TRUSTEES' ABILITY TO RETAIN AND COMPENSATE ATTORNEYS IN TEXAS

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David Johnson is an equity shareholder and the Fort Worth Office Managing Shareholder for Winstead PC. David Johnson's practice focuses on trust, estate, and closely-held business disputes. A frequent writer and speaker, David is known around the state as a thought leader in the fiduciary area. His award-winning blog, Fiduciary Litigator (www.fiduciarylitigator.com), features recent case law, legislative changes, and other precedent that impacts fiduciaries in Texas. David received the JD Supra 2023 Readers' Choice Award for Wealth Management, which was his sixth year in a row for such an award. He was also named a "Go-To Thought Leader" in Fiduciary Litigation by the National Law Review in 2020.

David's experience in trust and estate disputes includes will contests, elder abuse, mental competency, undue influence, trust modification/reformation/clarification, breach of fiduciary duty and related claims. He also handles matters involving trust decanting, trust severance and joinder, account disputes, power of attorney disputes, suits for judicial instruction and discharges, heirship proceedings, suits to remove a fiduciary, and accountings. Additionally, David has a transactional practice for trust departments in providing legal opinions on the construction of trust documents, documenting release and consent agreements, resignations, successor appointments, modification of trusts, trust mergers, trust severances, etc. He routinely works with and advises trustees, executors, guardians, and beneficiaries in connection with the aforementioned matters.

David is a fellow of the American College of Trust and Estate Counsel (ACTEC). ACTEC is an organization of almost 2,400 trust and estate lawyers and law professors who have been elected by their peers in recognition of having made outstanding contributions to the practice of trust and estate law. ACTEC brings together top lawyers in the profession to maintain a high quality of trust and estate legal services through mutual education, to create and foster networking among those lawyers based on the highest order of trust and confidence, and to contribute to the improvement of the areas of law in which trust and estate lawyers practice.

David is one of twenty attorneys in Texas that has the triple Board Certification in Civil Trial Law, Civil Appellate and Personal Injury Trial Law by the Texas Board of Legal Specialization. David is currently on the board of the Texas Board of Legal Specialization, the Texas State Bar's group that certifies attorneys in specialties. He was previously on the commission that wrote and graded the civil trial law examination.

David is licensed and has practiced in the U.S. Supreme Court; the Fifth, Seventh, and Eleventh Federal Circuits; the Federal District Courts for the Northern, Eastern, and Western Districts of Texas; the Texas Supreme Court and various Texas intermediate appellate courts.

David also served as an adjunct professor at Baylor University Law School and Texas Wesleyan Law School. Over the course of his career, David has given over 300 legal education presentations to bar groups, industry groups, and clients in the fiduciary and general litigation areas. David has published over twenty law review articles. These articles have been cited as authority repeatedly by the Texas Supreme Court and the Texas courts of appeals located in Amarillo, El Paso, Waco, Texarkana, Tyler, Beaumont, and Houston. Other jurisdictions also cite David's articles, such as the Supreme Court of Iowa and a federal district court in Pennsylvania. Authors and commentators also cite David's articles, including McDonald & Carlson in their Texas Civil Practice treatise and William V. Dorsaneo in the Texas Litigation Guide and in the Baylor Law Review. He has also been cited by St. Mary's Law Journal, South Texas Law Review, Texas Tech Law Review, Texas Tech's Estate Planning and Community Property Law Journal, DePaul Law Review, Thurgood Marshall Law Review, Texas Business Litigation Treatise, Tennessee Law Review, ABA Family Law Quarterly, Houston Law Review, Arizona State Law Review, Oklahoma Law Review, Vanderbilt Journal of Entertainment and Technology Law, Texas Review of Law & Politics, The Scholar St. Mary's Law Review on Race and Social Justice, Wake Forest Law Review, Cardozo Journal of Conflict Resolution, Denver Law Review, and William & Mary Law Review.

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I. INTRODUCTION

Trustees are often called upon to retain counsel to assist in trust administration issues, pursuing claims by a trustee, and defending claims filed against a trustee. David F. Johnson, *Trustees' Ability to Retain and Compensate Attorneys in Texas*, 16 Tex Tech Est Plan Com Prop LJ 97 (Fall 2023). Trustees are bombarded by attorneys who want to be retained, though they may not be qualified or the best option for the assignment. *Id.* Further, once an attorney is retained, the trustee has to pay them. *Id.* There are different statutory provisions in Texas dealing with the payment of attorneys. *Id.* This article is intended to give practical advice concerning the retention of attorneys by trustees and also address the legal issues involved with compensating attorneys. *Id.*

II. RIGHT TO RETAIN ATTORNEYS

Trustees have the statutory and common law right to retain attorneys for a variety of matters. *Id.* The first place to look regarding a trustee's right to retain counsel is the trust document itself. *Id.* "The trustee shall administer the trust in good faith according to its terms and the Texas [Property] Code." *Tolar v. Tolar*, No. 12-14-00228-CV, 2015 WL 2393993, at *3 (Tex. App.—Tyler May 20, 2015, no pet.). Additionally, "[t]he nature and extent of a trustee's duties and powers are primarily determined by the terms of the trust." RESTATEMENT (THIRD) OF TRS. § 90 cmt. b (AM. L. INST. 2007); *Stewart v. Selder*, 473 S.W.2d 3, 7 (Tex. 1971); Beaty v. Bales, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, no writ). If the language of the trust instrument unambiguously expresses the intent of the settlor, the instrument itself confers the trustee's powers and neither the trustee nor the courts may alter those powers. *Jewett v. Cap. Nat'l Bank of Austin,* 618 S.W.2d 109, 112 (Tex. App.—Waco 1981, writ ref'd n.r.e.); *Corpus Christi Nat'l Bank v. Gerdes*, 551 S.W.2d 521, 523 (Tex. App.—Corpus Christi–Edinburg 1977, writ ref'd n.r.e.). Moreover, a court may remove a trustee when "the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust . . . ." TEX. PROP. CODE ANN. § 113.082(a)(1).

Normally, trust documents expressly allow trustees to retain counsel. Johnson, *supra* note 1, at 12. If a trust document states that a trustee does not have the power to retain attorneys, then a trustee should either: (1) seek to modify or reform the trust to allow that common right, or (2) seek to resign because a trustee may not be able to meet many of its duties to manage and protect the trust without retaining attorneys. *Id.*

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

The Texas Property Code expressly instructs parties to look to common law regarding a trustee's duties. *Id.* § 113.051. A trustee has the duty to administer the trust with the skill and prudence which an ordinary, capable, and careful person would use in the conduct of their own affairs: "The trustee has a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law." RESTATEMENT (THIRD) OF TRS. § 76 (Am. L. Inst. 2007). Moreover,

> In administering the trust, the trustee's responsibilities include performance of the following functions: . . . collecting and protecting trust property. The duty of protecting the trust estate includes taking reasonable steps to enforce or realize on other claims held by the trust and to defend actions that may result in a loss to the trust estate. Reasonable steps may include taking an appeal to a higher court, compromise or arbitration of claims by or against the trust, or even abandoning a valid claim or not resisting an unenforceable claim if the costs and risk of litigation make such a decision reasonable under all the circumstances.

Id.

> It is not the duty of the trustee to bring an action to enforce a claim which is a part of the trust property if it is reasonable not to bring such an action, owing to the probable expense involved in the action or to the probability that the action would be unsuccessful or that if successful the claim

> would be uncollectible owing to the insolvency of the defendant or otherwise.

RESTATEMENT (THIRD) OF TRS. § 177 cmt. c (Am. L. Inst. 1959).

So, whether under the trust document, statute, or common law, a trustee normally has the power to retain attorneys to assist in trust-related matters when they deem that a prudent course of action.

One specific example when a trustee has the power to retain counsel is to seek instructions from a court. *Restatement (Third) of Trs.* § 71 cmt. a (Am. L. Inst. 2007). The Restatement (Third) of Trusts provides: "A trustee or beneficiary may apply to an appropriate court for instructions regarding the administration or distribution of the trust if there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust provisions." *Id.* § 71. Regarding the payment of fees associated with seeking instructions, the Restatement provides:

> Expenses incurred by a trustee in applying to the court for instructions are payable from the trust estate unless the application for instructions was plainly unwarranted, there being no reasonable uncertainty about the powers or duties of the trustee or about the relevant law or proper interpretation of the trust. In such a case it is normally improper for a trustee to incur the expenses of making the application…. Expenses incurred by the trustee as a result of a beneficiary's application for instructions are payable or reimbursable from the trust estate, provided the expenses and the trustee's conduct were reasonable and appropriate to the trustee's fiduciary duties.

Id. § 71 cmt. e.

The Texas Property Code and the Uniform Declaratory Judgment Act both have provisions that expressly allow a trustee to seek instructions from a court regarding various trust administration issues. TEX. PROP. CODE ANN. § 115.001; TEX. CIV. PRAC. & REM. CODE ANN. § 37.005. If a trustee has the power to seek court instructions, it has the power to retain an attorney to obtain that relief. RESTATEMENT (THIRD) OF TRS. § 71 cmt. a (Am. L. Inst. 2007).

III. SUGGESTIONS FOR TRUSTEES RETAINING ATTORNEYS

A. Introduction

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

B. Selecting Counsel

How should a trustee hire its counsel? There is no one right answer. A trustee should consider the legal work that needs to be accomplished. Is it highly complex or more routine? Does the assignment require expertise that justifies a higher rate or expense? Does the matter better fit a contingency fee attorney or one that charges by the hour? A trustee should determine what type of attorney is necessary. A trustee should then determine who the attorneys with the necessary experience and education to efficiently handle the assignment are. Attorneys are becoming more specialized, and trustees should take advantage of that fact. Is industry knowledge necessary or helpful? Trustees should utilize networking with other trustees and organizations to assist in identifying qualified counsel. A trustee may consider the following factors: ethics; reputation; expertise in the area of law ("Thought Leaders" in the area); track record; firm size, resources, and location; knowledge of forum and judge; rates; willingness to consider alternative billing arrangements; team/support; diversity; and responsiveness.

In Texas, there is the Texas Board of Legal Specialization (TBLS) that certifies attorneys in numerous legal areas. *About TBLS*, TEX. BD. OF LEGAL SPECIALIZATION, https://www.tbls.org/about (last visited Oct. 3, 2023) [https://perma.cc/U5X8-DDPK]. There are specializations in many areas, including, but not limited to, oil and gas, real estate, employment, insurance, estate planning, civil trial law, etc. *Id.* To be board certified, an attorney has to be qualified, meaning they have a certain amount of experience in the specialty area; devote a substantial amount of their practice to that specialty; and pass a rigorous written exam. *Standards for Attorney Certification*, TEX. BD. OF LEGAL SPECIALIZATION, https://content.tbls.org/pdf/attstdcr.pdf (Nov. 8, 2018) [https://perma.cc/T4DN-6HRV]. The TBLS has a website that contains a search function to find attorneys by specialization area. *Why Choose a Board Certified Lawyer?*, TEX. BD. OF LEGAL SPECIALIZATION, https://www.tbls.org/findlawyer (last visited Oct. 3, 2023) [https://perma.cc/447W-4MET].

Another great organization to find qualified attorneys in the trust and estate area is the American College of Trust and Estate Counsel (ACTEC). *See* THE AM. COLL. OF TR. & EST. COUNS., http://www.actec.org (last visited Oct. 4, 2023) [https://perma.cc/E683-MDAY]. ACTEC is a national organization that holds conferences in trust and estate law and focuses on trends in those specialties. *See id.* To be a member, an attorney has a rigorous application

process that focuses on substantial articles and speaking engagements in trust and estate law. *See id.* ACTEC fellows are not just attorneys that practice trust and estate law, they are thought leaders and show a continuing dedication to expanding trust and estate law. *See id.*

Selection of appropriate counsel and appropriate compensation are part of a trustee's fiduciary duty of prudence. RESTATEMENT (THIRD) OF TRS. § 80 cmt. d (Am. L. Inst. 2007). The Restatement (Third) of Trusts, provides:

> Abuse of discretion may also be found in failure to exercise prudence in the degree or manner of delegation. Prudence thus requires the trustee to exercise reasonable care, skill, and caution in the selection and retention of agents and in negotiating and establishing the terms of the delegation. Significant terms of a delegation range from matters of agent compensation, and matters relating to the duration, termination, and other conditions of the delegation, to providing the agent with substantive direction and guidance consistent with the terms and purposes of the trust. Significant terms also include those providing the arrangements for supervision or for reporting and reviewing the agent's activities, and perhaps a provision securing the agent's consent to the jurisdiction of a particular court. The trustee then has a further duty to act with prudence in supervising or monitoring the agent's performance and compliance with the terms of the delegation. Upon discovering a breach of duty by the agent (Comment g), the trustee has a duty to take reasonable steps to remedy it. *Id.* § 80 cmt. (d)(2).

Therefore, if a trustee retains counsel that is too expensive or not qualified, they may be liable for breach of fiduciary duty. *See What is a Trustee? 8 Trustee Power Explained Super Simply*, OPELON LLP, https://opelon.com/what-is-a-trustee/ (last visited Oct. 3, 2023) [https://perma.cc/4A7D-URD4]. A trustee should also be cautious when retaining an attorney to whom the trustee has a special relationship. *See, e.g., In the Est. of Lemme*, an administratrix of an estate hired her boyfriend to do legal work. No. 07-21-00300-CV, 2022 Tex. App. LEXIS 8829 (Tex. App.—Amarillo December 1, 2022, no pet.) (executrix removed due to hiring her boyfriend as an attorney and paying excessive fees).

C. Engagement Letters

Engagement letters are very important to both trustees and counsel. These are the contracts that set the stage for all future work and disputes. The use of properly drafted engagement letters is not only a critical risk management tool but also forms the foundation of client communication and trust. A trustee should seek different engagement letters for different assignments. Things to include in engagement letters includes as follows: identification of the client (and who is not the client); rates/fee arrangement; retainer; who pays bills and retainer; billing and payment; scope of assignment (and limitations); multi-party issues; termination; technology/hacking; conflicts of interest and waivers; business conflicts; rules of ethics; no guarantee on results or cost; and dispute resolution terms. *Id.*

D. Rates

At the outset of all legal assignments there should be an agreement and understanding of the fees and compensation. A written agreement is required for contingency fee cases. A written agreement should be executed for all assignments. The trustee has a duty to obtain reasonable compensation for its agents and to not overcompensate those agents. The Restatement (Third) of Trusts provides:

> A trustee is not limited to incurring expenses that are "necessary" or essential, but may incur expenses that, in the exercise of fiduciary judgment, are reasonable and appropriate in carrying out the purposes of the trust, serving the interests of the beneficiaries, and generally performing the functions and responsibilities of the trusteeship. For example, the trustee can properly incur expenses appropriate to the collection and protection of the trust property and to making the property productive. Although a trustee is expressly or impliedly authorized or required to incur a particular type of expense, the trustee has a duty to exercise such care and skill as a person of ordinary prudence would exercise in incurring the expense.

RESTATEMENT (THIRD) OF TRS. § 88 cmt. b (Am. l. Inst. 2007).

Specifically, regarding attorneys, the Restatement provides: "The trustee can properly incur *reasonable* expenses in employing lawyers, brokers, or other agents or advisors so far as such employment is appropriate to the sound administration of the trust." *Id.* at cmt. c (emphasis added).

A trustee should consider the market rates for the level of attorney expertise required and the locality of the work. A trustee should consider different rates for different types of work, even for the same counsel. A trustee should consider alternate billing arrangements

such as a lower rate or a partial contingency. A trustee should also consider whether there are any insurance issues, panel requirements, or fee limitations. If a trustee is giving a volume of work to a firm, it should expect a discount on rates.

Corporate trustees often use the same firm for multiple types of work. When a corporate trustee pays for counsel out of its own funds, they commonly negotiates lower rates (bank pay work). *See Understanding Corporate Trustees*, EST. PLAN. (Oct. 16, 2020), https://www.estateplanning.com/understanding-corporate-trustees [https://perma.cc/Z9BR-9XTS]. When the corporate trustee retains counsel and has the customer or trust pay, they commonly allow higher rates. *See id.* While this is acceptable for non-fiduciary work (loans, etc.), this practice of having two sets of rates is problematic in the fiduciary area. *See id.* A trustee has a fiduciary duty to the trust beneficiaries to obtain the best rates possible for legal work, and if the trustee allows a higher rate when the trust pays for attorney's fees than when the corporate trustee pays that can be a potential breach of fiduciary duty. *See* Adam Barone, *What Is a Trustee? Definition, Role, and Duties*, INVESTOPEDIA, https://www.investopedia.com/terms/t/trustee.asp (Sept. 18, 2022) [https://perma.cc/N97N-RZK2]. So, corporate trustees should be consistent and use the same rates for outside counsel whether it is a bank-pay or trust-pay matter. *See Understanding Corporate Trustees*, *supra* note 73.

