Parting Is Such Sweet Sorrow: Issues Arising From Trust Termination and Trustee Succession In Texas

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I. INTRODUCTION

Trust relationships are often complicated. This is true both for the management and distribution of complex assets, but also due to emotions and personal relationships. So, it makes sense that there are a number of issues that arise when trusts terminate or a trustee wants to resign and have another trustee take over that position. This paper will attempt to address the main legal issues that arise when trusts terminate or there is a successor trustee.

II. TRUSTEE SUCCESSION ISSUES

Beneficiaries or trustees may have to deal with the resignation, incapacity, or death of a trustee. Succession issues can create delay and cause disagreements.

A. Trustee Resignation

The old saying goes, "You can keep the cheese, just let me out of this trap." That is often true for trusts. When a trustee wants to resign, how can it do so?

A trustee may resign in accordance with the terms of the trust instrument, or a trustee may petition a court for permission to resign as trustee. Tex. Prop. Code § 113.081. A trustee must strictly follow the trust document in effectuating a resignation. If the trustee does not do so and does not obtain a court order allowing the resignation, then the trustee is still the trustee. *Gamboa v. Gamboa*, 383 S.W.3d 263, 2012 Tex. App. LEXIS 7371 (Tex. App.—San Antonio Aug. 31, 2012, no pet.). So, if a trustee wants to resign by the terms of the trust and without court intervention, then the trustee must strictly follow those terms.

A trustee/beneficiary relationship is like a track meet, if you are the trustee, you cannot stop until you hand off the baton to someone else. So, even if you think you have handed off the baton, you are still the trustee (and owe fiduciary duties) unless it is done correctly.

The most conservative way to ensure that a trustee has properly resigned is to seek a court order. The court may accept a trustee's resignation and discharge the trustee from the trust on the terms and conditions necessary to protect the rights of other interested persons. Tex. Prop. Code § 113.081. Whether a Trustee's resignation should be accepted is within the discretion of the trial court. *McCormick v. Hines*, 498 S.W.2d 58, 63 (Tex. Civ. App.—Amarillo 1973, writ dism'd). Consideration must be given to the interests of the parties to be affected. *Id*. The trial court has the discretion to alter the rights, powers, and authority of the successor trustee. Tex. Prop. Code Ann. § 113.084.

To the extent that the Trust instrument allows the trustee to resign, it is recommended that the trustee execute a formal notice of resignation and provide the same to the other trustees, if any, and the current beneficiaries.

B. Trustee Removal

There are instances where a trustee may not want to resign, but a beneficiary wants to remove it. Where a trust has provisions for trustee removal, a beneficiary may remove a trustee in accordance with the terms of a trust. Tex. Prop. Code § 113.082(a). A beneficiary must follow the terms of the trust in terminating a trustee's service. *Waldron v. Susan R. Winking Trust*, No. 12-18-00026-CV, 2019 Tex. App. LEXIS 5867 (Tex. App.—Tyler July 10, 2019, no pet.). The failure to follow the terms of the trust means that the beneficiary's attempt is void and of no effect. *Id*.

For example, in *Waldron v. Susan R. Winking Trust*, a daughter was a beneficiary of a trust set up by her parents. No. 12-18-00026-CV,

2019 Tex. App. LEXIS 5867 (Tex. App.—Tyler July 10, 2019, no pet.). The original trustee resigned, and the trust document provided:

> Successor. If the original trustee fails or ceases to serve for any reason, then Southside Bank, Tyler, Texas, shall be successor trustee. If this or any other successor trustee fails or ceases to serve for any reason, then any bank or trust company may be appointed successor trustee by delivery of written notice to the successor trustee signed by the grantor, or if either grantor is legally disabled or deceased, then signed by the other grantor, or if both grantors are legally disabled or deceased, then signed by the beneficiary, or the beneficiary's attorney-in-fact or legal guardian.

Id. When the proposed corporate trustee declined to serve, the daughter could not find any other bank or trust company to serve. She then filed suit to appoint an individual as trustee, which was granted. Later, she then filed an application asking the court to name her as successor trustee. The successor trustee then responded and stated: "Trustee is willing to resign and/or has no objection to his removal upon appointment of a qualified trustee as provided for in the Trust or as otherwise determined by the Court." He asked for a declaratory judgment and requested a finding that he complied with the Trust's terms, that he be removed or allowed to resign, that an appropriate successor trustee be appointed, and that he be discharged from any further liability. The trial court held a bench trial and found that the final accounting provided for the trust fairly and accurately set forth the trust's assets, liabilities, income, and expenses and the court approved it. The trial court further found that the successor trustee administered the trust in accordance with its terms and the applicable law and was not liable to the daughter on any claims. The judgment appointed another individual as successor trustee, her term to begin ten days after the judgment became final or all appeals exhausted, whichever was later. The trial court also found that all expenses and professional fees paid or incurred by the successor trustee were reasonable and necessary. The daughter appealed and complained that she had the right to remove the trustee by letter and that the successor trustee's fees and compensation should not have been paid by the trust after his resignation.

The court of appeals first addressed the law regarding appointing a successor trustee:

> The terms of the trust prevail over any provision of the Texas Trust Code with certain exceptions which are not applicable in this case. In this case, the Trust provided that the beneficiary could terminate a trustee by letter and appoint a successor bank or trust company that was willing to serve. But no bank or trust company was willing to serve. Therefore, the trust instrument did not provide a procedure for the appointment of a successor trustee under these circumstances. In such situation, the Trust Code provides that "[i]f for any reason a successor is not selected under the terms of the trust instrument, a court may and on the petition of any

> interested person shall appoint a successor in whom the trust shall vest." A trustee's fiduciary duties are not discharged until the trustee has been replaced by a successor trustee.

Id. The court affirmed the trial court's order:

> Waldron contends that she can remove the trustee at any time by written letter. In her view, Cozby was no longer trustee after the receipt of her termination letter. Therefore, he was not thereafter entitled to claim reimbursement from the Trust for expenses or professional services. Although Article 4.3 of the Trust provides for termination by letter, Article 4.2 requires that any successor trustee be a bank or trust company. Since no bank or trust company could be found that was willing to serve, Waldron could not appoint a successor and her attempt at removal by letter without naming a bank or trust company as successor was ineffective. The only procedure available for the trustee's replacement under these circumstances was by petition to the district court for the appointment of a trustee. Although ready and willing to be replaced, Cozby, as trustee, was obligated to continue in the performance of his duties until replaced by a successor trustee. The trial court correctly interpreted the trust instrument and correctly applied the pertinent provisions of the Texas Trust Code. The trial court's judgment is supported by the evidence.

Id.

If a trust document does not have procedures for removing a trustee, or a beneficiary otherwise cannot comply with this terms, the Texas Trust Code allows a court to remove a trustee. Additionally, on the petition of an interested person, a court may, in its discretion, remove a trustee and deny part or all of the trustee's compensation if:

> (1) the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust; (2) the trustee becomes incapacitated or insolvent; (3) the trustee fails to make an accounting that is required by law or by the terms of the trust; or (4) the court finds other cause for removal.

Tex. Prop. Code § 113.082(a). Further, a "beneficiary, co-trustee, or successor trustee may treat a violation resulting in removal as a breach of trust." *Id*.

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 trustee and the performance of the trust such that their suit to remove the fourth trustee was allowed to continue. *Ramirez v. Rodriguez*, No. 04-19-00618-CV, 2020 Tex. App. LEXIS 1340 (Tex. App.—San Antonio Feb. 19, 2020, no pet.). *See also In re Estate of Bryant*, No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131 (Tex. App.—Amarillo Mar. 11, 2020, no

pet.) (removal of trustee due to hostility to beneficiary); *Conte v. Ditta*, 312 S.W.3d 951 (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 (Tex. App.—Austin Mar. 12, 2009, no pet.) (affirmed removal of co-trustees).

An action to remove a trustee, regardless of the underlying grounds on which it is brought, is not subject to a limitations analysis. *Ditta v. Conte*, 298 S.W.3d 187 (Tex. 2009). In *Ditta v. Conte*, Conte was the trustee of a trust benefiting her mother, who was declared incapacitated in 1997. 298 S.W.3d 187 (Tex. 2009). In 2000, Ditta, the guardian for the incapacitated mother, filed suit after an accounting showed Conte and her brother had taken money from the trust for their personal expenses. The probate court ordered Conte to repay the trust but only if her mother needed the money. In 2004, Ditta sued to remove Conte as trustee, and claimed that Conte should be removed because of her improper use of trust funds and because her debt to the trust created a conflict of interest. The trial court removed her as trustee and modified the trust's terms to permit a bank to be trustee. The court of appeals reversed, holding that Ditta's lawsuit to remove Conte as trustee was barred by the four-year statute of limitations that applied for a breach of fiduciary duty claim.

The Supreme Court reversed the court of appeals and held that the four-year limitations period on suits alleging breach of fiduciary duty does not apply to the removal of a trustee. The Court stated: "The removal decision turns on the special status of the trustee as a fiduciary and the ongoing relationship between trustee and beneficiary, not on any particular or discrete act of the trustee." *Id*. "Because a trustee's fiduciary role is a status, courts acting within their explicit statutory discretion should be authorized to terminate the trustee's relationship with the trust at any time, without the application of a limitations period." *Id*. However, the Court noted that actions against a fiduciary for damages are still controlled by the statute of limitations analysis: "While the four-year limitations period proscribes whether an interested person can obtain monetary recovery from a trustee's fiduciary breach, it does not affect whether the interested person can seek that trustee's removal." *Id*.

C. Selecting A Successor Trustee

The Texas Trust Code provides direction regarding the appointment of a successor trustee. On the death, resignation, incapacity, or removal of a co-trustee, a successor trustee shall be selected according to the method, if any, prescribed in the trust instrument. Tex. Prop. Code § 113.083. So, the parties should review and follow the terms of the trust in identifying the successor trustee and in effectuating the appointment.

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. Tex. Prop. Code § 113.083. If it is not possible to follow the terms of the trust, then the parties should seek court approval of the appointment of a successor trustee. A trial court should select a successor trustee in conformance with the intent of the settlor, and abuses its discretion in failing to do so. *Conte v. Ditta*, 312 S.W.3d 951 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *Alpert v. Riley*, 274 S.W.3d 277, 296 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) ("The trial court abused its discretion by resorting to its equitable appointment power" instead of following the appointment method in the trust agreement). *See also Duncan v. O'Shea*, No. 7-11-88, 2012 WL 3192774, at

*8 n.17 (Tex. App.—Amarillo Aug. 7, 2012, no pet.) (not selected for publication).

In *Conte v. Ditta*, after remand the court of appeals affirmed the trial court's removal of the trustee. 312 S.W.3d 951 (Tex. App.—Houston [1st Dist.] 2010, no pet.). The court held: "In determining whether a trustee should be removed, the court can consider prior breaches or conflicts, without limitation, so long as potential harm exists." *Id*. The court concluded that the trial court did not abuse its discretion by holding that the trustee materially violated the terms of the trust and in finding that there was material financial loss to the trust as a result of the breach. But, the court of appeals held that the trial court erred in modifying the trust in appointing a new trustee. The trust provided a detailed system for selecting a new trustee, and that system should have been followed.

The court noted that a trial court is permitted to modify the terms of a trust if, due to circumstances not known to or anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair accomplishment of the purposes of the trust. *Id*. (citing Tex. Prop. Code § 112.054(a)(2)). But the trial court does not have unfettered discretion to modify a trust in any way it chooses. If the court finds that modification is proper, the court must exercise its discretion to modify "in the manner that conforms as nearly as possible to the intention of the settlor." *Id.* (citing Tex. Prop. Code § 112.054(b)). Accordingly, even though the parties under the trust instrument could not reappoint the trustee that had just been removed, "the court should have allowed [the beneficiaries] to select a successor trustee and simply modified the Trust by restricting their choice of successor trustee to someone whom it had not previously removed." *Id*.

If a person or entity named as a successor 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 position. Tex. Prop. Code § 112.009(c). If a trustee is not named or there is no alternate trustee designated or selected, the parties must seek a court appointment. *Id*.

It is common that the trust instrument names successor trustees. The current trustee and beneficiaries should attempt to have the named successor trustees, in order, choose to serve as a successor trustee. When a named successor trustee prefers to not take on that role, the beneficiaries and/or current trustees should obtain a signed documents where the named successor trustee expressly renounces the right to accept. The current trustee and/or beneficiary can then approach the next named successor trustee. If no named successor trustee accepts, then the current trustee and/or beneficiary can follow the terms of the trust on appointing a successor trustee not named in the trust. If there is no method for such a selection, then the current trustee or beneficiary can seek court approval for a successor trustee.

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. Tex. Prop. Code § 112.009(b). A person or entity named as a trustee has no obligation to accept the position. Once the person or entity named as trustee accepts the trustee position, he, she, or it incurs liability with respect to the trust. If the person or entity named as trustee exercises power or performs duties under the trust, he, she, or it is presumed to have accepted the trust. Tex. Prop. Code § 112.009(a). The Texas Property Trust 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.

Tex. Prop. Code § 112.009(a).

The Texas Trust Code has a general provision dealing with who can qualify as a trustee. 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.

Tex. Prop. Code § 112.008. Under this provision, a trust settlor or beneficiary can be a trustee. *Sharma v. Routh*, 302 S.W.3d 355 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (beneficiary could be trustee); *Evans v. Abbott*, No. 03-02-00719-CV, 2003 Tex. App. LEXIS 8243 (Tex. App.—Austin Sept. 25, 2003) (beneficiary could be trustee of trust). The Restatement 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." RESTATEMENT (SECOND) OF TRUSTS, §99, 115. [1]

[1]Texas Courts routinely look to the Restatement of Trusts for guidance. *See, e.g., Westerfeld v. Huckaby,* 474 S.W.2d 189 (Tex.1971); *Messer v. Johnson*, 422 S.W.2d 908 (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 (Tex. App.—Dallas January 2, 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

When the trustee is a corporation, it must have the power to act as a trustee in Texas. *See* Tex. Fin. Code § 151.001, *et seq.*; Tex. Est. Code §§ 505.001–505.006 (foreign corporate fiduciaries).

D. Merger Doctrine

In Texas, as elsewhere, a settlor cannot create a trust with himself or herself as both the sole trustee and sole beneficiary. Where there is a complete unity of title, there is no trust. 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.

Tex. Prop. Code §112.034. *Faulkner v. Kornman,* No. 10-00301, 2015 Bankr. LEXIS 3595 (Bankr. S.D. Tex. Oct. 23, 2015).

So, one way to avoid the merger doctrine and to create a valid trust is to appoint a trustee. As one commentator states:

> Where multiple beneficiaries and trustees are authorized, there is some authority for the position that no trust may be validly created where the same persons are both beneficiaries and trustees. However, generally speaking, a trust instrument may name two or more trustees and make the same persons the exclusive beneficiaries of the trust. In this regard, where, 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. The theory behind the rule that an intended trust is validly created although the trust instrument names the same persons both trustees and beneficiaries is that the necessary separation of the legal and equitable interests exists and that there is not automatically a merger of them even though the beneficiaries are also trustees; in such a case, each of the beneficiaries has an equitable interest of the same kind that they would have if a third person had been named as trustee, and there exists no good reason for defeating the intention of the settlor. Also, there is no merger of the legal and equitable interests as will render the trust invalid where no one of the trustees is free to deal alone with his or her own

156, 168 (Tex. App.—San Antonio 2009, pet. denied).

> equitable interest, any action taken by the trustees must be unanimous, and complete authority passes to the surviving trustees in case of the death of any trustee.

76 AM. JUR. 2D, TRUSTS, §211. So, one advantage of a trustee management structure is that it may defeat the merger doctrine and allow a trust to be properly formed.

E. Conflict of Interest Issues

When a beneficiary is a trustee, conflicts of interest may arise. Regarding the trustee who is also a beneficiary, 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 this type, there will inevitably be some conflicts of interest that are approved (see § 78, Comment c(2)), implicitly at least, either by the settlor (§ 37, Comment f(1)) or through an appointment process that is authorized by the terms of the trust or a statute (§ 34, Comments c and c(1)) or that is influenced (in the case of judicial appointment) by the trust provisions (§ 34, Comment f(1)). 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.

RESTATEMENT (THIRD) OF TRUSTS, § 79(b)(1). 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; see id. Comment b(1) and more generally id., Comments b and c).

Id. at §78(c)(2). Accordingly, where the settlors expressly provide for a beneficiary being a trustee, there is a presumption that the settlors approved of the conflict situation and impliedly favored the beneficiary/trustee. Those presumptions, however, may not apply where the settlors did not expressly designate the beneficiary as a potential trustee and the beneficiary is appointed to that position in some other fashion (*i.e.,* court appointment).

F. Co-Trustee Succession Issues

If a trust requires a certain number of trustees, and one no longer want to act or is able to act,

then the co-trustees and beneficiaries should follow the terms of the trust in selecting a successor co-trustee. However, if the trust allows the remaining co-trustees to continue acting without replacing the co-trustee, then they may do so. One commentator provides:

> 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 the remaining trustee or trustees simply continue to administer the trust. When the terms of the trust empower the surviving trustees to fill a vacancy, it depends on the terms of the trust whether they must do so.

SCOTT AND ASCHER ON TRUSTS, THE TRUSTEE, §11.11.1.

Accordingly, if a trust document allows a trustee to resign and for the trust administration to continue without the need for a successor trustee, then the trustee can resign and nothing further needs to be done. In that circumstance, the remaining trustees or trustee simply continues administering the trust. If, however, the trust requires that the resigning trustee be replaced, then the resigning trustee has continuing duties to administer the trust until its replacement is duly appointed.

As the Restatement provides:

> [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, with a replacement trustee being required only if the settlor manifested an intention (or it is conducive to the proper administration or purposes of the trust) that the number of trustees should be maintained, see § 34, Comment d, and § 85, Comment e. Also see § 34, Comment e, on the authority of courts to appoint additional trustees to promote better administration of a trust even when there is no vacancy.

