TOP TRUST AND ESTATE ISSUES THE TEXAS SUPREME COURT SHOULD ADDRESS

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TOP TRUST AND ESTATE ISSUES THE TEXAS SUPREME COURT SHOULD ADDRESS

I. INTRODUCTION

Trust and estate litigation is an incredibly important area of law in Texas and elsewhere. Once thing is certain: every person will die at some point. The amount of wealth transferred from the baby boomer generation in the United States is projected to be approximately $84.4 trillion by 2045. "*The Greatest Wealth Transfer in History Is Here, With Familiar (Rich) Winners.*" The New York Times, 14 May 2023. That is a lot of assets, and where a lot of assets are transferred, there will be a lot of conflicts.

Indeed, Texas created statutory probate courts in 1985 that became effective on January 1, 1986. The statutory probate courts were established for several key reasons including that district courts across Texas were overwhelmed with probate and estate matters, which were taking up significant judicial resources and delaying resolution of these cases. Statutory probate courts are in 12 of the state's 15 largest metropolitan areas and have original and exclusive jurisdiction over their counties' probate matters, guardianship cases, and mental health commitments and share jurisdiction with district courts over trust matters. https://www.txcourts.gov/about-texas-courts/trial-courts.

With all of this incredible amount of litigation in the trust and estate area, one would think that the Texas Supreme Court would devote a significant amount of time and attention to clarifying this important area. Although there are no official statistics on this, one search indicates that only 4-7% of the Court's opinions from 2000 to 2020 address trust or estate issues.

This article will address the Author's opinion about the top issues that the Texas Supreme Court should address to assist the judiciary, the bar, and litigants in Texas in this incredibly important area of law.

II. JURY TRIAL RIGHTS IN TRUST PROCEEDINGS

A. Issue

Parties file hundreds of trust disputes every year in district courts, county courts at law, and statutory probate courts. Often, part or all of the claims involve modifying trusts, reforming trusts, instructions for trust administration, judicial discharges, trustee removal, etc. These types of claims seem ripe for judicial decision-making. However, if there is an underlying fact question, e.g., what was the settlor's intent, what did the settlor anticipate, did the trustee steal money, etc. does a party have the right to send that fact issue to a jury to determine?

B. General Authority on Determining a Right to an Equitable Remedy

If requested, a jury should determine the amount of damages at law that should be awarded to a plaintiff where there is a fact issue. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 367 (Tex. 2000); *Ogu v. C.I.A. Servs*., No. 01-07-00933-CV, 2009 Tex. App. LEXIS 78 (Tex. App.—Houston [1st Dist.] Jan. 8, 2009, no pet.). In Texas, a jury's verdict has a "special, significant sacredness and inviolability." *Crawford v. Standard Fire Ins. Co*., 779 S.W.2d 935, 941 (Tex. App.—Beaumont 1989, no writ). The Texas Constitution requires that the right to trial by jury remain inviolate. Tex. Const., art. I, § 15; *Crawford*, 779 S.W.2d at 941. Denial of the constitutional right to trial by jury amounts to an abuse of discretion for which a new trial is the only remedy. *McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995).

Of course, a party must appropriately request a jury and object to any failure to provide one. *See Lavizadeh v. Moghadam*, No. 05-18-00955-CV, 2019 Tex. App. LEXIS 10835 (Tex. App.—Dallas December 13, 2019, no pet.) (trustee waived right to jury trial where he agreed to summary proceeding before trial court); *Duenas v. Duenas*, No. 13-07-089-CV, 2007 Tex. App. LEXIS 5622 (Tex. App.—Corpus Christi July 12, 2007, no pet.) (Because a party did not timely object regarding his right to a jury trial, the matter was waived.). Further, where there is no fact issue, then a trial court does not err in refusing to submit an issue to a jury. *See Lavizadeh v. Moghadam*, No. 05-18-00955-CV, 2019 Tex. App. LEXIS 10835 (Tex. App.—Dallas December 13, 2019, no pet.) (trial court's refusal to give jury trial was not harmful error where there was no fact question); *Willms v. Americas Tire Co*., 190 S.W.3d 796 (Tex. App.—Dallas 2006, pet. denied) (the granting of summary judgment did not violate a constitutional right to a jury trial because no material issues of fact existed to submit to a jury.).

However, a court, in its equitable jurisdiction, should determine whether an equitable remedy should be granted. *See Wagner & Brown, Ltd. v. Sheppard,* 282 S.W.3d 419, 428-29 (Tex. 2008) ("As with other equitable actions, a jury may have to settle disputed issues about what happened, but "the expediency, necessity, or propriety of equitable relief' is for the trial court …."). The Texas Supreme Court stated: "Although a litigant has the right to a trial by jury in an equitable action, only ultimate issues of fact are submitted for jury determination. The jury does not determine the expediency, necessity, or propriety of equitable relief. The determination of whether to grant an injunction based upon ultimate issues of fact found by the jury is for the trial court, exercising chancery powers, not the jury." *State v. Texas Pet. Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979); *Bostow v. Bank of Am.*, No. 14-04-00256-CV, 2006 Tex. App. LEXIS 377

(Tex. App.—Houston [14th Dist.] Jan. 17, 2006, no pet.); *Shields v. State*, 27 S.W.3d 267, 272 (Tex. App.—Austin 2000, no pet.). The jury's findings on issues of fact are binding; however, equitable principles and the appropriate relief to be afforded by equity are only to be applied by the court itself. *Shields*, 27 S.W.3d at 272. Because the court alone fashions equitable relief, it is not always confined to the literal findings of the jury in designing the injunction. *Id*.

For example, the Texas Supreme Court held: "A jury does not determine the expediency, necessity, or propriety of equitable relief such as disgorgement or constructive trust." *Energy Co. v. Huff Energy Fund LP*, 533 S.W.3d 866 (Tex. 2017) (citing *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999)). "Whether 'a constructive trust should be imposed must be determined by a court based on the equity of the circumstances.'" *Id*. "The scope and application of equitable relief such as a constructive trust 'within some limitations, is generally left to the discretion of the court imposing it.'" *Id*. (citing *Baker Botts, L.L.P. v. Cailloux*, 224 S.W.3d 723, 736 (Tex. App.—San Antonio 2007, pet. denied).

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

So, if properly requested and preserved, a party is entitled to submit a fact issue on legal damages to a jury. However, if a party seeks an equitable remedy, the trial court normally has the sole right to resolve that request. If there is some underlying fact issue that must be resolved with regard to the equitable remedy, then typically that fact issue should be submitted to a jury.

C. Case Example

In *In re Troy S. Poe Trust,* a co-trustee of a trust filed suit to modify the trust to increase the number of trustees and change the method for trustees to vote on issues as well as other modifications. 591 S.W.3d 168 (Tex. App.—El Paso 2019, pet. granted). The trial court denied the defendant co-trustee's request for a jury trial on underlying fact issues and held a two-day bench trial. After the trial court granted the plaintiff's modifications, the defendant co-trustee appealed and argued that the trial court erred in refusing him a jury trial.

The court of appeals first looked at a party's general right to a jury trial in Texas:

> The Texas Constitution addresses the right to a jury trial in two distinct provisions. The first, found in the Bill of Rights, provides that the "right of trial by jury shall remain inviolate." But this provision has been held to "maintain a right to trial by jury for those actions, or analogous actions, tried by jury when the Constitution was adopted in 1876." And Richard has not shown that trust modifications were tried to a jury in 1876 or before. The Texas Constitution also contains another provision governing jury trials in its judiciary article: "In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature." This section is broader than the Section 15 right to jury in the sense that it does not depend on court practice in 1876 or before. It is narrower in the sense that it only applies to "causes." But the Texas Supreme Court views the term "causes" expansively, and that court has only restricted the right to jury trial in specific contexts where "some special reason" made jury trials unsuitable, such civil contempt proceedings, election contests, suits to remove a sheriff, and appeals in administrative proceedings. The Texas Constitution also gives the legislature authority to regulate jury trials to maintain their "purity and efficiency." In that regard, we look to the statutory framework to determine whether parties possess a right to a jury trial.

Id. (internal citation omitted). The court then held that Texas Property Code did not waive a party's right to a

jury trial regarding a claim to modify a trust, and that the defendant co-trustee had a right to a jury trial on underlying fact questions involved in a trust modification case:

> Under Texas law, the right to a jury trial extends to disputed issues of fact in equitable, as well as legal proceedings. And as a general rule, "when contested fact issues must be resolved before equitable relief can be determined, a party is entitled to have that resolution made by a jury." "Once any such necessary factual disputes have been resolved, the weighing of all equitable considerations . . . and the ultimate decision of how much, if any, equitable relief should be awarded, must be determined by the trial court." The trial court, and not the jury, determines the "expediency, necessity, or propriety of equitable relief." Based on these general principles, Richard complains that the predicate question of whether there were changed circumstances, or the purpose of the trust had become impossible to fulfill, were for a jury to resolve.

Id. (internal citations omitted). The court of appeals agreed with the defendant co-trustee and held that he had a right to a jury trial on those initial issues. The court reversed and remanded for further proceedings. This was appealed to the Texas Supreme Court.

In *In re Poe Trust*, the Texas Supreme Court reversed and remanded the court of appeals. 's opinion. 646 S.W.3d 771 (Tex. 2022) The Court held that parties to trust modification proceedings were not entitled to a jury trial under the Texas Property Code:

> The Trust Code's incorporation of the Rules of Civil Procedure cannot be construed to create a jury right where one does not already exist. The procedures established by those rules are "not meant to alter the parties' . . . right to a jury trial." In short, no right to a jury trial in a judicial trust-modification proceeding was created by Trust Code Section 112.054, Trust Code Section 115.012, or the Texas Rules of Civil Procedure, whether they are viewed alone or in combination.

Id. But the Court remanded for the court of appeals to consider whether the defendant co-trustee had a right to a jury trial under the Texas Constitution:

> The Texas Constitution provides "two guarantees of the right to trial by jury" in civil proceedings. The Bill of Rights ensures that the "right of trial by jury shall remain inviolate." Our cases have said, and the parties here do not dispute, that this provision maintains a jury right for the sorts of actions tried by jury when the Constitution was adopted and, thus, "only applies if, in 1876, a jury would have been allowed to try the action or an analogous action."
>
> At the time of the Constitution's adoption, there was no common-law right to a jury trial in equitable actions and, consequently, our courts have held that the Bill of Rights did "not alter the common law tradition eschewing juries in equity." However, to provide a jury right in equitable actions, "a special clause was introduced." In our present Constitution, that guarantee is found in Article V, the Judiciary Article. It provides: "In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature." We have held, and no party here disputes, that the Judiciary Article "covers all 'causes' regardless of whether a jury was available in 1876."
>
> …
>
> The court of appeals confronted none of these constitutional arguments, which were first presented on rehearing. By that time, the court of appeals had concluded that the Trust Code's incorporation of the Rules of Civil Procedure conferred a right to a jury trial. That holding made in-depth treatment of the constitutional arguments unnecessary. Our holding today, however, changes that… Following our preferred practice, we remand the case to the court of appeals to address petitioners' constitutional arguments in the first instance. And we echo the concurrence's view that amici input could greatly aid the court of appeals' decisional process.

Id.

Back in the court of appeals, the court then completely reversed course and held that the co-trustee did not have a right to a jury trial. In *In re Poe Trust*, the court of appeals held that the co-trustee defendant did not have a constitutional right to a jury trial in a trust modification case and then affirmed the trial court's modification of the trust. No. 08-18-00074-CV, 2023 Tex. App. LEXIS 5598 (Tex. App.—El Paso July

28, 2023, pet. filed). The court held that there was no right to a jury trial under the Texas Bill of Rights:

> First, the Bill of Rights states the "right of trial by jury shall remain inviolate." This provision maintains a jury-trial right for the type of actions tried by jury when the Constitution was adopted and thus "only applies if, in 1876, a jury would have been allowed to try the action or an analogous action." And in 1876, there was no right to a jury trial in equitable actions; consequently, the Bill of Rights did "not alter the common law tradition eschewing juries in equity." Insofar as trust-deviation proceedings existed in 1876, they were considered equitable in nature, such that there would have been no jury-trial right at that time. Therefore, as the parties concede, there is no jury-trial right in a trust-modification proceeding under the Bill of Rights.

Id. The court then turned to the Judiciary Article and stated:

> [T]he "Judiciary Article" states: “In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature.” In contrast with the Bill of Rights, this provision expanded the jury-trial right to all "causes" in both law and equity, regardless of whether a jury trial was available for the same in 1876. However, there are differences in opinion regarding how the term "causes" in this provision should be defined.