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

For example, in *In the Est. of Lemme*, an administratrix of an estate hired her boyfriend to do legal work. No. 07-21-00300-CV, 2022 Tex. App. LEXIS 8829 (Tex. App.—Amarillo December 1, 2022, no pet.). After an accounting was submitted, heirs objected to the amount of the fees paid. The trial court removed the administratrix for gross mismanagement, and she appealed. The court of appeals first discussed the law regarding removing an administrator:

> Gross misconduct or gross mismanagement is a ground for removal of an executor. "Gross misconduct" and "gross mismanagement" include, at a minimum: (1) any willful omission to perform a legal duty; (2) any intentional commission of a wrongful act; and (3) any breach of a fiduciary duty that results in actual harm to a beneficiary's interests. "As a fiduciary, an executor has a duty to protect the beneficiaries' interest by fair dealing in good faith with fidelity and integrity. His personal interests may not conflict with his fiduciary obligations to the estate." In addition, a fiduciary owes a principal a high duty of strict accountability.

Id. The court of appeals then reviewed the evidence concerning the payment of attorney's fees:

> Richardson and Allen alleged that, considering the size of the estate and lack of complexity involved in handling it, the attorney's fees charged by Durrance were not reasonable or necessary. They further asserted that fees charged for non-legal activities, such as consulting plumbers and realtors, should not have been charged to or paid by the estate. Richardson and Allen claimed that Cox's relationship with Durrance influenced Durrance's billing practices in this case and Cox's decision to pay the excessive amounts, which significantly reduced the value of the estate and the ultimate amount received by the beneficiaries. Cox contends that she merely sought and paid for legal counsel and, as such, her actions could not constitute gross misconduct or gross mismanagement.
>
> At the evidentiary hearing, Durrance's invoice for $43,037.50, for services provided between March of 2019 and November of 2020, was admitted into evidence. Many entries were one-word descriptions of the work performed, such as "review," "preparation," and "plumber." The invoice also reflected entries for "travel" and one 20-hour "site visit." Richardson presented evidence that of the $43,037.50 paid to Durrance from estate funds, roughly $20,000 was paid for activities that were not legal in nature, such as communicating with plumbers, realtors, and utility companies. Durrance testified that he did not recall discussing any of the entries with Cox or Cox making any complaint about his invoices…
>
> In sum, the evidence reveals that Durrance charged, and Cox paid, attorney's fees that were not reasonable or necessary, including substantial charges for non-legal work. The evidence further shows that Cox failed to exercise meaningful oversight of the administration, instead delegating her fiduciary responsibilities to Durrance. Moreover, because Durrance and Cox are

> romantic partners who share a household, the payments to Durrance indicated that Cox favored her partner's—and arguably her own—personal financial interests over those of the estate beneficiaries.

Id. The court then concluded that the evidence supported the trial court's conclusion that the administratrix breached her fiduciary duty and engaged in gross mismanagement of the estate and affirmed the removal.

The court also affirmed the trial court's award of attorney's fees against the former administratrix. The court held that Section 351.003 of the Texas Estates Code allows certain costs and reasonable attorney's fees to be assessed against an administrator when the administrator is removed for cause. The court stated: "Because Cox was removed for cause, it was proper for the trial court to charge her with the attorney's fees incurred in removing her as administratrix." Id. The court then reviewed the evidence of attorney's fees, which included billing statements, hourly rate, number of hours, and testimony regarding segregation, and affirmed the award of $7,075 in attorney's fees.

E. Communication

A trustee should demand constant, clear communication from counsel. Once again, part of a trustee's fiduciary duty of prudence involves monitoring and managing its agents which requires communication.

The first step is to set an understanding of what communication is expected, how often, and in what medium. The trustee should communicate whether he or she prefers emails, texts, or phone calls. A trustee and counsel should communicate about expectations at the outset. They should discuss: timing considerations; budget and expense considerations; formal written budget (update requirements); rate issues; aggressiveness for matter; staffing expectations; experience requirements; confidentiality or privacy concerns related to issue; and any internal political issues that counsel should know about.

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

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

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

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

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

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

F. Attorney-Client Privilege

The substance of communications between counsel and the trustee is very important and is entitled to protection from disclosure to opposing parties and even to the trust's own beneficiaries.

1. Basis for Privilege and No Fiduciary Exception in Texas

The attorney-client privilege protects confidential communications between a client and their attorney "made for the purpose of facilitating the rendition of professional legal services to the client . . ." from disclosure. *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49 (Tex. 2012).

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications

> made to facilitate the rendition of professional legal services to the client: (A) between the client or the client's representative and the client's lawyer or the lawyer's representative; (B) between the client's lawyer and the lawyer's representative; (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action; (D) between the client's representatives or between the client and the client's representative; or (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1).

The privilege protects confidential communications. *See id.* A communication is "confidential" if it is not intended to be disclosed to third persons other than those persons to whom disclosure is made to further the rendition of professional legal services to the client, or those persons reasonably necessary to transmit the communication. *Id.* at 503(a)(5); *see e.g.*, *Boring & Tunneling Co. of Am. v. Salazar*, 782 S.W.2d 284, 289–90 (Tex. App.—Houston [1st Dist.] 1989, no writ) (finding the letter to adjuster from attorney was clearly made to facilitate rendition of legal services, and not intended for disclosure).

This rule "promotes free discourse between attorney and client, which advances the effective administration of justice." *In re XL Specialty Ins. Co.*, 373 S.W.3d at 49. Recognized as "the oldest of the privileges for confidential communications known to the common law," the attorney-client privilege promotes free discourse between an attorney and their client which advances the effective administration of justice. *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). In Texas, the attorney-client privilege has been characterized as sacrosanct and has long been recognized and zealously protected in our Anglo-American jurisprudence. *Paxton v. Dallas*, 509 S.W.3d 247, 249 (Tex. 2017). This privilege allows "unrestrained communication and contact between an attorney and client in all matters in which the attorney's professional advice or services are sought, without fear that these confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding." *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978). The privilege thus "promote[s] effective legal services, [which] in turn promotes the broader societal interest of the effective administration of justice." *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex. 1993).

In some jurisdictions, there is a fiduciary exception to the attorney-client communication privilege. *See* Craig C. Martin & Matthew H. Metcalf, *The Fiduciary Exception to the Attorney-Client Privilege*, 34 TORT & INS L.J. 827, 832–33 (1999); *Riggs Nat'l Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976). The fiduciary exception has its origins in English trust law, which long ago recognized that the fiduciary nature of the relationship between a trustee and a beneficiary of a trust provides an exception to the privilege with respect to communications between the trustee and the trust's attorney. Martin & Metcalf, *supra* note 116. The theory is that when a trustee seeks legal advice in executing their fiduciary duties, they are acting on behalf of the beneficiaries of the trust and, accordingly, cannot cloak their actions from the beneficiaries, the attorney's "real clients." *Id.*; *Zimmer*, 355 A.2d at 713–14.

> Understood in this fashion, the fiduciary exception is not an 'exception' to the attorney-client privilege at all. Rather, it merely reflects the fact that, at least as to advice regarding [trust] administration, a trustee is not 'the real client' and thus never enjoyed the privilege in the first place.

United States v. Mett, 178 F.3d 1058, 1063 (9th Cir. 1999).

In *Riggs National Bank of Washington D.C. v. Zimmer*, the court focused on three factors to identify the beneficiaries as the "real" clients: (1) the trustees had sought legal advice that would only benefit the trust, not the trustees personally; (2) the trustees had paid for that advice with trust funds, not the trustees' personal funds; and (3) there was no adversarial proceeding pending against the trustees, which presumably meant that there was no need for the trustees to seek advice in a personal capacity. *Zimmer*, 355 A.2d at 711–12. Another rationale to adopt the fiduciary exception is that a trustee's duty to furnish information about the trust to its beneficiaries includes the trustee's attorney-client communications. *Id.* at 712; *see* THE RESTATEMENT (THIRD) OF TRS. § 82 cmt. f (AM. L. INST. 2007) ("[L]egal consultations and advice obtained in the trustee's fiduciary capacity concerning decisions or actions to be taken in the course of administering the trust . . . are subject to the general principle entitling a beneficiary to information that is reasonably necessary to the prevention or redress of a breach of trust or otherwise to the enforcement of the beneficiary's rights under the trust."). "Viewed in this light, the fiduciary exception can be understood as an instance of the attorney-client privilege giving way in the face of a competing legal principle." *Mett*, 178

F.3d at 1063. However, the rationales underlying the fiduciary exception are not present when a trustee seeks legal advice in a personal capacity on matters not of trust administration as opposed to a fiduciary capacity on matters of trust administration. *See id*. ("On either rationale, however, it is clear that the fiduciary exception has its limits—by agreeing to serve as a fiduciary, an ERISA trustee is not completely debilitated from enjoying a confidential attorney-client relationship."); *see also* RESTATEMENT (THIRD) OF TRS. § 82 cmt. f (AM. L. INST. 2007) ("A trustee is privileged to refrain from disclosing to beneficiaries or co-trustees opinions obtained from, and other communications with, counsel retained for the trustee's personal protection in the course, or in anticipation, of litigation (e.g., for surcharge or removal). This situation is to be distinguished from legal consultations and advice obtained in the trustee's fiduciary capacity concerning decisions or actions to be taken in the course of administering the trust.").

Texas does not have a fiduciary exception and allows a trustee to retain counsel and maintain the attorney-client privilege against the trust's beneficiaries. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996). This privilege allows "unrestrained communication and contact between an attorney and client in all matters in which the attorney's professional advice or services are sought, without fear that these confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding." *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978). The privilege thus "promotes effective legal services, [which] in turn promotes the broader societal interest of the effective administration of justice." *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex. 1993).

Aside from the exception, the trustee has no duty to disclose attorney-client communications to beneficiaries. In *Huie v. DeShazo*, a beneficiary argued that communications between the trustee and their counsel should be disclosed to the beneficiaries because the trustee had a general duty to disclose. *Huie*, 922 S.W.2d at 920. The Texas Supreme Court disagreed:

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

Id.; *see Poth v. Small, Craig & Werkenthin, L.L.P.*, 967 S.W.2d 511, 515 (Tex. App.—Austin 1998, pet. denied); *Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.) ("Executors are entitled to employ attorneys to assist them in the administration of the estate. It is the executors, not the beneficiaries, who are empowered to hire and consult with an attorney and to act on the attorney's advice on behalf of the estate. The executors hire attorneys to represent themselves, not the beneficiaries, in carrying out the administration of the estate.").

Texas Rule of Evidence 503(b) protects not only confidential communications between the lawyer and client but also the discourse among their representatives. TEX. R. EVID. 503(b).

2. Privilege Includes Client's Representatives

"The attorney client privilege protects confidential communications between a lawyer and a client or their respective representatives made to facilitate the rendition of professional legal services to the client." *In re* Tex. Farmers Ins. Exch., 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, pet. denied). This privilege is not limited to communications made in anticipation of litigation. *Id.* Thus, Rule 503(b) protects not only confidential communications between the lawyer and client but also the discourse among their representatives. TEX. R. EVID. 503(b)(1)(A); *see In re Hicks*, 252 S.W.3d 790, 794 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("The [attorney-client] privilege covers not only direct communications between lawyer and client but also communications involving the client's representatives and the lawyer's representatives so long as they were made for the purpose of facilitating legal services to the client."). Rule 503(a)(2) defines "client representative" as "a person who has authority to obtain professional legal services for the client or to act for the client on the legal advice rendered," or "any other person who, to facilitate the rendition of professional legal services to the client, makes or receives a confidential communication while acting in the scope of employment for the client." TEX. R. EVID. 503(a)(2)(A), (B).

Clients are entitled to hire third parties to provide professional guidance and to include those professionals in attorney-client communications when they provide legal services to the client. *See e.g.*, *In re Stephens Inc.*, 579 S.W.3d 438, 441 (Tex. App.—San

Antonio 2019, no pet.). This is common in situations involving complex financial circumstances when the specialized knowledge of financial professionals aids both the attorney and the client in addressing legal issues. *Id.* For example, in *In re Stephens Inc.*, Consert, Inc. (Consert) engaged a third party, Stephens Inc. (Stephens), to provide professional guidance in connection with a proposed business transaction involving Consert and a purchaser. *Id.* at 443. Stephens was included on communications between Consert and its counsel and was also provided access to confidential attorney-client communications between Consert and its counsel. *Id.* at 441–42. When litigation subsequently ensued with former shareholders of Consert, the former shareholders tried to compel production of these documents arguing that the presence of Stephens waived privilege. *Id.* at 441. The court of appeals disagreed, and found that Stephens squarely fell within the definition of client representative under Rule 503(a)(2)(B). *Id.* at 447. Moreover, the court clarified that those communications between Consert and Stephens which transmitted legal advice were also protected "because communications 'between representatives of a client' are protected if they otherwise meet the requirements of the Rule, a lawyer need not be involved as an author or recipient." *Id.* at 445 (quoting *In re* Monsanto Co., 998 S.W.2d 917, 929–30 (Tex. App.—Waco 1999, no pet.)).

For a further example, in *In re Segner*, a trustee hired a consultant to assist in the management of a trust, including supervising employees and assisting with attorneys. *In re Segner*, 441 S.W.3d 409, 412 (Tex. App.—Dallas 2013, no pet.). In litigation, the trustee designated the consultant as an expert and disclosed the file and everything that was provided to the trustee, reviewed and prepared by the trustee, or prepared for the trustee "in anticipation of [their] expert testimony." *Id.* The opposing party sought production of much broader information from the consultant, which the trial court granted. *Id.* The court of appeals granted mandamus relief because the information was protected by the attorney-client privilege. *Id.* The court focused on the consultant's testimony that was "sent and received confidential communications with the trust's attorneys for the purposes of effectuating legal representation for the trust." *Id.*

Warning: A client and their attorney should document early in the case (either in the engagement letter or some separate writing) that the client has representatives for the facilitation of legal services, expressly name those representatives, and have the client and the representatives sign the document. Otherwise, there may be challenges to the representatives' capacity and the application of the attorney-client privilege. There has been at least one trust lawsuit in which a co-trustee's attorney-client communications were compelled to be produced when the client's representative had been copied on the communications and the trial court found that the representative did not expressly agree to the representative position.

3. Successor Trustee's Ownership of Attorney-Client Privilege

Attorneys that represent trustees should be aware that a successor trustee may own the privilege and be able to access communications between the attorney and a previous trustee. *See* EDWARD. J. IMWINKELRIED, THE NEW WIGMORE A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 6.5.2 (Wolters Kluwer 2015) ("[A] successor trustee inherits from a predecessor trustee the power to determine whether to assert the attorney-client privilege. The power automatically passes to the new trustee upon his or her assumption of the office of trustee."). For example, in *Moeller v. Superior Court*, the Supreme Court of California held that "the power to assert the attorney-client privilege with respect to confidential communications a predecessor trustee has had with its attorney on matters concerning trust administration passes from the predecessor trustee to its successor upon the successor's assumption of the office of trustee." *Moeller v. Superior Ct.,* 947 P.2d 279, 288 (Cal. 1997); *see In re Estate of Fedor*, 811 A.2d 970, 972 (N.J. Super. Ct. Ch. Div. 2001) ("[T]he power to waive the privilege passes to the new trustee."). The *Moeller* court reasoned that because a successor trustee succeeds to all the rights, duties, and responsibilities of the predecessor trustee, the trustee's powers must be inherent to the office of the trustee rather than personal to any particular trustee. *Moeller*, 947 P.2d at 283. The court justified its holding by focusing on the practicalities of a trustee's affairs:

> It is likely, then, that in performing their day-to-day duties, trustees regularly have confidential communications with their attorneys about trust business (e.g., potential acquisitions and dispositions of property, lawsuits involving trust property). At any given time, therefore, many privileged communications that involve pending trust transactions are in existence. To allow for effective continuous administration of a trust, the right of access to these communications and the privilege to prevent their disclosure must belong to the person presently acting as trustee, because that person has the duty to conduct all pending trust business. Therefore, for a trust to continue to operate smoothly when a change in trustee occurs, the power to assert the attorney-client privilege must pass from the predecessor trustee to the successor.

Id. at 284.

The court also reasoned that a successor trustee must have access to a predecessor trustee's legal files to avoid liability and harm to the beneficiaries, though the court recognized the trust instrument may exculpate the successor trustee from liability for a predecessor trustee's breach of trust. *See id.* at 287–88. However, when a trustee communicates with an attorney in the trustee's personal capacity on matters not of trust administration, disclosure of that communication may not be compelled by a successor trustee. *Borissoff v. Taylor & Faust*, 93 P.3d 337, 343–44 (Cal. 2004) ("A successor fiduciary becomes the holder of the attorney-client privilege 'only as to those confidential communications that occurred when the predecessor, in [its] fiduciary capacity, sought the attorney's advice for guidance in administering the trust.' Conversely, a successor fiduciary does not become the holder of the privilege for confidential communications that occurred when a predecessor fiduciary in [its] personal capacity sought an attorney's advice.") (emphases omitted) (quoting *Moeller*, 947 P.2d at 285).

