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ARTICLE: THE MORE THE MERRIER? ISSUES ARISING FROM CO-TRUSTEES ADMINISTERING TRUSTS

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Text

[*36] I. INTRODUCTION

Settlors can draft a trust to have one trustee that has the sole authority and power to administer the trust. [1]However, settlors can, and often do, require or allow a trust to be administered by co-trustees. [2]Co-trustees generally have equal rights to administer the trust and should administer the trust in all respects together as a unit. [3]There are certain advantages and drawbacks to using a co-trustee structure to administer a trust. [4]Further, there are a number of permutations that can be used to effectuate a co-trustee management structure. [5]

The co-trustees can be any potential combination. [6]One potential combination is a settlor and a corporate trustee acting as co-trustees. [7]In this example, the settlor intends for the corporate trustee to take the lead on investing and accounting functions, but the settlor is involved in big picture issues and distributions. [8]Further, co-settlors (e.g., husband and wife) can create a trust with themselves as co-trustees so they can have equal say in how the trust is administered. [9]Further, a settlor may want a corporate trustee and a family friend to be co-trustees. [10]The thought, once again, is that the corporate trustee takes the lead on

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[1] 1 WILLIAM H. BYRNES, TEXAS ESTATE PLANNING § 30.44(1) (Matthew Bender & Co. 2022).

[2] *Id.*

[3] *See id.* § 30.04(4)(c).

[4] *Id.* § 30.04(4)(c)-(d).

[5] *See id.* § 35.02(4).

[6] *Id.*

[7] *Id.* § 30.04(4)(b).

[8] *Id.*

[9] *See id.* § 30.04(2).

[10] *Id.* § 30.04(4)(b).

investing and accounting functions, but the family friend knows the family dynamics, the settlor's intent, and is involved in big picture issues such as distributions. [11]There is no limit to the combinations of co-trustees or the purposes of same. [12]

When a trust is administered by co-trustees, many issues can arise. [13]This Article is intended to address some of the more common issues so that settlors and potential trustees can evaluate the ramifications of co-trustee administration. [14]

[*37] II. APPROPRIATENESS OF APPOINTING CO-TRUSTEES

There are many reasons why a settlor may want to consider co-trustees. [15]For example, when there is only one individual trustee, he or she will always need to be available to participate in the administration of the trust. [16]That can create problems because an individual trustee has a life of their own and may be ill, traveling, having personal or business problems, or have other problems that distract a trustee's attention from trust administration. [17]When there are co-trustees, usually one will be available to administer the trust at all times with the consent of the other. [18]

The age-old adage "two heads are better than one," may apply to trust administration. [19]Co-trustees can combine their skills and knowledge to best serve the trust. [20]They can also serve as sounding boards for each other. [21]

Co-trustees can act as a policing mechanism. [22]If one co-trustee disagrees with an action by another co-trustee, he, she, or it has the authority to object in writing to that action and, if necessary, to file suit to protect the trust and beneficiaries' interests. [23]One commentator provides:

> It may be appropriate to appoint co-trustees if the trustor wishes to avoid the appearance of favoring one of several beneficiaries by naming that beneficiary as the sole trustee. The appointment of co-trustees may also be appropriate if the beneficiaries are to have adverse interests in the trust property and the trustor wishes to subject all decisions regarding the property to the joint assent of the co-trustees. Co-trustees may serve a useful function if a sole trustee would be left holding powers that result in taxation of trust income to a trustee, or inclusion of the trust property in the trustee's gross estate for estate tax purposes. This result can be avoided, or at least mitigated, if the trustee's powers can be exercised only with the consent of an independent or "adverse party" trustee. [24]

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[11] *Id.*

[12] *See id.* § 35.02(4)(b).

[13] *See id.* § 30.04(4)(d).

[14] *See* discussion *infra* Parts II-XVII.

[15] *See* BYRNES, *supra* note 1, § 35.02(4)(a).

[16] *See id.* § 35.02(2).

[17] *See id.*

[18] *See id.* § 35.02(4)(b).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] BYRNES, *supra* note 1, § 30.04.

Another commentator provides:

> Often co-trustees are named by the settlor, who may include one or more individuals and a corporate fiduciary. Frequently the named individual trustee is the settlor's spouse. Such a combination may satisfy the spouse or other family member who wishes direct participation and yet will secure **[*38]** the special skills and continuity of the corporate fiduciary in the administration of the trust. The details of investment, recordkeeping and other administrative matters are normally handled by the corporate trustee; the spouse or other individual trustee can be helpful in making various discretionary determinations, such as payment of trust income and principal. [25]

There are, of course, drawbacks to naming co-trustees. [26]Co-trustees can be compensated more than a single trustee, so they are often more expensive. [27]Co-trustees may disagree on an action, deadlock sets in, and then nothing happens. [28]If co-trustees retain counsel to sue each other, it will become expensive, create delay, and may result in unintended individuals managing the trust. [29]A co-trustee can potentially become liable for another co-trustee's actions; however, there is risk involved to being a co-trustee and some corporate or individual fiduciaries may not accept the position due to that risk. [30]One commentator provides:

> Selecting two co-trustees with equal power to control and manage the trust invites the possibility that their inability to agree will frustrate the trust purposes. If the trustor decides on three or more co-trustees, then a majority of them may exercise any power conferred by the trust instrument, unless the trust instrument provides otherwise. On the other hand, if there are only three, the death, resignation or removal of one of them creates the same potential for stalemate as would be the case if only two were appointed initially. It may be possible, however, to avoid an impasse in the administration of the trust by including special provisions in the trust instrument respecting decisions by co-trustees. For example, the instrument may provide that a majority of the co-trustees will have the power to take action on behalf of the trust. Alternatively, the instrument may give a third party the power to direct the co-trustees with respect to any matter about which the co-trustees themselves are unable to reach a decision. [31]

Another commentator provides:

> [T]he use of multiple trustees can present problems. Unless a statute or the trust instrument provides otherwise, all trustees must agree, since unanimity among trustees is normally required. Furthermore, unless a statute or the trust instrument provides otherwise, each trustee may be **[*39]** liable for any loss arising from action taken by a majority of the trustees. Usually these problems can be anticipated by appropriate provisions in the trust instrument to the effect that a majority vote of the trustees is to control and that a trustee is not to be liable if he specifically dissents from the decision of the majority. Delegation of trustee powers may be authorized, but nevertheless the trustee may not be relieved of liability for actions taken pursuant to the delegation. [32]

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[25] GEORGE G. BOGERT & GEORGE T. BOGERT, BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 121 (Rev. 2d ed. 2001).

[26] *See* BYRNES, *supra* note 1, § 30.04(4).

[27] BOGERT, *supra* note 25.

[28] BYRNES, *supra* note 1, § 30.04(4)(d); *TEX. PROP. CODE ANN. § 112.034*.

[29] RESTATEMENT (SECOND) OF TRS. § 184 (AM. L. INST. 1959).

[30] BOGERT, *supra* note 25.

[31] BYRNES, *supra* note 1.

[32] BOGERT, *supra* note 25.

So, a settlor should consider the benefits and drawbacks to co-trustee administration before providing for same in a trust document. [33]

III. FORMATION OF TRUST

In Texas, as elsewhere, a settlor cannot create a trust with himself or herself as both the sole trustee and sole beneficiary. [34]The Texas Property Code provides:

> If a settlor transfers both the legal title and all equitable interests in property to the same person or retains both the legal title and all equitable interests in property in himself as both the sole trustee and the sole beneficiary, a trust is not created and the transferee holds the property as his own . . . a trust terminates if the legal title to the trust property and all equitable interests in the trust become united in one person. [35]

So, one way to avoid the merger doctrine and to create a valid trust is to appoint a co-trustee. [36]

IV. WHO CAN BE A CO-TRUSTEE AND CO-TRUSTEE SUCCESSION ISSUES

A. De Jure Co-Trustees

1. Who Can Be a Co-Trustee

The first place to look to determine who can be a co-trustee is the trust document. [37]If the trust document states who can be a co-trustee, the trust **[*40]** document should generally control. [38]If the parties wish to select a co-trustee that differs from the terms of the trust document, the parties should seek court intervention by modifying the trust. [39]

If the trust document does not limit who can be a co-trustee, then the Texas Property Code has a general provision dealing with who can qualify as a co-trustee. [40]Section 112.008 states:

> (a) The trustee must have the legal capacity to take, hold, and transfer the trust property. If the trustee is a corporation, it must have the power to act as a trustee in this state.
>
> (b) Except as provided by Section 112.034, the fact that the person named as trustee is also a beneficiary does not disqualify the person from acting as trustee if he is otherwise qualified.
>
> (c) The settlor of a trust may be the trustee of the trust. [41]

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[33] *Id.*

[34] *TEX. PROP. CODE ANN. § 112.034(a)*-(b).

[35] *Id.; see also Faulkner v. Kornman, No. 10-00301, 2015 Bankr. LEXIS 3595, *14-20 (Bankr. S.D. Tex. Oct. 23, 2015)*; *76 AM. JUR. 2D Trusts § 211* (2002) ("[W]here, under the terms of the trust, neither trustee can transfer the trust property without the concurrence of the other trustee, neither is the sole beneficiary, and there is no merger of the legal and equitable titles in the property to them.").

[36] *See Faulkner v. Kornman, No. 10-00301, 2015 Bankr. LEXIS 3595, *14-20 (Bankr. S.D. Tex. Oct. 23, 2015)*.

[37] BOGERT, *supra* note 25; *TEX. PROP. CODE ANN. §§ 113.051*, *114.031*.

[38] *TEX. PROP. CODE ANN. §§ 113.051*, *114.031*.

[39] *See id.* § 112.054.

[40] *Id.* § 112.008.

[41] *Id.* (emphasizing that under this provision, a trust settlor or beneficiary can be a co-trustee); *see Sharma v. Routh, 302 S.W.3d 355, 366 (Tex. App.--Houston [14th Dist.] 2009, no pet.)* (stating that beneficiary could be trustee); *Evans v. Abbott, No. 03-02-00719-CV, 2003 Tex. App. LEXIS 8243, 8 (Tex. App.--Austin Sept. 25, 2003)* (stating that a beneficiary could be a trustee of a trust).

The Restatement (Second) of Trusts provides:

> There can be a trust in which one of the beneficiaries is also one of the trustees. The trustees hold the legal title to the trust property as joint tenants, and the beneficiaries, including the beneficiary who is also a trustee, have equitable interests the extent of which is determined by the terms of the trust. [42]

Regarding the trustee who is also a beneficiary, there can be some perceived conflict issues. [43]For example, the beneficiary or co-trustee can seek a discretionary distribution from the trust and also be one of the decision makers for that distribution. [44]When this happens, the settlor is assumed to have known of the conflict and approved of the same. [45]The Restatement provides:

> In many modern trust situations, the trustee (or one or more co-trustees) will be a life beneficiary or perhaps a remainder beneficiary. In a case of **[*41]** this type, there will inevitably be some conflicts of interest that are approved, implicitly at least, either by the settlor or through an appointment process that is authorized by the terms of the trust or a statute or that is influenced (in the case of judicial appointment) by the trust provisions. In these circumstances there is, on the one hand, some inference of a preference for or confidence in the trustee-beneficiary but, on the other hand, a general recognition that a trustee-beneficiary's conduct is to be closely scrutinized for abuse, including abuse by less than appropriate regard for the duty of impartiality. [46]

Further, the Restatement provides:

> The common situation in which one or more of a trust's beneficiaries are selected or authorized by the settlor to serve as trustee or co-trustee inevitably presents an array of conflicts between the trustee's interests as a beneficiary and the interests of other beneficiaries; the problems presented by these (usually) implicitly authorized conflicts are most appropriately dealt with as questions of impartiality under § 79 (even if the settlor's designation of the beneficiary-trustee may, as a matter of interpretation, suggest a "tilt" in favor of the beneficiary-trustee in the balancing of divergent interests. [47]

The other non-beneficiary co-trustees should be aware of this implicit approval and provide due regard for the beneficiary's/co-trustee's position and decisions while still complying with fiduciary duties. [48]

2. Co-Trustee Succession Issues

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[42] RESTATEMENT (SECOND) OF TRS. §§ 99, 115 (AM. L. INST. 1959) (emphasizing that when the trustee is a corporation, it must have the power to act as a trustee in Texas); *see* *TEX. FIN. CODE ANN. §§ 151.001*-.003; TEX. EST. CODE ANN. §§ 505.001-.006 (regulating foreign corporate fiduciaries).

[43] *See* *TEX. PROP. CODE ANN. § 112.008*.

[44] *See Guidance to Trustees in Making Distributions to Trust Beneficiaries*, NIXON PEABODY (July 27, 2021), *https://www.nixonpeabody.com/insights/articles/2021/07/27/guidance-to-trustees-in-making-distributions-to-trust-beneficiaries* [*https://perma.cc/E3GX-9PMD*].

[45] *See* RESTATEMENT (THIRD) OF TRS. § 79 (AM. L. INST. 2007).

[46] *Id.* § 79(b)(1) (citations omitted).

[47] *Id.* § 78(c)(2) (citations omitted).

[48] *See id.*

Co-trustees may have to deal with the resignation, incapacity, or death of another co-trustee. [49]A co-trustee may resign in accordance with the terms of the trust instrument, or a co-trustee may petition a court for permission to resign as trustee. [50]The court may accept a co-trustee's resignation and discharge the co-trustee from the trust on the terms and conditions necessary to protect the rights of other interested persons. [51]A co-trustee must strictly follow the trust document in effectuating a resignation. [52]If the co-trustee does not do so, and does not obtain a court order allowing the resignation, then the co-trustee is still the co-trustee. [53]

[*42] A beneficiary may remove a trustee in accordance with the terms of a trust. [54]A beneficiary must follow the terms of the trust in terminating a co-trustee's service. [55]The failure to follow the terms of the trust means that the beneficiary's attempt is void and of no effect. [56]Additionally, on the petition of an interested person, a court has the discretion to remove a co-trustee and deny part or all of their 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. [57]

Further, a "beneficiary, co[-]trustee, or successor trustee may treat a violation resulting in removal as a breach of trust." [58]For example, three co-trustees presented clear and specific evidence of a prima facie case that the fourth co-trustee's hostility was impeding his performance as a co-trustee and the performance of the trust such that their suit to remove the fourth co-trustee was allowed to continue. [59]An action to remove a co-trustee, regardless of the underlying grounds on which it is brought, is not subject to a limitations analysis. [60]

An issue is whether the resigning/removed co-trustee needs to be replaced. [61]One commentator provides:

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[49] *See* *TEX. PROP. CODE ANN. § 113.082*.

