TRUSTEES' ABILITY TO RETAIN AND COMPENSATE ATTORNEYS IN TEXAS

DAVID F. JOHNSON, *Fort Worth*
Winstead PC

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DAVID FOWLER JOHNSON
DFJOHNSON@WINSTEAD.COM
Managing Shareholder of Winstead PC's Fort Worth Office
300 Throckmorton, Suite 1700
Fort Worth, Texas 76102
(817) 420-8223

David maintains an active trial and appellate practice for the financial services industry. David is the primary author of the Texas Fiduciary Litigator blog (txfiduciarylitigator.com), which reports on legal cases and issues impacting the fiduciary field in Texas. David has specialized in trust and estate disputes including: trust modification/clarification, trustee resignation/removal, breach of fiduciary duty and related claims, accountings, will contests, mental competency issues, and undue influence. David's recent trial experience includes:

Represented a trustee in federal class action suit where trust beneficiaries challenged whether it was the authorized trustee of over 220 trusts;

Represented trustees regarding claims of mismanagement of assets;

Represented a trustee who filed suit to modify three trusts to remove a charitable beneficiary that had substantially changed operations;

Represented a trustee regarding dispute over the failure to make distributions;

Represented a trustee/bank regarding a negligence claim arising from investments from an IRA account;

Represented individuals in will contests arising from claims of undue influence and mental incompetence;

Represented estate representatives against claims raised by a beneficiary for breach of fiduciary duty;

Represented beneficiaries against estate representatives for breach of fiduciary duty and other related claims; and

Represented estate representatives, trustees, and beneficiaries regarding accountings and related claims.

David's financial institution experience also includes (but is not limited to): account litigation, breach of contract, foreclosure litigation, lender liability, receivership and injunction remedies upon default, non-recourse and other real estate lending, class action, RICO actions, usury, various tort causes of action, breach of fiduciary duty claims, and preference and other related claims raised by receivers.

David is one of twenty attorneys in the state (of the 84,000 licensed) that has the triple Board Certification in Civil Trial Law, Civil Appellate, and Personal Injury Trial Law by the Texas Board of Legal Specialization. Additionally, David on the board of directors for the Texas Board of Legal Specialization. David is a graduate of Baylor University School of Law, *Magna Cum Laude*, and Baylor University, B.B.A. in Accounting.

David has published over twenty (20) law review articles on various litigation topics. David's articles have been cited as authority by: federal courts, the Texas Supreme Court (three times), the Texas courts of appeals (El Paso, Waco, Texarkana, Tyler, Beaumont, and Houston), McDonald and Carlson in their Texas Civil Practice treatise, William V. Dorsaneo in the Texas Litigation Guide, Baylor Law Review, South Texas Law Review, and the Tennessee Law Review. David has presented and/or prepared written materials for over one hundred and fifty (150) continuing legal education courses.

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I. INTRODUCTION

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

II. RIGHT TO RETAIN ATTORNEYS

Trustees have the statutory and common-law right to retain attorneys for a variety of matters. The first place to look regarding a trustee's right to retain counsel is the trust document itself. Tex. Prop. Code §113.001, 113.051. *See Myrick v. Moody Nat'l Bank*, 336 S.W.3d 795, 801 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (terms of trust instrument may limit or expand trustee powers supplied by the Trust Code). Generally, a trust document's terms govern, and a trustee should follow them. Tex. Prop. Code Ann §§ 111.0035(b), 113.001; RESTATEMENT (THIRD) OF TRUSTS § 76(1) (2007) ("The trustee has a duty to administer the trust … in accordance with the terms of the trust . . . ."); RESTATEMENT (SECOND) OF TRUSTS § 164(a) (1959). The trustee shall administer the trust in good faith according to its terms and the Texas Trust Code. Tex. Prop. Code Ann. § 113.051. Moreover, a court may remove a trustee where "the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust…" Tex. Prop. Code Ann. § 113.082(a)(1).

"The trustee shall administer the trust in good faith according to its terms and the Texas Trust Code." *Tolar v. Tolar*, No. 12-14-00228-CV, 2015 Tex. App. LEXIS 5119 (Tex. App.—Tyler May 20, 2015, no pet.). "The powers conferred upon the trustee in the trust instrument must be strictly followed." *Id*. "The nature and extent of a trustee's duties and powers are primarily determined by the terms of the trust." RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. B; *Stewart v. Selder*, 473 S.W.2d 3 (Tex. 1971); *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, no writ). If the language of the trust instrument unambiguously expresses the intent of the settlor, the instrument itself confers the trustee's powers and neither the trustee nor the courts may alter those powers. *Jewett v. Capital National Bank of Austin*, 618 S.W.2d 109, 112 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.); *Corpus Christi National Bank v. Gerdes*, 551 S.W.2d 521, 523 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

Normally, trust documents expressly include provisions that grant a right to trustees to retain counsel. However, if the trust document is silent, then a trustee should consider its rights under Texas statutes and common law. If a trust document states that a trustee does not have the power to retain attorneys, then a trustee should either: 1) seek to modify the trust to allow that common right, or 2) seek to resign because a trustee may not be able to meet many of its duties to manage and protect the trust without retaining attorneys.

After reviewing the trust document, a trustee should be aware of statutory law governing its powers to retain counsel. To the extent the trust instrument is silent, the provisions of the Trust Code govern. Tex. Prop. Code Ann. § 113.001; *Conte v. Conte*, 56 S.W.3d 830, 832 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Under the Texas Property Code, a trustee generally has any power that is necessary or appropriate to carry out the purposes of the trust. Tex. Prop. Code Ann. § 113.002. "A trustee may employ attorneys, accountants, agents, including investment agents, and brokers reasonably necessary in the administration of the trust estate." *Id*. at § 113.018. A trustee has the statutory authority to retain attorneys and other professionals as it deems appropriate and pay for those fees. *Id*. at § 114.063. The Texas Property Code also states: "The powers, duties, and responsibilities under this subtitle do not exclude other implied powers, duties, or responsibilities that are not inconsistent with this subtitle." *Id*. § 113.024.

Additionally, Texas Trust Code section 113.051 provides: "The trustee shall administer the trust in good faith according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of his subtitle, in administering the trust the trustee shall perform all the duties imposed on trustees by the common law." Tex. Prop. Code § 113.051. So, the statute expressly instructs parties to look to the common law regarding a trustee's duties. A trustee has the duty to administer the trust with the skill and prudence which an ordinary, capable, and careful person would use in the conduct of his or her own affairs: "The trustee has a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law." Restatement (Third) of Trusts § 76. Moreover, "In administering the trust, the trustee's responsibilities include performance of the following functions: … collecting and protecting trust property." *Id*.

"The duty of protecting the trust estate includes taking reasonable steps to enforce or realize on other claims held by the trust and to defend actions that may result in a loss to the trust estate. Reasonable steps may include taking an appeal to a higher court, compromise or arbitration of claims by or against the trust, or even abandoning a valid claim or not resisting an unenforceable claim if the costs and risk of litigation make such a decision reasonable under all the circumstances." Restatement (Third) of Trusts § 76 cmt. (d). "It is not the duty of the trustee to bring an action to enforce a claim which is a part of the trust property if it is reasonable not to bring such an action, owing to the probable expense involved in the action or to the probability that the action would be unsuccessful or that if successful the claim would be uncollectible owing to the insolvency of the defendant or otherwise." Restatement (Second) of Trusts § 177 cmt. c.

So, a trustee has the power to retain attorneys to assist in trust related matters when it deems that a prudent course of action.

III. SUGGESTIONS FOR TRUSTEES RETAINING ATTORNEYS

A. Introduction

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

B. Selecting Counsel

How should a trustee hire its counsel? There is no one right answer.

A trustee should consider the legal work that needs to be accomplished. Is it highly complex or more routine? Does the assignment require expertise that justifies a higher rate/expense? Does the matter better fit a contingency attorney or one that charges by the hour? A trustee should determine what type of attorney is necessary.

A trustee should then determine who the attorneys are with the necessary experience to efficiently handle the assignment. Attorneys are becoming more specialized—take advantage of that. Is industry knowledge necessary or helpful? Trustees should utilize networking with other trustees and organizations to assist in identifying qualified counsel.

A trustee may consider the following factors: ethics; reputation; expertise in the area of law ("Thought Leaders" in the area); track record; firm size, resources, and location; knowledge of forum and/or judge; rates; willingness to consider alternative billing arrangements; team; diversity; and responsiveness.

C. Engagement Letters

Engagement letters are very important to both trustees and counsel. These are the contracts that set the stage for all future work and disputes. The use of properly drafted engagement letters is not only a critical risk management tool, but also forms the foundation of client communication and trust. A trustee should seek different engagement letters for different assignments.

Things to include in engagement letters: identify the client (and who is not the client); rates/fee arrangement; retainer; who pays bills and retainer; billing and payment; scope of assignment (and limitations); multi-party issues; termination; technology/hacking; conflicts of interest and waivers; business conflicts; rules of ethics; no guarantee on results or cost; and dispute resolution terms.

D. Rates

At the outset of all legal assignments there should be an agreement and understanding as to the fees and compensation. A written agreement is required for contingency fee cases. A written agreement should be executed for all assignments. A trustee should consider the market rates for the level of expertise required and/or the locality of the work.

A trustee should consider different rates for different types of work even for the same counsel. A trustee should consider alternate billing arrangements such as lower rate/partial contingency. A trustee should also consider whether there are any insurance issues, panel requirements, or fee limitations. If a trustee is giving a volume of work to a firm, it should expect a discount on rates.

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

E. Communication

A trustee should demand constant, clear communication from counsel. The first step is to set an understanding of what communication is expected, how often, and in what medium. The trustee should communicate whether he or she prefers emails, texts, or phone calls.

A trustee and counsel should communicate about expectations at the outset. They should discuss: timing considerations; budget and expense considerations; formal written budget (update requirements); rate

issues; aggressiveness for matter; staffing expectations; experience requirements; confidentiality/privacy issues related to issue; and any internal political issues that counsel should know about.

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

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

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

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

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

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

F. Attorney-Client Privilege

The substance of communications between a counsel and the trustee is very important and is entitled to protection from disclosure to opposing parties and even to the trust's own beneficiaries. The attorney-client privilege protects from disclosure confidential communications between a client and his or her attorney "made for the purpose of facilitating the rendition of professional legal services to the client . . . ." Tex. R. Civ. Evid. 503(b); *In XL re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49 (Tex. 2012) (orig. proceeding). A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client: (A) between the client or the client's representative and the client's lawyer or the lawyer's representative; (B) between the client's lawyer and the lawyer's representative; (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action; (D) between the client's representatives or between the client and the client's representative; or (E) among lawyers and their representatives representing the same client. Tex. R. Evid. 503(b)(1).

This rule "promotes free discourse between attorney and client, which advances the effective administration of justice." *XL Specialty Ins. Co*., 373 S.W.3d at 49; *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex. 1993). Texas allows a trustee to retain counsel and to maintain attorney-client privilege as against the trust's beneficiaries. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996).

This privilege allows "unrestrained communication and contact between an attorney and client in all matters in which the attorney's professional advice or services are sought, without fear that these confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding." *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978). The privilege thus "promotes effective legal services," which "in turn promotes the broader societal interest of the effective administration of justice." *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex. 1993).

Trustee has no duty to disclose attorney-client communications to beneficiaries. *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996). In *DeShazo*, a beneficiary argued that communications between the trustee and his counsel should be disclosed to the beneficiaries because the trustee had a general duty to disclose. *Id*. The Texas Supreme Court disagreed:

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

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

Rule 503(b) protects not only confidential communications between the lawyer and client, but also the discourse among their representatives. Tex. R. Evid. 511(1). For example, in *In re Segner*, a trustee hired a consultant to assist in the management of a trust, including supervising employees and assisting with attorneys. 441 S.W.3d 409 (Tex. App.—Dallas 2013, orig. proceeding). In litigation, the trustee designated the consultant as an expert and disclosed his file and everything that was provided to him, reviewed by, prepared by, or prepared for him "in anticipation of his expert testimony." *Id*. The opposing party sought production of much broader information from the consultant, which the trial court granted. The court of appeals granted mandamus relief because the information was protected by the attorney-client privilege. *Id*. The court focused on the consultant's testimony, that he "sent and reviewed confidential communications with the trust's attorneys for the purposes of effectuating legal representation for the trust." *Id*.

Further, co-trustees can jointly retain counsel and can jointly assert attorney-client privilege. The "joint client" or "co-client" doctrine applies in Texas "[w]hen the same attorney simultaneously represents two or more clients on the same matter." *Specialty Ins. Co.*, 373 S.W.3d at 50. "Joint representation is permitted when all clients consent and there is no substantial risk that the lawyer's representation of one client would be materially adversely affected by the lawyer's duties to the other." *Id*. (citing 2 Restatement (Third) of the Law Governing Lawyers § 128 (2000)). "'Where [an] attorney acts as counsel for two parties, communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients.'" *Id*. (quoting *In re JDN Real Estate-McKinney L.P.*, 211 S.W.3d 907, 922 (Tex. App.—Dallas 2006, [mand. denied])). When more than one person seeks consultation with an attorney on a matter of common interest, the parties and the attorney may reasonably presume the parties are seeking representation of a common matter. *In re JDN Real Estate—McKinney L.P.*, 211 S.W.3d 907, 922 (Tex. App.—Dallas 2006, pet. denied);

So, when co-trustees jointly retain counsel, their communications with their attorney are privileged as against third parties, such as beneficiaries. However, if the co-trustees themselves have a dispute, then there is no privilege and the communication between the attorney and either one of the co-trustees is open to discovery by the other co-trustee. Tex. R. Evid. 503(d)(5) (noting that communications made by two or more clients to a lawyer retained in common are not privileged "when offered in an action between or among any of the clients"). Texas Rule of Evidence 503(d)(5) provides that the following is an exception to the privilege: "If the communication: (A) is offered in an action between clients who retained or consulted a lawyer in common; (B) was made by any of the clients to the lawyer; and (C) is relevant to a matter of common interest between the clients." Tex. R. Evid. 503(d)(5).

For example, *In re Alexander*, a beneficiary filed suit against the trustee based on multiple allegations of breach of fiduciary duty, including an allegation that the trustee attempted to transfer the trustee position to successors in violation of the trust's terms. No. 14-18-00466-CV, 2019 Tex. App. LEXIS 6474 (Tex. App.—Houston [14th Dist.] July 30, 2019, original proc.). The beneficiary filed a motion to compel trust documents and emails regarding same that were drafted by an attorney, but which were never executed. After the trial court granted the motion to compel, the trustee filed a petition for writ of mandamus, challenging the order on the basis of the attorney-client privilege and attorney work product.

