintiff’s IRA investments. *See id.* at 346-47. The court held that the plaintiffs did not have a breach of contract claim:

The contracts, read together, did not impose any duty on respondents to notify appellants that Lewis had failed to make interest or principal payments to other IRA investors. It follows, of course, that respondents’ failure to give such notice did not breach the negligence clause in the Investment Instruction. Respondents had a duty to provide account information to each participant with regard to his or her own IRA. Appellants’ own evidence was that CALPAC provided appellants with quarterly statements, and that those statements reflected

that Lewis made interest payments to appellants until 1986, but not after that date. Appellants do not, and cannot, complain that respondents failed to meet their duty to report to appellants on appellants' own IRA account activity.

The court similarly held that the plaintiffs could not assert a negligence cause of action:

Respondents certainly had the duty to perform ministerial functions as plan administrator and trustee with due care; no claim is made that they failed to do so. But respondents retained no discretion as to appellants' choice of investments, nor any responsibility for advising about the risk of any investments. Those functions were expressly excluded from their relationship, and allocated to appellants as part of appellants' authority to "self direct" their accounts. Since appellants' losses were allegedly caused by their lack of notice that Lewis had defaulted on other loans, and since respondents had no duty to provide that notice, appellants cannot succeed on their cause of action for negligence.

Id. at 347 (citations omitted). Lastly, the court rejected the plaintiffs' claim that the administrator, like a stock broker, owed fiduciary duties and held that the administrator did not owe a fiduciary duty to the IRA customers:

In our case, as we have explained, the relationship between appellants and respondents encompassed very limited responsibilities. . . . [T]he relationship was confined

to respondents' performance of transactions selected by their customers; respondents had absolutely no responsibility to advise appellants with regard to the wisdom of their investment choices. This was not an expansive fiduciary relationship giving rise to a duty to notify the customer of the risky nature of an investment, or in our case, of the poor performance of similar investments held by different customers. Appellants did not and cannot allege facts supporting a cause of action for breach of fiduciary duty.

Id. at 348. Accordingly, the court affirmed the summary judgment on behalf of the administrator.

In *Paszamant v. Retirement Accounts, Inc.*, investors in self-directed IRAs brought negligence claims against the custodian of their IRAs based on the custodian's failure to seek or assure reasonable verification that the investors' funds had been invested in mortgages actually assigned to the investors. 776 So. 2d 1049, 1051 (Fla. Dist. Ct. App. 2001). The trial court granted summary judgment to the custodian, finding that no duty existed independent of the Custodian Agreement between the parties and that the Custodian Agreement provided that the custodian had no duty other than to transfer funds as directed by the particular investor. See *id.* Relying in large part on the California court's decision in *Brown*, the Florida District Court of Appeals affirmed the trial court's decision as follows:

We agree with the trial court that *Brown* is dispositive of this case. The investors' complaint in *Brown* was that the administrator failed to give notice of a default and the allegation in the instant case is that RAI failed to give notice that Plaza did not respond correctly to RAI's request for

recorded documents. In *Brown*, the investors sued in contract and in tort and lost on both theories because the contract excluded any duty to advise of choice or risk of investments, and thus, no independent duty of due care arose. In the instant case, the Investors did not pursue any contract claim because the Custodian Agreement also excluded advice with respect to choice or risk. It was the Investors who chose the options of directing and managing the IRA funds, and consequently, the obligation to determine the form of documentation that would reflect their investments.

Id. at 1043. Accordingly, the court affirmed the summary judgment for the custodian.

In *Goldblatt v. Federal Deposit Insurance Corporation*, a depositor sued the FDIC in an action for a determination of the priority of his claim against an insolvent bank. 105 F.3d 1325 (9th Cir. 1997). The depositor alleged that his IRA account with the bank was a special account that allowed him priority pursuant to a California statute. The court of appeals affirmed a summary judgment entered for the FDIC. In determining that the depositor's IRA account was not a "special" account, the court of appeals looked to the IRA custodial agreement. The court found that the agreement expressly provided that no fiduciary duties existed, and therefore, no trust-type relationship existed between the depositor and the bank. *Id.* at 1329.