[50] *Id.* § 113.081.

[51] *Id.*

[52] *Gamboa v. Gamboa, 383 S.W.3d 263, 273 (Tex. App.--San Antonio 2012, no pet.)*.

[53] *Id.*

[54] *TEX. PROP. CODE ANN. § 113.082(a)*.

[55] *Waldron v. Susan R. Winking Tr., No. 12-18-00026-CV, 2019 Tex. App. LEXIS 5867, at *21 (Tex. App.--Tyler July 10, 2019, no pet.)*.

[56] *Id.*

[57] *TEX. PROP. CODE ANN. § 113.082(a)*.

[58] *Id.*

[59] *Ramirez v. Rodriguez, No. 04-19-00618-CV, 2020 Tex. App. LEXIS 1340, at *5 (Tex. App.--San Antonio Feb. 19, 2020, no pet.)*; *see also* *In re Est. of Bryant, No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131, at *15 (Tex. App.--Amarillo Mar. 11, 2020, no pet.)* (removal of trustee due to hostility to beneficiary); *Conte v. Ditta, 312 S.W.3d 951, 961 (Tex. App.--Houston [1st Dist.] 2010, no pet.)* (affirmed removal of trustee); *Dildine v. Bonham, No. 03-07-00631-CV, 2009 Tex. App. LEXIS 1752, at *5 (Tex. App.--Austin Mar. 12, 2009, no pet.)* (affirmed removal of co-trustees).

[60] *Ditta v. Conte, 298 S.W.3d 187, 192 (Tex. 2009)*.

[61] *See* AUSTIN WAKEMAN SCOTT & MARK L. ASCHER ON TRUSTS, THE TRUSTEE § 11.11.1 (2020).

> When the terms of the trust name multiple trustees, one of whom fails to qualify or ceases to act, it depends on the circumstances whether a new trustee should be appointed to fill the vacancy, or whether the remaining trustee or trustees may continue to administer the trust. It if appears that the settlor intended that the number of trustees should remain constant, a new co-trustee will be appointed. So also, if it appears that filling the vacancy would be conducive to proper administration of the trust, a new trustee will be appointed although the trust instrument does not expressly so require. Generally, however, there is no reason to appoint a successor **[*43]** the remaining trustee or trustees simply continue to administer the trust. When the terms of the trust empower the surviving trustees to fil a vacancy, it depends on the terms of the trust whether they must do so. [62]

If a person or entity named as a co-trustee does not accept the trustee position, or if the person or entity is dead, no longer exists, or does not have capacity to act as a trustee, then the person or entity named as the alternate trustee, or designated, or selected in the manner prescribed in the terms of the trust may accept the trustee co-position. [63]If a co-trustee is not named or there is no alternate co-trustee designated or selected, the parties must seek a court appointment. [64]

If a person or entity named in the trust refuses to accept the appointment, then he, she, or it incurs no liability with respect to the trust. [65]A person or entity named as a co-trustee has no obligation to accept the position. [66]Once the person or entity named as trustee accepts the co-trustee position, he, she, or it incurs liability with respect to the trust. [67]If the person or entity named as co-trustee exercises power or performs duties under the trust, he, she, or it is presumed to have accepted the trust. [68]The Texas Property Code states:

> The signature of the person named as trustee on the writing evidencing the trust or on a separate written acceptance is conclusive evidence that the person accepted the trust. A person named as trustee who exercises power or performs duties under the trust is presumed to have accepted the trust, except that a person named as trustee may engage in the following conduct without accepting the trust: (1) acting to preserve the trust property if, within a reasonable time after acting, the person gives notice of the rejection of the trust to: (A) the settlor; or (B) if the settlor is deceased or incapacitated, all beneficiaries then entitled to receive trust distributions from the trust; and (2) inspecting or investigating trust property for any purpose, including determining the potential liability of the trust under environmental or other law. [69]

The Texas Trust Code also provides for the appointment of a successor trustee. [70]"On the death, resignation, incapacity, or removal of a [co-trustee], a successor [co-trustee] shall be selected according to the method, if any, prescribed in the trust instrument." [71]A trial court should select a successor **[*44]** co-trustee in conformance with the intent of the settlor, and abuses its discretion in failing to do so. [72]The resigning co-trustee must perform its duties until properly replaced. [73]

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[62] *Id.*

[63] *TEX. PROP. CODE ANN. § 112.009(c)*.

[64] *Id.*

[65] *Id.* § 112.009(b).

[66] *See id.*

[67] *See id.*

[68] *Id.* § 112.009(a).

[69] *Id.*

[70] *Id.* § 113.083.

[71] *Id.*

"If for any reason a successor is not selected under the terms of the trust instrument, a court may and on petition of any interested person shall appoint a successor in whom the trust shall vest." [74]Accordingly, if a trust document allows a co-trustee to resign and for the trust administration to continue without the need for a successor co-trustee, then the co-trustee can resign and nothing further needs to be done. [75]In that circumstance, the remaining co-trustees or trustee simply continues administering the trust. [76]If, however, the trust requires that the resigning co-trustee be replaced, then the resigning co-trustee has continuing duties to administer the trust until its replacement is duly appointed. [77]

A successor co-trustee is liable for a breach of trust of a predecessor:

> . . . only if he knows or should know of a situation constituting a breach of trust committed by the predecessor and the successor trustee: (1) improperly permits it to continue; (2) fails to make a reasonable effort to compel the predecessor trustee to deliver the trust property; or (3) fails to make a reasonable effort to compel a redress of a breach of trust committed by the predecessor trustee. [78]

A trust document may relieve a successor co-trustee of an obligation to raise claims against prior co-trustees. [79]

Upon termination of a trust, the co-trustees have a reasonable period of time to wind up the trust:

> If an event of termination occurs, the trustee may continue to exercise the powers of the trustee for the reasonable period of time required to wind up the affairs of the trust and to make distribution of its assets to the **[*45]** appropriate beneficiaries. The continued exercise of the trustee's powers after an event of termination does not affect the vested rights of beneficiaries of the trust. [80]

One court has held that co-trustees retain only the powers necessary to wind up the affairs of the trust or to distribute the trust property in accordance with the terms of the trust and the trustees had no authority to partition the trust property prior to distributing it in accordance with the trust document. [81]

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[72] *Conte v. Ditta, 312 S.W.3d 951, 961 (Tex. App.--Houston [1st Dist.] 2010, no pet.)*.

[73] KENNETH MCLAUGHLIN, JR., 4 TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION § 84.21 (2021). "A co-trustee must continue to act together with other co-trustees until he or she is relieved in accordance with the terms of the trust or by operation of law. A simple abandonment by one co-trustee will not vest all of the co-trustees' power in the remaining trustee or co-trustees." *Id.*

[74] *TEX. PROP. CODE ANN. § 113.083*.

[75] RESTATEMENT (THIRD) OF TRS., § 81 (AM. L. INST. 2007). "[W]hen several persons are designated as trustees and one of them dies, declines to serve or resigns, is removed, or is or becomes incapable of acting as trustee, the remaining trustee or trustees ordinarily are entitled to administer the trust?" *Id.*

[76] *Id.*

[77] *See* MCLAUGHLIN, *supra* note 73 ("[T]he surviving trustee or trustees have the right to manage and administer the trust and to exercise trustee powers."); *76 AM. JUR. 2D Trusts § 324* (2002) ("Generally, surviving co-trustees can exercise trust powers without filling the vacancy created by the death, removal, or resignation of one co-trustee.").

[78] *TEX. PROP. CODE ANN. § 114.002*.

[79] *Benge v. Roberts, No. 03-19-00719-CV, 2020 Tex. App. LEXIS 6335, at *8 (Tex. App.--Austin Aug. 12, 2020, no pet.)* (mem. op.).

[80] *TEX. PROP. CODE ANN. § 112.052*; *Kellner v. Kellner, 419 S.W.3d 541, 546 (Tex. App.--San Antonio 2013, no pet.)* (the termination of the trust did not affect the trustees' authority to continue to exercise their powers to wind up affairs and make a distribution of trust assets).

[81] *Sorrel v. Sorrel, 1 S.W.3d 867, 870 (Tex. App.--Corpus Christi-Edinburg 1999, no pet.)*.

B. De Facto Co-Trustees

Sometimes a party acts as a co-trustee but has not been officially appointed in that position or fails to follow the proper procedure in the appointment. [82]In that circumstance, the party is a de facto co-trustee. [83]

> An officer 'de jure' is one who is in all respects legally appointed [or elected] and qualified to exercise the office; one who is clothed with the full legal right and title to the office; in other words, one who has been legally elected or appointed to an office and who has qualified himself [or herself] to exercise the duties thereof according to the mode prescribed by law. [84]

An individual may become a de facto co-trustee by acting as same even though not officially named, appointed, or accepted as a trustee. [85]Courts in other jurisdictions have given their tacit approval of de facto trustees in various contexts. [86]

[*46] For example, in *Alpert v. Riley*, the Houston Court of Appeals for the First District held that the purported trustee did not properly accept that position under the trust document and was never properly acting as a trustee. [87]It then later held that because the individual was not the de jure trustee, it was not entitled to any compensation. [88]In *Bird v. Carl C. Anderson*, a trust beneficiary sued a defendant for usurping a trustee's role and breaching fiduciary duties as a de facto trustee. [89]The defendant filed a motion to dismiss under *Texas Rule of Civil Procedure 91*, arguing that there was no de facto trustee status in Texas. [90]The trial court denied the motion, found that "Texas law recognizes the legal capacity of 'de facto trustee' in the context of the administration of private trusts," but certified the issue for permissive appeal. [91]The court of appeals declined to accept the petition for interlocutory appeal. [92]Without opining on the merits of whether there is a de facto trustee status in

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[82] *See* Bird v. Anderson, No. 03-21-00140-CV, 2021 Tex. App. LEXIS 5036, at *2 (Tex. App.--Austin June 24, 2021, no pet.).

[83] *See* David F. Johnson, *Court Discusses De Facto Trustee Status in Texas*, JD (Aug. 11, 2021), https://www.jdsupra.com/legalnews/court-discusses-de-facto-trustee-status-4040145/ [http://perma.cc/D8J2-TFA5].

[84] Brown v. Anderson, 198 S.W.2d 188, 190 (Ark. 1946).

[85] In re Tr. of Daniel, 466 P.2d 647, 650 (Okla. 1970); *see also* Rivera v. Laredo, 948 S.W.2d 787, 794 (Tex. App.--San Antonio 1997, writ denied); Forwood v. Taylor, 208 S.W.2d 670, 673 (Tex. App.--Austin 1948, no writ).

[86] *See, e.g.*, Pueblo v. Grand Carniolian Slovenian Catholic Union, 358 P.2d 13, 16 (Colo. 1960); In re Woods, 215 B.R. 623, 627 (10th Cir. 1998) (citing In re Holiday Isles, Ltd., 29 B.R. 827, 829 (Bankr. S.D. Fla. 1983)) (stating that "[c]ourts faced with a trustee's failure to technically qualify have long recognized the concept of a 'de facto' trustee of a bankrupt estate"); Shackelford v. Lake, No. CIV-15-0218-HE, 2016 U.S. Dist. LEXIS 164199, 2016 WL 6993960, at *5 (W.D. Okla. Nov. 29, 2016) ("As his mother's attorney-in-fact, as the manager of the LLC, and as de facto trustee of her trust-like device, Mr. Shackleford [sic] clearly owed his mother fiduciary responsibilities." (internal citation and footnotes omitted)); United States v. Novotny, 2001 WL 1673628, at *3 (D. Colo. Nov. 8, 2001) ("Novotny and his wife have served as appointed or de facto trustees during the entire existence of the Trusts."); ***Yeast v. Pru, 292 F. 598, 603 (D.N.M. 1923)*** ("Therefore these trustees, if not de jure, were unquestionably de facto, trustees of the respective towns they assumed to represent and act for as such trustees."); In re Irrevocable Tr. of McKean, 183 P.3d 317, 321-22 (Wash. Ct. App. 2008); Allen Trust Co. v. Cowlitz Bank, 210 Or. App. 648, 661 (Or. Ct. App. 2007); Creel v. Martin, 454 So.2d 1350, 1353 (Ala. 1984); In re Estate of Dakin, 296 N.Y.S.2d 742, 743 (1968); Tr. of Daniel, 466 P.2d at 650; In re Bankers Tr., 403 F.2d 16, 20 (7th Cir. 1968).

[87] Alpert v. Riley, 274 S.W.3d 277, 286 (Tex. App.--Houston [1st Dist.] 2008, no pet.).

[88] *Id.*

[89] Bird v. Anderson, No. 03-21-00140-CV, 2021 Tex. App. LEXIS 5036, at *2 (Tex. App.--Austin June 24, 2021, no pet.).

[90] ***TEX. R. CIV. P. 91***.

[91] Bird, 2021 Tex. App. LEXIS 5036, at *3.