The court stated that the trustee filed affidavits proving that the drafts and communications were prepared in the course of the attorney's representation of the trustees and were for legal advice. The court then discussed the concept of a trustee's communications with its counsel being privileged:

> In *Huie*, the [Texas Supreme Court] considered whether the attorney-client privilege protects communications between a trustee and his or her attorney relating to the administration of a trust from discovery by a trust beneficiary. There, a trust beneficiary sued the trustee, alleging that he had mismanaged the trust, engaged in self-

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

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

Nonetheless, the court flatly rejected the beneficiary's argument that a trustee's duty of disclosure extends to any and every communication between the trustee and his attorney. The court explained that (1) its holding did not affect the trustee's duty to disclose all material facts and to provide a trust accounting to the beneficiary, even as to information conveyed to the attorney; (2) the beneficiary could depose the attorney and question him about his handling of trust property and other factual matters involving the trust; and (3) the attorney-client privilege did not bar the attorney from testifying about factual matters involving the trust, so long as he was not called on to reveal confidential attorney-client communications. Although a trustee owes a duty to a trust beneficiary, the trustee in Huie did not retain the attorney to represent the beneficiary but to represent himself in carrying out his fiduciary duties. Contrary to Preston's point, the Huie court recognized that communications between a trustee and the trustee's attorney made confidentially and for the purpose of facilitating legal services remain protected. The hypothetical in Huie involved the trustee's misappropriation of trust funds, which he revealed to his attorney for purpose of obtaining legal advice. The trustee's misappropriation was a material fact of which the trustee knew independent of the communication.

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

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

Where one co-trustee hires counsel, may the trustee produce attorney/client communications to its non-client co-trustee and maintain the privilege. Generally, there should be extreme caution applied in this circumstance outside of litigation. Confidential communications to which the attorney-client privilege applies include those "by the client or a representative of the client, or the client's lawyer or a representative

of the lawyer, to a lawyer or a representative of a lawyer representing another party to a pending action and concerning a matter of common interest therein[.]" Tex. R. Evid. 503(b)(1)(C). This rule, often referred to as the "common interest" privilege, is an exception to the general rule that no attorney-client privilege attaches to communications that are made in the presence of or disclosed to a third party. *In re JDN Real Estate—McKinney L.P.*, 211 S.W.3d 907, 922-23 (Tex. App.—Dallas 2006, orig. proceeding [mandamus denied]). The Texas Supreme Court has addressed the "pending action" requirement of the rule and concluded that the "common interest" privilege is more accurately described as an "allied litigant" privilege. *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 52 (Tex. 2012) (orig. proceeding). This is because the privilege does not extend beyond litigation and it applies to any parties—not just the defendants—to a pending action. *Id*. "Because of the pending action requirement, no commonality of interest exists absent actual litigation." *Id*.

A trustee should be careful, however, of using advice of counsel as a defense to a claim. True, advice of counsel is a factor in evaluating a trustee's prudence. Restatement (Third) of Trusts § 77 cmt. b(2), c; *In re Estate of Boylan*, No. 02-14-00170-CV, 2015 Tex. App. LEXIS 1427 (Tex. App.—Fort Worth February 12, 2015, no pet.). But, if a trustee raises advice of counsel as a defense, then the trustee will likely waive its attorney-client communication privilege.

If a party introduces any significant part of an otherwise privileged matter, that party waives the privilege. Tex. R. Evid. 511. If a defendant voluntarily introduces its communications with counsel as a defense to claims, it cannot also seek to keep other aspects of the communications privileged. A Delaware court reviewed a similar fact pattern and found that the privilege was waived. *Mennen v. Wilmington Trust Co.*, 2013 Del. Ch. LEXIS 238, 2013 WL 5288900 (Del. Ch. Sept. 18, 2013). In *Mennen*, a trustee was sued for breach of fiduciary duty. *Mennen* at *3. One of the trustee's defenses was that he received bad legal advice from counsel. *Id*. at *5. The trustee attempted to block production of the alleged bad advice from counsel, citing attorney-client privilege. *Id*. The court was unpersuaded by the trustee's invocation of privilege, stating that "a party's decision to rely on advice of counsel as a defense in litigation is a conscious decision to inject privileged communications into the litigation." *Id*. at *18 (citing *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3rd Cir. 1995)).

The Texas Rules of Evidence and courts nationwide agree that when privileged communications are voluntarily introduced in litigation, they are no longer privileged. The Texas Supreme Court has declared that a party cannot use a privilege as a sword to promote or protect its own affirmative claims or further the relief it seeks. *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107 (Tex. 1985) (orig. proceeding). In fact, the Supreme Court would later expand upon the "offensive use" doctrine and acknowledge that a party has waived the assertion of a privilege if the court determines that:

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

Transamerican Natural Gas Corp. v. Flores, 870 S.W.2d 10, 11-12 (Tex. 1994) (orig. proceeding); *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993) (orig. proceeding). The Supreme Court has explained that with regard to the second prong, "[t]he confidential communication must go to the very heart of the affirmative relief sought." *Davis*, 856 S.W.2d at 163. "When a party uses a privilege as a sword rather than a shield, she waives the privilege." *Alford*, 137 S.W.3d at 921. Accordingly, a trustee should be careful and weigh the risk and reward of injecting attorney-client communications into a dispute.

G. Inadvertent Attorney-Client Relationships

A trustee and its counsel should be careful to appropriately communicate with the beneficiary such that the beneficiary does not believe that he or she is a client of the trustee's attorney. Certainly, an attorney can represent more than one party; in fact, that is very common. For example, a law firm may represent both spouses in the sale of real property, the leasing of minerals, or in estate planning. *See, e.g., Estate of Arlitt v. Paterson*, 995 S.W.2d 713, 720–721 (Tex. App.—San Antonio 1999, pet. denied) (an attorney may represent a couple as joint estate planning clients, in which case the attorney will owe a duty to both clients). So, a reasonably prudent attorney should identify who he or she represents and clarify that he or she does not represent a party when the attorney first communicates with a party regarding a legal matter. *See* Tex. R. Disc. C. 4.03 ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the

misunderstanding."). Though not dispositive, a "trier of fact may consider the construction of a relevant rule of professional conduct that is designed for the protection of persons in the claimant's position as evidence of the standard of care and breach of the standard." William V. Dorsaneo, TEXAS LITIGATION GUIDE, § 322.02 (Citing RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 52, cmt. f).

The downside of this issue for the attorney is that the attorney may inadvertently create an attorney-client relationship and be held to fiduciary duties that are not anticipated. To have an attorney-client relationship, there does not have to be a formal agreement. "While it is generally a relationship created by contract, an attorney-client relationship can be implied based on the conduct of the parties." *Sotello v. Stewart*, 281 S.W.3d 76, 80-81 (Tex. App.—El Paso 2008, pet. denied) (citing *Sutton v. Estate of McCormick*, 47 S.W.3d 179, 182 (Tex. App.—Corpus Christi 2001, no pet.) and *Mellon Service Co. v. Touche Ross & Co.*, 17 S.W.3d 432, 437 (Tex. App.—Houston [1st Dist.] 2000, no pet.)). "The attorney-client relationship may be implied if the parties by their conduct manifest an intent to create such a relationship." *Daves v. Commission For Lawyer Discipline*, 952 S.W.2d 573, 577 (Tex. App.—Amarillo 1997, pet. denied). For the relationship to be established, "the parties must explicitly or by their conduct manifest an intention to create it. To determine whether there was a meeting of the minds, we use an objective standard examining what the parties said and did and do not look at their subjective states of mind." *Roberts v. Healey*, 991 S.W.2d 873, 880 (Tex. App. —Houston [14th Dist.] 1999, pet. denied). "More specifically, an attorney-client relationship can be implied from the attorney's gratuitous rendition of professional services." *Sotello v. Stewart*, 281 S.W.3d at 80-81 (citing *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied)).

It should also be noted that an attorney may be liable for not informing a party that it is not representing the party. *Querner v. Rindfuss*, 966 S.W.2d 661, 667-68 (Tex. App.—San Antonio 1998, writ denied) (recognizing that an attorney's advice may give rise to an informal fiduciary duty even when no formal attorney-client relationship is formed). The *Querner* court stated:

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

Id.; *see also Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, pet. denied); *Burnap v. Linnartz*, 914 S.W.2d 142, 148 (Tex. App.—San Antonio 1995, writ denied).

So, to avoid confusion, the attorney should always have a written engagement letter that expressly identifies the client or clients, the attorney is not representing any other party not expressly mentioned, the scope of the engagement, and when the engagement will be terminated. Further, if appropriate, the attorney should follow up and orally tell those that he or she is not representing, but with whom the attorney often communicates, that he or she is not representing them and is only representing his or her client(s). Further, individuals should also seek clarification and ask an attorney who the attorney represents and whether the individual should retain his or her own attorney. Everyone should strive to be on the same page regarding who is the attorney and who is the client.

H. Right To Control Claims

In pursuing or defending litigation, trustees normally have discretion. Trust documents often specify that the trustee has the power to file or defend claims. One such provision stated: "[T]rustee is authorized to prosecute or defend . . . any claim of or against the Trustee, the Trust or the Trust Estate, to waive or release rights of any kind and to pay or satisfy any debt, tax or claim upon any evidence by it deemed sufficient, without the joinder or consent of any Unitholder." *In re XTO Energy Inc.*, 471 S.W.3d 126 (Tex. App.—Dallas 2015, original proceeding). A trust document's provisions regarding any duty or power control over those set forth in the Texas Trust Code. Tex. Prop. Code §113.001, 113.051. *See Myrick v. Moody Nat'l Bank*, 336 S.W.3d 795, 801 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (terms of trust instrument may limit or expand trustee powers supplied by the Trust Code). A trustee has a duty to follow the terms of the trust. *Tolar v. Tolar*, No. 12-14-00228-CV, 2015 Tex. App. LEXIS 5119 (Tex. App.—Tyler May 20, 2015, no pet.).

In the absence of instruction from the trust document, the Texas Trust Code provides: "A trustee *may* compromise, contest, arbitrate, or settle claims of or against the trust estate or the trustee." Tex. Prop.

Code § 113.019. So, a trustee has statutory authority to bring claims or not bring claims.

The Texas Trust Code section 113.051 provides: "The trustee shall administer the trust in good faith according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of his subtitle, in administering the trust the trustee shall perform all the duties imposed on trustees by the common law." Tex. Prop. Code § 113.051. The statute expressly instructs parties to look to the common law regarding a trustee's duties.

A trustee has the duty to administer the trust with the skill and prudence which an ordinary, capable, and careful person would use in the conduct of his or her own affairs. *Stone v. King*, No. 13-98-022-CV, 2000 Tex. App. LEXIS 8070, 2000 WL 35729200 (Tex. App.—Corpus Christi 2000, pet. denied) (not designated for publication) (citing *Hoenig v. Texas Commerce Bank, N.A.*, 939 S.W.2d 656, 661 (Tex. App.—San Antonio 1996, no writ)). "The trustee has a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law." RESTATEMENT (THIRD) OF TRUSTS § 76. Moreover, "In administering the trust, the trustee's responsibilities include performance of the following functions: … collecting and protecting trust property." *Id*. A trustee has a duty to act prudently in managing and investing trust assets. *Hoenig v. Texas Commerce Bank*, 939 S.W.2d 656, 661 (Tex. App.—San Antonio 1996, no writ).

"The duty of protecting the trust estate includes taking reasonable steps to enforce or realize on other claims held by the trust and to defend actions that may result in a loss to the trust estate. Reasonable steps may include taking an appeal to a higher court, compromise or arbitration of claims by or against the trust, or even abandoning a valid claim or not resisting an unenforceable claim if the costs and risk of litigation make such a decision reasonable under all the circumstances." RESTATEMENT (THIRD) OF TRUSTS § 76 cmt. (d). "It is not the duty of the trustee to bring an action to enforce a claim which is a part of the trust property if it is reasonable not to bring such an action, owing to the probable expense involved in the action or to the probability that the action would be unsuccessful or that if successful the claim would be uncollectible owing to the insolvency of the defendant or otherwise." RESTATEMENT (SECOND) OF TRUSTS § 177 cmt. c.

Trust documents rarely, if ever, require a trustee to bring claims. Thus, under the Texas Property Code and the terms of the trust, a trustee is normally authorized, but not required, to pursue litigation. In one case, a trust had the following provision: "the trustee has the power to commence, compromise, settle, arbitrate, or defend at the expense of the Trust any litigation with respect to the Trust as the Trustee deems necessary or advisable." *DeRouen v. Bryan*, No. 03-11-00421-CV, 2012 Tex. App. LEXIS 8635 (Tex. App.—Austin Oct. 12, 2012, no pet.). The court held that under the Texas Trust Code and the terms of the trust, that a trustee is authorized, but not required, to pursue litigation against a debtor. "Absent bad faith or an abuse of discretion, Bryan cannot be held liable for his refusing to do so." *Id*. (citing *Corpus Christi Bank & Trust v. Roberts*, 597 S.W.2d 752, 754 (Tex. 1980) (explaining that trustee's authority under Texas Trust Act and terms of trust was discretionary and subject to review only for abuse of discretion); *see also* Tex. Prop. Code Ann. § 113.051 ("The trustee shall administer the trust in good faith according to its terms and [the Texas Trust Code].")). The *DeRouen* case dealt with a beneficiary suing a trustee for failing to sue the beneficiary's ex-wife for improperly receiving trust distributions. *Id*. The court of appeals affirmed summary judgment for the trustee. *Id*. The court stated:

> DeRouen does not contend, either in his response to the motion for summary judgment or now in this appeal, that Bryan's decision not to pursue litigation was in bad faith or an abuse of discretion. Further, the summary-judgment record in this case would not support such a finding. In response to Bryan's motion for summary judgment, DeRouen included his affidavit as summary-judgment evidence. In relevant part, DeRouen states in his affidavit:
>
> In December 2009, Bryan finally agreed to meet with me in person. Bryan acknowledged that the Trust funds had been improperly disbursed to a non-beneficiary. Bryan admitted that the first withdrawal had been made solely in response to a telephone call from Angela DeRouen. I shared with Bryan the other actions that Angela DeRouen had secretly taken and the horrible financial problems she caused me. I asked Bryan to take legal action on behalf of the Trust to recover the Trust funds he had improperly disbursed. Bryan stated that he would consider doing so and the meeting ended.
>
> While this constitutes evidence that Bryan refused to take legal action to recover the funds, it fails to raise a fact issue with regard to whether Bryan acted in bad faith or abused his discretion in doing so. *See Caldwell v. River Oaks Trust Co.*, No. 01-94-00273-CV, 1996 Tex. App. LEXIS 1798, at *12 (Tex. App.—Houston [1st Dist.] May 2, 1996, writ denied) (mem. op., not

> designated for publication) (noting that power "is considered discretionary if the trustee may decide whether to exercise it or not" and that summary-judgment evidence reflected that trustee's decision was "neither arbitrary nor capricious"). Instead, Bryan's deposition testimony, also attached to DeRouen's response to the motion for summary judgment, was that Bryan made the decision not to pursue litigation against Angela after considering the advice of counsel, his discussions with the trustor, and the potential cost of the litigation. Because there is no evidence that Bryan acted in bad faith or abused his discretion, the trial court did not err in granting summary judgment on DeRouen's breach-of-fiduciary duty claim and breach-of-contract claim based on Bryan's refusal to take legal action.
>
> Similarly, there is no evidence to support DeRouen's claims based on Bryan's refusal to pursue litigation to recover the funds. Consequently, the trial court did not err in granting summary judgment on DeRouen's claims for breach of fiduciary duty and breach of contract.

