

# TRUST DISTRIBUTIONS IN TEXAS

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## I. INTRODUCTION

“Show me the money!” was the tag line from the Jerry McGuire movie. But trustees often hear this on a daily basis from beneficiaries who have wants and needs. True, trustees have to follow the trust document in making distributions, but trust documents often give trustees great discretion in making distributions. Trustees must decide how much to give, how to give it, and when to give it.

Conversely, a beneficiary may have a legitimate need or want that should be paid by a trustee; yet, the trustee refuses to make the distribution. Perhaps the trustee makes the decision to ignore the request or outright deny the request based on an improper motive, like hostility toward the beneficiary. What recourse does the beneficiary have when the trustee abuses its discretion in refusing to make a proper distribution?

Also, a trustee may make generous distributions to one set of beneficiaries and remainder or secondary beneficiaries may have a complaint regarding those distributions. This is the first part of a two part series. This paper will address some of the more common issues that beneficiaries and trustees face regarding the standards for making distributions from trusts. The second part of the series will address other issues, including litigation and dispute resolution, regarding distribution issues.

## II. TRUSTEES’ FIDUCIARY DUTIES

Before one can understand the rights and duties associated with making trust distributions, one has to understand the broad scope of the fiduciary relationship. A trustee is held to a high fiduciary standard. *Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009). The fiduciary relationship exists between the trustee and the trust’s

beneficiaries, and the trustee must not breach or violate this relationship. *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377, 387-88 (Tex. 1945); RESTATEMENT (SECOND) OF TRUSTS § 170 CMT. A (1959); G. BOGERT, TRUSTS AND TRUSTEES § 543, at 217-18 (2d ed. rev. 1993). The fiduciary relationship comes with many high standards, including loyalty and utmost good faith. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512 (Tex. 1942). At all times, a fiduciary must act with integrity of the strictest kind. *Hartford Cas. Ins. v. Walker Cty. Agency, Inc.*, 808 S.W.2d 681, 687-88 (Tex. App.—Corpus Christi 1991, no writ). The Texas Supreme Court has described the high standards that a trustee owes the beneficiaries of a trust: “A trust is not a legal entity; rather it is a ‘fiduciary relationship with respect to property.’ High fiduciary standards are imposed upon trustees, who must handle trust property solely for the beneficiaries’ benefit. A fiduciary ‘occupies a position of peculiar confidence towards another.’” *Ditta*, at 191. A trustee owes a trust beneficiary an unwavering duty of good faith, loyalty, and fidelity over the trust’s affairs and its corpus. *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied) (citing *Ames v. Ames*, 757 S.W.2d 468, 476 (Tex. App.—Beaumont 1988), modified, 776 S.W.2d 154 (Tex. 1989)). To uphold its duty of loyalty, a trustee must meet a sole-interest standard and handle trust property solely for the benefit of the beneficiaries. Tex. Prop. Code §117.007; *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 898 (Tex. App.—Texarkana 1987, no writ). A trustee has a duty to refrain from self-dealing with trust assets. Tex. Prop. Code Ann. § 113.053(a).

A trustee has a duty to act prudently in managing and investing trust assets. A trustee has the duty to make assets productive while at the same time preserving

the assets. *Hershbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied). It has a duty to properly manage, supervise, and safeguard trust assets. *Hoening v. Texas Commerce Bank*, 939 S.W.2d 656, 661 (Tex. App.—San Antonio 1996, no writ). There is a duty to invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. Tex. Prop. Code Ann. § 117.004.

A trustee also has a duty of full disclosure of all material facts known to it that might affect the beneficiaries' rights. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). A trustee also has a duty of candor. *Welder v. Green*, 985 S.W.2d 170, 175 (Tex. App.—Corpus Christi 1998, pet. denied). Regardless of the circumstances, the law provides that beneficiaries are entitled to rely on a trustee to fully disclose all relevant information. See generally *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 788 (1938). In fact, a trustee has a duty to account to the beneficiaries for all trust transactions, including transactions, profits, and mistakes. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996); see also *Montgomery*, 669 S.W.2d at 313. A trustee's fiduciary duty even includes the disclosure of any matters that could possibly influence the fiduciary to act in a manner prejudicial to the principal. *Western Reserve Life Assur. Co. v. Graben*, 233 S.W.3d 360, 374 (Tex. App.—Fort Worth 2007, no pet.). The duty to disclose reflects the information a trustee is duty-bound to maintain as he or she is required to keep records of trust property and his or her actions. *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

### III. THE TRUSTEE SHOULD LOOK TO THE TRUST DOCUMENT.

## TEXAS STATUTES, COMMON LAW, AND COMMENTATORS

When a trustee or a beneficiary are faced with a question concerning a right or duty involving a trust distribution, they should focus on the following authority in this order: (1) the trust document, (2) the Texas Trust Code, (3) Texas common law, and (4) treatises/commentators.

The first place to look regarding a trustee's rights and duties is the trust document itself. Tex. Prop. Code §§ 113.001, 113.051. See *Myrick v. Moody Nat'l Bank*, 336 S.W.3d 795, 801 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (terms of trust instrument may limit or expand trustee powers supplied by the Trust Code). “The income and principal of a trust generally should be distributed in accordance with the settlor's intent, as manifested in the trust instrument.” 72 TEX JUR 3<sup>RD</sup>, TRUSTS § 118 (citing *Kimble v. Baker*, 285 S.W.2d 425 (Tex. Civ. App.—Eastland 1955, no pet.); *Smith v. Kountze*, 119 S.W.2d 721 (Tex. Civ. App.—Austin 1938), *judgment rev'd on other grounds*, 135 Tex. 543, 144 S.W.2d 261 (Comm'n App. 1940)).

Generally, a trust document's terms govern, and a trustee should follow them. Tex. Prop. Code Ann §§ 111.0035(b), 113.001; RESTATEMENT (THIRD) OF TRUSTS § 76(1) (“The trustee has a duty to administer the trust . . . in accordance with the terms of the trust . . . .”); RESTATEMENT (SECOND) OF TRUSTS § 164(a) (1959). The trustee shall administer the trust in good faith according to its terms and the Texas Trust Code. Tex. Prop. Code Ann. § 113.051; *Tolar v. Tolar*, No. 12-14-00228-CV, 2015 Tex. App. LEXIS 5119 (Tex. App.—Tyler May 20, 2015, no pet.). “The powers conferred upon the trustee in the trust instrument must be strictly followed.” *Id.* “The nature and extent of a trustee's duties and powers are



primarily determined by the terms of the trust.” RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. B; *Stewart v. Selder*, 473 S.W.2d 3 (Tex. 1971); *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, no writ). If the language of the trust instrument unambiguously expresses the intent of the settlor, the instrument itself confers the trustee’s powers and neither the trustee nor the courts may alter those powers. *Jewett v. Capital National Bank of Austin*, 618 S.W.2d 109, 112 (Tex. Civ. App.—Waco 1981, writ ref’d n.r.e.); *Corpus Christi National Bank v. Gerdes*, 551 S.W.2d 521, 523 (Tex. Civ. App.—Corpus Christi 1977, writ ref’d n.r.e.). The terms of a trust may not require or allow the trustee to commit a criminal or tortious act or an act that is contrary to public policy. Tex. Prop. Code §112.031.

When construing a trust, a party should focus on the settlor’s intent. *Matter of Estate of Kuyamjian*, No. 03-18-00257-CV, 2018 Tex. App. LEXIS 6182, 2018 WL 3749834, at \*2 (Tex. App.—Austin Aug. 8, 2018, pet. filed) (citing *San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 639 (Tex. 2000)). A party should “ascertain a trust grantor’s intent from the language contained in the trust’s four corners and focus on the meaning of the words actually used, not what the grantor intended to write.” *Kuyamjian*, 2018 Tex. App. LEXIS 6182, 2018 WL 3749834, at \*3 (citing *Soefje v. Jones*, 270 S.W.3d 617, 625 (Tex. App.—San Antonio 2008, no pet.)). “In this light, courts must not redraft [trust documents] to vary or add provisions ‘under the guise of construction of the language of the [trust documents]’ to reach a presumed intent.” *Id.* “We must interpret a trust to give meaning to all its provisions and to enact the intent of the grantor.” *Id.* In interpreting a trust document, a court will “(1) [c]onstrue the agreement as a whole; (2) give each word and phrase its plain, grammatical meaning

unless it definitely appears that such meaning would defeat the parties’ intent; (3) construe the agreement, if possible, so as to give each provision meaning and purpose so that no provision is rendered meaningless or moot; (4) [ensure that] express terms are favored over implied terms or subsequent conduct; and (5) [note that] surrounding circumstances may be considered—not to determine a party’s subjective intent—but to determine the appropriate meaning to ascribe to the language chosen by the parties.” *McCarty v. Montgomery*, 290 S.W.3d 525, 532 (Tex. App.—Eastland 2009, pet. denied)). Also, a party “must be particularly wary of isolating individual words, phrases, or clauses and reading them out of the context of the document as a whole.” *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995)).

One commentator advises those administering trusts to regularly read the trust document, maintain documents in the trust file that assist in construing the trust document, and provides the following advice on construing a trust:

It is important that trustees read the trust instrument carefully, even if they are sure that it is unambiguous and can perfectly recollect what it says. All trust administrators should make it a practice to review the relevant distribution provisions in the trust document each time they consider making a distribution, and at least once a year, they should review the entire trust instrument—a good time is during the annual review. Not only should trust administrators review the terms of the trust

instrument, but they should also review any extrinsic evidence in the file that clarifies the settlor's intent or that further explains any circumstances that might be relevant.

Sometimes, the trust administrator must gather basic information. For example, a file might contain a memo from a previous trust administrator, letters from the settlor, or written trust modifications; this information could be useful in interpreting the document. Additionally, it is often appropriate to understand the settlor's circumstances when the trust was executed and in testamentary trusts, the circumstances existing at the time of the settlor's death. The trust administrator should look to the trust document to see if the settlor provided express instructions or included a direct statement of the purpose of the trust. The trust administrator may be able to infer the purpose of the trust from its structure, and there may be an expression of preference between current and future beneficiaries. Some basic rules of construction have evolved to help in the interpretation of discretionary distribution clauses, or for that matter, any part of a trust agreement:

(1) Every trust is different. Trust administrators must try

to determine the settlor's goals from the content of the trust instrument and must try to implement these goals. Trust administrators must be sure to carefully read the entire instrument.

(2) Trust administrators must draw the settlor's intent from the instrument. They should clear their mind of what they think the document says or what they want it to say, and read what it actually says.

(3) Trust administrators cannot "correct" the work of a testator, a settlor, or counsel. "The very purpose of requiring a will to be in writing is to enable the testator to place it beyond the power of others, . . . to change or add to [it,] or to show that he intended something not set out in . . . his will."

(4) This is not math—trust administrators cannot add to or subtract from anything that appears in the instrument. If the instrument is unambiguous, courts do not admit other evidence for the purpose of interpreting the trust. If, however, the document is truly unclear, courts may consider extrinsic evidence to determine what a settlor or a testator intended by using or including a particular word or phrase.

(5) There is no reason to be afraid of the dictionary—use it.

(6) An expression of specific intent controls over an expression of general intent; if two expressions of specific intent are in conflict, trust administrators should choose the expression that least conflicts with the general intent.

(7) The term “may” means maybe--use discretion. The term “shall” means mandatory--just do it.

(8) When interpreting a document, certain legal presumptions may be useful.

(9) Be certain to have knowledge of what rules may apply that do not appear in the document...

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 186 (2014).

Another important point of trust construction deals with language that is precatory versus mandatory. Precatory language means that that trustee expresses his or her desire that the trustee consider some factor but does not require the trustee to do so. As one court stated:

A court's analysis regarding whether particular words are precatory or mandatory turns on "the testator's expressed intent as evidenced by the context of the will and

surrounding circumstances, 'and words which are precatory in their ordinary meaning will nevertheless be construed as mandatory when it is evident that such was the testator's intent.'" *In re Estate of Abshire*, No. 02-10-00060-CV, 2011 Tex. App. LEXIS 6676, 2011 WL 3671998, at \*4 (Tex. App.—Fort Worth, pet. denied) (mem. op.) (quoting *Wattenburger v. Morris*, 436 S.W.2d 234, 239 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.)). Generally, courts construe words akin to "want," "wish," "request," and "desire" as precatory in their ordinary sense and not as imposing a legal obligation. *Id.*; see *Bergin v. Bergin*, 159 Tex. 83, 315 S.W.2d 943, 947 (Tex. 1958) (recognizing that "[i]t is my desire" is usually precatory language but can be changed to mandatory by the will's context); *Thomasson v. Kirk*, 859 S.W.2d 493, 495 (Tex. App.—Houston [14th Dist.] 1993, writ denied). These same words, however, become mandatory "when used in a will where it appears from the context or from the entire document that they are the expression of the testator's intention in disposing of his property.'" *Estate of Abshire*, 2011 Tex. App. LEXIS 6676, 2011 WL 3671998, at \*4 (quoting *First United Methodist Church of Marlin v. Allen*, 557 S.W.2d

175, 177 (Tex. Civ. App.—  
Waco 1977, writ ref'd n.r.e.)).

*In re Estate of Rodriguez*, No. 04-17-00005-CV, 2018 Tex. App. LEXIS 254, at \*7(Tex. App.—San Antonio Jan. 10, 2018, no pet.) (“[W]e hold the reference to Frank's "desire" to keep the Ranch intact is precatory language which did not impose any legal obligation preventing Frank from entering into the to sell the Ranch to Christians.”). See also *In re Estate of Wharton*, No. 08-20-00002-CV, 2020 Tex. App. LEXIS 6956 (Tex. App.—El Paso August 27, 2020, no pet.) (“A careful review of the complete will leads us to conclude that despite the use of precatory terminology, it was the testator's intention—and his instruction to his executor—that the stock be offered for sale to his business partner, on terms that would effectuate his larger plan for the distribution of the estate to his heirs. Considered in isolation, Section 1.01 does describe a sale of shares to McKay in terms of preference rather than command. But a comprehensive review of the entire will tells another story.”); *Archer v. Archer*, No. 05-13-01341-CV, 2014 Tex. App. LEXIS 6551 (Tex. App.—Dallas June 17, 2014, no pet.) (the word request in a trust meant that the parties were not required to arbitrate disputes); *Bergin v. Bergin*, 159 Tex. 83, 89, 315 S.W.2d 943, 947 (1958) (“It is true that such words as 'wanted', 'wish', and 'desire' in their ordinary and primary meaning are precatory. But, they are often construed as mandatory when used in an instrument admittedly a will or when it appears from the context or from the entire document that they are the expression of the testator's intention in making disposition of his property.”).

For example, in *Wells Fargo, N.A. v. Clower*, a trustee filed suit for declaratory relief regarding its discretion to make income distributions. No. 02-20-00058-CV,

2021 Tex. App. LEXIS 7675 (Tex. App.—Fort Worth September 16, 2021, no pet. history). The beneficiaries filed counterclaims for breach of fiduciary duty. The beneficiaries then moved for summary judgment, alleging that the trustee had to distribute all of the net income, that it had not done so in the amount of over \$288,000, and sought damages, interest, and attorney's fees. The trial court granted the motion, and the trustee appealed.