[92] *Id.*

Texas, the court did imply that the defendant may owe fiduciary duties depending on the facts of the case even though he was not formally appointed a trustee:

> While the precise legal issue the trial court determined at this stage, per John's motion, is the viability of the de facto trustee "capacity" in which the Foundation has sued John, the trial court has yet to make the more salient determination of whether John owed the beneficiaries a fiduciary duty--either as a "de facto trustee" or under equitable principles--which is a question of law for the court that turns on the specific facts yet to be developed rather than on the legal capacity in which John was sued, considering that "fiduciary duties are equitable in nature and generally not subject to hard and fast rules[.]" . . . Even if this Court were to determine that the "de facto" capacity does not exist, such determination would not materially advance the litigation's termination because the issue of whether John owed the beneficiaries a fiduciary duty-in his individual capacity by allegedly and informally acting in the role of a trustee-would nonetheless remain a live issue. [93]

[*47] What is unclear is whether a person acting as a trustee (a de facto trustee), but who has not properly been placed in that position, is entitled to compensation in equity. [94]For example, the Washington Court of Appeals adopted this same standard:

> A person assumes the position of trustee under color of right or title where the person asserts "an authority that was derived from an election or appointment, no matter how irregular the election or appointment might be." A de facto trustee's good faith actions are binding on third persons. Because the purported successor trustee . . . acted as trustee and assumed its office through an appointment it reasonably believed to be effective, it was a de facto trustee and was entitled to compensation for its services. . . [Here, the appointed trustee] assumed the office of trustee under color of right when the dissolution court appointed it trustee. And [the appointed trustee] acted as the trustee, marshalling [sic] and protecting the Trust's assets. [The appointed trustee] reasonably believed it was the trustee and acted in good faith. The irregularity in the dissolution court's appointment did not invalidate [the appointed trustee's de facto] trustee status. [95]

Two elements must be met before a purported trustee can be deemed a de facto trustee: (1) the office or position must be assumed under color of right or title, and (2) the one claiming de facto status must exercise the duties of the office. [96]Accordingly, at least in some jurisdictions, it would appear that if someone acted in good faith, under color of right or title, and actually did work, then he or she may be entitled to some compensation as a de facto trustee even if he or she was not the de jure trustee. [97]

V. CO-TRUSTEES' FIDUCIARY DUTIES

A. Each Co-Trustee Owes Fiduciary Duties

The common law provides that each co-trustee owes the same fiduciary duties to the beneficiaries. [98]*Texas Property Code Section 113.051* provides:

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[93] *Id.* (citations omitted); *see also* Clower v. Wells Fargo Bank, N.A., NO. 2:07-CV-510-*TJW-CE, 2010 U.S. Dist. LEXIS 138795, at *2 (E.D. Tex. Oct. 18, 2010)* (denying motion to dismiss and held that plaintiffs properly plead claim based on de facto trustee status).

[94] *Compare Bird, 2021 Tex. App. LEXIS 5036, at *2 with Alpert v. Riley, 274 S.W.3d 277, 299 (Tex. App.--Houston [1st Dist.] 2008, pet. granted)*.

[95] *In re Irrevocable Tr. of McKean, 183 P.3d 317, 321-22 (Wash. Ct. App. 2008)* (internal footnotes and some internal citations omitted).

[96] *See In re Bankers Tr., 403 F.2d 16, 20 (7th Cir. 1968)*; *see also* Haynes v. Transamerica Corp., No. 16-CV-02934-KLM, 2018 LEXIS 8465, at *12-13 (D. Colo. Jan. 18, 2018).

[97] *See Bankers Tr., 403 F.2d at 20*.

[98] *See Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996)*.

> 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 this subtitle, in administering the trust **[*48]** the trustee shall perform all of the duties imposed on trustees by the common law. [99]

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." [100]So, each co-trustee or additional trustee has common law duties. [101]The Restatement discusses the duties owed by co-trustees. [102]It provides: "When a trust has multiple trustees, the fiduciary duties of trustees stated in this Chapter, except as modified by the terms of the trust, apply to each of the trustees." [103]The Restatement provides that the trust document may alter the delegation of duties among co-trustees:

> [T]rust provisions may and often should allocate roles and responsibilities among the trustees, or relieve one or more of the trustees of duties to participate in particular aspects of the trust's administration. A settlor may even designate, or provide for the appointment of, a "special trustee" to handle only one or more specified functions or types of decisions (e.g., the exercise of tax-sensitive powers of distribution, when the general trustee or trustees are beneficiaries of those powers), with the special trustee having no authority in or responsibility for other aspects of the trust's administration. The settlor's limiting of a trustee's functions or allocation of functions among the trustees usually, either explicitly or as a matter of interpretation, has the effect of relieving the trustee(s) to whom a function is not allocated of any affirmative duty to remain informed or to participate in deliberations about matters within that function. Similarly, exculpatory provisions ([Section] 96) may be designed to apply selectively.
>
> Even in matters for which a trustee is relieved of responsibility, however, if the trustee knows that a co-trustee is committing or attempting to commit a breach of trust, the trustee has a duty to take reasonable steps to prevent the fiduciary misconduct. [*See*] Comments *d* and *e*. Furthermore, absent clear provision in the trust to the contrary, even in the absence of any duty to intervene or grounds for suspicion, a trustee is entitled to request and receive reasonable information regarding an aspect of trust administration in which the trustee is not required to participate.
>
> **[*49]** The terms of a trust may provide that the decision of a particular trustee to take action in certain matters shall prevail for purposes of breaking a deadlock, or even by overriding a position of the other trustees although they may constitute a majority. Essentially, a provision of this type merely authorizes action upon the decision of one (or possibly more) of the trustees in the event of disagreement but does not relieve the others of their normal duties and rights of informed participation in the trustees' deliberations and decision making. More generally, on the duties and liabilities of minority or dissenting trustees, [*see*] Comments *d* and *e*. [104]

B. Co-Trustees Should Exercise Their Duties Jointly

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[99] *TEX. PROP. CODE ANN. § 113.051*.

[100] *Id.* § 111.004(18).

[101] *Id.* §§ 111.004(18), 113.051.

[102] RESTATEMENT (THIRD) OF TRS. § 81 (AM. L. INST. 2007); *see, e.g.*, *Westerfeld v. Huckaby, 474 S.W.2d 189, 192 (Tex. 1971)*; *Messer v. Johnson, 422 S.W.2d 908, 912 (Tex. 1968)*; *Mason v. Mason, 366 S.W.2d 552, 554-55 (Tex. 1963)*; *Lee v. Rogers Agency, 517 S.W.3d 137, 160-61 (Tex. App.--Texarkana 2016, pet. denied)*; *Woodham v. Wallace, No. 05-11-01121-CV, 2013 Tex. App. LEXIS 50, at *1, *9 (Tex. App.--Dallas 2013, no pet.)*; *Wolfe v. Devon Energy Prod. Co., LP, 382 S.W.3d 434, 446 (Tex. App.--Waco 2012, pet. denied)*; *Longoria v. Lasater, 292 S.W.3d 156, 168 (Tex. App.--San Antonio 2009, pet. denied)*.

[103] RESTATEMENT (THIRD) OF TRS. § 81(a) (AM. L. INST. 2007).

[104] *Id.* § 81.

Co-trustees each owe fiduciary duties, but they should exercise their duties jointly, as a unit. [105]So, one co-trustee should not take any action without the consent of the other co-trustee(s). [106]For example, if a trust calls for two co-trustees, it cannot operate with just one. [107]

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."
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> . . . .
>
> 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.
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> . . . .
>
> **[*50]** 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. [108]

For example, in *Conte v. Conte*, the Houston Court of Appeals for the First District 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. [109]The court noted that the trust expressly provided that "any decision acted upon shall require unanimous support by all [c]o-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." [110]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 for the reasonable costs and expenses incurred in connection with such Trustee's duties." [111]In a footnote, the

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[105] *Shellberg v. Shellberg, 459 S.W.2d 465, 470 (Tex. App.--Fort Worth 1970, ref. n.r.e.)*.

[106] *Id.*

[107] *Id.*

[108] GEORGE G. BOGERT ET AL., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES §§ 554, 744 (2022); *76 AM. JUR. 2D Trusts § 321* (2002) ("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.").

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

[110] *Id. at 834*.

[111] *Id.*

court also noted that the other cotrustee 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. [112]

C. Co-Trustees of Revocable Trusts Have Limited Duties

Co-trustees of revocable trusts have limited duties. [113]The general rule is that:

> [T]he duties of a trustee of a revocable trust are owed exclusively to the settlor the rights of non-settlor beneficiaries are generally subject to the control of the settlor. Thus, as a general rule, the trustee cannot be held to account by other beneficiaries for its administration of a revocable trust during the settlor's lifetime. [114]

[*51] For example, in *In re Estate of Little*, a settlor of a revocable trust withdrew trust assets and deposited them into an account with rights of survivorship with one child as the beneficiary. [115]His other children, who were beneficiaries of the revocable trust, sued the non-settlor co-trustee for allowing that to happen. [116]The trial court granted summary judgment for the co-trustee, and the beneficiaries appealed. [117]The court reviewed the co-trustee's duties:

> Furthermore, Dan, as co-trustee of a revocable trust, owed his fiduciary duty to Father while Father was alive. . . Dan was co-trustee of the Trust during Father's lifetime and ceased being a trustee when Father died. There is no evidence that he misappropriated or did anything with Trust property during his tenure as trustee. The uncontroverted evidence is that, while a co-trustee, Dan also made no decisions about the expenditure of funds from the survivorship account, nor did he claim entitlement to any funds in that account. Instead, he helped Father pay his living expenses from the survivorship account as Father directed. It was not until Father died and Dan was no longer a trustee that he claimed the $ 216,000 in the account for which he was the named the surviving party. Sums remaining in a survivorship account after the death of one of the parties belong to the surviving party. [118]

In *Moon v. Lesikar*, the Houston Court of Appeals for the Fourteenth District affirmed the dismissal of a case brought by a co-trustee against the settlor/cotrustee based on the removal of assets from the trust. [119]The court held that the co-trustee had no standing to challenge the settlor's removal of the assets. [120]

VI. TRUST MANAGEMENT BY CO-TRUSTEES

A. Decisions by Co-Trustees

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[112] *Id. at 835 n. 5*; *see also* *Stone v. King, No. 13-98-022-CV, 2000 Tex. App. LEXIS 8070, at *1, *10 (Tex. App.--Corpus Christi--Edinburg Nov. 30, 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).

[113] *See* *In re Est. of Little, No. 05-18-00704-CV, 2019 Tex. App. LEXIS 7355, at *1, *9 (Tex. App.--Dallas Aug. 20, 2019, pet. denied)*.

[114] *Id.*

[115] *Id.* at *3.

[116] *Id.*

[117] *Id.*

[118] *Id.* at *9 (accordingly, the court of appeals affirmed the summary judgment for the co-trustee) (citations omitted).

[119] *Moon v. Lesikar, 230 S.W.3d 800, 806 (Tex. App.--Houston [14th Dist.] 2007, pet. denied)*.

[120] *Id.* (citing *In re Malasky, 736 N.Y.S.2d 151, 152 (N.Y. App. Div. 2002)*; *Hoelscher v. Sandage, 462 N.W.2d 289, 291 (Iowa Ct. App. 1990)*.

Co-trustees are obligated to manage the trust together. [121]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." [122]However, the Texas Property Code **[*52]** provides that in the absence of trust direction, co-trustees generally act by majority decision. [123]

For example, in *Duncan v. O'Shea*, the Amarillo Court of Appeals affirmed a trial court's ruling that a trust could sell real estate where the majority of co-trustees voted for that action over the objection of a dissenting co-trustee. [124]The court held that the trustees had the power to make the sale, but that there was still an issue as to whether the action was a breach of duty. [125]The court stated:

> It merely declares that under applicable law and the terms of the *Marital Trust*, if Appellees, being a majority of the co[-]trustees, decide to sell a piece of real property held in the *Marital Trust*, then they may do so without her agreement. Appellees also note that if an actual sale violated the terms of the trust instrument or otherwise breached a fiduciary duty, Appellant would have a claim at that time. According to Appellees, the underlying proceeding is merely a declaration of their right to act without the agreement of Appellant in order to give assurance to any title insurance underwriters or potential buyer that she will not, as she has in the past, be able to interfere in the sale of that real property. Because the details of a future sale are not fact issues precluding the particular declaratory judgment sought, Appellant has not raised a genuine issue of material fact precluding summary judgment in this matter. [126]

There are circumstances when less than a majority of co-trustees can act for the trust. [127]If a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust. [128]"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." [129]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. [130]

[*53] *B. Right and Duty to Manage Trust*

The Texas Property Code provides that a co-trustee has a duty to participate in the performance of a trustee's function. [131]So, generally, a co-trustee must participate in the management of a trust. [132]There are two exceptions to a co-trustee's duty to

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[121] AUSTIN SCOTT & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 18.3 (6th ed. 2021).

[122] *Id.*

[123] *TEX. PROP. CODE ANN. § 113.085(a)*; *see also* RESTATEMENT (THIRD) OF TRS. § 39 (AM. L. INST. 2007).

[124] *Duncan v. O'Shea, No. 07-19-00085-CV, 2020 Tex. App. LEXIS 6564 (Tex. App.--Amarillo Aug. 17, 2020, no pet.)* (not designated for publication).

[125] *Id.*

[126] *Id. at *13*; *see also Ward v. Stanford, 443 S.W.3d 334 (Tex. App.--Dallas 2014, pet. denied)* (holding that a trust would not have accelerated a note where two of the three trustees voted against that action).

[127] *See TEX. PROP. CODE ANN. § 113.085*.

[128] *Id.* § 113.085(b).

[129] *Id.* § 113.085(d).

[130] *See id.*

[131] *Id.* § 113.085(c).

participate, which are if the co-trustee: (1) is unavailable to perform the function because of absence, illness, suspension, or disqualification; or (2) has properly delegated the performance of the function to another trustee. [133]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. [134]

The Restatement 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." [135]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." [136]

The Restatement goes on to explain a co-trustee's right to participate:

> The duty of a trustee to administer the trust (§ 76) applies to the trustees of trusts that have two or more trustees. Thus, except as otherwise provided by the terms of the trust, 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.
>
> 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.
>
> **[*54]** The duty to participate in the trust's administration does not prevent, as a means of participation, prudent delegation by the co-trustees to one or more agents in accordance with [Section] 80. Nor does it preclude proper delegation by a co-trustee to the other co-trustee(s) in accordance with Comment *c(1)*.
>
> The trustee's duty to participate in administering the trust does not require an equal level of effort or activity by each co-trustee, as recognized in the variability of their "reasonable" compensation (§ 38, Comment *i*). Accordingly, the duty of participation by each of the co-trustees does not prevent them from deciding (short of constituting delegation) to allow one or more of the co-trustees to carry more of the burden in regard to various matters, for example, by initiating, analyzing, reporting, and making recommendations for reasonably informed action by all of the trustees. It does, however, normally prevent the trustees from "dividing" the trusteeship or its functions in a manner that is not authorized by the terms of the trust. Cf. Comment *c(1)*.
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> If and to the extent a co-trustee is unavailable to participate prudently in the performance of a trusteeship function because of absence, illness, or other temporary incapacity, or because of disqualification under other law, the co-trustee is excused from participation. If prudence calls for action to be taken in these circumstances, the remaining co-trustee(s) can properly act for the trust.
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> In the case of a trust with two co-trustees, joint action or the concurrence of both trustees is required to exercise powers of the trusteeship. [*See*] § 39 Also, in trusts having three or more trustees, the terms of the trust or applicable law (rejecting the majority-control rule of § 39) may require action or concurrence by all of the trustees to exercise certain or all of the

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[132] *Id.*

[133] *Id.*

[134] *Id.* § 113.085(d).