RESTATEMENT (THIRD) OF TRUSTS, § 81.

Another commentator provides:

> If a trust instrument appoints two or more trustees, and if one or more of the trustees die, resign, or are removed, the surviving trustee or trustees have the right to manage and administer the trust and to exercise trustee

> powers. 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.

4 Texas Probate, Estate and Trust Administration § 84.21.

Another commentator provides:

> Generally, surviving co-trustees can exercise trust powers without filling the vacancy created by the death, removal, or resignation of one co-trustee. The Uniform Trust Code concurs in this position, providing that if a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust. Thus, for instance, a surviving testamentary trustee or trustees have the power to receive from the executor assets belonging to the trust, regardless of any duty to apply for the appointment of co-trustees necessary or advisable to carry out the intention of the testator.

76 AM. JUR. 2D, TRUSTS, § 324.

III. DUTY OF SUCCESSOR TRUSTEE TO POLICE PRIOR TRUSTEES

A successor 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." Tex. Prop. Code § 114.002.

A trust document may relieve a successor trustee of an obligation to raise claims against prior trustees. *Benge v. Roberts*, No. 03-19-00719-CV, 2020 Tex. App. LEXIS 6335 (Tex. App.—Austin August 12, 2020, pet. denied).

Texas Trust Code Section 114.007 has an important provision that may impact a successor trustee's duty to police a prior trustee's actions. Sections 114.007(a) and (c) provide:

> (a) a term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that the term relieves a trustee for liability: (1) a breach of trust committed: (A) in bad faith; (B) intentionally; or (C) with reckless indifference to the interest of the beneficiary; or (2) any profit derived by the trustee from a breach of trust…
>
> (c) This section applies only to a term of a trust that may otherwise relieve a trustee from liability for a breach of trust. Except as provided in Section 111.0035, this section does not prohibit the settlor, by the terms of the trust, from expressly: (1) relieving the trustee from a duty or restriction imposed by this

> subtitle or by common law; or (2) directing or permitting the trustee to do or not to do an action that would otherwise violate a duty or restriction imposed by this subtitle or by common law.

Tex. Prop. Code § 114.007(a), (c).

There are two primary types of clauses that are discussed in this provision. The first type of clause, which is discussed in subpart (a), is a general exculpatory clause that relieves a trustee from liability for breaching a duty. This type of clause is typically more general in nature. "[A]n exculpatory clause is '[a] contractual provision relieving a party from any liability resulting from a negligent or wrongful act.'" *Holland A. Sullivan, Jr., The Grizzle Bear: Lingering Exculpatory Clause Problems Posed By Texas Commerce Bank, N.A. v. Grizzle*, 56 BAYLOR L. REV. 253, 256 (2004). "A trustee's breach may give rise to liability, and the exculpatory clause purports to excuse the trustee from that liability." *Id*. This type of clause may state: "The trustee is not liable for any loss to the trust that arises from the trustee's actions or inactions unless done in bad faith or with reckless disregard."

The second type of clause, which is discussed in subpart (c), is a more specific "powers clause" that relieves a trustee from a particular duty or directs the trustee to do something that might ordinarily be a breach of duty. *Id*. For example, such a clause may state: "The trustee is relieved of the duty to investigate the actions of any prior trustee and has no duty to bring any claim against any prior trustee."

Texas Trust Code § 114.007 provides that a settlor can expressly permit the trustee "to do or not do an action that would otherwise violate a duty or restriction imposed by this subtitle or by common law," except as provided in Section 111.0035 of the Trust Code. Tex. Prop. Code § 114.007. Generally, these types of clauses can be enforceable in Texas and can limit a trustee's liability or duty. Tex. Prop. Code Ann. § 114.007; *Dolan v. Dolan*, No. 01-07-00694-CV, 2009 Tex. App. LEXIS 4487 (Tex. App.—Houston [1st Dist.] June 18, 2009, pet. denied). *See also* 4 Texas Probate, Estate and Trust Administration § 84.06, 76 Am Jur 2d Trusts § 339. "The Texas Trust Code implicitly authorizes the inclusion of exculpatory clauses in a trust instrument since the Trust Code provides that, as a general rule, the trust instrument will control over the Trust Code and also limits to what extent the settler of a trust can alter the trustee's liabilities and duties under the Trust Code." 1 Texas Estate Planning § 33.07. One commentator states that there are good reasons for the use of exculpatory clauses:

> One argument favoring liberal use of exoneration clauses suggests that, in the absence of such a clause, fiduciaries who fear suit are likely to be overly conservative in their investment and/or distribution policies. Another argument suggests that groundless suits should not be encouraged. Indeed, a client may purposely request the draftsperson to include an exoneration clause in an instrument, in order to persuade a cautious person, or someone with limited experience, to undertake service as a fiduciary, or to induce that person to exercise broader and, hopefully, more beneficial discretion.

Robert Whitman, *Exoneration Clauses in Wills and Trust Instruments* (1992), UConn Faculty Articles and Papers, 244.

A leading trust commentator explains that a settlor's reduction in the trustee's duties merely lessens the value of the gift:

> Though strictly construed by the courts, exculpatory clauses have been upheld, subject, however, to certain exceptions based upon public policy. The rationale appears to be that the settlor's reduction of the trustee's duties with regard to the degree of care and skill to be exercised in effect merely detracts from the quality of the settlor's gift or makes the gift less valuable. The settlor has the power "to select the agencies by which his bounty should be distributed and to impose the terms and conditions under which it should be done." In nearly all trust arrangements the settlor is making a gift, and it can be argued that because the beneficiaries have no right to demand that any gift be made, they can hardly expect equity to increase the quality or size of a gift made through the establishment of a trust.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, § 542.

Powers clauses are enforceable and mean that a trustee does not breach a fiduciary duty by doing an act expressly allowed under a trust document. For example, in *Benge v. Roberts*, a beneficiary sued co-trustees for breaching duties by not considering claims against a former trustee. No. 03-19-00719-CV, 2020 Tex. App. LEXIS 6335 (Tex. App.—Austin August 12, 2020, no pet.). The co-trustees filed a motion for summary judgment based on a clause in the trust that provided: "No successor Trustee shall have, or ever have, any duty, responsibility, obligation, or liability whatever for acts, defaults, or omissions of any predecessor Trustee, but such successor Trustee shall be liable only for its own acts and defaults with respect to the trust funds actually received by it as Trustee." *Id.* The beneficiary appealed, and the court of appeals affirmed. The court stated that these types of clauses are generally enforceable: "The Trust Code expressly permits such clauses." *Id*.

The beneficiary argued that a cause exists for the co-trustees' removal because they have "actual conflicts of interest" due to their participation with the former trustee. She contended that removal of the co-trustees because of their conflict of interest was a distinct claim from one alleging that they have liability for the former trustee's alleged breaches of fiduciary duty and, therefore, was not subject to the exculpatory clause. The court disagreed:

> We reject this argument because it directly conflicts with the broad language in the exculpatory clause relieving the co-trustees from any "duty, responsibility, [or] obligation" for the "acts, defaults, or omissions" of Missi. While ordinarily a successor trustee has the duty to "make a reasonable effort to compel a redress" of any breaches by a predecessor, see Tex. Prop. Code § 114.002(3)—which presumably would include impartially evaluating

> whether to "fight" Benge in the appeal of the Consolidated Matter—the exculpatory clause in the Trust relieves the co-trustees of that duty, as permitted by the Trust Code. See id. §§ 111.0035(b), 114.007(c). The co-trustees cannot as a matter of law have a conflict of interest due to allegedly lacking the ability to be "impartial" about deciding whether or how to redress Missi's alleged breaches when they have no duty to redress such breaches in the first instance. Accordingly, we hold that the trial court properly granted summary judgment on the basis of the Trust's exculpatory clause.

Id. Thus, the court affirmed the summary judgment for the defendant co-trustees based on the powers clause in the trust as it was enforceable under Section 114.007(c).

IV. DUTY OF PRIOR TRUSTEES TO REPORT

Beneficiaries of trust can face a difficult situation when the trustee of their trust either dies or becomes incapacitated. They may have many questions about the trust, such as what assets are in the trust or should be in the trust, what income and expenses have been incurred, what liabilities exist, what loans to and from the trust exist, what compensation has been paid, etc.? The problem is that the one person that should know all the answers is no longer able to provide them. What should the beneficiary do?

The first step is to analyze what duties a trustee has regarding disclosures to beneficiaries. The Texas Supreme Court has stated that "trustees and executors have a fiduciary duty of full disclosure of all material facts known to them that might affect [a beneficiary's] rights." *Huie v. DeShazo,* 922 S.W.2d 920, 923 (Tex. 1996); *see also Valdez v. Hollenbeck*, 465 S.W.3d 217, 231 (Tex. 2015). That duty cannot be limited by a trust document as to any beneficiary twenty-five years of age and entitled or permitted to receive trust distributions or who would receive a distribution if the trust terminated. Tex. Prop. Code § 111.0035(c). A strained trustee-beneficiary relationship does not minimize the fiduciary's duty of full and complete disclosure. *Montgomery v. Kennedy,* 669 S.W.2d 309, 313 (Tex. 1984). In addition to the duty of disclosure, a trustee must maintain a complete and accurate accounting of the administration of a trust. *Faulkner v. Bost*, 137 S.W.3d 254, 258 (Tex. App.—Tyler 2004, no pet.) (citing *Shannon v. Frost Nat'l Bank of San Antonio,* 533 S.W.2d 389, 393 (Tex. App.—San Antonio 1975, writ ref'd n.r.e.)). Those two duties come together in the statutory duty of a trustee to disclose the complete and accurate accounting of the trust's administration on demand. Tex. Prop. Code § 113.151(a). That statute expressly permits a beneficiary or an interested person to demand an accounting, which must be provided on or before ninety (90) days following the demand. Tex. Prop. Code §§ 113.151(a)-(b); *see also Davis v. Davis*, No. 2-00-436-CV, 2003 Tex. App. LEXIS 2667, at *7 (Tex. App.—Fort Worth 2003, no pet.) (mem. op.).

An accounting must show five things: 1) all assets that belong to the trust (whether in the trustee's possession or not); 2) all receipts, disbursements, and other transactions including their source and nature, with receipts of principal and interest shown separately; 3) listing of all property being administered; 4) cash balance on hand and the name and location of the depository

where the balance is maintained; and 5) all known liabilities owed by the trust. Tex. Prop. Code § 113.152. The accounting must provide these items from either the period when the trust was created or since the last accounting, whichever is later. *Id*. at § 113.151(a); *Soefje v. Jones*, 270 S.W.3d 617, 628 (Tex. App.—San Antonio 2008, no pet.). Any accounting that does not strictly provide all five of these is insufficient, and a court commits reversible error in approving a deficient accounting. *In re Dillard*, 98 S.W.3d 386, 397–98 (Tex. App.—Amarillo 2003, pet. denied).

The right to an accounting is critical in that it protects beneficiaries from the inherent risk of inequitable trustee conduct. As one court put it, "[w]ithout an account the beneficiary must be in the dark as to whether there has been a breach of trust and so is prevented as a practical matter from holding the trustee liable for a breach." *Hollenback v. Hanna*, 802 S.W.2d 412, 415-16 (Tex. App.—San Antonio 1991, no writ). In line with this reality, a trust document may not limit a trustee's duty to respond to a demand for an accounting if it is from a beneficiary who: (a) is entitled or permitted to receive a distribution from the trust, or (b) would receive a distribution if the trust terminated at the time of the demand. Tex. Prop. Code § 111.0035(b)(4).

Moreover, a trustee is not allowed to complain that the accounting is for a long period of time. The duty to disclose reflects the information a trustee is duty-bound to maintain as he or she is required to keep records of trust property and his or her actions. *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.). A trustee is under a duty to keep and maintain accurate records of transactions relating to trust property and the administration of the trust. *National Cattle Loan Co. v. Ward*, 113 Tex. 312, 255 S.W. 160, 164 (Comm'n App. 1923); *Faulkner v. Bost*, 137 S.W.3d 254, 259 (Tex. App.—Tyler 2004, no pet.); *Corpus Christi Bank & Trust v. Roberts*, 587 S.W.2d 173, 181 (Tex. App.—Corpus Christi 1979), aff'd, 597 S.W.2d 752 (Tex. 1980) ("One of the primary duties of a trustee is to keep full, accurate and orderly records concerning the status of the trust estate and all acts performed thereunder."); *Shannon v. Frost Nat'l Bank of San Antonio,* 533 S.W.2d 389, 393 (Tex. App.—San Antonio 1975, writ ref'd n.r.e.). There is no statute of limitations defense to a request for an accounting. *See Estate of Erwin*, No. 13-20-00301-CV, 2021 Tex. App. LEXIS 10160 (Tex. App.—Corpus Christi Dec. 29, 2021, no pet.) ("To the extent that Redding relies on the statute of limitations to shield her from rendering an accounting, she provides no case law, and we find none, that hold that the statute of limitations preventing recovery for breaches of fiduciary duty for failure to render an account prevent beneficiaries from seeking to compel an accounting.").

The Restatement provides a good description for the liability of not maintaining adequate records:

> A trustee who fails to keep proper records is liable for any loss or expense resulting from that failure. A trustee's failure to maintain necessary books and records may also cause a court in reviewing a judicial accounting to resolve doubts against the trustee. These failures by trustees may furnish grounds for reducing or denying compensation, or even for removal, or for charging the trustee with the costs of corrective procedures

> or of having to conduct otherwise unnecessary accounting proceedings in court.

RESTATEMENT (THIRD) OF TRUSTS § 83.

When a trustee becomes incapacitated or dies, his or her estate representative has the duty to prepare the accounting during his or her tenure. The leading case in Texas on this issue is *Corpus Christi Bank & Trust v. Roberts*, 587 S.W.2d 173 (Tex. App.—Corpus Christi 1979), *reformed in part on other grounds and aff'd in part*, 597 S.W.2d 752 (Tex. 1980). The settlor created a trust for her grandsons, which terminated when they became thirty years old. *Id*. at 176. After the trust terminated, the beneficiaries requested that the trustee prepare an accounting, but the trustee refused to do so. *Id.* The beneficiaries filed suit against the trustee requesting a court-ordered accounting and damages. *Id*. The trustee died prior to trial, and his executor, Corpus Christi Bank and Trust, was then substituted as party defendant. *Id*. Thereafter, the beneficiaries filed a motion seeking to compel the Bank, on behalf of the trustee, to render a full accounting, which the trial court granted. *Id*.

The court of appeals affirmed and explained:

> One of the primary duties of a trustee is to keep full, accurate and orderly records concerning the status of the trust estate and all acts performed thereunder .... A trustee is charged with the duty of maintaining an accurate account of all the transactions relating to the trust property. He is chargeable with all assets coming into his hands, the disposition for which he cannot account. ... In the event the trustee dies prior to the time he has rendered an account, ... [his representative] must render the account for the trust beneficiaries.

Id.

The Texas Supreme Court affirmed this aspect of the court of appeals's opinion. The Court analyzed a suit where, "After the trust [in issue] terminated under its terms [making the trustee a 'former trustee'] respondents filed suit seeking an accounting and recovery of all sums belonging to the trust estate which had not been properly accounted for by the [former] Trustee." *Corpus Christi Bank & Trust v. Roberts,* 597 S.W.2d 752, 573 (Tex. 1980). Despite expressing sympathy for the deceased trustee's executor, the Texas Supreme Court upheld the requirement for the accounting, stating: "We sympathize with the executor's difficulty in making a full accounting because of the death of this nonprofessional trustee as well as the death of his accountant before either could give testimony in this case. Nevertheless, this difficulty does not discharge the Trustee's obligation to make a full accounting of all funds belonging to the trust estate." *Id*. at 755.

More recently, the appellate court held that a former trustee's executor had to prepare an accounting and reversed a trial court's motion for protection on that issue. *See Estate of Erwin*, No. 13-20-00301-CV, 2021 Tex. App. LEXIS 10160 (Tex. App.—Corpus Christi 2021, no pet.). Citing to *Roberts* opinion, the court stated:

> Although Redding has not been appointed the successor

> trustee over C.E.'s testamentary trusts, as independent administrator for Bettye's estate, Redding assumes the responsibility of rendering an accounting. The trial court erred in granting Redding's motion for order of protection against producing an accounting of the trusts.

Id. The Roberts court did imply that once a successor trustee is appointed the successor trustee had the duty to prepare the accounting. *Id*. However, a successor trustee does not have knowledge of the trust's transactions and assets, and it has the right to seek an accounting from a former trustee. Tex. Prop. Code § 113.151(b) (interested parties can seek an accounting); *see also,* RESTATEMENT (THIRD) OF TRUSTS § 83.

In *In re Ng,* a trial court issued an order requiring the wife of a former trustee to prepare an accounting. No. 09-17-00386-CV, 2017 Tex. App. LEXIS 10129, at *1 (Tex. App.—Beaumont Oct. 27, 2017, no pet.). In that suit, the successor trustee sued the estate of the former trustee and obtained the order. *Id*. The wife filed a mandamus action, and the successor trustee responded. *Id*. The court of appeals refused mandamus relief, allowing the trial court's order requiring the accounting from the former trustee's estate's representative to be operative. *Id*.

Accordingly, the guardian for an incapacitated trustee or the representative of the estate of a deceased trustee may have the duty to prepare an accounting for a beneficiary.

Another issue is who pays for the accounting. The Texas Trust Code is silent on who pays for an accounting. Tex. Prop. Code § 113.151. It does state that "If a beneficiary is successful in the suit to compel a statement…, the court may … 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." *Id*. So, where a trustee fails to prepare an accounting the court can order the trustee, individually, to pay the fees and costs associated with that litigation.

Moreover, Section 114.008 of the Texas Trust Code provides:

> 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; … (8) reduce or deny compensation to the trustee; … or (10) order any other appropriate relief.

Tex. Prop. Code § 114.008(a). This statute provides a court with authority to redress a trustee's breach of trust (failure to keep and maintain adequate records) by ordering his or her estate to prepare an accounting at the estate's expense.