Id. The court then held that a trust modification proceeding is not a “cause” as that term is used in the Judiciary Article:

> Bock, on the other hand, argues that "cause" should include only "ordinary" causes of action, also referred to as "personal" actions, in which a plaintiff is seeking a personal judgment against a defendant based on the defendant's breach of a duty or other wrongdoing. He posits that a plaintiff must be asserting some "personal right" for which he may obtain a remedy or enforceable judgment against the defendant. And he argues that a trust-modification proceeding lacks the attributes of an ordinary cause of action—it is not brought by a plaintiff seeking a judgment against a defendant, but instead is brought in the interest of the beneficiary and will not result in an enforceable judgment against any of the interested parties.
>
> We conclude that Bock's approach is the correct one, as it more closely aligns with the 1876 Constitution drafters' intent in formulating the Judiciary Article's jury-trial right and best comports with Texas jurisprudence over time.

Id. The court further explained:

> Professor Harris later described the proceeding in which a plaintiff sues a defendant seeking a personal judgment against the defendant as the "ordinary cause of action," which he contrasted with "special civil proceedings" that do not share this key attribute… This interpretation of the term cause as meaning the ordinary cause of action in which a plaintiff seeks recourse against a defendant further comports with the Judiciary Article's "plaintiff" and "defendant" terminology. During the era in which the 1876 Constitution was adopted, Bouvier's Law Dictionary defined a plaintiff as a person "who, in a personal action, seeks a remedy for an injury to his rights." Plaintiff. It defined the term "defendant" in the opposing stance as a "party who is sued in a personal action." And in turn, it defined a "personal action" as one "brought for the specific goods and chattels; or for damages or other redress for breach of contract or for injuries of every other description; the specific recovery of lands, tenements and hereditaments only excepted." In other words, a personal action encompasses a situation in which a party seeks a judgment against a defendant as a remedy for a violation of a personal right… [W]e find the ordinary-cause-of-action framework to be the correct framework or test by which to determine whether a proceeding can be considered a Judicial Article cause versus a special proceeding that falls outside its scope.

Id. The court then held that a trust modification proceeding is more of a special proceeding and does not involve an ordinary cause of action:

> Utilizing the ordinary-cause-of-action framework, we agree with Bock that a trust-modification proceeding does not have any of the attributes of a cause for which a Judicial Article jury-trial right exists; instead, its nature is that of a special proceeding for which no jury-trial right exists. As Bock points out, in a trust-modification proceeding, there is no plaintiff seeking a right of recovery or a judgment against a defendant who has committed some wrong.

Id. So, the court of appeals affirmed the trial court's decision to deny the defendant co-trustee's request for a jury trial. The court then looked at the merits of the trust modification and affirmed it as well. The court essentially rejected the unambiguous intent expressed by the settlor in the trust document and focused on other evidence to modify the trust.

There was a dissenting justice who found that the defendant co-trustee did have a constitutional right to a jury trial. The dissenting justice stated:

> In the years when the 1875 Constitution was drafted, Texas law used "cause" broadly… In other words, "cause" was viewed comprehensively as encompassing contested questions before a court… Moreover, as this Court held in our prior decision in this case, the record here establishes that statutory prerequisites include disputed questions of fact. Specifically, this Court concluded that "the predicate questions of whether the trust needed to be modified was a fact question that should have been decided by a jury[.]"We observed in our earlier decision that, "as a general rule, 'when contested fact issues must be resolved before equitable relief can be determined, a party is entitled to have that resolution made by a jury.'" Because this suit is based on a long recognized equitable cause of action, I would hold it falls squarely within the meaning of "all causes" as included in the Judiciary Article's terms.
>
> The majority views a material distinction between the term "cases," as included in the Constitution of 1869, and the term "causes," as currently included. Specifically, the majority describes the term "causes," as "narrower language." On that point, I disagree. Controlling authorities of the era inform that "all cases of law or equity," as included in the 1869 version, essentially means the same thing as "all causes," which was adopted in 1876. Given the historical use of these terms, I see no indication that the voters of that era drew back from the otherwise expanding guarantee of a right to a jury trial.
>
> Additionally, the majority places heavy importance on the use of the terms, "plaintiff" and "defendant," as appearing in the Judiciary Article. Based in part on these terms, the majority concludes that the term "cause" can only be interpretated as meaning an "ordinary cause of action." Again, I disagree… First, these same terms, "plaintiff" and "defendant," appear in the Constitution of 1845, where the jury-trial guarantee was otherwise provided in "all causes in equity." Second, the terms "plaintiff" and "defendant" are not used as terms of limitation but rather to describe that a jury trial is guaranteed to all participants when "application [is] made in open court." Third and lastly, I see no indication here of any special circumstance that would cause a jury trial to be prohibitive. On that score, Justice Busby's concurring opinion in Poe, which is joined by Justice Devine and Justice Young, largely provides the analytical framework for making that determination. Because this modification suit is a statutory substitute for a cause in equity, I would classify it as falling into the second category of Justice Busby's framework. To that extent, the jury-trial right would extend in part to the disputed issues of fact of this suit while questions of equitable discretion should be decided by the court. Unlike the majority, I would hold that a trust modification proceeding qualifies as "a cause" within the meaning of the Judiciary Article's guarantee.

Id.

The defendant co-trustee filed a petition for review in the Texas Supreme Court.

One would think that the Texas Supreme Court would accept the petition in this case, again, and finally determine whether a party has a constitutional right to a jury trial on underlying fact disputes in these types of proceedings. Alas, the Court denied the petition for review without an explanation. However, three justices issued a concurring opinion that gave some insight on their thinking. *In re Poe Trust,* No. 23-0729, 2024 Tex. LEXIS 658, 2024 WL 3836556 (Tex. August 16, 2024) (concurring order). The concurring justices stated that they agreed with denying the petition because there was no showing of a fact issue that should have been presented to a jury. That in itself is very odd. The trial court held a two day bench trial where both parties introduced evidence to support both sides on the issue of whether the modifications should have been granted

on fact specific elements of: "(1) [whether] the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill; (2) because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust…" *Id.* (citing Texas Trust Code Section 112.054(a)(1), (2)). Whether the purposes of the trust have been fulfilled and whether circumstances not known to or anticipated by the settlor justify modification seem to be pretty fact specific issues.

The three concurring justices addressed whether the court of appeals correctly analyzed the constitutional right to a jury trial and would find that it did not:

> That guarantee, which appears in the Judiciary Article, provides that "[i]n the trial of all causes in the district courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury." We have held that this guarantee applies, among other things, to "ultimate issues of fact" in "equitable action[s]," analogous actions, and statutory or rule-based substitutes for such actions, as well as when challenging disputed facts addressed in proceedings ancillary to a cause. For example, it applies to contested matters of fact arising from receivership and probate proceedings.
>
> We have also explained that the Judiciary Article guarantee was "intended to broaden the right to a jury," and that the word "cause" had a "broad meaning . . . when our present Constitution was drafted" that included any "suit, litigation, or action" involving a "question . . . litigated or contested before a court" or "legal process . . . to obtain [a] demand" or "seek[] [a] right." Thus, a "special reason" is necessary to conclude that particular "adversary proceedings" do not "qualify as a 'cause'." Because we have identified certain special reasons—such as separate constitutional provisions—that some proceedings do not require a jury, "not all adversary proceedings are 'causes' within the meaning of the Judiciary Article." …
>
> But on remand, a majority of the court of appeals panel did not examine whether there was a "special reason" of the sort we have held sufficient to exclude such an adversary equitable action from the Judiciary Article guarantee. Instead, the panel majority excluded these claims by disregarding the broader definition of "cause" we endorsed in Credit Bureau and selecting a narrower alternative definition derived from the common law: an "ordinary cause of action" or "personal action" in which a plaintiff alleges that a defendant breached a legal duty or violated a legal right and seeks recourse for that conduct…
>
> Several weaknesses, however, underlie the panel majority's definition and reasoning. First, the panel's definition impermissibly departs from the "broad" definition of "cause" we endorsed in Credit Bureau, which was drawn from contemporaneous sources. Indeed, an amicus helpfully points out that Texas cases used the term "cause" in the 1870s to describe a wide variety of proceedings involving trusts. Second, the panel's definition is based on the common law and thus excludes equitable actions, which we have long held the Judiciary Article guarantee was specifically enacted to include. The panel's definition would collapse the Judiciary Article guarantee into the Bill of Rights guarantee, rendering the former surplusage…
>
> For this additional reason, the panel majority erred in choosing a different and much narrower common-law definition of "cause," which led it to depart improperly from several other binding precedents of this Court… Under these and other precedents, the court of appeals erred by adopting a binary view of the options for defining the scope of the Judiciary Article's jury-trial guarantee and selecting the narrower option. Instead, it should have followed the middle path charted by our cases (hodgepodge though they may be), proceeding to examine whether there is a "special reason" of the kind we have held sufficient to deny a jury trial even though this adversary equitable action otherwise falls within the broad meaning of "cause" in the Judiciary Article guarantee. If any departure from our precedent is warranted, it must come from this Court. I do not analyze either point here, however—whether a "special reason" applies in this context under our existing jurisprudence or whether that jurisprudence is well grounded in the Constitution's text and history. Because I conclude that there are no disputed questions of material fact in this case for a jury to resolve, those questions must await a future case.

Id. Of course, this order is just three justices' opinion out of the nine-member Court as to the validity of the court of appeals' reasoning. The Court could have accepted the case, affirmed the result, but corrected the

reasoning of the court of appeals. The Court did not do that. So, as we sit today, the court of appeals's analysis and narrow reading of "cause" in the constitutional right to a jury trial is the precedent in Texas.

After *Poe*, the same court of appeals expanded its holding that a trust dispute does not justify a jury trial to trustee removal claims. In *White v. White*, an income beneficiary of a trust was retained to manage ranch property. 704 S.W.3d 250 (Tex. App.—El Paso 2024, no pet.). He later became trustee of the trust and ratified his employment and the employment of several of his family members. Two of his brothers, who were also income beneficiaries, sued him for breach of fiduciary duty and sought damages, removal and other relief. Primarily, the brothers alleged that the trustee breached his fiduciary duty by: failing to act as a prudent investor, failing to make any income distributions, engaging in self-dealing by employing himself and his family, and paying himself and his family excessive compensation. After a jury trial, the trial court awarded relief against the trustee, which included removing him as trustee.

The court reviewed the trustee's complaint that the jury charge improperly placed the burden on him to establish that he complied with virtually all of his fiduciary duties when he only shouldered the burden to establish that he did not engage in any self-dealing transactions that resulted in a profit to him at the expense of the trust beneficiaries. The court reversed the judgment due to this charge error.

The court then addressed whether the trial court's removal and modification relief should be reversed. The noted that "*although a party is entitled to a jury trial on a tort claim for breach of fiduciary duty, there is no right to a jury trial on an equitable claim to remove a trustee or to modify a trust*." *Id*. (emph. added). The court of appeals held, however, that the parties submitted these equitable claims to the jury and that the relief should be reversed for the same reasons. *Id*.

D. Conclusion

These opinions show that there are differing approaches to whether a party in a trust dispute is entitled to a jury determination on underlying fact issues. The Texas Supreme Court should hear a case dealing with jury trial rights in trust proceedings to clarify whether a party is entitled to a jury trial on underlying factual issues.

III. PERSONAL JURISDICTION IN TRUST PROCEEDINGS

A. Issue

Trustees often need to seek court approval or instructions regarding trust administration. Further, beneficiaries may have claims that they want to raise against trustees. Where should those issues be resolved? The most convenient forum is the state where the trustee(s) administer the trust. However, what happens when the trust has beneficiaries who reside in other states? Can a court in the state where the trust is administered issue a binding judgment on all beneficiaries, who may object to the court's personal jurisdiction?

B. Uniform Trust Code Approach

The Uniform Trust Code has a section that specifically addresses a court's jurisdiction over a trustee and beneficiary. It states:

SECTION 202. JURISDICTION OVER TRUSTEE AND BENEFICIARY.

(a) By accepting the trusteeship of a trust having its principal place of administration in this State or by moving the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.
(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter 47involving the trust.
(c) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

Un. T. Code § 202.