Texas Rule of Evidence 503 does not provide any real clarity on this issue. *See* TEX. R. EVID. 503. The Rule defines a client as "a person, public officer, or corporation, association, or other organization or entity—whether public or private—that: (A) is rendered professional legal services by a lawyer; or (B) consults a lawyer with a view to obtaining professional legal services from the lawyer." *Id.* at 503(a)(1). This does not expressly state that a client includes successors, but it does not exclude that possibility either. *See id.* The Rule also states who may claim the privilege and provides: "The privilege may be claimed by: (1) the client; (2) the client's guardian or conservator; (3) a deceased client's personal representative; or (4) the successor, trustee, or similar representative of a corporation, association, or other organization or entity—whether or not in existence." *Id*. at 503(c). This provision does state that an estate representative can assert the privilege and presumably have access to those communications. *Id.* It also states that the successor or trustee of an organization or entity can have access to privileged communications. *Id.* The Rule does not state, however, that a successor trustee has the right to claim the privilege. Antonoplos & Associates, *The Difference Between a Trustee and Personal Representative*, ANTONOPLOS & ASSOCS. (Mar. 16, 2020), https://www.antonlegal.com/blog/how-to-select-a-trustee-or-personal-representative-for-your-trust-or-will/ [https://perma.cc/G2G7-GF7N]. A trustee is different from an estate representative and an entity. *Id.* However, a Texas court may consider the roles sufficiently similar to allow a successor trustee to claim the previous trustee's privilege and access those communications. Further, the Rule lists exceptions to the privilege but does not state that successors are allowed an exception. TEX. R. EVID. 503(d).

Texas has not directly addressed whether a successor trustee is entitled to view its predecessor's privileged communications with attorneys, no matter the scope. Once again, the Texas Supreme Court has held that the fiduciary exception does not apply such that a beneficiary is entitled to access privileged communications. *Huie v. DeShazo*, 922 S.W.2d 920, 920 (Tex. 1996). In Texas, a trust is not an entity and cannot be the client; rather, the trustee (in its capacity as trustee) is the party that is the client. *Id.* at 925. There are arguments on both sides of the issue of whether a successor trustee should have access to a previous trustee's communications.

In Texas, although not couched in terms of confidential communications, there is precedent that a successor fiduciary does not step into the shoes of the former fiduciary regarding privity and the ability to sue the attorney on behalf of the former fiduciary. *See Hodge v. Joyce W. Lindauer Atty., PLLC*, No. 06-21-00008-CV, 2021 Tex. App. LEXIS 8076 (Tex. App.—Texarkana Aug. 6, 2021, no pet.)(privity barrier bars successor administrator and successor trustee from asserting legal malpractice claim against attorney who represented previous administrator and trustee); *Messner v. Boon*, 466 S.W.3d 191 (Tex. App.—Texarkana 2015, pet. granted, judgment vacated w.r.m.) (successor personal representative lacks standing to assert a legal malpractice claim against an attorney retained by the prior personal representative). *See also Nye v. Eastman & Smith, Ltd*, 6th Dist. No. L-13-1034, 2013-Ohio-4742 (successor trustee was not I privity with attorney for previous trustee). This authority shows that the relationship is personal to that fiduciary and does not shift to a successor, which would support the position that a successor trustee is not allowed access to a prior trustee's communications with his or her attorneys.

4. Co-Trustee Access to Communications

Co-trustees can jointly retain counsel. When they do not, can one co-trustee gain access to his or her co-trustee's privileged communications? Texas courts have held that the attorney only represents the fiduciary who retained the attorney, and not others. *Lesikar v. Rappeport*, 33 S.W.3d 282, 320 (Tex. App.—Texarkana 2000, pet. denied) (holding that an attorney for one co-executor was not in privity with and therefore did not owe duties to other co-executor); *In re Valero Energy Corp*., 973 S.W.2d 453, 458-59 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding). In Lesikar, the court held that a co-executor is not in privity with the other co-executor's attorney:

> She argues for an extension of the law under the facts of this case because of the symmetry

> between each co-executrix's duties and responsibilities. Privity arises, she contends, because in prosecuting a claim for the estate, the attorney has the same duty he would have if employed by the other co-executrix -- to recover what is owed to the estate. She contends that, in the absence of this privity, one co-executrix cannot protect herself from the fraud of the other.
>
> In making this argument, however, Jenny blurs the respective roles of an executrix and her attorney. The executrix's duty is to prosecute claims on behalf of the estate; the attorney's duty is to give the executrix candid legal advice. The executrix is liable for breach of fiduciary duties to the beneficiaries; the attorney is liable for breach of fiduciary duties to the executrix.
>
> Co-executrices may have the same duties, but their opinions may differ about how best to fulfill those duties. Candid advice from an attorney is invaluable in weighing those competing options. We see no reason to risk diluting the value of that advice by requiring the attorney of one co-executrix to effectively represent the other co-executrix. Each co-executrix can protect herself adequately by entering into a joint representation arrangement with a single attorney where appropriate, or by employing her own attorney. We conclude that the trial court properly granted summary judgment for Werley.

Lesikar v. Rappeport, 33 S.W.3d at 320. As Texas does not follow the fiduciary exception to the attorney-client privilege and as a co-fiduciary does not have an attorney-client relationship with his or her co-fiduciary's attorney, there is no basis to allow a fiduciary to view communications between his or her co-fiduciary and his or her attorney.

5. Joint Client Privilege Issues

Co-trustees can jointly retain counsel and assert attorney-client privilege. *See In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 50 (Tex. 2012). The "joint client" or "co-client" doctrine applies in Texas "[w]hen the same attorney simultaneously represents two or more clients on the same matter." PAUL R. RICE ET AL., ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:30 (2022–2023 ed. 2011). "Joint representation is permitted when all clients consent and there is no substantial risk that the lawyer's representation of one client would be materially adversely affected by the lawyer's duties to the other." *In re* XL Specialty Ins. Co., 373 S.W.3d at 50 (citing RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 128 (AM. L. INST. 2000)). "Where [an] attorney acts as counsel for two parties, communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients." *In re* JDN Real Estate-McKinney L.P., 211 S.W.3d 907, 922 (Tex. App.—Dallas 2006, no pet.). When more than one person seeks consultation with an attorney on a matter of common interest, the parties and the attorney may reasonably presume the parties are seeking representation of a common matter. *Id.*

So, when co-trustees jointly retain counsel, their communications with their attorney are privileged as against third parties, such as beneficiaries. RESTATEMENT (THIRD) OF THE L. GOVERNING LS. § 75 (AM. L. INST. 2000). However, if the co-trustees themselves have a dispute, there is no privilege and the communication between the attorney and either one of the co-trustees is open to discovery by the other co-trustee. TEX. R. EVID. 503(d)(5) (noting that communications made by two or more clients to a lawyer retained in common are not privileged "when offered in an action between or among any of the clients"). Texas Rule of Evidence 503(d)(5) provides that the following is an exception to the privilege: "If the communication: (A) is offered in an action between clients who retained or consulted a lawyer in common; (B) was made by any of the clients to the lawyer; and (C) is relevant to a matter of common interest between the clients." *Id.*

For example, in *In re Alexander*, a beneficiary filed suit against the trustee based on multiple allegations of breach of fiduciary duty, including an allegation that the trustee attempted to transfer the trustee position to successors in violation of the trust's terms. *In re Alexander*, 580 S.W.3d 858, 858 Tex. App.—Houston [14th Dist.] 2019, no pet.). The beneficiary filed a motion to compel trust documents and emails regarding the same that were drafted by an attorney but were never executed. *Id.* at 863. After the trial court granted the motion to compel, the trustee filed a petition for writ of mandamus, challenging the order on the basis of the attorney-client privilege and attorney work-product doctrine. *Id.* at 860.

The court stated that the trustee filed affidavits proving that the drafts and communications were prepared in the course of the attorney's representation of the trustee and were for legal advice. *Id.* at 869. The court then discussed the concept of a trustee's communications with its counsel being privileged:

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

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

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

Nonetheless, the court flatly rejected the beneficiary's argument that a trustee's duty of disclosure extends to any and every communication between the trustee and his attorney. The court explained that (1) its holding did not affect the trustee's duty to disclose all material facts and to provide a trust accounting to the beneficiary, even as to information conveyed to the attorney; (2) the beneficiary could depose the attorney and question him about his handling of trust property and other factual matters involving the trust; and (3) the attorney-client privilege did not bar the attorney from testifying about factual matters involving the trust, so long as he was not called on to reveal confidential attorney-client communications.

> Although a trustee owes a duty to a trust beneficiary, the trustee in *Huie* did not retain the attorney to represent the beneficiary but to represent himself in carrying out his fiduciary duties. Contrary to Preston's point, the *Huie* court recognized that communications between a trustee and the trustee's attorney made confidentially and for the purpose of facilitating legal services remain protected. The hypothetical in Huie involved the trustee's misappropriation of trust funds, which he revealed to his attorney for purpose of obtaining legal advice. The trustee's misappropriation was a material fact of which the trustee knew independent of the communication.
>
> In contrast to the circumstances in *Huie*, and as explained above, HHS and all the Co-Trustees had an attorney-client relationship at the relevant time, and any communications among HHS and their joint clients regarding the contents of the draft documents were made for the purpose of obtaining legal services from HHS, and the Co-Trustees' knowledge of the draft documents was not gained independent of receiving legal advice. Accepting Preston's view of the discoverability of the subject documents would strip the attorney-client privilege and joint-client doctrine of their core purpose and meaning. Therefore, relators had no duty under Huie to disclose the draft documents to Preston.

Id. at 867–69.

The court also held that the trustee had not waived the privilege by testifying in a deposition about the drafts of the documents. *Id.* at 870. The court held that the testimony was not specific enough to constitute a waiver. *Id.* at 869. The court granted the petition and ordered the trial court to reverse its order compelling production of the documents and communications. *Id.* at 870.

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

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

G. Advice-of-Counsel Defense

The advice of counsel may be a defense in a case. The Restatement 3d Trusts contemplates the advice of counsel defense in two sections: §77 and §93, the sections dealing with the Duty of Prudence and claims for breach of trust respectively. Comment b(2) to sections 1 and 2 of §77 addresses the effect of advice of counsel:

> "The work of trusteeship, from interpreting the terms of the trust to decision making in various aspects of administration, can raise questions of legal complexity. Taking the advice of legal counsel on such matters evidences prudence on the part of the trustee. Reliance on advice of counsel, however, is not a complete defense to an alleged breach of trust, because that would reward a trustee who shopped for legal advice that would support the trustee's desired course of conduct or who otherwise acted unreasonably in procuring or following legal advice. In seeking and considering advice of counsel, the trustee has a duty to act with prudence. Thus, if a trustee has selected trust counsel prudently and in good faith, and has relied on plausible advice on a matter within counsel's expertise, the trustee's conduct is significantly probative of prudence" (emphasis added).

RESTATEMENT 3D OF TRUSTS §77 CMT. B(2) (2012).

Comment c to §93 limits the advice of counsel defense:

> "Traditionally, a quite different view has been taken of breach-of-trust questions involving mistakes as to the nature and extent of the trustee's duties and powers….Mistakes of this type occur not only in regard to statutory or common-law rules, but also when a trustee interprets trust provisions as permitting certain action or inaction that a court later determines to be improper. A breach of trust may be found even though the trustee acted reasonably and in good faith, perhaps even in reliance on advice of counsel. Trustees can ordinarily be protected from this risk by obtaining instructions (§71) concerning uncertainties of law or interpretation…." (emphasis added).

RESTATEMENT 3D OF TRUSTS §93 CMT. C (2012). The cases addressing the advice of counsel defense in Texas hold that advice of counsel is available as a defense. *See, e.g., In re Estate of Bryant*, No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131 (Tex. App.—Amarillo March 11, 2020, no pet.); *In re Estate of Boylan*, No. 02-14-00170-CV, 2015 Tex. App. LEXIS 1427 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.); *DeRouen v. Bryan*, No. 03-11-00421-CV, 2012 Tex. App. LEXIS 8635 at *1 (Tex. App.—Austin Oct. 12, 2012, no pet.).

In *DeRouen*, a beneficiary challenged a trustee's decision to not pursue litigation on behalf of the trust. *DeRouen v. Bryan*, No. 03-11-00421-CV, 2012 Tex. App. LEXIS 8635 at *1. Mary Sue Bryan established a trust (the Bryan trust) for her grandchildren, one of whom was DeRouen. *Id*. Mary's son Bryan was named sole trustee of the Bryan Trust. *Id*. Bryan, as trustee, made three distributions from DeRouen's portion of the trust's funds to DeRouen's wife Angela. *Id*. at *2. DeRouen contended that the distributions were improper because Angela was not a beneficiary under the Trust. *Id*. DeRouen contended that Angela was making false requests for distributions to Bryan, and DeRouen ultimately sued Bryan for breach of fiduciary duties for (i) making distributions to a non-beneficiary and (ii) refusing to take legal action to recover the wrongly distributed trust funds. *Id*. at *3. Bryan ultimately won summary judgment on issues unrelated to the advice of counsel defense. *Id* at *14.

The court of appeals engaged with Bryan's decision not to pursue litigation. *Id*. at *13-14. The court noted: "Thus, under the Texas Trust Code and the terms of the Bryan Trust, Bryan was authorized, but not required, to pursue litigation against Angela. Absent bad faith or an abuse of discretion, Bryan [cannot] be held liable for his refusing to do so." *Id*. at *12. In its analysis of Bryan's alleged bad faith, his reliance on advice of counsel in choosing not to pursue litigation against Angela was considered evidence of good faith:

"….Bryan made the decision not to pursue litigation against Angela after considering the advice of counsel, his discussions with the trustor, and the potential cost of litigation. Because there is no evidence that Bryan acted in bad faith or abused his discretion, the trial court did not err…." *Id.* The court's discussion of advice of counsel as a factor supporting good faith shows that that defense in available in Texas.

A trustee should be careful, however, of using advice of counsel as a defense to a claim. True, advice of counsel is a factor in evaluating a trustee's prudence. But, if a trustee raises advice of counsel as a defense, then the trustee will likely waive its attorney-client communication privilege as to that issue. If a party introduces any significant part of an otherwise privileged matter, that party waives the privilege. If a defendant voluntarily introduces its communications with counsel as a defense to claims, it cannot also seek to keep other aspects of the communications privileged. A Delaware court reviewed a similar fact pattern and found that the privilege was waived. *Mennen v. Wilmington Tr. Co*., No. 8432-ML, 2013 WL 5288900, at *1–13 (Del. Ch. Sept. 18, 2013). In *Mennen v. Wilmington Trust Company*, a trustee was sued for breach of fiduciary duty. *Id.* at *3. One of the trustee's defenses was that they received bad legal advice from counsel. *Id.* at *5. The trustee attempted to block production of the alleged bad advice from counsel, citing attorney-client privilege. *Id.* The court was unpersuaded by the trustee's invocation of the privilege, stating that "a party's decision to rely on advice of counsel as a defense in litigation is a conscious decision to inject privileged communications into the litigation." *Id.*

The Texas Rules of Evidence, and courts nationwide, agree that when privileged communications are voluntarily introduced in litigation, they are no longer privileged. The Texas Supreme Court has declared that a party cannot use the privilege as a sword to promote or protect its own affirmative claims or further the relief it seeks. *Id.* In fact, the Texas Supreme Court would later expand upon the "offensive use" doctrine and acknowledge that a party has waived the assertion of a privilege if the court determines that:

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

Transamerican Nat. Gas Corp. v. Flores, 870 S.W.2d 10, 11–12 (Tex. 1994).

The Texas Supreme Court has explained that with regard to the second prong, "[t]he confidential communication must go to the very heart of the affirmative relief sought." *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993). "When a party uses a privilege as a sword rather than a shield, [they] waive[] the privilege." *Alford v. Bryant*, 137 S.W.3d 916, 921 (Tex. App.—Dallas June 16, 2004, pet. denied). Accordingly, a trustee should be careful and weigh the risk and reward of injecting attorney-client communications into a dispute.

H. Inadvertent Attorney-Client Relationships

A trustee and its counsel should be careful to appropriately communicate with the beneficiary so that the beneficiary does not believe that they are a client of the trustee's attorney. Certainly, an attorney can represent more than one party; in fact, that is very common. For example, a law firm may represent both spouses in the sale of real property, the leasing of minerals, or estate planning. So, a reasonably prudent attorney should identify who they represent and clarify that they do not represent a party when they first communicate with a party regarding a legal matter. Though not dispositive, a "trier of fact may consider the construction of a relevant rule of professional conduct that is designed for the protection of persons in the claimant's position as evidence of the standard of care and breach of the standard." William V. Dorsaneo III, Texas Litigation Guide § 322.02 (Matthew Bender Elite Products eds., 1977) (citing RESTATEMENT (THIRD) OF L. GOVERNING LAWS. § 52, cmt. f).