The court of appeals reviewed trust construction principals:

The construction of a trust instrument is a question of law for the trial court, which must construe it to ascertain the settlors' intent from the language used within the instrument's four corners. All terms must be harmonized to properly give effect to all parts, and if possible, the court should construe the instrument to give effect to all provisions so that no provision is rendered meaningless. If a trust's meaning is ambiguous, its interpretation becomes a fact issue for which summary judgment is inappropriate, and whether the meaning is ambiguous is a question of law for the court. We look to the law that was in effect at the time that the trust became effective—here May 23, 1969—but look to the words of the instrument first and then, if necessary, turn to statutory provisions to fill in any gaps.

*Id.* (internal citation omitted).

The court then reviewed several of the trust's provisions concerning distributions. It stated that the trustee shall disburse all net income to the grantors. However, after the trust became irrevocable, it provided that:

[T]hen the Trustee is authorized and empowered to pay the net income of each of said trusts, to or among the

beneficiaries of that particular trust, as above named, or to any one of them, in such amounts and proportions as our Trustee in its sole and absolute discretion shall deem advisable, from time to time, without regard to equality of distribution... In exercising its discretion as to the amount (if any) of such net income which is to be paid to any of the aforesaid beneficiaries, our Trustee shall not be required to take into consideration any other income or property which is available to any such beneficiary from any other source.

*Id.* After the first to die of the grantors, the trust stated:

[I]t is our desire that all of the balance of net income from the said [JCC Trust] and the [EAB Trust], after distributions are made to the surviving Grantor, be disbursed to all or any one of the beneficiaries of each of said trusts, as the Trustee may deem advisable. It being our intention that our children, [John and Edith], and their issue and descendents [sic], shall share in the benefits of their respective trusts, as soon as possible.

*Id.*

The court reviewed the trust's provision wherein the settlors stated that they

“desire[d]” for the trustee to distribute all of net income and held that it was precatory and not mandatory:

Paragraph V states that after one of the grantors dies, the trustee could pay net income to the trust and sub-trust beneficiaries, with one exception, "in such amounts and proportions as [the] Trustee in its sole and absolute discretion shall deem advisable, from time to time, without regard to equality of distribution." The exception was that an equal amount was to be taken from each of the four sub-trusts for any and all distributions made to the surviving spouse, with any income not so disbursed to be incorporated into the sub-trusts' corpus, to continue to be held, administered, and distributed under the trust's terms.

Paragraph VII likewise provides for the trustee, "in its sole and absolute discretion," to make disbursements from the trust corpus for emergency or extraordinary expenses arising for the four children, their spouses, and their children, and it reiterates that "the Trustee's discretion shall be conclusive as to the advisability of any such disbursement and the same shall not be subject to review." Paragraph XIV(7) allows the trustee the final decision with regard to whether to treat "all receipts

or other property received" by the trusts as either corpus or income, and (16) allows the trustee "[t]o deal in any manner as between the trusts" as it thought advisable. And Paragraph XXIII gives the trustee the authority to resolve doubts about the trust's construction "in such manner as [it] shall deem equitable and proper" and provides that such decisions and actions would be final and binding "in the absence of bad faith."

Paragraph IX provides that once the trust became irrevocable but a surviving spouse remained alive, then after distributions were made to the surviving spouse and payments made for the deceased grantor's funeral expenses, cemetery lot, gravestone, and death taxes (and funds set aside for the surviving spouse—from all four trusts—and for the beneficiaries from their individual trusts, for funeral expenses, cemetery lots, gravestones, and death taxes), then the balance of net income in the JCC and EAB trusts could—but did not have to—be disbursed "as the Trustee may deem advisable," i.e., with due consideration not only for John and Edith but also for "their issue and descend[an]ts."

In the context of the trustee's discretion for classifying

income and corpus set out elsewhere in the trust agreement, and other terms set out in the trust agreement—specifically Paragraphs III and XI—showing that the grantors knew how to use mandatory language if they wanted to compel the distribution of all net income, Paragraph IX appears to demonstrate nothing more than the grantors' desire to show the two children from J.C.'s first wife that they would enjoy income from their inheritance sooner rather than later, albeit subject to the trustee's discretion, distributions for their stepmother until her death, and the cost of various funeral and associated expenses of their father's death and future funeral and associated expenses of their stepmother's death.

In short, the trustee was allowed to determine when and how much net income would be paid to each sub-trust beneficiary and was allowed to treat trust income as part of the trust corpus to provide not only for the grantors' children but also for the grantors' grandchildren until the trust's expiration. Within the context of the trust's four corners, then, Paragraph IX is unambiguous and its "desire" language is precatory rather than mandatory.

*Id.* Thus, the court reversed the summary judgment and remanded to the trial court for further proceedings, including whether the trustee should be awarded attorney's fees.

There are certain terms in a trust that cannot contravene the Texas Trust Code, which is contained in the Texas Property Code. Tex. Prop. Code § 111.001 et. seq. The Texas Trust Code provides that a trust's terms may not control in certain circumstances, including: (1) requiring a trustee to do an illegal or tortious act or an act that is contrary to public policy; (2) the application of exculpation provisions; (3) limit statute of limitations periods; (4) limit the duty to respond to a demand for an accounting in certain circumstances or to act in good faith; (5) limit a court to take certain judicial action regarding a trust, including removing a trustee, modifying a trust, order disgorgement of trustee's compensation for breach of trust, award attorney's fees, or exercise jurisdiction under Section 115.001 (which is described below); or (6) the application of forfeiture clauses. Tex. Prop. Code Ann § 111.0035(b). *Id.*

Otherwise, the Texas Trust Code provides default rules that a trustee and beneficiary should follow absent contradiction by the trust document. *Id.* As one commentator provides:

In practice, many of the statutory provisions that are designed to be especially conservative, are overridden by standard provisions in trust instruments to more effectively achieve the goals behind the trusts they govern. This makes sense when one considers the practical implications of trust drafting. A "simple" trust (in the literal sense, and not as that term is

generally understood for tax purposes) which fails to consider all the possible contingencies should be construed in such a manner which is most favorable to the beneficiary. In contrast, where a trustor makes the effort to think through and document his or her intent with regard to more unlikely scenarios, the law should (and generally does) seek to enforce and fulfill such intent.

Christian S. Kelso, *But What's An Ascertainable Standard? Clarifying Hems Distribution Standards And Other Fiduciary Considerations For Trustees*, 10 TEX. TECH EST PLAN COM PROP L J. 1 (2017).

A trustee and beneficiary should also consult with common law authorities. The Texas Trust Code specifically states that "[i]n the absence of any contrary terms in 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 trustees by the common law." Tex. Prop. Code § 113.051. There are several different types of common law authority. There may be controlling authority for the court that the party is litigating in front of, the court of appeals for that court, or the Texas Supreme Court. A court must follow controlling authority. There may be persuasive authority from other Texas intermediate courts of appeals or from other jurisdictions. Courts do not have to follow persuasive authority, but that authority is just that, persuasive.

Finally, a trustee or beneficiary should consult secondary sources, such as commentators, treatises, law review articles, etc. The author generally finds that the

Restatements of Trusts are very authoritative and Texas courts generally rely upon it for guidance (where it does not conflict with the Texas Trust Code or common law). *See, e.g., Westerfeld v. Huckaby*, 474 S.W.2d 189 (Tex.1971); *Messer v. Johnson*, 422 S.W.2d 908 (Tex. 1968); *Mason v. Mason*, 366 S.W.2d 552, 554–55 (Tex. 1963); *Lee v. Rogers Agency*, 517 S.W.3d 137, 160–61 (Tex. App.—Texarkana 2016, pet. denied); *Woodham v. Wallace*, No. 05-11-01121-CV, 2013 Tex. App. LEXIS 50 (Tex. App.—Dallas January 2, 2013, no pet.); *Wolfe v. Devon Energy Prod. Co. LP*, 382 S.W.3d 434, 446 (Tex. App.—Waco 2012, pet. denied); *Longoria v. Lasater*, 292 S.W.3d 156, 168 (Tex. App.—San Antonio 2009, pet. denied). The Restatement is a treatise created by contributions from judges, scholars, and trust practitioners. RESTATEMENT (THIRD) OF TRUSTS (Am. Law Inst. 2003). It is an amalgamation of court decisions and statutes across the country that intends to provide the best principles of trust law. Although the Restatement can be a useful guide, it is critical to emphasize that the Restatement is not primary authority for any particular legal argument or position. In other words, Texas courts are not bound to follow the principles of the Restatements. However, because Texas case law is somewhat limited, the Restatement provides some insight with respect to how a Texas court might approach the meaning of a specific trust provision or the rights and duties of trustees and beneficiaries. The author also relies on the Uniform Trust Code and other treatises, many of which are cited in this paper.

#### IV. TRUST DISTRIBUTION STANDARDS IN GENERAL

One purpose of a trust is for the trustee to make distributions to beneficiaries. The trustee must generally follow the standards for making these distributions as set forth in

the trust document. There are three general types of standards for distributions: mandatory or nondiscretionary distributions, complete and unfettered discretionary distributions, or limited discretionary distributions (unascertainable standards and ascertainable standards). The Author will discuss these three general types of distribution standards below.

#### V. TRUST PROVISIONS REQUIRING DISTRIBUTIONS

##### A. Trustees Must Make Mandatory Distributions

Some trusts provide that a trustee shall distribute income or principal to beneficiaries. The Texas Trust Code Section 113.051 requires that a trustee administer a trust according to its terms and Texas law. Tex. Prop. Code § 113.051. When a settlor chooses to use the word “shall” in a trust instrument, it imposes a mandatory obligation on the trustee. *Moser v. Bank of Texas (In re Chambers)*, 384 B.R. 460, 2008 Bankr. LEXIS 1492 (Bankr. E.D. Tex. 2008). Accordingly, when the trust document states that a trustee shall make a distribution, the trustee generally breaches its duty by failing to comply with the trust’s terms.

Restatement (3rd) of Trusts Section 76 states: “In administering the trust, the trustee has a duty to comply with the terms of the trust and applicable law providing for the distribution or application of trust income and principal to or for the beneficiaries or for the charitable or other purposes of the trust throughout the period of its ongoing administration, and also at the time of its termination.” RESTATEMENT (3RD) OF TRUSTS, § 76 “The trustee has a duty not to misdeliver trust funds or other trust property, and is ordinarily liable for failure to deliver the property to its proper



distributee—that is, to the designated beneficiary or his or her assignee.” *Id.*

#### B. Mandatory Income Distributions

A settlor often directs that the income from a trust be distributed to a beneficiary. This is common for marital trusts, such as Qualified Terminable Interest Property (QTIP) trusts. *See* I.R. C. 2056(b)(7). It is also common for charitable remainder unitrusts. Restatement (3rd) of Trusts Section 49 states:

Where a trustee is directed to pay the trust’s income to a beneficiary for life or a designated period, in the absence of other direction the trustee is under a duty to pay the beneficiary the net income of the trust property at reasonable intervals, normally monthly or quarter-annually, but at least annually, whether or not the beneficiary needs the income.... Despite a duty to distribute all income periodically, the trustee can properly withhold a reasonable amount of income receipts to meet present or anticipated expenses that are properly chargeable against income, or temporarily for the trustee’s and beneficiaries’ protection where there is reasonable doubt as to the amount of income properly payable to the income beneficiary.

RESTATEMENT (3RD) OF TRUSTS, § 49. Likewise, the Restatement (2nd) of Trusts Section 182 states:

Where a trust is created to pay the income to a beneficiary for a designated period, the trustee is under a duty to the beneficiary to pay to him at reasonable intervals the net income of the trust property.” “By the terms of the trust the trustee may be authorized or directed to accumulate the whole or a part of the income. If such a provision is not invalid, the trustee is not under a duty to pay to the beneficiary during the period in which he is authorized or directed to accumulate it such income as he is authorized to accumulate.

RESTATEMENT (2ND) OF TRUSTS, § 182.

Regarding a trustee’s common law duty to pay income to a beneficiary, Scott, *The Law of Trusts*, provides in part:

Where the income from the trust estate is payable to a beneficiary for life or for a designated period, the trustee is under a duty to pay him the net income, after deducting from the gross income the expenses properly incurred in the administration of the trust. He need not however pay the net income as soon as it is received but can properly pay it at reasonable intervals.

Where the terms of the trust do not specify the times at which such payments are to be made, it is ordinarily reasonable to make payments semiannually or quarterly.

Where by the terms of the trust the income is payable to life beneficiaries, the trustee has no right to withhold the income and accumulate it in order to pay the beneficiaries the accumulated income on the termination of the trust, but it is his duty to pay the income currently.

2 Scott, Trusts § 182 (3d ed. 1984).

One commentator provides that even though this type of trust calls for distributions by a formula, there may still be some discretionary decisions involved:

Because some trusts call for distribution by virtue of a specific formula, the trustee may not distribute under a traditional discretionary standard. A charitable remainder unitrust, for example, may simply require the trustee to exercise discretion in the choice of investments and apply a formula to determine how much to distribute. It is not uncommon for a trust to fix the amount of such a distribution but to require the trustee to exercise discretion in the choice of the charity that will receive the distribution. This would still require the trustee to read the instrument and file carefully to determine what charitable purposes the grantor or testator intended to accomplish. In trusts requiring the mandatory distribution of income, the trustee is required to exercise

discretion in the decision whether to use the adjustment power (discussed below), rather than make specific distributions for specific purposes. In each instance, however, determining the intent of the grantor remains important.

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 189 (2014).

Regarding time of payment, one treatise provides that “Except where the instrument creating the trust confers authority to do so, a trustee should, ordinarily, not withhold or defer payment of income, but should pay it over as it is received.” 90 C.J.S., Trusts, § 353(e). “If the time for the payment of income is not fixed by the trust instrument, it should be paid at reasonable intervals. There is no duty to pay income immediately upon its receipt.” BOGERT’S THE LAW OF TRUSTS AND TRUSTEES, § 814. Further, “If there is a dispute as to the status of the trust, the trustee may withhold income payments for a reasonable time pending the settlement of the litigation or controversy.” *Id.*

One issue that arises is when the trust provides that “the income” of the trust shall be paid, does this allow a trustee to accumulate income or does the trustee have to distribute “all income”? One Texas treatise provides, “When a trustee is given no discretion as to when all of the income is payable to the income beneficiaries, the trustee is not empowered to accumulate any income except with the consent of the income beneficiary.” 1 TEXAS ESTATE PLANNING § 34.06. *See also* 9 TEXAS TRANSACTION GUIDE--LEGAL FORMS § 50B.300. Thus, a trustee is not allowed to

accumulate income unless it is specifically authorized in the trust instrument. *Republic National Bank of Dallas v. Fredericks*, 155 Tex. 79, 283 S.W.2d 39, 44 (1955). In *Republic*, the will stated: “The income from said trust fund shall be paid in equal shares to my beloved children, NELSON RUSSELL EBIE and MRS. DOROTHY EBIE WRIGHT, for and during the terms of their natural lives and in monthly payments.” *Id.* The Texas Supreme Court held:

When we consider the language of the will as a whole and give due regard to all the provisions therein, we are convinced that the paramount purpose of A. C. Ebie was to provide for the comfort, care and support of his two children above any desire to benefit strangers or outsiders. How was this desire on the part of the testator to be accomplished? First, the testator directs that all of the income from the trust estate shall be paid by the Trustee in equal shares and “in monthly payments” to the two children, or children of a deceased child during the minority of such children...