The Uniform Trust Code also has comments to this provision:

> Comment This section clarifies that the courts of the principal place of administration have jurisdiction to enter orders relating to the trust that will be binding on both the trustee and beneficiaries. Consent to jurisdiction does not dispense with any required notice, however. With respect to jurisdiction over a beneficiary, the Comment to Uniform Probate Code § 7-103, upon which portions of this section are based, is instructive:
> It also seems reasonable to require beneficiaries to go to the seat of the trust when litigation has been instituted there concerning a trust in which they claim beneficial interests, much as the rights of

> shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by its selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered.
>
> The jurisdiction conferred over the trustee and beneficiaries by this section does not preclude jurisdiction by courts elsewhere on some other basis. Furthermore, the fact that the courts in a new State acquire jurisdiction under this section following a change in a trust's principal place of administration does not necessarily mean that the courts of the former principal place of administration lose jurisdiction, particularly as to matters involving events occurring prior to the transfer.
> The jurisdiction conferred by this section is limited. Pursuant to subsection (b), until a distribution is made, jurisdiction over a beneficiary is limited to the beneficiary's interests in the trust. Personal jurisdiction over a beneficiary is conferred only upon the making of a distribution. Subsection (b) also gives the court jurisdiction over other recipients of distributions. This would include individuals who receive distributions in the mistaken belief they are beneficiaries.
> For a discussion of jurisdictional issues concerning trusts, see 5A Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 556-573 (4th ed. 1989).

So, the Uniform Trust Code has a section that expressly grants courts in the state of administration of the trust jurisdiction over all trust beneficiaries in certain circumstances. This clearly assists trustees in having a court who has experience with the law of the jurisdiction of administration provide clarity and orders regarding a trust's administration that is binding on all trust beneficiaries. Otherwise, a trustee may be faced with costly litigation in multiple jurisdictions in front of jurists who do not know the law of the jurisdiction of the administration of the trust.

Texas does not have this type of statute that expressly discusses a court having jurisdiction over trust beneficiaries. Parties have, therefore, argued that Texas courts have in rem jurisdiction over the assets of the trust, and that a judgment would be binding on all parties interested in those assets.

C. Case Example

In *Hooten v. Collins*, a dispute arose between the trustee of a Texas trust and a beneficiary who resided overseas regarding the distribution of trust assets, which primarily consisted of real estate in Texas. No. 08-23-00327-CV, 2024 Tex. App. LEXIS 6805 (Tex. App.—El Paso September 16, 2024, no pet.). The trustee filed suit for instructions in Texas regarding approval of a distribution plan and discharge relief. The beneficiary shortly thereafter filed suit in California for breach of fiduciary duty based on the same set of facts. The beneficiary then objected to the Texas court's jurisdiction based on an alleged lack of personal jurisdiction. After discovery, the trial court held a hearing and denied the objection, and the beneficiary appealed. The court of appeals affirmed the denial of the objection.

The first issue was whether the trial court had in rem jurisdiction over the beneficiary due to the trust assets residing in Texas. The court held that even in in rem jurisdiction, a court must still have in personam jurisdiction over a defendant:

> More than a century ago, the U.S. Supreme Court distinguished between in personam and in rem jurisdiction for state-court jurisdictional inquiries. *Pennoyer v. Neff*, 95 U.S.714, 24 L. Ed. 565 (1877). As later explained in *Shaffer v. Heitner*, 433 U.S. 186, 189, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977):
>
> If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated "in personam" and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem."

Id. at 199. Consequently, the jurisdictional analysis following Pennoyer centered on the physical—and in some cases constructive—presence of people and things within the forum state. *Id*. at 201-03. Texas courts acknowledge the same distinction: "The general rule of in rem jurisdiction is that the court's jurisdiction is dependent on the court's control over the defendant res." *Costello v. State*, 774 S.W.2d 722, 723 (Tex. App.—Corpus Christi 1989, writ denied). "[A]n in rem action affects the interests of all persons in the world in the thing," but an in rem judgment's effect is limited only "to the property that supports jurisdiction." *Bodine v. Webb,* 992 S.W.2d 672, 676 (Tex. App.—Austin 1999, pet. denied). For that reason, the "court need not acquire jurisdiction over the person." *City of Conroe*, 602 S.W.3d at 457-58 (citing *Batjer v. Roberts*, 148 S.W. 841, 842 (Tex. App.—El Paso 1912, writ ref'd))

(observing that service of process in in rem suits may be constructive, and persons with interest in rem may never know of suit).

Robert argues that this is not a true in rem action because it is not a suit against the property. We agree that the claim here would be better described as quasi in rem:

> A quasi in rem proceeding is an action between parties where the object is to reach and dispose of property owned by them or of some interest therein. While an in rem action affects the interests of all persons in the world in the thing, a quasi in rem action affects only the interests of particular persons in the thing.

Bodine, 992 S.W.2d at 676 (internal citations omitted); *see also Hanson v. Denckla*, 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958) ("A judgement quasi in rem affects the interest of particular persons in designated property.").

Drawing on these principles, Marsha contends that the court need not have in personam jurisdiction over Robert because Texas has in rem jurisdiction over the trust property. Robert disagrees with Marsha's characterization of the claims and argues that, even if the location of property provides part of the alleged jurisdictional basis, a Texas court must still have in personam jurisdiction over him. In this respect, we agree with Robert that developments since Pennoyer have cemented due process protections into both in personam and in rem jurisdictional inquiries.

In *Shaffer v. Heitner*, the Court was asked to decide whether the seizure of property in the forum state could justify a court's exercise of jurisdiction over nonresident defendants in a suit unrelated to the ownership of that property. *Shaffer,* 433 U.S. at 189. The Court traced the constitutional doctrine of state-court jurisdiction to Pennoyer v. Neff. *See Shaffer*, 433 U.S. at 196. But the *Schaffer* Court recognized the watershed change occasioned by International Shoe. *Id.* at 203 (citing *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). After International Shoe, the focus of the personal jurisdictional inquiry changed from a state's sovereignty over persons within its border to the "relationship among the defendant, the forum, and the litigation." *Id*. at 204.

The Shaffer Court then reasoned that an assertion of jurisdiction over property is equivalent to an assertion of jurisdiction over a person's interest in that property. It dispensed with the theoretical distinction between in rem and in personam jurisdiction and concluded that all assertions of personal jurisdiction — whether based on property ownership (i.e., "in rem" or "quasi in rem") or personal contacts with the forum (i.e., "in personam") — are to be measured against the minimum-contacts and fairness prongs of the International Shoe test. *Id*. at 212 ("We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny.").

Several Texas courts have resolved challenges to personal jurisdiction in trust litigation where the trust res included Texas real property; each conducted a thorough minimum-contacts tests analyzing the defendant's contacts with the state. *See Johnson v. Kindred*, 285 S.W.3d 895, 899 (Tex. App.—Dallas 2009, no pet.); *Alexander v. Marshall*, No. 14-18-00425-CV, 2021 Tex. App. LEXIS 1952, 2021 WL 970760, at *5 (Tex. App.—Houston [14th Dist.] Mar. 16, 2021, pet. denied) (mem. op.); JPMorgan Chase Bank, N.A. v. Campbell, No. 09-20-00161-CV, 2021 Tex. App. LEXIS 5001, 2021 WL 2583573, at *5 (Tex. App.—Beaumont June 24, 2021, no pet.) (mem. op.). Similarly, we must determine whether Texas has personal jurisdiction over Robert based on a detailed analysis of his alleged forum contacts and the relationship between those Texas contacts and the litigation. See Dawson-Austin v. Austin, 968 S.W.2d 319, 327 (Tex. 1998) (conducting a minimum-contacts analysis in a divorce case relating to the distribution of Texas property that was part of the marital estate); see also Smith v. Lanier, 998 S.W.2d 324, 333 (Tex. App.—Austin 1999, pet. denied) (conducting separate minimum-contacts analyses to determine the character of an estate's property—i.e., separate or community—and to determine the propriety of jurisdiction over the nonresident representative of the deceased's estate in her individual capacity).

Id.

The court then discussed personal jurisdiction standards:

> The Texas long-arm statute extends a Texas court's personal jurisdiction "as far as the federal constitutional requirements of due process will permit," but no further. Thus, the contours of federal due process guide our decision.
>
> Federal due process limits a court's jurisdiction over nonresident defendants unless: (1) the defendant has established minimum contacts with the forum state; and (2) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. "As a general rule, the exercise of judicial power is not lawful unless the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" Due process requires purposeful availment because personal jurisdiction "is premised on notions of

> implied consent—that by invoking the benefits and protections of a forum's laws, a nonresident consents to suit there." Purposeful availment includes deliberately engaging in significant activities within a state or creating continuing obligations with residents of the forum. It includes seeking profit, benefits, or advantage from the forum. It excludes, however, "random," "fortuitous," or "attenuated" contacts or the "unilateral activity of another party or a third person." Moreover, a party may purposefully avoid a particular forum by structuring its transactions in such a way as to neither profit from the forum's laws nor subject itself to jurisdiction there.
> A plaintiff asserting that a court has specific jurisdiction over a nonresident defendant must also show that its claim arises out of, or relates to, the defendant's contacts with the forum. Under the Texas application of that requirement, "for a nonresident defendant's forum contacts to support an exercise of specific jurisdiction, there must be a substantial connection between those contacts and the operative facts of the litigation." Specific jurisdiction is not as exacting as general jurisdiction in that the contacts may be more sporadic or isolated so long as the cause of action arises out of those contacts.

Id. (internal citations omitted). The court held that there was sufficient evidence to support the trial court's exercise of personal jurisdiction over the beneficiary:

> First, we acknowledge the significant role that the Texas properties play in this dispute. When it established International Shoe as the standard for all assertions of jurisdiction for in rem actions, the United States Supreme Court in *Shaffer v. Heitner* observed the following:
>
> [T]he presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest.
>
> *Shaffer*, 433 U.S. at 207. The Court specifically noted the interest of a forum in "the marketability of property within its borders," "providing a procedure for peaceful resolution of disputes about the possession of that property" and the reality that "important records and witnesses will be found in the State." *Id*. at 208.
>
> The Court's observation rings particularly true here. This trust had 21 Texas income-producing properties. Their aggregate value was in the tens of millions of dollars. The properties required the services of a property management firm to collect rents, undertake maintenance, and handle the day-to-day tasks inherent with commercial real estate. Because Robert wanted to be involved in their disposition, he asked to receive an ongoing stream of information for the properties. The income generated by the properties further required accounting advice for quarterly tax obligations, here provided to Robert by a Texas CPA. And when many of the properties were sold (at Robert's urging), the beneficiaries only enjoyed the fruits of those sales under the benefits and protection of Texas law.
>
> To be sure, Robert's ownership interest in Texas property was only equitable and resulted from decisions made by the settlors and trustees. Which brings us to Robert's core argument: as a passive trust beneficiary, he cannot be deemed to have contacts in a jurisdiction where the trust happens to own property. Owning an equitable interest in the trust property alone is insufficient to confer jurisdiction when an interested person assumes only a passive role in the trust's administration. Johnson, 285 S.W.3d at 903 (finding no jurisdiction over passive beneficiary of trust).
>
> …
>
> Yet when interested parties take an active role in the trust's affairs with the knowledge that their actions will create continuing obligations towards Texas residents, those parties are subject to personal jurisdiction in Texas… Here, Marsha's evidence is legally sufficient to show that Robert assumed an active role in managing the trust's assets. For example, for 18 months, Robert kept in continuous communication with the trust's Texas-based property manager, Investar, and the trust's tax advisor, J.M. Trippon & Co., receiving information about the financial health of the Texas trust assets. Robert attended two in-person meetings in Texas to discuss the trust's administration, analyze its assets, and make additional requests for information from the trust's Texas-based professionals. While Robert minimizes the Texas visit by arguing his primary purpose was to attend his father's funeral, that explanation does nothing to refute the fact that he purposefully engaged in these contacts in Texas.
>
> More importantly, Robert attempted to insert himself into the trust's management such that there is some evidence he was more than a passive beneficiary… The trial court could have fairly

considered how Robert's requests had some influence over the plans to distribute the trust… Collectively, these contacts are legally sufficient to show Robert purposefully availed himself of the Texas forum: he inserted himself in the distribution plans of Trust B's property to obtain a benefit, advantage, or profit from transactions or conveyances of Texas real estate. For the above reasons, we find the evidence is legally sufficient to confer jurisdiction over Robert.

Id. The court also held that there was a sufficient connection between the defendant, the forum, and the litigation:

> This case arises out of the parties' inability to agree on a plan to realize an appropriate and equitable distribution of a trust's Texas property. Robert sought to influence the sale and distribution of Texas assets to beneficiaries of the trust. Additionally, Robert's demands and criticism of Marsha's performance as trustee are tied to the declaratory relief that Marsha now seeks. He accused Marsha of ignoring his interests and withholding information. Accordingly, some claims for declaratory relief enumerated in Marsha's petition are a request for the court to approve her actions as trustee and an accounting of the trust.