The downside of this issue for the attorney is that the attorney may inadvertently create an attorney-client relationship and be held to fiduciary duties that are not anticipated by them. To have an attorney-client relationship, there does not have to be a formal agreement. "While it is generally a relationship created by contract, an attorney-client relationship can be implied based on the conduct of the parties." *Sotello v. Stewart*, 281 S.W.3d 76, 80–81 (Tex. App.—El Paso 2008, pet. denied) (citing *Suttin v. Est. of McCormick*, 47 S.W.3d 179, 182 (Tex. App.—Corpus Christi–Edinburg 2001, no pet.); *Mellon Serv. Co. v. Touche Ross & Co.*, 17 S.W.3d 432, 437 (Tex. App.—Houston [1st Dist.] 2000, no pet.)). "The attorney-client relationship may be implied if the parties by their conduct manifest an intent to create such a relationship." *Daves v. Comm'n for Law. Discipline*, 952 S.W.2d 573, 577 (Tex. App.—Amarillo 1997, pet, denied). For the relationship to be established, "the parties must explicitly or by their conduct manifest an intention to create it. To determine whether there was a meeting of the minds, courts use an objective standard examining what the parties said and did; they do not

look at the parties subjective states of mind." *Roberts v. Healey*, 991 S.W.2d 873, 880 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). "More specifically, an attorney-client relationship can be implied from the attorney's gratuitous rendition of professional services." *Sotello*, 281 S.W.3d at 80–81 (citing *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi–Edinburg 1991, writ denied)).

It should also be noted that an attorney may be liable for not informing a party that they is not representing the party. The *Querner* court stated:

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

Querner v. Rindfuss, 966 S.W.2d 661, 667–68 (Tex. App.—San Antonio 1998, pet. denied) (recognizing that an attorney's advice may give rise to an informal fiduciary duty even when no formal attorney-client relationship is formed); *see Vinson & Elkins v. Moran*, 946 S.W.2d 381, 400–02 (Tex. App.—Houston [14th Dist.] 1997, writ denied); *Burnap v. Linnartz*, 914 S.W.2d 142, 148 (Tex. App.—San Antonio 1995, writ denied).

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

IV. CO-TRUSTEES MANAGING TRUSTS

A. Co-Trustees Must Jointly Manage Trusts

Retaining attorneys can be more complicated with a trust administered by co-trustees. Co-trustees each owe fiduciary duties, but they should exercise their duties jointly. So, one co-trustee should not take any action without the consent of the other co-trustees. For example, if a trust calls for two co-trustees, it cannot operate with just one.

At common law, the co-trustees had to act with unanimity: "The traditional rule, in the case of private trusts, was that if there were two or more trustees, all had to concur in the exercise of their powers." AUSTIN W. SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS, § 18.3 (5th ed. 2006)*; see*, *e.g.*, *Brown v. Donald,* 216 S.W.2d 679, 683 (Tex. App.—Fort Worth 1949, no writ); *see*, *e.g.*, *Hart v. First State Bank of Seminole,* 24 S.W.2d 480, 482 (Tex. App.—El Paso 1930, writ ref'd); *see*, *e.g.*, *Dodge v. Lacey*, 216 S.W. 400, 402 (Tex. App.—Fort Worth 1919, writ dism'd w.o.j.). However, the Texas Property Code provides that, in the absence of trust direction, co-trustees typically act by majority decision. TEX. PROP. CODE ANN. § 113.085(a); *Duncan v. O'Shea*, No. 07-19-00085-CV, 2020 WL 4773058, at *6 (Tex. App.—Amarillo 2020, no pet.); *see* RESTATEMENT (THIRD) OF TRS., § 39 (AM. L. INST. 2007). So, the Texas Property Code establishes the general rule that if the trust names two co-trustees, they must act jointly in order to bind the trust, and one cannot act on behalf of the trust without the consent of the other unless the trust agreement specifically authorizes the co-trustee to act unilaterally. PROP. §§ 111.0035; 113.085.

For example, in *Conte v. Conte*, the court of appeals affirmed a trial court's order denying a co-trustee's request for reimbursement for attorney's fees expended in connection with a declaratory judgment action brought by another co-trustee. *Conte v. Conte*, 56 S.W.3d 830, 835 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The court noted that the trust expressly provided that "any decision acted upon shall require unanimous support by all co-trustees then serving," and "[c]learly, Joseph Jr.'s decision to employ counsel to defend against [the] co-trustee's declaratory judgment action was not the subject of unanimous support by all co-trustees." *Id.* at 834. Thus, the trustee was not entitled to reimbursement from the trust for the attorneys' fees, despite the trust's provision that "[e]very trustee shall be reimbursed from the trust for the reasonable costs and expenses incurred in connection with such trustee's duties." *Id.* In a footnote, the court also noted that the other co-trustee had paid for the attorneys from the trust without the consent of the other co-trustee and this was an issue that the successor trustee or beneficiary could raise in a later proceeding. *Id.* at n.5.

Accordingly, if the trust document does not require unanimous action, a majority of the co-trustees can vote to retain counsel and pay from the trust. *Berry v. Berry*, 646 S.W.3d 516, 530 (Tex. 2022). Conversely, a co-trustee in the minority may not retain counsel and pay from the trust. *Id.* For example, in *Berry v. Berry*, one co-trustee sued the other three co-trustees regarding the administration of trust. *Id.* at 521. The court held that the co-trustee in the minority had no authority to sue the other co-trustees for damages:

> Kenneth first contends that, as a trustee, he can bring claims on behalf of the Trust against third parties. Kenneth is correct that a "trustee" is generally an "interested person" who may "bring an action under Section 115.001." But the claims at issue seek to vindicate the rights of the Trust, and the Trust has four co-trustees, three of whom oppose Kenneth's desire to assert the Trust's rights as he has. The question, then, is how to determine who may bring claims on behalf of a trust when co-trustees disagree. The Legislature has provided an unsurprising default rule: "Co-trustees may act by majority decision."
>
> Naturally, the other trustee brothers do not want the claims asserted by Kenneth on behalf of the Trust to proceed. In fact, the Consent Agreement they signed after the lawsuit was filed released any such claims and stated that the other trustees believe it is not in the best interests of the Trust for such claims to proceed. Faced with what amounts to a 3-1 vote of the trustees against him, Kenneth has no unilateral power to act for the Trust in court against the wishes of a majority of the trustees.
>
> Kenneth argues that trustees in his situation must have some recourse when, as alleged here, the other trustees have conspired with the non-trustee defendants to injure the Trust. But Kenneth does have recourse. He can seek removal of the other trustees, as he did in this suit. The defendants do not contest his authority to seek such relief. Further, the defendants do not dispute that Kenneth was permitted as a beneficiary to sue his brothers for breach of fiduciary duty. They oppose that claim on limitations grounds, not on the theory that Kenneth lacks the authority to bring it.

Id.

However, the minority co-trustee can individually retain and pay for counsel from its own funds and later seek reimbursement in litigation concerning removing the majority co-trustees. *See* TEX. PROP. CODE ANN. § 114.064.

B. Duty to Sue a Co-Trustee

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

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

Id.

The term "interested person" means:

> [A] *trustee*, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust. Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.

Id. § 111.004(18) (emphasis added).

The term "trustee" means "the person holding the property in trust, including an original, *additional*, or successor *trustee*, whether or not the person is appointed or confirmed by a court." *Id.* (emphasis added). So, "additional" trustees are interested persons and may invoke a court's jurisdiction under this statute. For example, in *Ramirez v. Rodriguez*, the court held that three co-trustees could sue to remove the fourth co-trustee due to hostility between the co-trustees. Ramirez v. Rodriguez, No. 04-19-00618-CV, 2020 WL

806653, at *4 (Tex. App.—San Antonio 2020, no pet.). Once again, the Texas Supreme Court has held that a co-trustee in the minority can seek to remove the other co-trustees but cannot sue on behalf of the trust. *Berry v. Berry*, 646 S.W.3d 516, 530 (Tex. 2022).

V. COMPENSATING ATTORNEYS

A. General Compensation Authority

1. Trust Language

Generally, trustees have the right to compensate attorneys who do work for a trust. Indeed, the power to retain attorneys would be meaningless if trustees did not have the commiserate right to pay them. For that reason, trusts often have express provisions allowing a trustee to retain agents, including attorneys, and to pay them from the trust. When a dispute arises concerning retaining or compensating attorneys, the trust document is the first place to look for guidance. Generally, the trust document governs and should be followed. Accordingly, if a trust document provides instructions on the retention and compensation of attorneys, those instructions should be followed.

However, as noted above, a trustee must use any power given in a trust in good faith. TEX. PROP. CODE ANN. § 111.0035. So, a trustee cannot use the power to hire and pay counsel if it is done in bad faith. *Id*. One example of bad faith may be when a trustee knows they have violated fiduciary duties and pays for the attorney out of the trust to defend against a reasonable claim of breach of fiduciary duty. RESTATEMENT (THIRD) OF TRS., § 88 cmt. d (AM. L. INST. 2007).

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

For example, such a provision may state:

> All trustees (whether in the minority or majority) shall be entitled to reimbursement and advancement (payment of fees in the interim and before a final judgment in litigation) for expenses, including attorney's fees, incurred in pursuance of their duties under this Trust at the expense of my Trust in regard to any other matter which might arise during the administration of my Trust.

2. Statutory Authority

Trust documents generally do not limit a trustee's power to retain and compensate attorneys. The Texas Property Code has several provisions that impact a trustee's power to compensate attorneys. *See* TEX. PROP. CODE ANN. § 113.018. To the extent the trust instrument is silent, the provisions of the Texas Property Code govern. *Id.* § 113.001; *Conte v. Conte*, 56 S.W.3d 830, 832 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

Texas Property Code Section 113.018, which is titled "Employment and Appointment of Agents," provides: "A trustee may employ attorneys, accountants, agents, including investment agents, and brokers reasonably necessary in the administration of the trust estate." PROP. § 113.018; *see Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996). From a fair reading of this statute, one would think that if a trustee has the power to retain an attorney, the trustee has the power to pay for the attorney. Indeed, few attorneys will perform their services for free for a trust.

The Texas Supreme Court discussed a trustee's ability to hire and pay professionals during the administration of a trust in *Corpus Christi Bank & Trust v. Roberts*, 597 S.W.2d 752, 753–54 (Tex. 1980). In this case, a trustee hired a real estate manager to manage and rent an apartment complex. *Id.* at 753. The trustee paid the real-estate manager from trust assets. *Id.* The trust beneficiaries challenged the fees paid to the manager. *Id.* The Texas Supreme Court analyzed Article 742b-25 of the Texas Trust Act, the predecessor to Property Code Section 113.018. *Id.* at 754. Article 7425b-25 provided that a trustee was authorized to "employ attorneys, accountants, agents, and brokers reasonably necessary in the administration of the trust estate." *Id.* The trust instrument in the case provided that the trustee had a duty to rent or lease trust assets. *Id.* The Texas Supreme Court held that the trustee had the authority to hire and pay the real-estate manager pursuant to that duty. *Id.* According to the court, "under the Texas Trust Act and the terms of the trust agreement the Trustee was granted authority to hire such agents as [the trustee] determined, in [the trustee's] discretion, were reasonably necessary for the management and control of the rental properties." *Id.* The court reversed the lower court's decision ordering the deceased trustee's estate to reimburse the trust for the fees paid to the real-estate manager. *Id.* at 755*; see Slack v. Preuss*, No. 06-21-00018-CV, 2022 WL 247824, at *11 (Tex. App.—Texarkana 2022, no pet.) (finding the trustee had authority to retain account and pay for same in administration of trust).

But one court has since held that "Section 113.018 of the Texas Property Code . . . authorizes a trustee to employ an attorney, but it does not address the conditions for reimbursement of attorney's fees from the trust estate." *Conte v. Conte*, 56 S.W.3d 830, 834 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

Note that this provision has an important limitation: "[R]easonably necessary in the administration of the trust estate." TEX. PROP. CODE

ANN. § 113.018. Generally, trust administration refers to the trustees' management of trust property according to the trust document's terms and for the benefit of the beneficiaries after the settlor's death. So, if a court or jury later finds that it was not "reasonably necessary in the administration of the trust estate" for the trustee to retain an attorney, the trustee may be found in violation of the statute and may be in breach of fiduciary duties.

One example of such an occasion may be when a trustee has breached their fiduciary duty and a beneficiary has sued the trustee for that breach. A judge or jury may find that a trustee who is defending against a correct breach of fiduciary duty claim did not retain an attorney who was reasonably necessary for the administration of the trust estate. Of course, the parties may not know until the end of the litigation whether the trustee breached a fiduciary duty and whether the trustee had the right to retain an attorney under this provision.

For example, in *Stone v. King*, the court of appeals affirmed a finding that a trustee breached their fiduciary duties in converting trust property to pay for their attorney's fees. No. 13-98-022-CV, 2000 WL 35729200, at *8 (Tex. App.—Corpus Christi–Edinburg 2000, pet. denied).

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

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

TEX. PROP. CODE ANN. § 114.063.

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

This provision has important limitations that reimbursement is only allowed where the retention of the agent was for "the convenience, benefit, or protection of the trust or its property" or where it was for "administering or protecting the trust or because of the trustee's holding or owning any of the trust property." *Id.* § 114.063(a)(1)–(2). Once again, a judge or jury may find that reimbursement for a trustee retaining counsel to defend against a correct breach of fiduciary duty claim does not comply with these limitations.

Section 114.063 does not expressly contain a requirement that the reimbursement be for expenses that are "reasonable and necessary" or "equitable and just." PROP. § 114.063. So, this statute does not appear to require a trustee to prove at the time of reimbursement that the attorney's fees and litigation expenses are reasonable and necessary or equitable and just. However, the Texas Property Code requires that a trustee act in good faith, and a jury or judge may determine that reimbursement for unnecessary or unreasonable attorney's fees does not meet the good-faith test. *Id.* §111.0035(b)(4)(B).

Texas Property 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*." *Id.* § 114.064; *Alpert v. Riley,* 274 S.W.3d 277, 295 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *Hachar v. Hachar,* 153 S.W.3d 138, 142 (Tex. App.—San Antonio 2004, no pet.). Texas Property Code Section 114.064 was codified because "the [then] current code [did] not contain a provision allowing the court to award costs and attorney's fees to a trustee who *prevails* in an action for removal or . . . surcharge." Senate Comm. on State Affairs, Bill Analysis, Tex. S.B. 517, 69th Leg., R.S. (1985) (emphasis added). So, when an interested party, including a trustee, files a proceeding under the Texas Property Code, a court may award any party attorney's fees that the court finds are equitable and just and also necessary and reasonable (the later findings may have to be made by a jury). *See In re Ellison Grandchildren Tr.*, 261 S.W.3d 111, 111 (Tex. App.—San Antonio 2008, pet. denied) (affirming award of attorney's fees to all parties to a trust construction case). The Texas Property Code describes the following jurisdiction of district courts regarding trust disputes:

> [A] district court has original and exclusive jurisdiction over all proceedings by or against a trustee and all proceedings concerning trusts, including proceedings to: (1) construe a trust instrument; (2) determine the law applicable to a trust instrument; (3) appoint or remove a trustee; (4) determine the powers, responsibilities, duties, and liability of a trustee; (5) ascertain beneficiaries; (6) make determinations of fact affecting the administration, distribution, or duration of a trust; (7) determine a question arising in the administration or distribution of a trust; (8)

> relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle; (9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and (10) surcharge a trustee.

PROP. § 115.001(a).

The granting or denying of attorney's fees to a trustee or beneficiary under Section 114.064 is within the sound discretion of the trial court, and a reviewing court will not reverse the trial court's judgment absent a clear showing that the trial court abused its discretion by acting without reference to any guiding rules and principles. *Lee v. Lee*, 47 S.W.3d 767, 793–794 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Lyco Acquisition 1984 Ltd. P'ship v. First Nat'l Bank*, 860 S.W.2d 117, 121 (Tex. App.—Amarillo 1993, writ denied). Moreover, unless waived, a party is entitled to a jury finding on whether the fees were reasonable and necessary. *See Lesikar v. Moon*, 237 S.W.3d 361, 375 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

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

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

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

Another theory is that Section 114.063 does not address the payment of attorney's fees at all, just other expenses. Section 114.064, which specifically provides for the recovery of attorney's fees, was adopted two years after Section 114.063, which makes no reference to attorney's fees. PROP. §§ 114.063, 114.064. If the Texas Legislature had intended Section 114.063 to cover attorney's fees and expenses, why did it later enact Section 114.064 to specifically govern attorney's fees? The specific Section 114.064 governs the issue of attorney's fees and the general Section 114.063 does not. PROP. §§ 114.063, 114.064.