[135] RESTATEMENT (THIRD) OF TRS. § 81 (AM. L. INST. 2007).

[136] *Id.* cmt. c.

> trustees' powers. If a situation arises in which prudence requires that the trustees reach a decision and they are unwilling or unable to do so, the trustees have a duty to apply to an appropriate court for instructions. [*See*] § 71. [137]

Indeed, there is a duty to participate in the administration of the trust, and if the co-trustee refuses to participate, then a court may remove that co-trustee. [138]In Texas, the Texas Trust Code provides that a court may remove a trustee:

> (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 **[*55]** 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. [139]

Certainly, a co-trustee refusing to participate in the trust's administration could be "other cause" for removal. [140]

Another commentator provides:

> When tested by these standards, the problem raised by a trustee who remains inactive after notice of past specific breach of trust or a threatened breach by his *co-trustee*, seems simple. To fail to act to repair a past wrong or prevent a threatened injury is to fail to use the care of a reasonably prudent man . . . .
>
> . . . [T]he case of the passive trustee who fails to inspect or supervise the administration of the trustee by his active colleague seems easy of solution. In the first place, to allow the co-trustee exclusive control of investments, the keeping of accounts, and expenditures from trust funds, is a delegation of discretionary duties. If the inactive trustee supervises the acts of his co-trustee, he becomes active and he may be said to make the acts of the co-trustee his own acts and to use his own discretion in the administration of the trust. But where there is no inspection, and the inactive trustee knows that discretionary duties must performed, he is assuredly authorizing the active co-trustee to exercise such discretion and ought to be regarded as committing a breach of trust. Secondly, judged by the measure of care of the ordinarily prudent man, the inactive trustee is guilty of a breach in failing to supervise. No man of common business ability would entrust a stock of goods, for example, to an agent for months or years without an accounting or inspection, even if there were no reason for suspicion.
>
> Cases where there has been mere passivity, as a result of which the co-trustee has obtained exclusive possession, or where the affirmative act of the inactive trustee has caused such exclusive possession, seem identical in principle. The result is the same in both cases. Nonfeasance where there is a duty to act ought to be regarded as the equivalent of misfeasance. A trustee who accepts a trust impliedly agrees to assume his full share of control and responsibility. Since the trust title and the trust powers are joint, it is the duty of each trustee to assist in reducing the property to joint possession where it may be jointly controlled. [141]

[*56] *C. Ratification of Co-Trustee's Invalid Actions*

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[137] *Id.* (cmt. on subsection (1)).

[138] *Id.*

[139] *TEX. PROP. CODE ANN. § 113.082*.

[140] *Id.*; *see also* SCOTT & ASCHER, *supra* note 121 § 184; *76 AM. JUR. 2D Trusts §§ 321*, *344*, *366* (2002).

[141] BOGERT, *supra* note 108, § 591.

As stated earlier, co-trustees should act in unison or by a majority vote depending on the number of co-trustees or the terms of the trust. [142]However, a single co-trustee's action, which was originally invalid, can later become effective by another co-trustee's ratification. [143]The Restatement provides:

> An action taken by one trustee with the consent of the other trustee(s) is valid. When a trustee has acted without the others' consent, they can ratify the action. Thus, a contract to sell trust property signed by one of two trustees with the knowledge and acquiescence of the other is valid. If the other trustee did not know of the contract when it was signed but later learned of it and failed to object within a reasonable time, this would be an effective ratification. [144]

Another commentator provides:

> Where a single trustee seeks to exercise a joint power, the invalidity of his action may be cured by later *ratification or acquiescence* by the nonacting trustees or by court order. A beneficiary may estop himself from objecting to the binding character of an attempt by one of several trustees to exercise a joint power, as where the beneficiary consents to the act in advance or accepts the benefits of the act after it has been accomplished. [145]

A co-trustee cannot, however, ratify an act that is in breach of the trust agreement. [146]

VII. CO-TRUSTEES DUTY TO COOPERATE

At common law, "[C]o-trustees owe to each other, as well as to the beneficiaries . . . the duty and obligation to so conduct themselves as to foster a spirit of mutual trust, confidence, and cooperation to the extent possible." [147]One commentator states:

> **[*57]** Co[-]trustees owe to each other, as well as to the beneficiaries of the trust, the duty and obligation to so conduct themselves as to foster a spirit of mutual trust, confidence, and cooperation to the extent possible; at the same time, the trustees should maintain an attitude of vigilant concern for the proper administration or protection of the trust business and affairs. [148]

Another commentator provides:

> [W]here there are several trustees and the relations among the trustees are such that they cannot cooperate in the affairs of the trust, all or one of them may be removed. In deciding such cases the court has regard only for what will be most beneficial to the interests of the beneficiaries. If it is shown that there is no danger of loss or mismanagement, or if the

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[142] RESTATEMENT (THIRD) OF TRS. § 81 (AM. L. INST. 2007).

[143] *Id.* § 39(b).

[144] *Id.*

[145] BOGERT, *supra* note 108, § 554; *see also* *In re Est. of Farley, 176 Misc. 772 (Sur. Ct. 2000)* (ratifying corporate co-trustee's course of conduct by being aware of conduct and agreeing to same); *W.A.K. ex rel. Karo v. Wachovia Bank, N.A., 712 F. Supp. 2d 476, 485 (E.D. Va. 2010)*; *Wyman v. Wyman, 676 P.2d 181, 184-85 (Mont. 1984)*; *Gleason v. Elbthal Realty Tr., 445 A.2d 1104, 1105 (N.H. 1982)*; *Deviney v. Lynch, 94 A.2d 578, 581 (Pa. 1953)*.

[146] *In re Est. of Foiles, 338 P.3d 1098, 1104, (Colo. App. 2014)*; *Mark Twain Kansas City Bank v. Kroh Bros. Dev. Co., 863 P.2d 355, 362 (Kan. 1992)*.

[147] *Ball v. Mills, 376 So.2d 1174, 1182 (Fla. App. 1979)*.

[148] *76 AM. JUR. 2D Trusts § 321* (2002).

> cause of the disagreement can be dispelled by the court's decision, or if the beneficiaries prefer to retain all of the trustees, removal may be denied. [149]

Moreover, the Uniform Trust Code provides that a trustee may be removed if "lack of cooperation among co-trustees substantially impairs the administration of the trust." [150]The associated comment states:

> The lack of cooperation among trustees justifying removal under subsection (b)(2) need not involve a breach of trust. The key factor is whether the administration of the trust is significantly impaired by the trustees' failure to agree. Removal is particularly appropriate if the naming of an even number of trustees, combined with their failure to agree, has resulted in deadlock requiring court resolution. The court may remove one or more or all of the trustees. . . . [R]emoval might be justified if a communications breakdown is caused by the trustee or appears to be incurable. [151]

Further, the failure of a co-trustee to cooperate with its co-trustees is grounds to remove the co-trustee. [152]

While the ill will or hostility of a trustee is generally insufficient cause, it becomes so if it is determined that the "hostility, ill will, or other factors have affected the trustee so that he cannot properly serve in his capacity." [153]In other words, if the evidence illustrates that the hostility "does or will affect" the trustee's performance of his duties, then cause exists for his **[*58]** removal. [154]Hostility is not limited only to situations wherein the trustee's performance is affected and also includes those wherein it impedes the proper performance of the trust, especially if the trustee made the subject of the suit is at fault. [155]

If a co-trustee refuses to cooperate and is hostile such that it impacts the administration of the trust, a court may remove that co-trustee. [156]For example, in *Ramirez v. Rodriguez*, three co-trustees sued a fourth trustee to have him removed because they had "engaged in a pattern of creating hostility and friction that impedes and/or affects the operations of the [T]rust." [157]The defendant filed a motion to dismiss the suit, and the court of appeals affirmed the denial of the dismissal. [158]The court stated:

> Sonia, Victor, and Javier sought to have Santiago removed as a co-trustee under [S]ection 113.082(a)(4) of the Texas Trust Code, which allows a trial court to remove a trustee based on a finding of "other cause for removal." "Ill will or hostility between a trustee and the beneficiaries of the trust, is, standing alone, insufficient grounds for removal of the trustee from office." However, a trustee will be removed if his hostility or ill will affects his performance. Furthermore, "[p]reservation of the trust and assurance that its purpose be served is of paramount importance in the law." For this reason, hostility that impedes the proper performance of the trust is grounds for removal, "especially if the trustee made

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[149] BOGERT, *supra* note 108, § 527.

[150] UNIF. TR. CODE § 706(b)(2) (UNIF. L. COMM'N 2000).

[151] *Id.*

[152] RESTATEMENT (THIRD) OF TRS. § 37(e) (AM. L. INST. 2007) ("The following are illustrative, but not exhaustive, of possible grounds for a court to remove a trustee: . . . unreasonable or corrupt failure to cooperate with a co-trustee.").

[153] *Akin v. Dahl, 661 S.W.2d 911, 913-14 (Tex. 1983)*; *Lee v. Lee, 47 S.W.3d 767, 792 (Tex. App.--Houston [14th Dist.] 2001, pet. denied)*.

[154] *Lee, 47 S.W.3d at 792* (internal italics omitted).

[155] *Bergman v. Bergman-Davison-Webster Charitable Tr., No. 07-02-0460-CV, 2004 Tex. App. LEXIS 1, at *2 (Tex. App.--Amarillo Jan. 2, 2004, no pet.)* (citing RESTATEMENT (THIRD) OF TRS. § 37 cmt. e(1) (AM. L. INST. 2003)); A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 107, p. 111 (4th ed. 1987)).

[156] *Ramirez v. Rodriguez, No. 04-19-00618-CV, 2020 Tex. App. LEXIS 1340, at *10-11 (Tex. App.--San Antonio Feb. 19, 2020, no pet.)*.

[157] *Id. at *3* (internal brackets omitted).

[158] *Id. at *12*.

> the subject matter of the suit is at fault." Removal actions prevent a trustee "from engaging in further behavior that could potentially harm the trust." "Any prior breaches or conflicts on the part of the trustee indicate that the trustee could repeat her behavior and harm the trust in the future." "At the very least, such prior conduct might lead a court to conclude that the special relationship of trust and confidence remains compromised." [159]

The court concluded that the plaintiffs raised sufficient allegations to support a claim:

> As previously noted, a trustee can be removed if his hostility or ill will affect his performance or the proper performance of the trust. We hold Sonia, Victor, and Javier presented clear and specific evidence of a prima face case that Santiago's hostility was impeding his performance as a cotrustee and the performance of the Trust. Accordingly, Sonia, Victor, and **[*59]** Javier satisfied their burden of proof, and the motion to dismiss was properly denied. [160]

In another case, a court affirmed the removal of a co-trustee and found probative evidence to conclude that the co-trustee caused hostility and friction and affected or impeded the operation of the trust. [161]The evidence included that the co-trustee taped meetings despite majority disapproval, thus chilling conversation, he sought to use his position to further his son's interests, he made false statements in an affidavit in order to secure a restraining order on a sale of trust property, he used profanity and intimidation during the meetings, and he threatened his fellow trustees with suit. [162]The court held:

> We recognize that the office of trustee carries with it fiduciary duties. So too do we understand that trustees are entitled to opinions independent from the other trustees and must voice them when they believe something is wrong. Yet, that does not entitle the dissenting individual to become so hostile or violent that the effective operation of the trust is impeded. Persistence and persuasion are the characteristics to be invoked to correct perceived error. Litigation may also be an alternative. But, violence, hostility, profanity, or intimidation are not, especially when they impede trust purposes. [163]

VIII. DELEGATION OF DUTIES

A. Delegation by Co-Trustee

At common law, a co-trustee could not delegate the administration of the trust to a co-trustee. [164]

> A co[-]trustee cannot delegate the administration of a trust to a single trustee. Nor may a trustee delegate the exercise of discretion to a joint or co[-]trustee. The Uniform Trust Code provides that a trustee may not delegate to a co[-]trustee the performance of a function the settlor reasonably expected the trustees to perform jointly, and unless a delegation was irrevocable, a trustee may revoke a delegation previously made. Generally, one trustee who delegates to another the

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[159] *Id. at *6-7* (citations omitted).

[160] *Id. at *10-11* (citations omitted); *see also* *Dildine v. Bonham, No. 03-07-00631-CV, 2009 Tex. App. LEXIS 1752, at *2 (Tex. App.--Austin Mar. 12, 2009, no pet.)* (affirmed removal of co-trustees who refused to set trustee meeting because it would allegedly be a waste of time).

[161] *Bergman v. Bergman-Davison-Webster Charitable Tr., No. 07-02-0460-CV, 2004 Tex. App. LEXIS 1, at *10 (Tex. App.--Amarillo Jan. 2, 2004, no pet.)*.

[162] *Id.*

[163] *Id.* at n. 2.

[164] *76 AM. JUR. 2D Trusts § 322* (2002).

> administration of a trust breaches the duties of a trustee. The duty of a trustee not to abandon **[*60]** the exercise of powers to co[-]trustees is owed to the beneficiaries of the trust and not to persons dealing with the co[-]trustee. [165]

However, in Texas, the Texas Trust Code provides that a co-trustee may delegate to another the performance of a function unless the settlor specifically directs that the co-trustees jointly perform the function. [166]"Unless a co[-]trustee's delegation under this subsection is irrevocable, the co[-]trustee making the delegation may revoke the delegation." [167]So, a co-trustee can opt out of participation in a management decision if the co-trustee is unavailable. [168]Further, a co-trustee may delegate a function to a co-trustee, which may generally be revoked. [169]The statute does not state that any particular function cannot be delegated. [170]

Further, the Uniform Prudent Investor Act provides that a trustee can delegate certain investment and management functions as follows:

> (a) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in: (1) selecting an agent; (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
>
> (b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
>
> (c) A trustee who complies with the requirements of Subsection (a) is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated, unless: (1) the agent is an affiliate of the trustee; or (2) under the terms of the delegation: (A) the trustee or a beneficiary of the trust is required to arbitrate disputes with the agent; or (B) the period for bringing an action by the trustee or a beneficiary of the trust with respect to an agent's actions is shortened from that which is applicable to trustees under the law of this state.
>
> (d) By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state. [171]

[*61] The Restatement provides:

> The general duty of each co-trustee to participate in performing the functions of the trusteeship does not prevent delegation on a prudent basis between or among themselves with respect to essentially ministerial matters, such as the custody of trust property and the implementation of decisions that have been made by proper vote of the co-trustees. (A trustee may also expressly delegate responsibilities and authority to the remaining co-trustee(s) in anticipation of the trustee's unavailability due to circumstances of the type described above in Comment *c*, involving relief from responsibility during illness or absence.)

