REMEDIES FOR BREACH OF FIDUCIARY DUTY

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CHAPTER 22

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REMEDIES FOR BREACH OF FIDUCIARY DUTY

I. INTRODUCTION

Fiduciary duties are the highest duties known to the law. *Nathan v. Hudson*, 376 S.W.2d 856, 860–61 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.). Texas Courts hold trustees to a "very high and very strict standard of conduct which equity demands." *Slay v. Burnett's Trust*, 187 S.W.2d 377, 387–88 (Tex. 1945). A trustee consents to have his conduct "measured by the standards of the finer loyalties exacted by courts of equity. That is a sound rule and should not be whittled down by exceptions. *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786 (Tex. 1938). *See also Geeslin v. McElhenney*, 788 S.W.2d 683, 685 (Tex. App.—Austin 1990, no writ); G. T. BOGERT, *Trust & Trustees* § 544 (2d rev. ed. 1993). Due to the extremely high duties and standard of care imposed on fiduciaries, the courts have applied broad, flexible remedies to protect beneficiaries. The various remedies available for a fiduciary's breach of its duties are designed to put beneficiaries in the same position they would have been in if no breach had been committed and to charge the fiduciary with any loss and give the trust any gain resulting from a breach of fiduciary duty.

II. FIDUCIARY DUTIES

There are three sources of fiduciary duties: the trust instrument, the Texas Trust Code, and the common law, in that order. Texas Trust Code Section 113.051 provides that the trustee shall "administer the trust according to its terms and [the Texas Trust Code]. In the absence of any contrary terms of the trust instrument or contrary provisions of [the Texas Trust Code], in administering the trust the trustee shall perform all of the duties imposed on the trustees by the common law." Case law has categorized fiduciary duties in various ways, but they generally, fall into the four main categories listed below.

A. Duty of Loyalty

The duty of loyalty is the hallmark of a fiduciary relationship. The trustee must at all times place the interests of the beneficiary above his own. *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945). The trustee is not permitted to "place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries." WILLIAM F. FRATCHER, *Scott on Trusts* § 170 (4th ed. 1987); RESTATEMENT (SECOND) OF TRUSTS § 170.

The duty of loyalty includes the duty not to "self-deal." A trustee who benefits personally from utilizing or dealing with trust property is considered to be "self-dealing." Any self-dealing by a fiduciary will give rise to a "presumption of unfairness," and the burden of proving the fairness of the transaction is placed on the fiduciary. *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502 (Tex. 1980); *Pace v. McEwen*, 574 S.W.2d 792 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.); *Jochec v. Clayburne*, 863 S.W.2d 516 (Tex. App.—Austin 1993, writ denied).

Texas Trust Code Section 117.007 expressly provides that a trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.

Section 117.008 expressly requires a trustee to act impartially in investing and managing trust assets if the trust has two or more beneficiaries, taking into account any differing interests of the beneficiaries. See also WILLIAM F. FRATCHER, *Scott on Trusts* § 183 (4th ed. 1987); RESTATEMENT (SECOND) OF TRUSTS § 183.

B. Duty of Competence

The Trustee has an affirmative duty to administer the trust. TEX. TRUST CODE §§113.006, 113.051. The fundamental duties of a trustee include the use of the skill and prudence which an ordinary, capable and careful person would use in the conduct of his own affairs. *Interfirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 888 (Tex. App.—Texarkana 1987, no writ). The duty of competence encompasses many "sub-duties," some of which are described below.

1. <u>Duty to Comply With the Prudent Investor Rule</u>

Texas Trust Code Section 117.003 provides that a trustee owes a duty to the beneficiaries of the trust to comply with the prudent investment rule, unless altered by the provisions of the trust. The standard of care for the prudent investor is stated in Trust Code Section 117.004 and requires a trustee to invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. A trustee's investment decisions regarding individual assets must be evaluated in the context of the trust portfolio as a whole and as part of an overall strategy having risk and return objectives reasonably suited to the trust.

2. <u>Duty Not to Delegate</u>

The trustee is generally obligated to personally administer the trust and cannot delegate to others acts

that the trustee should personally perform. *See* WILLIAM F. FRATCHER, *Scott on Trusts* § 171 (4th ed. 1987); RESTATEMENT (SECOND) OF TRUSTS § 171. There are exceptions to this rule. A trustee may employ attorneys, accountants, agents, including investment agents, and brokers reasonable necessary in the administration of the trust estate. TEX. TRUST CODE § 113.018. A trustee also may delegate investment decisions under certain circumstances. TEX. TRUST CODE §117.001.

3. Duty to Keep and Render Accounts

A trustee is under a duty to the beneficiaries of a trust to keep full accounts of the trust estate that are clear and accurate. WILLIAM F. FRATCHER, *Scott on Trusts* § 172 (4th ed. 1987); RESTATEMENT (SECOND) OF TRUSTS § 172. A beneficiary may demand a written statement of accounts covering the trust's transactions. TEX. TRUST CODE §113.151.

4. Duties at Inception of Trusteeship

Within a reasonable time after receiving trust assets, a trustee shall review the trust assets and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements and other circumstances of the trust, and the Texas Trust Code. TEX. TRUST CODE §117.006.

5. Duty to Exercise Reasonable Care and Skill

For matters other than investments, "a trustee is under a duty in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." *See* WILLIAM F. FRATCHER, *Scott on Trusts* § 174 (4th ed. 1987); RESTATEMENT (SECOND) OF TRUSTS § 174.

6. Duty to Take and Retain Control of Trust Property

The trustee is under a duty to take all reasonable steps to obtain and control the trust property. *See* WILLIAM F. FRATCHER, *supra* § 175; RESTATEMENT (SECOND) OF TRUSTS § 175.

7. Duty to Preserve Trust Property

A trustee must use the same care and skill that a person of ordinary prudence would use to preserve trust property. WILLIAM F. FRATCHER, *supra* § 176; RESTATEMENT (SECOND) OF TRUSTS § 176.

8. Duty to Enforce Claims

A trustee is under a duty to take reasonable actions to collect claims that are due to the trust estate. *See* WILLIAM F. FRATCHER, *supra* § 177; RESTATEMENT (SECOND) OF TRUSTS § 177.

9. Duty to Defend

The trustee is under a duty to do what is reasonable, under the circumstances, to defend actions by third parties against the trust estate. *See* WILLIAM F. FRATCHER, *supra* § 178; RESTATEMENT (SECOND) OF TRUSTS § 178.

10. Duty Not to Co-Mingle Trust Funds

The trustee has a duty to keep trust property separate from other property, and to properly designate it as trust property. Not only is it the trustee's duty to keep the trust property separate from the trustee's own property, but also to keep that property separate from other trusts the trustee may administer. *See* WILLIAM F. FRATCHER, *supra* § 179; RESTATEMENT (SECOND) OF TRUSTS § 179. Joint investments may be proper, but each trust's interest must be kept separate.

11. Duty With Respect to Bank Deposits

Although a trustee may deposit funds in a bank, he is under a duty to use reasonable care in selecting the bank and to properly designate the deposit as a trust deposit. He may not subject the deposit to unreasonable restrictions on withdrawal or leave the property in non-interest bearing accounts for unduly long periods of time. *See* WILLIAM F. FRATCHER, *supra* § 180; RESTATEMENT (SECOND) OF TRUSTS § 180. *See also* Section 113.007 of the Texas Trust Code, which authorizes the trustee to deposit trust funds that are "being held pending investment, distribution, or the payment of debts in a bank that is subject to supervision by state or federal authorities."

12. Duty With Respect to Co-Trustees

Unless the trust provides otherwise, all trustees are under a duty to participate in the trust administration. Therefore, a trustee cannot properly delegate the acts required of the trustee to co-trustees. It is also the duty of a trustee to use reasonable care to prevent other trustees from committing a breach of trust. *See* WILLIAM F. FRATCHER, *supra* § 184; RESTATEMENT (SECOND) OF TRUSTS §184.

C. Duty of Full Disclosure

A fiduciary has an affirmative duty to make a full and accurate disclosure of all material facts necessary for the beneficiaries to protect their interests. *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996); *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984); *Kinszbach Tool Co. Inc. v. Corbett-Wallace Corp.*, 160 S.W.2d 509 (Tex. 1942). The rationale for this rule is described in WILLIAM F. FRATCHER, *supra* § 173:

> The trustee is under a duty to the beneficiaries to give them on their request at reasonable times complete and accurate information as to the administration of the trust. The beneficiaries are entitled to know what the trust property is and how the trustee has dealt with it. They are entitled to examine the trust property and the accounts and vouchers and other documents relating to the trust and its administration. Where a trustee is created for several beneficiaries, each of them is entitled to information as to the trust. Where the trust is created in favor of successive beneficiaries, a beneficiary who has a future interest under the trust, as well as a beneficiary who is presently entitled to receive income, is entitled to such information, whether his interest is vested or contingent.

A trustee has a fiduciary duty, upon demand by the beneficiary, to furnish the beneficiaries with a formal trust accounting; to inform a beneficiary of the nature and amount of the trust property, the trustee's management actions, and the intent of the trustee regarding the future administration of the trust estate; and to allow the beneficiary to inspect the books and records of the trust. *Shannon v. First Nat'l Bank*, 533 S.W.2d 389 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.); WILLIAM F. FRATCHER, *supra* § 173; RESTATEMENT (SECOND) OF TRUSTS §173. The fiduciary duty of full disclosure operates before and after litigation has been filed and is probably in addition to any obligations of disclosure imposed by the "discovery" provisions of the Texas Rules of Civil Procedure. *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996); *In re Peterson*, 2004 WL 88872 (Tex. App.—Amarillo)(mem. op.)(No. 07-03-0512-CV)(not designated for publication).

D. Duty to Reasonably Exercise Discretion

A trustee must exercise a discretionary power "reasonably." *See Sassen v. Tanglegrove Townhouse Condo. Assoc.*, 877 S.W.2d 489 (Tex. App.—Texarkana 1994, writ denied). Effective January 1, 2004, Texas enacted the Uniform Principal and Income Act. Former Trust Code Sections 113.101 through 113.111 have been repealed. The Uniform Principal and Income Act is contained in Chapter 116 of the Texas Trust Code. In exercising a discretionary power of administration regarding a matter covered by the Uniform Principal and Income Act, "a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries." TEX. TRUST CODE §116.004(b).

1. <u>Power to Adjust Between Principal and Income.</u>

Trust Code Section 116.005 authorizes a trustee to adjust between principal and income if the trustee is in compliance with the prudent investor rule, the trust provides for distributions to a beneficiary by reference to the trust's "income" and the trustee cannot otherwise administer the trust impartially, based on what is fair and reasonable to all of the beneficiaries. The power to adjust specifically includes the power to allocate all or part of a capital gain to trust income. This section lists nine factors that a trustee may consider in deciding whether or how to exercise the power to adjust and prohibits a trustee from making an adjustment under certain circumstances.