There are some additional Texas Property Code provisions that are more general in nature but support a trustee's power to compensate attorneys. The Uniform Prudent Investor Act states: "In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the trust assets, the purposes of the trust, and the skills of the trustee." PROP. § 117.009. The statutes provide that a trustee may exercise any power necessary to carry out the purpose of the trust, except to the extent that the terms of the trust conflict with a provision of the Code or expressly limit the trustee's power. *Id.* §§ 113.001–.002. Further, a trustee must manage the property "as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust," and must "exercise reasonable care, skill, and caution" in doing so. *Id.* § 117.004. A prudent investor may retain and pay counsel to protect trust assets and investments.

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

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

TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a). Section 37.005 provides:

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

Id. § 37.005.

A plaintiff may be entitled to an award of attorney's fees regarding its declaratory judgment request: "In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." *Id.* § 37.009. This is not a "prevailing party" statute, and the court can award fees as it determines is equitable and just. *Hachar v. Hachar*, 153 S.W.3d 138, 142 (Tex. App.—San Antonio 2004, no pet.). For example, in an action declaring that a decedent's adopted grandchildren were not beneficiaries of a trust, it was equitable and just under Texas Civil Practice and Remedies Code Section 37.009 to award fees from the trust to the adopted grandchildren. *In re Ellison Grandchildren Tr.*, 261 S.W.3d 111, 127 (Tex. App.—San Antonio 2008, no pet.). For further example, in *Estate of Richardson*, a remainder beneficiary of a trust filed a declaratory judgment action to declare that the trust would terminate five years after its creation. No. 14-12-00516-CV, 2013 Tex. App. LEXIS 2664 (Tex. App.—Houston [14th Dist.] Mar. 14, 2013, no pet.). After the trustee filed a general denial, the beneficiary filed a motion for summary judgment. The trustee did not file a response to the motion and later conceded that the trust would terminate five years from inception. The trustee argued, however, that the remainder beneficiary was not entitled to any attorney's fees sought in connection an uncontested matter. The trial court agreed and denied the remainder beneficiary's request for attorney's fees. The court of appeals stated that, in a declaratory judgment action, the trial court may award reasonable and necessary attorney's fees that are equitable and just. The court held that identifying the amount of attorney's fees that are "reasonable and necessary" presents a question of fact, but determining the amount of those fees that it is "equitable and just" to award is a question of law for the trial court's sound discretion. It is within the trial court's discretion to conclude that it is not equitable or just to award even reasonable and necessary fees. Whether it is equitable and just to make a reduced award or none at all "is not a fact question because the determination is not susceptible to direct proof, but is rather a matter of fairness in light of all circumstances." The court of appeals held that it would not reverse a trial court's denial of a request for attorney's fees unless the complaining party showed a clear abuse of discretion. The court of appeals affirmed the denial of attorney's fees because the trial court could reasonably have determined that it was equitable and just to not award those fees where the fees may have exhausted the funds in the trust, which would divert the funds from the trust's current beneficiaries.

One commentator has taken the position that a trustee that is found to have breached fiduciary duties should not be entitled to an award of attorney's fees. *See* Charles Epps Ipock, *A Judicial and Economic Analysis of Attorney's Fees in Trust Litigation and the Resulting Inequitable Treatment of Trust Beneficiaries,* 43 ST. MARY'S L.J. 855 (2012).

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

However, regarding claims between a trustee and a beneficiary, the Texas Property Code is less clear as to when, and if, a trustee is allowed reimbursement from the trust for attorney's fees. Author's original thought. The most on-point and specific statute is Section 114.064, and that statute requires certain findings before an award or payment can be made. *See* TEX. PROP. CODE ANN. § 114.064.

3. Common Law Authority

Unless the trust document is limited by itself or a statute, a trustee has the powers recognized by the

common law. *Id.* §§ 113.002 ("Except as provided by Section 113.001, a trustee may exercise any powers in addition to the powers authorized by this subchapter that are necessary or appropriate to carry out the purposes of the trust."); PROP. § 113.024 ("The powers, duties, and responsibilities under this subtitle do not exclude other implied powers, duties, or responsibilities that are not inconsistent with this subtitle."); PROP. § 113.051 ("In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust the trustee shall perform all of the duties imposed on trustees by the common law."). The Restatement provides:

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

RESTATEMENT (THIRD) OF TRS. § 88 cmt. b (AM. L. INST. 2007).

The trustee can properly incur expenses appropriate for the collection and protection of trust assets. The trustee has a duty to exercise such care and skill as a person of ordinary prudence would exercise in incurring the expense. The trustee can properly incur reasonable expenses in employing lawyers. The trustee's right to indemnification "applies even if the trustee is unsuccessful in the dispute, as long as the trustee's conduct was not imprudent or otherwise in violation of a fiduciary duty." RESTATEMENT (THIRD) OF TRS. § 88 cmt. d (AM. L. INST. 2007). However:

> [I]f expenses that are improper have been paid from the trust estate, the trustee ordinarily has a duty to restore the amount of the improper payment(s) to the trust; if improper expenses have been paid from the trustee's personal funds, the trustee ordinarily is not entitled to reimbursement for those expenditures.

Id. at cmt. a.

> . . . .
> The trustee cannot properly incur expenses, however, in employing agents or others to do acts if the employment would involve a violation of the trustee's duties as defined either by law or by the terms of the trust.

Id. at cmt. c.

In *Moody Found. v. Est. of Moody*, the court of appeals reviewed a trial court's order allowing a trustee's request for reimbursement. Moody Found. v. Est. of Moody, No. 03-99-00034-CV, 1999 WL 1041541, at *1–2 (Tex. App.—Austin 1999, pet. denied). During the trustee's lifetime, the trustee served as a trustee of a charitable trust foundation (Foundation) for over thirty years until their removal following an indictment for fraud. *Id*. at *1. Both a criminal prosecution for fraud and an Internal Revenue Service action for acts of self-dealing ensued, and the trustee incurred legal fees in excess of one million dollars. *Id*. Following the trustee's death, their estate (Estate) sued the Foundation for reimbursement, and the probate court granted that reimbursement. *Id*. at *2. The court of appeals described a trustee's right to reimbursement as follows:

> Generally speaking, a trustee may incur expenses that are necessary to carry out the purposes of the trust. For example, it is appropriate for a trustee to incur expenses for costs in maintaining or defending a judicial proceeding for the benefit of the trust estate, such as litigation to resist claims that may result in a loss to the trust estate. When a trustee properly incurs expenses, he is entitled to reimbursement out of the trust estate for such expenses. Where an expense is not properly incurred, however, the trustee is not entitled to reimbursement from the estate. A trustee is not entitled to reimbursement for expenses that do not confer a benefit upon the trust estate, such as those expenses related to litigation resulting from the fault of the trustee.
> . . . .
> The Texas Trust Code authorizes the reimbursement of a trustee from trust principal or income and specifically provides for awards of attorney's fees. Section 114.063, entitled 'General Right to Reimbursement,' provides that '[a] trustee may discharge or reimburse himself from trust principal or income or partly from both for . . . advances made for the convenience, benefit or protection of the trust or its property' and for 'expenses incurred while administering or protecting the trust or because of the trustee's holding or owning any of the trust property.' Section 114.064 of the Code provides: 'In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just.'
> . . . .

> It is clear that under section 114.064, the grant or denial of attorney's fees is within the sound discretion of the trial court. We will not reverse the trial court judgment unless there is a clear showing that the trial court abused its discretion. The test for abuse of discretion is whether the trial court acted unreasonably or without reference to any guiding rules or principles.
>
> Under Texas law, a trustee may charge the trust for attorney's fees the trustee, acting reasonably and in good faith, incurs defending charges of breach of trust. The Estate, as the plaintiff seeking reimbursement from the Foundation, bore the burden in the probate court of establishing that Moody was acting reasonably and in good faith when he engaged in the conduct underlying the federal indictment and the tax court proceeding.

Id. at *3–5.

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

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

Id. at *7–9.

Because the trustee's conduct clearly fell short of the standard required of trustees, the court of appeals held that the weight of the evidence was so contrary to the probate court's finding as to render the judgment clearly wrong. *Id*. at *9. The court of appeals reversed and held that the trustee's estate was not entitled to reimbursement. *Id*.

In *American National Bank of Beaumont v. Biggs*, the court considered a trustee's reimbursement request for attorney's fees under equitable grounds. 274 S.W.2d 209, 216 (Tex. App.—Beaumont 1954, writ ref'd n.r.e.). The court held that such a payment would depend on the circumstances, including the trustee's good faith and the reasonableness of their actions:

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

Id. at 222.

Under the common law, it seems reasonably clear that a trustee can retain and compensate attorneys for routine trust administration issues if doing so is reasonable. Johnson, *supra* note 1, at 17–18. This analysis, however, does not necessarily apply to beneficiaries or a co-trustee suing another trustee for breaching duties. *Id*. at 18. The Restatement provides:

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

RESTATEMENT (THIRD) OF TRS. § 88 cmt. d (AM. L. INST., 2007).

There is no question that, at the end of the litigation, a court can award fees from the trust or from a trustee, individually, as it deems equitable and just. Johnson, *supra* note 1, at 18. Of course, the converse is also true; courts have denied trustees the right to recover fees from trusts where they have been unsuccessful in the litigation. *Id*.

In *Benge v. Roberts*, a beneficiary sued co-trustees for not raising claims against a prior trustee based on earlier litigation between the beneficiary and the prior trustee. No. 03-19-00719-CV, 2020 WL 4726688, at *1 (Tex. App.—Austin 2020, no pet.). The beneficiary argued that the co-trustees were breaching duties by incurring attorneys' fees in an appeal of the underlying suit between the beneficiary and the prior trustee. *Id*. at *3. The court held that if the beneficiary "is successful on appeal, the cause is remanded, and Benge is ultimately successful after a trial on the merits (and any further appeal), the Trust would not be responsible for the co-trustees' legal fees." *Id*. at n.9. A fiduciary cannot recover attorney's fees for conducting unreasonable or unnecessary litigation against their beneficiary. "[W]hen the fiduciary's omission or malfeasance is at the root of the litigation, the estate will not be required to reimburse the fiduciary for [the trustee's] attorneys' fees." *Tindall v. State by & Through Tex. Dep't of Mental Health & Mental Retardation,* 671 S.W.2d 691, 693 (Tex. App.—San Antonio 1984, writ ref'd n.r.e). So, whether a trustee is entitled to reimbursement from the trust for prosecuting or defending a breach of fiduciary duty claim is largely dependent on the outcome of the claim.

In *duPont v. Southern National Bank of Houston*, a federal court in Texas held as follows:

> A trustee can properly incur such expenses as are expressly authorized by the terms of the trust and such expenses as, although not expressly authorized, are necessary or appropriate to carry out the purposes of the trust. Where a trustee properly incurs expenses, he can pay them out of the trust estate and is entitled to a credit for such payments in his accounts. On the other hand, where an expense is not properly incurred the trustee is not entitled to reimbursement out of the trust estate.
>
> It is the duty of the trustee to defend claims against the trust estate, which if successful would cause loss to the trust estate. Specifically, it is the duty of the trustee to the beneficiaries to prevent the destruction of the trust. Thus, where the settlor seeks to rescind the trust on the ground that the settlor was induced by mistake to create the trust, it is the duty of the trustee to defend the trust, and resist proceedings to the extent to which it is reasonable to require him to do so. Reasonable expenses, including those incurred in the employment of attorneys, in defending a trust against an unjustified attack, are payable out of the trust property.
>
> Generally, an expense is properly incurred when it can be shown that the expense (i) is not excessive in amount, (ii) is beneficial to the beneficiaries and the trust estate and not solely for the benefit of the trustee; and (iii) is not caused by the personal fault or error of the trustee. Generally, a fiduciary is under a duty to protect an estate from unnecessary expense. Specifically, in the case of attorney fees, a trustee is entitled only to reimbursement from the trust estate for fees which constitute 'a fair allowance for the professional work necessary to be done in the proper protection of the trustee's interests.'
>
> DuPont III argues that a trustee may not obtain reimbursement for litigation expenses from the trust estate where those expenses are incurred not for the benefit of the trust estate but for the benefit of the trustee individually. Although a litigation expense incurred to prevent the Defendant's removal as trustee is a proper expense performed on behalf of the Trust, where legal fees are paid to counsel whose efforts are principally directed towards protecting the trustee from an expense which does not benefit the trust—in this case it is alleged that Brady has incurred litigation expenses to defend against an allegation of negligence—those fees must be

> paid by the trustee, without reimbursement from the trust estate.
>
> Additionally, where litigation results from the fault of the trustee, he is not entitled to charge the expenses of litigation against the trust estate. Thus, where a trustee is found to have committed a breach of trust, the trustee is not entitled to attorney's fees for defending the suit, or where the trustee engages in obstructive tactics in order to prolong litigation, his legal fees must be borne by him individually. Finally, where the trustee engages in such conduct which requires his removal, he is not entitled to reimbursement from the trust estate for attorney's fees in connection with his resistance to such action. As previously found, duPont III's contentions are not supported by the evidence in this case. Specifically, there is no evidence other than duPont III's conjecture that legal fees paid to counsel to defend Brady against future litigation were incurred in bad faith or for a purpose other than for the benefit of the Trust. Additionally, there is insufficient evidence in the record upon which to sustain a finding that Brady (or SNB or Garner) engaged in obstructive tactics or conduct which would entitle Plaintiff to relief. Accordingly, Plaintiff is not entitled to recovery of attorney fees.

duPont v. S. Nat'l Bank of Houston, 575 F. Supp. 849, 849 (S.D. Tex. 1983).

In conclusion, under the common law, a trustee may retain and pay counsel for routine services that benefit the trust when doing so is reasonable. *See id.* However, if the payments are not reasonable, the trustee likely breaches fiduciary duties in making those payments. *Id.* Further, when the litigation involves claims that the trustee breached fiduciary duties, whether a trustee is entitled to have the trust pay for the fees is largely dependent on if the trustee is successful in defending the claim; successful trustees are likely entitled to reimbursement while unsuccessful trustees are not. *Id*.

B. Trustees Right To A Lien

If a trustee pays attorneys out of the trustee's individual assets, and the trustee is entitled to reimbursement, then the trustee is entitled to a lien on trust property. Texas Trust Code Section 114.063 provides:

> (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; and (3) expenses incurred for any action taken under Section 113.025.
>
> (b) The trustee has a lien against trust property to secure reimbursement under Subsection (a).

Tex. Prop. Code § 114.063; *Woody K. Lesikar Special Tr. v. Moon*, No. 14-10-00119-CV, 2011 Tex. App. LEXIS 6177, 2011 WL 3447491 (Tex. App.—Houston [14th Dist.] Aug. 9, 2011, pet. denied) ("A valid reimbursement claim is secured by a statutory lien under the Texas Property Code."). *See also In re Cousins*, 551 S.W.3d 913 (Tex. App.—Tyler 2018, orig. proceeding [mand. denied]). This statute states that the trustee has a lien against trust property, but it does not state how to perfect the lien. A trustee should file a notice of lien in the real property records where real property is located and otherwise should file notice of liens for other assets as is appropriate.

Further, a former trustee with a claim for reimbursement may want to ensure that the trust does not terminate and/or distribute trust assets before the former trustee can seek reimbursement and/or a lien. In one case, the court held that a claim for expenses from a trust was defeated where the trust had already transferred its assets. *See Lesikar v. Moon*, No. 01-12-00406-CV, 2014 Tex. App. LEXIS 10041, 2014 WL 4374117, (Tex. App.—Houston [1st Dist.] Sept. 4, 2014, pet. denied).

C. Trustees Paying Attorneys in the Interim

Paying attorney's fees and litigation expenses is a more complicated issue in disputes between beneficiaries and trustees or co-trustees concerning an alleged breach of trust when the trustee wants to pay its attorneys in the interim and before a final resolution of the claims. In other words, can a trustee pay its attorneys from trust assets in defending against a claim of breach of fiduciary duty before a court or jury finds for the trustee?

1. Trustee as Plaintiff

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

> In hiring counsel for the trustees in their fiduciary capacity, the selection is ordinarily

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

RESTATEMENT (THIRD) OF TRS. § 81(d) (AM. L. INST. 2007) (emphasis added).

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

2. Beneficiary as Plaintiff

Generally, when a beneficiary sues a trustee, the trust should not pay the beneficiary's attorneys' fees unless a court awards them. *See Jernigan v. Jernigan*, 677 S.W.2d 137, 142 (Tex. App.—Dallas 1984, no writ). The Restatement provides:

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

RESTATEMENT (THIRD) OF TRS., § 88 at cmt. d. *See also Estate of Bonaccorsi* (1999) 69 Cal.App.4th 462, 473 [81 Cal. Rptr. 2d 604] (Trust beneficiaries must ordinarily pay their own attorney fees in challenging the trustee's conduct, even when they are successful.).