The Trustee being given no discretion as to the amount of monthly payments of income to be paid to the children, it follows that, except by agreement of the child or children, they were entitled to receive these monthly payments and the Trustee would accumulate no income beyond month to month.

*Id.* So, if the trust says that “the income” will be paid to a beneficiary, then all income will be distributed except for allowed expenses attributable to income. The trustee can only hold back income or accumulate it if the trust expressly authorizes accumulation.

### C. Mandatory Principal Distributions

Settlors can also provide that a trustee shall distribute portions of principal to a beneficiary. It is common for a trust to provide that a portion of the trust’s principal be distributed to a beneficiary upon certain age attainments. For example, a trust may provide that a beneficiary is entitled to a third of the trust’s principal upon attaining the age of twenty-five, another third of the trust’s principal at age thirty, and the remaining third of the trust’s principal at age thirty-five. The trust may provide that the beneficiary has a duty to request the distribution before the trustee has a duty to make the distribution.

For example, in *Lesikar v. Moon*, the court held that the trustee violated the terms of the trust when he failed to divide the trust principal into two equal portions and distribute one portion to a new trust for one beneficiary. 237 S.W.3d 361, 367(Tex. App.—Houston [14th Dist.] 2007, pet. denied). The court held:

Of the remaining assets in the Trust, the Amended Family Trust provided “[o]ne-half (1/2) shall be transferred into a separate trust for CAROLYN, if living, . . .” Under the Trust, Woody had no discretion to do other than fund the special trusts. Because Woody had no discretion not to fund Carolyn’s special trust, it was

not necessary for the trial court to make of finding of fraud, misconduct, or abuse of discretion.

*Id.*

In *Doherty v. JPMorgan Chase Bank, N.A.*, a court of appeals wrestled with whether trust language required mandatory distributions or whether the trustee had discretion. No. 01-08-00682-CV, 2010 Tex. App. LEXIS 2185, 2010 WL 1053053, at \* (Tex. App.—Houston [1st Dist.] Mar. 11, 2010, no pet.). The court of appeals held that the trust required mandatory distributions upon request by the beneficiary:

Paragraph 3.3. of the Trust states that JPMorgan “shall also distribute to [Doherty] such amounts of trust principal as she may request to provide for her com fort, health, support or maintenance, in order to maintain her in accordance with the standard of living to which she was accustomed at the time of [her husband’s] death.” This right to withdraw principal is to be construed “liberally.” In addition, the Trust allowed JPMorgan, in its sole discretion, to “distribute to [Doherty] such amounts of trust principal as [JPMorgan] deems desirable from time to time to provide liberally for her comfort, happiness, health, support or maintenance, including principal which may be requested by [Doherty] to make gifts to any one or more

of [her husband’s] descendants.”

JPMorgan, for its part, does not dispute that the disbursement Doherty requested was for her “comfort, health, support or maintenance.” Doherty argues that the terms of the Trust therefore compelled JPMorgan to make the requested disbursement, so as to allow Doherty to remodel the bathroom in her daughter’s house for her use after her incapacitation. We agree.

The plain language of Paragraph 3.3 required JPMorgan to distribute funds from the principal of the Trust when requested to do so by Doherty so long as those funds were requested in order to “provide for her comfort, health, support or maintenance, in order to maintain her in accordance with the standard of living to which she was accustomed at the time of [her husband’s] death.” Paragraph 3.3 contains a second, discretionary power that allows JPMorgan to distribute such funds as it, “in [its] sole discretion . . . deems desirable from time to time to provide liberally for [Doherty’s] comfort, happiness, health, support or maintenance, including principal which may be requested by my wife to make gifts to any one or more

of my descendants.” This latter, discretionary power does not restrict or affect JPMorgan’s mandatory duty to make distributions when requested by Doherty to provide for her comfort, health, support or maintenance. JPMorgan’s duty to make distributions when Doherty requested funds to remodel the bathroom at her daughter’s house for her own use was therefore absolute and nondelegable.

*Id.*

Accordingly, where a trust provides that a trustee must make certain principal distributions, a trustee must make those distributions unless the trustee obtains judicial relief to the contrary or the beneficiary consents and releases the trustee from that duty. It should be noted that often a trustee needs the beneficiary to assist it in making the distribution. The trustee may need a directive or request, information on where to send the assets, information on whether the assets should be liquidated or transferred in kind, etc. Until a beneficiary complies with these reasonable requests, a trustee may not have a duty to transfer the assets.

D. Community Property Implications For Mandatory Distributions

It should also be noted that mandatory distributions may have impact on whether they are considered separate or community property. Courts have held that distributions from testamentary or inter vivos trusts to married recipients who have no right to the trust corpus are the separate property of the recipient because these distributions are

received by gift or devise. *See Benavides v. Mathis*, 433 S.W.3d 59 (Tex. App.—San Antonio 2014, pet. denied); *Sharma v. Routh*, 302 S.W.3d 355 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *Cleaver v. Cleaver*, 935 S.W.2d 491, 492-94 (Tex. App.—Tyler 1996, no pet.). The *Sharma* court held that, “in the context of a distribution of trust income under an irrevocable trust during marriage, income distributions are community property only if the recipient has a present possessory right to part of the corpus, even if the recipient has chosen not to exercise that right, because the recipient’s possessory right to access the corpus means that the recipient is effectively an owner of the trust corpus.” *Sharma*, 302 S.W.3d at 364.

In *Ridgell v. Ridgell*, the court addressed the characterization of mandatory income distributions to the wife from two testamentary trusts. 960 S.W.2d 144, 147-50 (Tex. App.—Corpus Christi 1997, no pet.). The court stated that trust income received by a married beneficiary is community property if the receiving spouse “is entitled, or becomes entitled” to distributions of trust corpus. *Id.* at 148. The wife received mandatory distributions of trust income, and, in addition, the testamentary trusts mandated that the trustee make annual distributions of trust corpus to the wife during the first eleven years of the marriage. *See id.* at 146-50. As to the trusts in question, the wife either had received mandatory distributions of corpus or had a present possessory right to receive mandatory distributions of corpus. *See id.* at 147-50. The court held that the income distributions from the two testamentary trusts to the wife were community property.

Accordingly, a settlor should consider the tax and community property implications that arise when a trustee has a mandatory

duty to make income or principal distributions.

VI. TRUST PROVISIONS PROVIDING ABSOLUTE DISCRETION TO TRUSTEE TO MAKE DISTRIBUTIONS

A settlor may want to imbue a trustee with the ultimate discretion on whether to make a distribution or not.

A. Historically Courts Would Not Interfere With A Trustee's Discretionary Decision

Historically, courts in Texas have uniformly held that where a trustee has complete discretion in making distributions, a beneficiary cannot sue the trustee for breach of fiduciary duty for not making a distribution. *See Burns v. Miller, Heirsche, Martens & Haygood, P.C.*, 948 S.W.2d 317 (Tex. App.—Dallas 1997, writ denied); *Ridgell v. Ridgell*, 960 S.W.2d 144 (Tex. App.—Corpus Christi 1997, writ denied). Rather, under a discretionary trust, the beneficiary is entitled only to the income or principal that the trustee, in his discretion, shall distribute to the beneficiary. *See Kolpack v. Torres*, 829 S.W.2d 913, 915 (Tex. App.—Corpus Christi 1992, writ denied). The beneficiary of a discretionary trust cannot compel the trustee to pay him or to apply for his use any part of the trust property, nor can a creditor of the beneficiary reach any part of the trust property until it is distributed to the beneficiary. *Id.* In a discretionary trust situation, a court cannot substitute its discretion for that of a trustee. *See Di Portanova v. Monroe*, 229 S.W.3d 324, 329-332 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *Aguilar v. Garcia*, 880 S.W.2d 279, 281 (Tex. App.—Houston [14th Dist.] 1994, orig. proceeding) (noting that trial court had no discretion to limit discretionary

authority granted solely to trustee by statute).

The Fifth Circuit has described discretionary trusts as follows:

Additionally, “where by the terms of the trust a beneficiary is entitled only to so much of the income or principal as the trustee in his uncontrolled discretion shall see fit to give him,” the trust is denominated a “discretionary trust” by Texas law. It follows that when “no standard or guide is affixed to the trustee’s distribution power,” a beneficiary has no authority to force a trustee to distribute trust assets. A universal canon of Anglo-American trust law proclaims that when the trustee’s powers of distribution are wholly discretionary, the beneficiary has no ownership interest in the trust or its assets until the trustee exercises discretion by electing to make a distribution to the beneficiary. Texas law is to the same effect: “Where discretionary trusts are involved, the beneficiary has no right to trust income [or assets] until the trustee elects to irrevocably and unconditionally place it in the beneficiary’s control.” It follows that when such discretionary powers are granted to trustees of a spendthrift trust, assets of the trust are immune from claims of the beneficiary’s creditors,

who can stand in his shoes but no higher:

Discretionary trusts are similar in effect to a spendthrift trust in that where a trustee has been invested with a discretionary power to give an interest in a trust fund to a named beneficiary, the beneficiary cannot alienate the funds nor can creditors reach the fund until the trustee's discretion has been exercised.

A universally recognized corollary is that courts can neither prevent or force the exercise of discretion by the trustee nor specify a particular exercise or otherwise interfere with or impinge on such discretion when it is expressly vested, without condition or limitation, under the terms of the trust instrument. Again, Texas is in accord: Texas courts "are limited in their powers over the trustee of a discretionary trust," prohibited by law from interfering with the discretion of the trustee absent a clear showing of fraud or other egregious conduct.

*In re Bass*, 171 F.3d 1016 (5th Cir. 1999).

In *Marshall v. Ribosome L.P.*, a beneficiary of a trust sued a limited partnership of which the trustee was a partner. No. 01-18-00108-

CV, 2019 Tex. App. LEXIS 3787 (Tex. App.—Houston [1st Dist.] May 9, 2019, no pet.). The beneficiary asserted that the limited partnership aided and abetted a breach of fiduciary duty by making distributions to the trustee, when the trustee was refusing to make distributions to the beneficiary. The trial court granted summary judgment for the partnership, and the beneficiary appealed.

The court of appeals held that an aiding and abetting breach of fiduciary duty claim rests on an underlying breach of such a duty. The beneficiary claimed that the trustee had breached her fiduciary duty by failing to make distributions of trust income. The court rejected that theory because the trustee had broad discretion to make distributions:

Under the Trusts' language, however, the Trustee has absolute, unfettered discretion over the decision to accumulate or distribute the Trust income. *See, e.g., Caldwell v. River Oaks Tr. Co.*, No. 01-94-00273-CV, 1996 Tex. App. LEXIS 1798, 1996 WL 227520, at \*12 (Tex. App.—Houston [1st Dist.] May 2, 1996, writ denied) (mem. op.) ("A power is considered discretionary if the trustee may decide whether or not to exercise it."). In her "sole discretion," the Trustee "may accumulate or distribute income accruing for the benefit of the beneficiaries," and "determin[e] the time or frequency of any distributions" as well as "the manner, time, circumstances, and conditions of the exercise

of any right, power or authority vested in the Trustee.” Preston claims that his breach of fiduciary duty claim is supported by evidence that Elaine acted unfairly, suggesting that she knew he had come to depend on the distributions and that she had treated his brother differently under the separate trusts that benefit him. Preston labels this perceived unfairness as “bad faith”; however, a decision to accumulate interest—which the plain language of the Trusts expressly allows—and the differences in treatment between the beneficiaries of different trusts does not raise a fact issue showing a breach of fiduciary duty. Neither of the Trusts contains language limiting the trustee’s discretionary authority, such as by declaring a purpose to provide living expenses or requiring the distributions to Preston to be equal to those made to Pierce, Jr. under the trusts that benefit him. *See, e.g., Doherty v. JPMorgan Chase Bank, N.A.*, No. 01-08-00682-CV, 2010 Tex. App. LEXIS 2185, 2010 WL 1053053, at \* (Tex. App.—Houston [1st Dist.] Mar. 11, 2010, no pet.) (mem. op.) (holding that trustee erred in denying funds for modification of bathroom in daughter’s home where beneficiary had moved after suffering stroke that left her physically impaired; trust

required disbursement of funds on beneficiary’s request to provide for her “comfort, health, support, or maintenance”). None of the circumstances raises a fact issue as to whether Elaine abused the broad discretionary authority conferred by the Trusts.

*Id.* The court also noted that there was no evidence of loss or injury to the beneficiary or the trusts or of benefit to the trustee resulting from the decision to accumulate the income instead of distributing it. The court stated: “Preston claims that the withholding of Trust income ‘causes [him] damages equal to the distributions that were wrongly withheld.’ But the Trusts do not give Preston any right to override the Trustee’s decisions about how to handle the trust income. And, as he remains the beneficial owner of the interest income accumulated in the Trusts, he is not entitled to a damages award that would amount to a double recovery.” *Id.*

In *Malone v. Malone*, a beneficiary sued a trustee for breach of fiduciary duty for not making any distributions to her (other than a one-time \$5,000 payment). No. 02-08-157-CV, 2009 Tex. App. LEXIS 6589 (Tex. App.—Fort Worth August 20, 2009, pet. denied). The trust specifically stated: “The Trustee shall have complete discretion to pay or use . . . the net income and/or corpus of the Trust as the Trustee, in its sole discretion, may determine to be reasonably necessary for [Ann].” *Id.* at \*8. The trustee filed a no-evidence motion for summary judgment, and the beneficiary filed evidence that showed that the trustee admitted to withholding funds of the trust in order to keep the beneficiary from being with her mother at the end of her mother’s life and to



“punish” her for past acts that the trustee found unacceptable. *See id.* Nonetheless, the court of appeals affirmed the summary judgment for the trustee stating that “it was within the trustee’s discretion to make distributions to [the beneficiary], and a court cannot substitute its discretion for that of the trustee.” *Id.* The court concluded that the beneficiary presented no evidence that the trustee breached any fiduciary duty he may have owed under the trust and that the trial court did not err by granting a no-evidence summary judgment on the breach of fiduciary duty claim. *See id.*

In *Di Portanova v. Monroe*, a plaintiff sought declaratory relief concerning the trustee’s authority to make distributions. 229 S.W.3d 324, 327(Tex. App.—Houston [1st Dist.] 2006, pet. denied). The wills provide that the Trustees may make distributions from the trust estate only if the distribution, “in the discretion of the Trustee, [is] in the best interests of [the beneficiary].” *Id.* The trial court granted the requested relief and held that the trustees were authorized to make the distribution, and the court of appeals reversed. The court held:

the trial court’s declaration that the Trustees were authorized to fund the proposed LaMatta trust decides the preliminary issue of whether the proposed disbursement to the LaMattas would be in Ugo’s best interest. Put another way, the Trustees would not be authorized to make the proposed disbursement to the LaMattas unless it was in Ugo’s best interest to do so...

However, in this discretionary trust, the

Trustees, not the court, are given the power to determine the best interest of the beneficiary. Under a discretionary trust, the beneficiary is entitled only to the income or principal that the trustee, in his discretion, shall distribute to the beneficiary. The beneficiary of a discretionary trust cannot compel the trustee to pay him or to apply for his use any part of the trust property, nor can a creditor of the beneficiary reach any part of the trust property until it is distributed to the beneficiary. A court cannot substitute its discretion for that of a trustee, and can interfere with the exercise of discretionary powers only in cases of fraud, misconduct, or clear abuse of discretion...