Trust Code Section 116.006 provides that a court may not question a trustee's exercise or non-exercise of the power to adjust unless the court determines that the decision was an abuse of the trustee's discretion. If a court determines that a trustee has abused its discretion, the court may place the income and remainder beneficiaries in the positions that they would have occupied if the discretion had not been abused. TEX. TRUST CODE §116.006(c). If the trustee reasonably believes that one or more beneficiaries will object to the exercise of a discretionary power, the trustee may petition the court to determine whether the proposed discretionary act will result in an abuse of the trustee's discretion. TEX. TRUST CODE §116.006(d). In such a suit, the trustee is directed to advance from the trust principal all costs incident to the judicial determination, including attorney's fees of the trustee, any beneficiary who is a party and any guardian ad litem. At the conclusion of the proceeding, however, the court may award costs and attorney's fees as the court deems to be "equitable and just" as provided in Trust Code Section 114.064, including awarding costs against the trust, a beneficiary and/or the trustee in its individual capacity if the court determines that the trustee's exercise of the discretionary power would have resulted in an abuse of discretion or that the trustee did not have reasonable grounds for believing that a beneficiary would object.

The remaining sections of the Uniform Principal and Income Act generally provide for allocation of

specific receipts and disbursements between income and principal.

2. There is no "Absolute" Discretion.

Regardless of the language used in a trust instrument, a trustee's exercise of discretion in the performance of his duties is always subject to review by Texas courts under an "abuse of discretion" standard. *Corpus Christi Bank & Trust v. Roberts*, 597 S.W.2d 752, 754 (Tex. 1980).

III. Remedies for Breach of Fiduciary Duties

Various remedies for breach of fiduciary duty are available to obtain recovery for a specific beneficiary or for the trust as a whole, or to protect the trust and the interests of the beneficiaries. Although the beneficiary cannot obtain a double recovery, several remedies against the fiduciary may be available. For example, a beneficiary may obtain an accounting, damages from the trustee for a breach of trust, removal of the trustee, and denial of his compensation, or the beneficiary may obtain a constructive trust over property and also recover money damages to satisfy the balance of a breach of fiduciary duty claim. The beneficiary's choice among remedies will depend upon various factors, including the availability of trust property for recovery, the value such property, the applicable measure of damages, and the fiduciary's ability to pay damages.

A. Statutory Remedies

1. Texas Trust Code.

Section 114.008 specifies the following remedies available to a court when a breach of trust has occurred:

a. compel the trustee to perform the trustee's duty or duties;
b. enjoin the trustee from committing a breach of trust;
c. compel the trustee to redress a breach of trust, including compelling the trustee to pay money or restore property;
d. order a trustee to account;
e. appoint a receiver to take possession of the trust property and administer the trust;
f. suspend the trustee;
g. remove the trustee as provided under Section 113.082;
h. reduce or deny compensation to the trustee;
i. void an act of the trustee;
j. impose a lien or constructive trust on trust property;
k. trace trust property of which the trustee wrongfully disposed and recover the property or proceeds from the property; or
l. any other appropriate relief.

The rules and procedures to pursue these remedies are contained in the Texas Trust Code, other statutes, or common law, and are discussed further below.

2. Texas Probate Code

An executor or administrator holds the estate in trust for the beneficiaries or heirs, and is held to the same fiduciary standards that apply to all trustees. TEX. PROB. CODE § 37; *Humane Society of Austin & Travis County v. Austin Nat'l Bank,* 531 S.W.2d 574 (Tex. 1975), cert. denied, 425 U.S. 976 (1976). Thus, the remedies for a trustee's breach of fiduciary duty should be available for claims against an executor or administration, subject to the limitations on the judicial supervision of an independent executor under Probate Code Section 145(h). TEX. PROB. CODE § 145(h) ("as long as the estate is represented by an independent executor, further action of any nature shall not be had in the [court] except where this code specifically and explicitly provides for such action in the [court]").

The Probate Code provides the following remedies for a breach of fiduciary duty by an independent executor.

a. Request bond for independent executor. TEX. PROB. CODE § 149.
b. Demand and compel an estate accounting after 15 months. TEX. PROB. CODE § 149A.
c. Compel distribution of estate assets after 2 years. TEX. PROB. CODE § 149B.
d. Seek removal of independent executor. TEX. PROB. CODE § 149C.

B. Parties

1. Beneficiary

A beneficiary may have a claim against a trustee or executor for breach of fiduciary to recover amounts due to the beneficiary directly, such as to enforce his rights to distributions from the trust. Or, a beneficiary (or other interested person) may pursue a claim against the trustee for the benefit of the trust. In that case, the recovery will be paid to the trust. *See* TEX. PROP. CODE § 111.004(7).

2. Fiduciary

The fiduciary may be sued in his individual capacity or his representative capacity (or both) depending on the nature of the claim and the relief sought. If beneficiary is seeking to recover damages from the trustee's personal funds, the trustee must be named in his individual capacity. If the beneficiary is seeking to recover damages from trust assets, the trustee must be sued in his fiduciary capacity.

3. Third Parties

A third party (non-fiduciary) who knowingly participates in a fiduciary's breach of duty may be liable along with the fiduciary as a joint tort feasor. *Kinzbach Tool Co. v. Corbett-Wallace Corp*., 160 S.W.2d 509 (Tex. 1942). The trustee and third party may be joined in a suit for recovery of the value of the lost trust property.

C. Damages

1. Liability

A trustee is personally liable for damages resulting from a breach of fiduciary duty. TEX. PROP. CODE § 114.001(c). Conversely, a trustee is not liable for a loss or depreciation in value of the trust property or for a failure to make a profit that does not result from a breach of trust. TEX. PROP. CODE § 114.001(b).

In addition, even in the absence of a breach of trust, a trustee is accountable to the trust and its beneficiaries for the trust property and for any profit made by the trustee through or arising out of the administration of the trust. TEX. PROP. CODE § 114.001 (a). The reason for this rule was stated by the Texas Supreme Court in *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945):

> It is a well-settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity.

Id. at 388.

2. Elements

In order to recover actual damages for breach of fiduciary duty, a plaintiff must prove each of the following elements:

> (1) a fiduciary relationship between the plaintiff and defendant,
> (2) a breach by the defendant of his fiduciary duty to the plaintiff, and
> (3) an injury to the plaintiff or benefit to the defendant as a result of the defendant's breach.

Lundy v. Masson, 260 S.W.3d 482, 501 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *See also Avary v. Bank of Am., N.A.*, 72 S.W.3d 779, 792 (Tex. App.—Dallas 2002, pet. denied); *Wells Fargo Bank, N.A. v. Crocker*, No. 13-07-00732-CV (Tex. App.—Corpus Christi Dec. 29, 2009, pet. denied) (not designated for publication), 2009 WL 5135176; *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 508 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

3. Causation

Causation (i.e., that the injury resulted from the breach) must be proved as a separate element. *See Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 119 (Tex.2004) ("Breach of the standard of care and causation are separate inquiries . . . and an abundance of evidence as to one cannot substitute for a deficiency of evidence as to the other.").

The causation standard for breach of fiduciary duty in a trust case is provided by Trust Code Section 114.001(c) as the damages "resulting from" the breach. See Tex. Pattern Jury Charges—Family & Probate 235.14 (2012).

Non-trust breach of fiduciary duty cases appear to apply a "proximate cause" standard. *Longaker v. Evans*, 32 S.W.3d 725 (Tex. App.—San Antonio 2000, pet. withdrawn by agr.) (Beneficiary must prove causal link between executor's actions and damages to estate.); *Wells Fargo Bank, N.A. v. Crocker*, No. 13-07-00732-CV (Tex. App.—Corpus Christi Dec. 29, 2009) (not designated for publication), 2009 WL 5135176 (Beneficiaries had the burden to prove that the executor proximately caused an injury to them.); *Si Kyu Kim v. Harstan, Ltd.*, 286 S.W.3d 629, 635 (Tex. App.—El Paso 2009, pet. denied) (breach of fiduciary duty requires a showing that the breach proximately caused an injury) (*citing Jones v. Blume*,196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied); *Punts v. Wilson*, 137 S.W.3d 889, 891 (Tex. App.—Texarkana 2004, no pet.); *Lundy* v. Masson, 260 S.W.3d 482, 501 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). *See also*

Tex. Pattern Jury Charges—Business, Consumer, Insurance & Employment 115.18 (2010) (using "proximate cause" for breach of fiduciary duty damages). "Cause in fact and proximate cause are but specific applications of the rule that a plaintiff must produce evidence from which the [juror] may reasonably infer that the [injury suffered and the] damages sued for have resulted from the conduct of the defendant." *Selectouch Corp. v. Perfect Starch, Inc.,* 111 S.W.3d 830, 835 (Tex. App.— Dallas 2003, no pet.).

While there are no cases directly on point, it would appear that the "resulting from" causation standard is different from "proximate cause" in that the resulting harm need not be foreseeable in the former. Proximate cause has two elements - cause in fact and foreseeability. *City of Gladewater v. Pike*, 727 S.W.2d 514, 517 (Tex. 1987). In a fiduciary context, proximate cause means that the action of the fiduciary "is a substantial factor in bringing about the injury and a person of ordinary intelligence could have anticipated the dangers created for others by his conduct, whether the precise type of danger can be foreseen or not." *Hoenig v. Texas Commerce Bank, N.A.*, 939 S.W.2d 656 (Tex. App.—San Antonio 1996, no writ) (*citing Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 549–51 (Tex. 1985)); *Brown v. Edwards Transfer Co.*, 764 S.W.2d 220 (Tex. 1988).

Causation cannot be established by mere guess or conjecture, but rather must be proved by evidence of probative force. Such proof may be made by direct or circumstantial evidence. *Farley v. M.M. Cattle Co.*, 529 S.W.2d 751, 755 (Tex. 1975). In *Baker Botts, L.L.P. v. Caillous*, 224 S.W.3d 723 (Tex. App.—San Antonio 2007, no writ), the court of appeals found insufficient evidence to establish that the breach of fiduciary duty caused the alleged damages. In *Baker Botts*, husband and wife hired Baker Botts to do their estate planning. Upon husband's death, wife disclaimed her interest in her husband's estate. Years later, after wife had become mentally incapacitated, wife's son sued Baker Botts and Wells Fargo Bank, the executor of husband's estate, claiming that their breaches of fiduciary duties to wife caused her to sign the disclaimer to her detriment. The jury found that Wells Fargo and/or Baker Botts breached their duties of disclosure, loyalty and good faith owed to wife related to the disclaimer and that such breaches proximately caused $65.5 million in damages to wife, being the value wife would have received if she had not signed the disclaimer. In reversing the trial court's judgment, the court of appeals found no evidence that any of the breaches of duty by Wells Fargo or Baker Botts caused wife to disclaim her interest in husband's estate because the only evidence on the issue of causation was "speculative." Since no witness had any knowledge of wife's true wishes or intentions, "any assumption about what [wife] would have done had she [been fully informed] is based on nothing more than conjecture." Similarly, in *Longaker v. Evans*, 32 S.W.3d 725, 734–35 (Tex. App.—San Antonio 2000, pet. withdrawn by agr.), the court rejected as "mere speculation" any assumption as to the decedent's motives or intent when she terminated a trust for the benefit of her brother who was advising her and found no evidence of causation or damages.

4. Measure of Damages

A trustee is liable for the amount necessary to fairly and reasonably compensate the trust estate for damages resulting from the breach of trust. There are basically three measures of damages for breach of trust:

(1) any loss or depreciation of the value of the trust estate as a result of the breach of trust;
(2) any profit made by the trustee through the breach of trust;
(3) any profit that would have accrued to the trust estate if there had been no breach of trust.

TEX. PROP. CODE § 114.001(c); Tex. Pattern Jury Charges—Family & Probate 235.14 (2012).