Id. at *12-14.

A trustee does not always need to pursue every potential claim. In determining whether to sue a party, a trustee should weigh the likelihood of success, the amount of damages, the ability of defendant to pay, and the expense of the suit. For example, a trustee does not need to pursue a claim if the defendant is judgment proof. In this regard, the Texas Trust Code states: "A trustee may abandon property the trustee considers burdensome or worthless." Tex. Prop. Code § 113.020.

A trustee should act reasonably in making a decision to pursue a claim. For example, in the Texas Estate's Code, it requires a representative of an estate to use diligence to collect property of the estate:

> (a) If there is a reasonable prospect of collecting the claims or recovering the property of an estate, the personal representative of the estate shall use ordinary diligence to: (1) collect all claims and debts due the estate; and (2) recover possession of all property to which the estate has claim or title.
>
> (b) If a personal representative willfully neglects to use the ordinary diligence required under Subsection (a), the representative and the sureties on the representative's bond are liable, on the suit of any person interested in the estate, for the use of the estate, for the amount of those claims or the value of that property lost by the neglect.

Tex. Estate Code § 351.151. It should also be noted that estate representatives have the same fiduciary duties as trustees. *In re Estate of Boylan*, No. 02-14-00170-CV, 2015 Tex. App. LEXIS 1427, 2015 WL 598531 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.).

Where there is clear liability and a defendant has the ability to pay a judgment, a trustee should generally pursue claims that would result in a benefit to the trust. In *Ward v. Stanford*, a trust beneficiary sued co-trustees for not suing the settlor for defaulting on a large debt owed to the trust. 443 S.W.3d 334, 346 (Tex. App.—Dallas 2014, pet. denied). The co-trustees alleged that the four-year limitations period barred the beneficiary's breach of fiduciary duty claim. The beneficiary alleged that it had sued within four years of the co-trustees failing to pursue the note claim based on a six-year limitations period for suing on a negotiable note. The trial court ruled for the co-trustees, and the beneficiary appealed. The court of appeals held that the six-year period applied for the co-trustees' note claim and that there was a fact issue as to when the beneficiary's breach of fiduciary duty claim accrued:

> To agree with appellant, we would have to conclude the Trustees—as a matter of law—did not violate their fiduciary obligation to appellant until the date limitations barred their claim against Travis Ward on the Renewal Note. To agree with the Trustees, we would have to conclude—as a matter of law—that they violated their fiduciary duty by not filing suit on the first day after the Renewal Note matured (either by its terms or by acceleration). Based on this summary judgment record, we decline to reach either conclusion.
>
> The fiduciary duty claims accrued when a wrongful act—an act or omission violative of the Trustees' fiduciary obligations to appellant—caused an injury, i.e. when they constituted "an invasion of . . . [appellant's] right . . . be the damage however slight." The ultimate issue remains: when did the Trustees' actions—or inaction—violate their fiduciary obligations and damage appellant?
>
> Certainly the accrual date for claims against Travis Ward based on the Renewal Note is a factor relevant to when the breach of fiduciary claims accrued, but it is not dispositive of that question. The Trustees did not prove as a matter of law that their

> failure to sue on the Renewal Note the day after it was due constituted a breach of their fiduciary duty. And neither does the evidence show as a matter of law that the Trustees' failure to pursue collection of the Renewal Note was consistent with the faithful performance of their fiduciary duties up to the last possible date they could have avoided Travis Ward's limitations defense by filing suit on the Renewal Note…
>
> [W]e conclude the date on which the Trustees' inaction can be said to cross the line into a breach of their fiduciary obligations to appellant remains a fact question.

Id. The court reversed the summary judgment for the co-trustees and remanded the beneficiary's breach of fiduciary duty claim to the trial court for trial on the merits. *Id. See also Proctor v. White*, 172 S.W.3d 649 (Tex. App.—Eastland 2005, no pet.) (reversed summary judgment on beneficiary's breach of fiduciary duty claim against trustee for loaning trust funds to himself because there was a fact question on the statute of limitations).

A trustee should seriously consider whether it should pursue claims on behalf of the trust, and if it does not do so, it should document that decision and its reasoning in the trust file

When can a beneficiary sue on behalf of a trust where the trustee refuses to do so? Texas courts have historically held that a trust beneficiary may enforce a cause of action that the trustee has against a third party "if the trustee cannot or will not do so." *See, e.g,. In re Estate of Webb*, 266 S.W.3d 544, 552 (Tex. App.—Fort Worth 2008, pet. denied); *Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 874 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

If the trustee's action in not bringing a claim is wrongful, the beneficiary may have multiple different options in vindicating the trust's interests, including suing the trustee for breach of fiduciary duty and seeking an order from a court to require a trustee to comply with its duties.

One issue is if the trustee's action is not wrongful, does the beneficiary have the right to sue on behalf of the trust?

Once again, the Texas Property Code provides that a trustee has the power to compromise, contest, arbitrate, or settle claims of or against the trust estate. Tex. Prop. Code Ann. § 113.019. It does not provide a beneficiary with a similar right. In *In re XTO Energy Inc.*, a beneficiary, on behalf of the trust, sued an oil and gas operator for allegedly not paying sufficient funds to the trust and also sued the trustee for refusing to bring that claim. 471 S.W.3d 126 (Tex. App.—Dallas 2015, original proceeding). The trustee filed a special exception, requesting that the trial court dismiss the beneficiary's claims as she did not have standing and failed to plead sufficient facts that would allow her to usurp the trustee's authority to determine what legal actions to pursue on behalf of the trust. After the trial court denied the special exceptions, the trustee and operator filed a mandamus action.

The court of appeals first addressed a trustee's authority to control litigation. The court noted that under the Texas Trust Code section 113.019, a trustee is generally authorized to compromise, contest, arbitrate, or settle claims affecting the trust property. Further, the terms of a trust document may limit or expand trustee powers supplied by the trust code. The trust document in this case provided that the trustee was "authorized to prosecute or defend . . . any claim of or against the Trustee, the Trust or the Trust Estate, to waive or release rights of any kind and to pay or satisfy any debt, tax or claim upon any evidence by it deemed sufficient, without the joinder or consent of any Unitholder." *Id*. The court held that this granted the trustee discretion to determine the course of litigation "upon any evidence by it deemed sufficient" and was exceedingly broad.

The court then discussed prior cases that generally held that a trust beneficiary may enforce a cause of action that the trustee has against a third party "if the trustee cannot or will not do so." *Id*. The court countered that: "Despite this broad language, a beneficiary may not bring a cause of action on behalf of the trust merely because the trustee has declined to do so. To allow such an action would render the trustee's authority to manage litigation on behalf of the trust illusory." *Id*. The court found no Texas cases addressing the right of a beneficiary to enforce a cause of action against a third party that the trustee considered and concluded was not in the best interests of the trust to pursue. The court concluded: "Allowing a beneficiary to bring suit on behalf of a trust when the trustee has declined to do so amounts to the type of substitution of judgment that this rule was designed to prevent. Accordingly, the court should not allow such a suit to proceed unless the beneficiary pleads and proves that the trustee's refusal to pursue litigation constitutes fraud, misconduct, or a clear abuse of discretion." *Id*. The court reviewed the underlying claim and held that the trustee's decision, which was based on advice of counsel, was not the result of fraud, misconduct, or a clear abuse of discretion.

The court then addressed whether mandamus relief was appropriate. Mandamus may be available upon a showing that (1) the trial court clearly abused its discretion by failing to correctly apply the law and (2) the benefits and detriments of mandamus render appeal inadequate. The court already held that the

trial court abused its discretion in not granting the special exception. The court also held that there was an important substantive right involved, which was the right of a trustee to determine whether the trust will pursue litigation. Mandamus relief was appropriate regarding the beneficiary's claims against the oil and gas operator as those claims could not be cured by an amendment.

However, the court held that mandamus relief was not appropriate regarding the beneficiary's claims against the trustee. The court held that the beneficiary improperly sued the trustee on behalf of the trust because only the trustee can do that. Unlike the beneficiary's claims against the operator, however, this pleading defect can be cured by amendment. The court held that the Texas Trust Code provides a mechanism by which a beneficiary may sue a trustee. So, the beneficiary could sue the trustee on her own behalf regarding the trustee's decision to not sue the operator.

The trustee's request that the court of appeals order the trial court to dismiss the claims against the trustee because there was no likelihood of liability went to the merits of the beneficiary's claims rather than her standing to bring them. The court concluded that allowing the beneficiary to proceed with her claims on her own behalf does not interfere with the trustee's authority to control litigation on behalf of the trust. And to the extent the beneficiary's claims against the trustee lacked merit, the trustee had an adequate remedy in the trial court and by appeal (summary judgment, trial, etc.).

There is one statutory exception where beneficiaries can stop a trustee from bringing a claim. Texas Trust Code section 113.028 provides that a trustee may not assert a claim against a party that is not a beneficiary if the beneficiaries provide written notice to the trustee of their opposition to the trustee's asserting a claim. Tex. Prop. Code Ann. § 113.028(a). A trustee is not liable for failing to prosecute such a claim if it is prohibited from doing so by the beneficiaries. Tex. Prop. Code Ann. § 113.028(c). For example, in *Alpert v. Riley*, the court of appeals held that the trustee had no authority to continue prosecuting claims against the settlor after the beneficiaries gave written notice. 274 S.W.3d 277 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). If a trustee initiates a proceeding in contravention of Section 113.028 or continues such proceeding after receiving notice, then the trustee acts without authority and will be personally liable for any attorney's fees incurred by counsel in that proceeding. *Id*.

IV. CO-TRUSTEES MANAGING TRUSTS

A. Co-Trustees Must Jointly Manage Trusts

Retaining attorneys can be more complicated with a trust is administered by co-trustees. Co-trustees each owe fiduciary duties, but they should exercise their duties jointly, as a unit. *Brown v. Donald*, 216 S.W.2d 679, 683 (Tex. Civ. App.—Fort Worth 1949, no writ) (cotrustees must act jointly). So, one co-trustee should not take any action without the consent of the other co-trustees. *Shellberg v. Shellberg*, 459 S.W.2d 465, 470 (Civ. App.—Fort Worth 1970, ref. n.r.e.) ("The trust instrument conveyed the property to two trustees and provided that their powers were joint; the management, control and operation of the trust was to be by the joint action of the two trustees."). For example, if a trust calls for two co-trustees, it cannot operate with just one. *Id*.

One commentator provides:

> The powers of trustees of a private trust, whether they are imperative or discretionary, personal or attached to the office, are held jointly, in the absence of statute or contrary direction in the trust instrument. The trustees are regarded as a unit. They are joint tenants of realty in the usual case. They hold their powers as a group so that their authority can be exercised only by the action of all the trustees. "When the administration of a trust is vested in co-trustees, they all form but one collective trustee."
>
> …
>
> If one trustee attempts to exercise a joint power, or unjustifiably refuses to join with his co-trustees in exercising such a power, the court will often remove him. However, the court may decree that he act in a specified way and thus secure the affirmative use of the power. The powers of co-trustees are deemed to be joint and exercisable only by united action because courts believe such was the intent of the settlor. One who appoints several trustees to manage a trust is deemed to express a desire to have the benefit of the wisdom and skill of all in every act of importance under the trust. Since the rule is one based on the settlor's intent, a provision in the instrument varying the usual result is obviously valid. A settlor may give a majority or any other fraction of the whole group power to do a given act, for example, to sell land or to make investments. The majority so empowered must act in the interests of all the beneficiaries or be subject to control of the court at the instance of the minority.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, TRUSTEE'S POWERS IN GENERAL, § 554. *See also id*. at § 744 ("In the absence of provision otherwise made by court order, statute or settlor, the powers of the trustee are joint and must be exercised as a group. The power to make a contract of sale and a deed of trust property, therefore, must be employed by the trustees acting together."). Another commentator provides: "Generally, when the administration of a trust is vested in co-trustees, they all form one collective trustee and must exercise jointly all those powers that call for their discretion and judgment unless the trust instrument provides otherwise." 76 AM. JUR. 2D, TRUSTS, §321.

For example, in *Conte v. Conte*, the court of appeals affirmed a trial court's order denying a co-trustee's request for reimbursement for attorney's fees expended in connection with a declaratory judgment action brought by another co-trustee. 56 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The court noted that the trust expressly provided that "any decision acted upon shall require unanimous support by all co-trustees then serving," and "[c]learly, Joseph Jr.'s decision to employ counsel to defend against his co-trustee's declaratory judgment action was not the subject of unanimous support by all co-trustees." *Id*. Thus, he was not entitled to reimbursement from the trust for his attorneys' fees, despite the trust's provision that "[e]very trustee shall be reimbursed from the trust for the reasonable costs and expenses incurred in connection with such trustee's duties." *Id*. In a footnote, the court also noted that the other co-trustee had paid for her attorneys from the trust without the consent of the other co-trustee and noted that this was an issue that the successor trustee or beneficiary could raise in a later proceeding. *Id. See also Stone v. King*, No. 13-98-022-CV,2000 Tex. App. LEXIS 8070, 2000 WL 35729200 (Tex. App.—Corpus Christi 2000, pet. denied) (co-trustee had no authority to pay funds to third party without consent of co-trustee or to pay his attorneys for defense of claims).

B. Decisions By Co-Trustees

Co-trustees are obligated to manage the trust together. At common-law, the co-trustees had to act with unanimity: "The traditional rule, in the case of private trusts, was that if there were two or more trustees, all had to concur in the exercise of their powers." SCOTT AND ASCHER ON TRUSTS, WHEN POWERS ARE EXERCISABLE BY SEVERAL TRUSTEES, § 18.3. *See, e.g., Brown v. Donald*, 216 S.W.2d 679, 683 (Tex. Civ. App.—Fort Worth 1949, no writ); *Hart v. First State Bank of Seminole*, 24 S.W.2d 480, 482 (Tex. Civ. App.—El Paso 1930, writ ref'd); *Dodge v. Lacey*, 216 S.W. 400, 402 (Tex. Civ. App.—Fort Worth 1919, writ dism'd w.o.j.).

The Texas Property Code provides that, in the absence of trust direction, co-trustees generally act by majority decision. Tex. Prop. Code § 113.085(a); *Berry v. Berry*, no. 13-18-00169-CV, 2020 Tex. App. LEXIS 1884 (Tex. App.—Corpus Christi March 5, 2020, no pet.). *See also* RESTATEMENT (THIRD) OF TRUSTS, § 39. So, the Trust Code establishes the general rule that if the trust names two cotrustees, they must act jointly in order to bind the trust, and one cannot act on behalf of the trust without the consent of the other, unless the trust agreement specifically authorizes the co-trustee to act unilaterally. Tex. Prop. Code §§111.0035, 113.085.