Id. The court found that the exercise of jurisdiction was consistent with fair play and substantial justice and affirmed the order denying the defendant's objection to the Texas court's jurisdiction over the beneficiary.

D. Conclusion

This opinion is certainly contrary to the Uniform Trust Code's provision and makes it very difficult to have a court in the state where the trust is administered to have jurisdiction over all of the trust beneficiaries. The Texas Supreme Court should hear a case dealing with personal jurisdiction over a trust beneficiary to clarify whether in rem jurisdiction is different from in personam jurisdiction and what jurisdiction Texas courts have over trust beneficiaries concerning trust administration issues.

IV. INTERIM RELIEF IN TRUST PROCEEDINGS

A. Issue

Parties in fiduciary litigation often desire drastic interim relief, such as injunctions and receiverships. These types of remedies are generally difficult to obtain under common law due to the requirement that there be no adequate remedy at law and that there will irreparable harm unless such a remedy is awarded. However, the Texas Trust Code has a specific statute that discusses the types of relief that a court can award. The issue is whether this statute changes the common law and allows drastic interim remedies without the common law requirements for same.

B. Texas Trust Code Provision

Texas Trust Code Section 114.008 states:

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

Tex. Prop. Code § 114.008(a).

Receiverships are regarded as one of the harshest remedies known to civil law. *See Spiritas v. Davidoff*, 459 S.W.3d 224, 232 (Tex. App.—Dallas 2015, no pet.) ("Receivership is an extraordinarily harsh remedy."); *Parr v. First State Bank*, 507 S.W.2d 579, 583 (Tex. Civ. App.—San Antonio 1974, no writ) ("No more radical remedy could be devised."). Because it is a harsh remedy, to obtain a receivership, an applicant must show that the property or fund in litigation is in danger of being lost, removed, or materially injured. *B & W Cattle Co. v. First Nat'l. Bank of Hereford*, 692 S.W.2d 946, 947 (Tex. App.—Amarillo 1985). There must be a showing of no lesser alternative remedies, and there must be evidence of serious injury without the receivership. *Chapa v. Chapa*, No. 04-12-00519-CV, 2012 Tex. App. LEXIS 10702, *12 (Tex. App.—San Antonio Dec. 28, 2012, no pet.).

Nothing in the Property Code indicates that the Legislature intended to abandon the traditional requirements for a receivership when it authorized courts to appoint receivers as a remedy for a breach of

trust—especially not in the context of preliminary relief, when the liability allegations have not been fully litigated and the only justification for temporary relief is protection of the status quo. Rather, the Legislature was simply giving a non-exhaustive laundry list of remedies available to remedy a trustee's breach. The Legislature's intent was not to provide standards on what the procedural and substantive requirements were for each listed remedy.

Under the Code Construction Act, without regard to whether the statute is ambiguous, a court may consider the: "…(4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction…" Tex. Gov't Code § 311.023. In construing this statute, a court may consider the common law before the statute, which required a finding of harm, the law on similar subjects (such as executors and estates), which requires a finding of harm, and the consequences of the plaintiff's construction, which would allow a trial court to effectively remove a trustee against the settlor's intent when there is no harm in allowing the serving trustee to continue.

C. Case Examples

In *Moody Nat'l Bank v. Moody*, a beneficiary sued a trustee regarding several allegations of breach of fiduciary duty. No. 14-21-00096-CV, 2022 Tex. App. LEXIS 7844 (Tex. App.—Houston [14th Dist.] October 25, 2022, pet. filed). Six months later, the beneficiary sought a receivership, and the trial court granted same. The trustee appealed the order, and the court of appeals affirmed the order on one basis concerning an alleged failure to disclose a marital property agreement entered between the settlor and his wife. Importantly, regarding the trustee's argument that there was no evidence of any danger of loss, removal, or material injury to the trust property, the court held that it did not have to address that issue because the receiver was appointed under Texas Property Code Section 114.008(a)(5), which did not require any of the traditional elements for receivership relief. *Id*. at *17-18 and n. 12. Section 114.008(a)(5) of the Texas Property Code, that provides in part: "(a) To remedy a breach of trust that has occurred or might occur, the court may: … (5) appoint a receiver to take possession of the trust property and administer the trust." Tex. Prop. Code § 114.008(a)(5). So, the court of appeals held that Texas Trust Code Section 114.008 did not require applicants for receivership to establish the traditional elements for receivership relief.

For further example, in *Estate of Benson*, a beneficiary of a trust sought to remove the trustee, her father, for allegedly violating his fiduciary duties in administering the trust assets. No. 04-15-00087-CV, 2015 Tex. App. LEXIS 9477 (Tex. App.—San Antonio Sept. 9, 2015, pet. dism. by agr.). The trustee's relationship with the beneficiary and her adult children (who were remainder beneficiaries under the trust) became strained in December of 2014, when, according to the beneficiary, the trustee began exhibiting troubling behavior with them, as well as other business associates involved in managing trust assets. In a two-day evidentiary hearing, the beneficiary presented evidence that her father had cut off contact with her, banned her and her children from the trust's assets' facilities, and made a substantial and abrupt withdrawal from Lone Star Capital Bank, which the trust owned a 97% interest in and which placed the bank in an urgent situation. The beneficiary also presented evidence that the trustee had secretly relocated the office of the trust's bookkeeper to the trustee's condominium without telling anyone where she was going. Although the trustee himself did not testify at the hearing, he presented evidence that his relationship with the beneficiary was strained and that he no longer wanted any contact with them.

Following the hearing, the trial court entered an order appointing two temporary co-receivers to take control of the trust and the estate that created the trust, and further authorized the co-receivers to manage the business and financial affairs of the trust and essentially perform any actions necessary to preserve the trust's value. A few days later, the court issued a temporary injunction enjoining the trustee from taking any action related to the trust.

The court of appeals rejected the trustee's challenges to the appointment of temporary co-receivers and affirmed that part of the trial court's order. The court determined that the trial court had some evidence that there was a breach of trust to support its decision to appoint co-receivers, relying on the evidence presented at the temporary injunction hearing. The trustee not only had a duty to exercise the care and judgment that he would exercise when managing his own affairs, but also a duty to fully disclose any material facts that *might* affect the beneficiary's rights. Rejecting the trustee's arguments that appointment of co-receivers could not be defended under requirements of equity, the court noted that the beneficiary had sought receivers under section 114.008(a)(5) of the Texas Property Code, not under equitable grounds. Under the statute, a movant need not prove the elements of equity; thus, the beneficiary in this case was not required to produce evidence of irreparable harm or lack of another remedy.

In another case involving a receivership appointment over trust assets, *Elliott v. Weatherman*, the court recognized the Texas Trust Code as providing separate authority for receivership appointments but held that even if a specific statutory provision authorized a receivership, "a trial court should not appoint a receiver if another remedy exists at law or in

equity that is adequate and complete." 396 S.W.3d 224, 228 (Tex. App.—Austin 2013, no pet.) (holding trial court abused its discretion in appointing a receiver over the property and citing cases not involving receiverships over trust property).

D. Conclusion

There is now a conflict in the courts of appeals on this subject. Some courts correctly hold that even if a specific statutory provision authorizes a receivership, a trial court should not appoint a receiver without a finding of harm or danger and only in the absence of another remedy, either legal or equitable. *See, e.g., In re Estate of Hallmark*, 629 S.W.3d 433, 437 (Tex. App.—Eastland 2020, no pet.) ("Even if a specific statutory provision authorizes a receivership, a trial court should not appoint a receiver if another remedy exists, either legal or equitable. 'Rather, receivership is warranted only if the evidence shows a threat of serious injury to the applicant.'"); *Elliott v. Weatherman*, 396 S.W.3d 224, 228 (Tex. App.—Austin 2013, no pet.) (addressing receivership against co-trustees and holding: "Even if a specific statutory provision authorizes a receivership, a trial court should not appoint a receiver if another remedy exists at law or in equity that is adequate and complete" and also requiring showing of "great emergency or imperative necessity…"); *Benefield v. State*, 266 S.W.3d 25, 31 (Tex. App.—Houston [1st Dist.] 2008, no pet.) ("Even if a specific statutory provision authorizes a receivership, as in this case, a trial court should not appoint a receiver if another remedy exists, either legal or equitable. Rather, receivership is warranted only if the evidence shows a threat of serious injury to the applicant."); *Fortenberry v. Cavanaugh*, No. 03-04-00816-CV, 2005 Tex. App. LEXIS 4665, *6 (Tex. App.—Austin June 16, 2005, no pet.) ("[A] receiver will not be appointed if another remedy exists at law or in equity that is adequate and complete, even if receivership is authorized under a specific statutory provision, as in this case."). Some courts hold that the Texas Property Code allows a receivership on a showing of a potential breach of duty where there is no harm or danger to trust assets. *See, e.g., Moody Nat'l Bank v. Moody*, 2022 Tex. App. LEXIS 7844; *In Re Estate of Benson*, No. 04-15-00087-CV, 2015 Tex. App. LEXIS 9477, 2015 WL 5258702 (Tex. App.—San Antonio Sept. 9, 2015, pet. dism'd) (mem. op.).

Unfortunately, the Texas Supreme Court denied petition for review on this issue that is important to Texas jurisprudence. The Texas Supreme Court should hear a case dealing with interim relief under Texas Trust Code 114.008 to clarify whether the movant has the burden to establish the common law's ordinary requirements for the listed relief.

V. PAYMENT OF ATTORNEY'S FEES IN TRUST AND ESTATE PROCEEDINGS

A. Issue

Executors and trustees often get sued for breaching fiduciary duties and seeking removal relief. Executors and trustees usually use estate or trust funds to retain and pay counsel to defend those claims. Do those parties have the right to do so or are they breaching fiduciary duties by paying counsel to defend their conduct? Under what conditions can an executor or trustee use estate or trust funds to pay counsel in the interim to defend breach of fiduciary duty claims? *See, e.g.,* David F. Johnson, *Trustees' Ability To Retain And Compensate Attorneys In Texas*, 16 TEX TECH EST PLAN COM PROP LJ 97 (2023).

Certainly, an executor of an estate can retain counsel for various purposes, though the Texas Estates Code does not expressly provide for same in the context of defending a breach of fiduciary duty suit. Texas Estate's Code Section 404.0037 states that if an independent executor defends a removal action in good faith that the reasonable and necessary attorney's fees for the defense "shall be allowed out of the estate." Tex. Est. Code Ann. § 404.0037(a). The Texas Estate's Code's provision for the payment of attorney's fees in suits to remove an executor has been interpreted as not allowing an executor to use estate funds to pay attorneys in the interim. *In re Nunu*, No. 14-16-00394-CV, 2017 Tex. App. LEXIS 10306 (Tex. App.—Houston [14th Dist.] November 2, 2017, pet. denied); *Klein v. Klein*, 641 S.W.2d 387, 387 (Tex. App.—Dallas 1982, no writ). Yet, estate representatives routinely violate this authority when sued.

Trustees have the statutory and common-law right to retain attorneys for a variety of matters. The first place to look regarding a trustee's right to retain counsel is the trust document itself. Tex. Prop. Code §113.001, 113.051. *See Tolar v. Tolar*, No. 12-14-00228-CV, 2015 Tex. App. LEXIS 5119 (Tex. App.—Tyler May 20, 2015, no pet.) ("The powers conferred upon the trustee in the trust instrument must be strictly followed."); *Myrick v. Moody Nat'l Bank*, 336 S.W.3d 795, 801 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (terms of trust instrument may limit or expand trustee powers supplied by the Trust Code). Normally, trust documents expressly allow trustees to retain counsel or are silent on the matter.

After reviewing the trust document, a trustee should be aware of statutory law governing its powers to retain counsel. Under the Texas Trust Code, "A trustee may employ attorneys, accountants, agents, including investment agents, and brokers reasonably necessary in the administration of the trust estate." Tex. Prop. Code § 113.018. In a different provision, the Texas legislature specifically recognizes the trustee's right to reimbursement from trust funds:

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

Tex. Prop. Code § 114.063.

Texas Trust Code section 114.064 provides that, "[i]n any proceeding under this code, the Court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." Tex. Prop. Code § 114.064.

Further, a plaintiff or defendant 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.

These statutes largely discuss retaining counsel to represent trust interests when the trustee is not being sued for breach of duty. Further, they do not specifically address the payment of fees *in the interim* of such a dispute.

There is little authority in Texas that is directly on point on whether a trustee is entitled to compensate attorneys from trust assets in defending claims of breach of fiduciary duty in the interim, i.e., before the end of the litigation. Some authority seems to suggest that a trustee has the ability to do so. *See, e.g., In the Guardianship of Hollis*, No. 14-13-00659-CV, 2014 Tex. App. LEXIS 12038 (Tex. App.—Houston [14th Dist.] November 4, 2014, no pet.).