Of course, this quote does not address a support trust in which a trustee has discretion to make distributions for the beneficiary's support and maintenance, which may include making distributions to the beneficiary for the beneficiary to retain and pay for counsel. *See also Wing v. Goldman Sachs*, 382 N.C. 288, 293, 876 S.E.2d 390 (2022) (discussing trial court's order to pay beneficiary's attorney's fees). Certainly, the expense of attorney's fees could factor into a beneficiary's support needs.

It would be an unusual trustee, however, who decides that it is appropriate to make support and maintenance distributions for attorneys' fees expenses to a beneficiary who is suing the trustee. *Id.* A trustee could reasonably determine that the beneficiary is not entitled to a distribution for an attorney's fees expense under the distribution language of a trust. Further, in a trust with multiple beneficiaries, a trustee could reasonably determine that the beneficiary's claim solely benefits that beneficiary and not all of the beneficiaries of the trust, such that it would be unfair to tax the trust with those fees. Further, a trustee may consider that the beneficiary's attorney fees expense is a debt or liability and that a trust's spendthrift clause prohibits the payment of same. For example, in *Estate of Richardson*, a trial court denied an award of attorney's fees to a successful remainder beneficiary of a trust who filed a declaratory judgment action because of a spendthrift clause in the trust, which was affirmed on appeal on other grounds. No. 14-12-00516-CV, 2013 Tex. App. LEXIS 2664 (Tex. App.—Houston [14th Dist.] Mar. 14, 2013, no pet.).

Otherwise, as stated earlier, a court could award the beneficiary attorney's fees at the conclusion of the litigation against the trust or the trustee, individually, under Section 114.064. TEX. PROP. CODE ANN. § 114.064 ("In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just."). The granting or denying of attorney's fees to a trustee or beneficiary under Section 114.064 is within the sound discretion of the trial court, and a reviewing court will not reverse the trial court's judgment absent a clear showing that the trial court abused its discretion by acting without reference to any guiding rules and principles. *Lee v. Lee*, 47 S.W.3d 767, 793–94 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Lyco Acquisition 1984 Ltd. P'ship v. First Nat'l Bank of Amarillo,* 860 S.W.2d 117, 121 (Tex. App.—Amarillo 1993, writ denied). *See also Estate of Richardson*, No. 14-12-00516-CV, 2013 Tex. App. LEXIS 2664 (Tex. App.—Houston [14th Dist.] Mar. 14, 2013, no pet.)

(appellate court affirmed denial of attorney's fees to successful beneficiary where the trial court could reasonably have determined that it was equitable and just to not award those fees where the fees may have exhausted the funds in the trust, which would divert the funds from the trust's current beneficiaries). A beneficiary may also be entitled to an award of attorney's fees regarding its declaratory judgment request. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 ("In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just."). This is not a prevailing party statute, and the court can award fees as it determines what is equitable and just. *Hachar v. Hachar*, 153 S.W.3d 138, 140 (Tex. App.—San Antonio 2004, no pet.). For example, in an action declaring that a decedent's adopted grandchildren were not beneficiaries of a trust, it was equitable and just under Texas Civil Practice and Remedies Code Section 37.009 to award fees from the trust to the adopted grandchildren. *In re Ellison Grandchildren Tr.*, 261 S.W.3d 111, 127 (Tex. App.—San Antonio 2008, no pet.).

3. Argument Under Property Code Section 114.008(a) for Payment of a Party's Attorney's Fees in the Interim

Potentially, a plaintiff co-trustee or beneficiary could seek an order from a court requiring the trust to pay their attorney's fees from the trust in the interim of the case and before the judgment is final. *Who Pays Trustee's Legal Fees in Trust Litigation?*, STIMMEL L., https://www.stimmel-law.com/en/articles/who-pays-trustees-legal-fees-trust-litigation (last visited Oct. 9, 2023) [https://perma.cc/HN3Z-55VZ]. Texas Property Code Section 114.008(a) states: "To remedy a breach of trust that has occurred or might occur, the court may: . . . (10) order any other appropriate relief." TEX. PROP. CODE ANN. § 114.008(a)(10).

A plaintiff co-trustee or beneficiary could potentially file a motion and have a hearing in which the beneficiary has a showing that the defendant trustee breached fiduciary duties or might breach fiduciary duties, they have incurred attorney's fees in attempting to remedy these breaches, they are not capable of paying those fees moving forward, their attorney may have to withdraw due to nonpayment, and that but for an order requiring the trust to pay the co-trustee or beneficiary's fees, the trustee may not have to answer for its conduct. *Id.*; *see McDevitt v. Wellin*, No. 2:13-cv-3595-DCN, 2016 WL 199626, at *1–6 (D.S.C. Jan. 15, 2016) (trustee's motion for interim payment of fees was denied where there was no showing of irreparable harm). In this circumstance or other like circumstances, a trial court may decide that it is appropriate to "order any other appropriate relief" and require the trust to pay the plaintiff co-trustee or beneficiary's fees in the interim. PROP. § 114.008(a)(10).

Similarly, a trustee who is a defendant may want to seek court instruction and permission to use trust assets to pay its attorney's fees in the interim. If granted, the trustee should be insulated from a breach of fiduciary duty claim arising out of the use of trust assets to pay those fees even if the trustee is ultimately unsuccessful and ordered to reimburse those fees to the trust. *Wing v. Goldman Sachs,* 382 N.C. 288, 293, 876 S.E.2d 390 (2022) (holding that trustee can follow trial court's order to pay attorney's fees even if that order is later reversed).

4. Trustee as Defendant: Texas Precedent

There is very little authority in Texas 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. *Id.* In *In the Guardianship of Hollis*, a special needs trust's trustee used $67,000 to build a pool on the beneficiary's parent's property. *In the* Guardianship of Hollis, No. 14-13-00659-CV, 2014 WL 5685570, at *1 (Tex. App.—Houston [14th Dist.] Nov. 4, 2014, no pet.). The trial court ordered show-cause hearings to determine the appropriateness of the expense. *Id.* The trustee then spent $23,000 in attorney's fees to defend themselves in the show-cause hearings. *Id.* The trial court removed the trustee because they sought reimbursement from trust funds for defending their actions. *Id.* at *2. The trustee appealed the order removing it. *Id.* at *3. The court of appeals reversed. *Id.* at *5. The court held that one ground for removal is being guilty of gross misconduct or mismanagement, which the court noted meant more than ordinary misconduct and implied serious and willful wrongdoing. *Id.* The appellate court reversed the removal, stating that the trustee had the right to reimburse itself for reasonable costs and expenses in connection with administering or protecting the trust. *Id.*

In *In re McIntire*, trust beneficiaries sued a trustee for multiple allegations of breach of fiduciary duty. *In re* McIntire, No. 07-22-00249-CV, 2023 Tex. App. LEXIS 60 (Tex. App.—Amarillo Jan. 5, 2023, orig. proceeding). The trial court denied a temporary injunction request to stop a trustee from paying his counsel from the trust. The court of appeals affirmed the denial, and in so doing, the court held that the presumption should be that the trustee is acting in good faith and the burden is on the beneficiary to produce evidence to the contrary.

However, there is authority that a trustee defending against a breach of duty claim should not have access to trust assets to pay for its defense until a

court determines that it did not violate a duty. "Where a trustee is found to have committed a breach of trust, the trustee is not entitled to attorney's fees for defending the suit . . . ." *duPont v. S. Nat'l Bank of Houston*, 575 F. Supp. 849, 849 (S.D. Tex. 1983). Commentators have stated that a trustee cannot rely on Section 114.063 to authorize the payment of attorney fees in the interim arising from the defense of a breach of fiduciary duty claim. *See Joyce C. Moore, Recovering Attorney Fees In Probate And Trust Litigation, State Bar of Texas, Advanced Estate Planning and Probate Course*, June 7, 2017. *See also* Mary C. Burdette, Enforcing Beneficiaries' Rights, COLLIN COUNTY PROBATE BAR, March 11, 2011.

For example, in *Wells Fargo, N.A. v. Clower*, a trustee filed suit for declaratory relief regarding its discretion to make income distributions. No. 02-20-00058-CV, 2021 WL 4205056, at *3 (Tex. App.—Fort Worth Sept. 16, 2021, no pet.). The beneficiaries filed counterclaims for breach of fiduciary duty. *Id.* The trial court ordered the trustee to pay into the registry of the court over $250,000 for attorney's fees they had paid out of the trust and ordered the trustee to no longer pay its attorneys from the trust. *Id.* at *8.

In *In re Cousins*, a trustee filed a mandamus proceeding to challenge a trial court's denial of a motion to pay attorney's fees from the trust. 551 S.W.3d 913, 915 (Tex. App.—Tyler 2018, no pet.). A co-trustee sued the other co-trustee for a number of causes of action related to alleged breaches of fiduciary duty. *Id.* at 916. The plaintiff filed a motion for court ordered payment of their legal fees and litigation expenses from the trust based on Section 114.063 of the Texas Property Code. *Id.* At a hearing on the motion, the plaintiff's counsel argued that the Texas Property Code and the trust agreement authorized reimbursement for attorney's fees. *Id.* The counsel stated: "We're not asking you to award us attorney fees we're asking for access to the trust to pay our ongoing legal expenses." *Id.* The plaintiff incurred fees totaling just over $650,000 and argued that "[i]t's not our burden today when seeking interim attorney's fees to do any proof to show what's reasonable and necessary at this stage in the game." *Id.* The trial court denied the request, and the plaintiff filed a petition for writ of mandamus seeking an order from the court of appeals to order the trial court to grant the motion. *Id.*

The plaintiff relied on Section 114.063 of the Texas Property Code, arguing that the trial court's order denies him "this statutory right to ongoing reimbursement." *Id.* at 917. The court of appeals stated:

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

Id. at 917–18.

According to the plaintiff, Section 114.063 applies to reimbursement during the lawsuit and Section 114.064, not Section 114.063, applies at the end of the litigation. *Id.* at 918. The trustee argued that absent mandamus review, Section 114.063's application evades appellate review and the trustee will be forced to pursue litigation with their personal funds, which is "particularly egregious here when the trial court has already found a breach of fiduciary duty and thus validated some of Cousins's claims." *Id.* The court of appeals disagreed that mandamus relief was appropriate. *Id.* The court stated:

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

Id.

The court of appeals held that the trial court's denial of the motion is not the type of ruling that has the effect of precluding a decision on the merits. *Id.* at 919. "Cousins may still pursue his claims against James, including a claim for reimbursement under Section 114.063, and the eventual outcome has not been pre-determined by Respondent's ruling." *Id.* The court also held that mandamus review was not so essential to give needed and helpful direction regarding Section 114.063 that would otherwise prove elusive in an appeal from a final judgment. *Id.* The court stated:

> Section 114.063 was added in 1983 and amended in 1993, and few appellate courts have cited to or substantially analyzed that section. Additionally, the Texas Trust Code expressly authorizes a court to 'make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just.' We see no reason why a trial court's authority to award costs and attorney's fees would not encompass claims to reimbursement under Section 114.063. Thus, although Cousins' petition may present a question of first impression, we cannot conclude that the petition involves a legal issue that is likely to recur such that mandamus review, as opposed to a direct appeal from a final judgment, is necessary. Should Cousins find the verdict on his reimbursement claim to be unsatisfactory, he may appeal from the final judgment on that claim and nothing prevents him from relying on Section 114.063 in a direct appeal.

Id.

The plaintiff also argued that having to utilize personal funds to pursue the litigation is tantamount to an assertion that doing so makes the proceeding more costly or inconvenient. *Id.* at 919–20. The court held that this fact, standing alone, did not warrant mandamus review. *Id.* at 920. "This is particularly true given that, as previously discussed, the denial does not preclude Cousins from presenting a claim for reimbursement at trial and, consequently, Respondent's failure to grant the motion does not result in an irreversible waste of resources." *Id.* The court of appeals denied the petition for writ of mandamus, concluding that an ordinary appeal of the order denying the motion served as a plain, adequate, and complete remedy. *Id.*

If a trustee uses trust assets to pay for its attorney's fees in the interim, it risks a finding of breach of fiduciary duties where the trustee is later found liable on the underlying claim. *See Stone v. King*, No. 13-98-022-CV, 2000 WL 35729200, at *8 (Tex. App.—Corpus Christi–Edinburg Nov. 30, 2000, pet. denied). For example, in *Stone v. King*, the court of appeals affirmed a finding that a trustee breached their fiduciary duties in converting trust property to pay for their attorneys' fees. *Id.* The court of appeals held:

> The trial court also found Stone breached his fiduciary duties as trustee and the PMLA by converting $37,000 in trust funds held by KSP for his own use. Stone contends he was entitled to engage the services of an attorney to represent the interests of the trust and himself in his capacity as trustee, with attorney's fees constituting a trust expense. In support of his argument, Stone cites section 113.018 of the Texas Trust Code. Section 113.018 provides '[a] trustee may employ attorneys . . . reasonably necessary in the administration of the trust estate.' Stone argues King's effort to remove him as trustee was an attack on the trust, which he had a duty to defend.
>
> King argues that by taking trust funds from KSP to pay lawyers without his approval, Stone violated the trust provision requiring all actions to be taken jointly. He further argues Stone did not use the funds to defend the trust, but rather, to pay for an attorney to sue King.
>
> The trial court concluded Stone converted $37,000 of KSP funds for his own use. Conversion is the wrongful exercise of dominion and control over another's property in denial of, or inconsistent with, his rights. It is undisputed that Stone took approximately $37,000 from the KSP account for attorneys' fees without King's consent. It is also undisputed that the trust owned ninety-nine percent of KSP and King individually owned one percent.
>
> Under Texas law, a trustee may charge the trust for attorney's fees that the trustee, acting reasonably and in good faith, incurs defending charges of breach of trust. A trustee is not entitled to reimbursement for expenses that do not confer a benefit upon the trust estate, such as those expenses related to litigation resulting from the fault of the trustee. We have concluded that Stone breached his fiduciary duties by failing to distribute trust funds after being directed to do so by King's attorney and by adding D'Unger as a signatory to the trust account. Thus, the trial court could reasonably have concluded that the litigation seeking to remove Stone as trustee resulted from Stone's improper actions, that Stone did not act reasonably and in good faith in incurring the attorney's fees, and was, therefore, not entitled to charge the trust for the fees. Viewed in the light most favorable to the trial court's judgment, we hold the evidence is legally and factually sufficient to support the conclusion that Stone breached his fiduciary duties by converting $37,000 in trust funds for his own use.

Id. at *7–8.

5. Trustee as Defendant: Precedent from Other Jurisdictions

Though not binding, authority from other jurisdictions can be persuasive authority to Texas courts. *See generally Alexander v. Martin*, No. 2:08-CV-400-DF, 2010 WL 11530306, at *5 (E.D. Tex. Aug. 23, 2010) (stating other jurisdictions can be persuasive authority). Courts from other jurisdictions would support the position that a trial court should make some finding of a good faith defense before a trustee can pay for attorneys from the trust for defending breach claims.

In analyzing the availability of injunctive relief to safeguard the estate from its trustees during litigation, the Eastern District of Texas noted that "[i]n *Snook*, the Eleventh Circuit found a likelihood of success on the plaintiff's position that the trust should not be charged for attorney's fees until the merits are resolved[.]" *Alexander*, 2010 WL 11530306, at *4. When considered more fully, the reasoning behind this holding is clear as:

> It does not appear that the settlors' intent is furthered by allowing he trustees to charge the trust for attorney expenses before they have demonstrated to a court that they are not at fault and that the expenses are reasonable. To conclude otherwise would be to say, in effect, that the settlors intended for the trustees to have their attorney expenses paid by trust funds in all litigation, even when the trustees are guilty of maladministration and have incurred attorney expenses in clearly unreasonable amounts.
>
> Thus, we conclude that the plaintiffs are substantially likely to prevail on the merits of their claim that the trustees have no authority absent prior judicial authorization to use trust funds to pay their attorney's fees in the present case. . . .

Id. at *4-5.

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, 382 (Cal. Ct. App. 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.* at 390. The court noted that this issue is not well developed in the case law. *Id.* The court stated the following standard:

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

Id. at 392.