For example, *Duncan v. O'Shea*, the court affirmed a trial court's ruling that a trust could sell real estate where the majority of co-trustees voted for that action and over the objection of a dissenting co-trustee. No. 07-19-00085-CV, 2020 Tex. App. LEXIS 6564 (Tex. App.—Amarillo August 17, 2020, no pet. history). In another case, the court held that a co-trustee did not have authority to sue a third party on behalf of the trust where he was in the minority. *Berry v. Berry*, no. 13-18-00169-CV, 2020 Tex. App. LEXIS 1884 (Tex. App.—Corpus Christi March 5, 2020, no pet.). His remedy was to sue his co-trustees. *Id*. Further, in *Ward v. Stanford*, the court of appeals held that a trust would not have accelerated a note where two of the three trustees voted against that action. 443 S.W.3d 334 (Tex. App.—Dallas 2014, pet. denied).

There are circumstance when less than a majority of co-trustees can act for the trust. If a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust. Tex. Prop. Code § 113.085(b). If a co-trustee is unavailable to participate and prompt action is necessary to achieve the efficient administration or purposes of the trust or to avoid injury to the trust property or a beneficiary, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust. *Id*. § 113.085(d). Otherwise, an act by less than a majority of the co-trustees (absent trust document approval) is not valid, may result in liability to the improperly acting co-trustee, and may be voided depending on the innocence of the third party.

C. Co-Trustees Have Right and Duty To Manage Trusts And Retain Counsel

The Texas Property Code provides that a co-trustee has a duty to participate in the performance of a trustee's function. Tex. Prop. Code § 113.085(c). So, generally, a co-trustee must participate in the management of a trust. *Id*. There are two exceptions to a co-trustee's duty to participate, which are if the co-trustee:

(1) is unavailable to perform the function because of absence, illness, suspension

> under this code or other law, disqualification, if any, under this code, disqualification under other law, or other temporary incapacity; or
> (2) has delegated the performance of the function to another trustee in accordance with the terms of the trust or applicable law, has communicated the delegation to all other co-trustees, and has filed the delegation in the records of the trust.

Tex. Prop. Code § 113.085(c). If a co-trustee is unavailable to participate and prompt action is necessary to achieve the efficient administration or purposes of the trust or to avoid injury to the trust property or a beneficiary, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust. *Id*. § 113.085(d).

The Restatement (Third) of Trusts provides: "If a trust has more than one trustee, except as otherwise provided by the terms of the trust, each trustee has a duty and the right to participate in the administration of the trust." RESTATEMENT (THIRD) OF TRUSTS, § 81. Furthermore, "each co-trustee has a duty, and also the right, of active, prudent participation in the performance of all aspects of the trust's administration. Implicit in this requirement of prudent participation is a duty of reasonable cooperation among the trustees." *Id*. cmt. c.

D. Liability For Co-Trustee's Conduct

Co-trustees can be liable for the acts of their co-trustees. The Texas Property Code states:

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

Tex. Prop. Code § 114.006. Under this provision a co-trustee has a duty to prevent its co-trustee from committing a serious breach of trust and/or compel a co-trustee to redress such a breach. *In re Cousins*, 551 S.W.3d 913, n.2 (Tex. App.—Tyler 2018, orig. proceeding). One court cited this provision as an example of a trustee being held personally liable for actions taken as a trustee. *Crownover v. Crownover*, No. DR:15-CV-132-AM-CW 2018 U.S. Dist. LEXIS 237669 (W.D. Tex. March 30, 2018).

Even if a co-trustee attempts to delegate authority to a co-trustee, the delegating co-trustee may still be liable for failing to prevent its co-trustee from a serious breach of fiduciary duty. A co-trustee who does not agree with a decision should participate in the decision, document that it voted against the decision, document that it notified the co-trustee of its dissent, and if the transaction is a serious breach of fiduciary duty, retain counsel and bring suit against the co-trustee to prevent the breach.

E. Duty To Sue A Co-Trustee

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

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

Tex. Prop. Code § 113.082. *See also Ramirez v. Rodriguez*, No. 04-19-00618-CV, 2020 Tex. App. LEXIS 1340 (Tex. App.—San Antonio February 19, 2020, no pet.); *Aubrey v. Aubrey*, 523 S.W.3d 299 (Tex. App.—Dallas 2017, no pet.). The term "interested person" means "*a trustee*, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust. Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding." Tex. Prop. Code § 111.004(18) (emphasis added). The

term "Trustee" means "the person holding the property in trust, including an original, *additional*, or successor *trustee*, whether or not the person is appointed or confirmed by a court." Tex. Prop. Code § 111.004(18) (emphasis added). So, "additional" trustees are interested persons and may invoke a court's jurisdiction under this statute.

For example, in *Ramirez v. Rodriguez*, the court held that three co-trustees could sue to remove the fourth co-trustee due to hostility between the co-trustees. No. 04-19-00618-CV, 2020 Tex. App. LEXIS 1340 (Tex. App.—San Antonio February 19, 2020, no pet.). A co-trustee may appeal from a decree of distribution of trust assets, even if the other co-trustees refuse to join the appeal, if the appeal is taken to protect the trust estate. *Commercial National Bank in Nacogdoches v. Hayter*, 473 S.W.2d 561, 567 (Tex. Civ. App.—Tyler 1971, ref. n.r.e.).

In addition to common-law damage claims, a co-trustee can seek the following statutory remedies for breach of trust:

> (a) To remedy a breach of trust that has occurred or might occur, the court may: (1) compel the trustee to perform the trustee's duty or duties; (2) enjoin the trustee from committing a breach of trust; (3) compel the trustee to redress a breach of trust, including compelling the trustee to pay money or to restore property; (4) order a trustee to account; (5) appoint a receiver to take possession of the trust property and administer the trust; (6) suspend the trustee; (7) remove the trustee as provided under Section 113.082; (8) reduce or deny compensation to the trustee; (9) subject to Subsection (b), void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property of which the trustee wrongfully disposed and recover the property or the proceeds from the property; or (10) order any other appropriate relief.

Tex. Prop. Code § 114.008.

V. COMPENSATING ATTORNEYS

A. General Compensation Authority

1. Trust Language

Generally, trustees have the right to compensate attorneys who do work for a trust. Indeed, the power to retain attorneys would be meaningless if trustees did not have the commiserate right to pay them.

The first place to look for any power is the trust document itself. Generally, the trust document governs and should be followed. Tex. Prop. Code §111.0035(b). "The trustee shall administer the trust in good faith according to its terms and the Texas Trust Code." *Tolar v. Tolar*, No. 12-14-00228-CV, 2015 Tex. App. LEXIS 5119 (Tex. App.—Tyler May 20, 2015, no pet.). "The powers conferred upon the trustee in the trust instrument must be strictly followed." *Id.* Accordingly, if a trust document provides instructions on the retention and compensation of attorneys, those instructions should generally be followed.

Drafting Tip: Attorneys that draft trust documents may want to consider adding terms that expressly address a trustee having the right to retain counsel and compensate counsel. Specifically, a drafting attorney, who wants to include a trustee-friendly provision, may want to include an express statement that the trustee can compensate counsel in the interim (before any final resolution) from trust assets regarding any breach of fiduciary duty or related claims without the necessity of seeking court approval for same.

2. Statutory Authority

Trust documents generally do not limit a trustee's power to retain and compensate attorneys. The Texas Property Code has several provisions that impact a trustee's power to compensate attorneys. To the extent the trust instrument is silent, the provisions of the Trust Code govern. Tex. Prop. Code Ann. § 113.001; *Conte v. Conte*, 56 S.W.3d 830, 832 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

Texas Trust Code Section 113.018, which is titled "Employment and Appointment of Agents" provides: "A trustee may employ attorneys, accountants, agents, including investment agents, and brokers reasonably necessary in the administration of the trust estate." Tex. Prop. Code § 113.018. One would think that from a fair reading of this statute that if a trustee has the power to retain an attorney, the trustee has the power to pay for the attorney. Indeed, few attorneys will perform their services for free for a trust. But one court has held that "Section 113.018 of the Texas Property Code…authorizes a trustee to employ an attorney, but it does not address the conditions for reimbursement of attorney's fees from the trust estate." *Conte v. Conte*, 56 S.W.3d at 834.

Note that this provision has an important limitation: "reasonably necessary in the administration of the trust estate." Generally, trust administration refers to the trustees' management of trust property according to the trust document's terms and for the benefit of the beneficiaries after the settlor's death. So, if a court or jury later finds that it was not "reasonably necessary in the administration of the trust estate" for the trustee to retain an attorney, the trustee may be found in violation of the statute and may be in breach of fiduciary duties. One example of such an occasion may be when a trustee has breached

his fiduciary duty and a beneficiary has sued the trustee for that breach. A judge or jury may find that a trustee who is defending against a correct breach of fiduciary duty claim did not retain an attorney who was "reasonably necessary" for "the administration of the trust estate." Of course, the parties may not know until the end of the litigation whether the trustee breached a fiduciary duty and whether the trustee had the right to retain an attorney under this provision. For example, in *Stone v. King*, the court of appeals affirmed a finding that a trustee breached his fiduciary duties in converting trust property to pay for his attorneys' fees. No. 13-98-022-CV, 2000 Tex. App. LEXIS 8070, 2000 WL 35729200, at *8 (Tex. App.—Corpus Christi Nov. 30, 2000, pet. denied).

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

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

Tex. Prop. Code § 114.063. Note that the statute provides reimbursement for "expenses incurred while administering or protecting the trust, ***or*** because of the trustee's holding or owning any of the property." Tex. Prop. Code § 114.063 (a)(2)(emph. added). Moreover, the use of the disjunctive "or" makes it clear that a trustee's right to reimbursement from trust funds for expenses arises where the trustee is administering or protecting the trust or because the trustee is holding or owning any trust property. A trustee has a statutory lien against trust property to ensure the trustee is reimbursed for expenses incurred. *Id*. § 114.063(b).

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

Section 114.063 does not expressly contain a requirement that the reimbursement be for expenses that are "reasonable and necessary" or "equitable and just." *Id*. at § 114.063. So, this statute does not appear to require a trustee to prove at the time of reimbursement that the attorney's fees and litigation expenses are reasonable and necessary or equitable and just.

Rather, Trust Code section 114.064 provides that, "[i]n any proceeding under this code, the Court may make such award of costs and *reasonable and necessary* attorney's fees as may seem *equitable and just*." Tex. Trust Code § 114.064; *Alpert v. Riley*, 274 S.W.3d 277, 295 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *Hachar v. Hachar*, 153 S.W.3d 138, 142 (Tex. App.—San Antonio 2004, no pet.). So, where an interested party (including a trustee) files a "proceeding" under the Texas Trust Code, a court may award any party attorney's fees that the court finds are equitable and just and that are also found to be necessary and reasonable (the later findings may have to be made by a jury). The Texas Property Code describes the following jurisdiction of district courts regarding trust disputes:

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

Tex. Prop. Code § 115.001(a).

The granting or denying of attorney's fees to a trustee or beneficiary under section 114.064 is within the sound discretion of the trial court, and a reviewing court will not reverse the trial court's judgment absent a clear showing that the trial court abused its discretion by acting without reference to any guiding rules and principles. *Lee v. Lee*, 47 S.W.3d 767, 793-794 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Lyco Acquisition 1984 Ltd. P'ship v. First Nat'l Bank*, 860 S.W.2d 117, 121 (Tex. App.—Amarillo 1993, writ denied). Moreover, unless waived, a party is entitled to a jury finding on whether the fees were reasonable and necessary. *See Lesikar v.*

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

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

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

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

Another theory is that Section 114.063 does not address the payment of attorney's fees at all, just other expenses. Section 114.064 (which specifically provides for the recovery of attorney's fees) was adopted two years after Section 114.063 (which makes no reference to attorney's fees). If the Legislature had intended Section 114.063 to cover attorney's fees and expenses, why did it later enact Section 114.064 to specifically govern attorney's fees? The specific Section 114.064 governs the issue of attorney's fees and the general Section 114.063 does not. *See Harris County Appraisal Dist. v. Texas Workforce Comm'n*, 519 S.W.3d 113, 122

(Tex. 2017) (a later specific statute prevails over an earlier general one).

There are some additional Texas Property Code Provisions that are more general in nature, but that support a trustee's power to compensate attorneys. The statutes provide that a trustee may exercise any power necessary to carry out the purpose of the trust, except to the extent that the terms of the trust conflict with a provision of the Code or expressly limit the trustee's power. Tex. Prop. Code Ann. §§ 113.001-.002. Further, a trustee must manage the property "as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust," and must "exercise reasonable care, skill, and caution" in doing so. Tex. Prop. Code Ann. § 117.004.

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

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

Tex. Civ. Prac. & Rem. Code § 37.004(a). Section 37.005 provides:

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

> administrator regarding fiduciary fees and the settling of accounts.

Tex. Civ. Prac. & Rem. Code § 37.005.

A plaintiff may be entitled to an award of attorney's fees regarding its declaratory judgment request: "In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." Tex. Civ. Prac. & Rem. Code § 37.009. This is not a "prevailing party" statute, and the court can award fees as it determines is equitable and just. *Hachar v. Hachar,* 153 S.W.3d 138, 2004 Tex. App. LEXIS 10477 (Tex. App.—San Antonio Nov. 24, 2004, no pet.). For example, in an action declaring that a decedent's adopted grandchildren were not beneficiaries of a trust, it was equitable and just under Section 37.009 to award fees from the trust to the adopted grandchildren. *In re Ellison Grandchildren Trust*, 261 S.W.3d 111 (Tex. App.—San Antonio 2008, no pet.).

It seems reasonably clear that the Texas Trust Code allows a trustee can retain and compensate attorneys for routine trust administration issues, such as preparing deeds, negotiating oil and gas leases, filing suit to collect rent or royalties, etc. These payments can be made immediately, subject to a beneficiary or successor trustee or co-trustee later challenging the payment as being a breach of fiduciary duty. For example, if a trustee compensates an attorney for unnecessary work or for rates that are not reasonable, then some party may later allege that the trustee breached its fiduciary duties in making those payments from trust property. But that does not impact a trustee's power to make the payment at the outset.

3. Common Law Authority

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

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

Restatement (Third) of Trusts § 88 cmt. b. The trustee can properly incur expenses appropriate for the collection and protection of trust assets. *Id*. The trustee has a duty to exercise such care and skill as a person of ordinary prudence would exercise in incurring the expense. *Id*. The trustee can properly incur reasonable expenses in employing lawyers. *Id*. The trustee's right to indemnification "applies even if the trustee is unsuccessful in the dispute, as long as the trustee's conduct was not imprudent or otherwise in violation of a fiduciary duty." *Id*. cmt. d.