In this case, there has been no pleading or proof that the Trustees have acted with mala fides or a lack of good faith. Instead, by seeking a declaratory judgment that the trustees are authorized to fund the proposed LaMatta trust—i.e., that funding the proposed trust is in Ugo’s best interest—the Guardian has effectively bypassed the Trustees and prevented them from determining what action, in their opinion, is in Ugo’s best interest. Similarly, by declaring that the Trustees are authorized to fund the proposed LaMatta trust, the trial court has usurped a

power granted exclusively to the trustees under the Cullens' wills; the power to determine when Ugo's best interest would be served by distributions made from the trust estate.

*Id.* at 331.

In *In re Estate of Bryant*, a trustee misapplied assets and deposited them into the wrong trust but later deposited them into the correct trust. No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131 (Tex. App.—Amarillo Mar. 11, 2020, no pet.). The beneficiary of the correct trust sued the trustee for “damages for her loss of use of the funds in the Children’s Trust and Jane A. Bryant Trust from April 14, 2014, when Bill received the insurance proceeds, to May 5, 2015, when those proceeds were returned to the Children’s Trust.” *Id.* The court of appeals affirmed the trial court’s ruling that the beneficiary was not entitled to the damages. The court noted that the trust was a discretionary trust, and there was no requirement that even if the assets had been in the correct trust that the trustee had to distribute them to the beneficiary:

Although the trial court found that Bill breached his fiduciary duty with regards to the funds intended for the Children’s Trust, this does not necessarily indicate that Jane suffered the loss of use of those funds. Bill, as trustee of the Children’s Trust, had discretion whether and when to distribute trust funds to or for the benefit of beneficiaries. The evidence shows that, after the insurance proceeds were

returned to the Children’s Trust in 2015, Bill made no distribution to Jane from the trust. The trial court found that the language of the trust “arguably supports” Bill’s decision to consider Jane’s existing assets before he made distributions to Jane. Because Jane could not show that Bill was required to exercise his discretion to make a distribution to her from the trust, she could not establish that she incurred damages for the loss of use of the trust funds.

*Id.* (internal citations omitted).

B. Trustees Should Not Make A Discretionary Decision In Bad Faith

Some courts, however, held that trustees did not have unfettered discretion, even if the trust document said as much. “Even where a trustee is vested with broad discretion, courts may assert control over the trustee’s exercise of power ‘to prevent the frustration of the fundamental intent of the settlor’ and compel the trustee’s performance of his duty.” *In re Estate of Bryant*, No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131 (Tex. App.—Amarillo Mar. 11, 2020, no pet.) (citing *Boyd v. Frost Nat’l Bank*, 145 Tex. 206, 196 S.W.2d 497, 504 (Tex. 1946)). A trustee must exercise a discretionary power “reasonably” and in the best interests of the beneficiaries. *See Sassen v. Tanglegrove Townhouse Condo. Assoc.*, 877 S.W.2d 489 (Tex. App.—Texarkana 1994, writ denied). A court should not allow a trustee to abuse his or her discretion. *Coffee v. William Marsh Rice Univ.*, 408 S.W.2d 29 (Tex. Civ. App.—Houston 1966, no writ); *Brown v. Sherck*, 393 S.W.2d 172 (Tex. Civ. App.—Corpus Christi 1965, no

writ); *Nations v. Ulmer*, 122 S.W.2d 700 (Tex. Civ. App.—El Paso 1938, no writ). A trustee’s discretion is not unbridled discretion. *State v. Rubion*, 308 S.W.2d 4 (Tex. 1957); *First National Bank of Beaumont v. Howard*, 229 S.W.2d 781, 785 (Tex. 1950).

For example, in *In re XTO Energy Inc.*, the court of appeals wrestled with the issue of whether a beneficiary could file suit on behalf of a trust where the trustee refused to exercise its discretion to do so. 471 S.W.3d 126 (Tex. App.—Dallas July 27, 2015, original proceeding).

Generally, when a trustee is given discretion with respect to the exercise of a power, a court may not interfere except to prevent an abuse of discretion. A power is discretionary if a trustee may decide whether or not to exercise it... Under Texas law, a court may not interfere with the exercise of a trustee’s discretionary powers and substitute its discretion for that of the trustee *except in cases of fraud, misconduct, or a clear abuse of discretion*.

*Id.* (internal citations omitted). Accordingly, broad discretion did entitle a trustee to act with fraud, misconduct, or with a clear abuse of discretion, and a beneficiary could challenge the trustee if one of those exceptions occurred.

The Restatement provides:

A court will not interfere with a trustee’s exercise of a discretionary power when that exercise is reasonable

and not based on an improper interpretation of the terms of the trust. Thus, judicial intervention is not warranted merely because the court would have differently exercised the discretion.

On the other hand, a court will not permit abuse of discretion by the trustee. What constitutes an abuse depends on the terms of the trust, as well as on basic fiduciary duties and principles (§§ 76-83). Of particular importance are the purposes of the power and the standards, if any, applicable to its exercise (see Comments d-f) and the extent of the discretion conferred upon the trustee (Comment c). Relevant fiduciary principles include (i) the general duty to act, reasonably informed, with impartiality among the various beneficiaries and interests (§ 79) and (ii) the duty to provide the beneficiaries with information concerning the trust and its administration (§ 82). This combination of duties entitles the beneficiaries (and also the court) not only to accounting information but also to relevant, general information concerning the bases upon which the trustee’s discretionary judgments have been or will be made. See Comment e(1).

Court intervention may be obtained to rectify abuses resulting from bad faith or improper motive, and to correct errors resulting from mistakes of interpretation. Absent language of extended (e.g., “absolute” or “uncontrolled”) discretion (Comment c), a court will also intervene if it finds the payments made, or not made, to be unreasonable as a means of carrying out the trust provisions. For example, a beneficiary may be entitled to amounts sufficient to provide support, or to meet some other standard, and the amounts being paid by the trustee may be clearly excessive or inadequate for the purpose. It is not necessary, however, that the terms of the trust provide specific standards in order for a trustee’s good-faith decision to be found unreasonable and thus to constitute an abuse of discretion.

Furthermore, a court will intervene where the exercise of a power is left to the judgment of a trustee who improperly fails to exercise that judgment. Thus, even where a trustee has discretion whether or not to make any payments to a particular beneficiary, the court will interpose if the trustee, arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to exercise the discretion.

...

Although the discretionary character of a power of distribution does not ordinarily authorize the trustee to act beyond the bounds of reasonable judgment (Comment b), a settlor may manifest an intention to grant the trustee greater than ordinary latitude in exercising discretionary judgment. How does such an intention affect the duty of the trustee and the role of the court?

It is contrary to sound policy, and a contradiction in terms, to permit the settlor to relieve a “trustee” of all accountability. (Cf. § 87, and also § 76.) Once it is determined that the authority over trust distributions is held in the role of trustee (contrast nonfiduciary powers mentioned in Comment a), words such as “absolute” or “unlimited” or “sole and uncontrolled” are not interpreted literally. Even under the broadest grant of fiduciary discretion, a trustee must act honestly and in a state of mind contemplated by the settlor. Thus, the court will not permit the trustee to act in bad faith or for some purpose or motive other than to accomplish the purposes of the discretionary power. Except as the power is for the trustee’s personal benefit, the court will also prevent the trustee from failing to act,

either arbitrarily or from a misunderstanding of the trustee's duty or authority.

Within these limits, it is a matter of interpretation to ascertain the degree to which the settlor's use of language of extended (e.g., "absolute") discretion manifests an intention to relieve the trustee of normal judicial supervision and control in the exercise of a discretionary power over trust distributions.

...

Extended discretion serves to discourage challenges by remainder beneficiaries to the generosity of trustees, as in Illustration 4. On the other hand, it may also make it difficult for a discretionary beneficiary to obtain judicial intervention when a trustee's judgments are highly conservative with regard to matters that fall within the settlor's authorized purposes. The overall tenor of the terms of a power may, however, in the context of the trust's more general purposes, lead to an interpretation granting the trustee ordinary discretion with respect to the benefits to which the discretionary beneficiary is minimally entitled (e.g., reasonable support), with the extended discretion applicable to the trustee's allowance of more. This "one-sided" liberalization of the

discretionary authority, where a court finds the settlor's language was intended to assure generosity in favor of a life beneficiary, would thus tend to encumber the efforts of remainder beneficiaries who seek to challenge what might otherwise be excessively generous decisions by a trustee.

RESTATEMENT (THIRD) OF TRUSTS § 50.

One commentator states:

A settlor may permit their trustee, in the trustee's discretion, (1) to withhold all income or to pay the whole or any part (in which case the trust is called, for the purpose of deciding questions of voluntary or involuntary alienability, technically a "discretionary trust"); or (2) to select and exclude beneficiaries from a class; or (3) to decide the amount, form, time, purpose, or other feature of payment. As previously explained in a discussion of discretionary powers of all types, an honest exercise of this discretion with a view to the accomplishment of the settlor's purposes will be decisive, and a court will interfere and upset the determination only where there has been abuse of the discretion because of dishonest, arbitrary action or other conduct in frustration of the trust's objectives.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, § 811.

In 2009, the Texas Legislature created a statutory limitation on trustee discretion. *Sharma v. Routh*, 302 S.W.3d 355, n. 6 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (op. on reh'g). Texas Property Code Section 113.029 provides:

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of terms such as “absolute,” “sole,” or “uncontrolled,” the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

Tex. Prop. Code § 113.029. *Faulkner v. Kornman*, No. 10-00301, 2015 Bankr. LEXIS 3595 (Bankr. S.D. Tex. Oct. 23, 2015). This provision was added in 2009, and older cases may not reflect this statutory enactment. Acts 2009, 81st Leg., ch. 672 (H.B. 2368), § 3, effective September 1, 2009. Cases held that “Even where a trustee is vested with broad discretion, courts may assert control over the trustee’s exercise of power ‘to prevent the frustration of the fundamental intent of the settlor’ and compel the trustee’s performance of his duty.” *In re Estate of Bryant*, No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131 (Tex. App.—Amarillo Mar. 11, 2020, no pet.) (citing *Boyd v. Frost Nat’l Bank*, 145 Tex. 206, 196 S.W.2d 497, 504 (Tex. 1946)).

Further, the Texas Property Code provides that the “trustee shall administer the trust in good faith according to its terms and this subtitle.” Tex. Prop. Code § 113.051. The

Texas Trust Code goes on in Section 111.0035(b)(4)(B) to state: “[t]he terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit. . . a trustee’s duty . . . to act in good faith and in accordance with the purpose of the trust.” *Id.* at § 111.0035(b)(4)(B). One commentator describes these two provisions thusly:

The first, which is theoretically waivable, references good faith according to the trust instrument’s terms. On the other hand, the latter, non-waivable statute references good faith in accordance with the purpose of the trust. Standard rules of statutory construction mandate a presumption that this distinction is both purposeful and meaningful. In drafting § 111.0035, the legislature could have simply referenced § 113.051 as it did with several other non-waivable provisions. Instead, § 111.0035 adopts language which is more onerous on trustees. In other words, the legislative intent clearly indicates that trustees are actually supposed to act in a fiduciary capacity. One cannot hold and benefit from the title of trustee and at the same time be free of the burdens and responsibilities that go along with a fiduciary position.

Christian S. Kelso, *But What’s An Ascertainable Standard? Clarifying HEMS Distribution Standards And Other Fiduciary*

*Considerations For Trustees*, 10 TEX. TECH EST PLAN COM PROP L J. 1, 17 (2017).

Accordingly, even where a trust gives a trustee complete, unfettered, or sole discretion, the trustee must act with good faith. One court has held that bad faith in the context of trustee's actions is as follows:

The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. It has been held that a finding of bad faith requires some showing of an improper motive, and that improper motive is an essential element of bad faith.

*InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 888-89 (Tex. App.—Texarkana 1987, no writ) (citing Black's Law Dictionary). To the contrary, one Texas court has held that a standard of good faith for an executor is part subjective and part objective. *See Lee v. Lee*, 47 S.W.2d 767, 795 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). A fiduciary acts in good faith when he or she: (1) subjectively believes his or her defense is viable, and (2) is reasonable in light of existing law. *Id. See also In re Estate of Nunu*, 542 S.W.3d 67, 81 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

One commentator states:

On its face, allowing a trustee to make distributions in his or

her absolute discretion seems simple. Such a trustee should be authorized to properly make distributions whenever and however he or she deems appropriate. But all is not as it seems. A fundamental and non-waivable aspect of every trust is that the trustee must be trusted to manage, use, and distribute the trust's assets for the benefit of the trust's beneficiaries. Thus, at some point, a court must be able to step in and declare the actions of a trustee as being improper.

Christian S. Kelso, *Get HEMS Straight: Tailor the Right Distribution Standard*, 43 EST. PLAN. 3 (2015). Accordingly, even in a discretionary trust situation, a trustee cannot act arbitrarily and must act in good faith and in accordance with the terms and purposes of the trust and for the interests of the beneficiaries.

#### VII. TRUSTS THAT CREATE UNASCERTAINABLE STANDARDS FOR DISTRIBUTIONS

A settlor may want to create a trust that has some standards for distributions (more than just the sole discretion of the trustee) but which allow for broad discretion to the trustee. "A distribution standard will usually be considered unascertainable without an objective manner to determine whether a distribution fits within the instrument's distribution standard." Kelso, 10 TEX. TECH EST PLAN COM PROP L J. 1, 18 (2017). "There is no clear definition of an unascertainable standard. Nor is there an exclusive list of terms to create one." *Id.* Generally, the following terms imply an unascertainable distribution standard:

“comfort, happiness, benefit and welfare.” *Id.* (citing Treas. Reg. § 20.2041-1(c)(2) (2017) (“A power to use property for the comfort, welfare, or happiness of the holder of the power is not limited by the requisite standard.”) and Treas. Reg. § 1.674(b)-1(b)(5)(i) (2017) (stating that a power to distribute corpus for pleasure, desire, or happiness of beneficiary is not limited by a reasonably definite standard)).

One commentator provides:

While an ascertainable standard is commonly used, it is not mandatory. A settlor can simple [sic] provide that distributions can be made in the trustee’s sole discretion. Alternatively, the settlor can use other standards on which distributions can be made. These are generally considered to be unascertainable as there is no objective manner by which to determine whether a distribution (requested or made) fits within the distribution standard of the instrument. Unascertainable standards may be used when the settlor is less concerned about maintaining the trust principal for the remainder beneficiaries or when he or she wants the trustee to have more flexibility in making distributions. Due to the potential tax implications, these standards should be used with caution and only with independent trustees.

Sarah Patel Pacheco, *What Did You Mean By That? Trust Language And Application By Trustees*, State Bar of Texas, 35<sup>th</sup> Annual

Advanced Estate Planning and Probate Course, (2011).