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

In *Salmon v. Old National Bank*, the court examined a request for injunctive relief that mirrors the one brought by the plaintiff and held that "a claim against a trustee for mismanagement raises the question of the trustee's personal liability" and fees incurred in such a case are not for the benefit of the trust. No. 4:08CV-116-M, 2010 WL 1463196, at *2 (W.D. Ky. Apr. 8, 2010) (granting injunction against trustee's paying attorneys' fees from estate prior to judicial order allowing same). Additionally, the court noted that "courts generally do not allow the trustee to charge attorney's fees against the trust estate before they have successfully defended those claims." *Id.* (citing *Snook v. Tr. Co. of Ga. Bank of Savannah, N.A.,* 909 F.2d 480, 486 (11th Cir. 1990)). The court went so far as to state that "[t]he better practice may be for a trustee to seek reimbursement after any litigation with beneficiaries concludes, initially retaining separate counsel with personal funds." *Id.* (quoting *Wells Fargo Bank*, 990 P.2d at 599 n.4 (Cal. 2000)).

The court in *Sierra v. Williamson* agreed, stating that:

> [T]he Court cannot determine whether Defendants will be successful in defending this action. Nor is the Court in a position to determine whether Defendants' litigation expenses are reasonable. Therefore, the Court believes that the proper procedure is to allow Defendants to seek reimbursement from the Trust after the conclusion of this case, assuming Defendants are successful and their expenses reasonable. As a final matter, Defendants argue that not allowing a trustee to pay attorney's fees from the trust corpus would discourage or prevent otherwise

> qualified persons or entities from undertaking such a role. Judge McKinley briefly addressed this argument in Salmon. Noting that there is a disincentive for beneficiaries to file suit against trustees because all litigation expenses may be paid out of the trust property, Judge McKinley held that "the need to protect beneficiaries from self-interested trustees outweighs the innocent trustee's need for immediate payment of its attorney's fees.'

Sierra v. Williamson, 784 F. Supp. 2d 774, 776–78 (W.D. Ky. 2011).

In *In re Louise v. Steinhoefel Trust*, beneficiaries appealed a trial court's award of attorney's fees to a trustee in the interim. 854 N.W.2d 792, 796 (Neb. Ct. App. 2014). The trial court later determined that the trustee did breach its fiduciary duty. *Id.* at 799. The court of appeals vacated the interim awards and remanded:

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

Id. at 803.

In *Ball v. Mills*, an appellate court reversed an order by a trial court allowing a trustee attorney's fees from a trust in the interim. 376 So. 2d 1174, 1183 (Fla. Dist. Ct. App. 1979). The court stated:

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

Id.

In *Kemp v. Kemp*, an appellate court reversed a trial court's award of attorney's fees to a beneficiary in the interim against a trustee even though the trustee admitted to breaches of fiduciary duty at the hearing. 788 S.E.2d 517, 524 (Ga. Ct. App. 2016). The court stated:

> And while no Georgia case specifically addresses whether OCGA § 53-12-302 (a) (4) authorizes an 'interim-fee award' (such as the one in this case), the plain language of the statute provides that attorney fees and costs of litigation may be included in an award of damages resulting from a trustee's breach of trust or threat of such breach. And because this litigation is still pending, no damages have been awarded for Alexander's breach-of-trust claim. As a result, the instant fee award could not have been included in any such damages. To the contrary, Alexander was awarded fees incurred in pursuing his successful request for injunctive relief; and it is worth noting that even the trial court's grant of injunctive relief, including its

> removal of Sandra as trustee of the Kemp Trusts, is only temporary.
>
> Furthermore, in addressing a former, nearly identical, version of OCGA § 53-12-302 (a) (4), we explained that 'there can be no recovery of any kind under this statute, including attorney fees, without a finding of a breach of trust.' Specifically, we held that, in the case of a jury trial, the trial court erred in awarding fees under this prior statute when there was no verdict form presenting the jury with the question of whether the defendants breached a fiduciary duty. But here, at this stage in the proceedings, we are not at liberty to presume that a judge or jury will enter a judgment or verdict answering that question.
>
> In its order granting attorney fees, the trial court noted that it was necessary for Alexander to file the instant action and seek Sandra's temporary removal as trustee because of the 'established breaches of her fiduciary duty' and evidence that there were real and realistic threats of continued and additional breaches of such duties. Nevertheless, even if it was necessary for Alexander to seek temporary injunctive relief, there has been no official adjudication of Alexander's breach-of-trust claim on the merits, either through the grant of summary judgment or by a jury verdict.

Id. at 523.

Paying fees before a trial court awards them, or self-help, has led to serious results. In *In re Baylis*, the court held:

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

In re Baylis, 313 F.3d 9, 22 (1st Cir. 2002).

At the very least, a trustee may have the responsibility to reimburse a trust for expenses it has improperly caused the trust to incur, such as requiring a trustee to reimburse a trust for the trustee's own legal expenses when the defense was not successful. *See*, *e.g.*, *Snook v. Tr. Co. of Ga. Bank of Savannah, N.A.*, 909 F.2d 480, 487 (11th Cir. 1990); *Garwood v. Garwood,* 233 P.3d 977, 982–83, 986–87 (Wyo. 2010); *Hamilton ex rel. Slate-Hamilton v. Connally,* 959 So. 2d 640, 641–42 (Ala. 2006). Accordingly, there is precedent from other jurisdictions that would not allow a payment from the trust for a trustee's attorney's fees until the final resolution of the underlying breach of fiduciary duty claim. *See*, *e.g.*, *Snook*, 909 F.2d at 487; *Garwood*, 233 P.3d at 982–83, 986–87; *Connally*, 959 So. 2d at 641–42.

6. Estate's Code Authority on Paying Fiduciary in the Interim

Though not controlling for trust lawsuits, the Texas Estates Code has a provision covering the payment of attorney's fees in suits to remove an executor in which the suit has been interpreted as not allowing an executor to use estate funds to pay attorneys in the interim. TEX. EST. CODE ANN. § 404.0037(a). In *In re Nunu*, an estate beneficiary sued the executor to have then removed due to alleged breaches of fiduciary duty and also sought to have the court refuse to pay the executor's attorneys for representing them in a removal action and to have those fees forfeited. 542 S.W.3d 67, 71 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). Texas Estates Code Section 404.0037 provides: "An independent executor who defends an action for the independent executor's removal in good faith, whether successful or not, shall be allowed out of the estate the independent executor's necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings." EST. § 404.0037(a). The executor used estate funds to pay at least some of the attorneys' fees incurred in their defense in this suit. *In re* Nunu, 542 S.W.3d at 75. The beneficiary challenged the payment of the attorneys' fees. *Id.*

The court of appeals discussed Texas Estates Code Section 404.0037, which states that if an independent executor defends a removal action in good faith, the reasonable and necessary attorney's fees for the defense "shall be allowed out of the estate." *Id.* (citing EST. § 404.037(a)). The court noted that good faith is an issue on which the independent executor bears the burden of proof. *Id.* at 81. The court held:

> '[A]n executor acts in good faith when he or she subjectively believes his or her defense is viable, if that belief is reasonable in light of existing law.' Good faith is established as a

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

Id. at 81–82.

The court held that the executor did not have the authority to pay the attorneys from estate funds in the interim before the court allowed such an award after the removal issue was resolved:

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

Id. at 83.

The court sustained the beneficiary's issue in part and remanded to the trial court the determination of the amount to be paid from the estate for the executor's "necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings." *Id.* at 84.

Similarly, in *Klein v. Klein*, the court of appeals dismissed an executor's claims for attorneys' fees and expenses as premature because the removal action was still pending. 641 S.W.2d 387, 387 (Tex. App.—Dallas 1982, no writ). The court held:

> [T]he executor's claim for expenses in defending the removal motion could not properly be determined without also determining the other issues raised by the amended pleading. The amount of expenses allowed to the executor could not properly be fixed without deciding whether the renewal commissions were assets of the estate. If they are found to be assets of the estate, an issue may be raised concerning the executor's good faith in defending, as required by article 149C of the Probate Code. The question of necessity and reasonableness of the expenses and their proper allocation as between the several issues would also be affected. Consequently, we hold that the trial court's award of attorneys' fees to the executor was premature.

Id. at 390.

D. Methods to Prevent a Trustee from Paying an Attorney in the Interim

1. Motion Under Property Code Section 114.008

Potentially, a plaintiff co-trustee or beneficiary could seek an order from a court requiring the trustee pay their attorney's fees in the interim of the case before it is final. *See* TEX. PROP. CODE ANN. § 114.008(a). Texas Property Code Section 114.008(a) states:

> 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; . . . or (10) order any other appropriate relief.

Id.

A plaintiff co-trustee or beneficiary could potentially file a motion and have a hearing in which the plaintiff argues that the trustee is breaching a

fiduciary duty by paying for their attorney's fees from the trust before the resolution of the claims and the court should enter an order not allowing that to continue. *See id.* The trustee could argue that this type of order is an injunction order that has the normal requirements for injunctive relief: probable right of recovery and irreparable harm. *See id.*

There is authority, however, that relief under Section 114.008 does not require a petitioning party to meet the common law elements for such relief. *See id.* Under this statute, courts issue orders giving injunctive-type relief. *See In re Bumstead Fam. Irrevocable Tr.*, No. 13-20-00350-CV, 2022 WL 710159, at *16–17 (Tex. App.—Corpus Christi–Edinburg 2022, pet. denied); *see also In re Mendell,* No. 01-20-00750-CV, 2021 WL 1181198, at *1 (Tex. App.—Houston [1st Dist.] 2021, no pet.) (issuing permanent injunction under § 114.008); *see also Bates Energy Oil & Gas, LLC v. Complete Oil Field Servs., LLC*, No. SA-17-CA-808-XR, 2017 WL 4051569, at *7 (W.D. Tex. Sept. 13, 2017) (citing to statute in support of order not allowing funds in escrow to be depleted). This statute does not expressly require any other equitable or legal elements to be proven; one interpretation is that a court can grant the enumerated relief upon showing that a trustee breached or might breach a trust. *See* PROP. § 114.008(a). When injunctive relief is provided by a specific statute, an applicant may not need to prove these common law elements to obtain temporary relief. *See*, *e.g.*, *Cook v. Tom Brown Ministries*, 385 S.W.3d 592, 599 (Tex. App.—El Paso 2012, pet. denied); *see also 8100 N. Freeway Ltd. v. Houston*, 329 S.W.3d 858, 861 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *see also Marauder Corp. v. Beall*, 301 S.W.3d 817, 820 (Tex. App.—Dallas 2009, no pet.). In such cases, an appellate court reviews the trial court's decision on a temporary injunction application for an abuse of discretion. *Hughs v. Dikeman*, 631 S.W.3d 362, 383 (Tex. App.—Houston [14th Dist.] 2020, no pet.); *8100 N. Freeway Ltd.*, 329 S.W.3d at 861.

For example, in *In re Estate of Benson*, a beneficiary sought and obtained a receivership under Section 114.008 against a trustee. No. 04-15-00087-CV, 2015 WL 5258702, at *7–8 (Tex. App.—San Antonio Sept. 9, 2015, pet. dism'd). The trustee appealed and argued that the beneficiary did not establish the equitable elements for a receivership. *Id.* at *7. The appellate court held that the beneficiary did not have to establish non-statutory elements for a receivership:

> Renee requested the appointment of a receiver pursuant to section 114.008(a)(5) of the Texas Property Code, not based on equity. Section 114.008(a)(5) authorizes the appointment of a receiver to take possession of trust property and administer the trust so long as the court finds that "a breach of trust has occurred or might occur." Thus, Renee was not statutorily required to produce evidence showing irreparable harm or lack of another remedy. The appointment of a receiver is listed as one of many other equally available remedies that an applicant can request. Accordingly, Renee was only required to produce evidence satisfying the statutory requirements of section 114.008(a)(5), and as discussed above, there was some evidence establishing a breach of trust occurred so as to support the probate court's discretionary decision to appoint co-receivers to oversee the Trust.

In re Est. of Benson, 2015 WL 5258702, at *19–20; *see Moody Nat'l Bank v. Moody*, No. 14-21-00096-CV, 2022 WL 14205534, at *6 (Tex. App.—Houston [14th Dist.] Oct. 25, 2022, pet. denied) (affirming receivership order after holding that traditional requirements for same were not applicable under § 114.008).

Texas Property Code Section 114.008 may allow a court to order a trustee to not sell, spend, or otherwise dissipate any assets belonging to the trust to pay for any attorney's fees or expenses related to litigation during the pendency of the litigation until further order of the court without the need for the applicant to meet the traditional elements for injunctive relief. TEX. PROP. CODE ANN. § 114.008(a).

Alternatively, nothing in the Texas Property Code indicates that the Texas Legislature intended to abandon the traditional requirements for an injunction or receivership when it authorized courts to enter orders 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. *Id.* Some courts hold that even if a specific statutory provision authorizes equitable relief (such as a receivership), a trial court should not enter the same without a finding of harm or danger and only in the absence of another remedy, either legal or equitable. *See*, *e.g.*, *In re Est. 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.'"); *see also 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 . . . ."); *see also 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 WL 1412103, at *2 (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."). Accordingly, it is unclear whether a party and court can rely on Section 114.008 in entering an order requiring a trustee to not access trust assets without requiring the traditional elements for injunctive relief. PROP. § 114.008.

2. Injunction General Requirements

A plaintiff may want to seek immediate relief from a court to prevent a trustee from using trust assets to pay its attorneys to defend a breach of fiduciary duty claim and may frame that relief as "injunctive relief." A court has the authority to enter temporary injunctive relief to protect a breach-of-fiduciary-duty plaintiff from irreparable injury and to maintain the status quo. *See*, *e.g.*, *Glassman v. Goodfriend,* 347 S.W.3d 772, 347 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (signing a temporary injunction and order removing the trustee, terminating the trust, and appointing a successor trustee to wind up the trust); *Ryals v. Ogden,* No. 14-07-01008-CV, 2009 WL 2589429, at *1 (Tex. App.—Houston [14th Dist.] Aug. 25, 2009, no pet.) (granting temporary injunction against trustee from selling trust property); *In re Holland,* No. 14-09-00656-CV, 2009 WL 3154479, at *1 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (granting temporary injunction against executor from interfering with trial court's orders); *Twyman v. Twyman*, No. 01-08-00904-CV, 2009 WL 2050979, at *1 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (granting temporary injunction against trustee from withdrawing any additional funds from the trust while litigation was pending); *Farr v. Hall*, 553 S.W.2d 666, 672 (Tex. App.—Amarillo 1977, writ ref'd n.r.e.) (issuing an injunction to prohibit executor from proposed stock redemption).

A temporary restraining order serves to provide emergency relief and to preserve the status quo until a hearing may be had on a temporary injunction. *Cannan v. Green Oaks Apts., Ltd.,* 758 S.W.2d 753, 755 (Tex. 1988). The purpose of a temporary injunction is to preserve the status quo pending a full trial on the merits. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993); *Trostle v. Trostle,* 77 S.W.3d 908, 916 (Tex. App.—Amarillo 2002, no pet.). The status quo is the last actual peaceable, noncontested status that preceded the controversy. *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004). One court states:

> The principles governing courts of equity govern injunction proceedings unless superseded by specific statutory mandate. In balancing the equities, the trial court must weigh the harm or injury to the applicant if the injunctive relief is withheld against the harm or injury to the respondent if the relief is granted.

Seaborg Jackson Partners v. Beverly Hills Sav., 753 S.W.2d 242, 245 (Tex. App.—Dallas 1988, writ dism'd).

To be entitled to temporary injunctive relief, a plaintiff must plead a cause of action, prove a probable right to relief, and prove an immediate, irreparable injury if temporary relief is not granted. *IAC, Ltd. v. Bell Helicopter Textron, Inc.,* 160 S.W.3d 191 (Tex. App.—Fort Worth 2005, no pet.). For example, in *183/620 Group Joint Venture v. SPF Joint Venture*, the court of appeals affirmed a temporary injunction prohibiting the defendants from using funds held by them as fiduciaries for the payment of attorney's fees and expenses in defending the breach of fiduciary duty lawsuit. *183/620 Grp. Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901, 904 (Tex. App.—Austin 1989, writ dism'd w.o.j.).

3. Probable Right to Recovery

To show a probable right of recovery, an applicant need not establish that they will finally prevail in the litigation; rather, they must only present some evidence that, under the applicable rules of law, tends to support its cause of action. *Camp v. Shannon*, 162 Tex. 515, 348 S.W.2d 517, 519 (Tex. 1961); *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 197 (Tex. App.—Fort Worth 2005, no pet.). It is important to note that in a fiduciary case, there is authority that the usual burden of establishing a probable right of recovery does not apply if the gist of the complaint is that a fiduciary is guilty of self-dealing. *Health Discovery Corp. v. Williams*, 148 S.W.3d 167, (Tex. App.—Waco 2004, no pet.) (interested directors had burden to establish fairness of transaction in temporary injunction proceeding).