Moreover, the Restatement provides also provides for the remedies available where a trustee fails to properly maintain accurate records of all trust transactions:

> A trustee who fails to keep proper records is liable for any

> loss or expense resulting from that failure. A trustee's failure to maintain necessary books and records may also cause a court in reviewing a judicial accounting to resolve doubts against the trustee. These failures by trustees may furnish grounds for reducing or denying compensation, or even for removal, or for charging the trustee with the costs of corrective procedures or of having to conduct otherwise unnecessary accounting proceedings in court.

RESTATEMENT (THIRD) OF TRUSTS, § 83a(1). *See also, Miller v. Pender*, 93 N.H. 1, 34 A.2d 663 (1943) (affirming a trial court's order requiring a trustee to pay the expense of employing an accountant when the expenditures were made necessary by the inadequacy of the trustee's records). So, the common law supports a court entering an order requiring a trustee's estate to prepare an accounting since inception and that the estate representative pay for same.

V. TRUST TERMINATION

"All good things must come to an end." For the most part, that is also true for trusts. The termination of a trust and the distribution of its assets can be a ripe area for disputes.

A. Events That Cause The Termination Of A Trust

1. Termination By Own Terms

The most usual way for a trusts to terminate is due to their own language and limitations. The Texas Trust Code provides that a trust terminates when the trust's terms specifies that it terminates:

> A trust terminates if by its terms the trust is to continue only until the expiration of a certain period or until the happening of a certain event and the period of time has elapsed or the event has occurred…

Tex. Prop. Code §112.052. This is important because before a trust terminates, the trustee is the correct party to hold assets due or owing to the trust. *Fetter v. Brown*, No. 10-13-00392-CV, 2014 Tex. App. LEXIS 11209, 2014 WL 5094080 (Tex. App.—Waco Oct. 9, 2014, pet. denied).

In one case, a court determined that a trust did not terminate just because the beneficiaries had the right to demand the distribution of its assets upon a certain event. *Schaefer v. Bellfort Chateau L.P.*, No. 14-04-00254-CV, 2005 Tex. App. LEXIS 6564, 2005 WL 1981299 (Tex. App.—Houston 14th Dist., Aug. 18, 2005, pet. denied). The court held:

> The Schaefers asserted that, as a matter of law, the two trusts in question terminated on July 23, 1991, when Mike turned eighteen. However, the applicable trust documents show that these trusts do not, by their terms, continue only until the expiration of a certain period or until the happening of a certain event. *See* Tex. Prop. Code § 112.052. None of the trust documents state that the trusts are to continue only until all the beneficiaries have reached the age of majority. Rather, these documents permit the beneficiaries, if they wish, to obtain their share of the trust corpus upon reaching the age

> of majority. Allowing for such a possibility is not the same as stating that the trusts shall terminate when all beneficiaries have reached the age of majority. Under the applicable standard of review, the trial court did not err in implicitly determining that the trusts in question do not, by their terms, continue only until the expiration of a certain period or until the happening of a certain event. *See* Tex. Prop. Code § 112.052.

Id. at *12. Certainly, the trust would terminate if all of the beneficiaries demanded a distribution and such distributions were made. But until those events happened, the trust was still in existence.

In *Mendell v. Scott*, beneficiaries sued for a declaration that a trust had terminated when the primary beneficiary died. No. 01-20-00578-CV, 2023 Tex. App. LEXIS 5382 (Tex. App.—Houston [1st Dist.] July 25, 2023, no pet.). The court held:

> As noted above, Section 112.052 provides that a "trust terminates if by its terms the trust is to continue only until . . . the happening of a certain event and . . . the event has occurred." Tex. Prop. Code § 112.052. In their third motion for summary judgment, appellees pointed to the following language in Section 6.2 of the Trust as evidence that it terminated upon Uncle Mutt's death: "If the said Susan Edis Gottlieb Herzfeld does not survive Settlor, and, again, conditioned upon no Prohibited Act . . . having been attributed to the Susan Herzfeld Share . . . then, instead, the Susan Herzfeld Share shall be distributed to her children, Laurence Scott (Herzfeld) and Rachel Chaput, in equal shares, outright and free of trust[.]"
>
> The crux of Mendell's argument in opposition of finding that the Trust terminated upon Uncle Mutt's death seems to be that because the Trust provided her with the discretion to determine whether a Prohibited Act occurred, no merger could have happened (and thus, no termination of the Trust), until she made that determination. She further argues that the terms of the Trust obligated her to establish reserves to defend, not only the Trust, but also Uncle Mutt's estate, and that all costs to defend the estate were to be borne by the Trust if Susan brought a challenge. While Susan disclaimed her interest in the Trust, she never disclaimed her interest in Uncle Mutt's estate, so the reserves had to be maintained until the applicable limitations period expired for Susan to bring a challenge to the estate. See, e.g., Tex. Est. Code § 256.204(a) (two years for will contest). Mendell further contends that because Section 4.2 of the Trust Agreement mandates that the "primary purposes" for the Trust are to

allow Mendell to pay from the Trust assets a one-third share of costs to defend Uncle Mutt's estate and all other final bills or debts of the estate—before any distribution is made—the Trust could not terminate or be wound up until the applicable limitations period expired.6Link to the text of the note So, according to Mendell, she would have until at least that date to investigate whether a "Prohibited Act" had occurred.

We disagree.

The Trust does not contain the explicit statement that it is to terminate upon Uncle Mutt's death; however, under the specific facts in this case, that is the effect of the distribution provision that applies in the event Susan "does not survive" Uncle Mutt. Although Susan's disclaimer occurred after Uncle Mutt's death, her disclaimer took "effect as of the time of [Uncle Mutt]'s death" and "relates back for all purposes to the time of [Uncle Mutt]'s death," see Tex. Prop. Code § 240.051(b) (emphasis added), and the disclaimed interest passed as if she "had died immediately before" Uncle Mutt's death. *See id.* § 240.051(e)(2)(A). Thus, we must proceed to the portion of Section 6.2 which provides for distribution in the event that Susan predeceased Uncle Mutt. Although Mendell is correct that distribution to appellees was likewise "conditioned upon no Prohibited Act . . . having been attributed to the Susan Herzfeld Share," Mendell's arguments related to her ability to exercise discretion to determine whether a Prohibited Act had occurred after Uncle Mutt's death, thus preventing the termination or winding up of the Trust, all overlook the summary judgment evidence that she had, in fact, already made this determination as of August 17.

Furthermore, we reject Mendell's argument that the Trust could not terminate until the primary purposes under Section 4.2(a) and (b) were fulfilled. Upon Uncle Mutt's death, Section 6.1 provides for the payment of final and administrative expenses, i.e., the payment of costs and expenses identified in Sections 4.2(a) and (b). The language of Section 6.2 then provides for the distribution of the "remaining trust assets," i.e., those "residual assets" identified in Section 4.3(c), to either Susan, in trust, or if Susan predeceased Uncle Mutt, to appellees "outright and free of trust." Because Mendell had determined that as of August 17 no Prohibited Act had occurred by any party, and that she was prepared to move

> forward with the distributions pursuant to Section 6.2 of the Trust, albeit to Susan's trust, this necessarily means that, as of August 17, Mendell had either made "payment or distribution, or provi[ded] for payment or distribution, of all amounts described in Section 4.2(a) and 4.2(b)." Accordingly, Section 6.2 directed that Mendell "shall" distribute "the remaining trust assets" to appellees "outright and free of trust."
>
> Thus, under the specific facts of this case, where Susan was treated as if she predeceased Uncle Mutt, the Trust was "to continue only until. . . the happening of a certain event," i.e., Uncle Mutt's death. *See* Tex. Prop. Code § 112.052. In other words, Uncle Mutt's death was the "event of termination." *See id*. Accordingly, we conclude that the trial court correctly determined that the trust "has terminated according to its terms."

Id.

In *Herbig v. Welch*, a dispute arose around whether a trust terminated and whether certain transfers were valid. No. 01-22-00080-CV, 2023 Tex. App. LEXIS 4505 (Tex. App.—Houston [1st Dist.] June 27, 2023, no pet.). The parties disputed whether a trust terminated, whether a trustee had authority to accept transfers after termination, whether certain transfers were void, and whether a party had capacity or standing to assert all these issues. The trial court granted summary judgment that the trust did terminate upon the death of the primary beneficiary, and the court of appeals affirmed:

> In her motion for summary judgment, Jeanne pointed to the following language in Article IV of the WFT as evidence that it, and the sub trusts, terminated upon Richard's death: … "Upon the death of the surviving Beneficiary, the Trustee shall distribute all assets remaining in the various Trusts established in Article III in accordance with any powers of appointment exercised by the surviving Beneficiary. To the extent not exercised, such property will be distributed to the descendants of Trustors on a per stirpes basis." Herbig argues that while this article "provides for the distribution of assets upon Richard's death, . . . it does not provide for an immediate extinction of the WFT." While Herbig is correct that this language does not expressly state that the Welch Family Trust C became "immediate[ly] extinct[]" or that it terminates upon Richard's death, it does, by its terms, direct that the trust be terminated. It provides for the distribution of "all assets remaining in the various Trusts . . . in accordance with any powers of appointment exercised by [Richard]," and to the extent such powers of appointment were not exercised, "such property will be distributed to the descendants of Trustors on

> a per stirpes basis." There are no provisions allowing for powers of appointment related to the Welch Family Trust C, so under the terms applicable to that trust, any remaining assets at the time of Richard's death "will be distributed to the descendants of Trustors on a per stirpes basis." Other than to distribute "all assets remaining," there are no directives as to what would be done with the trust following Richard's death. After all trust property and assets remaining in the Welch Family Trust C are distributed upon Richard's death, the trust would have no remaining property or corpus. The only reasonable interpretation of this provision is that the Welch Family Trust C was "to continue only until . . . the happening of a certain event," i.e., Richard's death. See Tex. Prop. Code § 112.052. In other words, Richard's death was the "event of termination." See id. Once that event occurred, i.e., Richard died, the Welch Family Trust C terminated.

Id. The court of appeals then determined whether the trustee of the terminated trust could accept new property to the trust after termination. The court stated:

> As noted above, Section 112.052 of the Texas Property Code states: "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 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." Tex. Prop. Code § 112.052…
>
> Under this law, after the Welch Family Trust C terminated on September 9, 2019, Herbig was permitted to continue to exercise his powers as trustee for a reasonable time required to wind up the affairs of the trust and to make distribution of its assets to the appropriate beneficiaries. See Tex. Prop. Code § 112.052; Sorrel, 1 S.W.3d at 870. Herbig argues that because his powers as trustee included the power to accept additional property or interests into the trust "at any time," he was endowed with that right beyond the termination of the trust. He asserts that winding up the trust necessarily could include accepting the transfer of property. We disagree.
>
> The opening paragraph of the WFT provides that it assigned to Richard and Margaret "all property, real or personal, which we, or through the actions of our attorneys-in-fact, or any other person may, at any time or from time to time, transfer, add or cause to be added to this Trust, all of which, together with any

> income thereon, is hereinafter called 'Trust Property[.]'" Article II also provides that "[s]ubject to acceptance by the Trustee, additional property or interests may be transferred or assigned from time to time or at any time by any person . . . ." It is this language that Herbig points to in support of his argument that he could continue to accept new property into the trust even after termination. He contends that Jeanne, and the trial court's, construction of the WFT renders the "at any time" language meaningless. But this language cited by Herbig presupposes that there is a trust in which to accept property. If we were to adopt Herbig's interpretation, this would mean that the trustee could continue to accept new property into a trust even many years after the termination event occurs, preventing the winding up of the trust indefinitely.
>
> Furthermore, this language of the trust neither expressly permits, nor prohibits, the trustee from accepting new property into the trust after termination. Accordingly, as Herbig recognizes, where the language of the trust is silent, the provisions of the Trust Code govern. See Tex. Prop. Code § 113.001; Myrick v. Moody Nat'l Bank, 336 S.W.3d 795, 802 (Tex. App.—Houston [1st Dist.] 2011, no pet.). As stated above, Section 112.052 permits a trustee to retain his powers after termination "for the reasonable period of time required to wind up the affairs of the trust and to make distribution of its assets to the appropriate beneficiaries." … Accordingly, we hold that the neither the express terms of the Welch family Trust C, nor the Trust Code, authorized Herbig to accept the transfers of new property into the trust following Richard's death and the termination of the trust.

Id.

2. Termination By Suit

A trustee or beneficiary may petition a court to modify or terminate the trust when either (a) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill or (b) because of circumstances not known to or anticipated by the trustor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purposes of the trust. Tex. Prop. Code § 112.054(a).

Further, a court can terminate a trust if: "(A) continuance of the trust is not necessary to achieve any material purpose of the trust; or (B) the order is not inconsistent with a material purpose of the trust." *Id*. Regarding this ground, the statute provides:

> The court may not take the action permitted by Subsection (a)(5) unless all beneficiaries of the trust have consented to the order or are deemed to have consented to the order. A minor, incapacitated, unborn, or unascertained beneficiary is

> deemed to have consented if a person representing the beneficiary's interest under Section 115.013(c) has consented or if a guardian ad litem appointed to represent the beneficiary's interest under Section 115.014 consents on the beneficiary's behalf.

Id. at 112.054(d).

The court may order a modification or the termination of the trust, for the purpose of conforming as nearly as possible to the intention of the trustor. Tex. Prop. C. § 112.054(b). The court must consider a spendthrift provision of a trust in making its determination, but the court may not rely on the existence of a spendthrift provision as the sole reason for its decision. *Id*.

3. Termination Due To Small Trust

The Texas Trust Code provides that if the trust property has a total value of fifty thousand dollars ($50,000) or less, a trustee may terminate the trust after notice to all beneficiaries. Tex. Prop. Code § 112.059. Similarly, a trust document can allow a trustee to terminate a trust when the trust assets are depleted to some specific level or when the trustee, in its discretion, determines that the trust is no viable. Any such provision would be enforceable.

4. Termination by Decanting

A trust may also be terminated by transferring – or decanting – its assets into a second trust. As one commentator provides:

> Since 2013, Texas allows a distribution of trust principal in further trust, a process called 'trust decanting' by estate planners. Trust decanting provides a method for clients to change the terms of their irrevocable trusts. Essentially, decanting a trust means distributing the property from an old trust into a new trust with new and presumably more favorable trust terms for one or more of the old trust beneficiaries. Assets that remain in the old trust will continue to be governed by its terms. If the old trust is emptied, it can simply terminate. It is the trustee who executes the trust decanting process, using powers either granted by the old trust itself, state law or common law rules.

1 Texas Estate Planning § 32.09.

5. Termination By Merger

The Texas Trust Code provides that a trustee may merge multiple trusts together into one resulting trust. The provision states:

> (c) The trustee may, unless expressly prohibited by the terms of the instrument establishing a trust, combine two or more trusts into a single trust without a judicial proceeding if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of one of the separate trusts. The trustee shall complete the trust combination by:
>
> (1) giving a written notice of the combination, not later than

> the 30th day before the effective date of the combination, to each beneficiary who might then be entitled to receive distributions from the separate trusts being combined or to each beneficiary who might be entitled to receive distributions from the separate trusts once the trusts are funded; and
>
> (2) executing a written instrument, acknowledged before a notary public or other person authorized to take acknowledgments of conveyances of real estate stating that the trust has been combined pursuant to this section and that the notice requirements of this subsection have been satisfied.

Tex. Prop. Code § 112.057(c). True, some would argue that neither trust technically "terminates" and stay active in the resulting trust. However, practically, the trust that no longer follows its original trust document effectively is terminated and the assets distributed to the resulting trust.

6. Termination Due To Divorce

Certain individual provisions in a trust instrument executed by a divorced individual as settlor before the divorced individual's marriage was dissolved are revoked by the dissolution of the marriage. The Texas Trust Code provides as follows:

> (a) The dissolution of the marriage revokes a provision in a trust instrument that was executed by a divorced individual as settlor before the divorced individual's marriage was dissolved and that: (1) is a revocable disposition or appointment of property made to the divorced individual's former spouse or any relative of the former spouse who is not a relative of the divorced individual; (2) revocably confers a general or special power of appointment on the divorced individual's former spouse or any relative of the former spouse who is not a relative of the divorced individual; or (3) revocably nominates the divorced individual's former spouse or any relative of the former spouse who is not a relative of the divorced individual to serve: (A) as a personal representative, trustee, conservator, agent, or guardian; or (B) in another fiduciary or representative capacity.

Tex. Prop. Code § 112.102(a). There are exceptions to these provisions. *Id*. at § 112.102(b). Further, Section 112.103 provides:

> (a) An interest granted in a provision of a trust instrument that is revoked under Section 112.102(a)(1) or (2) passes as if the former spouse of the divorced individual who executed the trust instrument and each relative of the former spouse who is not a relative of the divorced individual disclaimed the interest granted in the provision.

> (b) An interest granted in a provision of a trust instrument that is revoked under Section 112.102(a)(3) passes as if the former spouse and each relative of the former spouse who is not a relative of the divorced individual died immediately before the dissolution of the marriage.

Tex. Prop. Code § 112.103(a-b). There is a provision dealing with the liability of certain purchasers or recipients of benefits. *Id*. at § 112.104. There is also a provision dealing with the liability of a former spouse or his or her relatives for certain benefits. *Id*. at § 112.105.

The Texas Estate's Code has similarly provisions. Tex. Est. Code § 123.051-056.

7. Termination Due To Merger of Interests

As mentioned above in selecting a successor trustee, a trust terminates if the legal title to the trust property and all equitable interests in the trust become united in one person. Tex. Prop. Code § 112.034(b). When one person holds both legal title to the property and the entire beneficial interest, the two estates merge and that person holds the property free of trust. *Rife v. Kerr*, 513 S.W.3d 601 (Tex. App.—San Antonio 2016, no pet.).

B. Effect Of Act Causing Termination

One issue that arises when a trust terminates is when do the beneficiaries actually own the trust's assets. Is it when the trustee signs a deed or assignment document or transfers possession? Is it immediately when the trust terminates?