However, there is authority that a trustee defending against a breach of duty claim should not have access to trust assets to pay for its defense until a court determines that it did not violate a duty. *See, e.g., Moody Found, v. Estate of Moody,* No. 03-99-0034-CV, 1999 Tex. App. LEXIS 8597, at *11 (Tex. App. — Austin Nov. 18, 1999, pet. denied) (not designated for publication) ("A trustee is not entitled to reimbursement for expenses that do not confer a benefit upon the trust estate, such as expenses related to litigation resulting from the fault of the trustee." (citing 3 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, SCOTT ON TRUSTS § 188.6, at 70 (4th ed. 1988)). *See* Joyce C. Moore, Recovering Attorney Fees In Probate And Trust Litigation, State Bar of Texas, Advanced Estate Planning and Probate Course, June 7, 2017. See also Mary C. Burdette, Enforcing Beneficiaries' Rights, COLLIN COUNTY PROBATE BAR, March 11, 2011. If a trustee uses trust assets to pay for its attorney's fees in the interim, it risks a finding of breaching fiduciary duties by doing so where the trustee is later found liable on the underlying claim. *Stone v. King*, No. 13-98-022-CV, 2000 Tex. App. LEXIS 8070, 2000 WL 35729200, at *8 (Tex. App.—Corpus Christi Nov. 30, 2000, pet. denied).

B. Case Examples

In *In re McIntire*, trust beneficiaries sued a trustee for multiple allegations of breach of fiduciary duty. No. 07-22-00249-CV, 2023 Tex. App. LEXIS 60 (Tex. App.—Amarillo January 5, 2023, original proceeding). The trust beneficiaries sought an order requiring the trustee to reimburse trust assets used to pay his attorneys and also ordering him to deposit trust assets into the registry of the court. The trial court denied those motions, and the beneficiaries filed a petition for writ of mandamus. The beneficiaries argued that there was not an adequate remedy at law (which is a requirement for mandamus relief) because the trustee did not have sufficient personal assets to reimburse the trust if he lost the case. The court disagreed with the factual component of this argument:

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

Id.

C. Conclusion

A California court has an interesting procedure for a fiduciary defendant accessing funds to pay for a defense. In *People Ex Rel Harris v. Shine*, the trustee petitioned for advance fees from the trust for defense of a petition for removal, subject to repayment if the trustee was ultimately found not entitled to indemnity. 224 Cal. Rptr.3d. 380 (2017). The court noted that the issue was the trustee's "… entitlement to interim or pendente lite fees (i.e. fees for ongoing litigation not yet resolved on the merits)." *Id*. The court noted that

this issue is not well developed in the case law. *Id*. at 390. The court stated the following standard:

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

Id. Under this procedure, presumably, a trustee should file a motion to seek authority to use trust funds to pay attorneys based upon the factors set out in the opinion. Absent such an order allowing the payment of fees, the trustee would not be authorized to pay fees in the interim.

At this point there is no Texas Supreme Court precedent on whether a trustee or executor can use estate or trust funds to pay counsel in the interim to defend breach claims. The court should grant a petition for review or a mandamus to clarify whether and under what circumstances that a trustee or executor can use trust or estate assets to pay fees in the interim. Further, there could also be clarification on whether and under what circumstances a trustee or executor should use trust or estate funds to pay a beneficiary's legal expenses.

VI. ENFORCEMENT OF NO-CONTEST CLAUSES

A. Issue

Texas courts routinely discuss the importance of following the settlor's or trustor's intent in following the terms of a will or trust. Courts are not generally allowed to rewrite wills and trusts just because they want to do so. Wills and trusts also routinely have no contest or in terrorem clauses that threaten to disinherit a beneficiary who challenges the underlying document. However, some clauses go even further and threaten to disinherit a beneficiary who challenges a trustee's or executor's conduct or actions. Under what circumstances should such a clause be enforced, if at all?

A no contest provision, also known as a forfeiture clause or in terrorem clause, makes the distributions from a last will and testament or trust conditional on a named beneficiary not challenging or disputing the validity of the instrument. *Di Portanova v. Monroe*, 402 S.W.3d 711,715 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

The Texas legislature has also addressed no contest provisions by enacting forfeiture statutes in the Texas Estates Code and Texas Trust Code. The no contest statute applicable to trusts, Section 112.038 of the Texas Trust Code, states:

> (a) A provision in a trust that would cause a forfeiture of or void an interest for bringing any court action, including contesting a trust, is enforceable unless in a court action determining whether the forfeiture clause should be enforced, the person who brought the action contrary to the forfeiture clause establishes by a preponderance of the evidence that:
>
> (1) just cause existed for bringing the action; and (2) the action was brought and maintained in good faith.
>
> (b) This section is not intended to and does not repeal any law, recognizing that forfeiture clauses *generally* will not be construed to prevent a beneficiary from seeking to compel a fiduciary to perform the fiduciary's duties, seeking redress against a fiduciary for a breach of the fiduciary's duties, or seeking a judicial construction of a will or trust.

Tex. Prop. Code § 112.038 (emph. added). Note that subsection (b) states that "generally" no contest clauses will not prevent a beneficiary from bringing certain claims.

Section 254.005 of the Texas Estates Code, which applies to no contest provisions in a will, states:

> (a) A provision in a will that would cause a forfeiture of or void a devise or provision in favor of a person for bringing any court action, including contesting a will, is enforceable unless in a court action determining whether the forfeiture clause should be enforced, the person who brought the action contrary to the forfeiture clause establishes by a preponderance of the evidence that: (1) just cause existed for bringing the action; and (2) the action was brought and maintained in good faith.
>
> (b) This section is not intended to and does not repeal any law recognizing that forfeiture clauses *generally* will not be construed to prevent a beneficiary from seeking to compel a fiduciary to perform the fiduciary's duties, seeking redress against a fiduciary for a

breach of the fiduciary's duties, or seeking a judicial construction of a will or trust.

Tex. Est. Code 254.005. Once again, note that subsection (b) states that "generally" no contest clauses will not prevent a beneficiary from bringing certain claims.

B. Case Example

In *Ard v. Hudson*, a beneficiary sued testamentary trustees and executors for breach of fiduciary duty and also sought an accounting, temporary injunctive relief, and a receiver. No. 02-13-00198-CV, 2015 Tex. App. LEXIS 8727 (Tex. App.—Fort Worth August 20, 2015). The trial court granted a summary judgment for the defendants on the basis of a no-contest clause. The court of appeals held that a breach of a forfeiture clause will be found only when the beneficiary's or devisee's actions fall clearly within the express terms of the clause. The court mentioned other precedent where challenging a fiduciary did not trigger a no-contest clause. The defendants agreed with that, but argued that the beneficiary's requests for temporary and permanent injunctive relief and her motions to suspend her brothers as co-trustees and to appoint a receiver triggered the clause. The court held: "[The] inherent right [to challenge a fiduciary] would be worthless absent the beneficiary's corresponding inherent right to seek protection during such an ongoing challenge of what is left of his or her share of the estate or trust assets, and any income thereon, that the testator or grantor, as the case may be, intended the beneficiary to have." *Id*. The defendants also argued that a condition precedent barred the beneficiary's claims: "Each benefit conferred herein is made on the condition precedent that the beneficiary shall accept and agree to all provisions of this Will." *Id*. The court rejected this argument, holding: "We construe the condition precedent language located within the forfeiture clause to be consistent with the forfeiture clause as a whole." *Id*. The court reversed the summary judgment.

The executors/trustees then filed a petition for review with the Texas Supreme Court. The Texas Supreme Court accepted the case and set oral argument. The Court's staff attorney described the issue in the case as: "[t]he principal issue is whether a will beneficiary who seeks an accounting, alleges breach of fiduciary duty against co-executors and seeks a receiver violates a forfeiture clause." The petitioners argued that the appellate court's opinion incorrectly allowed a beneficiary to artfully describe will-violating conduct as a breach of fiduciary duty claim in order to side step the impact of a no-contest clause. They argue that doing so will encourage "vexatious or prolonged interfamilial litigation." Unfortunately, the parties in the *Ard v. Hudson* case settled the case before oral argument and before the Court issued an opinion. However, the fact that the Texas Supreme Court accepted the case means that the Court may support a more aggressive approach to no contest clauses than many of the courts of appeals.

C. Conclusion

A beneficiary under a will or trust receives a gift. Settlors/trustors can generally attach whatever strings to that gift that they want. One such string is that the beneficiary cannot challenge certain acts or actions by a trustee or executor. When a beneficiary violates the clear and unambiguous terms of a no contest clause, when can a court simply ignore the no contest clause and refuse to enforce it? How are courts to construe those clauses? The Texas Supreme Court should accept a case dealing with these important issues.

VII. ENFORCEMENT OF EXCULPATORY CLAUSES IN TRUST AND ESTATE PROCEEDINGS

A. Issue

There are very important procedural and substantive issues involved in litigating exculpatory clauses. Who has the burden to plead and prove an exculpatory clause defense and what elements are involved in such a defense? If good faith is an issue, does that involve a subjective and objective test?

It is common for settlors and trustors to execute trust and will documents that contain exculpatory clauses. An exculpatory clause is one that forgives the trustee for some action or inaction. Generally, these types of clauses can be enforceable in Texas and can limit a trustee's or executor's duty. *See Dolan v. Dolan*, No. 01-07-00694-CV, 2009 Tex. App. LEXIS 4487 (Tex. App.—Houston [1st Dist.] June 18, 2009, pet. denied).

In *Texas Commerce Bank v. Grizzle*, the Texas Supreme Court held that public policy as expressed by the legislature in the Trust Code allowed relieving a corporate trustee from liability for self-dealing except for what was specified in sections 113.052 and 113.053. 96 S.W.3d 240, 249 (Tex. 2002). In *Grizzle*, a case involving alleged self-dealing by the trustee, the Court held that "the trust Code authorizes a settlor to exonerate a corporate trustee from almost all liability for self-dealing," such as misapplying or mishandling trust funds, including failing to promptly reinvest trust monies. *Id*. at 250; *see also Clifton v. Hopkins*, 107 S.W.3d 755 (Tex. App.—Waco 2003, no pet.).

In response to *Grizzle*, the Texas Legislature amended the Texas Property Code, and it now limits a settlor's ability to exculpate a trustee. Section 111.0035 provides that the terms of a trust may not limit a trustee's duty to respond to a demand for an accounting or to act in good faith. Tex. Prop. Code Ann. §111.035(b)(4). Additionally, Texas Property Code section 114.007 provides: "(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 of liability for: (1) a breach of trust committed: (A) in bad faith; (B) intentionally; or (C) with reckless indifference to the interest of a beneficiary; or (2) any profit derived by the trustee from a breach of trust." Tex. Prop. Code Ann. §114.007(a).

B. Case Examples

The issue of whether an exculpatory clause argument was an affirmative defense, and who had the burden to establish good faith was discussed in *Kohlhausen v. Baxendale*, No. 01-15-00901-CV, 2018 Tex. App. LEXIS 1828 (Tex. App.—Houston [1st Dist.] March 13, 2018, no pet.). The court affirmed a summary judgment for a trustee on the basis of an exculpatory clause in a trust document. A mother created a testamentary trust for the benefit of her son Kelley William Joste. The will, which named Kelley as trustee and beneficiary of his trust, also set forth an exculpatory clause that protected the trustee regarding administration.

After the mother died, Kelley exercised his right to become the sole trustee of his trust. After Kelley died, his estranged daughter received control of the trust's assets. She then died. Her executor then sued her father's executor for the father allegedly breaching his fiduciary duty. The father's executor filed a motion for summary judgment and argued that the claims should be dismissed because the will's exculpatory clause relieved the trustee from liability for any actions or omissions "if done in good faith and without gross negligence." *Id*. After a hearing, the trial court granted the motion.