The beneficiaries are entitled to be put in the position that they would have been in if no breach had been committed. This is true even if no loss is suffered by the trust. The gain or profit not realized by the trust because of a breach of trust constitutes sufficient injury. WILLIAM F. FRATCHER, *Scott on Trusts* § 205 (4th ed. 1987). The trustee's liability for any profit made by the trustee through a breach of trust is not affected by an exculpation clause. TEX. PROP. CODE § 114.001(a)(2). Thus, even if a trustee is not liable for damages for a breach of trust resulting from ordinary negligence because a trust provision exculpates him for any breach unless intentional or due to gross negligence, the trustee is still liable to the trust for any profit realized by the trustee resulting from the breach.

The beneficiary can choose the most advantageous remedy. Some of these concepts are illustrated as follows:

BREACH	DAMAGES
1. Trustee sells property for less than fair market value.	Value at time of sale over sales price.
2. Trustee purchases property for more than fair market value.	Purchase price over value at time of sale.
3. Trustee sells property in violation of duty to retain and property value increases after sale.	Value at time of sale plus interest; or Value at time of suit plus income if had not been sold.
4. Trustee retains property in violation of duty to sell and property value decreases after sale.	Value on date trustee should have sold property
5. Trustee makes a profit through a breach of trust or not.	Amount of the profit
6. Trustee makes improper investment that decreases in value.	Purchase price plus interest
7. Trustee directed to invest only in bonds, but instead invests in stocks.	Amount invested in stocks plus interest, or Amount trust would have received if bonds had been purchased.
8. Instead of investing in bonds, Trustee misappropriates trust funds and uses in personal business.	Amount invested in business plus interest, or Amount invested in business plus profits earned in business (pro rata share), or Current value of principal and income if bonds had been invested properly.
9. Trustee sells trust property to self (even if for FMV)	Set aside sale and take back property, or Trustee pay trust FMV on date of judgment

If a trustee breaches a duty that produces a gain for the trust and also breaches a duty that produces a loss, generally the trustee is chargeable with the entire loss and accountable for the entire gain and cannot net the two in determining damages where the breaches are separate and distinct. For example, if the trust requires that the trustee invest solely in bonds and the trustee instead invests in stocks, the trustee will be liable for any losses suffered on any stocks, while the trust keeps any gains on others. RESTATEMENT (SECOND) OF TRUSTS § 213; WILLIAM F. FRATCHER, *Scott on Trusts* § 213 (4th ed. 1987). However, if the gains and losses result from a single breach, then the trustee is liable only for the net loss or net gain. The following factors may be considered in determining whether two breaches of trust are separate:

(1) Whether the improper acts are the result of a single strategy or policy, a single decision or judgment, or a single set of interrelated decisions;
(2) The amount of time between the instances of misconduct and whether the trustee was aware of the earlier misconduct and its resulting loss or profit;
(3) Whether the trustee intended to commit a breach of trust or knew the misconduct was a breach of trust; and
(4) Whether the profit and loss can be offset without inequitable consequences, for example to beneficiaries having different beneficial interests in the trust.

Restatement (Third) of Trusts § 101. Netting might be allowed where a trustee breached his duty to diversify trust assets, resulting in damages equal to the return that would have been earned if the assets had been properly diversified over the actual return earned on the portfolio.

Damages for breach of trust ordinarily include interest or a return from the date of the breach. *See Anderson v. Armstrong*, 132 Tex. 122, 120 S.W.2d 444 (1938); *United Hay Co. v. Ford*, 81 S.W.2d 776 (Tex. Civ. App.—Galveston 1935, writ ref'd); *Langford v. Shamburger*, 392 F.2d 939, 943 (5th Cir. 1968); WILLIAM F. FRATCHER, *Scott on Trusts* § 207 (4th ed. 1987). This is not "pre-judgment interest" but rather is an element of damages as an amount that would have accrued if no breach had occurred as authorized by Trust Code 114.001(c). Thus, Texas Finance Code Section 304.1045 should not prevent this recovery. The pre-judgment interest statute applies only to claims for wrongful death, personal injury, or property damage, and does not apply to claims for breach of fiduciary duty. TEX. FIN. CODE ANN. § 304.102 (West); *See also Lee v. Lee*, 47 S.W.3d 767, 798-99 (Tex. App.—Houston

[14th Dist.] 2001, pet. denied). However, a successful plaintiff in a breach of fiduciary duty case may still recover common law or equitable pre-judgment interest which is computed as simple interest. *Id*. So, while there is no statutory right to recover pre-judgment interest, a plaintiff should still plead for the recovery of pre-judgment interest. In any case, "any profit that would have accrued to the trust estate if there had been no breach of trust" is recoverable as actual damages in a breach of trust case under Trust Code Section 114.001(c), which should include a return of any income or growth that would have been earned on any misapplied trust funds.

Some courts have indicated that actual damages in a breach of fiduciary duty action can be based on contract-type damages such as "benefit of the bargain" or out-of-pocket compensatory damages, as well as consequential damages. *See Lesikar v. Rappeport*, 33 S.W.3d 282 (Tex. App.—Texarkana 2000, pet. denied) (actual damages for breach of fiduciary duty and fraud include general or direct damages as well as special or consequential damages). However, it is unclear whether contract damages are available for a breach of fiduciary duty. Further, resort to these concepts, which do not squarely fit most breach of trust cases, may not be appropriate or necessary because Trust Code Section 114.001(c)(3) specifically authorizes recovery of actual damages measured by "any loss or depreciation in value of the trust" or "any profit" that would have accrued to the trust estate if there had been no breach of fiduciary duty.

5. Collection by Offset if Trustee is also a Beneficiary.

If the trustee who is liable for damages for breach of trust also is a beneficiary of the trust, the liability can be satisfied by offset against his beneficial interest in the trust. TEX. PROP. CODE § 114.031(b).

D. Constructive Trust

If the fiduciary is insolvent or has used trust or estate assets to purchase property that has appreciated, the remedy of constructive trust may be preferable to a judgment against the trustee for money damages. A constructive trust is an equitable remedial devise used to prevent unjust enrichment due to the wrongful acquisition of title to property. WILLIAM F. FRATCHER, *Scott on Trusts* § 462.2 (4th ed. 1987). It is a remedy imposed to redress a wrong or prevent unjust enrichment. *Young v. Fawcett*, 376 S.W.3d 209, 215 (Tex. App.—Beaumont 2012, no pet.); *Lesikar v. Rappeport*, 33 S.W.3d 282, 303 (Tex. App.—Texarkana 2000, pet. denied); *Omohundro v. Matthews*, 161 Tex. 367, 341 S.W.2d 401 (1960); *In re Estate of Arrendell*, 213 S.W.3d 496 (Tex. App.—Texarkana 2006, no pet.). A constructive trust is a relationship with respect to property, subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property. *Talley v. Howsley*, 142 Tex. 81, 86, 176 S.W.2d 158, 160 (1943). Thus, a constructive trust is a device equity uses to remedy a wrong. *Lesikar v. Rappeport*, 33 S.W.3d 282, 303 (Tex. App.—Texarkana 2000, pet. denied); *see also Meadows v. Bierschwale*, 516 S.W.2d 125, 131 (Tex.1974); *Blankenship v. Citizens Nat'l Bank of Lubbock*, 449 S.W.2d 77 (Tex. App.—Amarillo 1970, writ ref'd n.r.e.); *In re Estate of Preston*, 346 S.W.3d 137, 165 (Tex. App.—Fort Worth 2011, no pet.); WILLIAM F. FRATCHER, *Scott on Trusts* § 462 (4th ed. 1987) . While the form of a constructive trust is practically without limit, its existence depends upon the circumstances. *Hubbard v. Shankle*, 138 S.W.3d 474, 485 (Tex. App.—Fort Worth 2004, pet. denied); *Troxel v. Bishop*, 201 S.W.3d 290, 297 (Tex. App.—Dallas 2006, no pet.). The remedy of constructive trust "is broad and far reaching and designed to circumvent technical legal principles of title and ownership in order to reach a just result." *Southwest Livestock & Trucking v. Dooley*, 884 S.W.2d 805, 810 (Tex. App.—San Antonio 1994, writ denied).

A constructive trust is a remedy available for breach of fiduciary duty. TEX. PROP. Code §114.008(9); *In re Estate of Arrendell*, 213 S.W.3d 496 (Tex. App.—Texarkana 2006, no pet.). It applies to all types of fiduciaries, including trustees, executors and administrators, guardians, and agents. A constructive trust may be imposed when one acquires legal title to property in violation of a fiduciary relationship. *Lesikar v. Rappeport*, 33 S.W.3d 282, 303 (Tex. App.—Texarkana 2000, pet. denied). A constructive trust may be imposed on any property transferred or converted by a fiduciary in breach of his duty so long as there is no subsequent bona fide purchaser for value without notice of the breach. For example, if a fiduciary acquires property for himself in breach of his duty of loyalty, a constructive trust may be imposed on the property wrongfully acquired in favor of the trust.

To obtain a constructive trust for a breach of fiduciary duty, the proponent must specifically plead and strictly prove the following elements: (1) breach of a fiduciary relationship, (2) unjust enrichment; and (3) tracing to an identifiable res. *Troxel*, 201 S.W.3d at 297; *Hubbard*, 138 S.W.3d at 485. If a plaintiff is seeking to

impose a constructive trust, but does not know what property may have been acquired by the fiduciary with the proceeds of his wrongdoing, the plaintiff should make general allegations in the petition such as the following: "Plaintiff requests that a constructive trust be imposed on all property owned, in whole or in part, by defendant X which was acquired, in whole or in part, but defendant X with the funds misappropriated from the plaintiff's account." *Moore, Litigation Involving Fiduciaries: Trial Handbook 2009,* 33rd Annual Advanced Estate Planning & Probate Course, p. 74. The plaintiff should send discovery aimed at locating the funds and demand a statutory accounting of the estate or trust to assist with at least the initial tracing steps. The plaintiff also may consider seeking an equitable accounting of the funds once in the trustee's individual possession. *Southwest Livestock & Trucking*, 884 S.W.2d at 810. Whether a constructive trust should be imposed is within the discretion of the court. *Id.*

The person seeking to impose a constructive trust initially has the burden to trace trust funds or property into the specific property sought to be recovered. *Wilz v. Flournoy*, 228 S.W.3d 674 (Tex. 2007); *Meyers v. Baylor Univ. in Waco*, 6 S.W.2d 393 (Tex. Civ. App.—Dallas 1928, writ ref'd). If this is not possible due to commingling, the right to a constructive trust is not defeated if the beneficiary can trace to the commingled fund." *Southwest Livestock & Trucking*, 884 S.W.2d at 810; *Eaton v. Husted*, 141 Tex. 349, 358, 172 S.W.2d 493, 498 (1943); *Peirce v. Sheldon Petroleum Co.*, 589 S.W.2d 849, 853 (Tex. Civ. App.—Amarillo 1979, no writ). If a trustee commingles trust funds with the trustee's personal funds, the entire commingled fund is subject to the trust. *Moody v. Pitts*, 708 S.W.2d 930, 937 (Tex. App.—Corpus Christi 1986, no writ); *Gen. Assoc. of Davidian Seventh Day Adventists, Inc. v. Gen. Assoc. of Davidian Seventh Day Adventists,* 410 S.W.2d 256, 259 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.). When a trustee has commingled funds and has expended funds, the money expended is presumed to be the trustee's personal funds, and the remaining funds belong to the trust. *Batmanis v. Batmanis,* 600 S.W.2d 887, 890 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

Once this tracing burden has been met, the entire property will be treated as subject to a constructive trust unless the trustee can distinguish and separate that property which is his own. *Wilz*, 228 S.W.3d at 676; *Collins v. Griffith*, 125 S.W.2d 419 (Tex. Civ. App.—Amarillo 1938, writ ref'd); *Graham v. Turner*, 472 S.W.2d 831, 840 (Tex. Civ. App.—Waco 1971, no writ). Thus, if a fiduciary commingles trust or estate property with his own, and purchases property in his name, the burden is on the fiduciary to show how much of the property was purchased with his own funds. *Eaton v. Husted*, 141 Tex. 349, 172 S.W.2d 493 (1943); *Lung v. Lung*, 259 S.W.2d 253 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.); *see also Moseley v. Fikes*, 126 S.W.2d 589 (Tex. Civ. App.—Fort Worth 1939), *aff'd*, 136 Tex. 386, 151 S.W.2d 202 (1939).