Adding the term “comfort” generally means that the distribution standard is unascertainable. *Lehman v. United States*, 448 F.2d 1318 (5th Cir. 1971). In *Lehman*, the Fifth Circuit reviewed a will with the following language: “[a wife] in the exercise of her own discretion, . . . consume for her own use, benefit, comfort, support, and maintenance, all or any part of the corpus of [the testator’s] estate or proceeds thereof whenever she, in her own discretion, deems the income, rents, and revenues thereof insufficient for her support, maintenance, *comfort*, and welfare.” *Id.* (emphasis added). The court held that this term resulted in the wife possessing an “unrestricted and discretionary right—at least in the absence of evidence of action fraud—to consume the property, governed only by her own personal assessment of her own personal need.” *Id.*

Other common terms that effectuate an unascertainable standard are happiness or benefit. The Restatement provides:

Language of “comfort” often accompanies a support standard. Whether modifying support (e.g., “comfortable support” or “support in reasonable comfort”) or as an additional standard (“support and comfort”), the normal construction is the same: the language adds nothing to the usual meaning of accustomed support (*supra*) for a beneficiary whose lifestyle is already at least reasonably comfortable. Such terms, however, would tend to elevate the appropriate standard for a beneficiary



whose accustomed lifestyle has been more modest. “Comfort,” in isolation, normally has like effect, impliedly referring to a comfortable level of support. On the other hand, stronger language, such as “generous” support, may permit and encourage the trustee to allow, and may even require, some reasonable enhancement of the beneficiary’s lifestyle; but it falls short of a “happiness” standard (infra) in that the benefits still must normally be support-related.

Although one effect of authorizing distributions for the “benefit,” “best interests,” or “welfare” of a beneficiary is to suggest a support standard, these terms tend also to authorize discretionary expenditures that fall beyond the usual scope of a purely support-related standard. For example, a “benefit” standard might make it reasonable for a trustee to make substantial distributions to provide a beneficiary with capital needed to start a business. (See also loans to beneficiaries, infra this Comment.) Terms of this type, however, lack the objective quality of a term such as “support.” Thus, they may not facilitate a beneficiary’s efforts to obtain judicial intervention to compel distributions by the trustee. On the other hand,

the presence of less objective terminology in a discretionary standard may diminish the relevance of the beneficiary’s other resources, except a parent’s obligation to support a minor beneficiary. See Comment e.

The terms of a discretionary standard occasionally include stronger language, such as the word “happiness.” Such language suggests an intention that the trustee’s judgment be exercised generously and without relatively objective limitation. Although “happiness” alone expresses no objective minimum of entitlements (which to some extent may nevertheless be readily implied), the primary effect of such a term is to immunize from challenge by remainder beneficiaries almost any reasonably affordable distributions. This, however, does not mean that the trustee cannot properly resist any reasonable request by the beneficiary, because the decision remains one within the fiduciary discretion of the trustee.

RESTATEMENT (THIRD) OF TRUSTS § 50.

Welfare has also been a term that creates an unascertainable standard. Sarah Patel Pacheco, *What Did You Mean By That? Trust Language And Application By Trustees*, State Bar of Texas, 35th Annual Advanced Estate Planning and Probate Course, (2011) (citing Treas. Reg. §

20.2041-1(c)(2) and *First Virginia Bank v. United States*, 490 F.2d 532 (4th Cir. 1974)).

For example, in *Ballenger v. Ballenger*, the court reversed an injunction precluding trustees from making large distributions to themselves. 694 S.W.2d 72 (Tex. App.—Corpus Christi 1985, no writ). The court primarily held that there was no showing of an irreparable harm because money damages would be sufficient. However, the court also discussed that the trust allowed distributions for “comfort”:

The appellants introduced testimony to the effect that they were elderly and each was having health problems. Appellant Katherine Fairchild testified that they, the co-trustees, honestly believed that the proposed distribution of money was appropriate for their “comfort,” as contemplated by the trust agreement. She also negated appellee’s charges of fraudulent intentions on their part by stating that the reason they wrote Robert Ballenger, Sr., in advance was to let him know their plans for distribution of the cash. There is no doubt that the appellants could have distributed the assets without Robert B. Ballenger, Sr.’s prior knowledge or consent.

We find that the evidence presented, at the very least, raised material disputed issues of fact for the trier of facts. It was error for the trial court to make a finding in advance of a trial on the merits that the income is not

insufficient for the care, comfort and support of any of the beneficiaries and, by so doing, deprived appellants of the right to exercise their “sole discretion” in distributing corpus.

*Id.* at 79.

As we will see in the next section, an ascertainable standard (health, education, maintenance and support) has more restrictions than an unascertainable standard. One commentator astutely questions:

What difference is there (at least in practice) between having a trustee distribute for the beneficiaries’ “welfare and benefit” compared to their “maintenance and support?” Why is the former unascertainable compared to the latter? Stated another way, are “maintenance and support” really that much more ascertainable than “welfare and benefit?”

Kelso, 10 TEX. TECH EST PLAN COM PROP L J. 1, 20 (2017).

#### VIII. TRUSTS THAT CREATE AN ASCERTAINABLE STANDARD FOR DISTRIBUTIONS

A settlor may want to provide ascertainable standards by which the trustee will determine distributions. Although a settlor can use other terms to create an ascertainable standard, most frequently, a settlor uses the terms health, education, maintenance and support (“HEMS”). There are several reasons for doing so, including limiting a trustee’s discretion and also

important tax and creditor protection implications.

A. Tax and Creditor Implications For Ascertainable Distribution Standards

If a trustee is also as a beneficiary of a trust, and the trust gives the trustee complete discretion to make distributions to himself or herself, then the IRS will disregard the trust and consider the trust's assets as part of the trustee's estate. Most trustees/beneficiaries want to keep assets out of their estates. So, the IRS has created ascertainable distribution standards, and if those standards are in the trust document, then the assets will not be considered as part of the trustee/beneficiary's estate. Christian S. Kelso, 10 TEX. TECH EST PLAN COM PROP L J. 1 (2017). Examples of ascertainable standards are: support, support in reasonable comfort, maintenance in health and reasonable comfort, support in his accustomed manner of living, education, and health. Tr. Reg. § 20.2041-1(c)(2).

As stated in Treasury Regulation Section 20.2041-1(c)(2): "A power to consume, invade, or appropriate income or corpus, or both, for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent is, by reason of [IRC §] 2041(b)(1)(A), not a general power of appointment." Tr. Reg. § 20.2041-1(c)(2). This ascertainable standard can also impact and protect a beneficiary from gift tax liability when he or she holds the right to make distributions to others. 26 C.F.R. § 25.2511(g)(2).

As one commentator provides:

If a beneficiary of a trust holds a power, as trustee or otherwise, to make distributions to himself or for

his benefit, and the power is limited by an ascertainable standard relating to the beneficiary's health, education, support, or maintenance, then the trust property will not be included in the gross estate of the beneficiary for federal estate tax purposes by reason of the beneficiary's possession of such power, because such a limited power does not constitute a "power of appointment." Also, the lapse or other release of exercise of such a power limited by such an ascertainable standard will not be a taxable gift for federal tax purposes by the beneficiary which held the power.

...

Similarly, a trust beneficiary that holds a fiduciary power during his or her lifetime to make distributions to or for the benefit of another beneficiary of the same trust, and the power is limited by an ascertainable standard relating to the other beneficiary's health, education, support, or maintenance, will not be deemed to have made a taxable gift for federal gift tax purposes. But, this same regulation states that "if a trust instrument provides that the determination of a trustee shall be conclusive with respect to the exercise or non-exercise of a power," then the power is not

considered to be limited by the requisite standard. Furthermore, even if such a power is subject to an ascertainable standard, property distributable to a person for whom the beneficiary/trustee has a legal obligation to support could be included in beneficiary/trustee's gross estate for federal estate tax purposes, unless the trustee is prohibited from making any distributions to a beneficiary that would satisfy the trustee's individual legal obligations to support such beneficiary.

Several court cases and IRS rulings have held that if the settlor is the trustee or controls the trustee of a trust, then the trustee's possession of a power to make distributions to or for the benefit of a beneficiary of the trust, if limited by an ascertainable standard relating to the beneficiary's health, education, support, or maintenance will not cause the trust property to be included in the gross estate of the settlor/trustee for federal estate tax purposes under I.R.C. Sections 2036 or 2038.

The power of any trustee, including the settlor, to distribute corpus to or for a beneficiary or beneficiaries, limited by a "reasonably definite standard" set forth in the trust instrument, will not

cause the trust income to be taxed to the settlor for federal income tax purposes. A "reasonably definite standard" includes "a power to distribute corpus for the education, support, maintenance, or health of the beneficiary." Yet, a reasonably definite standard which limits the power to distribute income to the or for the beneficiary or beneficiaries, is not sufficient to prevent the trust income from being taxed to the settlor, if the settlor or settlor's spouse is one of the trustees holding the power to distribute income.

Sarah Patel Pacheco, *What Did You Mean By That? Trust Language And Application By Trustees*, State Bar of Texas, 35<sup>th</sup> Annual Advanced Estate Planning and Probate Course, (2011).

Regarding creditor protections, the Texas Trust Code provides that "When, however, the trust has a spendthrift provision and the beneficiary's power is limited by an ascertainable standard relating to the beneficiary's health, education, support, and/or maintenance, a creditor in Texas generally cannot attach the beneficiary's interest on the basis that the beneficiary holds a distribution right or power." Tex. Prop. Code § 112.035.

Section 113.029 provides:

Subject to Subsection (d), and unless the terms of the trust expressly indicate that a requirement provided by this subsection does not apply: (1) a person, other than a settlor,

who is a beneficiary and trustee, trustee affiliate, or discretionary power holder of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's, the trustee affiliate's, or the discretionary power holder's personal benefit may exercise the power only in accordance with an ascertainable standard relating to the trustee's, the trustee affiliate's, or the discretionary power holder's individual health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1), Internal Revenue Code of 1986; and (2) a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

Tex. Prop. Code § 113.029(b). This provision does not apply to: “(1) a power held by the settlor’s spouse who is the trustee of a trust for which a marital deduction, as defined by Section 2056(b)(5) or 2523(e), Internal Revenue Code of 1986, was previously allowed; (2) any trust during any period that the trust may be revoked or amended by its settlor; or (3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c), Internal Revenue Code of 1986.” *Id.*

B. Distribution Standards Limit Trustee Discretion

In Texas, the use of the words “support” and “maintenance” in a trust instrument evinces

the creation of “support trusts.” *State v. Rubion*, 158 Tex. 43, 308 S.W.2d 4, 8-10 (1957); *Duncan v. O’Shea*, No. 07-11-0088-CV, 2012 Tex. App. LEXIS 6494 (Tex. App.—Amarillo Aug. 7, 2012, no pet.). Under common law, the considerations a trustee must refer to in exercising its discretion regarding a support and maintenance trust, include “1) the size of the trust estate, 2) the beneficiary’s age, life expectancy, and condition in life, 3) his present and future needs, 4) the other resources available to him or his individual wealth, and 5) his present and future health, both mental and physical.” *Estate of Dillard*, 98 S.W.3d 386 (Tex. App.—Amarillo 2007, pet. denied). *See also Keisling v. Landrum*, 218 S.W.3d 737, 744 (Tex. App.—Fort Worth 2007, pet. denied). Even though a trustee has a responsibility to distribute the trust’s income and principal for maintenance, it also has a competing responsibility to manage the trust prudently and responsibly to preserve it for her future support and maintenance. Tex. Prop. Code Ann. § 113.006 (Vernon Supp. 2006) (stating that a trust may manage the trust property on the conditions and for the lengths of time as the trustee deems proper); *Keisling v. Landrum*, 218 S.W.3d at 744; *Brault v. Bigham*, 493 S.W.2d 576, 579 (Tex. Civ. App.—Waco 1973, writ ref’d n.r.e.) (holding that safety of the trust fund is the first care of the law, and on this depends every rule which has been made for the conduct of trustees). Thus such a trust “does not state that [the trustee] must give into [a beneficiary’s] every support and maintenance whim; it simply notes that income and principal from the trust shall be distributed to appellant to support and maintain her if appellant’s income does not suffice.” *Keisling v. Landrum*, 218 S.W.3d at 744.

So, a distribution standard featuring the terms support and maintenance, does not afford trustees unbridled discretion. Rather, the trustee's discretion must be "reasonably exercised to accomplish the purposes of the trust according to the settlor's intention and his exercise thereof is subject to judicial review and control." *Kelly v. Womack*, 268 S.W.2d 903, 907 (Tex. 1954); *Powell v. Parks*, 86 S.W.2d 725 (Tex. 1935); *Davis v. Davis*, 44 S.W.2d 447 (Tex. Civ. App.—Texarkana 1931, no writ). This concept developed by Texas courts also aligns with the Restatement:

A court will not interfere with a trustee's exercise of a discretionary power when that exercise is reasonable and not based on an improper interpretation of the terms of the trust. Thus, judicial intervention is not warranted merely because the court would have differently exercised the discretion. On the other hand, a court will not permit abuse of discretion by the trustee. . . . Of particular importance are the purposes of the power and the standards, if any, applicable to its exercise . . . and the extent of the discretion conferred upon the trustee . . .

#### RESTATEMENT (THIRD) OF TRUSTS § 50.

For example, in *State v. Rubion*, the court had to decide what interest the beneficiary had when the trust instrument allowed the trustee to distribute assets for the beneficiary's support and maintenance. 158 Tex. 43, 308 S.W.2d 4, 8 (1957). The court noted that those terms evinced the creation of a support trust. *Id.* And, though a trustee's

discretion regarding distributions from such a trust may be considerable, it was not unbridled. *Id.* at 8-9. The trustee must act reasonably and in a manner commensurate with the purpose of the trust. *Id.* at 9. This meant that his decision to distribute income or corpus for the beneficiary's support and maintenance could not be exercised at a whim. The court ruled that the trustee abused his discretion by refusing to invade the principal of the trust to make payments for the beneficiary's care while she was in a state mental hospital. The trustee argued that he was within his discretion to withhold payments of principal because the corpus of the trust should be preserved for her support if she were ever discharged from the hospital, and further, that if the trust corpus were used to pay all of her medical care it would completely destroy the trust. Disagreeing, the court held the trustee abused his discretion by withholding the entire principal and the trustee should have determined what amount could have been distributed while still preserving the long-term health of the trust.

In *Penix*, the appellate court ruled that a trustee was within its discretion to withhold principal as well as income, in order to meet the future needs of the beneficiary. *Penix v. First Nat'l Bank of Paris*, 260 S.W.2d 63 (Tex. Civ. App.—Texarkana, writ ref'd). There, the trustee argued successfully that, because the beneficiary was only nine years old, the income produced from the trust was well in excess of what was needed for her current support, and any excess above the beneficiary's current needs should be held in reserve for emergencies. The court found that the trustee was within its discretion. The court discounted any significance of the word "shall" within the grant.