While a trust is in existence, the trustee holds legal title and the beneficiaries have equitable title. *Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc*., 48 S.W.3d 865, 883 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("In a trust relationship, the law divides the bundle of rights in the property—the trustee holds legal title while the beneficiary possesses an equitable title or property interest."); see also RESTATEMENT (THIRD) OF TRUSTS § 49 (2003) ("The beneficiary of a trust has a property interest in the subject matter of the trust. He has a form of ownership." (quoting 2 A. Scott, The Law of Trusts § 130)).

Equitable title is a right, enforceable in equity, to have the legal title to real estate transferred to the owner of the right upon performance of specified conditions. *Eagle Oil & Gas Co. v. TRO-X, L.P.*, 619 S.W.3d 699, 706 (Tex. 2021); *City of Houston v. Guthrie*, 332 S.W.3d 578, 588 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *Langoria v. Lasater*, 292 S.W.3d 156, 165 (Tex. App.—San Antonio 2009, pet. denied). In the trust context, the holders of equitable title to property "are considered the real owners," and the trustee vested with legal title "holds [the property] for the benefit of" the equitable-title holder. *Eagle Oil & Gas Co.*, 619 S.W.3d at 706 (quoting *Bradley v. Shaffer*, 535 S.W.3d 242, 248 (Tex. App.—Eastland 2017, no pet.)). *See also BLF LLC v. Landing at Blanco Prop. Owners Ass'n*, No. 03-22-00423-CV, 2023 Tex. App. LEXIS 9300 (Tex. App.—Austin December 13, 2023, no pet. history).

Courts have held that as soon as the trust terminates that the legal ownership of the trust's property passes to the beneficiaries. *Sorrel v. Sorrel*, 1 S.W.3d 867, 870 (Tex. App.—Corpus Christi—Edinburg 1999, no pet.) (citing *Nowlin v. Frost Nat'l Bank*, 908 S.W.2d 283, 289 (Tex. App.—Houston [1st Dist.] 1995, no writ); RESTATEMENT (SECOND) OF TRUSTS § 344 (1957)). In *Sorrel*, the trustee, after termination,

attempted to partition trust property. *Id*. The beneficiaries alleged that the trustee did not have the authority to do so, and the trial court agreed. The court held that "[t]his is so because title, in effect, has already passed to the beneficiaries." *Id*. During the existence of a trust, legal title to the *res* is in the trustee and equitable title is in the beneficiaries. *Id*. at 871 (citing *Shearrer v. Holley*, 952 S.W.2d 74, 78 (Tex. App.—San Antonio 1997, no writ)). But, upon the termination of a trust, "the estate of the trustee ceases, and the legal, as well as the equitable, title vests in the beneficial owner without the necessity of any act or intervention on the part of the trustee, unless the intention of the creator appears that the legal title should continue in the trustee. The termination of a trust leaves the trustee with a mere administrative title to the fund." *Id*. at 870-71 (citing 89 C.J.S. Trusts § 96 (1955)). The court concluded:

> Upon Katherine's death, the trust terminated and the trust property passed according to the trust instrument to Frank's then living descendants, to be distributed per stripes. During the existence of a trust, legal title to the res is in the trustee and equitable title is in the beneficiaries. *Accord Shearrer v. Holley*, 952 S.W.2d 74, 78 (Tex. App.—San Antonio 1997, no writ). Upon termination, legal and equitable interests merge and the beneficiaries acquire full ownership interest in the property. *See id.* "This merger of interests may be accomplished by an express conveyance of the legal title to the beneficiaries by the trustee upon termination of the trust, or may occur automatically upon termination of the trust 'where by the terms of the trust is provided that upon expiration of the period of duration of the trust the trust property shall vest in the beneficiary.'" *Id.; Smith v. Kountze*, 119 S.W.2d 721, 726 (Tex. Civ. App.—Austin 1938), *rev'd on other grounds,* 135 Tex. 543, 144 S.W.2d 261 (Tex. 1940); *see also* RESTATEMENT (SECOND) OF TRUSTS § 345 cmt. a (1959). After termination the trustee has only the very limited authority given by statute, i. e., to "wind up the affairs of the trust and to make distribution."
>
> We hold that where the express terms of the trust specify that the trust terminates upon the occurrence of a certain event and directs how the property is to be distributed, the trustees may not partition the trust property prior to distributing it in accordance with the instrument, but may only convey it to the appropriate beneficiaries in the manner instructed by the trust. CF. RESTATEMENT (SECOND) OF TRUSTS § 345 (1959) (stating that the trust must be distributed according to the trust agreement upon termination). The settlor may bestow upon the trustees powers to distribute realty of the trust by partition upon termination, but such power is not present here. Hence, these trustees were acting outside their authority in attempting

> to convey trust property in 1997, and the trial court was correct in holding that conveyance void. We affirm the trial court's holding in regards to appellants' first three issues.

Id.; *see also Jinkins v. Jinkins*, 522 S.W.3d 771 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *Fetter v. Brown*, No. 10-13-00392-CV, 2014 Tex. App. LEXIS 11209, 2014 WL 5094080 (Tex. App.—Waco Oct. 9, 2014, pet. denied) (legal title vests in beneficiaries when trust terminates).

As one court noted:

> It is basic trust law that "for a trust to be a trust, the legal title of the [trust property] must immediately pass to the trustee, and beneficial or equitable interest to the beneficiaries." During the duration of the trust, neither the beneficiaries nor the trustee own the property. It is not until the legal and equitable interests merge in the beneficiaries that the beneficiaries acquire a full ownership interest in the property. This merger of interests may be accomplished by an express conveyance of the legal title to the beneficiaries by the trustee upon termination of the trust, or may occur automatically upon termination of the trust "where by the terms of the trust is provided that upon expiration of the period of duration of the trust the trust property shall vest in the beneficiary."

Schearrer v. Holley, 952 S.W.2d 74, 78 (Tex. App.—San Antonio 1997, no writ).

There is support for this analysis in the Texas Trust Code, which provides:

> A trust terminates if by its terms the trust is to continue only until the expiration of a certain period or until the happening of a certain event and the period of time has elapsed or the event has occurred. 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 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*.

Tex. Prop. Code §112.052 (emph. added). Courts have interpreted this language in Section 112.052 to mean that "the beneficiaries entitled to receive the trust assets upon termination automatically have vested rights upon the termination event," *Kellner v. Kellner*, 419 S.W.3d 541, 546 (Tex. App.—San Antonio 2013, pet. denied), because upon termination, legal and equitable interests merge, and the beneficiaries acquire full ownership interest in the property. *See Sorrel,* 1 S.W.3d at 871; *Shearrer*, 952 S.W.2d at 78; see also Tex. Prop. Code § 112.034(b) ("[A] trust terminates if the legal title to the trust property and all equitable interests in the trust become united in one person."); *Mendell v. Scott*, No. 01-20-00578-CV, 2023 Tex. App. LEXIS 5382 (Tex. App.—Houston [1st

Dist.] July 25, 2023, no pet.); *Herbig v. Welch*, No. 01-22-00080-CV, 2023 Tex. App. LEXIS 4505 (Tex. App.—Houston [1st Dist.] June 27, 2023, no pet.).

One commentator explains as follows:

> Generally, title to real property held in trust vests directly in the beneficiary if the trustee has neither a power nor a duty related to the administration of the trust. The title of a trustee in real property is not divested, however, if the trustee's title is not merely nominal but is subject to a power or duty in relation to the property. Therefore, whether the trust res is realty or personalty, a trust becomes a simple, passive, or dry trust when a trustee has no duties to perform, the purposes of the trust having been accomplished; the beneficiary is then entitled to have the full legal title and control of the property, since no other person has an interest in the property. A trustee of property that is subject to a dry or passive trust may terminate the trust at any time by conveying the property to the beneficiary, unless the trustee is definitely required to continue his or her trusteeship by the words of the instrument creating the trust.

72 Tex. Jur. 3rd, Trusts § 172

C. Trustee's Right To Wind Up The Trust

Beneficiaries can become impatient when a trust terminates and demand that the trustee immediately transfer assets to them. They may even allege that the trustee does not have any power or authority to do anything but transfer assets after an event of termination. That is not accurate. Texas Trust Code Section 112.052 provides that a trustee may exercise the powers of a trustee after an event of termination:

> A trust terminates if by its terms the trust is to continue only until the expiration of a certain period or until the happening of a certain event and the period of time has elapsed or the event has occurred. *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 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.

Tex. Prop. Code § 112.052 (emphasis added). The term to "wind up" the affairs of the trust is not defined in Chapter 112 of the Texas Property Code. Therefore, the common, ordinary meaning of the term applies. *Tex. State Bd. of Examiners of Marriage & Family Therapists v. Tex. Med. Ass'n,* 511 S.W.3d 28, 34 (Tex. 2017) (stating "[b]ecause the statute and the rule do not define these key terms, we must apply their common, ordinary

meaning unless a contrary meaning is apparent from the statute's language"). Courts "consult dictionaries to discern the natural meaning of a common-usage term not defined by contract, statute, or regulation." *Epps v. Fowler*, 351 S.W.3d 862, 866 (Tex. 2011). Black's Law Dictionary defines "[w]inding up" as the "[p]rocess of settling the accounts and liquidating assets for a partnership or corporation , for the purpose of making distribution of net assets to shareholders or partners and dissolving the concern." BLACK'S LAW DICTIONARY 1601 (6th ed. 1990). Websters provides: "a: the act of bringing to an end, b: a concluding act or part: FINISH. https://www.merriam-webster.com/dictionary. The term "winding up" has been discussed in various cases. *See, e.g., Brookfield Asset Mgmt., Inc. v. AIG Fin. Prods. Corp.,* 09 Civ. 8285 (PGG), 2010 U.S. Dist. LEXIS 103272, at *40 (S.D.N.Y. Sept. 29, 2010) (quoting from the ninth edition of Black's Law Dictionary, which states that "'winding up' is 'the process of settling accounts and liquidating assets in anticipation of a partnership's or a corporation's dissolution'"); *In re A & B Assocs., L.P.,* 593 B.R. 27, 63 (Bankr. S.D. Ga. Sept. 26, 2018) (quoting from the tenth edition of Black's Law Dictionary and stating "[t]he term 'winding up,' though not defined in the statute, generally refers to '[t]he process of settling accounts and liquidating assets in anticipation of a partnership's or a corporation's dissolution'").

"[T]he Texas Trust Code expressly provides that the trustee of a terminated trust may continue to exercise the powers of trustee for the reasonable period of time required to wind up the affairs of the trust." *Campbell v. Auto. Ins. Co. of Hartford Connecticut*, No. 07-06-0158-CV, 2007 WL 1390625 (Tex. App.—Amarillo May 9, 2007, no pet.).

Texas courts have recognized that winding-up powers are subject to the terms of the instrument: "The rule in such cases is that subject to the provisions of the trust instrument, the trustee has [winding-up powers]." *Kimble v. Baker*, 285 S.W.2d 425, 430 (Tex. Civ. App.—Eastland 1955, no writ); s*ee also, Cogdell v. Fort Worth National Bank*, 537 S.W.2d 304, 307 (Tex. Civ. App.—Fort Worth 1976, writ dism'd) ("There was nothing in the will creating the trust that is inconsistent with the trustee exercising such powers as are necessary to enable the trustee to wind up the trust"). Under Texas law, winding-up powers are a default provision that may only be denied to a trustee where the instrument affirmatively and expressly indicates that they are not contemplated after a specified termination date. *Id*.

For example, in *Myrick v. Enron Oil & Gas Co.*, the court held that even though an event occurred that triggered the termination of a trust, that the trustee could not wind up the trust until litigation was completed. 296 S.W.3d 724 (Tex. App.—El Paso 2009, no pet.). The court held:

> The pending Trust 25 litigation prevented Moody Bank from 'winding up' the affairs of Trust 25 and making a final distribution until after the agreed judgment was entered on March 19, 1993. During the period after the trust terminated and the conclusion of the Trust 25 litigation, Moody Bank had a continuing duty to manage the trust estate and seek the best possible result for the beneficiaries.

Id. at 728.

Similarly, in *Cogdell v. Fort Worth National Bank*, where a trust was involved in three

ongoing lawsuits at the time of termination, a Texas appeals court found it proper to allow the trustee to continue representation, reasoning that the trustee has such powers and duties as are necessary for winding up the estate. 537 S.W.2d 304, 307 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.); *see also Kellner v. Kellner*, 419 S.W.3d 541 (Tex. App.—San Antonio Nov. 13, 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).

Other courts have held that 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. One court held that the trustees had no authority to partition the trust property prior to distributing it in accordance with the trust document. *Sorrel v. Sorrel*, 1 S.W.3d 867 (Tex. App.—Corpus Christi Aug. 31, 1999, no pet.). One court held that the trustee in wind up had no authority to accept new assets. *Herbig v. Welch*, No. 01-22-00080-CV, 2023 Tex. App. LEXIS 4505 (Tex. App.—Houston [1st Dist.] June 27, 2023, no pet.).

In *Greener v. Wells*, the trust, by its express terms, terminated on the settlor's youngest daughter's twenty-first birthday. No. 07-95-0330-CV, 1997 WL 615653, *1 (Tex. App.-Amarillo Oct. 7, 1997, no pet.). After the trust's termination, the trustee failed to distribute trust property to the beneficiaries for thirteen years. *Id*. at *3. In addition to her failure to distribute trust property within a reasonable period of time after the trust terminated, the trustee attempted to mortgage one of the trust properties. *Id*. at *1. The court held the trustee could not bind trust property after the youngest daughter's twenty-first birthday. *Id*. at *3.

This is consistent with the Restatement, which states:

> Although the termination date for a trust has arrived, the trustee does not thereby necessarily cease to be trustee but normally continues to serve until the trust is finally wound up. The period for winding up the trust refers to the period after the termination date and before trust administration ends by complete distribution of the trust estate. The duration of this period of continuation properly depends on the circumstances involved. If, for example, the estate is large, especially with tax complications, or if the trust terms or circumstances require the sale of property that is not readily saleable, or if the beneficiaries entitled to distribution or the amounts to which they are entitled are difficult of ascertainment, the period for winding up the trust may properly be longer than it would be in the absence of these or other complicating circumstances. Also, delay may result because of difficulties in establishing and implementing a plan for distributing the trust estate that both serves the interest of the beneficiaries and is consistent with the trustee's duty of impartiality… The powers and duties of the trustee in winding up the trust are an extension of the powers and duties of the trustee generally in administering the

> trust, except that the trustee's fiduciary duties in exercising powers of the trusteeship are significantly affected by the fact that the trust is in (or approaching) the process of termination. Accordingly, when the termination date has arrived, the trustee can properly exercise powers of the trusteeship as appropriate to the winding up of the trust (including distribution of the trust estate) in accordance with its purposes and the interests of its beneficiaries.

RESTATEMENT (3RD) OF TRUSTS, § 89(b). The Restatement further states, "Although the trust termination date has arrived, the trustee can properly exercise such powers as are reasonable and appropriate for the preservation of the trust property until the process of winding up is completed." *Id*. at § 89, com. d; *see also* RESTATEMENT (SECOND) OF TRUSTS § 344 (1959) (noting that the trustee retains, upon termination, "such powers and duties as are appropriate for the winding up of the trust"); 76 Am. Jur. 2d Trusts § 71 ("The termination of a trust leaves the trustee with a mere administrative title to the property, and the trustee is not immediately divested of all duties and responsibilities, but has the powers and duties appropriate for winding up trust affairs.").

Generally, it is recognized across jurisdictions that trustees retain post-termination powers and duties for the purpose of winding up trust administration. *See, e.g., Sterling v. Sterling,* (2015) 242 Cal.App.4th 185, 200 (trustee had authority to administer assets while in wind up); *Botsford v. Haskins & Sells,* 81 Cal. App. 3d 780, 146 Cal. Rptr. 752, 754 (Dist. Ct. App. 1978) (trustees commenced legal action after the date set for termination of the trust); *Krys v. Aaron*, 106 F. Supp. 3d 492 (D.N.J. 2015) (trustee had authority to pursue claims on behalf of trust in wind up); *Peoples Bank v. D'Lo Royalties, Inc.*, 235 So. 2d 257, 266 (Miss. 1970) ("When the time for the termination of the trust arrives, the duties and powers of the trustees do not cease immediately, but rather hold on until the trust is closed."); *Leith v. Mercantile Tr. Co. Nat'l Ass'n,* 423 S.W.2d 75, 85 (Mo. Ct. App. 1967) (holding that during the winding up phase, trustee was under duty to take necessary steps toward distribution and to exercise reasonable care and skill in preservation of trust property until distribution was complete). Trustees also have the power to file claims after a trust terminates as part of the trustee's wind-up powers. As one court so artfully stated:

> In this case, the most operative consideration is not merely the initiation of a lawsuit post termination, but rather the claims involved in the lawsuit. Kamlesh, as successor co-trustee, had the power and duty upon trust termination to distribute trust assets to the beneficiaries. It is only reasonable that in order to so distribute assets, a trustee must have the ancillary ability to account for and marshal these assets; else they would be unable to fulfill their chief post-termination obligation. Kamlesh brought this action to recover assets that he alleges were wrongfully appropriated by various perpetrators from the RPT. Assuming his allegations are true, Kamlesh would have been initially unable to properly allocate assets that were essentially

> stolen from the RPT and, therefore, rightfully pursued a legal remedy to recover the pilfered property. We therefore find that in winding up the affairs of the RPT, bringing this lawsuit after trust termination in order to recover trust assets was "a reasonable continued function of the trustee." *Botsford,* 146 Cal. Rptr. at 756. The power to distribute assets necessarily includes the ability to marshal them, including through litigation if necessary.

Hemlani v. Melwani, 2016 Guam 33, 2016 Guam LEXIS 30 (Dec. 20, 2016).

So, there may be issues that need to be cleared up, like litigation and claims prosecution and defense, before a trustee can distribute out trust assets. Depending on the issue, this wind-up period can take years.