In a fiduciary self-dealing context, the "presumption of unfairness" attaches to the transactions of the fiduciary, shifting the burden to the defendant to prove that the plaintiff will not recover. *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508-09 (Tex. 1980) (a profiting fiduciary has the burden of showing the fairness of the transactions). If

the presumption cannot be rebutted at the temporary injunction stage, then the injunction should be granted as the plaintiff, by simply presenting a prima facie case of the existence of a fiduciary relationship and a probable breach of that duty, has adduced sufficient facts tending to support the right to recover on the merits. *Camp v. Shannon*, 348 S.W.2d 517, 519 (Tex. 1961); *Health Discovery Corp. v. Williams*, 148 S.W.3d at 169-70; *Jenkins v. Transdel Corp.,* 2004 WL 1404464 (Tex. App.—Austin 2004, no pet.).

4. Irreparable Harm

Generally, to be entitled to a temporary injunction, the applicant must show a probable, imminent, and irreparable injury in the interim. *IAC, Ltd. v. Bell Helicopter Textron, Inc*., 160 S.W.3d 191 (Tex. App.—Fort Worth 2005, no pet.). "Imminent" means that the injury is relatively certain to occur rather than being remote and speculative. *Limon v. State*, 947 S.W.2d 620, 625 (Tex. App.—Austin 1997, no writ); *City of Arlington v. City of Fort Worth*, 873 S.W.2d 765, 768-69 (Tex. App.—Fort Worth 1994, writ dism'd w.o.j.). Evidence that the defendant does not have sufficient assets to cover the amount of damages that the plaintiff will incur will support a finding that an applicant has no adequate remedy at law. *Hartwell v. Lone Star, PCA*, 528 S.W.3d 750, 752 (Tex. App.—Texarkana 2017, pet. dism'd); *Loye v. Travelhost, Inc.*, 156 S.W.3d 615, 618 (Tex. App.—Dallas 2004, no pet.); *Ohlhausen v. Thompson*, 704 S.W.2d 434, 440 (Tex. App.—Houston [14th Dist.] 1986, no writ) (affirming injunction precluding use of funds against defendant who withdrew funds from account where defendant admitted he spent some of funds and did not own otherwise could not make restitution).

If there is evidence that the defendant will secret away funds and attempt to avoid payment, a trial court has discretion to award injunctive relief. *Hartwell v. Lone Star, PCA*, 528 S.W.3d at 758. For example, injunctive relief was proper in a case in which the defendants had followed a pattern of transferring funds to corporations that were under their control. *Minexa Ariz., Inc. v. Staubach*, 667 S.W.2d 563, 567–68 (Tex. App.—Dallas 1984, no writ). The court found that the fact that damages are calculable is irrelevant if, absent injunction, defendants would be able to dissipate specific funds contributed by members of plaintiff class that would otherwise be available to pay judgments. *Id.* For further example, in *R.H. Sanders v. Haves*, the court found there was no adequate remedy at law when the plaintiff established that the defendant diverted corporate assets for personal use, removed funds from the corporation, drew excessive sums for travel, and was stripping the corporation of its assets. *R.H. Sanders Corp. v. Haves,* 541 S.W.2d 262, 265 (Tex. App.—Dallas 1976, no writ); *see TCA Bldg. Co. v. Northwestern Res. Co.*, 890 S.W.2d 175, 179 (Tex. App.—Waco 1994, no writ); *see also Ohlhausen*, 704 S.W.2d at 437 (holding that no adequate remedy of law where party spent part of funds in controversy); *see also Abramov v. Royal Dall., Inc.*, 536 S.W.2d 388, 391 (Tex. App.—Dallas 1976, no writ) (affirmed injunction requiring party to deposit funds in registry of court where evidence showed party had no ability to pay damages); *see also Baucum v. Texam Oil Corp.,* 423 S.W.2d 434, 442 (Tex. App.—El Paso 1967, writ ref'd n.r.e.) (upholding temporary injunction restraining defendant from disposing of a number of different kinds of assets and properties in order to maintain status quo, and explaining that "the mere fact that there exists a remedy at law is not conclusive, but the remedy at law must be complete, practical and efficient, and subject to prompt administration. This means, of course, that equity will step in with its injunctive processes where the remedy at law may not be sufficient or effective. . . .").

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

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

> be available in their entirety in the interim. Because there was at least some evidence from which it would be reasonable to infer that appellants' funds would be diverted or dissipated pending trial, we conclude that the trial court did not abuse its discretion in finding appellees' remedy at law inadequate and granting the temporary injunction.

No. 05-93-01852-CV, 1994 WL 137233, at *7–8 (Tex. App.—Dallas Apr. 19, 1994, no pet.); *see Coffee v. Hermann Hosp. Est*., No. 01-85-00520-CV, 1986 Tex. App. LEXIS 12878, at *3 (Tex. App.—Houston [1st Dist.] May 1, 1986, no pet.) (holding that irreparable injury was shown where "[t]here was testimony from which it might reasonably have been inferred that the Coffees were not cooperative in accounting for assets of the Estate, and that to insure the preservation of the Estate's assets, temporary injunctive relief was necessary.").

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

The court of appeals initially noted that an inadequate legal remedy must generally be shown before a trial court can grant a temporary injunction. *Id.* The court reasoned, however, that such a showing "is only an ordinary requirement; it is not universal or invariable." *Id.* Where the injunction seeks to restrain a party from expending sums held by them as fiduciaries, the court held that damages would not be an adequate remedy "because the funds will be reduced, pending final hearing, so they will not be available in their entirety, in the interim, for the purposes for which they were delivered to the holder in the first place." *Id.* at 904. Since a breach of fiduciary duty claim is by nature an "equitable" action, even in cases where damages may be sought, if the fiduciary relationship is still continuing, the beneficiary has an equitable right to be protected from further harm. *See id.* Thus, there is authority that there is never an adequate remedy at law for a breach of fiduciary duty claim. *See id.*

In *Zaffirini v. Guerra*, beneficiaries sued the trustees of a trust for breach of fiduciary duty and removal. Zaffirini v. Guerra, No. 04-14-00436-CV, 2014 WL 6687236, at *1 (Tex. App.—San Antonio Nov. 26, 2014, no pet.). The trustees paid their attorneys from the trust to defend the suit. *Id.* The beneficiaries obtained a temporary injunction preventing the payment of fees from the trust. *Id.* The court of appeals reversed the injunction, holding there was no evidence of irreparable harm: the trustees could not pay back the money. *Id.* at *4.

In *In re McIntire*, trust beneficiaries sued a trustee for multiple allegations of breach of fiduciary duty. *In re* McIntire, No. 07-22-00249-CV, 2023 Tex. App. LEXIS 60, at *1–12 (Tex. App.—Amarillo Jan. 5, 2023, orig. proceeding). The trust beneficiaries sought an order requiring the trustee to reimburse trust assets used to pay their attorneys and direct them to deposit trust assets into the registry of the court. *Id.* at *5. The trial court denied those motions, and the beneficiaries filed a petition for writ of mandamus. *Id.* 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 they lost the case. *Id.* at *6–7. 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. at *7.

Regarding a clear abuse of discretion element for mandamus relief, the court of appeals noted that the authority cited by the beneficiaries allowed a court to provide the requested relief, but did not require it:

> Their effort to carry that burden consisted of citing authority recognizing a trial court's ability to act. Yet, the two statutes they mentioned speak of what the trial court 'may' do to 'remedy a breach of trust.' Neither specify what a court must do. Nor do they mandate a court to sequester the trust estate, order the reimbursement of previously paid fees, and effectively place the trustee in the position of funding his own defense against claims which may ultimately prove baseless. In short, the implementation of any remedies mentioned in the two statutes is discretionary, and none required the court to grant the relief sought by the McIntires.

Id. at *9.

In conclusion, the court also held that, absent a finding of a breach, the trial court did not err in refusing the interim relief sought by the beneficiaries:

> [T]here had and has been no formal adjudication that any breach occurred. So, given the rule that 'a trustee may charge the trust for attorney's fees the trustee, acting reasonably and in good faith, incurs defending charges of breach of trust,' a finding of breach would seem a prerequisite to barring a trustee from turning to the trust for payment. In short, the legal authority offered does not establish that the trial court had but one choice, which was to grant the specific relief sought by the McIntires. This is not to say the court is unable to fashion other relief which protects all involved as this aging suit winds its way to final disposition. It is to say that the McIntires failed to prove their entitlement to a writ of mandamus when the trial court denied their motion below.

Id. at *11–12.

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

5. Motion For A Bond

Potentially, instead of seeking an order stopping a trustee from paying for its attorneys from the trust, a plaintiff may ask the court to require the defendant trustee to post a bond in an amount sufficient to cover the potential reimbursement to the trust for attorney's fees. Texas Trust Code, Section 113.058(d) provides that: "Any interested person may bring an action to increase or decrease the amount of a bond, require a bond, or substitute or add sureties. Notwithstanding Subsection (b), for cause shown, a court may require a bond even if the instrument creating the trust provides otherwise." Tex. Prop. Code § 113.058. Therefore, if there is concern and evidence that a trustee may not be able to reimburse a trust for trust assets used to defend the trustee, a beneficiary can file a motion to have the court require the trustee to post a bond in a certain amount. If the trustee later defaults, the beneficiary can then seek reimbursement from the sureties.

VI. DUTY TO DISCLOSE ATTORNEY'S FEES PAYMENTS

Full disclosure is very important on all material decisions. The Texas Supreme Court has stated that trustees and executors have "'a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiaries'] rights.'" *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (quoting *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). Further, the Restatement (Third) of Trusts, Section 82 provides that a trustee has a duty to keep beneficiaries reasonably informed about significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests. RESTATEMENT (THIRD) OF TRS. § 82 (1) (AM. L. INST. 2007).

The duty to disclose includes a co-trustee. A trustee, "particularly one empowered to exercise greater control or having greater knowledge of trust affairs" is under a duty "to inform each co-trustee of all material facts that have come to [the trustee's] attention and that are relevant to the administration of the trust." GEORGE GLEASON BOGERT ET AL., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 584 (2023). Even though a majority of trustees are authorized to act for all trustees, each trustee is entitled to access to trust records and to information regarding the administration of the trust, including investment decisions. *See* Bogert, TRUSTS & TRUSTEES § 584, at 40. Accordingly, a trustee has the duty to disclose to the beneficiaries and co-trustees that they have retained counsel, the amount of fees that have been incurred or paid and how such

fees are being paid. *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996). However, as noted earlier, a trustee has no duty to disclose attorney-client communications to beneficiaries.

VII. ALLOCATION OF FEES TO BENEFICIARY'S SHARE OF TRUST

When a trustee faces litigation, it has to retain counsel. When the trustee is successful, it should have the expense associated with the litigation paid by the trust or the beneficiary. Certainly, Texas Property Code 114.064 gives a court a authority to award attorney's fees against a beneficiary regarding trust litigation. TEX. PROP. CODE § 114.064. But that remedy may be illusory where the beneficiary has no assets for collection. Certainly, the trustee can still have the fees paid by the trust in that event, but it can be unfair to other beneficiaries to have the trust assets pay for those fees when one beneficiary files meritless claims. One potential solution to this unfairness is for the trustee to allocate the litigation expense solely to the litigating beneficiary's interest in the trust or future distributions.

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

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

TEX. PROP. CODE § 114.031(a).

So, if a beneficiary has caused loss to the trust due to wrongfully dealing with trust property, a trustee has a claim against the beneficiary, who is liable for the loss. *Id*.

The Texas Property Code also has a provision that allows a trustee to offset any distributions to the beneficiary due to a loss:

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

TEX. PROP. CODE § 114.031(b).

Therefore, if a trustee establishes a claim against the beneficiary, the trustee can then simply payoff that debt by offsetting distributions otherwise due to the beneficiary from the trust. Whereas a statute of limitations might bar a lawsuit against the beneficiary, limitations may not apply to offsetting a beneficiary's interest in the trust. *See*, *e.g.*, *Cook v. Cook*, 177 Cal.App.4th 1436, 99 Cal. Rptr.3d 913, 918-919 (2009) (allowing recourse, despite the running of the statute of limitations, because the settlor "expressed intent to offset unpaid debts to implement a testamentary plan to treat each beneficiary equally").

Further, as a trustee has a duty of impartiality to be fair to all beneficiaries, a successful trustee may be required to seek out methods to allocate trust expenses incurred in litigation to the complaining, yet unsuccessful, beneficiary. Texas Property Code 115.001(a) provides that a court has jurisdiction to "make determinations of fact affecting the administration, distribution, or duration of a trust." TEX. PROP. CODE § 115.001(a). Therefore, a trustee may seek an instruction from a court to determine whether the beneficiary raised claims in bad faith and whether the trustee can or should allocate the expense of the litigation solely to the beneficiary's future distributions or interest in the trust.

Some jurisdictions have held that if an action brought by a trust beneficiary is determined to be "groundless," "vexatious" or otherwise lacking in merit, legal fees incurred by the trustee can be ordered assessed against the beneficiary's share in the trust rather than against the entire corpus of the trust. *See*, *e.g.*, *Childs v. National Bank of Austin*, 575 F.Supp. 634 (N.D. Ill. 1983); *Rudnick v. Rudnick*, 179 Cal. App. 4th 1328, 102 Cal. Rptr. 3d 493, 495 (Cal. Ct. App. 2009); *Conley v. Waite* (1933), 134 Cal. App. 505, 25 P.2d 496; *Estate of Leslie v. Leslie*, 886 P.2d 284 (Colo. App. 1994); *In re Estate of Campbell*, 46 Haw. 475, 382 P.2d 920, 954 (Haw. 1963); *Patterson v. Northern Trust Co.* (1919), 286 Ill. 564, 122 N.E. 55; *Pellico v. Pellico*, 2018 IL App (2d) 160935-U, 2018 Ill. App. Unpub. LEXIS 2116; *Webbe v. First Nat'l Bank & Trust Co.* (1985), 139 Ill.App.3d 806, 487 N.E.2d 711, 93 Ill. Dec. 886; *Boston Safe Deposit and Trust Company v. Stone*, 348 Mass. 345, 203 N.E.2d 547, 554 (Mass. 1965); *Klinkerfuss v. Cronin*, 199 S.W.3d 831, 843-44(Mo. App. E.D. 2006); *In re Feinberg's Estate* (1948), 82 N.Y.S.2d 879, *aff'd* 275 A.D. 925, 90 N.Y.S.2d 690. *See also* GEORGE GLEASON BOGERT AND GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES, section 525, p. 46 (Rev. 2d ed. 1993).

In *Webbe*, a beneficiary sued the trustee for breach of fiduciary duty, mismanagement, and for failing to transfer the trust to the beneficiary. In entering judgment against the beneficiary, the trial court declared:

> The general rule is that a trustee found to be without fault is entitled to reimbursement from the trust fund for all expenses properly incurred in administering and defending the trust. [Citations omitted]. Such rule does not condition assessment of fees and costs upon the outcome of litigation or allow charging them against the unsuccessful party, unless the claim defended against was groundless or vexatious.
> …
> When one of several beneficiaries brings essentially groundless and unsuccessful litigation against a trustee the purpose of which was to benefit only himself, no reason suggests itself why the other beneficiaries, who did not join with him, sought no relief and had no voice in the conduct of the case, should share the expense with the initiating beneficiary. If such were not the case, a beneficiary could assault will and trust provisions attempting to increase his individual shares secure in the knowledge that, if he was unsuccessful, the cost would be borne by the other beneficiaries equally and not recovered solely out of the share of the party seeking to further his own ends. This would not seem just.

Webbe, supra at 810-11, 487 N.E.2d at 713-14; *see also Patterson*, *supra*.

The only Texas case on this issue is *Zapalac v. Cain*, where a court of appeals held that an unsuccessful party regarding a will contest that was done in good faith was entitled to an award of fees from the estate and not from his or her portion of the estate. 39 S.W.3d 414, 421(Tex. App.—Houston [1st Dist.] 2001, no pet.). The court held:

> The Zapalacs argue alternatively that, should this Court find that Cain was entitled to attorney's fees, both their own and Cain's attorney's fee awards should be charged against Cain's share of the decedent's estate because her claims were groundless. They cite cases from other states applying this approach to groundless and unsuccessful litigation brought by an obstreperous beneficiary. However, appellants have not cited (nor has our research found) any Texas case that has charged an award of attorney's fees under Section 243 against only the portion of the estate belonging to a party who unsuccessfully attempted, in good faith, to admit another will to probate. Section 243 expressly provides that, when an unsuccessful party in good faith defends a will or attempts to introduce it to probate, his necessary attorney's fees "may be allowed out of the estate." To judicially engraft the words "out of the unsuccessful party's portion of the estate" would contravene the explicit wording of the Section 243.

Id. The *Zapalac* case, however, likely does not apply to a trust dispute as *Zapalac* dealt with a specific statute in a will contest. Accordingly, there is an argument in Texas that a trustee could allocate the litigation expenses associated with a beneficiary's unsuccessful ligation to that beneficiary's portion of the trust or future distributions.

VIII. CONCLUSION

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