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[165] *Id.*

[166] *TEX. PROP. CODE ANN. § 113.085(e)*.

[167] *Id.*

[168] *See id.*

[169] *See id.*

[170] *Id.*

[171] *TEX. PROP. CODE ANN. § 117.011*; *see also Aubrey v. Aubrey, 523 S.W.3d 299, 314 (Tex. App.--Dallas 2017, no pet.)* (plaintiff could not raise claim that trustee did not personally perform certain functions when statute allowed delegation).

> Delegation is also permissible in circumstances in which it would be unreasonable to expect the co-trustee personally to perform the function(s) in question. (Compare the earlier standard for delegation *generally*, as stated in *Restatement Second, Trusts § 171*.)
>
> Furthermore, delegation to a co-trustee may be desirable and appropriate in circumstances in which adherence to the general rule of Comment *c* would not be practical and prudent because of cost or inefficiency, or even because delegation would be consistent with the settlor's expectations in designating, or providing for appointment of, that co-trustee. For example, delegation of investment authority is generally authorized by implication when a settlor designates his or her surviving spouse to serve as co-trustee with a skilled professional trustee (or provides that the co-trustee position should always be filled by one of the settlor's children, to serve with the professional trustee) when the settlor was aware that the spouse (or children) had neither skill nor interest in investment or relevant financial matters.
>
> A trustee's delegation to the other trustee(s) is revocable and does not relieve the other trustee(s) of the duty to provide information to the delegating trustee, on request or in the event of significant, unanticipated circumstances or changes of investment policy.
>
> . . .
>
> Note further that . . . co-trustees cannot, ordinarily at least, hire and fire one another, and also that a "dividing" of functions among fiduciary peers invites the evolution of territorial prerogatives and unhealthy forms of reciprocity. [172]

However, delegation is limited to actions that the settlor would have contemplated being performed by one trustee. [173]Under Uniform Trust Code **[*62]** Section 703(e): "A trustee may not delegate to a co[-]trustee the performance of a function the settlor reasonably expected the trustees to perform jointly." [174]The Uniform Code goes on to state:

> Rationale. The comments to UTC [Section] 703 explain: "Co[-]trustees are appointed for a variety of reasons. Having multiple decision-makers serves as a safeguard against eccentricity or misconduct. Co[-]trustees are often appointed to gain advantage of differing skills, perhaps a financial institution for its permanence and professional skills, and a family member to maintain a personal connection with the beneficiaries. On other occasions, co[-]trustees are appointed to make certain that all family lines are represented in the trust's management . . . .
>
> "Subsection (e) addresses the extent to which a trustee may delegate the performance of functions to a co[-]trustee. The standard differs from the standard for delegation to an agent as provided in Section 807 because the two situations are different . . . . Subsection (e) is premised on the assumption that the settlor selected co[-]trustees for a specific reason and that this reason ought to control the scope of a permitted delegation to a co-trustee. Subsection (e) prohibits a trustee from delegating to another trustee functions the settlor reasonably expected the trustees to perform jointly. The exact extent to which a trustee may delegate functions to another trustee in a particular case will vary depending on the reasons the settlor decided to appoint the cotrustees. The better practice is [for a settlor] to address the division of functions in the terms of the trust. . . ." [175]

B. Directed Trusts

If a trust instrument grants any person, including the trustor, an advisory or investment committee, or one or more co-trustees, authority to direct the making or retention of an investment or to perform any other act of management or administration of the trust to the exclusion of the other co-trustees, the excluded co-trustees are not liable for a loss resulting from the exercise of that authority. [176]The Texas Property Code provides:

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[172] RESTATEMENT (THIRD) OF TRS. § 81 (AM. L. INST. 2007).

[173] *Id.*

[174] UNIF. TR. CODE § 703(e) (UNIF. L. COMM'N 2000).

[175] RESTATEMENT (THIRD) OF TRS. § 81 (AM. L. INST. 2007); *see id.* § 703 cmt.

[176] *TEX. PROP. CODE ANN. § 114.0031*.

> If the terms of a trust give a person the authority to direct, consent to, or disapprove a trustee's actual or proposed investment decisions, distribution decisions, or other decisions, the person is an advisor . . . .
>
> A trustee who acts in accordance with the direction of an advisor, as prescribed by the trust terms, is not liable, except in cases of willful misconduct on the part of the trustee so directed, for any loss resulting directly or indirectly from that act.

[*63] If the trust terms provide that a trustee must make decisions with the consent of an advisor, the trustee is not liable, except in cases of willful misconduct or gross negligence on the part of the trustee, for any loss resulting directly or indirectly from any act taken or not taken as a result of the advisor's failure to provide the required consent after having been requested to do so by the trustee.

If the trust terms provide that a trustee must act in accordance with the direction of an advisor with respect to investment decisions, distribution decisions, or other decisions of the trustee, the trustee does not, except to the extent the trust terms provide otherwise, have the duty to: (1) monitor the conduct of the advisor; (2) provide advice to the advisor or consult with the advisor; or (3) communicate with or warn or apprise any beneficiary or third party concerning instances in which the trustee would or might have exercised the trustee's own discretion in a manner different from the manner directed by the advisor.

Absent clear and convincing evidence to the contrary, the actions of a trustee pertaining to matters within the scope of the advisor's authority, such as confirming that the advisor's directions have been carried out and recording and reporting actions taken at the advisor's direction, are presumed to be administrative actions taken by the trustee solely to allow the trustee to perform those duties assigned to the trustee under the trust terms, and such administrative actions are not considered to constitute an undertaking by the trustee to monitor the advisor or otherwise participate in actions within the scope of the advisor's authority. [177]

IX. CO-TRUSTEES HAVE A DUTY TO DISCLOSE TO ONE ANOTHER

Co-trustees have a duty to disclose to beneficiaries and to each other. [178]A trustee also has a duty of full disclosure of all material facts known to him or her that might affect the beneficiaries' rights. [179]Further, a trustee has a duty of candor. [180]Regardless of the circumstances, the law provides that beneficiaries are entitled to rely on a trustee to fully disclose all relevant information. [181]In fact, a trustee has a duty to account to the beneficiaries for all trust transactions, including profits and mistakes. [182]A trustee's fiduciary duty even includes the disclosure of any matters that could possibly influence the fiduciary to act in a manner prejudicial to the principal. [183]The duty to disclose reflects the information a trustee is duty bound to maintain, as he or **[*64]** she is required to keep records of trust property and his or her actions related to it. [184]

A co-trustee has a duty to disclose certain information to another cotrustee. [185]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

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[177] *Id.*

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

[179] *Id.*

[180] *Welder v. Green, 985 S.W.2d 170, 175 (Tex. App--Corpus Christi-Edinburg 1998, pet. denied)*.

[181] *See generally Johnson v. Peckham, 120 S.W.2d 786, 787 (Tex. 1938)*.

[182] *Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996)*; *see also Montgomery, 669 S.W.2d at 313*.

[183] *W. Rsrv. Life Assur. Co. v. Graben, 233 S.W.3d 360, 374 (Tex. App.--Fort Worth 2007, no pet.)*.

[184] *Beaty v. Bales, 677 S.W.2d 750, 754 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.)*.

[185] *In re Alexander, 580 S.W.3d 858, 966 (Tex. App.--Houston [14th Dist.] 2019, no pet.)*.

facts that have come to his attention and that are relevant to the administration of the trust." [186]Even though a majority of trustees are authorized to act for all trustees, each trustee is entitled access to trust records and to information regarding the administration of the trust, including investment decisions. [187]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." [188]

X. CO-TRUSTEES CAN SEEK AN ACCOUNTING

A co-trustee can seek an accounting from the other co-trustee(s). [189]*Texas Property Code Section 113.151* provides what is required to request an accounting: "A beneficiary by written demand may request the trustee to deliver to each beneficiary of the trust a written statement of accounts covering all transactions since the last accounting or since the creation of the trust, whichever is later." [190]"'Beneficiary' means a person for whose benefit property is held in trust, regardless of the nature of the interest." [191]In fact, the right to an accounting is a wide ranging right. [192]Any interested person may file suit to compel a trustee to account to that person. [193]An interested person means "a trustee, beneficiary, any other person with an interest in or claim against the trust, or anyone affected by the administration of the trust." [194]The Texas Property Code states: "'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." [195] **[*65]** So, in Section 113.151 when it states that a person sends a demand for an accounting to the trustee, it includes "additional trustee." [196]So, the Texas Legislature has provided a broad right to request and demand an accounting from a trustee. [197]

Texas Property Code Section 113.151(a) provides:

> If the trustee fails or refuses to deliver the statement on or before the 90th day after the date the trustee receives the demand or after a longer period ordered by a court, any beneficiary of the trust may file suit to compel the trustee to deliver the statement to all beneficiaries of the trust.
>
> If a beneficiary is successful in the suit to compel a statement under this section, the court may, in its discretion, award all or part of the costs of court and all of the suing beneficiary's reasonable and necessary attorney's fees and costs against the trustee in the trustee's individual capacity or in the trustee's capacity as trustee. [198]

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[186] GEORGE GLEESON, THE LAW OF TRUSTS & TRUSTEES § 584 (Supp. Rev. 2d ed. 1992); *see also* *Pa. Co. v. Wilmington Tr. Co., 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).

[187] BOGERT, *supra* note 108, § 584.

[188] *Id.*

[189] Author's original thought.

[190] *TEX. PROP. CODE ANN. § 113.151*.

[191] *Id.* § 114.004(2).

[192] *See id.* § 113.151.

[193] *Id.*

[194] *Id.* § 111.004(7); *see, e.g.*, *Faulkner v. Bost, 137 S.W.3d 254 (Tex. App.--Tyler 2004, no pet.)* (daughter was an interested person with standing to request an accounting of Trust A, even though she was not a trustee or beneficiary, because she served as Trustee of Trust B, which held an assigned interest in Trust A).

[195] *TEX. PROP. CODE ANN. § 111.004*.

[196] *See id.* § 113.151.

[197] *See id.*

If a trustee declines to provide an accounting in response to the statutory request, the trustee will likely breach his, her, or its fiduciary duties as a co-trustee. [199]The *Uzzell* court stated: "Counsel for Roe further testified that Uzzell, though asked repeatedly, failed and refused to provide an account of the trust transactions as required by statute." [200]"This constituted a breach of Uzzell's fiduciary duty to Roe to fully disclose all material facts about the trust." [201]

XI. CO-TRUSTEE COMPENSATION

When a trust document is silent as to compensation for trustees, the statutory compensation scheme afforded by *Section 114.061 of the Texas Property Code* applies. [202]Unless the trust does not allow compensation or allows only limited compensation, a trustee's payment of reasonable compensation to itself is not a breach of fiduciary duty. [203]Section 114.061 provides, in pertinent part:

> **[*66]** (a) Unless the terms of the trust provide otherwise and except as provided in Subsection (b) of this section, the trustee is entitled to reasonable compensation from the trust for acting as trustee.
>
> (b) If the trustee commits a breach of trust, the court may in its discretion deny him all or part of his compensation. [204]

The statute does not define the term "reasonable compensation." [205]

Where there are multiple trustees, the combined compensation must be reasonable. [206]In this regard, the Restatement provides:

> When there are two or more co-trustees, compensation that is fixed by statute or trust provision ordinarily is to be divided among them in accordance with the relative value of their services. Where the rule of reasonable compensation applies, see generally Comment *c*, and especially Comment *c(1)*. In the aggregate, the reasonable fees for multiple trustees may be higher than for a single trustee, because the normal duty of each trustee to participate in all aspects of administration (see § 81, and cf. § 80) can be expected not only to result in some duplication of effort but also to contribute to the quality of administration. And see Comment *c(1)* on factors (time, skill, etc.) relevant to establishing the compensation of each of the co-trustees. [207]

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[198] *Id.* § 113.151(a).

[199] *Uzzell v. Roe, 2009 WL 1981389 *1, *11-12 (Tex. App.--Austin 2009, no pet.)*.

[200] *Id.* (citing *Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1995))*.

[201] *Id.* (citing *Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1995))*.

[202] *TEX. PROP. CODE ANN. § 114.061(a)*; *see also Bigbee v. Castleberry, No. 13-06-551-CV, 2008 WL 152382, at *2, n.1 (Tex. App.--Corpus Christi-Edinburgh Jan. 17, 2008, pet. denied)* (mem op.); *Nacol v. McNutt, 797 S.W.2d 153, 155 (Tex. App.--Houston [14th Dist.] 1990, writ denied)* ("[A] trustee is, after all, presumptively entitled to reasonable compensation for her services.").

[203] *TEX. PROP. CODE ANN. § 114.061*; *InterFirst Bank Dall., N.A. v. Risser, 739 S.W.2d 882, 888 (Tex. App.--Texarkana 1987, no writ)*.

[204] *TEX. PROP. CODE ANN. § 114.061(a)*; *see also* UNIF. TR. CODE § 708(a) (UNIF. L. COMM'N 2000) (providing for reasonable compensation).

[205] *See TEX. PROP. CODE ANN. § 114.061*.

[206] *See id.*; *see also Risser, 739 S.W.2d at 889*.

[207] RESTATEMENT (THIRD) OF TRS. § 38 (AM. L. INST. 2007).