D. Trust Claims Against Beneficiaries

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

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

Tex. Prop. Code § 114.031(a). So, if a beneficiary has caused loss to the trust due to wrongfully dealing with trust property, a trustee has a claim against the beneficiary, who is liable for the loss. *Id*.

The beneficiary may not have any assets, so suing the beneficiary may be a worthless exercise. Notwithstanding, the Texas Property Code also has a provision that allows a trustee to offset any distributions to the beneficiary due to a loss:

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

Tex. Prop. Code § 114.031(b). Therefore, if a trustee establishes a claim against the beneficiary, the trustee can then simply payoff that debt by offsetting distributions otherwise due to the beneficiary from the trust. A statute of limitations might bar a lawsuit against the beneficiary, but there is recourse to the beneficiary's interest in the trust. *See, e.g., Cook v. Cook*, 177 Cal.App.4th 1436, 99 Cal. Rptr.3d 913, 918-919 (2009) (allowing recourse, despite the running of the statute of limitations, because the settlor "expressed intent to offset unpaid debts to implement a testamentary plan to treat each beneficiary equally").

The Restatement provides:

> (1) A beneficiary is not personally liable to the trust except to the extent: (a) of a loan or advance to the beneficiary from the trust; (b) of the beneficiary's debt to the settlor that has been placed in the trust, unless the settlor manifested a contrary intention; (c) the trust suffered a loss resulting from a breach of trust in which the beneficiary participated; or (d) provided by other law, such as the law of contract, tort, or unjust enrichment.
>
> (2) If a beneficiary is personally liable to the trust, the trust is entitled to a charge against the beneficiary's interest in the trust to secure the payment of the liability.

RESTATEMENT (THIRD) OF TRUSTS, § 104. Commentary to the Restatement further states:

> If the trustee makes a loan or advance of trust property to a beneficiary, the beneficiary ordinarily is personally liable to the trust for the unrepaid amount of the loan or advance. The nature and extent of the obligation, however, may be affected by the terms of the trust

Id. at comment (d). It further provides:

> If a beneficiary is personally liable to the trust, the trust is entitled, as stated in Subsection (2), to a charge against the beneficiary's interest in the trust to secure the payment of the liability. This rule applies even though the beneficiary's interest is subject to a spendthrift restraint.

Id. at comment (h).

Similarly, Scott on Trusts provides:

> Where a beneficiary is under a liability to pay money into the trust estate, his interest in the trust estate is subject to a charge for the amount of his liability. This is an application of a broader principle that "a person entitled to participate in a fund and also bound to contribute to the same fund cannot receive the benefit without discharging the obligation." This broad principle that he who seeks equity must do equity.

William F. Fratcher, SCOTT ON TRUSTS, § 251 (1988). The commentator continues:

> If the trustee makes a loan of trust money to one of the beneficiaries, not only is the beneficiary personally liable to the repay the amount of the loan to the trust, but his interest is subject to a charge for the amount lent. The rule is the same where the trustee makes an advance out of the trust estate to the beneficiary, that is, a payment to the beneficiary before the time when by the terms of the trust the payment is due. Where the

> payment is made by way of loan, the beneficiary expressly undertakes to repay the amount of the loan to the trust; and even if there is no agreement that his interest in the trust is security for the loan, the trustee may nevertheless withhold payments otherwise due to him in order to reimburse the trust estate for the amount of the loan. Where the trustee makes an advance out of the trust estate to the beneficiary, the beneficiary is personally liable, even though he has not expressly agreed to repay the amount of the advance. Where the trustee makes a loan or advance to a beneficiary out of the trust property, his interest in the trust is subject to a charge for the amount lent to advanced, and the trustee in order to reimburse the estate can withhold what would otherwise be payable to the beneficiary.

Id. at § 255.

Furthermore, the fact that a trust may be a spendthrift trust does not protect a beneficiary from a trustee offsetting future distributions by what is owed. *See Bruce G. Robert QTIP Marital Trust v. Grasso*, 332 S.W.3d 248 (Ct. App. Mo. December 28, 2010) (citing Restatement (Second) Trusts, Section 225(f): "Spendthrift trust. Although the interest of the beneficiary is not transferable by him or subject to the claims of his creditors, his interest is subject to a charge for advances made to him out of the trust property unless the settlor has manifested a different intention."); *Danning v. Lederer*, 232 F.2d 610, 614 (7th Cir. 1956) (the existence of a provision allowing the beneficiary to receive loans from the trust does not to invalidate the spendthrift clause).

These rights may not practically be relevant if the only beneficiary of the trust is the beneficiary who has defaulted on the loan and caused the loss. However, where the trust has multiple beneficiaries (including contingent remainder beneficiaries), these rights are important to allow a trustee to comply with its fiduciary duty treat all beneficiaries fairly.

E. Trustees' Duties After Termination

A trustee still owes fiduciary duties to the beneficiaries after the trust has terminated and before winding up the trust has been completed. A fiduciary owes its principal one of the highest duties known to law—this is a very special relationship. *See, e.g., Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009) ("A fiduciary 'occupies a position of peculiar confidence towards another.'… Because a trustee's fiduciary role is a status, courts acting within their explicit statutory discretion should be authorized to terminate the trustee's relationship with the trust at any time, without the application of a limitations period."); *Rawhide Mesa-Partners, Ltd. v. Brown McCarroll, L.L.P*., 344 S.W.3d 56, 60 (Tex. App.—Eastland 2011, no pet.) To uphold its duty of loyalty, a trustee must meet a sole interest standard and handle trust property solely for the benefit of the beneficiaries. Tex. Prop. Code § 117.007; *InterFirst Bank Dallas, N.A. v. Risser,* 739 S.W.2d 882, 898 (Tex. App.—Texarkana 1987, no writ). A trustee has a duty of full disclosure of all material facts known to it that might affect the beneficiaries' rights. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). A trustee also has a duty of candor. *Welder v. Green*, 985 S.W.2d 170, 175 (Tex. App—Corpus Christi 1998, pet. denied). Regardless of the circumstances, the

law provides that beneficiaries are entitled to rely on a trustee to fully disclose all relevant information. *See generally, Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 788 (1938).

A trustee has a duty to act prudently in managing and investing trust assets. It has a duty to properly manage, supervise, and safeguard trust assets. *Hoenig v. Texas Commerce Bank*, 939 S.W.2d 656, 661 (Tex. App.—San Antonio 1996, no writ). There is a duty to invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. Tex. Prop. Code § 117.004.

However, the duty to manage and invest trust assets is greatly altered when a trust has terminated and is in wind-up. As one court has stated: "After termination the trustee has only the very limited authority given by statute, i.e., to 'wind up the affairs of the trust and to make distribution.'" *Sorrel v. Sorrel*, 1 S.W.3d 867, 1999 Tex. App. LEXIS 6611 (Tex. App.—Corpus Christi Aug. 31, 1999, no pet.). Further, where the express terms of a trust specified that the trust terminated upon the occurrence of a certain event and directed how the property was to be distributed, the trustees had no authority to partition the trust property prior to distributing it in accordance with the instrument, but could have only conveyed it to the appropriate beneficiaries in the manner instructed by the trust. *Id*.

After termination, the trustee should wind up the trust and distribute assets to the beneficiaries as per the terms of the trust. The Texas Trust Code provides: "The settlor may provide in the trust instrument how property may or may not be disposed of in the event of failure, termination, or revocation of the trust." Tex. Prop. Code §112.053. For example, in one case the express terms of the trust stated how the property was to be distributed upon termination. *Lombana v. AIG Am.*, No. 01-12-00168-CV, 2014 Tex. App. LEXIS 2302 (Tex. App.—Houston [1st Dist.] Feb. 27, 2014, no pet.). However, if the terms of the trust do not state how the assets are to be distributed or provide the trustee discretion in partitioning assets or making divided interest distributions, then legal title to all of the trust property vested in beneficiaries as tenants in common upon the termination of the trust without necessity of a transfer or conveyance to them of the title by any person, trustee, executor, or otherwise. *Gonzalez v. Gonzalez*, 469 S.W.2d 624 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.). *See also,* 4 Thompson on Real Property, Thomas Editions § 32.06.

The Restatement specifically discusses the powers and duties of a trustee upon termination of a trust. It states: "The powers of a trustee do not end on the trust's termination date but may be exercised as appropriate to the performance of the trustee's duties in winding up administration, including making distribution, in a manner consistent with the purposes of the trust and the interests of the beneficiaries." RESTATEMENT (THIRD) OF TRUSTS, §89.

The comments recognize that a trustee in wind up has different fiduciary duties due to the nature of the termination of the trust: "The powers and duties of the trustee in winding up the trust are an extension of the powers and duties of the trustee generally in administering the trust, except that the trustee's fiduciary duties in exercising powers of the trusteeship are significantly affected by the fact that the trust is in (or approaching) the process of termination." *Id*. at cmt. b. In wind-up, trustees have a duty to manage all of the assets, no matter what beneficiary receives them. The comments to the Restatement provide:

> During the windup period the trustee has a duty: to determine and satisfy trust obligations, including those to taxing authorities; to ascertain the proper distributees and their shares, and plan and make distribution accordingly; and, unless waived by the beneficiaries, to prepare and submit an accounting or report to the court or the beneficiaries. *In the meantime, the trustee has a duty to preserve and manage the trust property. These responsibilities are to be carried out with prudence and special attention to the fact that the trust is in the process of termination, and in accordance with the purposes of the trust and the interests of the beneficiaries*.
>
> …
>
> Although the trust termination date has arrived, the trustee can properly exercise such powers as are reasonable and appropriate for the preservation of the trust property until the process of winding up is completed…
>
> So also, the trustee can properly keep trust property productive, as reasonable in the circumstances. Accordingly, suitable new investments or commitments (e.g., renewal of leases on trust-owned apartments) may be appropriate to avoid wasting the potential of trust assets to produce income or other return for the remainder beneficiaries. Sound exercise of fiduciary discretion in this respect requires not only that the trustee take account of the likely period until preliminary or final distribution can be made of the assets in question, but also that this consideration be balanced against the interest of distributees in receiving property that is unencumbered or readily marketable , on the duty of a trustee regarding leases that might extend beyond the duration of the trust).

Id. at cmts. c, d.

If a trust has one beneficiary, and there is no provision in the trust to the contrary, a trustee should normally transfer the assets in kind. *Id*. at cmt. e(1). Where there are multiple beneficiaries, the Restatement provides:

> If on termination of a trust there are several beneficiaries among whom the trust estate is to be distributed, whether and to what extent it would be appropriate for the trustee to convey trust property to the beneficiaries as tenants in common, or to divide and distribute property in kind, or to sell property and distribute the proceeds, depends on the terms of the trust. Absent such terms, or to the extent they do not apply, the mode or modes of distribution to be employed depend upon what the trustee, in the exercise of discretion, determines is in the interest of the beneficiaries and fair and reasonable under the

circumstances. The trustee's exercise of discretion in these matters, whether or not conferred by trust provision, is subject to judicial review and intervention for abuse (§ 87). The trustee's duties of prudence and impartiality have particular importance in these situations.

Among the numerous factors that may be of significance to a trustee in developing an appropriate plan for the form and timing of distributions are: the nature of the trust subject matter (the extent to which it consists of securities, chattels, business interests, etc.) and the tax and other characteristics of specific properties; the number of remainder beneficiaries and the size of their various shares; and the preferences, concerns, and circumstances (tax and financial positions, legal capacity or skill level, etc.) of the various distributees. In planning distribution, the trustee should take into account, so far as practical, the likely transaction costs and tax effects (immediate and long-term) to the beneficiaries as well as to the trust. With these and other relevant considerations in mind, the trustee has a duty to act fairly, with reasonable care, and in the interests of the various beneficiaries.

In short, except as otherwise provided by the terms of the trust, a trustee may make, as prudent and appropriate to the circumstances of the trust and its beneficiaries, distributions in cash or in kind or in undivided interests, or in some combination of these, and in making distributions in kind may do so either on a pro rata basis or on a non-pro rata basis (with assets in the latter event to be valued at their date or dates of distribution).

Unless otherwise required by trust provision (Comment e(3)), or by fiduciary duties in other aspects of the windup process (Comment c), considerations of prudence and impartiality may cause trustees to prefer--so far as practical--to distribute trust property in kind on a pro rata basis, that is, by transferring real property (and possibly other nonfungibles) to the remainder beneficiaries as tenants in common and by dividing and distributing fungibles (e.g., 600 shares of the same class of XYZ Co. stock) among the beneficiaries so that each receives his or her proportionate share of each of the fungible asset holdings.

Id. at cmt. e(2). However, this is all subject to the terms of the trust: "If the terms of the trust specify the method or methods by which distribution is to be made by the trustee, the provision is normally controlling. Similarly, a remainder disposition of specific property to one or more designated persons is normally binding as a provision implicitly

directing distribution of that property in kind." *Id*. at cmt. e(3).

Of course, distributions in termination are subject to a trustee's duty to pay expenses and liabilities. The Restatement provides: " If the terms of the trust specify the method or methods by which distribution is to be made by the trustee, the provision is normally controlling… *specific provisions of these types may be subject to the trustee's duty to satisfy obligations of the trust*." RESTATEMENT (THIRD) OF TRUSTS, §89(e)(3) (emphasis added).

F. Trustee's Liability For Failing To Know Of Facts Relevant To Distributions

A trustee has a duty to act prudently in managing, investing, and distributing trust assets. It has a duty to properly manage, supervise, and safeguard trust assets. *Hoenig v. Texas Commerce Bank*, 939 S.W.2d 656, 661 (Tex. App.—San Antonio 1996, no writ). The proper standard against which a trustee is measured is that of an ordinary person in the conduct of his own affairs. *Stone v. King*, No. 13-98-022-CV,2 000 Tex. App. LEXIS 8070, 2000 WL 35729200 (Tex. App.—Corpus Christi 2000, pet. denied) (not designated for publication) (citing *Hoenig v. Texas Commerce Bank, N.A*., 939 S.W.2d 656, 661 (Tex. App.—San Antonio 1996, no writ)). However, the Texas Uniform Prudent Investor Act provides that in a trustee's management of assets: "A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise." Tex. Prop. Code § 117.004(f). It further states that a trustee will use "reasonable effort to verify facts relevant to the investment and management of trust assets." *Id.* at § 117.004(d).

The Restatement provides:

> In matters relating to the administration of the trust, the trustee has a duty to exercise prudence--that is, to act with care, skill, and caution… The prudence of a trustee's conduct is to be judged on the basis of circumstances at the time of that conduct, not with the benefit of hindsight or by taking account of developments that occur after the time of the action or decision.
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> …
>
> The duty of care requires the trustee to exercise reasonable effort and diligence in planning the administration of the trust, in making and implementing administrative decisions, and in monitoring the trust situation, with due attention to the trust's objectives and the interests of the beneficiaries. This will ordinarily involve investigation appropriate to the particular action under consideration, and also obtaining relevant information about such matters as the contents and resources of the trust estate and the circumstances and requirements of the trust and its beneficiaries.
>
> …
>
> What constitutes due diligence, satisfying the duty of prudence, is inevitably

> affected by the nature of the transaction or activity and the market(s) involved.

RESTATEMENT (THIRD) OF TRUSTS, §76.

The Restatement (Second) of Trusts provides: "When the question whether the trustee has committed a breach of trust depends not upon the extent of his powers and duties, but upon whether he has acted with proper care or caution, the mere fact that he has made a mistake of fact or of law in the exercise of his powers or performance of his duties does not render him liable for breach of trust. In such a case he is liable for breach of trust if he is negligent, but not if he acts with proper care and caution." RESTATEMENT (SECOND) OF TRUSTS, §201.

However, Restatement (Second) of Trusts also provides: "The trustee is liable although he makes the payment or conveyance under a reasonable mistake of law or of fact. If he is in doubt as to the proper person to whom a payment or conveyance should be made, he can apply to the court for instructions and will be protected by the order of the court against claims of all persons who were made parties to the proceeding. The trustee is liable although he reasonably believes that the person to whom he pays or conveys is the beneficiary or that the payment or conveyance is authorized or directed by the beneficiary or by the terms of the trust." RESTATEMENT (SECOND) OF TRUSTS, §226. *See also* 2 A. W. SCOTT, THE LAW OF TRUSTS § 226, at 1647-48 (2d ed. 1956).

Another commentator provides:

> It is generally held that a trustee is under an unqualified and absolute duty to make payments and distributions to the beneficiaries entitled thereto, rather than merely to use the care and judgment of a person of reasonable prudence in distributing the trust property. The trustee's equitable obligation is deemed to be like that of a contract debtor who is not absolved by showing that they tried in good faith and with the ability of an ordinarily prudent person to make payment. By accepting the trust the trustee is considered as having assumed an unconditional obligation to follow the applicable provisions regarding payments and distributions. This seems to be a reasonable view.
>
> …
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> However in some cases there has appeared a tendency to qualify and limit the duty of the trustee so that the trustee will not be under liability for a wrongful payment if the trustee acted honestly and with the skill and diligence of a reasonably prudent person. Doubtless the heavy burden which the older rule places upon the trustee has been considered excessive, involving as it does the necessity to keep records as to births, deaths, marriages, and similar vital statistics, and the task of making constant investigations as to the status of beneficiaries or other circumstances. Yet it may be argued that the standard of

> reasonable prudence is applied to the trustee's conduct generally and that there is no basis for an exception in the case of payments or distributions. Thus if a trustee made an improper payment and was guilty of negligence in doing so, clearly the trustee should be held liable.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, § 814.

Texas has a statute that expressly states that a trustee's mistake of fact can relieve it of liability. Tex. Prop. Code § 114.004. Texas Property Code Section 114.004 states: "A trustee is not liable for a mistake of fact made before the trustee has actual knowledge or receives written notice of the happening of any event that determines or affects the distribution of the income or principal of the trust, including marriage, divorce, attainment of a certain age, performance of education requirements, or death." Tex. Prop. Code § 114.004. As of now, there are no Texas decisions discussing this statute.