In the *Estate of Dillard*, the trustee argued that the trust was a discretionary trust (so that he could distribute as much principal to

himself as a beneficiary as he wanted), but the court disagreed. 98 S.W.3d 386 (Tex. App.—Amarillo 2007, pet. denied). The court found that the trust was a support trust that required that the trustee evaluate each distribution under the factors set out by the Texas Supreme Court in *Rubion*:

Admittedly, Iris used the word “discretion” when expressing the scope of the trustee’s authority. Yet, she also incorporated therein the words “support and maintenance” and stated that the corpus could be expended when “necessary” to serve that purpose and when he was in “need of additional funds.” “Support and maintenance,” “additional funds,” and “necessary” hardly connote utter discretion to do that which the trustee may care to at any given moment. Rather, they evince a restriction on the trustee’s discretion and authority and denote an intent to permit expenditure when needed for Dillard’s support and maintenance. So, like the testatrix in *Rubion*, Iris too created a support trust. Given that, distributions of principal therefrom could be made only in ways commensurate with that purpose. In other words, and contrary to the suggestion of Dillard, the discretion vested in the trustee under the instrument at bar was and is not unbridled or absolute. Instead, he, like the trustee in *Rubion*, must exercise it only after considering the

beneficiary’s needs, age, condition, separate resources, the size of the trust estate, health, and the like. And, if upon considering those factors, the trustee reasonably concludes that a distribution is warranted, only then can it be made. Finally, the wording used by the trial court at bar to describe the trustee’s authority merely reflects the restrictions imposed by Iris and recognized by the Supreme Court long ago.

*Id.* at 395.

In *First Nat’l Bank v. Howard*, the settlor was a widower whose will created a spendthrift trust in favor of his two daughters. 229 S.W.2d 781 (Tex. 1950). Its terms provided that each daughter would receive the net income of the trust until one daughter died, at which point the principal would go one-half to the deceased daughter’s heirs per stirpes and one-half to the remaining daughter. The trust terms also provided, that

In the event the net income from this Trust Estate shall be insufficient in the discretion and judgment of the Trustee to properly maintain and support those persons who, under the preceding paragraph are entitled to portions of said net income and to enable said persons to procure necessary and reasonable medical care, aid and assistance, and to give said persons proper educational advantages, then, and in that event, said Trustee shall be authorized to pay for

such purposes such additional sums out of the corpus of the said Trust Estate as may in its sole and uncontrolled discretion be necessary or advisable. In determining whether such additional sums shall be paid out for said persons, the decision of the Trustee shall be final and conclusive.

*Id.* One daughter was relatively well off, while the other lived in near poverty. Both the daughters sued the trustee after it denied the impoverished daughter's request for support above her share of the trust's income. *Id.*

The Court first noted that it would not treat the trustee's decision as final or conclusive, but could interfere if the trustee acted "outside the bounds of reasonable judgment." *Id.* It next determined that the trustee had done just that, as the trustee failed to act "in that state of mind in which the settlor contemplated it should act." *Id.* The settlor had been generous with his daughters in life, including paying for their college educations. *Id.* While the trustee's was obligated to invade the trust's principle only in instances of need, the need in this case included helping one daughter escape her position and to allow that daughter to pay the college costs of the settlor's grandson. *Id.* The case was remanded to determine what the trustee should have paid. *Id.*

In *In re Estate of Bryant*, a couple set up three trusts for their three children, Bill, Leslie, and Jane. No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131 (Tex. App.—Amarillo March 11, 2020, no pet.). After the couple had both passed away, their son Bill assumed the role of trustee of three trusts: Irrevocable Trust, the Children's Trust, and

the Family Trust. Under the terms of the three trusts, following the couple's deaths, trust assets were to be distributed to the three siblings equally, with the partial exception of the Family Trust assets.

One of the sisters filed claims to terminate her interest in a trust due to her need for the trust's assets under a HEMS standard, which the trial court granted. The court of appeals affirmed the trial court's action:

Section 112.054 of the Texas Trust Code authorizes a court to terminate a trust on the petition of a trustee or beneficiary. Among other reasons, a trust may be terminated when (1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill, or (2) because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust. The purpose of the Jane A. Bryant Trust is to provide for Jane's "health, education and maintenance needs." The terms of the trust direct the trustee to "give primary consideration" to Jane when administering the trust. In addition, the trust gives the trustee discretion to distribute all of the income and/or principal of the trust when necessary or appropriate to provide for the beneficiary's health, education, maintenance, and support. The trial court heard evidence that Jane has significant medical expenses totaling over \$100,000, is



unemployed, and has a terminal illness that prohibits her from working. Jane testified that she doesn't have any retirement savings and that she has outstanding legal bills incurred in this litigation. Having sold her home, she now pays monthly rent. Jane testified that she sought a distribution from her trust to assist with these obligations. Bill maintains that Jane has "current, and significant, cash resources." Jane testified that she had "about \$350,000 worth of cash left." The trial court found that "Jane's circumstances justify the distribution of the entirety of her part of the Children['s] Trust to her." The trial court made this finding in light of evidence of the stated purposes of the trust; Jane's health, maintenance, and support needs; the antagonistic relationship between Bill and Jane; Bill's improper distribution of trust funds to himself and Leslie; and Bill's reluctance to make distributions to Jane from her trust. Under these facts, we find no abuse of discretion in the trial court's decision.

*Id.*

Accordingly, though a support trust seems as though it provides very broad discretion to a trustee to make distributions, that discretion is not unbridled, and there are factors and limitations associated with it.

C. Warning For Drafters Of Ascertainable Standard Trusts

Courts are very literal in interpreting trusts. A drafting attorney should be very careful regarding the words that he or she uses in forming the distribution standard in the trust. As one commentator states:

In certain circumstances, distinguishing between ascertainable and unascertainable standards may present challenges. Typically, "one 'bad' word will spoil the bunch," causing a beneficiary's "health, support and comfort" to be subject to an unascertainable distribution standard. The addition of "comfort" expands the standard too broadly, causing it to become unascertainable. However, "support in reasonable comfort" is still considered ascertainable, as is "maintenance in health and reasonable comfort." While adding one wrong word will transform an ascertainable standard into an unascertainable one, the opposite may also be true. In practice, however, the prudent drafter should always avoid verbiage that might bring the standard into doubt. There is simply nothing to gain by adding such superfluous language.

...

Still, this problem underscores how "drafters should, where possible,

provide clarification as to the intent of each grantor.” Sadly, drafting attorneys almost never bother to delve into their clients’ intent in this regard and many beneficiaries have suffered because of it.

Kelso, 10 TEX. TECH EST PLAN COM PROP L J. 1, 26-27 (2017).

#### D. HEMS Standard Distributions

##### 1. Distributions for Health

Trust documents do not usually elaborate on the specifics of what the term “health” or “health care” means for the purposes of distributions. Regarding a court created trust, the Texas Property Code states:

The trustee may disburse amounts of the trust’s principal, income, or both as the trustee in the trustee’s sole discretion determines to be reasonably necessary for the health, education, support, or maintenance of the beneficiary. *The trustee may conclusively presume that medicine or treatments approved by a licensed physician are appropriate for the health of the beneficiary.*

Tex. Prop. Code § 142.005(b)(2) (emphasis added). In another statute, the term “physician” means a person who is: “(1) licensed to practice medicine in one or more states in the United States; or (2) a graduate of a medical school accredited by the Liaison Committee on Medical Education or the American Osteopathic Association ...” Texas Civ. Prac. & Rem. Code § 74.401(g). This provision obviously provides great

protection to a trustee who makes a distribution based on a licensed physician’s recommendation.

The Restatement (Third) of Trusts provides that the standard of “health” is generally thought to include the following: emergency medical treatment; psychiatric treatment; psychological treatment; routine health care examinations; dental; eye care; cosmetic surgery; Lasik surgery; health, dental, or vision insurance; unconventional medical treatment; home health care; gym memberships; spa memberships; golf club memberships; and extended vacations to relieve tension and stress. RESTATEMENT (THIRD) OF TRUSTS, §50 (2003). The Restatement elaborates:

[W]ithout more, references to “health,” “medical care,” and the like in the terms of a discretionary power may be useful to inform beneficiary expectations or guide an inexperienced trustee, but presumptively they provide merely for health and medical benefits like those normally implied by a support standard. Thus, if the intention is to assure the beneficiary some special form of education, or expensive home care when not cost efficient, further elaboration would be helpful. Even a grant of extended discretion is likely to make it more difficult, if the trustee does not act generously, for a beneficiary to compel a trustee to follow a particular course of action (see Comment c).

*Id.*

Another commentator states:

Some of the obvious, and more traditional, requests that fall under the category of health include the following: health, dental, life, and long-term care insurance premiums; uninsured doctor, hospital, and lab costs; home health care; physical therapy; psychiatric treatment/psychological counseling; mental health and mental retardation services; occupational therapy; medical expenses of beneficiary's children where a duty to support exists; dental and orthodontia expenses; medical supplies, equipment, and batteries; pharmaceuticals; medically prescribed therapeutic items such as whirlpools, horses, pools; hospital beds and specially designed furniture for the handicapped; eye care, eyeglasses, and contact lenses; linens and special clothing requirements; handicap transport vans and lift equipment; ramp construction, adaptation of doors, and remodeling to accommodate handicaps; installation of safety equipment such as handrails; and specialized cleaning to eliminate allergens.

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 204-05 (2014).

A trustee has a more difficult time deciding whether alternative treatment options should be paid for by a trust. Alternative treatment options include, but are not limited to, “acupuncture or homeopathic remedies, as well as elective medical procedures such as plastic surgery, laser eye surgery, cosmetic dentistry, non-diagnostic full body scans, over the counter lab tests, tattoo removal, and concierge medicine.” Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 206 (2014).

For example, in *Cadwell v. River Oaks Trust Co.*, a trustee's decision to cease paying for a beneficiary's hotel room following the beneficiary's release from a hospital was not an abuse of discretion when the beneficiary's healthcare provider indicated it was not necessary and the beneficiary refused to work with the trustee to get his apartment cleaned, his stated need for remaining in the hotel. 1996 Tex. App. LEXIS 1798 (Tex. App.—Houston May 2, 1996, writ denied). The trust provided that the trustee was to distribute all income to the settlor's son as the beneficiary, and pursuant to its “sole reasonable discretion,” it could invade the principal as necessary to provide for the beneficiary's “health, support, maintenance, comfort and welfare.” *Id.* at \*3. The trustee was further directed to consider the standard of living the beneficiary enjoyed while the settlor was living. *Id.* at \*4.

The evidence showed that the beneficiary solely lived on trust distributions. *Id.* at \*3. Following a stint in a hospital for a leg infection, the trustee arranged for the beneficiary to stay for two weeks in a hotel. *Id.* at \*6. At the end of the two weeks, the beneficiary asked to continue staying at the hotel because his apartment was dirty. *Id.* The trustee decided to not make a distribution for this request, and the hotel

eventually locked the beneficiary out of his room. *Id.* In the meantime, the beneficiary rejected the trustee's efforts to assist in having the apartment cleaned. *Id.*

The beneficiary sued to have the trustee replaced, claiming among other things breach of fiduciary duty for failing to pay for a continued stay at the hotel or at a new apartment. *Id.* at \*7. The trustee responded that its refusal complied with the discretion it was afforded by the terms of the trust. While some evidence suggested that the beneficiaries housing concerns stemmed from fear of another leg infection, all testimony indicated that the trustee agreed to allow the continued hotel stay if the beneficiary would provide a letter from a healthcare provider justifying the request. *Id.* at \*38. No such letter was ever provided. *Id.* Indeed, the beneficiary's doctor said alternative housing was not necessary. *Id.* Based on that evidence, the court of appeals agreed that the trustee's actions were an appropriate exercise of discretion. *Id.* at \*41. The beneficiary made no showing of fraud in the trustee's decision, and so the court affirmed summary judgment on that ground for the trustee. *Id.* at 43.

## 2. Distributions for Education

The standard of "education" is thought to include the following: grammar, secondary and high school tuition; graduate school; post-graduate school; medical school, law school, or other professional school; support of the beneficiary while in school; support of beneficiary while not in school (between semesters); studies for the student that makes a career out of learning; technical school training; career training; and college as part of a study abroad program. RESTATEMENT (THIRD) OF TRUSTS, §50 (2003). "The term "education," without elaboration, is ordinarily construed as extending to payment of living expenses as

well as fees and other costs of attending an institution of higher education, or the beneficiary's pursuit of a program of trade or technical training, and the like, as may be reasonably suitable to the individual and to the trust funds available for the purpose." *Id.* A trustee can also make distributions for a beneficiary's dependant's educational expenses. See *First National Bank of Beaumont v. Howard*, 229 S.W.2d 781 (Tex. 1950).

Another commentator states:

Common requests classified by corporate trustees as "education" include, but are not limited to, the following: tuition for, including private school, college, graduate school, trade or vocational training; study skills classes and tutoring; speech or reading therapy; room and board at school; summer school and summer activities; after school programs and extended day care; costs of travel to and from school; sports activities and lessons; computer purchases, maintenance, and repair; graduation costs, proms, class rings; music lessons and instrument purchase and repair; books and school supplies; and uniforms and school clothes.

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 205 (2014).

3. Distributions for Support and Maintenance

The terms “support” and “maintenance” are considered synonymous, and are generally placed into three categories: what is generally deemed to be included, what might be included, and what expressly is not included. RESTATEMENT (THIRD) OF TRUSTS, §50 (2003). The following expenses are generally included: regular mortgage payments; property taxes; suitable health insurance or care; existing programs of life and property insurance; continuation of accustomed patterns of vacation; continuation of family gifting; and continuation of charitable gifting. The following expenses might be included: reasonable additional comforts or luxuries; and special vacations of a type the beneficiary had never taken before. The following expenses are generally not included: payments unrelated to support which merely contribute to the beneficiaries’ contentment or happiness; distributions to enlarge the beneficiaries’ personal estate; and distributions to enable the beneficiary to make extraordinary gifts. When applying this standard, a trustee should consult the law of the relevant jurisdiction because these categories and what are included may vary.

In *In re Willa Peters Hubberd Testamentary Trust*, the court of appeals affirmed a modification of a trust to allow a trustee to pay for health insurance for a beneficiary where such was appropriate to support and maintain the beneficiary. 432 S.W.3d 358 (Tex. App.—San Antonio 2014, no pet.). The court noted: “Dahlman’s failure to maintain such insurance would substantially impair the accomplishment of the purpose to provide for the health, support, education, and maintenance of Dahlman and the grandchildren.” *Id.* at 367.

In *Duncan v. O’Shea*, the court held that a trustee’s distributions to herself as a beneficiary under a support and maintenance standard were permissible even though the distributions exceeded her household budget at the time of the settlor’s death. 07-11-0088-CV, 2012 WL 3192774, at \*4-5 (Tex. App.—Amarillo Aug. 7, 2012, no pet.). The beneficiary was the trustee of a marital trust and a family trust created under her late husband’s will. She was the sole beneficiary during her lifetime of the marital trust (initially funded with approximately \$200,000 in assets). Principal could be distributed as “necessary, when added to the funds reasonably available to [the beneficiary] from all other sources . . . to provide for [the beneficiary’s] health, support and maintenance in order to maintain her, to the extent reasonably possible, in accordance with the standard of living to which [the beneficiary] is accustomed as the time of [the settlor’s] death.” *Id.* The trust terminated on the beneficiary’s death with the remainder passing to the settlor’s descendants.

The family trust initially was funded with approximately \$1,680,000 in assets. The terms of that trust authorized the trustee to distribute both income and principal to the beneficiary under the same terms that applied to principal of the marital trust. Additionally, the family trust could distribute income and principal to the settlor’s descendants if such distributions did not jeopardize the beneficiary’s financial security.