One commentator states:

> In the absence of statute that [specifically addresses the method of apportionment,] two or more trustees of the same trust are compensated according to the amount of services each has rendered, the whole sum paid the group usually amounting to what would have been paid a single trustee for like work. The single commission is not divided among them in proportion to the number of trustees, but on a quantum meruit basis. [208]

Another commentator provides:

> The general rule that the compensation of a trustee when not definitely fixed by the trust instrument or by statute must be reasonable for the services rendered is applicable in the case of co[-]trustees. Under some circumstances, co[-]trustees are allowed full compensation for each of them rather than a single full compensation to be divided among them. The division of compensation by trustees among themselves, where the total is **[*67]** a reasonable allowance, will not be interfered with by the court, although in some circumstances, it may be advisable for the court to fix their relative shares.
>
> Co[-]trustees rendering similar services generally are entitled to equal compensation or commissions, but where a trust instrument requires of some co[-]trustees services not required of others, differences in compensation are deemed proper. The allocation of compensation between those who participate in the management of the trust may be a matter to be decided by them on the basis of the services rendered by each. A trustee may be required to obtain the authorization of the co[-]trustee before being compensated from the trust account, particularly where the language of the trust instrument permits the trustees to jointly authorize compensation. The trial court may not rely on protracted arguments and disputes among the co[-]trustees as a basis for requiring the co[-]trustees to waive their contractual rights to compensation. [209]

The Texas Banker's Association (TBA) has form policies for bank trust departments. [210]The TBA's policy for dividing compensation with a co-fiduciary states:

> Except under unusual circumstances, it is the policy of the trust department to request the same allowance or make the same charge for serving as co-fiduciary as for sole fiduciary. This policy is based on experiences with co-fiduciary appointments which have revealed that work and responsibility do not diminish with the addition of a co-fiduciary. [211]

So, the TBA takes the reasonable position that where a co-trustee does the work of a sole trustee, it should be compensated as such. [212]

In the context of co-trustees, there is normally one trustee that does the majority of the work administering the trust (managing financial investments, real estate, oil and gas, closely held business, and other investments; retaining vendors, attorneys, accountants; paying expenses and taxes; determining distributions; etc.). [213]That trustee should be paid more than another co-trustee that simply monitors the activities and participates in big picture and distribution decisions. [214]The co-trustees should

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[208] BOGERT, *supra* note 108, § 978.

[209] *76 AM. JUR. 2D Trusts § 577* (2002).

[210] *See* TBA Policies, New Business, Section C, Policy No. 10.

[211] *Id.*

[212] *See id.*

[213] *See* Committee on Trust Administration and Accounting, *The Co-Trustee Relationship - Rights and Duties*, 8 REAL PROP. PROB. & TR. J. 9, 15 (1973).

discuss what fair total compensation is for the services that they both provide. [215]Finally, it is not unfair for co-trustee compensation to be higher than sole-trustee **[*68]** compensation, and a settlor should be aware of that when he or she executes a trust document providing for more than one trust administrator. [216]

It should be noted that where a purported trustee is appointed in violation of the Texas Trust Code and the trust instruments, the purported trustee lacks authority to hold that status and is not entitled to recover compensation for trustee services. [217]

XII. DEADLOCKED CO-TRUSTEES

Once again, in the absence of trust direction, co-trustees generally act by majority decision. [218]The Texas Trust Code does not explain what happens when there is a deadlock between an even number of co-trustees. [219]What happens when the trust does not provide any direction on resolving a co-trustee deadlock? [220]When the co-trustees have a deadlocked situation, the trustees can seek court intervention. [221]The Texas Declaratory Judgments Act provides broadly that:

> A person interested as or through . . . a trustee . . . may have a declaration of rights or legal relations in respect to the trust or estate: . . . (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 . . . . [222]

Moreover, the *Texas Property Code Section 115.001* provides that the district courts have jurisdiction:

> [O]ver 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; . . . (4) determine the powers, responsibilities, duties, and liability of a trustee; . . . (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 . . . . [223]

[*69] Accordingly, co-trustees can seek court instruction where they are deadlocked on an important decision. [224]

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[214] *See id.* at 23; *TEX. PROP. CODE ANN. § 114.061(a)*.

[215] *See* Committee on Trust Administration and Accounting, *supra* note 213, at 23.

[216] *See id.*

[217] *See Alpert v. Riley, 274 S.W.3d 277, 296-97 (Tex. App.--Houston [1st Dist.] 2008, no pet.)*.

[218] *TEX. PROP. CODE ANN. § 113.085(a)*.

[219] *See id.*

[220] Author's original thought.

[221] *See TEX. CIV. PRAC. & REM. CODE ANN. § 37.005*.

[222] *Id.*

[223] *TEX. PROP. CODE ANN. § 115.001*.

[224] *See id.*

There is a duty to participate in the administration of the trust and to cooperate with co-trustees. [225]If a co-trustee refuses to participate or reasonably cooperate, then a court may remove that trustee. [226]The Texas Property Code provides that a court may remove a trustee:

> (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. [227]

Certainly, a co-trustee refusing to participate in the trust's administration in good faith which results in a deadlocked situation could be "other cause" for removal. [228]

Moreover, where co-trustees are deadlocked on many issues, and the situation is harming the trust, then one or more of the co-trustees may be able to seek a receivership for the trust. [229]The Texas Property Code expressly provides for a receivership as a remedy for a breach of trust that has occurred or may occur. [230]Section 114.008 provides in part:

> (a) To remedy a breach of trust that has occurred or might occur, the court may: . . . (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; . . . (10) order any other appropriate relief. [231]

[*70] For example, in *Blalack v. Blalack*, the Texarkana Court of Appeals affirmed a receivership in an estate dispute where the co-executors were in a deadlock and were not managing the estate. [232]The court explained:

> Evidence was presented in the receivership hearing from which the trial judge might conclude that the two joint legal representatives of the decedent's estate had not been able to agree upon any important managerial decision affecting the estate for a period of several months prior to the hearing. Production of oil and gas from estate owned property by a long-time employee was condoned rather than agreed to by the joint legal representatives. Thousands of dollars of the indebtedness represented by notes payable had matured and demand for payment had been made. The joint legal representatives were unable to agree to use a part or all of available funds or liquidate assets to pay indebtedness or agree upon any course of action that would avert foreclosure of liens attaching to estate property. The stalemate in management

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[225] *See id.* § 113.082.

[226] *See id.*

[227] *Id.* § 113.082(a).

[228] *Id.*

[229] *See id.* § 114.008(a).

[230] *Id.*

[231] *Id.* (emphasis added); *Est. of Benson, No. 04-15-00087-CV, 2015 Tex. App. LEXIS 9477, at *7 (Tex. App.--San Antonio Sept. 9, 2015, pet. dism'd by agr.)* (the court of appeals rejected the trustee's challenges to the appointment of temporary co-receivers as the trial court had some evidence that there was a breach of trust to support its decision to appoint co-receivers, relying on the evidence presented at the temporary injunction hearing and held, that under the statute, a movant need not prove the elements of equity; thus, the beneficiary in this case was not required to produce evidence of irreparable harm or lack of another remedy); *Carroll v. Carroll, 464 S.W.2d 440, 450 (Tex. App.--Amarillo 1971, writ dism'd w.o.j.)* (affirming receivership in estate case where property was in jeopardy and family had dissention).

[232] *Blalack v. Blalack, 424 S.W. 2d 646, 650 (Tex. App.--Texarkana 1968, no writ)*.

> caused the loss of trade discounts. The impasse was eroding the estate and subjecting its assets to the threat and danger of loss at a distress sale and ultimately the estate to bankruptcy. [233]

Courts from other jurisdictions hold that a co-trustee has standing to file suit to seek instructions from a court or the removal of the co-trustees and the appointment of successor trustees. [234]For example, in *In re Trust of Marta*, the court resolved a deadlock, but warned as follows:

> This case has presented a question of what a court should do when two cotrustees are deadlocked over matters committed to their mere discretion in the absence of an abuse of discretion or other compelling circumstances. The general answer to that question has been provided by the General Assembly: under 12 *Del. C.* § 3407, "[a] trustee may be removed by the Court of Chancery on its own initiative or on petition of a trustor, cotrustee, or beneficiary if . . . (2) [a] lack of cooperation among co-trustees substantially impairs the administration of the trust." DeMichiel and DiFonzo are, from the evidence including, specifically, their testimony and demeanor at trial, not capable of, or not interested in, cooperating with each other. Their inability to cooperate is, as should be evident from this letter opinion, "substantially impairing the administration of the trust." Thus, under ordinary circumstances, the better remedy would likely have been to remove them as co-trustees and to appoint new trustees. [235]

[*71] While acknowledging that a co-trustee can seek court assistance in a deadlock situation, one court held that a co-trustee did not breach duties to diversify where the co-trustees were deadlocked on the issue:

> [T]here is no provision within the Trust Agreement that would have provided a means for breaking this deadlock between the equally divided co-trustees. Ms. Stein's father, as settlor, certainly knew that in designating an even number of trustees, a deadlock or tie vote was a distinct possibility. Not only did he provide no mechanism to break such a tie vote, but he also expressly included a proviso that certain actions could only be taken by a majority vote. The trust instrument read as a whole, therefore, clearly evidences the settlor's intent to allow no action to occur in tie vote or deadlock situations. Thus, the settlor's intent was to condition affirmative action of the trustees on a 3 to 1 or unanimous vote. In addition, the individual and corporate trustees were given an equal standing with each other. [236]

In *In re Mark K. Eggebrecht Irrevocable Trust*, the Montana Supreme Court affirmed a trial court's order modifying a trust at the request of one co-trustee to remove both deadlocked co-trustees so that a sole corporate trustee could be appointed to properly administer the trust. [237]The court held that the trust's purpose had been frustrated by one co-trustee who refused to make distributions for the beneficiaries' medical and school expenses. [238]

The Restatement (Second) of Trusts provides that a co-trustee may have to sue to obtain judicial directions where a discretionary power should be exercised but other co-trustees will not allow such to happen:

> Where there are several trustees, action by all of them is necessary to the exercise of powers conferred upon them. [*See*] § 194. If the circumstances are such that it is the duty of the trustees to exercise a power conferred upon them, and one of

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[233] *Id.*

[234] *See In re Jackson, 174 A.3d 14, 25 (Pa. Super. Ct. 2017)*; *In re* Tr. of Marta, No. 20210-NC, 2003 LEXIS 87, at *14 (Del. Ch. Aug. 14, 2003); *Stuart v. Cont'l Ill. Nat'l Bank & Tr. Co. of Chi., 369 N.E.2d 1262, 1275 (Ill. 1977)*.

[235] *Tr. of Marta*, 2003 LEXIS 87 at *14.

[236] *Tr. of Rosenfeld, No. 040148, 2004 Phila. Ct. Com. Pl. LEXIS 130, (Pa. Com. Pl. May 19, 2004)*.

[237] *In re Mark K. Eggebrecht, 4 P.3d 1207, 1211 (Mont. 2000)*.

[238] *Id.*

> them refuses to concur in the exercise of the power, the other trustees are not justified in merely acquiescing in the non-exercise of the power. [*See*] § 185. In such a case it is their duty to apply to the court for instructions. [239]

Further, it provides:

> If there are two or more trustees, action by all of them is necessary to the exercise of the powers conferred upon them as trustees. If one of them refuses to concur in the exercise of a power, the others cannot exercise the power. In such a case, however, if it appears to be for the best interest of the trust that there should be an exercise of the power, the court may on **[*72]** the application of a co-trustee or beneficiary direct its exercise. The court may remove a trustee who unreasonably refuses to concur in the exercise of a power if such removal would be for the best interest of the trust. [240]

The Restatement provides: "If multiple trustees are deadlocked with regard to the exercise of a power, on application of a co-trustee or beneficiary a proper court may direct exercise of the power or take other action to break the deadlock." [241]Furthermore, it provides that the trust document may resolve deadlocks:

> The terms of a trust may provide that the powers of multiple trustees are to be exercised in a manner that differs from that prescribed by the rule of this Section. Thus, for example, a trust provision may require that all of the trust's three trustees concur in exercising powers or a particular power, or may provide that the decision of a particular trustee prevails in the event two trustees are deadlocked with regard to certain matters. [242]

One Texas commentator provides:

> When there are multiple trustees, a trustee has the right to manage and administer the trust through majority rule. A trust instrument that provides for co-trustees may specify the number of co-trustees required to exercise any or all of the powers granted to them. Power that is vested in three or more trustees may be exercised by a majority of the trustees, unless the trust instrument provides otherwise . . . .
>
> This means that no trustee has the right to veto the will of the majority of the trustees unless the trust instrument so specifies. However, every trustee has certain limited rights, regardless of the actions of the majority. Every trustee may take steps to avoid personal liability for actions taken by the majority of trustees. In addition, when litigation is involved, every trustee has the right to take an appeal when the appeal is taken to protect the estate.
>
> Majority rule rights mean nothing when there are only two trustees, or when there is an even number of trustee who are deadlocked on an issue of management or administration of the trust. In the case of a trust with two trustees, joint action is necessary to administer a trust. [243]

The commentator goes on to state:

> **[*73]** There is no rule in the Trust Code for the resolution of a difference of opinion between two co-trustees or for a deadlock situation involving an even number of trustees. Nonetheless, it seems clear that, in all cases, one trustee will be liable for the acts of the other trustee or trustees if he or she withdraws his or her opposition and permits the act to go forward. At common law, co-trustees were considered sureties for each other, guaranteeing faithful performance to the beneficiaries. If one trustee simply acts without the consent of the remaining trustees, and the co-trustees are held jointly

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[239] RESTATEMENT (SECOND) OF TRS. § 184 (AM. L. INST. 2007).

[240] *Id.* § 194.

[241] RESTATEMENT (THIRD) OF TRS. § 39(e) (AM. L. INST. 2007).

[242] *Id.* § 39(f).

[243] *Shellberg v. Shellberg, 459 S.W.2d 465, 470 (Tex. App.--Fort Worth 1970, writ. ref'd n.r.e.)*; MCLAUGHLIN, *supra* note 73 § 84.21.