Tracing to an identifiable *res* can range from straightforward to highly complex. It does not matter how many transactions have occurred with the property as long as it can clearly be identified. As stated in Bogert:

> If trust property can be traced step by step in the dealings of the trustee and others, it does not matter how many changes in form have been experienced or what the nature of the substitute trust property now is. The trustee may have entered into fifty different transactions of sale and reinvestment with regard to the original trust property and its proceeds. He may have held bank credit at the beginning, purchased corporate stock with that credit, exchanged the stock for bonds, and sold the bonds and invested in realty.

G. T. BOGERT, *Trust & Trustees* § 921 (2d rev. ed. 1993).

A fairly simple tracing example is where a fiduciary has taken money from a trust bank account and used it to purchase real property in his individual name. The trust funds can be traced to the real property through the trust's and the trustee's personal bank records and the closing documents for the purchase of the property. However, if the fiduciary has engaged in multiple or complex transactions, it may be necessary to engage a forensic accountant to trace the property and provide expert testimony at trial. It also may be possible to obtain a court appointed auditor under Rule 172 of the Texas Rules of Civil Procedure to do the tracing.

E. Equitable Lien

Rather than use the remedy of constructive trust, a beneficiary may choose to obtain a money judgment against the trustee, secured by an equitable lien against any trust *res* or it product in the hands of the trustee. TEX. PROP. CODE §114.008(9). This remedy leaves title to the wrongfully acquired property in the defendant, but orders that such property be sold and the proceeds paid to the trust to satisfy the judgment. G. T. BOGERT, *Trust & Trustees* § 865 (2d rev. ed. 1993).

F. Fee Forfeiture

Forfeiture or denial of a fiduciary's compensation is a remedy similar to a constructive trust. *ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867 (Tex. 2010) ("courts may fashion equitable remedies such as profit disgorgement and fee forfeiture to remedy a breach of fiduciary duty"). Where a fiduciary has committed a breach of trust, the court may deny him all or part of his compensation. A basis for denial of compensation is that a fiduciary is not entitled to compensation unless he has properly performed the necessary services. In addition, the remedy of fee forfeiture is intended to protect relationships of trust by discouraging agents' disloyalty. *Burrow v. Arce*, 997 S.W.2d 229, 238 (Tex.1999). It is not necessary to prove that the fiduciary's breach caused actual damages in order to obtain the remedy of fee forfeiture. *Id.* at 240. "It is the [fiduciary's] disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation." *Id.* at 238. A fiduciary's fee may be disallowed even though the fiduciary is not liable for damages for a breach of trust due to an exculpatory clause in the trust instrument. WILLIAM F. FRATCHER, *Scott on Trusts* § 243 (4th ed. 1987).

Under Texas Trust Code Section 114.061(b), a court may in its discretion deny a trustee all or part of his compensation if he commits a breach of trust. *See also,* TEX. PROP. CODE §114.008(8). Texas Probate Code Section 241 provides that a court may deny a commission in whole or in part if the executor or administrator "has not taken care of and managed the estate property prudently" or has been removed under Probate Code Sections 149C or 222.

A plaintiff must specifically plead for the remedy of fee forfeiture or denial. *Shands v. Tex. State Bank*, 121 S.W.3d 75, 78 (Tex. App.—San Antonio 2003, pet. denied) (*citing Lee v. Lee,* 47 S.W.3d 767, 780–81 (Tex.App.-Houston [14th Dist.] 2001, pet. denied)) (failure to plead for fee forfeiture waives recovery).

Fee forfeiture is not automatic in every case involving a breach of fiduciary duty. The remedy must fit the circumstances and may be limited to "clear and serious" violations of duty. *Burrow v. Arce*, 997 S.W.2d 229, 241 (Tex. 1999) (relating to forfeiture of fee by an attorney who breaches a fiduciary duty to the client). Whether fee forfeiture should be ordered, and in what amount, is determined by the court based on a consideration of all relevant circumstances. Any contested fact issues must first be resolved by the jury, such as whether the fiduciary's actions were intentional, or merely inadvertent. *Id.* at 245; *See also* Tex. Pattern Jury Charges—Business, Consumer, Insurance & Employment 115.17 (2010). In exercising its discretion regarding forfeiture of a trustee's compensation for breach of trust, the court should consider the following factors:

> (1) whether the trustee acted in good faith or not;
> (2) whether the breach of trust was intentional or negligent or without fault;
> (3) whether the breach of trust related to the management of the whole trust or related only to a part of the trust property;
> (4) whether or not the breach of trust occasioned any loss and whether if there has been a loss it has been made good by the trustee;
> (5) whether the trustee's services were of value to the trust.

Burrow, 997 S.W.2d at 243, quoting *Restatement (Second) of Trusts* § 243.

G. Profit Disgorgement

A fiduciary breaches his duty of loyalty if he uses his position of trust to profit personally. The duty of loyalty requires that the trustee must place the interests of the beneficiary above his own. *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945). A trustee is prohibited from making a profit for himself so that his personal interests do not conflict with the decisions made in administering the trust. *Id.* at 388.

A trustee is accountable to the trust for any profit made by the trustee through or arising out of the administration of the trust, even where there is no breach of trust, the trust has suffered no loss, and the trustee is fully exculpated. TEX. PROP. CODE § 114.0001(a) (disgorgement of any profit made by trustee even if no breach of trust); § 114.0001(c)(2) (disgorgement of any profit made by trustee through breach of trust); and § 114.007(a)(2) (exculpation clause that relieves trustee of liability for any profit derived from a breach of trust is unenforceable). This remedy is often referred to as "profit disgorgement" by a trustee. *See Kinsbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509 (Tex. 1942) (third party defendant required to repay secret commission earned by breaching fiduciary agent); *Langford v. Shamburger*, 392 F.2d 939 (5th Cir. 1968) (trustee who commingled trust funds with his personal funds could be required to pay highest legal rate of interest to principal); *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945) (trustee required to return all profits made as result of unauthorized loan of trust funds). A plaintiff must specifically plead for profit disgorgement

as a remedy for breach of fiduciary duty and allege facts to support the remedy.

Profit disgorgement does not present a jury question. However, the jury will decide any factual disputes regarding the amount of profit received by the fiduciary.

H. Exemplary damages

Breach of fiduciary duty is a tort for which a plaintiff may recover exemplary damages. *Brosseau v. Ranzau*, 81 S.W.3d 381 (Tex. App.—Beaumont 2002, pet. denied); *Lesikar v. Rappeport*, 33 S.W.3d 282, 310 (Tex. App.—Texarkana 2000, pet. denied); *Hawthorne v. Guenther*, 917 S.W.2d 924, 936 (Tex. App.—Beaumont 1996, writ denied). Chapter 41 of the Texas Civil Practice and Remedies Code governs exemplary or punitive damages, which are defined as "damages awarded as a penalty or by way of punishment but not for compensatory purposes." TEX. CIV. PRAC & REM. CODE §41.001(5). Exemplary damages are not recoverable unless actual damages are awarded to the plaintiff. TEX. CIV. PRAC & REM. CODE §41.004(a). The jury must be unanimous in finding liability for and the amount of exemplary damages. TEX. CIV. PRAC. & REM. CODE § 41.003(d).

To obtain an award of exemplary damages, the plaintiff must prove by clear and convincing evidence that the harm suffered resulted from fraud, malice or gross negligence. TEX. CIV. PRAC & REM. CODE §41.003(a). "Fraud" is defined in Chapter 41 to mean "fraud other than constructive fraud." TEX. CIV. PRAC. & REM. CODE § 41.001(6). "Malice" is defined as a "specific intent by the defendant to cause substantial injury or harm to the claimant." TEX. CIV. PRAC. & REM. CODE §41.001(7). "Gross negligence" means an act or omission:

1. which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
2. of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety or welfare of others.

TEX. CIV. PRAC. & REM. CODE § 41.001(11). The "intent" issue concerning exemplary damages for breach of fiduciary duty can be addressed by determining whether "one with a fiduciary duty intended to gain an additional unwarranted benefit." *Brosseau v. Ranzau*, 81 S.W.3d 381 (Tex. App.—Beaumont 2002, pet. denied). As explained in *Lesikar:*

> While it is a general rule that Texas courts allow the recovery of punitive damages where the defendant, in committing a tort, acted willfully, maliciously, or fraudulently, where punitive damages are awarded for breach of fiduciary duty the actual motives of the defendant and whether the defendant acted with malice are immaterial. But something more than a simple breach is required for the recovery of punitive damages; the acts constituting the breach must have been fraudulent, or at least intentional. An intentional breach may be found where the fiduciary intends to gain an additional benefit for himself. The Supreme Court has suggested that willful and fraudulent acts are presumed when the fiduciary . . . gains an additional benefit for himself as a result of the breach.

33 S.W.3d at 311.

In determining the amount of exemplary damages, the following factors must be considered: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which conduct offends a public sense of justice and propriety; and (6) the net worth of the defendant. TEX. CIV. PRAC. & REM. CODE § 41.011.

Exemplary damages may not exceed an amount equal to the greater of (1) two times the amount of economic damages plus any non-economic damages (not to exceed $750,000), or (2) $200,000. TEX. CIV. PRAC. & REM. CODE 41.008(b). Economic damages compensate a claimant for actual economic or pecuniary loss. TEX. CIV. PRAC. & REM. CODE § 41.001(4). The Code defines non-economic damages as those intended to compensate a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship in society, inconvenience, loss of enjoyment of life, injury to reputation and all other non-pecuniary losses of any kind other than exemplary damages. TEX. CIV. PRAC. & REM. CODE § 41.001(12).

One of the exceptions to the statutory cap on exemplary damages is where there has been a

misapplication of fiduciary property as defined in Section 32.45 of the Texas Penal Code. TEX. CIV. PRAC. & REM. CODE § 41.008(c)(10). Under Section 32.45 of the Penal Code, it is a felony offense if a person "intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary . . ." The term "fiduciary" is defined in Section 32.45 to include a trustee, guardian, administrator, executor, conservator, receiver and any other person acting in a fiduciary capacity including an officer, manager, employee or agent carrying on fiduciary functions on behalf of a fiduciary. TEX. PEN. CODE §32.45(a)(1). The term "misapply" means to deal with property contrary to "an agreement under which the fiduciary holds the property" or "a law prescribing the custody or disposition of the property." TEX. PEN. CODE §32.45(a)(2). In *Konkel v. Otwell*, the court applied this exception to the statutory cap. 65 S.W.3d 183 (Tex. App.—Eastland 2001, no pet.) (broker acted in fiduciary capacity for investors, warranting exemplary damages exceeding statutory limit when broker took large sums of money from investors, promising high return on their investment, while taking the sums for himself).