The beneficiary’s annual income and distributions from the trusts exceeded her annual expenses with respect to the maintenance of her residence, healthcare, and property taxes. The beneficiary’s personal assets were worth \$1,425,000 (\$400,000 in a brokerage account with the remainder in real estate).

A child of the settlor filed a lawsuit against the beneficiary for a breach of fiduciary duty. The child claimed that the beneficiary was withdrawing (as the trustee) “more income and principal than was necessary to maintain [the beneficiary’s] standard of living prior to [the settlor’s] death.” *Id.* at \*4.

The court found that the “testimony established that during [the settlor and beneficiary’s marriage, the settlor] was ‘frugal but he was generous’ and that although the beneficiary had a household budget of \$1,500 per month, the settlor was generous with gifts to the beneficiary that included “cars, horse trailers, raised barns, land, remodeling of a vacation home in Maine, [and] a three and one-half carat diamond.” *Id.* at \*1. Ultimately, the court held that the beneficiary had not distributed more to herself than what was permitted under the standards of the trusts. The court’s analysis to reach this conclusion is not well developed. With limited discussion, it appears that the court relied on (i) testimony of the settlor’s generous gift-giving towards the beneficiary and (ii) the factors of the “support trust” doctrine to conclude that the distributions to the beneficiary were permitted.

#### 4. Words of Restriction On Distributions

A trust may provide that distributions may only be made for support of a beneficiary where there is an emergency or hardship. When those words are used, they restrict the trustee’s discretion to make distributions. The Restatement provides:

Illustrative of terms that tend to be highly restrictive are those that authorize invasion of principal or other discretionary payments in the

event of an “emergency,” “severe hardship,” “disability,” or the like. These are construed as authorizing distributions only when the described conditions or circumstances arise, and then only to the extent appropriate to alleviate the emergency, hardship, or special need.

#### RESTATEMENT (THIRD) OF TRUSTS § 50.

For example, in *Ellison v. Ellison*, a settlor created a testamentary trust for the benefit of his wife and minor child via a lengthy and convoluted will. 164 S.W.2d 775, 776 (Tex. App.—Fort Worth 1942, writ ref’d for want of merit). The purpose of the trust was, in part, the following:

[T]o provide my wife with a net spendable income of about \$ 500.00 per month after the expenses of handling the estate have been paid. \$ 500.00 is specified because that is about the amount we are now spending but should be adjusted according to the net income and condition of the estate and the value of the American dollar. Based on present money values, I recommend that on no condition shall the Executor allow a larger living expense, except in case of sickness and such tuition fees and most conservative allowance for the education of my son, or heirs. In addition to the \$ 500.00 per month I recommend that my wife be given about \$ 5000.00 cash every third year for the

purpose of travel, automobile, or other luxury she may choose. . .

And [trustee] shall have and exercise all other powers that an absolute owner could, with respect to the control, management, disposition, investment and preservation of this trust, and the different items of property that may belong thereto from time to time.

*Id.* at 777. Other clauses presented the trustee with more precise and often conflicting direction. *Id.* The trustee sought a determination of whether it could increase the monthly sum above \$500 and whether that increase would be within his discretion. *Id.* at 778–79.

The court began its analysis repeating the maxim that the trustee’s obligations would be determined by construing the trust-creating document’s terms as a whole. *Id.* at 780. It then considered what it perceived was the settlor’s intent in drafting the trust: (1) to support his wife and son in their lifestyle and (2) to provide for his son into adulthood. *Id.* Furthermore, the court noted that in the trust the settlor stated that his wife would care for their child, citing some provisions of the trust that gave the wife authority to direct the trustee to make certain distributions. *Id.*

Based on these broad considerations the court stated, “We think it clear from the language used it was the intention of the testator to vest the trustee with such power and authority; the discretion used by the trustee to be in harmony with and controlled by the things pointed out as affecting changed conditions, if they should occur.” *Id.* at 781. The court thus held that the

monthly payment to the beneficiaries could be increased within the discretion rooted in evidence on a cost of living increase of the trustee. *Id.* at 782–83.

#### E. Consideration of a Beneficiary’s Lifestyle

Trusts often require a trustee to consider the beneficiary’s lifestyle in determining the amount of distributions.

“Support” and “maintenance” distribution standards extend beyond a beneficiary’s bare necessities to include the beneficiary’s accustomed style of living. *Id.* Although the general starting point on which to base a beneficiary’s accustomed style of living is when a trust became irrevocable, distributions for a higher standard of living over time may be appropriate. Specifically, such distributions may be appropriate:

The accustomed manner of living for these purposes is ordinarily that enjoyed by the beneficiary at the time of the settlor’s death or at the time an irrevocable trust is created. The distributions appropriate to that lifestyle not only increase to compensate for inflation but also may increase to meet subsequent increases in the beneficiary’s needs resulting, for example, from deteriorating health or from added burdens appropriately assumed for the needs of another. Also, if a beneficiary becomes accustomed over time to a higher standard of living, that standard may become the appropriate standard of support if consistent with the trust’s

level of productivity and not inconsistent with an apparent priority among beneficiaries or other purpose of the settlor. Furthermore, distributions allowing the beneficiary an increased standard of living may be appropriate if, in light of the productivity of the trust estate, the eventual result would otherwise favor the remainder beneficiaries over the present beneficiary to a degree unlikely to have been intended by the settlor.

...

Under the usual construction of a support standard (*supra*) it would not be reasonable (Comment b), or even a result contemplated by the settlor (Comment c), for the trustee to provide only bare essentials for a beneficiary who had enjoyed a relatively comfortable lifestyle. (This is so even though the discretionary power is couched in terms of amounts the trustee considers “necessary” for the beneficiary’s support.)

*Id.*

Another commentator provides:

In such a trust the settlor may reasonably be held to have intended to provide for the maintenance of the beneficiary in the social and economic position in which the latter had been living at

the time of the creation of the trust, and to give the beneficiary the comforts and necessities to which they had been accustomed, and not merely to provide the beneficiary with the bare necessities of life. A trustee has been held entitled to include under the term “support” the education of the beneficiary, the maintenance of the beneficiary’s family, the purchase of life insurance on the beneficiary’s life to secure the beneficiary’s creditors, a vacation, nursing and medical care, and the payment of debts. Under a strict construction of support and living expenses the trustee may be held not entitled to pay the costs of the funeral of a life beneficiary, but a contrary view has been adopted in some decisions.

BOGERT’S THE LAW OF TRUSTS AND TRUSTEES, § 811.

One commentator provides:

There is more precedent on standard of living than nearly any other issue facing the trustee. This is probably because so many testamentary trusts incorporate the desire of the testator to provide support to a loved one “in the manner to which [the loved one] has been accustomed immediately prior to my death.” The “appropriate” standard of living may be



important even in trusts where the beneficiary's previous standard of living is not an issue.

A trustee should investigate and document the beneficiary's activities; this might include visiting the beneficiary and following up on distributions for major expenses, vacations, and education. And it might include research to determine what the grantor's standard of living was more than a generation ago. The courts consider the following factors to be relevant in various circumstances: type and size of dwellings; type and expense of educational institutions attended; wardrobe; domestic help employed; number and price of automobiles; membership in recreational facilities; vacations; and everyday activities. The trustee should monitor, record, and consider these in making maintenance and support distribution decisions. The trustee must "determine the amount of trust income sufficient for the 'suitable' support and maintenance of the trust beneficiary." Despite the broad interpretation of state courts in considering what is appropriate to distribute under an "accustomed standard of living" trust, the prudent personal trustee should also be aware of the tax ramifications of such a standard. "[T]he power to

invade corpus . . . to continue an accustomed standard of living" without further limitation has been held to be outside the ascertainable standard, even if limited somewhat.

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 191 (2014).

Another commentator states:

Trusts regularly direct trustees to give distributions in order to allow beneficiaries to maintain a standard of living. The law calculates a beneficiary's standard of living as of the time of the grantor's death or when the trust became irrevocable. The reason for this is in keeping with interpreting the trust according to what the settlor intended. Even without specific language, distributions are to be made "according to the beneficiary's station in life." However, a trustee may be justified in giving lower levels of distributions if the trust estate is modest in relation to the future needs of the beneficiary.

Christian S. Kelso, *But What's An Ascertainable Standard? Clarifying HEMS Distribution Standards And Other Fiduciary Considerations For Trustees*, 10 TEX. TECH EST PLAN COM PROP L.J. 1, 31-32 (2017).

F. Consideration of a Beneficiary's Other Resources

Settlors often state that a trustee is to consider a beneficiary's other resources in determining whether to make a support distribution and how much of a distribution to make. Sometimes the trust is silent on this issue. One commentator provides:

From state to state, the default approach falls into the following three broad categories: (1) The testator intended that the trust be an absolute gift of support, and the trustee should not look outside the trust to determine the beneficiary's other means; (2) The trustee must consider other means, but the beneficiary is not required to exhaust them; and (3) The beneficiary must rely completely on his own resources for support, unless such resources prove inadequate. Often, the settlor specifies what the trustee should consider regarding outside support. But when it is not specified in the instrument, Texas law follows the moderate path of assuming the beneficiary's other means of support should be considered, but it does not require a beneficiary to exhaust such outside resources. As noted, this is not the prevailing view everywhere. However, in Texas and in a majority of states, in considering distributions, the view is that there are no reasonable grounds to exclude

information regarding other means of support. In these jurisdictions, the most important factor considered is the ultimate intent of the settlor or the testator—generally presumed to be to provide support, as necessary.

The rationale is that to determine what amount of support is necessary, the trustee must consider the beneficiary's circumstances and determine need. In *Howard*, the court held that the requirement that the trustee consider income from any source included the family. It held that the trustee must "consider all income enjoyed by the beneficiaries from any and all sources, all income enjoyed by their husbands from whatever source so long as it is available for support of the beneficiaries and their sons," and income received by the sons. In some cases of doubt, courts have suggested the trustee should err on the side of the primary beneficiary. This, of course, presumes that one class of beneficiary is of primary importance. However, most trusts do not have a primary beneficiary. In fact, as noted below, in most cases the trustee has the same duty to all classes of beneficiary. This may create a conflict between the needs of the current income beneficiary and the needs of

the future income or principal beneficiaries

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 192-93 (2014).

The Restatement provides:

It is important to ascertain whether a trustee, in determining the distributions to be made to a beneficiary under an objective standard (such as a support standard), (i) is required to take account of the beneficiary's other resources, (ii) is prohibited from doing so, or (iii) is to consider the other resources but has some discretion in the matter. If the trust provisions do not address the question, the general rule of construction presumes the last of these.

Specifically, with several qualifications (below), the presumption is that the trustee is to take the beneficiary's other resources into account in determining whether and in what amounts distributions are to be made, except insofar as, in the trustee's discretionary judgment, the settlor's intended treatment of the beneficiary or the purposes of the trust will in some respect be better accomplished by not doing so.

One qualification is that, if the discretionary power is

one to invade principal for (or to distribute additional income to) a beneficiary who is entitled to all or a specific part of the trust income, or to an annuity or unitrust amount, the trustee must take the mandatory distributions into account before making additional payments under the discretionary power. Where a beneficiary is entitled to payments from another trust created by the same settlor (e.g., nonmarital and marital deduction trusts for a surviving spouse), or as a part of coordinated estate planning with another (such as the settlor's spouse), required distributions from the other trust--and the purposes of both trusts--are to be taken into account by the trustee in deciding whether, in what amounts, and from which trust(s) discretionary payments are to be made.

Another qualification is that, to the extent and for as long as the discretionary interest is intended to provide for the support, education, or health care of a beneficiary (or group of beneficiaries, Comment f) for periods during which a beneficiary probably was not expected to be self-supporting, the usual inference is that the trustee is not to deny or reduce payments for these purposes because of a beneficiary's personal resources. (But contrast the effect of

another's duty to support the beneficiary, Comment e(3)).

Furthermore, in cases of nonobjective standards (e.g., "benefit" or "happiness"), other resources have less direct relevance than with regard to additional amounts necessary to maintain an accustomed lifestyle, for example. Those resources, however, may have some bearing on the overall reasonableness of an exercise of the discretionary authority.

As a rule of construction, the above presumption, with its qualifications, does not apply when the settlor expresses a different intent or if the presumption is contrary to purposes or terms of the trust as interpreted in light of circumstances and other evidence of the settlor's intention (§ 4). Thus, the settlor may manifest an intention that other resources are not to be taken into account (as in an absolute gift of support) or that they must be (as in a provision for payments "only if and as needed" to maintain an accustomed standard of living), with the trustee to have no discretion in the matter. (Contrast, however, the common phrase "necessary for support," which without more normally does not limit the trustee's discretion in this way.) On factors relevant to this

question of interpretation, see Comment g.

A grant of extended discretion (Comment c) does not relieve the trustee of a duty to take into account, or of a duty to disregard, a beneficiary's other resources, although the extended discretion is a factor to be considered in the process of interpretation. If, under the general rule of construction, the trustee has discretion in the matter the trustee has greater latitude in exercising that discretion when the settlor has used language of extended discretion in granting the power of distribution.

...

Where a trustee is to take a beneficiary's other resources into account in deciding whether and in what amounts to make discretionary payments to satisfy a standard, those resources normally include the beneficiary's income and other periodic receipts, such as pension or other annuity payments and court-ordered support payments.

A trustee may have discretion, and perhaps a duty, to take account of the principal of the beneficiary's personal estate, depending on the terms and purposes of the discretionary power and other purposes of the trust. The

settlor's relationships and objectives with respect to both the beneficiary in question and the trust's other current and remainder beneficiaries are of particular relevance. Also important are any income, estate, and other tax purposes the trust may serve (see Comment g), as well as the liquidity (including marketability and income-tax basis) of the discretionary beneficiary's assets.

RESTATEMENT (THIRD) OF TRUSTS § 50.

A trustee may also take into account public benefits that a beneficiary receives. The Restatement provides:

If a discretionary beneficiary is or may be eligible to receive public benefits, this factor, like the availability of other resources generally, is to be taken into account by the trustee under the usual rule of construction. Thus, to the extent consistent with the terms and purposes of the trust, and allowable by applicable benefits statutes (see Reporter's Notes), the presumption is that the trustee's discretion should be exercised in a manner that will avoid either disqualifying the beneficiary for other benefits or expending trust funds for purposes for which public funds would otherwise be available.

*Id.* at e(4).

Another commentator provides:

A question which has caused much litigation is whether, where a trustee has power to pay or spend trust income to the extent necessary to support the beneficiary, the trustee may take into consideration the income then being received by the beneficiary from other sources, or capital assets which the beneficiary owns outside the trust, or obligations of third persons to support the beneficiary arising out of marriage or parenthood. It is of course possible for a settlor to express or imply, or to be presumed to have, an intent that nontrust property is not to be considered by the trustee, and that full support is to come from the trust income, even though it is wholly or partly unnecessary. Or obviously the settlor may have had the intention that the trustee should consider the property and means of support of the beneficiary which are unconnected with the trust in deciding how much trust income should be paid or applied for support.

In settling this question of construction, the exact wording of the trust instrument must be considered carefully, as well as the relationships between the settlor and beneficiary and other beneficiaries, the financial situations of the

income and principal beneficiaries, and knowledge by the settlor of the family and financial status of the particular beneficiary.

...