> and severally liable to the beneficiary for the acts of one of them, the co-trustees who were not equally at fault may be entitled to indemnity from the defaulting co-trustee. [244]

Another commentator provides:

> In the case of private trusts, when there are multiple trustees, the courts have long required all the trustees to concur in the exercise of their powers . . . . The unanimity rule continues to apply in a variety of circumstances, either because there are only two trustees or because applicable law or the terms of the trust impose it. Likewise there will be situations in which an even number of trustees are equally divided. It thus remains necessary to consider how to resolve instances of trustee impasse. When the exercise of a power is discretionary and the dissenting trustees are guilty of no abuse of discretion in refusing to concur, the court ordinarily will not direct the dissenters to concur. But when one or more trustees refuse to concur in the exercise of a power, and the refusal is in violation of a duty, either because the exercise of the power is not discretionary or because the circumstances are such that it would be an abuse of discretion not to exercise it, such as when failure to exercise the power would result in harm to the trust estate, the court can direct the dissenters to join in with the others in exercising the power. In such a case, the other trustees or the beneficiaries can apply to the court for directions. Alternatively, a trustee's unreasonable refusal to join the exercise of a power may be grounds for removal. Occasionally, when the trustees' failure to agree has become injurious to the trust, the court has taken upon itself the execution of the trust. [245]

XIII. CO-TRUSTEES CAN BE LIABLE FOR EACH OTHER'S CONDUCT

A. Texas Statute Regarding Liability for Co-Trustee's Actions

Co-trustees can be liable for the acts of their co-trustees. [246]The Texas Property Code states:

> **[*74]** (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 cotrustee of the dissent in writing at or before the time of the action is not liable for the action. [247]

Under this provision a co-trustee has a duty "to (1) prevent a co[-]trustee from committing a serious breach of trust; and (2) compel a co-trustee to redress such a breach." [248]One court cited this provision as an example of a trustee being held personally liable for actions taken as a trustee. [249]

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[244] MCLAUGHLIN, *supra* note 73 § 84.08.

[245] MARK L. ASCHER ET. AL, SCOTT & ASCHER ON TRUSTS, WHEN POWERS ARE EXERCISABLE BY SEVERAL TRUSTEES § 18.3.

[246] *See* *TEX. PROP. CODE ANN. § 114.006(a)*-(c).

[247] *Id.* § 114.006.

[248] *Id.* § 114.006(b); *In re Cousins, 551 S.W.3d 913, 916 (Tex. App.--Tyler 2018, no pet.)*.

[249] Crownover v. Crownover, No. DR:15-CV-132-*AM-CW 2018 U.S. Dist. LEXIS 237669, at *20 (W.D. Tex. Mar. 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. [250]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, bring suit against the co-trustee to prevent the breach. [251]

Where a co-trustee is the settlor of a revocable trust, his or her co-trustee may not be liable for the settlor's actions. [252]In *In re Estate of Little*, a settlor of a revocable trust withdrew trust assets and deposited them into an account with rights of survivorship with one child as the beneficiary. [253]His other children--who were beneficiaries of the revocable trust--sued the non-settlor co-trustee for allowing that to happen. [254]The trial court granted summary judgment for the co-trustee, and the beneficiaries appealed. [255]The Dallas Court of Appeals first held that the beneficiaries had standing to bring their claims. [256]The court then turned to the co-trustee's duties:

> **[*75]** Furthermore, Dan, as co-trustee of a revocable trust, owed his fiduciary duty to Father while Father was alive. The general rule is that: "[T]he duties of a trustee of a revocable trust are owed exclusively to the settlor . . . the rights of non-settlor beneficiaries are generally subject to the control of the settlor. Thus, as a general rule, the trustee cannot be held to account by other beneficiaries for its administration of a revocable trust during the settlor's lifetime."
>
> Dan was co-trustee of the Trust during Father's lifetime and ceased being a trustee when Father died. There is no evidence that he misappropriated or did anything with Trust property during his tenure as trustee. The uncontroverted evidence is that, while a co-trustee, Dan also made no decisions about the expenditure of funds from the survivorship account, nor did he claim entitlement to any funds in that account. Instead, he helped Father pay his living expenses from the survivorship account as Father directed. It was not until Father died and Dan was no longer a trustee that he claimed the $ 216,000 in the account for which he was the named the surviving party. Sums remaining in a survivorship account after the death of one of the parties belong to the surviving party. [257]

Accordingly, the Court of Appeals affirmed the summary judgment for the co-trustee. [258]

B. Commentators' Views

One Texas commentator stated:

> [I]t seems clear that, in all cases, one trustee will be liable for the acts of the other trustee or trustees if he or she withdraws his or her opposition and permits the act to go forward. At common law, co-trustees were considered sureties for each other, guaranteeing faithful performance to the beneficiaries. If one trustee simply acts without the consent of the

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[250] *TEX. PROP. CODE ANN. § 114.006(b)*.

[251] *Id.* § 114.006(a).

[252] *In re Est. of Little, No. 05-18-00704-CV, 2019 Tex. App. LEXIS 7355, at *1 (Tex. App.--Dallas Aug. 20, 2019, pet. denied)*.

[253] *Id.*

[254] *Id. at *6*.

[255] *Id. at *1*.

[256] *Id. at *7*.

[257] *Id. at *2* (quoting *Mayfield v. Peek, 546 S.W.3d 253, 263 (Tex. App.--El Paso 2017, no pet.)), *22*.

[258] *Id. at *22*.

> remaining trustees, and the co-trustees are held jointly and severally liable to the beneficiary for the acts of one of them, the co-trustees who were not equally at fault may be entitled to indemnity from the defaulting co-trustee. [259]

The Restatement provides as follows regarding co-trustee liability:

> A trustee is not liable for a breach of trust committed by a co-trustee, unless the trustee: (i) participated or acquiesced in the breach of trust or was involved in concealing it; (ii) improperly delegated administration of the **[*76]** trust to the co-trustee; or (iii) enabled the co-trustee to commit the breach of trust by failing to exercise reasonable care, including by failing to make reasonable effort to enjoin or otherwise prevent the breach of trust. Furthermore, a trustee may be liable for neglecting to take reasonable steps seeking to obtain redress for the breach of trust. That it might be "reasonable" for a trustee to decide not to bring suit to redress a breach of trust, [*see*] § 76, Comment d.
>
> A trustee who opposed an action taken upon decision by a majority of the trustees, and who made that opposition known to a co-trustee but thereafter reasonably joined in the action in order to avoid obstructing its execution, is not liable for the action unless the dissenting trustee was aware that the action was a breach of trust.
>
> When several trustees are liable for a breach of trust, either as a breach committed by them jointly or on another of the above grounds, they are jointly and severally liable. On the right of a trustee to contribution or indemnity from co-trustee(s), [*see*] Chapter 19. [260]

Another commentator provides:

> Generally, a trustee is responsible only for its own acts or omissions and is not liable to the beneficiary for a breach of trust committed by a co[-]trustee. Therefore, a trustee is not responsible for acts or misconduct of a co[-]trustee: in which the first trustee has not joined, to which the first trustee does not consent, which the first trustee has not aided or made possible by his or her own neglect. On the other hand, a trustee is liable to the beneficiary if the trustee: (1) participates in a breach of trust committed by a co[-]trustee; (2) improperly delegates the administration of the trust to a co[-]trustee; (3) approves or acquiesces in or conceals a breach of trust committed by a co[-]trustee; (4) fails to exercise reasonable care in the administration of the trust which has enabled a co-trustee to commit a breach of trust; or (5) neglects to take proper steps to compel a co[-]trustee to redress a breach of trust. In other words, a trustee is responsible for the wrongful acts of a co[-]trustee to which he or she consented or which, by his or her negligence, enabled the co[-]trustee to commit but for no others. [261]

C. Right to Contribution

Though an innocent co-trustee may be liable to beneficiaries for the wrongdoing of another co-trustee, the innocent co-trustee may be entitled to contribution from the wrongdoing co-trustee. [262]The Restatement provides:

> **[*77]** (1) Except as otherwise provided in this Section, if two or more trustees are liable for a breach of trust, they are jointly and severally liable, with contribution rights and obligations between or among them reflecting their respective degrees of fault.
>
> (2) A trustee who committed a breach in bad faith is not entitled to contribution unless the trustee or trustees from whom contribution is sought also acted in bad faith.
>
> (3) A trustee who benefited personally from the breach is not entitled to contribution to the extent of that benefit. [263]

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[259] MCLAUGHLIN, *supra* note 73 § 84.08.

[260] RESTATEMENT (THIRD) OF TRS. § 81 cmt. subsec. (2)e (AM. L. INST. 2007)

[261] *76 AM. JUR. 2D Trusts § 343* (2022).

[262] RESTATEMENT (THIRD) OF TRS. § 102 (AM. L. INST. 2007).

The Restatement explains as follows:

> Substantially equally at fault. If the trustees are substantially equally at fault, each is entitled to equal contribution from the other(s). Thus, if two co-trustees participate in a breach of trust and are substantially equally at fault, one who makes good the breach is entitled to be reimbursed by the other for one-half of the liability. If three co[-]trustees participate in a breach of trust and are substantially equally at fault, one who makes good the breach is entitled to reimbursement from each of the others for one-third (thereby achieving a total contribution of two-thirds) of the liability.
>
> Fault so disproportionate as to prevent contribution. If the fault between or among trustees is sufficiently disproportionate, a trustee who is significantly more at fault is not entitled to contribution, and the trustee(s) significantly less at fault are entitled to a full indemnity.
>
> Whether the fault is sufficiently disproportionate to prevent contribution (or merit indemnity) depends on the facts and circumstances. Among the factors to be considered are the following: (1) Did one trustee mislead the other(s) into joining in the breach? (2) Did one trustee commit the breach intentionally (on the distinction between intentional and bad-faith breaches, [*see*] Comment d), while the other(s) did so by simple negligence? (3) Did one trustee, having greater experience or expertise, essentially control the actions of the other(s), such as where a trustee without business experience regularly relied on the judgment of the experienced trustee? (4) Did one trustee act essentially alone while the joint and several liability of the other(s) resulted merely from a failure to exercise reasonable care to prevent the breach or from improper delegation or monitoring? [*See generally*] § 81 and id., Comments b-e.
>
> . . .
>
> **[*78]** Fault neither substantially equal nor so disproportionate as to prevent contribution. If the fault of the trustees who are liable for a breach of trust is not substantially equal (Comment b(1)), but not so disproportionate as to prevent contribution (Comment b(2)), the trustees' contribution obligations are proportionate to their respective degrees of fault. Thus, if two trustees participate in a breach of trust and the one who has made good the breach is determined to be 75 percent at fault (considering factors generally similar to those described in Comment b(2)), that trustee is entitled to contribution from the other for 25 percent of the liability.
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> . . .
>
> Trustee acting in bad faith. A trustee who commits a breach of trust in bad faith is generally not entitled to contribution from another trustee who participated in the breach. There is an exception to this general rule, however. If a trustee from whom contribution is sought also acted in bad faith, contribution is required, with contribution rights and liabilities determined in accordance with Subsection (1). A bad-faith trustee may not hide behind another's unclean hands.
>
> For purposes of Subsection (2) and this Comment, bad faith includes fraud, embezzlement, and other misconduct involving a dishonest motive or conscious disregard for the interests of the beneficiaries or the purposes of the trust. Intentional participation in a known breach of trust, however, does not necessarily entail bad faith. Thus, if trustees join in what they know to be a breach of trust, even one involving self-dealing, they do not act in bad faith if their objective is to advance the interests of the beneficiaries.
>
> Benefit received by trustee. A trustee who receives a benefit from a breach of trust is not entitled to contribution from the other trustee(s) to the extent of the benefit received. The other(s) are entitled to exoneration to the same extent. [264]

XIV. THIRD PARTIES RELYING ON CO-TRUSTEE AUTHORITY

A co-trustee can enter into transactions that exceeds his or her authority. [265]One issue that arises is whether the third party, on the opposite side of that transaction, can be held liable. [266]A person who deals with a co-trustee may not be liable even though the co-trustee is exceeding his or her authority. [267]The Texas Property Code provides:

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[263] *Id.*

[264] *Id.* at cmt. subsec. (1)b(1)-(3), (2)d, (3)e.

[*79] (a) A person who deals with a trustee in good faith and for fair value actually received by the trust is not liable to the trustee or the beneficiaries of the trust if the trustee has exceeded the trustee's authority in dealing with the person.

(b) A person other than a beneficiary is not required to inquire into the extent of the trustee's powers or the propriety of the exercise of those powers if the person: (1) deals with the trustee in good faith; and (2) obtains: (A) a certification of trust described by Section 114.086; or (B) a copy of the trust instrument.

(c) A person who in good faith delivers money or other assets to a trustee is not required to ensure the proper application of the money or other assets. [268]

Further, the Texas Property Code provides that a third party who receives a certification of trust may have certain statutory protections:

(f) A person who acts in reliance on a certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for the action and may assume without inquiry the existence of the facts contained in the certification.

(g) If a person has actual knowledge that the trustee is acting outside the scope of the trust, and the actual knowledge was acquired by the person before the person entered into the transaction with the trustee or made a binding commitment to enter into the transaction, the transaction is not enforceable against the trust.

(h) A person who in good faith enters into a transaction relying on a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification are correct. This section does not create an implication that a person is liable for acting in reliance on a certification of trust that fails to contain all the information required by Subsection (a). A person's failure to demand a certification of trust does not: (1) affect the protection provided to the person by Section 114.081; or (2) create an inference as to whether the person has acted in good faith. [269]

For example, in *Rice v. Malouf*, a co-trustee, acting alone without the knowledge of his co-trustee, caused $ 1.6 million dollars to be transferred by wire from a trust bank account to the recipient's personal account. [270]After **[*80]** the bad-acting co-trustee died, the other co-trustees filed suit against the recipient for a constructive trust and sought return of the money. [271]The court noted that *Section 284 of the Restatement (Second) of Trusts* states:

If the trustee in breach of trust transfers trust property to . . . a person who takes for value and without knowledge of the breach of trust . . . the latter holds the interest so transferred . . . free of the trust, as is under no liability to the beneficiary. [272]

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[265] *TEX. PROP. CODE ANN. § 114.081*.

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.* § 114.086.

[270] *Rice v. Malouf, No. 07-11-00441-CV, 2013 Tex. App. LEXIS 8373, at *2 (Tex. App.--Amarillo July 8, 2013, pet. denied)*.

[271] *Id. at *1*.

[272] *Id. at *11* (quoting RESTATEMENT (SECOND) OF TRS. § 284 (AM. L. INST. 1959)).