The court of appeals held that an exculpatory clause argument is an affirmative defense. "A defendant urging summary judgment on an affirmative defense is in the same position as a plaintiff urging summary judgment on a claim," and that the party asserting an affirmative defense has the burden of pleading and proving it. *Id*. The court held that after the trustee established the existence of the exculpatory clause, the burden shifted to the non-movant to bring forward evidence negating its applicability. The court stated:

> In this case, Baxendale pleaded the exculpatory clause and attached a copy of the Will containing the clause to his summary judgment motion. The Will plainly states that Kelley is not liable for any acts or omissions so long as such conduct was done "in good faith and without gross negligence." Because Baxendale established that he was entitled to summary judgment as a matter of law on all of Kohlhausen's claims based on the plain language of the Will, Kolhausen was required to bring forth more than a scintilla of evidence creating a fact issue as to the applicability of the clause, i.e., evidence that Kelley's acts or omissions were done in bad faith or with gross negligence.
>
> ….
>
> In her affidavit, Kohlhausen averred that after reviewing the financial documents available to her she was "unaware of any evidence that Kelley made any distributions to Valley from the Trust between 1997 and 2012." Kohlhausen further averred: "I have reviewed the account statements produced by [Baxendale]. These statements are incomplete and I am unable to ascertain from them an accurate account of what receipts and distributions were made from the Trust during the time Kelley was trustee." Kohlhausen also stated that she was "unaware of any documentation to suggest Kelley ever contacted Valley to inquire about her support needs during the time he was trustee."
>
> ….
>
> Kohlausen's affidavit does not raise a fact issue as to whether Kelley failed to disclose information regarding the Trust to Valleyessa, make distributions to Valleyssa, consider her support needs, or document his activities as trustee. The paucity of evidence in this case is a result of the fact that both principals to the dispute have passed away. There is no one to depose and no affidavits to file establishing key facts. Moreover, the terms of the Will provided that Valleyessa was a contingent beneficiary, and Kelley, as the primary beneficiary, was allowed but not required to make a distribution to Valleyessa. Kohlhausen's attorney is reduced to an attempt to build a case on the scant records left behind by Kelley. Such evidence amounts to no more than a scintilla and is insufficient to even establish what actions Kelley took or failed to take as trustee, much less that Kelley acted in bad faith or with gross negligence.

Id. The court held that because the summary judgment evidence failed to raise an issue of material fact as to whether any of the father's alleged acts or omissions were taken in bad faith for involved gross negligence, the plaintiff failed to meet her burden of establishing the inapplicability of the exculpatory clause to such acts or omissions and affirmed the summary judgment for the defendant.

Another recent case discussed the issue of whether the good faith test involves an objective component or just a subjective component. In *Marshall v. Marshall*,

the Marshall Grandchildren's Trust ("Trust") was established in 1987 for Preston Marshall's benefit, with his parents Elaine and E. Pierce Marshall as trustees. No. 14-23-00276-CV, 2025 Tex. App. LEXIS 8751 (Tex. App.—Houston [14th Dist.] November 13, 2025, no pet. history). From 2007-2014, the Trust distributed income to Preston in cash. In 2015, after Preston demanded an accounting and challenged Elaine's petition to appoint a successor trustee, Elaine made an in-kind distribution by using Trust income to pay down Preston's debt to another trust benefiting Elaine. In 2016, Elaine made another in-kind distribution of stock. Preston sued Elaine concerning her actions as trustee. On cross-motions for summary judgment, the trial court granted a partial summary judgment in Preston's favor on liability and denied Elaine's motion. A jury found in Preston's favor on most of the issues submitted to it, awarding about $350,000 in actual damages.

The court addressed Elaine's exculpatory-clause defense and held that good faith is purely a subjective test, but held that there was evidence to support a finding of subjective bad faith:

> The parties disagree further about the meaning of "good faith" for determining what evidence satisfies the exculpatory clause. Elaine contends it is purely subjective: "honesty in belief or purpose." Preston contends there should be an objective component such that any subjective belief must also be "reasonable in light of existing law." In construing an undefined term to determine the settlor's intent, we give common words their plain meaning and may consult dictionary definitions. In consulting various dictionary definitions, our supreme court has noted that definitions of good faith "focus overwhelmingly on subjective state of mind." In determining the meaning of good faith in a statute, the court rejected imposing an objective standard and relied on its earlier decision concerning a surety agreement, holding that "good faith" refers to conduct that is "honest in fact and is free of both improper motive and willful ignorance of the facts at hand."
>
> Lee involved an award of attorney's fees that depended upon whether a party's position in a lawsuit was maintained in good faith. Requiring a party's position in a lawsuit to be "reasonable in light of existing law" is consistent with the nature of the proceedings (a lawsuit) and the award to be gained (attorney's fees). But we cannot rely on public policy, as this court did in Lee when construing a statute, to add a requirement of "reasonable in light of existing law" to the words used by the settlor in a trust.
>
> As noted above, a trustee ordinarily may be liable for breach of fiduciary duties even when her actions are made in good faith if her actions nonetheless fall below an objective standard of reasonableness. To give effect to the exculpatory clause here, as the settlor intended, we cannot impose an objective or reasonableness standard for the trustee's good faith mistakes of law, mistakes of fact, or errors of judgment. We follow the Supreme Court of Texas for the common and ordinary meaning of good faith: honesty in fact and free of both improper motive and willful ignorance of the facts at hand. With this definition in mind, we review the evidence filed with the parties' competing motions for summary judgment.

Id. The court then held that the trial court erred in grating Preston's summary judgment because there was evidence of good faith by Elaine that, if believed, would trigger the exculpatory clause defense.

C. Conclusion

The Texas Supreme Court should grant a case dealing with exculpatory clause issues in trusts and wills. The Court should address whether an exculpatory clause argument is an affirmative defense, and if so, who has the burden to establish its existence and the existence of good faith by the trustee/executor. The Court should also address what the test is for good faith in the context of trustees and executors: subjective and objective components or just a subjective component?

VIII. AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

A. Issue

Does Texas law recognize an aiding and abetting breach of fiduciary duty claim? If so, what are its elements? If not, does Texas law recognize knowing participation in breach of fiduciary duty and how is that different from aiding and abetting?

B. Case Example

In *First United Pentecostal Church of Beaumont v. Parker*, a church hired an attorney to defend it against sexual abuse allegations. 2017 Tex. LEXIS 295 (Tex. March 17, 2017). During the same time, the church also engaged the attorney to assist in a hurricane/insurance claim. When the insurance company offered to pay over $1 million to settle the claim, the attorney generously suggested that the church leave those funds in the attorney's trust account to assist with creditor protection. The attorney then withdrew those funds in 2008 and used them for his personal expenses and the expenses of his firm. The attorney had a contract attorney working with his firm. The contract attorney did not know about the improper use of the money at the time that it was done. Rather, he learned about it in

2010, but failed to disclose that information to the client. Eventually, the contract attorney did disclose the information and sent a letter wherein he repented and admitted to breaching his fiduciary duty. The original attorney fled to Arkansas, but was later caught. He pled guilty to misappropriation of fiduciary property and received a fifteen-year sentence.

Not in the forgiving mood, the church then filed a lawsuit against the attorney, his firm, and the contract attorney for a number of causes of action, including breach of fiduciary duty, conspiracy to breach fiduciary duty, and aiding and abetting breach of fiduciary duty. The contract attorney filed a no-evidence motion for summary judgment, mainly arguing that there was no evidence that his conduct caused any damages to the client. Basically, he argued that the deed was already done when he learned of the attorney's theft and his assistance in covering up the theft did not cause any damage. The trial court granted the motion for summary judgment, and the client appealed. The court of appeals affirmed the judgment, though there was a dissenting justice.

The court reviewed the aiding and abetting breach of fiduciary duty claim. The court first held that the client did not adequately raise that claim in the summary judgment proceedings and waived it. In any event, assuming such a claim existed and assuming it was adequately raised, the court held that there was not sufficient evidence to support such a claim in this case:

> Moreover, as noted above, although we have never expressly recognized a distinct aiding and abetting cause of action, the court of appeals determined that such a claim requires evidence that the defendant, with wrongful intent, substantially assisted and encouraged a tortfeasor in a wrongful act that harmed the plaintiff. Here the church references no evidence that Parker assisted or encouraged Lamb in stealing the church's money. In his response to the PSI report, Lamb disclaimed Parker's involvement, and Parker clearly and consistently disclaimed knowing that Lamb was taking the church's money from the firm's trust account until the summer of 2010 after the money was gone. While it is true that Parker helped Lamb cover up the theft, this cannot be the basis for a claim against Parker for aiding and abetting Lamb's prior theft or misapplication of the church's money when there is no evidence that Parker was aware of Lamb's plans or actions until after they had taken place. *See Juhl*, 936 S.W.2d at 644-45 (noting that courts should look to the nature of the wrongful act, kind and amount of assistance, relation to the actor, defendant's presence while the wrongful act was committed, and defendant's state of mind (citing RESTATMENT (SECOND) OF TORTS § 876 cmt. d (1977))). As we discussed above, Lamb spent all of the church's money before Parker became involved, and there is no evidence the church was harmed by the only wrongful act in which Parker assisted or encouraged Lamb—covering up the fact that Lamb had spent the church's money.

Id.

C. Conclusion

The court held that it had previously expressly stated that Texas had not adopted an aiding and abetting claim at this time. The court cited to its previous opinion of *Juhl v. Airington*, 936 S.W.2d 640, 643 (Tex. 1996), wherein the court held that there was a question in Texas as to whether there is a concert of action theory. That case dealt with whether a group of parties were responsible for a negligence claim and did not address a breach of fiduciary duty claim.

This case highlights a rather confusing area of law in Texas. The Texas Supreme Court has previously held that there is a claim for knowing participation in a breach of fiduciary duty in Texas. *See Kinzbach Tool Co. v. Corbett-Wallace Corp*., 138 Tex. 565, 160 S.W.2d 509, 514 (1942). The general elements for a knowing-participation claim are: 1) the existence of a fiduciary relationship; 2) the third party knew of the fiduciary relationship; and 3) the third party was aware it was participating in the breach of that fiduciary relationship. *Meadows v. Harford Life Ins. Co*., 492 F.3d 634, 639 (5th Cir. 2007); *Straehla v. AL Glob. Servs., LLC*, 619 S.W.3d 795, 804 (Tex. App.—San Antonio 2020, pet. denied); *Darocy v. Abildtrup*, 345 S.W.3d 129, 137-38 (Tex. App.—Dallas 2011, no pet.).

Depending on how the Texas Supreme Court rules in the future, there may be a recognized aiding-and-abetting breach-of-fiduciary-duty claim in Texas. The Texas Supreme Court has stated that it has not expressly adopted a claim for aiding and abetting outside the context of a fraud claim. *See Ernst & Young v. Pacific Mut. Life Ins. Co*., 51 S.W.3d 573, 583 n. 7 (Tex. 2001); *West Fork Advisors v. Sungard Consulting*, 437 S.W.3d 917 (Tex. App.—Dallas 2014, no pet.). Notwithstanding, Texas courts have found such an action to exist. *See Hendricks v. Thornton*, 973 S.W.2d 348 (Tex. App.—Beaumont 1998, pet. denied); *Floyd v. Hefner*, 556 F.Supp.2d 617 (S.D. Tex. 2008).

One court identified the elements for aiding and abetting as the defendant must act with unlawful intent and give substantial assistance and encouragement to a wrongdoer in a tortious act. *West Fork Advisors*, 437 S.W.3d at 921. Another court held that the elements of a civil aiding-and-abetting claim are: (1) the primary

actor committed a tort; (2) the defendant knew that the primary actor's conduct constituted a tort; (3) the defendant intended to assist the primary actor; (4) the defendant gave the primary actor assistance or encouragement; and (5) the defendant's conduct was a substantial factor in causing the tort. *Immobiliere Jeuness Establissement v. Amegy Bank Nat'l Ass'n*, 525 S.W.3d 875, 882 (Tex. App.—Houston [14th Dist.] 2017, no pet.). One court has held that the substantial assistance element differentiates an aiding-and-abetting claim from a knowing-participation claim. *Reynolds v. Sanchez Oil & Gas Corp*., No. 01-18-00940-CV, 2023 Tex. App. LEXIS 8903 (Tex. App.—Houston [1st Dist.] November 30, 2023, no pet.).

Other courts have held that there is no such claim in Texas because there is no statute that recognizes it and the Texas Supreme Court has not recognized it. *Id.; Hampton v. Equity Tr. Co.*, 607 S.W.3d 1, 5 (Tex. App.—Austin 2020, pet. denied) ("In the absence of recognition by the Supreme Court of Texas or the Legislature, we conclude that a common-law cause of action for aiding and abetting does not exist in Texas."); *Thibodeaux v. Starx Inv. Holdings, Inc.*, No. 03-20-00613-CV, 2021 Tex. App. LEXIS 8576, at *38 n.8 (Tex. App.—Austin Oct. 22, 2021, pet. dism'd) (mem. op.).

There is not any particularly compelling guidance on whether these claims (knowing participation and aiding and abetting) are the same or different or whether they are recognized in Texas or not. And if they do exist and are different, what differences are there regarding the elements of each claim? The Texas Supreme Court still has much to explain related to this important area of law.