In *Abbott v. Chemical Trust*, investors brought an action against several defendants, including a bank/custodian of their IRA accounts arising out of a Ponzi scheme. Cause No. 01-2049-JWL, 2001 U.S. Dist. LEXIS 6214 (D.C. Kansas April 26, 2001). A trustee for a chemical trust asset called the bank and inquired whether the bank would be willing to handle self-directed IRAs for people wishing to invest

in his trust. *Id.* at *13. In evaluating the trust asset, the bank looked only at the asset and determined that it was the type of debt instrument that was administratively feasible. After the bank agreed to administer the IRAs, it received requests from investors to open those accounts and had instructions from the investors to invest their funds in the trust asset. *Id.* at *16. The bank made no assessment of the asset's risk prior to purchasing it for the investors. The bank issued monthly investment reviews to the investors that identified a market value for the trust asset, however this value was derived solely from the purchase price and did not make any attempt to estimate a market value. *Id.* at *17.

The bank received a grand jury subpoena from a United States district court requiring it to testify in a criminal proceeding brought against the chemical trust and its trustee. *Id.* at * 18. Pursuant to the subpoena instructions and directions of legal counsel, the bank did not disclose this to the investors and continued to purchase the chemical trust asset for new customers. *Id.* at *19. Later, the bank discovered that another agency was investigating the chemical trust and its trustee and decided that since such was public information it would act to discontinue purchasing the asset and discontinue being the custodian. However, the bank failed to inform its investors of the true reason it resigned as custodian. *Id.* at *22.

After the chemical trust asset failed, the investors sued several defendants including the bank on multiple claims. The plaintiffs moved for partial summary judgment against defendant bank on their claims for fraud, negligence, breach of fiduciary duty, constructive trust, breach of contract, violation of the Texas Deceptive Trade Practices Act and violation of the California Business and Professions Code. *Id.* at *24. The defendant cross-moved for summary judgment. The court granted summary judgment for defendant, holding that plaintiffs failed to show that the defendant committed fraud, negligence, breach of fiduciary duty, constructive trust, breach of contract, or statutory violations.

In support of the investors' fraud claims, they alleged that the bank failed to disclose the existence of the grand jury subpoena, failed to disclose other information that the bank knew about other agencies investigating the chemical trust asset, misrepresented to them that it had reviewed the chemical trust asset, misrepresented the value of the asset each month, and misrepresented why it resigned as custodian. *Id.* at *34-33. In support of the investors' negligence claims, they alleged that a reasonably prudent bank would have investigated the asset before transferring the investors' funds.

The court held that the bank had no common law or contractual duties to investigate or review the chemical trust asset and had no such duties to disclose any information concerning the chemical trust asset:

Like the circumstances in *Brown and Paszaman*, the relationship between the parties here—as evidenced by the written agreements between the parties—encompassed very limited responsibilities. The custodial agreement between the parties clearly states that FNB has "no responsibility or involvement in evaluating or selecting any assets for disposition, and shall have no liability for any loss or damages that may result from or be associated with any requested investment transaction." The agreement also clearly states that FNB "assume[s] no responsibility for rendering investment advice with respect to your IRA, nor will we offer any opinion or judgment to you on matters concerning the value or suitability of any investment or proposed investment for your IRA." With respect to plaintiffs' negligence claim, then, the agreement between the parties provided that FNB had no duty

to plaintiffs other than to transfer funds as directed by plaintiffs and plaintiffs have failed to identify any independent duty of due care owed by FNB to plaintiffs. Thus, because FNB had no duty to investigate or review the Chemical Trust asset, plaintiffs' negligence claim fails as a matter of law. With respect to plaintiffs' fraud claim, plaintiffs have wholly failed to show that the relationship between FNB and plaintiffs was one which would give rise to a duty on the part of FNB to communicate the information that plaintiffs contend FNB should have disclosed. While FNB may have had some fiduciary duty to plaintiffs, that duty was limited to executing the transactions requested by plaintiffs. While the parties certainly had a contractual relationship, the contract itself expressly limited FNB's obligations to communicate investment information to plaintiffs. Thus, because plaintiffs have failed to demonstrate that FNB had a legal or equitable obligation to communicate various facts to plaintiffs, plaintiffs' fraud claim fails as a matter of law.