However, "if expenses that are improper have been paid from the trust estate, the trustee ordinarily has a duty to restore the amount of the improper payment(s) to the trust; if improper expenses have been paid from the trustee's personal funds, the trustee ordinarily is not entitled to reimbursement for those expenditures." *Id*. at cmt. a. "The trustee cannot properly incur expenses, however, in employing agents or others to do acts if the employment would involve a violation of the trustee's duties as defined either by law or by the terms of the trust." *Id*. at cmt. c. The Uniform Prudent Investor Act § 7 states: "In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the trust assets, the purposes of the trust, and the skills of the trustee." UPIA § 7. The comment to that section aptly begins: "Wasting beneficiaries' money is imprudent." *Id*. cmt.

The Texas Supreme Court discussed a trustee's ability to hire and pay professionals during the administration of a trust in *Corpus Christi Bank & Trust v. Roberts*, 597 S.W.2d 752, 753-54 (Tex. 1980). In this case, a trustee hired a real-estate manager to manage and rent an apartment complex. *Id*. at 753. The trustee paid the real-estate manager from trust assets. *Id*. The trust beneficiaries challenged the fees paid to the manager. *Id*. The Texas Supreme Court analyzed Article 742b-25 of the Texas Trust Act, the predecessor to Trust Code Section 113.018. *Id*. at 754. Article 7425b-25 provided that a trustee was authorized to "employ attorneys, accountants, agents, and brokers reasonably necessary in the administration of the trust estate." *Id*. The trust instrument in the case provided that the trustee had a duty to rent or lease trust. *Id*. The Texas Supreme Court held that the trustee had the authority to hire and pay the real-estate manager pursuant to that duty. According to the Court, "under the Texas Trust Act and the terms of the trust agreement the Trustee was granted authority to hire such agents as he determined, in his discretion, were reasonably necessary for the management and control of the rental properties." *Id*. The Court reversed the lower court's decision that had ordered the deceased trustee's estate to reimburse the trust for the fees paid to the real-estate manager. *Id*. at 755.

Under the common law, it seems reasonably clear that a trustee can retain and compensate attorneys for routine trust administration issues. *See Clement v. Merchants National Bank,* 493 So.2d 1350 (Ala. 1986); *Wells Fargo Bank v. Superior Court*, 24 Cal.4th 201, 990 P.2d 591, 91 Cal. Rptr.2d 716 (2000); *Wilbank v. Gray*, 795 So.2d 541 (Miss. App.

2001); *Estate of Dern Family Trust*, 279 Mont. 138, 928 P.2d 123 (1996); *Matter of Estate of Matsis*, 280 App. Div. 2d 480, 720 N.Y.S.2d 179 (2001); *First National Bank v. Stricklin*, 347 P.2d 652 (Okla. 1959); *Masters v. Bissett*, 101 Or.App. 163, 790 P.2d 16 (1990).

This analysis, however, does not necessarily apply to beneficiaries or a co-trustee suing a trustee for breaching duties. The Restatement provides:

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

RESTATEMENT (THIRD) OF TRUSTS § 88, at cmt. d.

There is no question that at the end of the litigation, a court can award fees from the trust or from a trustee, individually, as it deems equitable and just. Tex. Prop. Code 114.064. *See, e.g., In re Trusteeship of Williams*, 591 N.W.2d 743, 748-749 (Minn. App. 1999) ("The determination of whether attorney fees [of trustees] will be chargeable to the trust is in the sound discretion of the district court. A trustee is entitled to reasonable attorney fees incurred in good faith in defending its administration of the trust, in defending a proceeding for the benefit of the trust, and in defending a beneficiary's challenge to the trust's administration. However, where a trustee has acted in bad faith or has been guilty of fraud or inexcusable neglect that has caused loss to the estate, the trustee may be denied attorney fees."); *Atwood v. Atwood*, 25 P.3d 936, 952 (Okla. Civ. App. 2001). Courts have awarded trustees the costs of their successful defenses. *See, e.g., In re Couch Trust*, 723 A.2d 376 (Del. Ch. 1998); *Estate of Beach*, 15 Cal.3d 623, 125 Cal.Rptr. 570, 542 P.2d 994 (1975); *Estate of Ber-thot*, 312 Mont. 366, 380, 59 P.3d 1080, 1089 (2002); *Jessup v. Smith*, 223 N.Y. 203, 207, 119 N.E. 403, 404 (1918); *In re Francis E. McGillick Foundation*, 537 Pa. 194, 642 A.2d 467 (1994) *Stepp v. Foster*, 259 Va. 210, 524 S.E.2d 866 (2000).

Of course, the converse is also true; courts have denied trustees the right to recover fees from trusts where they have been unsuccessful in the litigation. *See, e.g., Citizens & Southern National Bank v. Haskins*, 254 Ga. 131, 327 S.E.2d 192 (1985); *In re Drake's Will*, 195 Minn. 464, 263 N.W. 439 (1935); *Baker Boyer National Bank v. Garver*, 43 Wash.App. 673, 719 P.2d 583 (1986); *Marshall v. First National Bank*, 97 P.3d 830 (Alaska 2004). For example, in *Benge v. Roberts*, a beneficiary sued co-trustees for not raising claims against a prior trustee based on earlier litigation between the beneficiary and the prior trustee. No. 03-19-00719-CV, 2020 Tex. App. LEXIS 6335 (Tex. App.—Austin August 12, 2020, no pet. history). The beneficiary argued that the co-trustees were breaching duties by incurring attorneys' fees in an appeal of the underlying suit between the beneficiary and the prior trustee. The court held that if the beneficiary "is successful on appeal, the cause is remanded, and Benge is ultimately successful after a trial on the merits (and any further appeal), the Trust would not be responsible for the co-trustees' legal fees. *See DuPont v. Southern Nat'l Bank*, 575 F. Supp. 849, 864 (S.D. Tex. 1983) (noting that under Texas law, trustee is not entitled to reimbursement for expenses related to litigation resulting from fault of trustee), aff'd in part and vacated and remanded in part, 771 F.2d 874 (5th Cir. 1985)"). A fiduciary cannot recover attorney's fees for conducting unreasonable or unnecessary litigation against his beneficiary. *In re Estate of Bessire*, 399 S.W.3d 642, 650 (Tex. App.—Amarillo 2013, pet. denied). "[W]hen the fiduciary's omission or malfeasance is at the root of the litigation, the estate will not be required to reimburse the fiduciary for his or her attorneys' fees." *Tindall v. State By &Through Texas Dept. of Mental Health & Mental Retardation*, 671 S.W.2d 691, 693 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.). *Accord, In re Estate of Washington*, 289 S.W.3d 362, 370 (Tex. App.—Texarkana 2009, pet. denied).

So, whether a trustee is entitled to reimbursement form the trust for prosecuting or defending a breach of fiduciary duty claim is largely dependent on the outcome of the claim.

B. Trustees Paying Attorneys In The Interim

Paying litigation expenses is a more complicated issue in disputes between beneficiaries and trustees or co-trustees concerning an alleged breach of trust where the trustee wants to pay its attorneys in the interim and before a final resolution of the claims. In other words, can a trustee pay its attorneys from trust funds in defending against a claim of breach of fiduciary duty before a court or jury finds for the trustee? The answer to that question likely depends on the standards that apply in allowing a trustee to reimburse itself in this circumstance.

1. Power To Pay Attorneys

The first issue is whether the trustee has the power to pay attorneys from the trust. Whether a trust requires unanimous consent or a majority vote, if the required vote does allow one or the other co-trustees to retain counsel, then they cannot do so absent court intervention. If one co-trustee has access to the trust assets, it should not use those assets to pay for an attorney absent appropriate approvals. For example, in *Conte v. Conte*, the court of appeals affirmed a trial court's order denying a co-trustee's request for reimbursement for attorney's fees expended in connection with a declaratory judgment action brought by another co-trustee. 56 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The court noted that the trust expressly provided that "any decision acted upon shall require unanimous support by all co-trustees then serving," and "[c]learly, Joseph Jr.'s decision to employ counsel to defend against his co-trustee's declaratory judgment action was not the subject of unanimous support by all co-trustees." *Id*. Thus, he was not entitled to reimbursement from the trust for his attorneys' fees, despite the trust's provision that "[e]very trustee shall be reimbursed from the trust for the reasonable costs and expenses incurred in connection with such trustee's duties." *Id*. In a footnote, the court also noted that the other co-trustee had paid for her attorneys from the trust without the consent of the other co-trustee and noted that this was an issue that the successor trustee or beneficiary could raise in a later proceeding. *Id*.

2. Trustee As Plaintiff

The second issue is whether a trustee *should* use trust assets to pay for attorneys in the interim. There is authority that a trustee bringing the claim (policing its co-trustee) should have access to trust assets to pay for that activity. IA WALTER L. NOSSAMAN & JOSEPH L. WYATT, JR., TRUST ADMINISTRATION AND TAXATION, §§ 32.007 (2d rev. ed. 2004) ("a trustee suing co-trustees for their breach of trust may be allowed attorneys' fees for his efforts."). The Restatement provides:

> In hiring counsel for the trustees in their fiduciary capacity, the selection is ordinarily made by majority vote of the co-trustees (§ 39), with all of the trustees entitled to participate in meetings and other aspects of the counseling process and to have access to communications from the trustees' counsel. If separate counsel is reasonably needed to aid a trustee in the performance of a fiduciary duty, as may be necessary under Subsection (2), appropriate attorney fees are payable or reimbursable from the trust estate…
>
> [Subsection (2)]. When a trust has multiple trustees, each trustee ordinarily (cf. Comment b) has a duty to exercise reasonable care to prevent a co-trustee from committing a breach of trust. Thus, for example, it is a breach of trust for a trustee knowingly to allow a co-trustee to commit a breach of trust. And, if a breach occurs, the trustee must take reasonable steps seeking to compel the co-trustee to redress the breach of trust. *If a trustee needs independent counsel to fulfill these duties, reasonable attorney fees may be paid or reimbursed from the trust.*
>
> RESTATEMENT (THIRD) OF TRUSTS § 81(d).

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

3. Trustee As Defendant

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

Some authority seems to suggest that a trustee has the ability to do so. In *In the Guardianship of Hollis*, a special needs trust's trustee used $67,000 to build a pool on the beneficiary's parent's property. No. 14-13-00659-CV, 2014 Tex. App. LEXIS 12038 (Tex. App.—Houston [14th Dist.] November 4, 2014, no pet.). The trial court ordered show cause hearings to determine the appropriateness of the expense. The trustee then spent $23,000 in attorney's fees to defend itself in the show cause hearings. Court removed the trustee because it sought reimbursement from trust funds for defending is actions. The trustee appealed the order removing it. The court of appeals reversed. It held that one ground for removal is being guilty of gross misconduct or mismanagement, which the court noted meant more than ordinary misconduct and implied serious and willful wrongdoing. The appellate court reversed the removal, stating that the trustee had the right to reimburse itself for reasonable costs and expenses in connection with administering or protecting the trust. *Id*. The court cited to *Grey v. First Nat'l Bank*, 393 F.2d 371 (5th Cir. 1968) (stating that a trustee may charge his trust for attorney's fees that the trustee, acting reasonably and in good faith, incurs in defending a charge of breach of trust). *See also Dupont v. Southern Nat'l Bank of Houston*, 771 F.2d 874, 882 (5th Cir. 1985)).

However, there is authority that a trustee defending against a breach of duty claim should not have access to trust assets to pay for its defense until a court determines that it did not violate a duty. "Where a trustee is found to have committed a breach of trust, the trustee is not entitled to attorney's fees for defending the suit..." *duPont v. S. Nat'l Bank*, 575 F. Supp. 849, 864 (S.D. Tex. 1983), *aff'd in part, rev'd in part on other grounds*, 771 F.2d 874 (5th Cir. 1985); *see also Alpert v. Riley*, No. H-04-CV-3774, 2011 U.S. Dist. LEXIS 84582, 2011 WL 3325884(S.D. Tex. Aug. 2, 2011); *Moody Found, v. Estate of Moody*, No. 03-99-0034-CV, 1999 Tex. App. LEXIS 8597, at *11 (Tex. App. —Austin Nov. 18, 1999, pet. denied) (not designated for publication) ("A trustee is not entitled to reimbursement for expenses that do not confer a benefit upon the trust estate, such as expenses related to litigation resulting from the fault of the trustee." (citing 3 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, SCOTT ON TRUSTS § 188.6, at 70 (4th ed. 1988)).

Commentators have stated that a trustee cannot rely on Section 114.063 to authorize the payment of attorney fees arising from the defense of a breach of fiduciary duty claim. *See Joyce C. Moore, Recovering Attorney Fees In Probate And Trust Litigation, State Bar of Texas, Advanced Estate Planning and Probate Course*, June 7, 2017. *See also* Mary C. Burdette, Enforcing Beneficiaries' Rights, COLLIN COUNTY PROBATE BAR, March 11, 2011.

Indeed, if a trustee uses trust assets to pay for its attorney's fees in the interim, it risks a finding of breaching fiduciary duties by doing so where the trustee is later found liable on the underlying claim. For example, in *Stone v. King*, the court of appeals affirmed a finding that a trustee breached his fiduciary duties in converting trust property to pay for his attorneys' fees. No. 13-98-022-CV, 2000 Tex. App. LEXIS 8070, 2000 WL 35729200, at *8 (Tex. App.—Corpus Christi Nov. 30, 2000, pet. denied).

In *In re Nunu*, an estate beneficiary sued the executrix to have her removed due to alleged breaches of fiduciary duty and also sought to have the court refuse to pay her attorneys in representing her in a removal action and/or sought to have those fees forfeited. No. 14-16-00394-CV, 2017 Tex. App. LEXIS 10306 (Tex. App.—Houston [14th Dist.] November 2, 2017, pet. denied). Texas Estates Code section 404.0037 provides: "[a]n independent executor who defends an action for the independent executor's removal in good faith, whether successful or not, shall be allowed out of the estate the independent executor's necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings." *Id*. (citing Tex. Est. Code Ann. § 404.0037(a)). The executrix used estate funds to pay at least some of the attorneys' fees incurred in her defense in this suit. The beneficiary challenged the payment of the attorneys' fees.

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

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

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

> There is no such order in the record, and the trial court could not properly have approved payments made before the removal action had been decided.... Although Nancy appears to have assumed that she could pay her legal fees without first obtaining findings that the fees were both necessary and reasonable, the statute does not authorize such a procedure."

Id. The court sustained the beneficiary's issue in part and remanded to the trial court the determination of the amount to be paid from the estate for the executrix's "necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings." *Id*. *See also Klein v. Klein*, 641 S.W.2d 387, 387 (Tex. App.—Dallas 1982, no writ) (dismissing an executor's claims for attorneys' fees and expenses as premature because the removal action was still pending).

In *Moody Foundation v. Estate of Moody*, the court of appeals reviewed a trial court's order allowing a trustee's request for reimbursement. 1999 Tex. App. LEXIS 8597, at *11. During his lifetime a trustee served as a trustee of a charitable trust foundation (Foundation) for over 30 years until his removal following an indictment for fraud. *Id*. Both a criminal prosecution for fraud and an Internal Revenue Service action for acts of self-dealing ensued and trustee incurred legal fees in excess of $1 million. Following the trustee's death, his estate (Estate) sued the Foundation for reimbursement, and the probate court granted that reimbursement.