Further, "[g]enerally, a transfer by a trustee in breach of trust in consideration of the extinguishment of a pre-existing debt or other obligation is not a transfer for value." [273]However, there is an exception that states that a transfer by the trustee for the extinguishment of a pre-existing debt or other obligation is "for value" if the trust property transferred is money. [274]

The Amarillo Court of Appeals affirmed the jury's verdict that the transfer was "for value." [275]The co-trustee who transferred the money had an entity that owed $ 1.6 million to the recipient's businesses. [276]The court held: "[We] find the evidence permitted reasonable and fair-minded jurors to believe the $ 1.6 million wired by [the trustee] to [the recipient's] personal bank account was in partial extinguishment of the preexisting obligation due [to] the [recipient's] entities from [the trustee's entity]." [277]The court held that the recipient of the funds was allowed to keep those funds. [278]

So, depending on the intent and consideration for a transaction, a third party may be able to keep trust property that was improperly transferred from a co-trustee. [279]This places additional pressure on co-trustees to be vigilant regarding the policing of his or her co-trustees' actions. [280]If there are two individual co-trustees, they should have dual signature requirements for transfers of trust assets. [281]Otherwise, an innocent co-trustee will certainly be a target of a claim by a beneficiary when the innocent co-trustee allowed the bad co-trustee to perpetrate an improper transaction that harmed the trust. [282]

[*81] XV. A CO-TRUSTEE MAY HAVE TO SUE ITS CO-TRUSTEE

A. Texas Statutory Provisions

The Texas Property Code allows a co-trustee to sue another co-trustee for breach of fiduciary duty, to seek removal of the co-trustee, and to seek forfeiture of compensation. [283]*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. [284]

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[273] *Id.* (citing RESTATEMENT (SECOND) OF TRS. § 284 (AM. L. INST. 1959)).

[274] *Id. at *11*.

[275] *Id. at *17*.

[276] *Id. at *16-17*.

[277] *Id.*

[278] *Id. at *21*.

[279] *See, e.g., id. at *1*.

[280] *See TEX. PROP. CODE ANN. § 114.006(a)*-(b).

[281] *See id.* § 114.001(a).

[282] *See id.* § 114.006(a)-(b).

[283] *See id.* § 114.008(a).

[284] *Id.* § 113.082(a)-(b); *see also Ramirez v. Rodriguez, No. 04-19-00618-CV, 2020 Tex. App. LEXIS 1340, at *11 (Tex. App.--San Antonio Feb. 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. [285]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. [286]

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." [287]So, "additional" trustees are interested persons and may invoke a court's jurisdiction under this statute. [288]

For example, in *Ramirez v. Rodriguez*, the San Antonio Court of Appeals held that three co-trustees could sue to remove the fourth co-trustee **[*82]** due to hostility between the co-trustees. [289]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. [290]

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. [291]

B. Commentators' Views

"A decision by the majority of three or more trustees does not, however, prevent a dissenting trustee from maintaining a suit or appeal to challenge the decision." [292]"It is clear . . . that where there are several trustees one of them may maintain an action against the others to enforce the trust or to compel the redress of a breach of trust." [293]"It is the duty of each [co-trustee] to use reasonable care to prevent the others from committing a breach of trust; and if one of the trustees commits a breach of trust, it is the duty of the others to compel him to redress it." [294]

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[285] *TEX. PROP. CODE ANN. § 111.004(7)*.

[286] *Id.*

[287] *Id.* § 111.004(18).

[288] *See id.* § 111.004(7), (18).

[289] *Ramirez, 2020 Tex. App. LEXIS 1340, at *11*.

[290] *See Com. Nat'l Bank in Nacogdoches v. Hayter, 473 S.W.2d 561, 567 (Tex. App.--Tyler 1971, writ. ref'd n.r.e.)*.

[291] *TEX. PROP. CODE ANN. § 114.008(a)*.

[292] 4 NANCY SAINT-PAUL, TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION § 82.05[1] (2021).

[293] *Myers v. Burns, No 94 C 927, 1995 U.S. Dist. LEXIS 6468, at *6 (N.D. Ill. May 12, 1995)* (quoting AUSTIN WAKEMAN SCOTT & WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 391 (4th ed. 1989); *see also Stuart v. Cont'l Ill. Nat'l Bank & Tr. Co., 369 N.E.2d 1262, 1279 (Ill. 1977)* (authorizing attorney's fees to be paid out of trust in suit between co-trustees).

[294] SCOTT ON TRUSTS § 184.

The Restatement provides:

> 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, **[*83]** 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. [*See*] § 88, Comment *d*.
>
> A trustee is not precluded from maintaining a suit for redress by the fact that the trustee participated in the breach of trust, because the suit is on behalf of the trust and its beneficiaries. [295]

The fact that a co-trustee may have participated in some aspect of the wrongful conduct does not preclude he, she, or it from raising claims. [296]

The Uniform Trust Code states in relevant part: "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." [297]A comment observes:

> By permitting the trustees to act by a majority, this section contemplates that there may be a trustee or trustees who might dissent. Trustees who dissent from the acts of a co-trustee are in general protected from liability. Subsection (f) protects trustees who refused to join in the action. Subsection (h) protects a dissenting trustee who joined the action at the direction of the majority such as to satisfy a demand of the other side to a transaction, if the trustee expressed the dissent to a co-trustee at or before the time of the action in question. However, the protections provided by subsections (f) and (h) no longer apply if the action constitutes a serious breach of trust. In that event, subsection (g) may impose liability against a dissenting trustee for failing to take reasonable steps to rectify the improper conduct. The responsibility to take action against a breaching co-trustee codifies the substance of *Sections 184 and 224 of the Restatement (Second) of Trusts* (1959). [298]

XVI. ATTORNEY-CLIENT PRIVILEGE ISSUES

"Confidential communications between client and counsel made to facilitate legal services are generally insulated from disclosure." [299]

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the **[*84]** 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. [300]

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[295] RESTATEMENT (THIRD) OF TRS. § 81 cmt. d (AM. L. INST. 2007).

[296] *Id.* § 81(d).

[297] UNIF. TR. CODE § 703(g) (UNIF. L. COMM'N 2021).

[298] *Id.* § 703(g) cmt.

[299] *In re XL Specialty Ins. Co., 373 S.W.3d 46, 49 (Tex. 2012)* (orig. proceeding) (citing ***TEX. R. EVID. 503(b)***).

[300] ***TEX. R. EVID. 503(b)(1)***.

This rule "promotes free discourse between attorney and client, which advances the effective administration of justice." [301]Texas allows a trustee to retain counsel and to maintain attorney-client privilege as against the trust's beneficiaries. [302]

In *Huie v. 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. [303]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. [304]

Texas Rule of Evidence 503(b) protects not only confidential communications between the lawyer and client, but also the discourse among their representatives. [305]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. [306]In litigation, the trustee designated the consultant as an expert and disclosed his file and everything that was **[*85]** provided to him, reviewed by, prepared by, or prepared for him "in anticipation of his expert testimony." [307]The opposing party sought production of much broader information from the consultant, which the trial court granted. [308]The Dallas Court of Appeals granted mandamus relief because the information was protected by the attorney-client privilege. [309]The court focused on the consultant's testimony, that he "sent and received confidential communications with the Trust's attorneys for the purposes of effectuating legal representation for the Trust." [310]

Further, co-trustees can jointly retain counsel and can jointly assert attorney-client privilege. [311]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." [312]"Joint representation is permitted when all clients consent and there is no substantial risk that the lawyer's representation of

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[301] *XL Specialty Ins., 373 S.W.3d at 49* (citing *Republic Ins. v. Davis, 856 S.W.2d 158, 160 (Tex. 1993)*).

[302] *See Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996)*.

[303] *Id.*

[304] *Id. at 923-24*; *see also In re Prudence--Bonds Corp., 76 F. Supp. 643, 647 (E.D.N.Y. 1948)*.

[305] ***TEX. R. EVID. 503(b)***.

[306] *In re Segner, 441 S.W.3d 409, 412 (Tex. App.--Dallas 2013)* (orig. proceeding).

[307] *Id. at 410*.

[308] *Id. at 410-11*.

[309] *Id. at 413*.

[310] *Id. at 412*.

[311] *Id.*

[312] *In re XL Specialty Ins. Co., 373 S.W.3d 46, 50 (Tex. 2012)* (quoting PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:30 (2011)).

one client would be materially and adversely affected by the lawyer's duties to the other." [313]"'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.'" [314]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. [315]

So, when co-trustees jointly retain counsel, their communications with their attorney are privileged as against third parties, such as beneficiaries. [316]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. [317]*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 **[*86]** clients to the lawyer; and (C) is relevant to a matter of common interest between the clients." [318]

For example, in *In re Alexander*, a beneficiary filed suit against the trustee based on multiple allegations of breach of fiduciary duty, including an allegation that the trustee attempted to transfer the trustee position to successors in violation of the trust's terms. [319]The beneficiary filed a motion to compel production of trust documents and emails regarding the same that were drafted by an attorney, but which were never executed. [320]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. [321]

The Houston Court of Appeals for the Fourteenth District 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. [322]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.
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> 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 (quoting *Montgomery v. Kennedy, 669 S.W.2d 309, 313 (Tex.*

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[313] *Id.* (quoting 2 *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128* (AM. L. INST. 2000)).

[314] *Id.* (quoting *In re JDN Real Estate-McKinney L.P., 211 S.W.3d 907, 922 (Tex. App.--Dallas 2006, pet. denied))*.

[315] *JDN Real Estate-McKinney L.P., 211 S.W.3d at 922*.

[316] *Id.*

[317] ***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").

[318] *Id.*

[319] *In re Alexander, 580 S.W.3d 858, 860-61 (Tex. App.--Houston [14th Dist.] 2019)* (orig. proceeding).

[320] *Id.*

[321] *Id.*

[322] *Id. at 865*.

1984).'" 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:

[*87] '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. [323]

[*88] The court also held that the trustee had not waived the privilege by testifying in a deposition about the drafts of the documents. [324]The court held that the testimony was not specific enough to constitute a waiver. [325]The court granted the petition and ordered the trial court to reverse its order compelling production of the documents and communications. [326]

Where one co-trustee hires counsel, may the trustee produce attorney-client communications to its non-client co-trustee and maintain the privilege? [327]Generally, there should be extreme caution applied in this circumstance outside of litigation. [328]Confidential communications to which the attorney-client privilege applies include those by the client or a representative of

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[323] *Id. at 867-69* (citations omitted).

[324] *Id. at 858*.

[325] *Id.*

[326] *Id. at 870*.

[327] Author's original thought.

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. [329]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 made in the presence of or disclosed to a third party. [330]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. [331]This is because the privilege does not extend beyond litigation and it applies to any parties--not just the defendants--to a pending action. [332]Because of the "pending action requirement, no commonality of interest exists absent actual litigation." [333]

A trustee should be careful, however, of using advice of counsel as a defense to a claim. [334]True, advice of counsel is a factor in evaluating a trustee's prudence. [335]But, if a trustee raises advice of counsel as a defense, then the trustee will likely waive its attorney-client communication privilege. [336]

[*89] If a party introduces any significant part of an otherwise privileged matter, that party waives the privilege. [337]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. [338]A Delaware court reviewed a similar fact pattern and found that the privilege was waived. [339]In *Mennen v. Wilmington Trust Co.*, a trustee was sued for breach of fiduciary duty. [340]One of the trustee's defenses was that he received bad legal advice from counsel. [341]The trustee attempted to block production of the alleged bad advice from counsel, citing attorney-client privilege. [342]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." [343]

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[328] Brian Spahn, *Advice of Counsel: Impact on Attorney-Client Privilege and Waiver*, AM. BAR ASS'N (Dec. 21, 2018), https://www.americanbar.org/groups/litigation/committees/corporate-counsel/practice/2018/advice-of-counsel-impact-on-attorney-client-privilege-and-waiver/[https://perma.cc/LNY4-3HE8].

[329] ***TEX. R. EVID. 503(b)(1)(C)***.

[330] *In re JDN Real Estate-McKinney L.P., 211 S.W.3d 907, 922-23 (Tex. App.--Dallas 2006, writ denied)* (orig. proceeding).

[331] *In re XL Specialty Ins. Co., 373 S.W.3d 46, 52 (Tex. 2012)* (orig. proceeding).

[332] *Id.*

[333] *Id.*

[334] *See* Spahn *infra* note 328.

[335] RESTATEMENT (THIRD) OF TRS. § 77 cmt. b(2), c (AM. L. INST. 2007); *In re Estate of Boylan, No. 02-14-00170-CV, 2015 Tex. App. LEXIS 1427 (Tex. App.--Fort Worth 2015, no pet.)*.

[336] *See* Spahn, *supra* note 335.

[337] ***TEX. R. EVID. 511***.

[338] *See id.*

[339] *Mennen v. Wilmington Tr. Co., 2013 WL 5288900, at *1 (Del. Ch. Sept. 18, 2013)*.

[340] *Id. at *3*.

[341] *Id. at *5*.

[342] *Id.*

[343] *Id. at *18* (citing *Glenmede Tr. 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. [344]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. [345]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. [346]

The Texas Supreme Court has explained that with regard to the second prong, "The confidential communication must go to the very heart of the affirmative relief sought." [347]"When a party uses a privilege as a sword rather than a shield, she waives the privilege." [348]Accordingly, co-trustees should be **[*90]** careful and weigh the risk and reward of injecting attorney-client communications into a dispute. [349]

XVII. CONCLUSION

There are many reasons that a settlor may want co-trustees. [350]When a settlor decides to use a co-trustee management structure, that decision comes with certain advantages and drawbacks. [351]The drawbacks can be mitigated to some extent by adding terms and instructions in the trust document. [352]This Article is intended to provide guidance on co-trustee management and litigation in Texas. [353]

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[344] ***TEX. R. EVID. 511***; *Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105, 107 (Tex. 1985)* (orig. proceeding).

[345] *Ginsberg, 686 S.W.2d at 107*.

[346] *Transamerican Natural Gas Corp. v. Flores, 870 S.W.2d 10, 11-12 (Tex. 1994)* (orig. proceeding); *see Republic Ins. Co. v. Davis, 856 S.W.2d 158, 163 (Tex. 1993)* (orig. proceeding).

[347] *Davis, 856 S.W.2d at 163*.

[348] *Alford v. Bryant, 137 S.W.3d 916, 921 (Tex. App.--Dallas, 2004, pet. denied)*.

[349] *See id.*

[350] *See supra* Part II.

[351] *See supra* Part II.

[352] *See supra* Part II.

[353] Author's original thought.