Generally, exemplary damages are not available in the absence of actual damages. TEX. CIV. PRAC. & REM. CODE § 41.004(a). However, certain equitable remedies for breach of fiduciary duty may support exemplary damages. The Texas Supreme Court has recognized a "recovery of property" exception to the rule requiring the recovery of actual damages, noting that "where equity requires the return of property, this 'recovery of the consideration paid as a result of the fraud constitutes actual damages and will serve as the basis for the recovery of exemplary damages.'" *In Re Estate of Preston*, 346 S.W.3d 137 (Tex. App.—Fort Worth 2011, no pet.) (*citing Nabours v. Longview Sav. & Loan Ass'n*, 700 S.W.2d 901, 904–905 (Tex. 1985)); *See also Procom Energy L.L.A. v. Roach*, 16 S.W.3d 377 (Tex. App.—Tyler 2000, pet. denied)(equitable relief did not apply to the return of property, but the court held that a lack of actual damages did not preclude the award of exemplary damages to an operator who recovered a constructive trust on an overriding royalty interest acquired by a gas producer in breach of fiduciary duty). Although exemplary damages can be awarded in connection with an equitable award of property alone, a jury question and a finding regarding the value of equitable relief is required. *Martin v. Tex. Dental Plans, Inc.*, 948 S.W.2d 799, 804–05 (Tex. App.—San Antonio 1997, pet. denied) (concrete value must be assigned to equitable relief before exemplary damages may be awarded).

I. Attorney's Fees and Costs

A prevailing party cannot recover attorney's fees from an opposing party unless permitted by statute, a contract between the parties, or under equity. *Holland v. Wal-Mart Stores, Inc.*,1 S.W.3d 91 (Tex. 1999).

1. <u>Trust Code Section § 114.064.</u>

In any trust proceeding, the court has discretion to award costs and "reasonable and necessary" attorney's fees "as may seem equitable and just." TEX. PROP. CODE § 114.064. An award of attorney's fees under Section 114.064 is not dependent on a finding that the party "substantially prevailed." *Hachar v. Hachar*, 153 S.W.3d 138, 142–143 (Tex. App.—San Antonio 2004, no pet.). Whether to award costs and attorney's fees is within the sound discretion of the court. *Lyco Acquisition 1984 Ltd. Partnership v. First Nat'l Bank of Amarillo*, 860 S.W.2d 117, 121 (Tex. App.—Amarillo 1993, writ denied). Whether the attorney's fees are "reasonable and necessary" is a question of fact for the jury to determine, but the "equitable and just" requirements are questions of law for the trial court to decide. *Id.* Thus, in a breach of fiduciary duty case, the court could award attorneys' fees to any party out of the trust or from any other party, or deny fees to any or all parties. *See Sammons v. Elder*, 940 S.W.2d 276 (Tex. App.–Waco 1997, writ denied) (court refused to award attorney's fees to either side); *Texarkana Nat'l Bank v. Brown*, 920 F.Supp. 706, 713 (E.D. Tex. 1996)(payment by fiduciary of trust beneficary's attorneys' fees was "equitable and just" due to fiduciary's breach of trust).

2. <u>Trust Code §113.151(a).</u>

If a beneficiary of a trust is successful in a suit to compel an accounting, the court may award all or part of the beneficiary's costs and reasonable and necessary attorney's fees against the trustee in the trustee's individual capacity or in the trustee's capacity as trustee.

3. <u>Trustee Removed for Cause.</u>

If a trustee is removed for cause, he should not be entitled to recover his attorney's fees out of the trust and may be ordered to personally bear the beneficiary's attorney's fees. RESTATEMENT §188.4; *Jernigan v. Jernigan*, 677 S.W.2d 137 (Tex. App.—Dallas 1984, no writ) (where one of three beneficiaries successfully sued the trustee for breach of trust, the trial court acted improperly in ordering the entire trust corpus and accumulated income paid to the plaintiff's attorney's as their fee).

4. <u>Probate Code Section 242.</u>

Personal representatives of estates may be entitled to their attorneys fees from the estate. Section 242 of the Texas Probate Code provides:

> Personal representatives of estates shall also be entitled to all necessary and reasonable expenses incurred by them in the preservation, safekeeping, and management of the estate, and in collecting or attempting to collect claims or debts, and in recovering or attempting to recover property to which the estate has a title or claims, and all reasonable attorney's fees necessarily incurred in connection with the proceedings and management of such estate, on satisfactory proof to the court.

5. Probate Code § 149C(c).

An independent executor who defends an action for removal in good faith, whether successful or not, shall be allowed out of the estate his reasonable attorneys fees in the removal proceedings. *But see Kanz v. Hood*, 17 S.W.3d 311 (Tex. App.—Waco 2000, pet. denied) (even though court did not remove executor, it did not abuse its discretion in refusing to award fees).

6. Litigation Due to Fiduciary's Misconduct.

If litigation is a result of the fiduciary's misconduct, the fiduciary is not entitled to recover attorney's fees out of the estate. *See Tindall v. State*, 671 S.W.2d 691, 693 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) ("it is thus apparent that when the fiduciary's omission or malfeasance is at the root of the litigation, the estate will not be required to reimburse the fiduciary for his or her attorneys' fees" as such "fees are not necessarily incurred in connection with the management of the estate."); *In Re: Higganbotham's Estate*, 192 S.W.2d 285, 290 (Tex. Civ. App.—Beaumont 1946, no writ); *In Re: Estate of Washington*, 289 S.W.3d 362 (Tex. App.— Texarkana 2009, pet. denied) (administratrix who was removed was not entitled to recover her attorney's fees from the estate as the removal action was neither for the preservation or safekeeping of the estate, nor the management of the estate as provided.) However, if the trustee successfully defends a suit for breach of fiduciary duty or removal, his fees are properly payable out of the trust. RESTATEMENT § 188.4.

J. Removal of Fiduciary

1. Trustee

A beneficiary may file a petition seeking the trustee's removal 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 required by law or by the trust; or
> (4) the court finds other cause for removal.

TEX. PROP. CODE § 113.082. The court also may deny part or all of the removed trustee's compensation. *Id.* A beneficiary, co-trustee, or successor trustee may treat a violation resulting in removal as a breach of trust. TEX. PROP. CODE §113.082(b).

A breach of fiduciary duty also can constitute a material violation of the trust to support a basis for removal. *Lee v. Lee*, 47 S.W.3d 767 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (beneficiaries pleaded for removal under grounds set forth in Section 113.082 and presented evidence that the jury found to be breaches of fiduciary duty, which would warrant removal of trustee). Additionally, a jury award for damages can constitute material financial loss to the trust for the purpose of establishing a basis for the removal of a trustee. *Id.*

The decision to remove a trustee is within the discretion of the court, but any factual disputes regarding a basis for removal should be submitted to the jury. Whether the trustee materially violated or attempted to materially violate the term of the trust or whether the violation or attempted violation of the trust resulted in a material financial loss to the trust present fact questions for a jury. The other grounds for removal under Section 113.082 are not likely to present fact questions. *See* Tex. Pattern Jury Charges—Family & Probate 235.16 (2012) and comments thereto.

2. Removal of an Independent Executor

A beneficiary may seek removal of an independent executor under Texas Probate Code Section 149C (or of a dependent personal representative under Texas Probate Code Section 222 if:

> (1) the independent executor fails to return within ninety days after qualification, unless such time is extended by order of the court, an inventory of the property of the estate and list of claims that have come to the independent executor's knowledge;

(2) sufficient grounds appear to support belief that the independent executor has misapplied or embezzled, or that the independent executor is about to misapply or embezzle, all or any part of the property committed to the independent executor's care;

(3) the independent executor fails to make an accounting which is required by law to be made;

(4) the independent executor fails to timely file the affidavit or certificate required by Section 128A of this code;

(5) the independent executor is proved to have been guilty of gross misconduct or gross mismanagement in the performance of the independent executor's duties; or

(6) the independent executor becomes an incapacitated person, or is sentenced to the penitentiary, or from any other cause becomes legally incapacitated from properly performing the independent executor's fiduciary duties.

TEX. PROB. CODE § 149C. Removal of the executor is not mandatory upon proof of statutory grounds for removal, and the order is reviewed under an abuse of discretion standard. *Lee v. Lee*, 47 S.W.3d 767 (Tex. App.—Houston [14th Dist.] 2001, writ denied).

The Texas Supreme Court considered the standards for removing an independent executor in *Kappus v. Kappus*, 284 S.W.3d 831 (Tex. 2009). The Court refused to engraft conflict of interest onto Section 149C as a ground for removal, and concluded that a good-faith disagreement between an executor and the estate over the percentage, division and valuation of estate assets is not grounds for removal as a matter of law. In *Kappas*, James ("Decedent") and John, the Executor, were brothers and owned land as equal co-tenants. In a divorce between James and his wife Sandra, Sandra acquired an equitable lien on James' share of the land for her one-half share of the community improvements made to the land. After James died in 2005, John was appointed executor under his will. John was in the process of selling the land in order to pay the Decedent's debts. Sandra, on behalf of her children, objected to the sale, claiming that James' estate owned more than fifty percent (50%) of the land due to improvements James had made. Sandra also sought to remove John as the independent executor and as the trustee of a testamentary trust based on conflict of interest. The trial court divided the property 58.59% for the estate and 41.41% for John and refused to remove John. The Austin Court of Appeals reversed the trial court's decision on removal, finding that John's conflict of interest required removal under Section 149C.

The Texas Supreme Court reversed the Court of Appeals and held that removal of John as the independent executor was improper under Section 149C. The court analyzed Sandra's claim for removal based on subsections (2) ("misapplied or embezzled"), (5) ("gross misconduct or gross mismanagement"), and (6) ("legally incapacitated) of Section 149C. The court construed the terms "misapplied or embezzled" as essentially synonymous and to require a finding that "the executor was engaged in subterfuge or wrongful misuse." *Id.* at 830. The court found that the evidence did not show any dishonesty or misappropriation by John, and at worst, showed a good-faith disagreement between John and Sandra as to how to split the value of the improvements between John and the estate.

The court interpreted the terms "gross misconduct or gross mismanagement" to mean "something beyond ordinary misconduct and ordinary mismanagement." *Id.* The Court defined "gross" as "glaringly obvious; flagrant," according to the American Heritage College Dictionary. The court held that a conflict of interest is not per se "gross misconduct or gross mismanagement," noting that the Probate Code allows creditors of an estate to serve as administrator despite their conflict of interest by virtue of a claim against estate assets. The court expressed concern that by "declaring a per say removal rule for any 'conflict of interest' whenever spouse-executors have a shared interest in community property, and issues arise over the separate or community character of the estate assets, the surviving spouse could be ousted." In addition, such a rule "would undermine the ability of Texas testators to name their own independent executor and also weaken the ability of a executor 'free of judicial supervision,' to effect the distribution of an estate with a minimum of cost and delay." Further, it would impose "this extra-statutory restriction even if the testator was fully aware of the potential conflict when the executor was chosen." The court held that a good-faith disagreement over the executor's ownership share in the estate does not, standing alone, equate to actual misconduct.