IX. THE PRESUMPTION OF UNFAIRNESS FOR SELF-INTERESTED TRANSACTIONS

A. Issue

The Texas Supreme Court should accept cases dealing with self-interested transactions in fiduciary cases and resolve whether there is a presumption of unfairness and, if so, what that presumption means.

Where a plaintiff challenges a fiduciary's conduct that does not involve a self-interested transaction, the plaintiff has the burden to prove that the conduct was improper. *White v. White*, 704 S.W.3d 250 (Tex. App.—El Paso 2024, no pet.). So, in this circumstance, the plaintiff has the initial burden of proof (persuasion and production) to prove each element of a breach of fiduciary duty claim.

As part of a duty of loyalty, a fiduciary should generally only benefit from the relationship by being fairly compensated where allowed. where a transaction involves self-dealing, a fiduciary in Texas usually has the burden of proof to establish that the transaction was fair to the principal. "Texas courts have applied a presumption of unfairness to transactions between a fiduciary and a party to whom he owes a duty of disclosure, thus casting upon the profiting fiduciary the burden of showing the fairness of the transactions." *Collins v. Smith,* 53 S.W.3d 832, 840 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (citing *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507-08 (Tex. 1980); *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261 (Tex. 1974); *Int'l. Bankers Life Ins. Co. v. Holloway,* 368 S.W.2d 567, 576 (Tex. 1963).); *see also See Harrison v. Harrison Interests,* No. 14-15-00348-CV, 2017 Tex. App. LEXIS 1677 (Tex. App.—Houston [14th Dist.] February 28, 2017, no pet. history). Where a party attacks a transaction between a fiduciary and a beneficiary, it is the fiduciary's burden of proof to establish the fairness of the transaction. *Fitz-Gerald v. Hull*, 150 Tex. 39, 49, 237 S.W.2d 256, 261 (1951); *Harrison,* 2017 Tex. App. LEXIS 1677. *See also Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, 20 S.W.3d 692, 699 (Tex. 2000) (considering whether a release agreement could bar claims arising from a fiduciary relationship and holding that the presumption of unfairness or invalidity applied); *Roels v. Valkenaar*, No. 03-19-00502-CV, 2020 Tex. App. LEXIS 6684, 2020 WL 4930041, at *6 (Tex. App.—Austin Aug. 20, 2020, no pet.) (mem. op.).

To establish the fairness of a transaction between a fiduciary and his principal, relevant factors include: (1) there was full disclosure regarding the transaction, (2) the consideration (if any) was adequate, (3) the beneficiary had the benefit of independent advice, (4) the party owing the fiduciary duty benefited at the expense of the beneficiary, and (5) the fiduciary significantly benefited from the transaction as viewed in light of the circumstances in existence at the time of the transaction. *Jordan v. Lyles*, 455 S.W.3d 785, 792 (Tex. App.—Tyler 2015, no pet.); *Lee v. Hasson*, 286 S.W.3d 1, 21 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). Otherwise stated, "The burden would then require Hetzler 'to prove (a) that the questioned transaction was made in good faith, (b) for a fair consideration, and (c) after full and complete disclosure of all material information to the principal.'" *Collins v. Hetzler,* 2025 Tex. App. LEXIS 2085; *Jackson Law Off., P.C. v. Chappell,* 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied).

Put in context, the presumption of unfairness only applies to the breach element of a breach of fiduciary duty claim. A plaintiff has the burden to prove that a fiduciary relationship exists, that a self-interested transaction occurred and the amount of damages/benefits. *See Dyke v. Hall*, No. 03-18-00457-CV,2019 Tex. App. LEXIS 9136, 2019 WL 5251139, at *10 (Tex. App.—Austin Oct. 17, 2019, no pet.) (presumption of unfairness applies to the breach element of a breach of fiduciary duty claim).

There are many presumptions in the law that allow a party to prove one fact and presume another. Johnson,

The Use of Presumptions in Summary Judgment Procedure in Texas and Federal Courts, 54 BAYLOR L. REV. 605 (2002) (hereinafter "Johnson Article"). A presumption shifts the burden of production from the party relying upon it to the other party regarding the presumed fact. *Id*.

A presumption is a procedural rule of law that attaches specific probative value to particular facts. *See Forder v. State*, 456 S.W.2d 378, 387 (Tex. Crim. App. 1970); *Combined Am. Ins. Co. v. Blanton*, 163 Tex. 225, 353 S.W.2d 847, 849 (1962); *Vise v. Foster*, 247 S.W.2d 274, 277 (Tex. Civ. App.—Waco 1952, writ ref'd n.r.e.); *Fox v. Grand Union Tea Co.*, 236 S.W.2d 561, 563 (Tex. Civ. App.—Austin 1951, mand. overruled). A court has defined a presumption as a rule of law "by which the finding of a basic fact gives rise to the existence of the presumed fact, until the presumption is rebutted." *Hunter v. Palmer*, 988 S.W.2d 471, 473 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Procedurally, a presumption is a device that guides a trial court in locating the burden of production at a particular time. *See Tex. A&M Univ. v. Chambers,* 31 S.W.3d 780, 784 (Tex. App.—Austin 2000, pet. denied); *Allred v. Harris County Child Welfare Unit,* 615 S.W.2d 803, 806 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

There are at least two types of presumptions: conclusive and rebuttable. A conclusive presumption cannot be rebutted, and once it is established, the opposing party cannot offer evidence to contradict it. *See Stooksberry v. Swann,* 85 Tex. 563, 22 S.W. 963, 966 (1893). A rebuttable presumption, however, can be rebutted by evidence. *See Davis v. Austin*, 632 S.W.2d 331, 333 (Tex. 1982); *Empire Gas & Fuel Co.*, 143 S.W.2d at 767; *Beken v. Hoffman*, 196 S.W.2d 548, 551 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.). It compels a factfinder to make a conclusion in the absence of any evidence to the contrary. *See Davis*, 632 S.W.2d at 333; *Farley v. M.M. Cattle Co.,* 529 S.W.2d 751, 756 (Tex. 1975); *Sanders v. Davila*, 593 S.W.2d 127, 130 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).

Where there is evidence to the contrary, the presumption simply disappears, and a factfinder cannot weigh it or treat it as evidence. *See White v. Smyth*, 147 Tex. 272, 214 S.W.2d 967, 974 (1948); *Dodson v. Watson*, 110 Tex. 355, 220 S.W. 771, 772 (1920); *Perry v. Breland*, 16 S.W.3d 182, 186 (Tex. App.—Eastland 2000, pet. denied); *Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W.2d 202, 212 (Tex. App.—Amarillo 1996, no writ); *Sanders*, 593 S.W.2d at 130. But where the party opposing the presumption fails to produce any contrary evidence, the presumption is established conclusively. *See Pete v. Stevens*, 582 S.W.2d 892, 894 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.); *Mitchell v. Stanton*, 139 S.W. 1033, 1036 (Tex. Civ. App.—San Antonio 1911, writ ref'd). Where the party opposing the presumption produces contrary evidence and the presumption disappears, the evidence that originally gave rise to the presumption still retains whatever independent evidentiary value that it has and may be considered by the factfinder in determining the issue. *See Employers' Nat'l Life Ins. Co. v. Willits*, 436 S.W.2d 918, 921 (Tex. Civ. App.—Amarillo 1968, writ ref'd n.r.e.); *Cimarron Ins. Co. v. Price*, 409 S.W.2d 601, 607 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).

The main reason for a presumption is its impact on the burden of proof. The burden of proof has two separate components. First, the burden of proof means the burden of persuasion, i.e., the burden to persuade the trier of fact that evidence supports a proposition. *See e.g., Clark v. Hiles,* 67 Tex. 141, 2 S.W. 356, 359 (1886); *Dwyer v. Cont'l Ins. Co.*, 57 Tex. 181, 182 (1882); *Azores v. Samson,* 434 S.W.2d 401, 405 (Tex. Civ. App.—Dallas 1968, no writ); *Walter E. Heller & Co. v. Allen,* 412 S.W.2d 712, 718-19 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.); *Gooch v. Davidson*, 245 S.W.2d 989, 991 (Tex. Civ. App.—Amarillo 1952, no writ); *Finney v. Finney*, 164 S.W.2d 263, 266 (Tex. Civ. App.—Fort Worth 1942, writ ref'd w.o.j.). This burden of persuasion generally stays on the same party throughout the trial and never shifts. *See Grieger v. Vega*, 153 Tex. 498, 271 S.W.2d 85, 90 (1954); Walker v. Money, 132 Tex. 132, 120 S.W.2d 428, 431 (1938). Secondly, the burden of proof means the burden of production, i.e., the burden to go forward and produce sufficient evidence in order to meet a prima facie case. *See e.g., Ellsworth v. Ellsworth*, 151 S.W.2d 628, 633 (Tex. Civ. App.—El Paso 1941, writ ref'd); *Cameron Compress Co. v. Kubecka*, 283 S.W. 285, 286 (Tex. Civ. App.—Austin 1926, writ ref'd); *Producers' Oil Co. v. State*, 213 S.W. 349, 353 (Tex. Civ. App.—San Antonio 1919, no writ). Prima facie evidence is evidence that, until its effect is overcome by other evidence, will suffice as proof of a fact in issue. *See Dodson v. Watson,* 110 Tex. 355, 220 S.W. 771, 772 (1920). The burden of production can shift back and forth between the parties depending upon the evidence that is produced. *See Tex. & Pac. Ry. Co. v. Moore*, 329 S.W.2d 293, 297 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.); *Ellsworth*, 151 S.W.2d at 628; *Producers' Oil Co.,* 213 S.W. at 353. Normally, one party will initially bear both the burden of persuasion and the burden of production, and where the burden of persuasion does not shift to the other party, the burden of production may shift back and forth as each side produces evidence. *See Simpson v. Home Petroleum Corp.*, 770 F.2d 499, 503 (5th Cir. 1985); *Tex. & Pac. Ry. Co.*, 329 S.W.2d at 297; *Producers' Oil Co.,* 213 S.W. at 353.

Normally, once a presumption is established it only shifts the burden of production and places the burden on the opposite party to produce evidence to the

contrary. *See GMC v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993); *Combined Am. Ins. Co. v. Blanton,* 163 Tex. 225, 353 S.W.2d 847, 849 (1962); *Moore v. Tex. Bank & Trust Co*., 576 S.W.2d 691, 695 (Tex. Civ. App.—Eastland 1979), *rev'd on other grounds*, 595 S.W.2d 502 (Tex. 1980); *DeMuth v. Head*, 378 S.W.2d 389, 390 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.); *Amarillo v. Attebury*, 303 S.W.2d 804, 806 (Tex. Civ. App.—Amarillo 1957, no writ). A presumption places on the opposing party the burden to produce sufficient evidence to justify a finding that is contrary to the presumed fact. *See Empire Gas & Fuel Co. v. Muegge,* 135 Tex. 520, 143 S.W.2d 763, 767-68 (1940); *Gant v. Dumas Glass & Mirror, Inc.,* 935 S.W.2d 202, 212 (Tex. App.—Amarillo 1996, no writ); *DeMuth*, 378 S.W.2d at 390. It generally does not, however, shift the burden of persuasion to the other side. *See DeMuth,* 378 S.W.2d at 390; *Nat'l Aid Life Ass'n v. Driskill*, 138 S.W.2d 238, 242 (Tex. Civ. App.—Eastland 1940, no writ). Thereafter, when the party opposing the presumption produces contrary evidence that is sufficient to support a finding contrary to the presumption, the presumption is rebutted and disappears, and the burden of production shifts back to the party originally relying upon the presumption. *See First Nat'l Bank of Mission v. Thomas,* 402 S.W.2d 890, 893 (Tex. 1965); *Southland Life Ins. Co. v. Greenwade*, 138 Tex. 450, 159 S.W.2d 854, 857 (1942); Gant, 935 S.W.2d at 212; *Allred v. Harris County Child Welfare Unit,* 615 S.W.2d 803, 806 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

One court has discussed the application of another type of rebuttal presumption that shifts both the burden of production and persuasion. *Weed v. Frost Bank*, 565 S.W.3d 397, 412-13 (Tex. App.—San Antonio 2018, pet. denied). The court first discussed the typical rebuttable presumption that only shifts the burden of production:

> "Over the years, numerous approaches to the treatment of presumptions [in civil cases] have been urged." 1 Steven Goode & Olin Guy Wellborn III, TEXAS PRACTICE: TEXAS RULES OF EVIDENCE § 301.2 (4th ed. 2016). "One, traditionally associated with James Bradley Thayer, gives presumptions only minor effect." *Id*. "A Thayer-type presumption shifts only the burden of production to the opponent of the presumption." *Id*. "In other words, once the presumption's proponent establishes the existence of the basic fact, the factfinder must find the presumed fact exists unless the opponent meets the burden of production as to the presumed fact." *Id*. "This means that the opponent must produce enough evidence so that a reasonable juror could find the non-existence of the presumed fact." *Id*. "If the opponent meets this burden, the presumption disappears from the case; the case proceeds as if there were no presumption." *Id*. "If, however, the opponent fails to meet its burden of production, the factfinder must find that the presumed fact exists." *Id*. Under a Thayer-type presumption, the burden imposed on the party seeking to rebut the presumption "is slight." *Id*. All a party "must do to eliminate the presumption from the case is produce enough evidence so that a reasonable juror could find the non-existence of the presumed fact." *Id*. "As a result of the ease with which Thayer-type presumptions can be defeated, they are frequently referred to as 'bursting bubble' presumptions." *Id*. "Many presumptions in Texas are given the minimal, Thayer-type effect." *Id*.