Id. at *38-39.

Regarding the investors' breach of fiduciary duty claim, they alleged that the bank owed them fiduciary duties because it undertook a review of the chemical trust contract and undertook to value the asset each month for the investors. *Id.* at *40. The court held that to the extent the bank owed a fiduciary duty to the investors it was limited to executing the particular transactions requested by the plaintiffs:

It is beyond dispute that plaintiffs' self-directed IRAs with FNB were nondiscretionary accounts. That is, plaintiffs instructed FNB to purchase specific assets and FNB exercised no discretion in that regard. Moreover, despite plaintiffs attempt to argue that FNB somehow assumed a duty to review or value the Chemical Trust asset, it is uncontroverted that any review of the asset was limited to assessing the administrative feasibility of the asset. In addition, there is no evidence that plaintiffs actually believed that FNB would review or evaluate the Chemical Trust asset for purposes of assessing the soundness of plaintiffs' investment decision. In such circumstances, the law is clear that FNB's fiduciary duty to plaintiffs—to the extent such a duty exists—is limited to carrying out the transactions requested by plaintiffs. Here, there is no evidence whatsoever that FNB served as an advisor to plaintiffs with respect to their investment decisions or that FNB had any obligation to supervise or monitor plaintiffs' investment decisions. There is no evidence that FNB induced plaintiffs to make particular investments. There is no evidence that plaintiffs requested FNB to investigate or review the asset, that plaintiffs believed that FNB would undertake an investigation or review of the asset or that FNB had any obligation to undertake any investigation or review of the asset. In short, to the extent FNB owed a fiduciary duty to plaintiffs, that duty was limited to executing the transactions requested by plaintiffs. FNB

fulfilled that duty. Thus, plaintiffs' claim for breach of fiduciary duty fails as a matter of law. Summary judgment in favor of FNB is granted on this claim.

Id. at 39-41 (internal citations omitted). The court similarly dismissed the investors' other claims under RICO, breach of contract, constructive trust, securities fraud, the Texas Deceptive Trade Practices Act, and the California Business and Professions Code, and granted summary judgment for the bank.

B. Discretionary IRA Accounts

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

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

- (1) manage the account in a manner directly comporting with the needs and objectives of the customer as stated in the authorization papers or as apparent from the customer's investment and trading history;
- (2) keep informed regarding the

changes in the market which affect his customer's interest and act responsively to protect those interests; (3) keep his customer informed as to each completed transaction; and (4) explain forthrightly the practical impact and potential risks of the course of dealing in which the broker is engaged.

Id. at 257-58 (citing *Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951 (E.D. Mich. 1978), *aff'd* 647 F.2d 165 (6th Cir. 1981); *McCoun v. Rea (In re Rea)*, 245 B.R. 77, 90 (Bankr. N. D. Tex. 2000) (outlining duties of Texan who day-traded stocks using adversary plaintiffs' money)).

Interestingly, in *Anton*, the court held that “the scope of the appellees' duty to keep appellant informed about her accounts is limited to information about assets in the account and activities related to those assets.” *See id.* at 258. The court held that that “the duty does not extend to the client's assets outside the account or to assets that the client anticipates someday will be in her control.” *See id.* Therefore, the *Anton* court held that the custodian did not have a duty to inform a beneficiary of an account that she was eliminated as a beneficiary or that the custodian breached any duty in failing to pay her the funds in the account and in paying her children after the change of beneficiary was completed.

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

It should be noted that at least one Texas case would seem to limit a negligence cause of action against a discretionary account custodian due to multiple reasons, including the economic loss rule. *See Vodicka v. Lahr*, No. 03-10-00126-CV, 2012 Tex. App. LEXIS 4557 (Tex. App.—Austin 2012, no pet.).

XV. CONCLUSION

Because joint accounts hold money, there will always be disputes over the ownership of that money. This paper was intended to give general guidance when these disputes arise.