The Court did recognize, however, that "there may be scenarios where an executor's conflict of interest is so

absolute as to constitute what the statute terms "gross misconduct or gross mismanagement," and listed the following factors to be considered in making that determination:

(1) the size of the estate,
(2) the degree of actual harm to the estate,
(3) the executor's good-faith in asserting a claim for estate property,
(4) the testator's knowledge of the conflict, and
(5) the executor's disclosure of the conflict

Id. at 837–38. As support for factor (4), the court cited *In re Roy*, which held that while a conflict of interest might not be enough to remove an independent executor, the failure to disclose that conflict was grounds for removal. 249 S.W.3d 592, 596–97 (Tex. App.—Waco 2008, pet. denied). The court found that all of the factors favored John and affirmed the trial court's decision not to remove John for gross misconduct or gross mismanagement. *Kappus*, 284 S.W.3d at 838.

The final argument made by Sandra was that John was "legally incapacitated" from performing as independent executor due to his conflict of interest. The Court held that subsection (6) is "inapplicable to an alleged conflict of interest." The court defined an incapacitated person as a "person who is impaired by an intoxicant, by mental illness or deficiency, or by physical illness or disability to the extent that personal decision-making is impossible." *Id.*

The Court also affirmed the trial court's decision not to remove John as trustee of the testamentary trust. Although recognizing that Trust Code Section 113.082 governing removal of a trustee provides "more leeway on removal" than does the Probate Code because a court may remove a trustee for "other cause," the Court applied essentially the same analysis as it did to the Probate Code removal statute.

The Court concluded with three policy reasons for its decision that a good-faith disagreement in this case was not grounds for removal. The court stated that such a development would:

(1) depart from the specific grounds for removal in the statute,

(2) frustrate the testator's choice of executor (particularly the common practice of appointing spouse-executors), and

(3) impede the broader goal of supporting the independent administration of estates with minimal costs and court supervision.

The Court specifically distinguished the grounds for removal of an executor post-appointment from those to disqualify a person to serve as executor pre-appointment under Probate Code Section 78. The Court found that the power under Section 78 to find a person "unsuitable" confers broader court discretion than Section 149C. This distinction indicates that certain types of conflicts of interests may provide a basis for finding a person "unsuitable" to serve.

The concerns discussed in *Kappus* are consistent with those discussed in *Geeslin v. McElhenney*, 788 S.W.2d 683, 684 (Tex. App.—Austin 1990, no writ). In *Geeslin,* the Austin Court of Appeals declined to interpret the terms "gross mismanagement and gross misconduct" to encompass any and all deviations from ordinary care because such an interpretation "would practically convert independent administration into court-supervised administration, by encouraging numerous lawsuits challenging almost every aspect of an executor's conduct regarding the estate." The independent executor was removed in *Estate of Miller*, where the attorney-independent executor, who was the great nephew of the 101 year old decedent, filed an Inventory 19 months after appointment, paid himself exorbitant and unnecessary attorney's fees, failed to pay property taxes or correct code violations leaving the estate property subject to foreclosure, and made a loan to a client out of estate assets with no repayment terms, interest or collateral. 243 S.W.3d 831 (Tex. App.—Dallas 2008, no writ).

An independent executor who defends an action for his removal in good faith, whether successful or not, shall be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings. TEX. PROB. CODE § 149C(c); *Hartmann v. Solbrig*, 12 S.W.3d 587 (Tex. App.—San Antonio 2000, pet. denied). The court may deny recovery of the independent executor's fees out of the estate even if not removed, if the independent executor is not found to have defended the removal action in good faith. *Kanz v. Hood*, 17 S.W.3d 311 (Tex. App.—Waco 2000, pet. denied). A party seeking removal of an independent executor may recover reasonable attorney's fees and expenses out of the estate. TEX. PROB. CODE §149C(d). An estate can even be liable for attorney's fees to both sides in a action to

remove an executor that is brought and defended in good faith. *Garcia v. Garcia*, 878 S.W.2d 678 (Tex. App.—Corpus Christi 1994, no writ).

K. Accountings

In order to secure performance of a trustee or executor or redress a breach, a beneficiary may first need information regarding the fiduciary's actions and the status of the trust or estate administration. Exercising his right to obtain a trust or estate accounting and/or to inspect the trust or estate property and records, is a preliminary step that the beneficiary should consider. An accounting also may be important evidence to use at trial. Additionally, the accounting may reflect additional claims. A fiduciary will be liable for any assets not accounted for in the accounting. See *Sierad v. Barnett*, 164 S.W.3d 471 (Tex. App.—Dallas 2005, no pet.)(trial court granted judgment of $342,250 against the fiduciary for unaccounted funds received by the fiduciary on the basis that once the assets from the estate were traced to the fiduciary, the presumption arose that those funds remain in the fiduciary's possession, and the burden is on the fiduciary to account for those funds or be held liable for the same).

1. Estate Accountings

An "interested person" as defined under Section 3 of the Texas Probate Code may demand an accounting of an estate from an independent executor after the expiration of fifteen (15) months from the date of the executor's appointment. TEX. PROB. CODE §149A. The demand should be made in writing by making a "demand for an accounting of the Estate pursuant to Section 149A of the Texas Probate Code" to the independent executor. The independent executor must furnish a sworn accounting setting forth "in detail" the following:

- a. The property belonging to the estate which has come into his hands as executor.
- b. The disposition that has been made of such property.
- c. The debts that have been paid.
- d. The debts and expenses, if any, still owing by the estate.
- e. The property of the estate, if any, still remaining in his hands.
- f. Such other facts as may be necessary to a full and definite understanding of the exact condition of the estate.
- g. Such facts, if any, that show why the administration should not be closed and the estate distributed.

TEX. PROB. CODE §149A(a).

If the independent executor does not comply with a demand for an accounting within 60 days after receipt of the demand, the beneficiary may compel compliance by filing an action in court. After a hearing, the court shall enter an order requiring the accounting to be made at such time as the court deems proper under the circumstances.

Subsequent accountings may be demanded only for twelve-month intervals. TEX. PROB. CODE §149A(c). A beneficiary has four years from the time that the estate is closed to demand an accounting from the independent executor. *Estate of McGarr*, 10 S.W.3d 373 (Tex .App.—Corpus Christi 2000, pet. denied); *Little v. Smith*, 943 S.W.2d 414, 416 (Tex. 1997).

2. Trust Accountings

Unless required by the trust instrument, a trustee has no duty to make periodic accountings to the beneficiaries under Texas law. However, the Texas Trust Code gives a beneficiary the right to demand a written accounting of all of the trust transactions from inception or since the last accounting. TEX. PROP. CODE § 113.151. A beneficiary means a "person for whose benefit property is held in trust, regardless of the nature of the interest." TEX. PROP. CODE § 111.004(2). Thus, current and remainder beneficiaries may demand an accounting of the Trust.

A demand for an accounting of a trust should be made in writing pursuant to Section 113.151 and 113.152 of the Texas Trust Code. The accounting must cover from inception of the trust since the last accounting. Except in unusual circumstances, a trustee is not required to provide an accounting more frequently than once every 12 months. If the trustee fails or refuses to provide an accounting within 90 days after receipt of the demand, the beneficiary may file suit to compel the trustee to provide the accounting. If the beneficiary is successful in compelling the accounting, the court may order the trustee in his individual capacity to pay all of the beneficiary's attorney's fees. *Id.*

An "interested person" also may file suit to compel the trustee to provide an accounting. The court will order the trustee to account if it finds that "the nature of the interest in the trust of, the claim against the trust by, or the effect of the administration of the trust on the interested person is sufficient to require an accounting by the trustee." TEX. PROP. CODE § 113.151(b). An "interested person" includes a trustee, beneficiary, or any

other person having an interest in or claim against the trust or any person who is affected by the administration of the trust. "Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding." TEX. PROP. CODE § 111.004(7).

A Trust Code accounting is an allocation of cash received and cash disbursed between principal and income and a description of all financial transactions affecting the trust. The contents of an accounting are prescribed by Section 113.152:

1. The trust property that has been received and was not previously listed in a prior accounting.
2. A list of receipts and disbursements, allocated between income and principal.
3. A list and description of all property being administered (with descriptions).
4. Cash accounts, their balance, and where they are deposited.
5. A list of all trust liabilities.

TEX. PROP. CODE § 113.152.

As described above, an accounting also may put the beneficiary on notice of the trustee's acts for purposes of the statute of limitations on claims against the trustee. The statute of limitations for breach of fiduciary duty claims and most other trust-related actions is four years. TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.004, 16.051. The discovery rule applies, so the statute does not begin running until the facts constituting a cause of action are discovered. The statute may be tolled during a beneficiary's minority or disability. If a transaction has been fully disclosed in an accounting, the accounting may be used to bar claims relating to such transaction more than four years later.

3. Accounting from Agent Under POA

Section 489B of the Texas Probate Code provides that an agent under a power of attorney is a fiduciary and has a duty to inform and to account for actions taken pursuant to the power of attorney. The agent is required to maintain records of each action taken or decision made by him or her. The principal, or his ***personal representative***, may demand an accounting by the agent. The accounting shall include:

a. the property belonging to the principal that has come to the agent's knowledge or into the agent's possession;
b. all actions taken or decisions made by the agent;
c. a complete account of receipts, disbursements, and other actions of the agent, including their source and nature, with receipts of principal and income shown separately;
d. a listing of all property over which the agent has exercised control, with an adequate description of each asset and its current value if known to the agent;
e. the cash balance on hand and the name and location of the depository where the balance is kept;
f. all known liabilities; and
g. such other information and facts known to the agent as may be necessary to a full and definite understanding of the exact condition of the property belonging to the principal.

TEX. PROB. CODE §489B(c), (d). The agent is required to maintain all records regarding the principal's property until delivered to the principal or discharged by a court. TEX. PROB. CODE § 489B(e), (f). If the agent fails or refuses to provide documentation or deliver the accounting within 60 days, the principal may file suit to compel the agent to deliver the accounting, or to deliver the assets. TEX. PROB. CODE § 489B(g). If the principal is deceased, the principal's personal representative shall have all authority to act as given to the principal.

While the general rule is that only the executor may bring actions on behalf of the estate, there are exceptions to this rule. If the executor will not or can not act, or if his interest is antagonistic to that of the beneficiaries, the beneficiaries may bring an action. *Chandler v. Welbourn*, 156 Tex. 312, 294 S.W.2d 801 (1956). Thus, if the independent executor was also the agent under the decedent's power of attorney, and there are questions or concerns regarding his actions as agent, the beneficiaries of the estate should be entitled to seek an accounting from the agent.

L. Interim Remedies

1. Temporary Restraining Order/Temporary Injunction

During the course of litigation, a beneficiary may want to request a temporary restraining order or temporary injunction when the fiduciary has indicated an unwillingness to cease and desist from wasting assets or other wrongful behavior. An injunction will generally prohibit a fiduciary from doing some act with trust or

estate property, while the fiduciary remains in control of the property. A court can also enter a mandatory injunction requiring a fiduciary to take affirmative action.

The Civil Practice and Remedies Code governs injunctive relief. SEE TEX. CIV. PRAC. & REM. CODE §§ 65.001–65.045. A temporary restraining order and temporary injunction are further governed by the Texas Rules of Civil Procedure. TEX. R. CIV. P. 680–693a. Additionally, Texas Trust Code Section 114.008 (2) specifically provides for injunction as a remedy for breach of trust that "has occurred or might occur." TEX. PROP. CODE § 114.008. A TRO and temporary injunction may also be the only way to protect the beneficiary and the trust or estate assets from further damage in the event the fiduciary will not be able to adequately respond in damages.