Id. The court then went on to discuss the other type of rebuttable presumption that shifts both the burden of production and persuasion and remains in the case even if contradictory evidence is presented:

> Another type of presumption, called a "Morgan Presumption" after Professor Edmund M. Morgan, "shifts to the opponent not only the burden of producing evidence but the burden of persuasion as well." Jerome A. Hoffman, *Thinking About Presumptions: The "Presumption" of Agency From Ownership as Study Specimen,* 48 ALA. L. REV. 885, 896-97 (1997). "Thus, once the proponent establishes the basic facts of a presumption, the factfinder would be required to find the presumed fact unless the opponent actually satisfies the factfinder of the presumed fact's nonexistence." 1 Steven Goode & Olin Guy Wellborn III, TEXAS PRACTICE: TEXAS RULES OF EVIDENCE § 301.2 (4th ed. 2016). "Merely offering evidence of its non-existence would not suffice to remove the presumption from the case." *Id*.

Id.

B. Case Examples

There is authority that regarding the presumption of unfairness for fiduciary self-interested transactions, that both the burden of persuasion and production shift to the fiduciary. The Texas Pattern Jury Charge states: "In fiduciary duty cases, however, the presumption of unfairness operates to shift both the burden of producing evidence and the burden of persuasion to the fiduciary." Tex. Pat. J. Ch. 232.2 cmt. (citing *Sorrell v.*

Elsey, 748 S.W.2d 584, 586 (Tex. App.—San Antonio 1988, writ denied); *Miller*, 700 S.W.2d at 945–46; *Fillion v. Troy*, 656 S.W.2d 912, 914 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Cole v. Plummer*, 559 S.W.2d 87, 89 (Tex. App.—Eastland 1977, writ ref'd n.r.e.)). In *Sorrell,* the court stated: "the burden cast upon the party claiming validity of the transaction not only includes presenting evidence but securing findings of the "material issues—those being whether [the validity claiming party] had made reasonable use of the confidence placed in him and whether the transactions were ultimately fair and equitable to [the complaining party]." *Sorrell v. Elsey*, 748 S.W.2d at 586. More recently, a court has held: "[t]his presumption of unfairness shifted both the burden of producing evidence and the burden of persuasion to Douglas." *Musquiz v. Keesee*, No. 07-15-00461-CV, 2017 Tex. App. LEXIS 9214 (Tex. App.—Amarillo Sep. 28, 2017, pet. denied).

Further, in *Moore v. Texas Bank & Trust Co*., the court of appeals held:

> Once a fiduciary or confidential relationship is established, a presumption arises that a gift from the principal to the fiduciary is unfair and invalid. *Stephens County Museum, Inc. v. Swenson*, supra. The effect of the presumption is to place upon the fiduciary the burden of going forward with evidence from which the jury could find the nonexistence of the presumed fact. 1 McCormick & Ray, Texas Law of Evidence § 53 (2d ed. 1956). See Stephens County Museum, Inc. v. Swenson, supra. If the fiduciary succeeds, a fact issue is presented; if not, an instructed verdict should be rendered against him. The general rule in Texas is that the sole effect of a presumption is to fix the burden of producing evidence and does not affect the burden of persuasion. 1 McCormick & Ray, § 53, supra. We hold that the fiduciary has the burden of persuasion on the issue of whether the transaction was ultimately fair and equitable. *See Archer v. Griffith*, supra.

576 S.W.2d 691, 695 (Tex. App.—Eastland 1979), *rev'd on other grounds*, 595 S.W.2d 502 (Tex. 1980) (citing *Archer v. Griffith*, 390 S.W.2d 735 (Tex.1964)). *See also National Plan Administrators, Inc. v. National Health Ins. Co.*, No. 03-03-00306-CV, 2004 Tex. App. LEXIS 10257 (Tex. App.—Austin September 10, 2004, pet. denied) ("The burden cast upon the fiduciary not only includes presenting evidence but securing findings of the material issues--whether the fiduciary had made reasonable use of the confidence placed in him and whether the transactions were ultimately fair and equitable.").

According to this authority the presumption of unfairness is a super presumption that shifts both the burden of production and persuasion to the fiduciary. But it is still a rebuttable presumption, and a fiduciary can produce evidence to rebut the presumption though it will continue to have the burden of persuasion to prove the fairness. In other words, in a normal presumption situation, a plaintiff has the burden of proof (production and persuasion) on its claim. The plaintiff supports its claim, or some element of its claim, by using a presumption: plaintiff proves X, which equals Y. The burden of production then switches to the defendant to prove that Y does not exist. If the defendant does so, then the presumption falls away and the plaintiff has the burden to produce evidence of Y and to convince the finder of fact that Y existed.

In the super presumption of unfairness, a plaintiff has the burden to prove breach of fiduciary duty: the defendant owes a fiduciary duty, the defendant breached the duty, that breach caused some harm to the plaintiff or benefit to the defendant. The plaintiff establishes breach by proving that a self-interested transaction occurred. If the plaintiff proves such a transaction, then the defendant has the burden to produce evidence of the fairness of the transaction and also persuade the finder of fact that the transaction was fair. If the defendant produces evidence of fairness, the presumption does not fall away; rather, the defendant still has the burden to persuade the finder of fact that the transaction was fair.

There is authority that the presumption of unfairness is not a super presumption; but just a normal presumption. *Fielding v. Tullos*, No. 09-17-00203-CV, 2018 Tex. App. LEXIS 7136, 2018 WL 4138971 (Tex. App.—Beaumont Aug. 20, 2018, no pet.). The court held that the presumption is a rebuttable presumption that is extinguished with the offering of contrary evidence, not one that shifted the ultimate burden of proof of unfairness:

> Fielding had the burden of establishing that a fiduciary relationship existed between Tullos and Charles. Once a contestant presents evidence of a fiduciary relationship, a presumption of undue influence may arise and the other party then bears the burden to come forward with evidence to rebut the presumption. Such a rebuttable presumption shifts the burden of producing evidence to the party against which it operates. Once evidence contradicting the presumption has been offered, the presumption is extinguished. *Id*. The case then proceeds as if no presumption ever existed. A rebuttable presumption does not shift the ultimate burden of proof. The Plaintiff acknowledges

> the Estate did not state a claim for breach of a fiduciary duty, however the Plaintiff argues that a fiduciary relationship existed between Charles and Tullos, the effect of which is to shift the burden of proof onto Tullos to disprove undue influence. Assuming without deciding that Tullos owed Charles a fiduciary duty, it would not shift the ultimate burden of proof in the case to Tullos, but it would invoke the application of a rebuttable presumption. Tullos could rebut the presumption by coming forward with evidence showing the fairness of the transaction. If Tullos's summary judgment evidence contradicted the presumption, the presumption was extinguished. Plaintiff retained the ultimate burden of proof on her claims.

Id. (internal citation omitted). *See also Cardona v. Cardona*, No. 09-19-00118-CV, 2020 Tex. App. LEXIS 3644 (Tex. App.—Beaumont December 2, 2019, no pet.); *Lee v. Kline*, No. 14-98-00268-CV,2000 Tex. App. LEXIS 290, 2000 WL 19227 (Tex. App.—Houston [14th Dist.] Jan. 13, 2000, pet. denied) (after defendant offered evidence of fairness, the presumption disappeared and the defendant had no duty to obtain a jury finding on fairness).

In *Estate of Grogan*, the court seemed to equate the presumption of unfairness with the presumption of undue influence:

> This Court has not expressly applied this presumption in the context of a will contest, though we have recognized that "Texas appellate courts have held that when a fiduciary transacts with the principle [sic] or accepts a gift or bequest from the principal, a burden is placed on the fiduciary to demonstrate the fairness of the transaction." Nevertheless, the presumption is rebuttable. "Once evidence contradicting the presumption has been offered, the presumption is extinguished," and "[t]he case then proceeds as if no presumption ever existed." In other words, the rebuttable presumption shifts only the burden of production and "does not shift the ultimate burden of proof."

595 S.W.3d 807 (Tex. App.—Texarkana 2019, no pet.) (internal citations omitted).

One could argue that these opinions are wrong or that they deal with a different presumption: the presumption of undue influence based on a fiduciary duty.

At least one court has disagreed with these opinions and held that the presumptions are the same and that it is super presumption. In *In re Estate of Klutts*, the court held:

> While the Beaumont court in *Fielding* did hold that the presumption is a rebuttable presumption that is extinguished with the offering of contrary evidence, not one that shifted the ultimate burden of proof of unfairness, none of the cases cited in Fielding regarding this burden-shifting proposition involved undue influence in a fiduciary self-dealing situation. Accordingly, we are unpersuaded by Michael's argument.

To the contrary, *Danford* and case law from the supreme court and other courts of appeals reflect that in situations involving self-dealing in fiduciary or confidential relationships, a presumption of unfairness arises that shifts both the burden of production and the burden of persuasion to the fiduciary seeking to uphold the transaction. *See Moore*, 595 S.W.2d at 509; *see also Stephens Cty. Museum, Inc. v. Swenson*, 517 S.W.2d 257, 260 (Tex. 1974) (observing that when a fiduciary relationship existed between sisters and their brother, who was operating under their power of attorney and who was also a director of the museum to which the sisters had made a contribution that they later sought to set aside, "[u]nder such conditions, equity indulges the presumption of unfairness and invalidity, and requires proof at the hand of the party claiming validity and benefits of the transaction that it is fair and reasonable"); *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964) (noting that after respondent "established that the conveyance was executed and delivered during the existence of the attorney-client relationship, the burden was on petitioner to show that his acquisition of the interest conveyed by the deed was fair, honest[,] and equitable"); *Int'l Bankers Life Ins. Co. v. Holloway,* 368 S.W.2d 567, 576 (Tex. 1963) ("Contracts between a corporation and its officers and directors are not void but are voidable for unfairness and fraud with the burden upon the fiduciary of proving fairness."); *McAuley v. Flentge*, No. 06-15-00051-CV, 2016 Tex. App. LEXIS 6039, 2016 WL 3182667, at *7 (Tex. App.—Texarkana June 8, 2016, pet. denied) (mem. op.) (citing *Swenson,* 517 S.W.2d at 260; Archer, 390 S.W.2d at 740); *Jordan v. Lyles,* 455 S.W.3d 785, 792 (Tex. App.—Tyler 2015, no pet.) (op. on reh'g) ("Even in the case of a gift between parties with a fiduciary relationship, equity indulges the presumption of unfairness and invalidity, and requires proof at the hand of the party claiming validity of the transaction that it is fair and reasonable."). Thus, we decline Michael's invitation to follow *Fielding*.

No. 02-18-00356-CV, 2019 Tex. App. LEXIS 11063 (Tex. App.—Fort Worth December 19, 2019, settled by agr.). *See also Peek v. Mayfield*, 2023 Tex. App. LEXIS 7226 (Tex. App.—Fort Worth 2023, pet. denied). So, Texas currently has authority that the presumption of unfairness is a super presumption and some authority that it is just a regular presumption.

C. Conclusion

The Texas Supreme Court should accept a case dealing with self-interested transactions in fiduciary cases and resolve whether there is a presumption of unfairness and, if so, whether that presumption is a super presumption or just a normal presumption. The Court should address the burdens of production and persuasion in litigating these presumptions. The Court should also address whether such a presumption applies to a new will or trust when those are not historically considered "transactions" between a settlor/trustee and a beneficiary.

X. CONCLUSION

Fiduciary litigation is a booming area of law. The Texas Supreme Court has complete discretion what cases it should accept. The Court should prioritize common fiduciary issues and accept more of these types of disputes to clarify the law. This paper outlines some of the issues that the author deems appropriate for Supreme Court review.