The court of appeals described a trustee's right to reimbursement as follows:

> Generally speaking, a trustee may incur expenses that are necessary to carry out the purposes of the trust. *See* RESTATEMENT (SECOND) OF TRUSTS § 188. For example, it is appropriate for a trustee to incur expenses for costs in maintaining or defending a judicial proceeding for the benefit of the trust estate, such as litigation to resist claims that may result in a loss to the trust estate. *See id.; see also* 3 SCOTT ON TRUSTS § 188.4 at 62 (4th ed. 1988). When a trustee properly incurs expenses, he is entitled to reimbursement out of the trust estate for such expenses. *See* RESTATEMENT (SECOND) OF TRUSTS § 244. Where an expense is not properly incurred, however, the trustee is not entitled to reimbursement from the estate. *See id*. § 245. A trustee is not entitled to reimbursement for expenses that do not confer a benefit upon the trust estate, such as those expenses related to litigation resulting from the fault of the trustee. *See* 3 SCOTT ON TRUSTS § 188.6 at 70; *duPont v. Southern Nat'l Bank*, 575 F. Supp. 849, 864 (S.D. Tex. 1983), modified, 771 F.2d 874 (5th Cir. 1985).

The Texas Trust Code authorizes the reimbursement of a trustee from trust principal or income and specifically provides for awards of attorney's fees. Section 114.063, entitled "General Right to Reimbursement," provides that "[a] trustee may discharge or reimburse himself from trust principal or income or partly from both for . . . advances made for the convenience, benefit or protection of the trust or its property" and for "expenses incurred while administering or protecting the trust or because of the trustee's holding or owning any of the trust property." Tex. Prop. Code Ann. § 114.063 (emphasis added). Section 114.064 of the Code provides: "In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." *Id*. § 114.064 (emphasis added).

It is clear that under section 114.064, the grant or denial of attorney's fees is within the sound discretion of the trial court. *See Lyco Acquisition 1984 v. First Nat'l Bank*, 860 S.W.2d 117, 121 (Tex. App.—Amarillo 1993, writ denied). We will not reverse the trial court judgment unless there is a clear showing that the trial court abused its discretion. *See id.* The test for abuse of discretion is whether the trial court acted unreasonably or without reference to any guiding rules or principles. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

Under Texas law, a trustee may charge the trust for attorney's fees the trustee, acting reasonably and in good faith, incurs defending charges of breach of trust. *See Grey v. First Nat'l Bank*, 393 F.2d 371, 387 (5th Cir. 1968); *duPont*, 575 F. Supp. at 863; *see generally* 90 C.J.S. Trusts § 285 (1955); *Rowland v. Moore*, 168 S.W.2d 911, 916 (Tex. Civ. App.—Fort Worth), *rev'd on other grounds*, 141 Tex. 469, 174 S.W.2d

> 248 (Tex. 1943). The Estate, as the plaintiff seeking reimbursement from the Foundation, bore the burden in the probate court of establishing that Moody was acting reasonably and in good faith when he engaged in the conduct underlying the federal indictment and the tax court proceeding.

Id.

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

> Having reviewed the Fifth Circuit's opinion concerning Moody's conduct underlying the criminal case, we conclude that the evidence is insufficient to support the probate court's finding that Moody acted reasonably and in good faith as to 100% of the conduct alleged. The Estate bears the burden of establishing that Moody's conduct was reasonable and in good faith, and nothing in the Fifth Circuit's opinion satisfies this burden.
> …
>
> The Estate may be reimbursed for legal expenses incurred by Moody in the tax case if it establishes that Moody's conduct underlying the case was reasonable and in good faith. To meet its burden, the Estate relies solely upon the opinion of the tax court. The court determined that Moody did not personally benefit from most Foundation grants. Thus, the court concluded that in most instances Moody had not engaged in self-dealing as defined by the Internal Revenue Code. This conclusion does not establish that Moody's actions as a trustee were reasonable. Many of Moody's acts, while they may not have constituted self-dealing under the Internal Revenue Code, cannot be considered reasonable conduct for a foundation trustee.
> While Moody may not have personally, directly or indirectly, benefitted from these transactions, his conduct was not shown to be reasonable. He breached his duty of loyalty as a trustee by failing to use the skill and prudence of a reasonable person in administering the trust. *See Ames*, 757 S.W.2d at 476; *Risser*, 739 S.W.2d at 888; *see also Ertel*, 852 S.W.2d at 21. His naivete and lack of business acumen resulted in the Foundation funding projects of dubious value. Where reasonable conduct is lacking, it is irrelevant that, for the most part, the tax court found that Moody did not knowingly abuse the trust or act in bad faith. *See Republic Nat'l Bank & Trust Co.*, 105 S.W.2d at 885. Thus, the probate court erred in finding that Moody acted reasonably and in good faith as to 93.99% of the conduct alleged in the tax court case.

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

In *Stone v. King*, the court of appeals affirmed a finding that a trustee breached his fiduciary duties in converting trust property to pay for his attorneys' fees. No. 13-98-022-CV, 2000 Tex. App. LEXIS 8070, 2000 WL 35729200, at *8 (Tex. App.—Corpus Christi Nov. 30, 2000, pet. denied). The court stated:

> The trial court also found Stone breached his fiduciary duties as trustee and the PMLA by converting $37,000 in trust funds held by KSP for his own use. Stone contends he was entitled to engage the services of an attorney to represent the interests of the trust and himself in his capacity as trustee, with attorney's fees constituting a trust expense. In support of his argument, Stone cites section 113.018 of the Texas Trust Code. *See* Act of May 22, 1999, 76th Leg., R.S., ch. 794, 1999 Tex. Sess. Law Serv. 3417 (amended 1999) (current version at Tex. Prop. Code Ann. § 113.018 (Vernon Supp. 2000)). Section 113.018 provides "[a] trustee may employ attorneys . . . reasonably necessary in the administration of the trust estate." Tex. Prop. Code Ann. § 113.018 (Vernon Supp. 2000). Stone argues King's effort to remove him as trustee was an attack on the trust, which he had a duty to defend.
>
> King argues that by taking trust funds from KSP to pay lawyers without his approval, Stone violated the trust provision requiring all actions to be taken jointly. He further argues Stone did not use the funds to defend the trust, but rather, to pay for an attorney to sue King.
> The trial court concluded Stone converted $37,000 of KSP funds for his own use. Conversion is the wrongful exercise of

> dominion and control over another's property in denial of, or inconsistent with, his rights. *Virgil T. Walker Constr. Co. v. Flores*, 710 S.W.2d 159, 160 (Tex. App.—Corpus Christi 1986, no writ). It is undisputed that Stone took approximately $37,000 from the KSP account for attorneys' fees without King's consent. It is also undisputed that the trust owned ninety-nine percent of KSP and King individually owned one percent.
>
> Under Texas law, a trustee may charge the trust for attorney's fees that the trustee, acting reasonably and in good faith, incurs defending charges of breach of trust. *See Grey v. First Nat'l Bank*, 393 F.2d 371, 387 (5th Cir. 1968) (applying Texas law); *DuPont v. Southern Nat'l Bank*, 575 F. Supp. 849, 864 (S.D. Tex. 1983), *modified*, 771 F.2d 874 (5th Cir. 1985); *see generally* 90 C.J.S. Trusts § 285 (1955). A trustee is not entitled to reimbursement for expenses that do not confer a benefit upon the trust estate, such as those expenses related to litigation resulting from the fault of the trustee. *See DuPont*, 575 F. Supp. at 864. We have concluded that Stone breached his fiduciary duties by failing to distribute trust funds after being directed to do so by King's attorney and by adding D'Unger as a signatory to the trust account. Thus, the trial court could reasonably have concluded that the litigation seeking to remove Stone as trustee resulted from Stone's improper actions, that Stone did not act reasonably and in good faith in incurring the attorney's fees, and was, therefore, not entitled to charge the trust for the fees. Viewed in the light most favorable to the trial court's judgment, we hold the evidence is legally and factually sufficient to support the conclusion that Stone breached his fiduciary duties by converting $37,000 in trust funds for his own use.

Id.

In *American National Bank v. Biggs*, the court considered a trustee's reimbursement request for attorney's fees under equitable grounds. 274 S.W.2d 209 (Tex. Civ. App.—Beaumont 1962, no writ). The court held that such a payment would depend on the circumstances, including the trustee's good faith and reasonableness of his actions:

> There are some incidental matters yet to be discussed, but it is our conclusion, which we will announce at this point, that under the facts concerning the actions of the trustees Leon Mitchell and Vick Mitchell, that is, their good faith, the reasonableness of their actions, their reliance on advice of counsel, their attempt at performance of a duty, and the ambiguity of the will as the source of their actions, the trial court, on the basis of equitable considerations, was authorized … to charge this fee to the entire trust estate, remaindermen as well as life tenants, that is, to the principal of the estate.

Id. at 222. This case would seem to indicate that a trial court would need to make this type of fact-specific determination before a trustee is entitled to reimbursement for attorney's fees.

In *duPont v. S. Nat'l Bank*, the court held as follows:

> A trustee can properly incur such expenses as are expressly authorized by the terms of the trust and such expenses as, although not expressly authorized, are necessary or appropriate to carry out the purposes of the trust. *Mason v. Mason*, 366 S.W.2d 552, 554 (Tex. 1963). Where a trustee properly incurs expenses, he can pay them out of the trust estate and is entitled to a credit for such payments in his accounts. On the other hand, where an expense is not properly incurred the trustee is not entitled to reimbursement out of the trust estate. 3 Scott, §§ 188 and 244.
>
> It is the duty of the trustee to defend claims against the trust estate, which if successful would cause loss to the trust estate. *See, Mason*, supra at 554; *First National Bank of Port Arthur v. Sassine*, 556 S.W.2d 116, 117 (Tex. Civ. App. —1977, no writ). Specifically, it is the duty of the trustee to the beneficiaries to prevent the destruction of the trust. Thus, where the settlor seeks to rescind the trust on the ground that the settlor was induced by mistake to create the trust, it is the duty of the trustee to defend the trust, and resist proceedings to the extent to which it is reasonable to require him to do so. *Mason*, supra at 554. Reasonable expenses, including those incurred in the employment of attorneys, in defending a trust against an unjustified attack, are payable out of the trust property. TEX. REV. CIV. STAT. ANN. art. 7425b-36 (Vernon's 1960 & Supp. 1982-83). *Van Gorden v. Lunt*, 234 Iowa 832, 13 N.W.2d 341 (1944); *Blackhurst v. Johnson*, 72 F.2d

644 (8th Cir.1934); *First National Bank of Wichita Falls v. Stricklin*, 347 P.2d 652 (Okl. 1959); 3 Scott § 178; Bogert, § 581 (1981).

Generally, an expense is properly incurred when it can be shown that the expense (i) is not excessive in amount, (ii) is beneficial to the beneficiaries and the trust estate and not solely for the benefit of the trustee; and (iii) is not caused by the personal fault or error of the trustee. *See generally*, Bogert, § 801 (1981). *See Birmingham Trust National Bank v. Harrison*, 403 So.2d 224 (Ala. 1981) (per curiam) (co-trustee is entitled to recover attorney fees for separate counsel when incurred in good faith and to protect the trust's interest). Generally, a fiduciary is under a duty to protect an estate from unnecessary expense. *Crowell v. Styler*, 314 Mass. 122, 49 N.E.2d 599 (1943). Specifically, in the case of attorney fees, a trustee is entitled only to reimbursement from the trust estate for fees which constitute "a fair allowance for the professional work necessary to be done in the proper protection of the trustee's interests." *In Re Delamater's Estate*, 51 N.Y.S.2d 399 (1944), *aff'd*, 292 N.Y. 518, 54 N.E.2d 205 (1944), or "which the trustee, acting reasonably and in good faith, incurs in defense of litigation charging him with breach of trust." *Grey v. First National Bank in Dallas*, 393 F.2d 371, 387 (5th Cir.), cert. denied, 393 U.S. 961, 89 S. Ct. 398, 21 L. Ed. 2d 374 (1968).

DuPont III argues that a trustee may not obtain reimbursement for litigation expenses from the trust estate where those expenses are incurred not for the benefit of the trust estate but for the benefit of the trustee individually. Although a litigation expense incurred to prevent the Defendant's removal as trustee is a proper expense performed on behalf of the Trust, *see In re Gerber Trust*, 117 Mich.App. 1, 323 N.W.2d 567, 572 (1982), where legal fees are paid to counsel whose efforts are principally directed towards protecting the trustee from an expense which does not benefit the trust—in this case it is alleged that Brady has incurred litigation expenses to defend against an allegation of negligence—those fees must be paid by the trustee, without reimbursement from the trust estate. *In re Corcoran Trusts*, 282 A.2d 653 (1971), *aff'd sub nom., Bankers Trust Company v. Duffy*, 295 A.2d 725 (Del.1972).

> Additionally, where litigation results from the fault of the trustee, he is not entitled to charge the expenses of litigation against the trust estate. Thus, where a trustee is found to have committed a breach of trust, the trustee is not entitled to attorney's fees for defending the suit, *see, Matter of Guardianship of Brown, Ind.App.*, 436 N.E.2d 877, 891 (1982), or where the trustee engages in obstructive tactics in order to prolong litigation, his legal fees must be borne by him individually. *April v. April*, 245 A.D. 841, 281 N.Y.S. 538 (1935) (per curiam). Finally, where the trustee engages in such conduct which requires his removal, he is not entitled to reimbursement from the trust estate for attorney's fees in connection with his resistance to such action. *Miller v. Burford*, 259 Cal.App.2d 536, 66 Cal.Rptr. 756 (1968).
>
> As previously found, duPont III's contentions are not supported by the evidence in this case. Specifically, there is no evidence other than duPont III's conjecture that legal fees paid to counsel to defend Brady against future litigation were incurred in bad faith or for a purpose other than for the benefit of the Trust. Additionally, there is insufficient evidence in the record upon which to sustain a finding that Brady (or SNB or Garner) engaged in obstructive tactics or conduct which would entitle Plaintiff to relief. Accordingly, Plaintiff is not entitled to recovery of attorney fees.

575 F. Supp. 849, 864 (S.D. Tex. 1983), *aff'd in part, rev'd in part on other grounds*, 771 F.2d 874 (5th Cir. 1985).

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

attorney's fees to do any proof to show what's reasonable and necessary at this stage in the game." *Id*. The trial court denied the request, and the plaintiff filed a petition for writ of mandamus seeking an order from the court of appeals to order the trial court to grant the motion.

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

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

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

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

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

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

Id.

The plaintiff also argued that he must utilize personal funds to pursue the litigation is tantamount to an assertion that doing so makes the proceeding more costly or inconvenient. The court held that this fact, standing alone, did not warrant mandamus review. "This is particularly true given that, as previously discussed, the denial does not preclude Cousins from presenting a claim for reimbursement at trial and, consequently, Respondent's failure to grant the motion does not result in an irreversible waste of

resources." *Id*. The court of appeals denied the petition for writ of mandamus, concluding that an ordinary appeal of the order denying the motion served as a plain, adequate, and complete remedy.