Interestingly, this statute does not have any requirements that the trustee act reasonably or with diligence. The Uniform Trust Code has a similar provision, but it requires the trustee to act with reasonable care to determine whether the event occurred. UTC § 1007. Similarly, a Washington statute has a reasonableness requirement: "When the happening of any event, including but not limited to such events as marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of the trust, then a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for any action or inaction based on lack of knowledge of the event. A corporate trustee is not liable prior to receiving such knowledge or notice in its trust department office where the trust is being administered." Rev. Code Wash. (ARCW) § 11.98.100. This shows that the absence of any ordinary care language in the Texas statute was likely intentional and means that even if the trustee is negligent in not knowing, the trustee is still not liable.

In *National Acad. Of Scis. v. Cambridge Trust Co*., 346 N.E. 879 (S.Ct. Mass. 1976) where a bank continued to make payments to settlor's widow from 1945 through 1967, although she had remarried and was no longer entitled to such payments, without making any effort to ascertain her marital status, the court noted that:

> The will contained no exculpatory clause protecting the bank from liability for this type of error. As noted by Professor Scott, some States have provided protection for trustees in these circumstances: "In a few states it is provided by statute that when the happening of any event, including marriage, divorce, attainment of a certain age, performance of educational requirements, death, or any other event, affects the distribution of the income or principal of trust estates, the trustees shall not be liable for mistakes of fact made prior to the actual knowledge or written notice of such fact: Oklahoma: Stats. Ann., tit. 60, § 175.24 (I) (4). Texas: Civ. Stat. Ann., art. 7425b-25 (I) (4). Washington: R.C., § 30.99.090, as inserted by Laws 1959, c. 124." 3 A.

> Scott, Trusts § 226 at 1799 n.7 (3d ed. 1967). Massachusetts thus far has chosen not to provide trustees with this type of statutory protection.

Id. The *Cambridge Trust* case ultimately held that a trustee had liability for making distributions where that state did not have a comparable statute.

There are a few commentators that address Texas' statute, but do not add much to the actual language of the statute. In 2 Texas Estate Planning § 170.05, the treatise provides the following sample trust language: "Written Notice to Trustee. Until the trustee receives written notice of any death or other event upon which the right to payments from any trust may depend, the trustee shall incur no liability for disbursements made in good faith to persons whose interests may have been affected by that event." It then provides the following explanation: "Frequently, the right to an interest in a trust depends on the occurrence of an event, such as the birth, death or remarriage of a beneficiary, or the assignment of an interest in the trust. A provision included in the document specifies that if the trustee does not receive written notice of such event, the trustee will incur no liability for making distributions [see Texas Property Code § 114.004 for statutory provision to the same effect]." 9 Texas Transaction Guide--Legal Forms § 50C.24 provides: "A trustee is not liable for a mistake of fact made before the trustee has actual knowledge or receives written notice of the happening of any event that determines or affects the distribution of the income or principal of the trust. Marriage, divorce, attainment of a certain age, performance of education requirements, and death are some of the types of events that may affect distribution [Tex. Prop. Code § 114.004]." 72 Tex Jur Trusts § 165 provides: "A trustee is not liable for a mistake of fact made before the trustee has actual knowledge or receives written notice of the happening of any event that determines or affects the distribution of the income or principal of the trust, including marriage, divorce, attainment of a certain age, performance of education requirements, or death."

G. Continuing A Terminated Trust

There is authority that parties to a trust can continue the trust after technical termination. "If the beneficiaries consent to the trustee holding and administering the trust property after the expiration of the trust term, the trust will be deemed extended and the powers and duties of the trustee continue unchanged." BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 1010; *see also* 76 Am. Jur. 2d Trusts § 68 ("[M]odification or amendment of a trust is ordinarily possible by parties in interest and against parties without a vested interest."); RESTATEMENT (THIRD) OF TRUSTS § 65 (2003) ("If all of the beneficiaries of an irrevocable trust consent, they can compel the termination or modification of the trust."); *see also Shellberg v. Shellberg,* 459 S.W.2d 465, 468–69 (Tex. App.—Fort Worth 1970, writ ref'd n.r.e.) (agreement by grantors to extend trust agreement was enforceable); *William W. Salmon Trust v. Salmon*, No. 1:05-cv-221, 2006 WL 8459782, at *3–*4 (S.D. Ind. May 2, 2006) (execution of an agreement between the beneficiary and trustee to extend an irrevocable trust that was to terminate after ten years for the beneficiary's lifetime was valid); *Campbell v. Jordan*, 162 S.E.2d 545, 549 (N.C. 1968) (court would not terminate trust arrangement between descendants of deceased brother of plaintiff because they had the right to postpone the trust's termination); *Lipsitt v. Sweeney*, 59 N.E.2d 465, 468–69 (Mass. 1945) (first trust expired five years after death of decedent's widow, but all parties acquiesced to the trust

continuing for two years thereafter, when the parties then agreed to put the trust property into a second trust).

Texas courts have acknowledged the continuation of trusts by agreement. *See, e.g., Bradley v. Shaffer*, 535 S.W.3d 242, 246–47 (Tex. App.—Eastland 2017, no pet.) (spendthrift trust had provision providing that trust was for a period of twenty years; however, beneficiaries agreed to extend trust, and extended trust did not violate rule against perpetuities); *Rosin v. Berco & Leja Rosin Trust,* No. 04-08-00601, 2009 WL 1956386, at *4 (Tex. App.—San Antonio July 8, 2009, pet. denied) (trust was to terminate on October 1, 1979 but beneficiary and trustee agreed to extend it for 10 years); *Shellberg*, 459 S.W.2d at 468–69; *Farish's Est. v. United States*, 233 F. Supp. 220 (S.D. Tex. 1964) (trust had continued in effect for two years after son turned thirty despite trust providing that "[t]he principal and income of the Trust Fund shall be held in trust for the benefit of the Grantor's son . . . until the latter attains thirty (30) years of age, at which time the trustee shall pay over to him the entire Trust Fund"); *Kimble v. Baker*, 285 S.W.2d 425, 426–28 (Tex. App.—Eastland 1955, no writ) (noting that a trust estate terminated on a particular date "under the terms of the wills and the extension agreement" and concluding that the trustees had winding-up powers that began after the date the trust terminated (following the extension)).

VI. BENEFICIARIES' CONSENT AND RELEASE TO TRUSTEES' ACTIONS

Trustees and beneficiaries can enter into private agreements that provide protection for a trustee upon the termination of a trust or upon trustee succession. A trustee and beneficiary may want to enter into a release agreement. The trustee obviously wants the protection afforded by the release, and the beneficiary may be willing to enter into such a release because he or she is not aware of any egregious breach of fiduciary duty and entering into a private relief may avoid the expense involved in a judicial discharge and may also avoid delay in the distribution of the trust's assets.

A release is a contractual clause that states that one party is relieving the other party from liability associated with certain conduct. For a revocable trust, a settlor may revoke, modify, or amend the trust at any time before the settlor's death or incapacity. Tex. Prop. Code § 112.051. Accordingly, in a revocable trust situation, a settlor may modify or amend a trust to specifically release trustees from almost any duty or conduct. *See Puhl v. U.S. Bank, N.A*., 34 N.E.3d 530 (Ohio Ct. App. 2015) (court held that in a revocable trust, during her lifetime, the settlor had the authority to instruct the trustee to retain stocks, and the trustee had the duty to follow those instructions regardless of the risk presented by the nondiversification).

The Texas Trust Code expressly states that beneficiaries can release trustees. A beneficiary who has full capacity and acting on full information may relieve trustees from any duty, responsibility, restriction, or liability that would otherwise be imposed by the Texas Trust Code. Tex. Prop. Code § 114.005. To be effective, this release must be in writing and delivered to the trustees. *Id*. The trustees should be careful to properly word the release or else certain conduct may be outside of the scope of the release. *See, e.g., Estate of Wolf*, 2016 NYLJ LEXIS 2965 (July 19, 2016) (release did not protect trustee from diversification claim that arose after the effective dates for the release).

Further, writings between the trustees and beneficiary, including releases, consents, or other agreements relating to the trustees' duties, powers, responsibilities, restrictions,

or liabilities, can be final and binding on the beneficiary if they are in writing, signed by the beneficiary, and the beneficiary has legal capacity and full knowledge of the relevant facts. Tex. Prop. Code § 114.032. A minor is bound if a parent signs, there are no conflicts between the minor and the parent, and there is no guardian for the minor. *Id*.

Once again, both of the Texas Trust Code provisions set forth above require that the beneficiary act "on full information" and full knowledge of the relevant facts. Tex. Prop. Code §§ 114.005, 114.032. This is important because releases can be voided on grounds of fraud, like any other contract. *Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990). So, fiduciaries should be very careful to provide full disclosures to beneficiaries before execution of a release regarding all material facts concerning the released matter. The trustee should offer to provide access to its books and records and require the beneficiary to confirm that they had access to that information. *See Le Tulle v. McDonald*, 444 S.W.2d 794 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.) (court reversed summary judgment based on release of trustee where disclosure was not adequate).

In *Austin Trust Co. v. Houren*, beneficiaries of a trust executed a family settlement agreement with the former trustee's estate. 664 S.W.3d 35 (Tex. 2023). After the settlement agreement was executed, one of the parties sued the former trustee's estate for over a $37 million alleged debt. The former trustee was the primary beneficiary and distributed the $37 million to himself over a long period of time and categorized the payments as accounts receivable on software program. The beneficiaries alleged that this was a debt due to the entries. The former executor's estate alleged that the entries simply showed distributions, not loans. The beneficiaries asserted claims in the alternative, that the trustee's estate owed a debt and that even if it was not a debt that the distributions were inappropriately large.

The trustee's estate filed a motion for summary judgment based on the release in the settlement agreement, which the trial court granted. The court of appeals affirmed, finding that the release's language was sufficiently broad to cover these claims and that the release was effective. *Id*. (*Austin Trust Co. v. Houren.* No. 14-19-00387-CV, 2021 Tex. App. LEXIS 1955 (Tex. App.—Houston March 16, 2021, pet. granted)). The Texas Supreme Court affirmed the lower courts.

The Court first addressed the scope of the release in the family settlement agreement and stated:

> The parties agreed to release "the other Parties . . . with respect to any and all liability arising from any and all Claims . . . in connection with the other Parties . . . and the Covered Activities." "Claims" is broadly defined as "any and all obligations, causes of action, suits, promises, agreements, losses, damages, charges, expenses, challenges, contests, liabilities, costs, claims, and demands of any nature whatsoever, known or unknown, which have now accrued or may ever accrue in the future." The released claims include, but are not limited to, "claims of any form of sole, contributory, concurrent, gross, or other negligence, undue influence, duress, breach of fiduciary duty, or other misconduct by the other parties, the

> professionals, or their affiliates." And as noted, "Covered Activities" includes claims based on the "operation, management, or administration of the Estate . . . or the Trusts"; "the distribution (including, but not limited to, gifts or loans) (or failure to distribute) of any property or asset of or by [Bob], the Estate, the Companies, or the Trusts"; and "any Claims related to, based upon, or made evident in the Disclosures" or the facts stated in Article I of the Agreement.

Id. The Court held that this was broad enough to cover any claim that the former trustee's estate had a debt or that the trustee made inappropriate distributions to himself. The plaintiff alleged that a separate provision dealing with paying of estate debts was the applicable provision and meant that the estate still had to pay back the $37 million. The Court disagreed:

> Read in isolation, Paragraph 3.11's requirement that Houren pay "all" debts of and claims against the Estate does not distinguish between the source of those claims. But Houren argues that this paragraph, when read within the context of the entire Agreement, does not require payment of claims and debts that (1) are asserted by parties to the Agreement and (2) otherwise fall within the scope of the Agreement's releases in Article IV. We agree with the result Houren urges because other provisions within the Agreement confirm that Paragraph 3.11 was not intended to override the Article IV releases.

Id. The Court also held:

> In the FSA, the parties agreed that the releases contained therein generally applied to "any and all liability arising from any and all Claims," as defined in the FSA, against the other parties or relating to "Covered Activities," as defined in the FSA. The released claims included, but were not limited to "claims of any form of sole, contributory, concurrent, gross, or other negligence, undue influence, duress, breach of fiduciary duty, or other misconduct by the other parties, the professionals, or their affiliates[.]" The FSA defined "Covered Activities" as (1) "the formation, operation, management, or administration of the Estate, . . . or the Trusts," (2) "the distribution (including, but not limited to, gifts or loans) (or failure to distribute) of any property or asset of or by the Mayor, the Estate, . . . or the Trusts," (3) "any actions taken (or not taken) in reliance upon this Agreement or the facts listed in Article I," (4) "any Claims related to, based upon, or made evident in the Disclosures," and (5) "any Claims related to, based upon, or made evident in the facts set forth in Article I" of the

> FSA. We conclude that this language specifically and unambiguously released appellants' claims asserted in their First Amended Counterclaim.

Id.

The Court then addressed the validity of the releases in the family settlement agreement. The Court discussed that a fiduciary has a duty to make disclosures to a beneficiary for a release to be enforceable:

> A family settlement agreement is an alternative method of estate administration in Texas that is a favorite of the law. Generally, settlement agreements are enforceable in the same manner as any other written contract. However, when the agreement purports to release claims against one who owes the other party a fiduciary duty, the policies of freedom of contract and encouragement of final settlement agreements must be balanced against the duties of care and loyalty owed by the released fiduciary. Under longstanding common law, trustees and executors owe the beneficiaries of a respective trust or estate a fiduciary duty of full disclosure of all material facts known to them that might affect the beneficiaries' rights. With respect to agreements releasing a fiduciary from liability, the duty includes ensuring that the beneficiary "was informed of all material facts relating to the release." The condition on release agreements involving trustees is reflected in the Texas Trust Code, which provides that "[a] beneficiary who has full legal capacity and is acting on full information may relieve a trustee from any duty, responsibility, restriction, or liability as to the beneficiary that would otherwise be imposed on the trustee by this subtitle, including liability for past violations."

Id.

The Court then turned to the breach of fiduciary duty claim, that the decedent breached duties by distributing assets that he was not entitled to distribute and whether that claim was effectively released. The Court first held that a beneficiary's consent is effective when it is made with full knowledge:

> In *Slay v. Burnett Trust*, we confirmed the "established rule" governing when a beneficiary's "consent to an act of his trustee which would constitute a violation of the duty of loyalty precludes him from holding the trustee liable for the consequences of the act." We explained that such consent does not foreclose liability "unless it is made to appear that when he gave his consent the beneficiary had full knowledge of all the material facts which the trustee knew." Further, releases of liability for certain fiduciaries, including trustees, are governed by statute.

> Under the Trust Code, "[a] beneficiary who has full legal capacity and is acting on full information may relieve a trustee from any duty, responsibility, restriction, or liability as to the beneficiary that would otherwise be imposed on the trustee by this subtitle, including liability for past violations." Tex. Prop. Code § 114.005(a).
>
> …
>
> But we need not definitively answer that question in this case because (1) Section 114.005 of the Trust Code expressly enables beneficiaries to consent to the releases at issue when they have "full information" and (2) as discussed below, we hold that the Marital Trust's beneficiaries had such "full information" when they executed the Agreement.
>
> Under the Trust Code, a "trustee who commits a breach of trust is chargeable with any damages resulting from such breach of trust, including . . . any loss or depreciation in value of the trust estate as a result of the breach of trust." However, as noted, "[a] beneficiary who has full legal capacity and is acting on full information may relieve a trustee from any duty, responsibility, restriction, or liability that would otherwise be imposed on the trustee by this subtitle, including liability for past violations." Here, the Beneficiary Parties agreed to release Houren, as executor of Bob's estate, from liability for Bob's alleged breach of the Marital Trust, thereby triggering Section 114.005's conditions.

Id. The Court held that Section 114.005 did apply in this case as it applies to a release of a deceased trustee's estate. The Court also assumed without deciding that the requirement of full knowledge cannot be waived by a beneficiary. The Court reviewed the evidence and held that it proved that the beneficiaries did have sufficient knowledge to enforce the release:

> Section 114.005 does not define "full information," but we presume the Legislature enacted the provision "with full knowledge of the existing condition of the law and with reference to it." In the context of Section 114.005, we see nothing indicating that the Legislature intended "full information" to mean something other than we have required under the common law—specifically, "full knowledge of all the material facts which the trustee knew." Both Section 114.005 and Slay echo the Restatement (Third) of Trusts, which, in turn, gives color to the phrase "acting on full information." According to the Restatement, which we find persuasive:
>
> It is not necessary that the trustee inform the beneficiary of all the details of which the trustee has knowledge; but,

> because of the strict fiduciary relationship between trustee and beneficiary, a trustee who would rely on a beneficiary's consent, ratification, or release normally has the burden of showing that the beneficiary (or his or her representative) was sufficiently informed to understand the character of the act or omission and was in a position to reach an informed opinion on the advisability of consenting, ratifying, or granting a release. . . .
>
> Whether such "full information" has been provided necessarily depends on the facts and circumstances of each case. The Restatement and our precedent clarify the purpose behind the full-information requirement, which is to ensure the beneficiary makes a meaningful and informed decision before signing away any rights he may have. *Knowledge of the full scope, extent, and details of the acts the beneficiary is releasing, while certainly preferable, is not required so long as he is informed enough to understand the nature and consequences of what he is giving up.* We hold that the Beneficiary Parties were sufficiently informed to understand the character of the act they were releasing and were in a position to reach an informed opinion on the advisability of agreeing to the release. This conclusion is supported by both the parties' acknowledgments in the Agreement itself as well as the circumstances surrounding its execution.

Id. (emph. added). The Court concluded:

> In sum, while the sufficiency of disclosure will depend on the facts and circumstances of each case, the underlying legal principle remains constant: a beneficiary has full information when he is in a position to make a meaningful and informed decision about releasing a trustee from liability or, said differently, when he is informed enough to understand the nature and consequences of what he is releasing. Here, the Beneficiary Parties were fully aware that they were waiving the right to challenge the propriety of any of the prior distributions from the Marital Trust, even if they did not know the exact amount, in exchange for an expedited distribution of the trust's remaining assets.