For an application or petition for temporary restraining order to be granted without notice, the verified pleading or affidavit must show on its face that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon. TEX. R. CIV. P. 680. There is no evidence presented in connection with a TRO, whether done ex parte or at a hearing. *Id.* Determination of whether a TRO should be granted is based solely on the verified pleadings or affidavit, though the court will likely also hear arguments of counsel. *Id.* A TRO should be granted when the facts contained in the pleadings show immediate, irreparable injury, loss or damage will result to a trust or estate if the TRO is not granted. *Id.*

An application or petition for temporary injunction should be verified and contain a "plain and intelligible statement of the grounds for such relief." TEX. R. CIV. P. 682. An applicant should also plead a probable right to recovery on the underlying litigation and a probable injury if temporary equitable relief is denied. *Transport Co. of Tex. v. Robertson Transports*, 152 Tex. 551, 552, 261 S.W.2d 549, 551 (1953).

While a TRO is determined on the pleadings, evidence is required to support a temporary injunction will only be granted after an evidentiary hearing. Injunctive relief will not be granted unless the applicant has shown: (1) a cause of action against the party seeking to be enjoined; (2) a probable right to the relief requested; and (3) imminent, irreparable harm in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). Generally, the party requesting the injunction has the burden to prove these elements. *Tom James Co. v. Mendrop*, 819 S.W.2d 251, 253 (Tex. App.—Fort Worth 1991, no writ).

The probable right to the relief requested element means that the plaintiff must prove a prima facie case of the cause of action alleged. Generally, a plaintiff may prove this element by presenting evidence that sustains the alleged cause of action. *Yarto v. Gilliland*, 287 S.W.3d 83 (Tex. App.—Corpus Christi-Edinburg 2009, no pet.). However a breach of fiduciary claim alters the normal rules applicable to establishing a "probable right to recover." This element does not apply to the plaintiff if the gist of the complaint is "self-dealing." In a fiduciary self-dealing action, the "presumption of unfairness" attaches to the transactions of the fiduciary shifting the burden to the fiduciary to prove that the plaintiff will <u>not</u> recover. *See Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1964); *See also* comments to TPJ 235.10. If the presumption cannot be rebutted as a matter of law at the temporary injunction hearing, then the injunction should likely be granted since the plaintiff, by simply presenting a *prima facie* case of the existence of a fiduciary relationship and a probable breach of that duty has adduced sufficient facts tending to support his right to recover on the merits. *Camp v. Shannon*, 348 S.W.2d 517, 519 (Tex. 1961).

A court has broad discretion in what constitutes imminent, irreparable harm. *Walling v. Metcalfe*, 863 S.W.2d 56 (Tex. 1993). A fiduciary's actions preceding the filing of a temporary injunction can support a finding that the fiduciary presents an ongoing danger to the assets of the trust, and, therefore, imminent, irreparable harm exists. *Twyman v. Twyman*, No. 01-08-00904-CV (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet) (not designated for publication), 2009 WL 2050979. In *Twyman*, for example, the Court held that the temporary injunction enjoining the trustee in a suit seeking removal and damages for breach of fiduciary duty was proper to prevent the trustee from continuing to withdraw funds for the trustee's personal living expenses. *Id.* Evidence of such conduct proved imminent and irreparable injury in the interim if the fiduciary was not enjoined.

Generally, the imminent, irreparable harm element can be proven by showing there is no adequate remedy at law for damages meaning that he cannot be adequately compensated in damages or the damages are not measurable by any pecuniary standard. *Butnaru*, 84 S.W.3d 198;*Twyman v. Twyman*, No. 01-08-00904-CV (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet) (not designated for publication), 2009 WL 2050979. However, in a breach of fiduciary duty case, the beneficiary may not be required to show that he has no adequate remedy at law. *183/620 Group Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901, 903–904 (Tex. App.—Austin 1989, writ denied w.o.j.). Because a

breach of fiduciary claim is by nature an "equitable" action, even in cases where damages may be sought, if the fiduciary relationship is still continuing, the beneficiary should have an equitable right to be protected from further harm without having to prove no adequate remedy at law. *Id.*; *See* SCOTT, *The Law of Trusts* § 199.2 at 1639 (3rd ed. 1967) (where reasonable likelihood exists that trustee will commit breach of trust the beneficiary may sue in equity to enjoin breach, any adequate remedy at law being immaterial); G. T. BOGERT, *Trust & Trustees* § 870 at 107–108 (2d rev. ed. 1993) (existence of an adequate remedy of law has no effect on any equitable remedy available to a beneficiary against a defaulting trustee).

2. Receiver

Section 64.001 et. seq. of the Texas Civil Practice and Remedies Code governs receivership. Pursuant to Section 64.001, a court may appoint a receiver "in an action by between partners or others jointly owning or interested in any property or fund" or "in any case in which a receiver may be appointed under the rules of equity." TEX. CIV. PRAC. & REM. CODE§ 64.001(a)(3), (b). In addition, the Texas Trust Code authorizes a court to "appoint a receiver to take possession of the trust property and administer the trust" to remedy a breach of trust "that has occurred or might occur." TEX. PROP. CODE § 114.008(a)(5).

Pursuant to Section 64.001, a receiver may be appointed to take over the management of a business owned by an estate or trust, or for an estate or trust in danger of mismanagement or waste by the fiduciary. *Estate of Herring*, 983 S.W.2d 61 (Tex. App.—Corpus Christi 1999, no pet.); *Oldham v. Keaton*, 597 S.W.2d 938 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.); *Pfeiffer v. Pfeiffer*, 394 S.W.2d 679 (Tex. Civ. App.—Houston 1965, writ dism'd); *Temple State Bank v. Mansfield,* 215 S.W. 154 (Tex. Civ. App.—Galveston 1919, writ dism'd w.o.j.). Unlike injunctive relief, when a receiver is appointed, the receiver will actually take over the business or the assets of the estate or trust and take them out of the control of the fiduciary. However, the receivership must be ancillary or auxiliary to some right that constitutes an independent cause of action and it is not an action within itself. *See Manning v. State*, 423 S.W.2d 406, 410 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.); *Pelton v. First Nat'l Bank of Angelton*, 400 S.W.2d 398, 401 (Tex. Civ. App.—Houston 1966, no writ); *Greenland v. Pryor*, 360 S.W.2d 423, 425 (Tex. Civ. App.—San Antonio 1962, no writ).

Texas courts have allowed a receivership over a decedent's estate even when there is an existing independent administration over the estate. *Griggs v. Brewster*, 62 S.W.2d 980, 986 (Tex. 1933); *Blalack v. Blalack*, 424 S.W.2d 646, 650 (Tex. Civ. App.—Texarkana 1968, no writ)(receiver appointed due to impasse between independent co-executors); *O'Connor v. O'Connor*, 320 S.W.2d 384, 389 (Tex. Civ. App.—Dallas 1959, writ dism'd) (receiver appointed when independent executor refused to account to the beneficiary); *Hake v. Dillworth*, 96 S.W.2d 121, 122 (Tex. Civ. App.—Waco 1936, writ dism'd) (receiver appointed to sell remaining estate assets and distribute the proceeds due to a dispute over whether the estate was ready for distribution, executor's commission, and whether the executor mismanaged the estate); *Freeman v. Banks*, 91 S.W.2d 1077, 1080 (Tex. Civ. App.—Fort Worth, 1936 writ ref'd) (receiver appointed upon removal of an independent executor); *Freeman v. Banks*, 91 S.W.2d 1078, 1080 (Tex. Civ. App.—Fort Worth 1936, writ ref'd) (receiver appointed upon removal of an independent executor); *Griggs v. Brewster*, 62 S.W.2d 980, 985 (Tex. 1933) (receiver appointed in will construction suit including allegations of conversion by executor).

An application for receivership must state a cause of action against a person owning or in possession of property sought to be placed in the hands of a receiver, and must allege adequate grounds for the appointment of a receiver. *See Carroll v. Carroll*, 464 S.W.2d 440 (Tex. Civ. App.—Amarillo 1971, writ dism'd); *Harlen v. Pfeffer*, 693 S.W.2d 543 (Tex. App.—San Antonio 1985, no writ). When the appointment of a receiver is requested in an action between partners or others jointly interested in any property or fund, the application must set forth facts showing a danger of loss, removal, or material injury to the property. TEX. CIV. PRAC. & REM. CODE § 64.001(b).

Under Section 64.001(b) of the Texas Civil Practice & Remedies Code, a receiver may only be appointed in actions between partners or other jointly owning or interested in any property or fund if it is shown that the party seeking the receivership has a probable interest in or right to the property or fund, and the property or funds must be in danger of being lost, removed, or materially injured. TEX. CIV. PRAC. & REM CODE § 64.001 (b). The appointment of a receiver rests largely within the discretion of the court, and a trial court can appoint a receiver on its on motion when the facts justify the appointment to preserve or protect the property in litigation. *Krumnow v. Krumnow*, 174 S.W.3d 820 (Tex. App.—Waco 2005, pet. denied).

3. Auditor

In addition to obtaining a receiver or other remedy, a party may request that the court appoint an auditor to settle accounts between the parties. Texas Rule of Civil Procedure 172 provides that "when an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court shall appoint an auditor or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible . . . ." TEX. R. CIV. P. 172.

To request an audit, a specific motion or application should be filed with the court with the claims to be submitted to the auditor spelled out in as much detail as possible. Once the auditor files the report, the parties must file exceptions and objections to the auditor's report within thirty (30) days. TEX. R. CIV. P. 172. Failure to file exceptions to the auditor's report may result in a waiver of the right to introduce evidence contrary to the report at the time of trial. *Sanchez v. Jary*, 768 S.W.2d 933 (Tex. App.—San Antonio 1989, no writ). *See also Burns v. Burns*, 2 S.W.3d 339 (Tex. App.—San Antonio 1999, no pet.).

Whether the court will appoint an auditor turns on the facts of each case, but the remedy is generally only used in more complicated, complex matters or transactions. *See, e.g., Robson v. Jones*, 33 Tex. 324, 328 (1870) (auditor unnecessary where no particular complications apparent on face of account); *Ellison v. Keese*, 25 Tex. 83, 91 (Supp. 1860) (court found no reason for appointment of auditor in will contest); *Gifford v. Gabbard*, 305 S.W.2d 668, 672–73 (Tex. Civ. App.—El Paso 1957, no writ) (no necessity for auditor where all pertinent documents are in evidence and books are in simple form); *Peters v. Brookshire*, 195 S.W.2d 181, 186–87 (Tex. Civ. App.—Fort Worth 1946, writ ref'd n.r.e.) (no reversible error in failing to appoint auditor where books did not appear to be complicated and private auditors had access to books); *but see*, *Dwyer v. Kaltayer*, 68 Tex. 554, 5 S.W. 75, 77 (1887) (audit proper where estate large and settlement embraced results of testator's business); *Whitaker v. Bledsoe*, 34 Tex. 401 (1870) (partnership accounting necessary to assist court); *Hunt v. Ullibari*, 35 S.W. 298 (Tex. Civ. App. 1896, no writ) (auditor appointed in dispute involving examination or revision of complicated account).