Courts from other jurisdictions would support the position that a trial court should make some finding of good faith defense before a trustee can pay for attorneys from the trust for defending breach claims. There is a case from California that addresses this issue. In *People Ex Rel Harris v. Shine*, the trustee petitioned for advance fees from the trust for defense of a petition for removal, subject to repayment if the trustee was ultimately found not entitled to indemnity. 224 Cal. Rptr.3d. 380 (2017). The court noted that the issue was the trustee's "… entitlement to *interim or pendente lite* fees (i.e. fees for ongoing litigation not yet resolved on the merits)." *Id*. The court noted that this issue is not well developed in the case law. *Id.* at 390. The court stated the following standard:

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

Id. at 392.

In *Wells Fargo Bank v. Superior Court*, the court held "[A] trustee has a right to charge the trust for the cost of successfully defending against [suits] by beneficiaries. The better practice may be for a trustee to seek reimbursement after any litigation with beneficiaries concludes, initially retaining counsel with personal funds." 22 Cal.4th 201, 213, 990 P.2d 591, 599, 91 Cal.Rptr.2d 716, 725 (2000).

In *In re Louise V. Steinhoefel Trust*, beneficiaries appealed a trial court's award of attorney's fees to a trustee in the interim. 22 Neb. App. 293, 854 N.W.2d 792 (2014). The trial court later determined that the trustee did have breaches of fiduciary duty. The court of appeals vacated the interim awards and remanded:

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

Id. at 307.

In *Ball v. Mills*, an appellate court reversed an order by a trial court allowing a trustee attorney's fees from a trust in the interim. 376 So.2d 1174 (Fla. Dist. Ct. App. 1979). The court stated:

> We cannot agree with appellants that recovery of attorney's fees in litigation by one trustee against another is dependent upon whether the complaining trustee has prevailed in the action. Neither can we agree that under no circumstances may an award of interim attorney's fees be made prior to conclusion of the litigation. But we do agree with appellants' final contention that in this case the complaining trustee, Mills, has failed to offer proof which would justify the award of interim attorney's fees, and that his application for attorney's fees was deficient in that the basis for the award in terms of the services rendered, and the time devoted to the various steps in these proceedings, has not been shown.
>
> The trust is entitled to have notice of the amount claimed and the specific services for which compensation is claimed, and to have the court make a determination of the reasonableness and necessity for the charges. A mere statement indicating the expenditure of a certain number of hours and a demand for payment based upon the number of hours times the hourly rate, is not sufficient. The reasonableness and necessity of the services generally, and the reasonableness and necessity of the time devoted to each step in the proceeding must be determined by the trial judge, and it must be determined, as well, that all of the claimed services were rendered for the benefit of the trust itself, and not for some other purpose. Otherwise, it is a matter of mere speculation and conjecture as to what

> services are being compensated, and whether the same would actually qualify for reimbursement from the trust.

Id. *See also Sturdevant v. Sturdevant*, 315 N.W.2d 263, 269 (N.D. 1982).

In *Kemp v. Kemp*, an appellate court reversed a trial court's award of attorney's fees to a beneficiary in the interim against a trustee even though the trustee admitted to breaches of fiduciary duty at the hearing. 337 Ga. App. 627, 632,788 S.E.2d 517, (2016). The court stated:

> And while no Georgia case specifically addresses whether OCGA § 53-12-302 (a) (4) authorizes an "interim-fee award" (such as the one in this case), the plain language of the statute provides that attorney fees and costs of litigation may be included in an award of damages resulting from a trustee's breach of trust or threat of such breach. And because this litigation is still pending, no damages have been awarded for Alexander's breach-of-trust claim. As a result, the instant fee award could not have been included in any such damages. To the contrary, Alexander was awarded fees incurred in pursuing his successful request for injunctive relief; and it is worth noting that even the trial court's grant of injunctive relief, including its removal of Sandra as trustee of the Kemp Trusts, is only temporary.
>
> Furthermore, in addressing a former, nearly identical, version of OCGA § 53-12-302 (a) (4), we explained that "there can be no recovery of any kind under this statute, including attorney fees, without a finding of a breach of trust." Specifically, we held that, in the case of a jury trial, the trial court erred in awarding fees under this prior statute when there was no verdict form presenting the jury with the question of whether the defendants breached a fiduciary duty. But here, at this stage in the proceedings, we are not at liberty to presume that a judge or jury will enter a judgment or verdict answering that question.
>
> In its order granting attorney fees, the trial court noted that it was necessary for Alexander to file the instant action and seek Sandra's temporary removal as trustee because of the "established breaches of her fiduciary duty" and evidence that there were real and realistic threats of continued and additional breaches of such duties. Nevertheless, even if it was necessary for Alexander to seek temporary injunctive relief, there has been no official adjudication of Alexander's breach-of-trust claim on the merits, either through the grant of summary judgment or by a jury verdict.

Id. at 634.

Self-help, i.e., paying fees before a trial court awards same, has led to serious results. In *In re Baylis*, the court held:

> The probate court found that although the trust had no obligation to defend Baylis on the fraud charges brought against him personally or to indemnify him, Baylis caused fees for his defense to be paid by the Trust. . . . [P] Baylis's actions were in violation of his duty of loyalty. . . . [P] Given Baylis's active role in creating the conflict ..., he should have requested permission from the probate court before he used trust assets to defend himself against the personal aspects of the … law suit. He did not do so. Instead, he proceeded to use trust assets to defend himself, an extremely reckless thing to do in light of his duty of loyalty. [P] Given this combination of fiduciary breach … and the self-dealing to defend against it, we find that Baylis's actions here constitute defalcation under 11 U.S.C. § 523(a)(4). Thus, … the judgment debt relating to these actions is non-dischargeable.
>
> 313 F.3d 9, 22 (1st Cir. 2002).

Accordingly, there is not clear precedent in Texas at this time on whether a trustee can pay its attorney's fees in the interim regarding a breach of fiduciary duty claim. There is some precedent to support that position, but there is precedent from other jurisdictions that would not allow such a payment from the trust until the final resolution of the underlying breach of fiduciary duty claim.

C. Temporary Injunction To Prevent A Trustee From Paying An Attorney In The Interim

1. General Requirements

A plaintiff may want to seek immediate relief from a court to prevent a trustee from using trust assets to pay its attorneys to defend a breach of fiduciary duty claim. Texas rules allow a plaintiff to request a temporary restraining order and/or a temporary injunction to provide such relief. Texas Trust Code Section 114.008(2) provides for injunctive relief as a remedy for breach of trust that "has

occurred or may occur." Tex. Prop. Code §114.008(2).

A court has the authority to enter temporary injunctive relief to protect a breach-of-fiduciary-duty plaintiff from irreparable injury and to maintain the status quo. *See, e.g., Glassman v. Goodfriend*, 347 S.W.3d 772 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (court signed a temporary injunction and order removing the trustee, terminating the trust, and appointing a successor trustee to wind up the trust); *Ryals v. Ogden*, No. 14-07-01008-CV, 2009 Tex. App. LEXIS 6634 (Tex. App.—Houston [14th] Dist. August 25, 2009, no pet.) (granted temporary injunction against trustee from selling trust property); *In re Holland*, No. 14-09-00656-CV, 2009 Tex. App. LEXIS 7635 (Tex. App.—Houston [14th] Dist. August 20, 2009, no pet.) (granted temporary injunction against executor from interfering with trial court's orders); *Twyman v. Twyman*, No. 01-08-00904-CV, 2009 Tex. App. LEXIS 5552 (Tex. App.—Houston [1st] Dist. July 16, 2009, no pet.) (granted temporary injunction against trustee from withdrawing any additional funds from the trust while litigation was pending); *Farr v. Hall*, 553 S.W.2d 666, 672 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.) (injunction to prohibit executor from proposed stock redemption).

A temporary restraining order serves to provide emergency relief and to preserve the status quo until a hearing may be had on a temporary injunction. *Cannan v. Green Oaks Apts., Ltd.*, 758 S.W.2d 753, 755 (Tex. 1988). The purpose of a temporary injunction is to preserve the status quo pending a full trial on the merits. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993); *Trostle v. Trostle*, 77 S.W.3d 908, 916 (Tex. App.—Amarillo 2002, no pet.). The status quo is the last actual peaceable, noncontested status that preceded the controversy. *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004). "The principles governing courts of equity govern injunction proceedings unless superseded by specific statutory mandate. In balancing the equities, the trial court must weigh the harm or injury to the applicant if the injunctive relief is withheld against the harm or injury to the respondent if the relief is granted." *Seaborg Jackson Partners v. Beverly Hills Sav.*, 753 S.W.2d 242, 245 (Tex. App.—Dallas 1988, writ dism'd).

To be entitled to temporary injunctive relief, a plaintiff must plead a cause of action, prove a probable right to relief, and prove an immediate, irreparable injury if temporary relief is not granted. *IAC, Ltd. v. Bell Helicopter Textron*, Inc., 160 S.W.3d 191 (Tex. App.—Fort Worth 2005, no pet.). For example, in *183/620 Group Joint Venture v. SPF Joint Venture*, the court of appeals affirmed a temporary injunction prohibiting the defendants from using funds held by them as fiduciaries for the payment of attorney's fees and expenses in defending the breach of fiduciary duty lawsuit. 765 S.W.2d 901 (Tex. App.—Austin 1989, writ dism. w.o.j.).

2. Probable Right To Recovery

To show a probable right of recovery, an applicant need not establish that it will finally prevail in the litigation, rather, it must only present some evidence that, under the applicable rules of law, tends to support its cause of action. *Camp v. Shannon*, 162 Tex. 515, 348 S.W.2d 517, 519 (Tex. 1961); *IAC, Ltd. v. Bell Helicopter Textron, Inc*., 160 S.W.3d 191, 197 (Tex. App.—Fort Worth 2005, no pet.).

In a fiduciary case, there is authority that the usual burden of establishing a probable right of recovery does not apply if the gist of the complaint is that a fiduciary is guilty of self-dealing. *Health Discovery Corp. v. Williams*, 148 S.W.3d 167, (Tex. App.—Waco 2004, no pet.) (interested directors had burden to establish fairness of transaction in temporary injunction proceeding). In a fiduciary self-dealing context, the "presumption of unfairness" attaches to the transactions of the fiduciary, shifting the burden to the defendant to prove that the plaintiff will not recover. *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508-09 (Tex. 1980) (a profiting fiduciary has the burden of showing the fairness of the transactions). If the presumption cannot be rebutted at the temporary injunction stage, then the injunction should be granted as the plaintiff, by simply presenting a prima facie case of the existence of a fiduciary relationship and a probable breach of that duty, has adduced sufficient facts tending to support his right to recover on the merits. *Camp v. Shannon*, 348 S.W.2d 517, 519 (Tex. 1961); *Health Discovery Corp. v. Williams*, 148 S.W.3d at 169-70; *Jenkins v. Transdel Corp*., 2004 WL 1404464 (Tex. App.—Austin 2004, no pet.).

3. Irreparable Harm

Generally, to be entitled to a temporary injunction, the applicant must show a probable, imminent, and irreparable injury in the interim. *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191 (Tex. App.—Fort Worth 2005, no pet.). "Imminent" means that the injury is relatively certain to occur rather than being remote and speculative. *Limon v. State*, 947 S.W.2d 620, 625 (Tex. App.—Austin 1997, no writ); *City of Arlington v. City of Fort Worth*, 873 S.W.2d 765, 768-69 (Tex. App.—Fort Worth 1994, writ dism'd w.o.j.).

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

> Appellees' evidence at the hearing revealed a long history of Gatlin transferring funds from Knox and GXG accounts to his own personal or company accounts, and vice versa. In addition, Jan Farmer, Southwest Industrial's comptroller, testified that Gatlin frequently transferred large sums of money between his companies for reasons she could not explain, and that the documentation relating to these transfers, as well as to the subsidiary companies generally, were poorly maintained. This evidence, coupled with the testimony that Gatlin had in the past generated and backdated letters to himself and that he had been uncooperative when Knox sought the return of her records, was sufficient to justify the trial court's conclusion that, if not restrained, Gatlin might continue to divert and conceal assets in his possession pending trial.
>
> We have previously recognized that a legal remedy may be considered inadequate when there is a danger that a defendant's funds will be reduced or diverted pending trial. As we noted in *Minexa*, the fact that damages may be subject to the most precise calculation becomes irrelevant if the defendants in a case are permitted to dissipate funds that would otherwise be available to pay a judgment. A number of our sister courts have likewise found a party's remedy at law to be inadequate when a defendant's funds will be reduced, pending final hearing, and will not be available in their entirety in the interim. Because there was at least some evidence from which it would be reasonable to infer that appellants' funds would be diverted or dissipated pending trial, we conclude that the trial court did not abuse its discretion in finding appellees' remedy at law inadequate and granting the temporary injunction.

No. 05-93-01852-CV, 1994 Tex. App. LEXIS 4047 (Tex. App.—Dallas April 19, 1994, no pet.); *see also Coffee v. Hermann Hosp. Estate*, No. 01-85-00520-CV, 1986 Tex. App. LEXIS 12878 (Tex. App.—Houston [1st Dist.] May 1, 1986, no pet.) (not designated for publication) (probably injury was shown where "[t]here was testimony from which it might reasonably have been inferred that the Coffees were not cooperative in accounting for assets of the Estate, and that to insure the preservation of the Estate's assets, temporary injunctive relief was necessary.").

In a fiduciary case, there is also authority that the plaintiff is not required to show that it has an inadequate remedy at law. *183/620 Group Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901 (Tex. App.—Austin 1989, writ dism. w.o.j.) (authorities cited therein). In *183/620 Group Joint Venture*, the appellee and other landowners entrusted a large sum of money to the appellants to be held by them as fiduciaries and expended according to the parties' contracts. 765 S.W.2d at 902-03. Pursuant to the contracts, the appellants were to serve as "project manager" of the landowners' properties and expend the money to improve the properties. *Id*. at 902. The appellee subsequently sued the appellants, asserting that the appellants failed to properly manage the construction improvement projects. *Id*. The appellee sought an injunction to require the appellants to repay funds expended in defense of the pending lawsuit and to restrain the appellants from any future expenditures for the same purpose. *Id*. at 902-03. The trial court found that the parties' contracts did not authorize the appellants to use the money entrusted to them for their defense. *Id*. at 903. The trial court further found that a temporary injunction was necessary to maintain the existing status of the trust funds even though there was no showing that appellants would be unable to pay a judgment for damages that might be based on their misappropriation of the funds. *Id*.