Id. Therefore, the Court affirmed the lower courts' judgment for the former trustee's estate due to the release in the family settlement agreement.

It should be noted that a trustee should not require a private release before making any distribution. Though a trustee can withhold sufficient funds to prosecute a judicial release or discharge, it cannot refuse to distribute

other assets to the beneficiaries. As one court stated:

> No advice of counsel could absolve Jeffrey from, in effect, holding the trust assets hostage pending "negotiations" for terms of a general release protective of his own interests, rather than the beneficiaries, while the latter for their part were ready and presumably eager to begin to receive and enjoy the trusts' assets. This is hardly to say that an attorney on behalf of a trustee client may not seek to save the trust time and expense through an informal accounting. But the effort to obtain the beneficiaries' releases does not toll the trustee's obligation to give the beneficiary his due within the terms of the will or trust instrument (see Matter of Pearl Dubens, NYLJ, Oct. 28, 1974, at 18 col 1 [Sur Ct NY County]; Restatement [Third] Trusts § 89, comments c & e). Nor would the pendency of a Judicial accounting do so, as it presents no practical or technical impediment to distribution of trust assets unnecessary for winding it up.

Matter of Lasdon 2010 N.Y. Misc. LEXIS 6654 , NYLJ 1202474997186 [2010].

VII. REFUNDING AGREEMENT

A trustee can make partial distributions and/or a final distribution. In either event, the trustee is at risk that it may distribute assets that it may later need to pay debts or expenses in the winding up of the trust. Once the trustee distributes the assets, what recourse does it have to get them back from the beneficiaries if needed?

The use of receipt, release, refunding, and indemnification agreements are common. *See Estate of Mamdouha S. Bobst*, 2023 NYLJ LEXIS 24 (Sur. Ct. NY January 5, 2023) (trustee asserted claim against charities under refunding agreement); *In re Ins. Tr. Agreement of Sawders*, 2018 PA Super 345, 201 A.3d 192 , 200 (Pa. Super. 2018) (trustee made partial distribution after receiving a refunding agreement); *Estate of Rothko*, 98 Misc. 2d 718, 414 N.Y.S.2d 444 (Surr. Ct., N.Y. County 1979).These types of agreements are often used because any distribution made before a final account is prepared and adjudicated is done at the trustee's risk. A trustee may use a receipt, release, and refunding agreement so that in such a scenario the beneficiaries would be required to return some of the money distributed to pay debts and expenses. Attorneys representing trustees generally do not recommend that they make partial or final distributions before obtaining a signed release, receipt, and refunding agreement.

From the point of view of a beneficiary, the primary concern is making sure that the beneficiary's interest in the trust is not diminished.

VIII. TRUSTEES' RIGHT TO SEEK JUICIAL RELIEF

A. Authority for Seeking Judicial Discharge Relief

The Texas Property Code describes the following jurisdiction of district courts regarding trust disputes:

> [A] district court has original and exclusive jurisdiction over all proceedings by or

> against a trustee and all proceedings concerning trusts, including proceedings to: …(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; (9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and (10) surcharge a trustee.
>
> (a-1) The list of proceedings described by Subsection (a) over which a district court has exclusive and original jurisdiction is not exhaustive…

Tex. Prop. Code § 115.001(a).

It also provides that a court may intervene in the administration of a trust to the extent that the court's jurisdiction is invoked by an interested person or as otherwise provided by law. *Id*. at § 115.001(c). The term "interested person" means "a trustee, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust. Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding." Tex. Prop. Code § 111.004(18). Accordingly, the Property Code expressly states that a trustee is an interested person and may invoke a court's jurisdiction over the administration of a trust.

The trial court may accept a Trustee's resignation and discharge the Trustee from the Trust on the terms and conditions necessary to protect the rights of other interested parties. Tex. Prop. Code § 113.081.

Trustees can also assert claims under the Texas Uniform Declaratory Judgment Act. *Murphy v. Am. Rice, Inc.*, No. 01-03-01357-CV, 2007 Tex. App. LEXIS 2031, at 34 (Tex. App.—Houston [1st Dist.] Mar. 9, 2007, no pet.) (a plaintiff asserting a breach of fiduciary duty claim may request declaratory relief in addition to other remedies). A declaratory judgment is a remedial measure that determines the rights of the parties and affords relief from uncertainty with respect to rights, status, and legal relations. *Ysasaga v. Nationwide Mut. Ins. Co.,* 279 S.W.3d 858, 863 (Tex. App.—Dallas 2009, pet. denied). Where the undisputed evidence shows a party's entitlement to declaratory relief, it is error for the trial court not to grant the relief requested. *Cont'l Homes of Tex., L.P. v. City of San Antonio*, 275 S.W.3d 9, 21 (Tex. App.—San Antonio 2008, pet. denied).

Section 37.004 provides:

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

> franchise and obtain a declaration of rights, status, or other legal relations thereunder.

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

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

Tex. Civ. Prac. & Rem. Code § 37.005.

Any court of record in Texas can issue declaratory relief: "A court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. An action or proceeding is not open to objection on the ground that a declaratory judgment or decree is prayed for." Tex. Civ. Prac. & Rem. Code § 37.003. Specifically, a district court has jurisdiction pursuant to Tex. Const. art. V, § 8; Tex. Gov't Code Ann. §§ 24.007, 24.008; and Tex. Civ. Prac. & Rem. Code § 37.003 (2008) over a declaratory judgment action. *Naddour v. Onewest Bank, FSB*, No. 10-12-00301-CV, 2013 Tex. App. LEXIS 14778 (Tex. App.—Waco Dec. 5, 2013, no pet.).

While Section 37.003 provides that a court has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed, a declaratory judgment action is available only if (1) a justiciable controversy exists and (2) the controversy can be resolved by court declaration. *Cont'l Cas. Co. v. Rivera*, 124 S.W.3d 705 (Tex. App.—Austin Nov. 6, 2003, no pet.).

Under these provisions a trustee has a right to seek declaratory relief from a district court. *Myrick v. Moody Nat'l Bank*, 336 S.W.3d 795 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (district court had jurisdiction to determine trustee's right to borrow funds); *Twyman v. Twyman*, No. 01-08-00904-CV, 2009 Tex. App. LEXIS 5552 (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet.) (court had jurisdiction to issue temporary injunction in declaratory judgment suit to prevent trustee from disbursing trust funds); *In re Estate of Hunt*, 908 S.W.2d 483, 1995 Tex. App. LEXIS 2603 (Tex. App.—San Antonio Aug. 23, 1995, reh'g denied) (Section 37.005 entitles an heir to receive a declaration of rights or legal relations in respect to a trust or an estate); *Commercial Nat'l Bank v. Hayter*, 473 S.W.2d 561 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.).

For example, in *Cogdell v. Fort Worth Nat'l Bank*, the trustee settled claims and sought judicial approval of the settlement agreement. 544 S.W.2d 825, 829 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.). The court of appeals noted that the trustee sought court approval of a settlement agreement that released claims against trustee, because of potential conflict of interest, and holding that approval of settlement was a question for the court. *Id.*

B. Breadth of Discharge Relief

Trustees often file suits and seek some form of discharge or no liability relief. The Texas Trust Code provides that a court has jurisdiction to "determine the powers, responsibilities, duties, and liability of a trustee" and also to "require an accounting by a trustee, review trustee fees, and settle interim or final accounts." Tex. Prop. Code 115.001(a). The Texas Trust Code also authorizes the court to accept a trustee's resignation and discharge the trustee from the trust on the terms and conditions necessary to protect the rights of other interested parties. *Id*. 113.081(b).

Due to this right, when a trustee resigns or has some other significant event occur, it is standard practice to request that the beneficiaries provide the trustee with a private release. If the beneficiary refuses, the trustee has the right to file an accounting and request a discharge, which would normally be paid for by the trust. So, the beneficiary is encouraged to sign the private release to save on expense. There is nothing particularly unfair about this where there is a corporate trustee that has produced regular statements and the beneficiary has had the opportunity to raise a complaint if he or she has one.

There is a difference between an approval of accounting and discharge and a finding of no-liability. Obtaining court approval of a final accounting alone is not or should not be an adjudication of claims by the beneficiaries. *Texas State Bank v. Amaro*, 87 S.W. 3d 538 (Tex. 2002). In *Amaro*, the Texas Supreme Court stated:

> [T]he Trust Code does not contemplate that an accounting will settle the trustee's tort liability. As noted, section 113.152 establishes the contents of an accounting and requires the trustee to list trust property, transactions, property, cash, and all known liabilities owed by the trust. It simply does not reach the trustee's tort liability. This conclusion is supported by the Trust Code's structure, which includes Subchapter E "Accounting by Trustee" within Chapter 113, entitled "Administration." In contrast, Chapter 114 concerns "liabilities, rights, and remedies of trustees, beneficiaries, and third persons." Thus, the final accounting "forms the basis for a winding up of the trust to ascertain the balance due to the beneficiary." Supra, 74 S.W.3d at 397. As TSB states in its brief, "TSB's requested relief in essence provided for determination of what amounts should be paid to Vargas by TSB and the closing of the trust and issues relating thereto." Determining TSB's tort liability is not necessary to the closing of the trust or ascertaining the trust balance due the beneficiary, and, as we held above, was not within the scope of TSB's

> requested relief. Accordingly, because approving the accounting, including the distributions, costs, and expenses, was not an adjudication of TSB's tort liabilities, Vargas was not entitled to a jury or to forty-five days' notice of the hearing.

Id. *See also Riley v. Alpert,* No. 01-11-00430-CV,2012 Tex. App. LEXIS 6049, 2012 WL 3042991(Tex. App. July 26, 2012, no pet.); *Bank of Texas, N.A. Trustee v. Mexia*, 135 S.W.3d 356, 362 (Tex. App.—Dallas 2004, pet. denied)(approval of an accounting is an administrative function, not an adjudication of trustee's tort liability).

So, the trustee must plead for a release and no tort liability finding, and the court must conduct an evidentiary hearing regarding the trustee's actions. The trustee can do so under Section 115.001(a) and also via the Texas Uniform Declaratory Judgment Act in the Texas Civil Practice and Remedies Code Chapter 37.

Many times trustees seek judicial relief in a "friendly" judicial proceeding. Can a trustee seek a no-tort liability finding when no one objects? If a court grants a no-liability finding, and no one preserves any error regarding that finding, then it will be res judicata and enforceable. *Cable Walt Trust Co. Inc. v. Palmer*, 859 S.W.2d 475, 480-81 (Tex. App.—San Antonio 1993, writ denied).

For example, in *Goepp v. Comerica Bank & Trust, N.A.*, the settlors created inter vivos trusts and their three children were the remainder beneficiaries. No. 03-19-00485-CV, 2021 Tex. App. LEXIS 5461 (Tex. App.—Austin July 9, 2021, no pet. history). The three children became co-trustees and then had disputes. They entered into a family settlement agreement, and had a corporate trustee appointed successor trustee. The corporate trustee then filed a "First Amended Petition for Settlement of Trustee's Final Account and Order of No Liability." *Id*. One of the children objected "to the Trustee's Petition, complaining about the timing of certain preferential distribution payments, about the calculations of interest on the distributions, and that he 'has yet to be reimbursed the monies owed to him for out of pocket expenses of durable medical equipment purchased on behalf of Iraida.'" *Id*. After the trial court entered the relief requested by the corporate trustee, several of the children appealed.

The court rejected the child's complaint about the "no liability" order for the corporate trustee because it was not preserved and was waived:

> In her fifth and final issue, Heidi argues that the probate court "abus[ed] [its] discretion in issuing an order of 'no liability' . . . to extinguish [Heidi's] claims for breach of trust and breach of fiduciary duty in violation of the law." Heidi does not challenge the sufficiency of the evidence supporting the order; rather, she argues that the probate court "cannot rule that Comerica . . . has no liability or attempt to adjudicate this claim, which would have a preclusive effect on further litigation elsewhere." Heidi's argument is not exactly clear. To the extent Heidi is challenging the order on the jurisdictional grounds raised in her first four issues, we have overruled those issues. And if Heidi is

> raising a nonjurisdictional ground to challenge the issuance of the "no liability" order, she did not preserve error as to this issue by making this complaint to the probate court and obtaining a ruling on the complaint.

Id.

In *Goughnour v. Patterson*, a beneficiary sued a trustee based on a failed real estate investment. No. 12-17-00234-CV, 2019 Tex. App. LEXIS 1665 (Tex. App.—Tyler March 5, 2019, pet. denied). In 2007, the trustee of four trusts invited his mother, the primary beneficiary, and his siblings, also beneficiaries, to participate in a real estate investment that he created by allowing the use of trust funds. They all agreed, and the trustee transferred a total of $2.1 million from the four trusts to the real estate investment entity. The project failed, and the trusts lost the $2.1 million. In 2011, the trustee filed suit to resign and obtain a judicial discharge. A sister filed a breach of fiduciary duty claim based on this failed investment.

After a bench trial, the court rendered judgment approving the trust accounting, approving the trustee's administration, and holding that the trustee, individually and in his capacity of trustee, was "completely discharged and relieved of all duties" and was "fully and completely released and discharged from any and all claims, duties, causes of action or liabilities (including taxes of any kind) relating to any and all actions or omissions in connection with his administration of the DPH Trust." *Id*. The court ordered that the successor trustee pay all outstanding legal and accounting fees incurred by the trust, appointed a successor trustee, and relieved the successor trustee of any and all duty, responsibility, or authority to investigate the actions or inactions of the trustee as prior trustee. The court further ordered that the sister take nothing on all her claims and ordered her to pay attorney's fees for the trustee. The sister appealed.

The court of appeals issued a very lengthy and detailed opinion affirming in part and reversing in part the trial court's judgment.

The beneficiary complained that the trial court should not have discharged the trustee from liability. The court of appeals affirmed the trial court's discharge related to an accounting:

> Whether a Trustee's resignation should be accepted is within the discretion of the trial court. The trust code and the language of the trust instrument determine the Trustee's powers and duties. The trust code requires that a written statement of accounts shall show (1) all trust property that has come to the trustee's knowledge or into the trustee's possession, (2) a complete account of receipts, disbursements, and other transactions regarding the trust property, (3) a listing of all property being administered, with a description of each asset, (4) the cash balance on hand with the name and location of the depository where the balance is kept, and (5) all known liabilities owed by the trust.… The Trust's accountant testified that the accounting reflects the receipts, disbursements, payment of expenses, distributions,

> transfers, land sales, and all financial transactions that occurred in the DPH Trust. He stated that the accounting fully and fairly discloses all financial matters relating to the administration of the Trust from 2002 through 2016.
>
> Robert testified regarding the documents that he provided to Deborah showing all financial transactions involved in the administration of the Trust. He presented monthly statements itemizing investment accounts, including their gains, losses, and values, as reported by UBS Financial Services, Inc., for 2002 through 2016 and showing the cash balance on hand. He also presented spreadsheets showing receipts and disbursements from the DPH Trust from 2002 through 2016, documents showing cash available to the DPH Trust, as well as income tax returns for the DPH Trust for 2002 through 2015. The record also contains closing statements relating to the sale of real estate.
>
> Robert testified that each of the four trusts started with $115,000 in 1989. Since 2002, when he became Trustee, till the time of trial, he paid Ruth close to a million dollars. He estimated that the value of the DPH Trust at the time of trial was $1.2 or $1.3 million. The record shows that all investments Robert made on behalf of the Trust, with the exception of the Bighorn investment, were profitable. Additionally, Robert sent emails to Ruth and his siblings describing the current financial picture of the Trust and updating them on Trust activities. Based on the evidence presented at the hearing on Robert's petition for resignation, we conclude the trial court did not abuse its discretion by determining that Robert properly administered the Trust and properly performed his duties, including providing the beneficiaries with a complete accounting, and the court properly approved Robert's administration.

Id. The court of appeals also held that the trial court did not give a declaration regarding a trustee's non-liability for tort causes of action, but rather adjudicated the beneficiary's failed tort claims:

> In the final judgment, the court ordered that Robert is fully and completely released and discharged from any and all claims, duties, causes of action or liabilities relating to any and all actions or omissions in connection with his administration of the DPH Trust. Deborah complains that this order constitutes an abuse of discretion. She states that approving a final accounting does not adjudicate a trustee's "potential tort liability" and that a trustee cannot use a declaratory judgment action

> to determine "potential tort liability." The court's order does not include this phrase, and she does not explain how the order addresses "potential tort liability." We conclude that it does not.… In response to Robert's petition for resignation as Trustee, Deborah filed counterclaims alleging various theories of liability. Those counterclaims were disposed of by partial summary judgments prior to the trial before the court at which the issues of the accounting and Robert's discharge were heard. The final judgment incorporated the prior summary judgments, specifically ordering that Deborah take nothing on all her claims against Robert. Considering the literal meaning of the language used, we conclude that the final judgment's reference to a release of liability contemplates the previously determined counterclaims, not "potential tort liability." As previously explained, the trial court's rulings on Deborah's counterclaims were proper. Therefore, the trial court did not abuse its discretion by releasing Robert from liability for his actions or omissions in connection with his administration of the Trust.

Id.

C. Form of Accounting

The trust code requires that a written statement of accounts shall show (1) all trust property that has come to the trustee's knowledge or into the trustee's possession, (2) a complete account of receipts, disbursements, and other transactions regarding the trust property, (3) a listing of all property being administered, with a description of each asset, (4) the cash balance on hand with the name and location of the depository where the balance is kept, and (5) all known liabilities owed by the trust. Tex. Prop. Code § 113.152.

Unlike a written statement of account under the Texas Estates Code, an accounting for a trust does not have to be a sworn document. There is no statutory form or other requirement for how this information has to be presented. The comments to the Uniform Trust Code, which has a similar report/disclosure requirement, provides: "The Uniform Trust Code employs the term 'report' instead of 'accounting' in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust's income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests." Unif. Trust Code § 813(c) cmt.