IV. USE OF EXPERTS

A. Standards for Admissibility of Expert Testimony.

Rule 702 of the Texas Rules of Evidence provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Pursuant to Rule 104(a) of the Texas Rules of Evidence, whether an expert is qualified is a preliminary question to be decided by the trial court.

The party offering the testimony of the expert bears the burden to prove that the expert is qualified under Rule 702. *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996). As the Texas Supreme Court explained, ". . . the proponent of the testimony has the burden to show that the expert 'possess[es] special knowledge as to **the very matter on which he proposes to give an opinion**'." *Broders*, 924 S.W.2d at 152–3 (emphasis added).

In *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995), the Texas Supreme Court held that Rule 702 requires the ". . . proponent to show that the expert's testimony is relevant to the issues in the case **and is based upon a reliable foundation**." *Robinson*, 923 S.W.2d at 556 (emphasis added). As Justice Hecht wrote in the unanimous opinion of the Texas Supreme Court in *Gammill v. Jack Williams Chevrolet, Inc.*:

> [i]n addition to being relevant, the underlying scientific technique or principle must be reliable. Scientific evidence which is not grounded "in the methods and procedures of science" is no more than "subjective belief or unsupported speculation." **Unreliable evidence is of no assistance to the trier of fact and is therefore inadmissible under Rule 702**.

972 S.W.2d 713, 720 (Tex. 1998) (emphasis added).

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the United States Supreme Court held that ". . . the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. As the Texas Supreme Court noted in *Robinson*, "[p]rofessional expert witnesses are available to render an opinion on almost any theory,

regardless of its merit. . . . [T]here are some experts who 'are more than willing to proffer opinions of dubious value for the proper fee.'" *Robinson*, 923 S.W.2d at 553. Moreover, an expert witness often appears more believable than a lay witness. As a result, ". . . a jury more readily accepts the opinion of an expert witness as true simply because of his or her designation as an expert." *Id.* Because of the proliferation of experts and the potential prejudice of their testimony, the Texas Supreme Court has pointed out that ". . . trial judges have a heightened responsibility to ensure that expert testimony show some indicia of reliability." *Id.* As one court explained, whether evidence is reliable ". . . is an issue of admissibility for the trial court, not a weight of the evidence issue for the fact finder." *Greenberg Traurig of New York, P.C. v. Moody*, 161 S.W.3d 56, 95–96 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

As one court explained: "When the reliability of an expert's testimony is challenged, the trial court must 'evaluate the methods, analysis, and principles relied upon in reaching the opinion . . . [in order to] ensure that the opinion comports with applicable professional standards outside the courtroom'." *In re Estate of Robinson*, 140 S.W.3d 782, 789 (Tex. App.—Corpus Christi 2004, pet. denied) (citations omitted). When an expert's testimony does not have a reliable scientific basis, it is an abuse of the trial court's discretion to admit such testimony. *Ford Motor Co. v. Aguiniga*, 9 S.W.3d 252, 262 (Tex. App.—San Antonio 1999, pet. denied).

That one is a medical doctor does not automatically allow one to testify as an expert witness, nor does it relieve the trial court of its obligation to determine whether the expert's testimony is reliable and thus admissible. As one court explained: "Just as a lawyer is not by general education and experience qualified to give an expert opinion on every subject of the law, so too a scientist or medical doctor is not presumed to have expert knowledge about every conceivable scientific principle or disease." *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996), *quoting O'Conner v. Commonwealth Edison Co.*, 807 F.Supp. 1376, 1390 (C.D. Ill. 1992), *aff'd*, 13 F.3d 1090 (7th Cir. 1994), *cert. denied*, 512 U.S.1222, 114 S.Ct. 2711 (1994).

As the Texas Supreme Court explained in *Robinson,* among the factors for the trial court to consider in analyzing whether the expert's opinions are admissible are the following:

(1) the extent to which the theory has been or can be tested;
(2) the extent to which the technique relies upon the subjective interpretation of the expert;
(3) whether the theory has been subjected to peer review and/or publication;
(4) the technique's potential rate of error;
(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
(6) the non-judicial uses which have been made of the theory or technique.

Robinson, 140 S.W.3d at 557. The *Robinson* court also emphasized that these factors are non-exclusive and the trial court may consider other factors to determine whether expert opinions are reliable. *Id.* When these factors are not applicable, then the trial must engage in what the Texas Supreme Court has described as the "analytical-gap" analysis. *Gammill*, 972 S.W.2d at 726. "The trial court must determine whether there may be 'simply too great an analytical gap between the data and the opinion proffered for the opinion to be reliable'." *Id*.

B. About What Can an Expert Witness Testify

As one appellate court explained: "Mapping the contours of permissible testimony from an expert presents challenges because it is easier to explain what an expert *cannot* say than it is to explain what the expert *can* say." *Fleming v. Kinney ex rel. Shelton*, 395 S.W.3d 917 (Tex. App.—Houston [14th Dist.] 2013, rule 53.7(f) motion granted May 22, 2013).

This is seen most frequently in breaches of fiduciary duty when one uses an expert to testify about fiduciary duties and whether they were breached. "An expert may state an opinion on a mixed question of law and fact if the opinion is limited to the relevant issues and is based on proper legal concepts." *Greenberg Traurig*, 161 S.W.3d at 94 (*citing GTE S.W., Inc. v. Bruce*, 998 S.W.2d 605, 619–20 (Tex.1999)); *see also Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 365 (Tex.1987). "An issue involves a mixed question of law and fact when a standard or measure has been fixed by law and the question is whether the person or conduct measures up to that standard." *Greenberg Traurig,* 161 S.W.3d at 94 (*citing Mega Child Care, Inc. v. Tex. Dep't of Protective & Regulatory Servs.*, 29 S.W.3d 303, 309 (Tex. App.—Houston [14th Dist.] 2000, no pet.)).

Legal issues are reserved for the Court, which has the sole responsibility and, in fact the obligation, to instruct the jury on legal issues. *Upjohn Co. v. Rylander*, 38 S.W.3d 600, 611 (Tex. App.—Austin 2000, pet.

denied) (holding "matters of statutory construction are questions of law for the court to decide"). For example, in a case involving whether a police officer unreasonably used his firearm, an expert was not allowed to testify that the officer used excessive force. In explaining its reasoning, the Fifth Circuit Court of Appeals said: ". . . testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. But that does not permit experts to offer legal conclusions, and whether an officer's use of his firearm was unreasonable for purposes of the Fourth Amendment is a legal conclusion." *McBroom v. Payne*, 478 F. App'x 196, 200 (5th Cir. 2012)(citations omitted).

As the court in *Greenberg Traurig* explained: "an expert is not allowed to testify directly to his understanding of the law, but may only apply legal terms to his understanding of the factual matters in issue." *Greenberg Traurig*, 161 S.W.3d at 94. The *Greenberg Traurig* case involved a lawsuit brought by a corporation against the lawyers and law firm that represented it in an initial public offering. The trial court allowed a law professor and a retired Texas Supreme Court justice to testify about the law involving fiduciary duties and conspiracy, the disciplinary rules applicable to attorneys, Ponzi schemes, the latest pronouncement of the Texas Supreme Court regarding a law firm's duty of disclosure, and "what the [retired justice] think[s] the law is." *Greenberg Traurig*, 161 S.W.3d at 95. The trial court even admitted a copy of the Texas Pattern Jury Charge for breach of fiduciary duty into evidence. *Id*.

In holding that the trial court erred in admitting this testimony, the appellate court explained: "It is not the role of the expert witness to define the particular legal principles applicable to a case; that is the role of the trial court. . . . As such, an expert may not usurp the trial court's role in trying the case." *Id*. The *Greenberg Traurig* court also quoted *United States v. Cross*, where the court wrote: "[e]ach courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards." *United States v. Cross*, 113 F.Supp.2d 1282, 1284 (S.D. Ind.2000). In concluding that the trial court's error probably caused the rendition of an improper judgment, the court stated:

> By permitting attorneys to state opinions as to what the applicable law is, the trial judge voluntarily allows his role as the legal expert in the courtroom to be usurped or diminished by the testifying attorney. Thus, when attorneys are qualified as experts on certain areas of the law, the jury will be tempted to turn to the expert, rather than the trial judge, for guidance on the law. These concerns are magnified when the expert witnesses are not merely practicing attorneys in a given area of the law, but are cloaked with the authority associated with being a learned legal scholar, a law school professor, or a former supreme court justice.

Greenberg Traurig, 161 S.W.3d at 99 (citations omitted).

C. Factors to Consider When Selecting and Using Expert Witnesses

This topic has been the subject of numerous papers and lengthy talks. However, suffice it so say that one must carefully consider the objective to be obtained by using an expert witness and then determine how best to achieve that objective. If you are using an expert to testify, rather than purely as a consulting witness, remember that the expert must have a suitable demeanor and the ability to explain things clearly and convincingly. The expert obviously must have the credentials to establish that their testimony is reliable and that it will assist the jury as described above. Is your expert subject to impeachment on the basis of bias or conflicts of interest? Have they testified on the other side of your issue so that their credibility could be effectively impeached?

Also, keep in mind that for testifying experts, "if the expert is retained by, employed by, or otherwise subject to the control of the responding party," then in response to a request for disclosure you must produce to the requesting party "all documents, tangible things, reports, models, or data compilations that have been produced to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony." TEX. R. CIV. P 194.2(f)(4)(A).

D. The use of Expert Witnesses in Fiduciary Litigation

This topic could also be the subject of a speech or article. Suffice it to say that in litigation involving breaches of fiduciary duty expert testimony is generally necessary in some form or fashion. Often more than one expert is needed. The most common use of expert witnesses is to show damages and prove up attorneys' fees. But there are some other, more esoteric or atypical, circumstances where experts are necessary. Each case must be evaluated on the specific facts, claims, defenses, and the remedies sought. That way counsel can select the proper expert to achieve the desired outcome.

The testimony of some experts is relatively straightforward. If a trustee improperly invested trust assets then most likely an investment advisor can explain how the assets should have been invested and what the return on properly invested assets would have been. If a party is entitled to recover attorneys' fees then trial counsel, and perhaps an independent attorney, can testify that the fees are reasonable and necessary, along with the factors set out in Rule 1.04 of the Texas Rules of Disciplinary Procedure and the Andersen factors. *See Arthur Andersen & Co. v. Perry Equip. Corp*., 945 S.W.2d 812, 818–19 (Tex. 1997). Other types of expert testimony can be more problematic. How do you prove that a trustee did not properly exercise its discretion to make distributions under the trust? Do you find a retired trust officer to testify as to what a trustee should have considered and done under those circumstances? Do you need an expert witness to testify that a trustee failed to satisfy his duty to disclose? What about whether an accounting was sufficient? Did the accounting adequately distinguish between income and principal?

Tracing claims frequently require the involvement of a forensic accountant who can do the tracing and explain it to the jury. Unraveling complicated corporate transactions, such as family limited partnerships and joint ventures can often involve expert witnesses too. And, of course, as discussed above, an expert witness may be necessary to testify as to whether or not a defendant complied with their fiduciary duties. The expert cannot testify as to what the fiduciary duties are, but can ". . . apply legal terms to his understanding of the factual matters in issue."

Then, for every expert that is designated, the opposing party will feel compelled to designate one of their own. For example, the defense will generally retain an economist or other damage expert to show that the plaintiff's damage model is not correct, that the discount rate is too high, or some other "problem" with the plaintiff's claim for damages. The defendant trustee will quite likely have an expert to opine that the trustee did comply with his fiduciary duties.