The court of appeals initially noted that an inadequate legal remedy must generally be shown before a trial court can grant a temporary injunction. *Id*. The court reasoned, however, that such a showing "is only an ordinary requirement; it is not universal or invariable." *Id*. Where the injunction seeks to restrain a party from expending sums held by them as fiduciaries, the court held that damages would not be an adequate remedy "because the funds will be reduced, pending final hearing, so they will not be available in their entirety, in the interim, for the purposes for which they were delivered to the holder in the first place." *Id*. at 904. Since a breach of fiduciary duty claim is by nature an "equitable" action, even in cases where damages may be sought, if the fiduciary relationship is still continuing, the beneficiary has an equitable right to be protected from further harm. *See id*. Thus, there is never an adequate remedy at law for a breach of fiduciary duty claim. *See id*. *See also Hibbs v. Hibbs*, No. 13-97-755-CV, 1998 Tex. App. LEXIS 1876 (Tex. App.—Corpus Christi March 26, 1998, no pet.) (not designated for publication); *Coffee v. Hermann Hosp. Estate*, No. 01-85-00520-CV, 1986 Tex. App. LEXIS 12878 (Tex. App.—Houston [1st Dist.] May 1, 1986, no pet.) (not designated for publication).

More recently, in *Zaffirini v. Guerra*, beneficiaries sued the trustees of a trust for breach of fiduciary duty and removal. No. 04-14-00436-CV, 2014 Tex. App. LEXIS 12761 (Tex. App.—San Antonio November 26, 2014, no pet.). The trustees

paid their attorneys from the trust to defend the suit. The beneficiaries obtained a temporary injunction preventing the payment of fees from the trust. The court of appeals reversed the injunction, holding there was no evidence of irreparable harm: that the trustees could not pay back the money. *Id*.

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

D. Trustee's Right To Offset Award of Attorney's Fees Against Beneficiary's Interest In Trust

There is precedent that if a court awards attorney's fees to the trustee in a dispute between a trustee and beneficiary, that the beneficiary's interest in the trust may be taxed with paying that award. In *Courtade v. Estrada*, Estrada created an inter vivos irrevocable trust and deeded real estate into the trust. No. 02-14-00295-CV, 2016 Tex. App. LEXIS 3072 (Tex. App.—Fort Worth March 24, 2016, no pet.). Two days later, Estrada attempted to deed the same property to a daughter. After Estrada died, the trustee of her trust and her daughter sued each other regarding the real property and other issues. The trial court entered summary judgment for the trustee, holding that the trust owned the real estate. The court of appeals affirmed that judgment. The daughter challenged the trial court's award of fees for the trustee. One of the grounds for fees alleged by the trustee was that section 114.031 of the property code provides that a beneficiary is liable for loss to the trust if the beneficiary "misappropriated or otherwise wrongfully dealt with the trust property." *Id*. (citing Tex. Prop. Code Ann. § 114.031). The court of appeals held that the trial court could have found that the daughter misappropriated trust property by living in the trust's real property without permission and without paying any rent and by directing other tenants to send rent checks to her. Citing Section 114.031, the court of appeals affirmed that award: "Due to Estrada-Davis's misappropriation and wrongful acts with respect to the Trust's property, the Trust incurred substantial attorney's fees. The trial court was therefore within its discretion to offset those attorney's fees against Estrada-Davis's interest in the Trust." *Id*.

VI. STATUTORY REMEDIES TO ADDRESS A TRUSTEE'S IMPROPER PAYMENT OF ATTORNEYS

A. Removal of A Trustee

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

Tex. Prop. Code Ann. §113.082.

B. Trustee Liability

> The trustee is accountable to a beneficiary for the trust property and for any profit made by the trustee through or arising out of the administration of the trust, even though the profit does not result from a breach of trust; provided, however, that the trustee is not required to return to a beneficiary the trustee's compensation as provided by this subtitle, by the terms of the trust instrument, or by a writing delivered to the trustee and signed by all beneficiaries of the trust who have full legal capacity.
>
> A trustee who commits a breach of trust is chargeable with any damages resulting from such breach of trust, including but not limited to: (1) any loss or depreciation in value of the trust estate as a result of the breach of trust; (2) any profit made by the trustee through the breach of trust; or (3) any profit that would have accrued to the trust estate if there had been no breach of trust.

Tex. Prop. Code Ann. §114.001(a), (c).

C. Beneficiaries' Remedies

> To remedy a breach of trust that has occurred or might occur, the court may: (1) compel the trustee to perform the trustee's

> duty or duties; (2) enjoin the trustee from committing a breach of trust; (3) compel the trustee to redress a breach of trust, including compelling the trustee to pay money or to restore property; (4) order a trustee to account; (5) appoint a receiver to take possession of the trust property and administer the trust; (6) suspend the trustee; (7) remove the trustee as provided under Section 113.082; (8) reduce or deny compensation to the trustee; (9) subject to Subsection (b), void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property of which the trustee wrongfully disposed and recover the property or the proceeds from the property; or (10) order any other appropriate relief.

Tex. Prop. Code Ann. 114.008.

D. Forfeiture of Compensation

> If the trustee commits a breach of trust, the court may in its discretion deny him all or part of his compensation.

Tex. Prop. Code Ann. 114.061.

VII. BENEFICIARY'S RIGHT TO ATTORNEY'S FEES

In the context of recovering attorney's fees, Texas follows the American Rule, which provides that litigants may recover attorney's fees only if specifically provided for by statute or contract. *See Tony Gullo Motors I, L.P. v. Chapa,* 212 S.W.3d 299, 310-11 (Tex. 2006) ("Absent a contract or statute, trial courts do not have inherent authority to require a losing party to pay the prevailing party's fees.").

When a beneficiary sues a co-trustee, generally, the trust should not pay the beneficiary's attorneys' fees unless a court awards same. The Restatement provides:

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

RESTATEMENT (THIRD) OF TRUSTS, § 88 at cmt d. Of course, this provision does not address a support trust where a trustee has discretion to make distributions for the beneficiary's support and maintenance, which may include making distributions to the beneficiary for the beneficiary to retain and pay for counsel.

The Texas Property Code states: "In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." Tex. Prop. Code Ann. § 114.064. The granting or denying of attorney's fees to a trustee or beneficiary under section 114.064 is within the sound discretion of the trial court, and a reviewing court will not reverse the trial court's judgment absent a clear showing that the trial court abused its discretion by acting without reference to any guiding rules and principles. *Lee v. Lee*, 47 S.W.3d 767, 793-794 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Lyco Acquisition 1984 Ltd. P'ship v. First Nat'l Bank*, 860 S.W.2d 117, 121 (Tex. App.—Amarillo 1993, writ denied).

A plaintiff may be entitled to an award of attorney's fees regarding its declaratory judgment request: "In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." Tex. Civ. Prac. & Rem. Code § 37.009. This is not a "prevailing party" statute, and the court can award fees as it determines is equitable and just. *Hachar v. Hachar*, 153 S.W.3d 138, 2004 Tex. App. LEXIS 10477 (Tex. App.—San Antonio Nov. 24, 2004, no pet.). For example, in an action declaring that a decedent's adopted grandchildren were not beneficiaries of a trust, it was equitable and just under Section 37.009 to award fees from the trust to the adopted grandchildren. *In re Ellison Grandchildren Trust*, 261 S.W.3d 111 (Tex. App.—San Antonio 2008, no pet.).

VIII. DETERMINATION OF ATTORNEY'S FEES REMEDY

One issue that arises is what fact finder determines the appropriateness or amount of an award of attorney's fees. If requested, a jury should determine the amount of damages at law that should be awarded to a plaintiff where there is a fact issue. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 367 (Tex. 2000); *Ogu v. C.I.A. Servs.*, No. 01-07-00933-CV, 2009 Tex. App. LEXIS 78 (Tex. App.—Houston [1st Dist.] Jan. 8, 2009, no pet.). In Texas, a jury's verdict has a "special, significant sacredness and inviolability." *Crawford v. Standard Fire Ins. Co*., 779 S.W.2d 935, 941 (Tex. App.—Beaumont 1989, no writ). The Texas Constitution requires that the right

to trial by jury remain inviolate. Tex. Const., art. I, § 15; *Crawford*, 779 S.W.2d at 941. Denial of the constitutional right to trial by jury amounts to an abuse of discretion for which a new trial is the only remedy. *McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995).

Of course, a party must appropriately request a jury and object to any failure to provide one. *Duenas v. Duenas*, No. 13-07-089-CV, 2007 Tex. App. LEXIS 5622 (Tex. App.—Corpus Christi July 12, 2007, no pet.) (Because a party did not timely object regarding his right to a jury trial, the matter was waived.). Further, where there is no fact issue, then a trial court does not err in refusing to submit an issue to a jury. *See Willms v. Americas Tire Co.*, 190 S.W.3d 796 (Tex. App.—Dallas 2006, pet. denied) (the granting of summary judgment did not violate a constitutional right to a jury trial because no material issues of fact existed to submit to a jury.).

However, a court, in its equitable jurisdiction, should determine whether an equitable remedy should be granted. *See Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 428-29 (Tex. 2008) ("As with other equitable actions, a jury may have to settle disputed issues about what happened, but 'the expediency, necessity, or propriety of equitable relief' is for the trial court … ."). The Texas Supreme Court stated: "Although a litigant has the right to a trial by jury in an equitable action, only ultimate issues of fact are submitted for jury determination. The jury does not determine the expediency, necessity, or propriety of equitable relief. The determination of whether to grant an injunction based upon ultimate issues of fact found by the jury is for the trial court, exercising chancery powers, not the jury." *State v. Texas Pet. Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979); *Bostow v. Bank of Am.*, No. 14-04-00256-CV, 2006 Tex. App. LEXIS 377 (Tex. App.—Houston [14th Dist.] Jan. 17, 2006, no pet.); *Shields v. State*, 27 S.W.3d 267, 272 (Tex. App.—Austin 2000, no pet.). The jury's findings on issues of fact are binding; however, equitable principles and the appropriate relief to be afforded by equity are only to be applied by the court itself. *Shields*, 27 S.W.3d at 272. Because the court alone fashions equitable relief, it is not always confined to the literal findings of the jury in designing the injunction. *Id.*

For example, the Texas Supreme Court recently held: "A jury does not determine the expediency, necessity, or propriety of equitable relief such as disgorgement or constructive trust." *Longview Energy Co. v. Huff Energy Fund LP*, No. 15-0968, 2017 Tex. LEXIS 525, 2017 WL 2492004 (Tex. June 9, 2017) (citing *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999)). "Whether 'a constructive trust should be imposed must be determined by a court based on the equity of the circumstances.'" *Id*. "The scope and application of equitable relief such as a constructive trust 'within some limitations, is generally left to the discretion of the court imposing it.'" *Id*. (citing *Baker Botts, L.L.P. v. Cailloux*, 224 S.W.3d 723, 736 (Tex. App.—San Antonio 2007, pet. denied)).

"If 'contested fact issues must be resolved before a court can determine the expediency, necessity, or propriety of equitable relief, a party is entitled to have a jury resolve the disputed fact issues.'" *Id*. (citing *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 596 (Tex. 2008). "But uncontroverted issues do not need to be submitted to a jury." *Id*. (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 815 (Tex. 2005)). *See also Wilz v. Flournoy*, 228 S.W.3d 674, 676-77 (Tex. 2007) (noting that in the underlying trial, the jury found that no personal funds were used to purchase the farm, which justified the award of a constructive trust on the farm.); *Paschal v. Great W. Drilling, Ltd.*, 215 S.W.3d 437, 445 (Tex. App.—Eastland 2006, pet. denied) ("The jury found that all of the premiums on the four policies were paid with funds that Alan stole from Great Western. Accordingly, the trial court imposed a constructive trust on all of the funds remaining in existence from the life insurance proceeds.").

Texas Property Code Section 114.064 provides the court may make such awards of costs and reasonable and necessary fees as may seem equitable and just. So, if properly requested and preserved, a party is entitled to submit a fact issue on necessariness and reasonableness of attorney's fees to a jury. However, the trial court normally has the sole right to resolve whether such an award is equitable or just. The question regarding whether fees are equitable and just is a legal question. *Lesikar v. Moon*, 237 S.W.3d 361, 375-76 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

If there is some underlying fact issue that must be resolved with regard to the equitable determination, then that fact issue should be submitted to a jury. Parties should be very careful to evaluate all requested remedies before trial and determine what should be submitted to the court and what should be submitted to a jury. Otherwise, after trial, a court may determine that a party waived the right to a jury on a fact issue, and either refuse to award the remedy or grant the remedy and supporting findings may be found in support of a trial court's judgment. Tex. R. Civ. P. 279; *Bostow v. Bank of Am.*, No. 14-04-00256-CV, 2006 Tex. App. LEXIS 377 (Tex. App.—Houston [14th Dist.] Jan. 17, 2006, no pet.) ("[T]he jury's finding as to Bostow's harassing conduct is a sufficient finding on the ultimate issues of fact to support the trial court's exercise of discretion in granting a permanent injunction. Thus, the Bank did not abandon its claim for injunctive relief by failing to submit fact questions to the jury that would support its

entitlement to injunctive relief."). *See also Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993) (suggesting permanent injunction could be based on jury finding liability for invasion of privacy); *Memon v. Shaikh*, 401 S.W.3d 407, 423 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (holding jury's defamation finding supported permanent injunction).

IX. DUTY TO DISCLOSE ATTORNEY'S FEES PAYMENTS

Full disclosure is very important on all material decisions. The Texas Supreme Court has stated that "trustees and executors have a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiaries'] rights." *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996). *See also Valdez v. Hollenbeck*, 465 S.W.3d 217 (Tex. 2015). Further, the Restatement (Third) of Trusts, Section 82(1) provides that a trustee has a duty to keep beneficiaries reasonably informed of about significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests.

The duty to disclose includes a co-trustee. A trustee, "particularly one empowered to exercise greater control, or having greater knowledge of trust affairs" is under a duty "to inform each co-trustee of all material facts relative to the administration of the trust that have come to his attention." G. Bogert, TRUSTS & TRUSTEES § 584, at 40 (Supp. rev. 2d ed. 1992). *See also Pennsylvania Co. v. Wilmington Trust Co*., 40 Del. Ch. 567, 186 A.2d 751 (Del Ch. 1962) (co-trustee has duty to keep fellow trustees informed regarding facts which would affect the price at which to sell trust property). Even though a majority of trustees are authorized to act for all trustees, each trustee is entitled to access to trust records and to information regarding the administration of the trust, including investment decisions. *See* Bogert, TRUSTS & TRUSTEES § 584, at 40. By refusing to provide a co-trustee with trust information, or a meaningful opportunity to review this information, "a co-trustee commits a breach of trust for which he may be removed as a trustee." *Id*.

Accordingly, a trustee likely has the duty to disclose to the beneficiaries and co-trustees that it has retained counsel and the amount of fees that have been incurred and/or paid and how the fees are being paid. However, as noted earlier, trustee has no duty to disclose attorney-client communications to beneficiaries. *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).

X. CONCLUSION

Retaining attorneys can be a difficult process. This presentation attempted to provide some practical and helpful suggestions in identifying, retaining, and communicating with counsel. Further, a trustee's power to retain and compensate attorneys is a ripe area for disputes. This presentation attempted to provide a current view of the law in Texas on the important considerations surrounding these issues. The author hopes that this paper and presentation assists parties in Texas to understand their rights and remedies in this area.