A corporate trustee's statements are often sufficient to comply with a statutory accounting/report/statement requirement if they contain the required information. For example, in *In re Goar*, a beneficiary complained that a trustee did not provide an adequate statutory report. 2012 Ariz. App.

Unpub. LEXIS 1541 (Ct. App. Ariz. December 31, 2012). The court held that the trustee's trust statements were sufficient to comply with the statutory report requirement. *Id.* It held that it would not read into the statute any other or additional requirements than what were expressly stated. Id. The court stated:

> Contrary to Myers's assertion, Bossé's proposed trust distribution meets the reporting requirements of § 14-10813(C). The document provides detailed information about the trusts; the assets held therein and their respective values; the previous and proposed distributions; and a holdback for administrative expenses. In addition, Bossé attached to that document a recent account statement listing the trust assets with more specificity and reflecting the income, deposits, withdrawals, expenses, purchases, and sales. The proposed distribution submitted by Bossé thus includes the 'receipts and disbursements' that Myers had specifically requested.

Id. *See also* 72 TEX. JUR 3RD, TRUSTS § 153 ("It is usual for trustees, and in their own interest, to supply statements of account to a beneficiary on request in order to obviate a suit for an accounting.").

So, where a trustee's statements include all of the statutorily required information, a trustee should not be required to repackage the same information at great expense and provide it to the beneficiary.

Once court of appeals affirmed an accounting based on the following evidence:

> The Trust's accountant testified that the accounting reflects the receipts, disbursements, payment of expenses, distributions, transfers, land sales, and all financial transactions that occurred in the DPH Trust. He stated that the accounting fully and fairly discloses all financial matters relating to the administration of the Trust from 2002 through 2016.
>
> Robert testified regarding the documents that he provided to Deborah showing all financial transactions involved in the administration of the Trust. He presented monthly statements itemizing investment accounts, including their gains, losses, and values, as reported by UBS Financial Services, Inc., for 2002 through 2016 and showing the cash balance on hand. He also presented spreadsheets showing receipts and disbursements from the DPH Trust from 2002 through 2016, documents showing cash available to the DPH Trust, as well as income tax returns for the DPH Trust for 2002 through 2015. The record also contains closing statements relating to the sale of real estate.
>
> Robert testified that each of the four trusts started with $115,000 in 1989. Since 2002, when he became Trustee, till

> the time of trial, he paid Ruth close to a million dollars. He estimated that the value of the DPH Trust at the time of trial was $1.2 or $1.3 million. The record shows that all investments Robert made on behalf of the Trust, with the exception of the Bighorn investment, were profitable. Additionally, Robert sent emails to Ruth and his siblings describing the current financial picture of the Trust and updating them on Trust activities. Based on the evidence presented at the hearing on Robert's petition for resignation, we conclude the trial court did not abuse its discretion by determining that Robert properly administered the Trust and properly performed his duties, including providing the beneficiaries with a complete accounting, and the court properly approved Robert's administration.

Goughnour v. Patterson, No. 12-17-00234-CV, 2019 Tex. App. LEXIS 1665 (Tex. App.—Tyler March 5, 2019, pet. denied).

D. Venue

The Texas Property Code provides for venue for trust disputes arising under the Property Code and specifically provides for venue for trusts managed by multiple trustees. The Code provides:

> (b-1) If there are multiple trustees none of whom is a corporate trustee and the trustees maintain a principal office in this state, an action shall be brought in the county in which: (1) the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed; or (2) the trustees maintain the principal office.
>
> (b-2) If there are multiple trustees none of whom is a corporate trustee and the trustees do not maintain a principal office in this state, an action shall be brought in the county in which: (1) the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed; or (2) any trustee resides or has resided at any time during the four-year period preceding the date the action is filed.
>
> (c) If there are one or more corporate trustees, an action shall be brought in the county in which: (1) the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed; or (2) any corporate trustee maintains its principal office in this state.
>
> (c-1) Notwithstanding Subsections (b), (b-1), (b-2), and (c), if the settlor is deceased and an administration of the settlor's estate is pending in this state,

> an action involving the interpretation and administration of an inter vivos trust created by the settlor or a testamentary trust created by the settlor's will may be brought: (1) in a county in which venue is proper under Subsection (b), (b-1), (b-2), or (c); or (2) in the county in which the administration of the settlor's estate is pending.

Tex. Prop. Code § 115.002 (b-1)-(c-1). The Code has the following definitions:

> (f) For the purposes of this section:
>
> (1) "Corporate trustee" means an entity organized as a financial institution or a corporation with the authority to act in a fiduciary capacity.
>
> (2) "Principal office" means:
>
> (A) if there are one or more corporate trustees, an office of a corporate trustee in this state where the decision makers for the corporate trustee within this state conduct the daily affairs of the corporate trustee; or
>
> (B) if there are multiple trustees, none of which is a corporate trustee, an office in this state that is not maintained within the personal residence of any trustee, and in which one or more trustees conducts the daily affairs of the trustees.
>
> (2-a) The mere presence of an agent or representative of a trustee does not establish a principal office as defined by Subdivision (2). The principal office of a corporate trustee or the principal office maintained by multiple noncorporate trustees may also be but is not necessarily the same as the situs of administration of the trust.
>
> (3) "Situs of administration" means the location in this state where the trustee maintains the office that is primarily responsible for dealing with the settlor and beneficiaries of the trust. The situs of administration may also be but is not necessarily the same as the principal office of a corporate trustee or the principal office maintained by multiple noncorporate trustees.

Tex. Prop. Code § 115.002(f).

This venue statute is mandatory, and a trial court's refusal to comply with it may result in a successful mandamus proceeding. *In re Green,* 527 S.W.3d 277 (Tex. App.—El Paso Dec. 2, 2016, original proceeding); *In re Wheeler,* 441 S.W.3d 430 (Tex. App.—Waco 2014, original proceeding); *In re J.P. Morgan Chase Bank, N.A*., 373 S.W.3d 615 (Tex. App.—San Antonio Apr. 11, 2012, original proceeding).

Further, the venue statute is now very broad and applies to "all proceedings by or against a trustee." As one court stated: "In 2007, section 115.001 was amended to provide that a district court has original and exclusive jurisdiction over not only all proceedings

concerning a trust, but also "all proceedings by or against a trustee." *In re J.P. Morgan Chase Bank, N.A.*, 373 S.W.3d 615 (Tex. App.—San Antonio Apr. 11, 2012, original proceeding) (citing Act of May 24, 2005, 79th Leg., R.S., ch. 148, 2005 Tex. Gen. Laws 296 (amended 2007)). *But see In re J.P. Morgan Chase Bank, N.A.*, No. 13-11-00707-CV, 361 S.W.3d 703, 2011 Tex. App. LEXIS 9601, 2011 WL 6098696, at *3 (Tex. App.—Corpus Christi, Dec. 5, 2011, orig. proceeding) (applying the venue statute more narrowly and holding that section 115.001 was inapplicable because the suit did not involve an action relating to the trust itself or the operation of a trust).

Further, the Code provides that the parties may agree to transfer an action to any county: "Notwithstanding any other provision of this section, on agreement by all parties the court may transfer an action from a county of proper venue under this section to any other county." Tex. Prop. Code § 115.002(e).

The Code also provides for transfer of venue where there are more than one counties that have proper venue:

> (d) For just and reasonable cause, including the location of the records and the convenience of the parties and witnesses, the court may transfer an action from a county of proper venue under this section to another county of proper venue: (1) on motion of a defendant or joined party, filed concurrently with or before the filing of the answer or other initial responsive pleading, and served in accordance with law; or (2) on motion of an intervening party, filed not later than the 20th day after the court signs the order allowing the intervention, and served in accordance with law.

Tex. Prop. Code § 115.002 (b-1)-(c-1).

E. Necessary Parties

The Texas Property Code provides the following regarding necessary parties to a trust dispute under the Property Code:

> The only necessary parties to such an action are:
>
> (1) a beneficiary of the trust on whose act or obligation the action is predicated;
>
> (2) a beneficiary of the trust designated by name, other than a beneficiary whose interest has been distributed, extinguished, terminated, or paid;
>
> (3) a person who is actually receiving distributions from the trust estate at the time the action is filed; and
>
> (4) the trustee, if a trustee is serving at the time the action is filed.

Tex. Prop. Code § 115.011(b).

This section specifically states that a trustee is a necessary party if the trustee is serving at the time that the action is filed. *In re Estate of Moore*, 553 S.W.3d 533 (Tex. App.—El Paso Mar. 15, 2018, no pet.) ("A trustee is a necessary party to an action involving a trust or against a trustee, provided a trustee is serving at the time the action is filed.");

Estate of Webb, 266 S.W.3d 544, 548 (Tex. App.—Fort Worth 2008, pet. denied) ("The Texas Trust Code provides that in an action by or against a trustee and in all proceedings concerning trusts, the trustee is a necessary party if a trustee is serving at the time the action is filed."); *Smith v. Plainview Hospital and Clinic Foundation,* 393 S.W.2d 424, 427 (Tex. Civ. App.—Amarillo 1965, writ dism'd). For example, in *In re Estate of Moore*, the court of appeals reversed a judgment via a restricted appeal where the record did not show that the trustee was served with process. *In re Estate of Moore*, 553 S.W.3d at 536.

The term "Trustee" means "the person holding the property in trust, including an original, additional, or successor trustee, whether or not the person is appointed or confirmed by a court." Tex. Prop. Code § 111.004(18). So, "additional" trustees are necessary parties to any trust proceeding under the Texas Property Code.

One older case provides that where several trustees hold property jointly, all are ordinarily necessary parties to an action concerning it unless separate authority is conferred by statute or the trust instrument. *Upham v. Boaz Well Service, Inc.*, 357 S.W.2d 411 (Tex. Civ. App.—Fort Worth 1962, no writ).

However, the failure to join necessary parties under this statutes does not necessarily mean that the court lacks jurisdiction to settle trust disputes before it. *Ernst v. Banker's Servs. Group*, No. 05-98-00496-CV, 2001 Tex. App. LEXIS 7076 (Tex. App.—Dallas Oct. 22, 2001, no pet.). The *Ernst* court stated:

> Rule 39 governs whether parties must be joined before a court may proceed with adjudication. *See* Tex. R. Civ. P. 39 (Joinder of Persons Needed for Just Adjudication). If the trial court determines that it is not feasible to join a party who should otherwise be joined, the court must proceed with an analysis under subsection (b) to determine "whether in equity and good conscience the action should proceed among the parties before it." Tex. R. Civ. P. 39(b). As the Texas Supreme Court has stated, "Under the provisions of our present Rule 39 it would be rare indeed if there were a person whose presence was so indispensable in the sense that his absence deprives the court of jurisdiction to adjudicate between the parties already joined." *Cooper v. Tex. Gulf Indus*., 513 S.W.2d 200, 204 (Tex. 1974). This is so because the concern under the current rule is "less that of the jurisdiction of a court to proceed and is more a question of whether the court ought to proceed with those who are present." *Id*.

Id. at *5-6.

Texas Rule of Civil Procedure 39(a) provides:

> (a) Persons to Be Joined If Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject

> of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Tex. R. Civ. P. 39(a). Trial courts have broad discretion in deciding matters of joinder of parties. *Royalty Petroleum Corp. v. Dennis,* 160 Tex. 392, 332 S.W.2d 313, 317 (1960); *Longoria v. Exxon Mobil Corp*., 255 S.W.3d 174 (Tex. App.—San Antonio 2008, pet. denied); *Dahl v. Hartman*, 14 S.W.3d 434, 436 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). There is no precise formula for determining whether a particular person falls within the scope of Rule 39. *Cooper v. Tex. Gulf Indus. Inc*., 513 S.W.2d 200, 204 (Tex. 1974).

Under the Texas Uniform Declaratory Judgment Act, the statute provides: "When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party to the proceeding." Tex. Civ. Prac. & Rem. Code § 37.006. Under this provision a court may decide to not issue declaratory relief where all impacted parties are not named in the suit. *In re Nunu,* 542 S.W.3d 67 (Tex. App.—Houston [14th Dist.] 2017, pet denied); *In re Estate of Grant*, No. 11-03-00141-CV, 2004 Tex. App. LEXIS 8354 (Tex. App.—Eastland Sept. 16, 2004) (trial court did not err in dismissing a granddaughter's petition for declaratory relief because the granddaughter's children were necessary parties to the proceeding in that the children could have relitigated the matter as the declaration would have affected their interests, and the finality of the original judgment would have been undermined); *Montgomery County Auto Auction v. Century Sur. Co.,* 2008 U.S. Dist. LEXIS 35165 (S.D. Tex. Apr. 29, 2008). However, courts have held that this provision should be interpreted the same as Texas Rule of Civil Procedure 39, which allows the court to issue relief in some circumstances even where some affected parties are not named. *Stark v. Benckenstein*, 156 S.W.3d 112, 2004 Tex. App. LEXIS 11842 (Tex. App. Beaumont Dec. 30, 2004, no pet.); *Wilchester W. Concerned Homeowners LDEF, Inc. v. Wilchester W. Fund, Inc.*, No. 01-03-00436-CV, 2004 Tex. App. LEXIS 5417 (Tex. App.—Houston [1st Dist.] June 17, 2004), op. withdrawn, sub. op., 177 S.W.3d 552, 2005 Tex. App. LEXIS 6368 (Tex. App.—Houston [1st Dist.] Aug. 11, 2005).

The Attorney General of Texas is also a proper party for disputes concerning charitable trusts. "Charitable trust" means "a charitable entity, a trust the stated purpose of which is to benefit a charitable entity, or an inter vivos or testamentary gift to a charitable entity." Tex. Prop. Code § 123.001(2). The Texas Property Code states:

> For and on behalf of the interest of the general public of this state in charitable trusts, the attorney general is a proper party and may intervene in a proceeding involving a charitable trust. The attorney general may join and enter into a compromise, settlement agreement, contract, or judgment relating to a proceeding involving a charitable trust.

Tex. Prop. Code § 123.002. A party must provide notice to the Attorney General of such a suit: "Any party initiating a proceeding involving a charitable trust shall give notice of the proceeding to the attorney general by sending to the attorney general, by registered or certified mail, a true copy of the petition or other instrument initiating the proceeding involving a charitable trust within 30 days of the filing of such petition or other instrument, but no less than 25 days prior to a hearing in such a proceeding." *Id*. at § 123.003; *Moore v. Allen*, 544 S.W.2d 448 (Tex. Civ. App.—Waco 1976, no writ) (Failure to serve state attorney general in an action to construe a will that affected a charitable trust rendered the judgment void and unenforceable as state attorney general was a necessary party). "Proceeding involving a charitable trust" means:

> a suit or other judicial proceeding the object of which is to: (A) terminate a charitable trust or distribute its assets to other than charitable donees; (B) depart from the objects of the charitable trust stated in the instrument creating the trust, including a proceeding in which the doctrine of cy-pres is invoked; (C) construe, nullify, or impair the provisions of a testamentary or other instrument creating or affecting a charitable trust; (D) contest or set aside the probate of an alleged will under which money, property, or another thing of value is given for charitable purposes; (E) allow a charitable trust to contest or set aside the probate of an alleged will; (F) determine matters relating to the probate and administration of an estate involving a charitable trust; or (G) obtain a declaratory judgment involving a charitable trust.

Tex. Prop. Code § 123.001(3).

F. Attorney's Fees and Prejudgment Interest

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

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

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

> a recovery that benefits the trust's beneficiaries generally (rather than merely the beneficiary in question) or by clarifying a significant uncertainty in the terms of the trust.

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

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

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

A plaintiff may be entitled to an award of pre-judgment interest, but it is generally discretionary with the court. In *Phillips Petroleum Co. v. Stahl Petroleum Co.*, the Texas Supreme Court recognized two separate bases for the award of prejudgment interest: (1) an enabling statute; and (2) general principles of equity. 569 S.W.2d 480, 485 (Tex. 1978). Statutory prejudgment interest generally applies only to judgments in wrongful death, personal injury, property damage, and condemnation cases. Tex. Fin. Code §§ 304.102, 304.201 (Vernon Supp. 2004-05); *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 530 (Tex. 1998). There is no statutory authority for a recovery of prejudgment interest for a breach of fiduciary duty claim. *Robertson v. ADJ Partnership, Ltd.*, 204 S.W.3d 484, 496 (Tex. App.—Beaumont 2006, no pet.).

Under an equitable theory, if no statute requires pre-judgment interest to be awarded, a court has the discretion to award pre-judgment interest if it determines an award is appropriate based on the facts of the case. *See e.g., City of Port Isabel v. Shiba*, 976 S.W.2d 856, 860 (Tex. App.—Corpus Christi 1998, pet. denied) (where no statute controls, decision to award prejudgment interest left to discretion of trial court); *Larcon Petroleum, Inc. v. Autotronic Sys.*, 576 S.W.2d 873, 879 (Tex. App.—Houston [14th Dist.] 1979, no writ) (trial court may, but not is not required to, award pre-judgment interest under authority of statute or under equitable theory).

Courts have affirmed a trial court's decision to not award pre-judgment interest to a breach-of-fiduciary-duty plaintiff. *Critical Path Res., Inc. v. Huntsman Int'l, LLC*, NO. 09-17-00497-CV, 2020 Tex. App. LEXIS 2310 (Tex. App.—Beaumont March 19, 2020, no pet.); *Robertson*, 204 S.W.3d at 496; *Lee v. Lee*, 47 S.W.3d 767, 800 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

If a court awards prejudgment interest for a breach of fiduciary duty claim, the court should award a rate that is equal to the post-judgment interest rate that applies at the time of the judgment. Tex. Fin. Code § 304.103.

IX. CONCLUSION

There are many interesting and difficult issues that arise around the termination of a trust or the succession of trustees. This paper was intended to provide guidance when a trust terminates, a trustee resigns, or is removed and a new trustee is appointed.