If the beneficiary's other resources are to be considered, does that mean just the beneficiary's sources of income or all of the beneficiary's assets? The general rule seems to be to limit the consideration to sources of income and not the beneficiary's assets in general.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, § 811.

Absent some provision in a trust, a trustee should generally take into account in making distributions to a beneficiary that the beneficiary may have other individuals that are obligated to support him or her.

One commentator states:

The existence of a trust generally does not abrogate the duty of any other person obligated to support the beneficiary. There are numerous factors for the trustee to consider in situations where others may be obligated to support a beneficiary. These are raised most often in court-created trusts, although they certainly may be an issue in any type of personal trust. Such considerations include the following: (1) the ability of a

parent, or parents, to support a beneficiary with a disability, educate the beneficiary, meet emergencies, or provide necessary training for life; (2) the age, the mental and physical condition of the beneficiary, and if incapacitated, the likely duration of the incapacity; and (3) the beneficiary's likelihood of having to continue medical needs or the beneficiary's ability to obtain insurance and to support himself. All states also have laws regarding the duty between spouses.

When a trustee asks about a third-party's obligation, beneficiaries and their family members may find such questions intrusive; others may refuse to respond. However, the information is necessary because the law charges the trustee with duties, regardless of whether the parents are satisfying their duty to support a child or whether the need for maintenance and support truly exists. Most people would rather answer specific questions or prepare financial statements than provide tax returns—tax returns often fail to provide a clear picture of financial resources. Notwithstanding their limited value, some corporate trustees still require

beneficiaries to provide tax returns.

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 208 (2014).

Another commentator states:

A particularly vexing problem is determining whether a trust was intended to support a beneficiary or merely supplement their lifestyle.... Also, when a trustee is directed to take other sources of support into consideration, the trust is likely to be for supplementing income rather than being used as the beneficiary's primary source of support.

Christian S. Kelso, *But What's An Ascertainable Standard? Clarifying HEMS Distribution Standards And Other Fiduciary Considerations For Trustees*, 10 TEX. TECH EST PLAN COM PROP L J. 1, 33 (2017).

Historically, in Texas, there have been conflicting authorities when a trust is silent on the issue. *Compare First Nat. Bank of Beaumont v. Howard*, 149 Tex. 130, 229 S.W.2d 781, 786 (1950) (should consider all income available to the beneficiaries from any sources in determining whether to make distributions from principal) *with Penix v. First Nat. Bank of Paris*, 260 S.W.2d 63, 67 (Tex. Civ. App.—Texarkana 1953, writ ref'd) (trustee required to consider need for distribution “without regard to the financial ability of [the beneficiary’s] parents”).

In *Keisling v. Landrum*, a husband and wife were married after each person had been in a

prior long-term marriage. 218 S.W.3d 737, 739 (Tex. App.—Fort Worth 2007, pet. denied). Prior to the marriage, the settlor’s assets were in excess of \$1.3 million, while the beneficiary’s assets were approximately \$300,000. *Id.* Although the settlor and beneficiary signed a prenuptial agreement, the settlor “agreed to provide for the couple’s standard of living and to pay [the beneficiary’s] mortgage, property taxes, and for repairs and maintenance for her home . . .” *Id.* After a three-year marriage, the settlor died, leaving a testamentary trust containing most of the settlor’s estate. *Id.* The trust was for the primary benefit of the beneficiary but also included the settlor’s children from an earlier marriage. *Id.* The relevant portion of the trust stated:

The primary purpose of [the settlor’s trust] shall be to provide for the support, maintenance, and health of my wife in the standard of living to which she is accustomed at my death. If my wife’s own income and other financial resources from sources other than from this trust are not sufficient to so maintain her in such standard of living, the Trustee shall distribute, from time to time, as much of the current trust net income, or accumulated trust net income, as shall be necessary to so maintain her. If my wife’s own income and other financial resources, together with distributions of current and accumulated trust net income from this trust, are not sufficient to maintain her in such standard of living, then the Trustee shall distribute as much of the trust

corpus as shall be necessary to so maintain her. After my wife has been provided for in the manner described above, and if in the Trustee's judgment, it will not endanger my wife's present or reasonably foreseeable future support, the Trustee may distribute to my descendants, from time to time, such amounts of the current or accumulated trust net income and as much of the trust corpus, as shall be necessary for their respective support, maintenance, health, and education . . .

*Id.* at 740. The trustee, who was a friend of both the settlor and his first wife, made no distributions to the beneficiary and claimed that the beneficiary "was not entitled to distributions until she exhausted all of her 'other financial resources,' which included everything save one home and one vehicle." *Id.* at 739. As a result, the beneficiary filed a lawsuit. The beneficiary claimed that she did not have to exhaust her other assets and that she was entitled to distributions consistent with her standard of living that included multiple vehicles, homes, and vacations. Specifically, the beneficiary argued that the trust should cover the difference between her estimated monthly expenses of \$5,600 at the time of the settlor's death and her \$1,137.75 monthly revenue. *Id.* at 741.

The court agreed with the beneficiary by relying on the "standard of living" provision quoted above. *Id.* at 740, 742-43. The court held that the "standard of living" provision dictated that distributions should be made for expenses in connection with the beneficiary's lifestyle (at the settlor's death) that featured multiple homes, vehicles, and vacations. *Id.* The settlor, during his life,

paid for all of the beneficiary's living expenses with his assets. Those assets passed to the testamentary trust under his will, and the opinion states that settlor "intended the trust to take his place supporting [the beneficiary's] high standard of living after he died." *Id.* at 740. The result from the court is that the trust was to pay for almost all of the beneficiary's living expenses

Although the court did not cite the Restatement when analyzing the beneficiary's standard of living, its analysis was in harmony with the Restatement's comments quoted above. The court held that a trust with a support and maintenance standard permitted distributions for the beneficiary's expenses related to "food, gas, gifts to church, gifts to children, utilities, a security system, maid service, yard maintenance, taxes, insurance, cruises to Panama and Alaska, dental and medical care, shopping, five vehicles, and costs to support multiple homes." *Id.* at 741.

Further, the trust in *Keisling* required distributions to be made if the beneficiary's "income and other financial resources" were not sufficient to maintain her accustomed standard of living. *Id.* at 740. The trustee interpreted that language to mean that the beneficiary was required to expend all of her assets except one house and one car before the trustee was required to make a distribution. The court strongly rejected the trustee's interpretation as follows:

While [the settlor] was alive, [the beneficiary] enjoyed the benefits and luxuries of cruises and vacations, multiple homes, and multiple vehicles. There is no evidence in the wording of the instrument that [the settlor] intended the trust to



be a parachute to protect [the beneficiary] from poverty after she had exhausted all of her own assets. On the contrary, the purpose of the trust was to step in and pay for [the beneficiary's] high standard of living upon [the settlor's] death. This high standard, which was established before [the settlor] died, included use of and access to not just one vehicle, but to several. [The beneficiary's] standard of living also included use of both of the couple's homes plus use and access to her own home in Oklahoma. It would be nonsensical to require [the beneficiary] to sell all of her vehicles and other assets save one home and one vehicle just so the trust could "step in" and provide her with funds to purchase new assets and vehicles to replace them. Further, if we construe "other financial resources" to mean all assets, nothing in the instrument shows an intent for [the beneficiary] to keep one home and one vehicle; in that situation, [the beneficiary] would have to sell everything she owns before receiving distributions, which is also nonsensical. . . .

Here, [the settlor's] trust is unambiguous in its intent to maintain [the beneficiary] in the standard of living to which she was accustomed at his death. By requiring [the

beneficiary] to use her own income and "other financial resources," [the settlor] did not intend for [the beneficiary] to become impoverished before the trust stepped in to again elevate her to a high standard of living. On the contrary, [the settlor] designed the trust to provide [the beneficiary] with a comfortable lifestyle, which included multiple vehicles, at least one vacation each year, and other reasonable luxuries. . .

More importantly, it is irrelevant that [the settlor and the beneficiary] enjoyed an inflated standard of living; what is relevant is the instrument language.

*Id.* at 742-43. The court sided with the beneficiary's expert witness who, citing Section 50 cmt. e(2) of the Restatement, testified that "other financial resources" meant income and cash flow from other sources such as "Social Security, pension payments, annuity contracts, and similar items." *Id.* at 741-42. In adopting this interpretation, the court stated as follows:

Because the trust language unambiguously shows [the settlor's] intent to provide for [the beneficiary] without [the beneficiary] having to exhaust any assets, we hold that "other financial resources" as used in [settlor's] will means "income and other periodic receipts, such as pension or other annuity payments and

court-ordered support  
payments.”

*Id.* at 743.

The court did not address the portion of the Restatement indicating that “[a] trustee may have discretion, and perhaps a duty, to take account of the principal of the beneficiary’s personal estate, depending on the terms and purposes of the discretionary power and other purposes of the trust.” *Id.* The court likely did not do so because the beneficiary did not have a large separate personal estate.

The court’s holding is consistent with a Texas Supreme Court case, *First Nat. Bank of Beaumont v. Howard*, 229 S.W.2d 781, 785-86 (Tex. 1950). In *Howard*, the trustee had discretion to distribute principal necessary for the beneficiaries’ support and maintenance. *Id.* at 783. Although the trust instrument was silent on whether to consider other resources, the court held that in determining whether a need existed, the trustee should consider “all income enjoyed by the beneficiaries from any and all sources,” including income from the beneficiaries’ husbands (if available to support the beneficiaries) and insurance policies from the settlor. *Id.* at 783, 786.

In *Duncan v. O’Shea*, which was discussed earlier, the trusts at issue also required the trustee to take into account “funds reasonably available to [the beneficiary] from all other sources . . .” 07-11-0088-CV, 2012 WL 3192774, at \*4 —5 (Tex. App.—Amarillo Aug. 7, 2012, no pet.). With respect to distributions to the beneficiary, the court did not discuss whether the beneficiary’s personal assets should be taken into account, even though her assets (\$1,450,000) were similar in value to those held in the trusts (\$1,680,000 in the family trust and \$200,000 in the marital trust). Instead, the court focused on the

beneficiary’s cash flow and monthly expenses to determine whether the trustee had distributed more than was permitted under the trust standards, ultimately deciding that the trustee had not distributed too much.

G. Trust Language That Impacts Interpretation of Distribution Standard

Once again, the primary goal of the trustee is to follow the settlor’s intent as expressed in the trust document. Often a settlor will use language to modify the distribution standard. The Restatement Provides:

Many factors may be influential in a process of interpretation that seeks to determine whether, based on evidence of the intention of a particular settlor, a relevant rule of construction or some aspect of it is inapplicable or modified with respect to the discretionary trust in question, or to decide how some inference may apply in a particular situation. This is evident in judicial opinions involving matters considered in the preceding commentary. Many reported cases have proceeded without acknowledging any applicable presumption or constructional preference as a starting point.

Factors often cited in opinions as influential range from the particular language used in the grant of discretion (e.g., details of wording such as whether “may” or “shall” was used, whether discretion

was about amounts “necessary” rather than “appropriate” to a beneficiary’s support, and whether remainder beneficiaries were to take “the principal” or “whatever principal remains”) to the relationships between the settlor and one or more of the beneficiaries. Relevant relationships include not only family relationships but also the settlor’s personal feelings about a beneficiary, and occasionally about the beneficiary’s spouse, and whether it had been customary or would be “natural” for the settlor to provide for the beneficiary’s needs. Among many other factors cited as influential are whether the trustee is also a beneficiary of the power, whether the discretion is applicable to income as well as principal, whether the settlor made other provision for the discretionary beneficiary (or other beneficiaries) under the same document or otherwise, whether the settlor was aware of the beneficiary’s other resources or of other circumstances, whether a spendthrift restraint was imposed on the beneficiary’s interest, and whether a given interpretation might incidentally benefit someone other than the designated beneficiary.

Specific language, facts, and circumstances in a situation

are properly to be considered in the process of interpretation, and may overcome, alter, or reinforce a particular presumption. Realistically, however, these factors often reveal little of a settlor’s actual intent. The settlor may have formed no intention on the matter at issue, or whatever intention may have existed might not have been ascertained by counsel or preserved in the drafting. In any event, the significance of particular facts and circumstances is often highly speculative, or they may cut both or several ways even if judicial opinions sometimes mention but one side. Furthermore, to be influenced by and draw meaning from subtle details of wording may well ignore the realities of how drafting is done, not to mention that the words were those of one whose work product suggests inattention to the particular issue or circumstances for which it has become necessary to discover, or attribute, an intention.

Frequently, therefore, the most revealing and reliable guides for resolving these types of questions are the underlying or general purposes of the trust or provision in question. From these it may be deduced what objectives the settlor had in mind, and thus what intention might appropriately be attributed to the settlor on the

matter at issue. Accordingly, rather than relying on speculation about the import of specific details of fact or wording, it is often more instructive to analyze the variety of beneficial interests and other provisions of the trust as a whole, with any other available evidence, in a broader effort to ascertain why the trust was created and what role the particular discretionary power was to play in the trust plan.

RESTATEMENT (THIRD) OF TRUSTS § 50(f).

Another commentator states:

In addition to the terms above, trust instruments typically include modifying language which impacts how distributions are to be made. These terms complicate the problem of interpreting trust language.

...

The term "may" implies discretion. If a trustee may make distributions for HEMS, he or she may, for example, determine that a beneficiary needs a distribution for a mortgage payment and still determine properly that the distribution should be withheld. Conversely, the term "shall" is mandatory. If the same trustee shall make distributions for HEMS, the distributions become compulsory and enforceable

upon the trustees determination that the beneficiary needs it for the mortgage payment, assuming, of course, that the trust instrument does not somehow provide otherwise.

On a more theoretical front, a "may" modifier effectively creates an upper limit to permissible distributions. A trustee who may make distributions for HEMS, might never make any distribution at all. On the other hand, a "shall" modifier triggers every distribution that falls within the standard. Because it therefore makes the related distribution standard more ascertainable, a "shall" standard is preferred when tax is a prime consideration.

Similarly, a "may" modifier subjects a trustee to attack on multiple fronts, creating a catch-22. In the above example involving the trustee who may make a distribution to cover the beneficiary's mortgage payment, if the trustee makes the distribution, the beneficiary will be satisfied but the remainder beneficiaries are likely to complain. On the other hand, if the trustee withholds the distribution, the beneficiary will complain but the remainder beneficiaries will be satisfied.

Christian S. Kelso, *But What's An Ascertainable Standard? Clarifying HEMS*

*Distribution Standards And Other Fiduciary Considerations For Trustees*, 10 TEX. TECH EST PLAN COM PROP L J. 1, 31 (2017).

H. There Must Be A Showing That The Standard Supported The Distribution

If a distribution for a support trust is ever challenged, a trustee should have proper support for the decision to make the distribution. Certainly, a trustee has a duty to investigate and have a factual basis for any discretionary act. *See* SCOTT ON TRUSTS, § 187.3 (4th Ed. 1988); *see also* BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, § 811 ("If the trustee is directed to pay the beneficiary adequate funds for support on demand, the trustee may have a duty to require the beneficiary to prove the need for a payment of principal to meet living expenses.").

The Restatement provides:

The duty of care requires the trustee to exercise reasonable effort and diligence in planning the administration of the trust, in making and implementing administrative decisions, and in monitoring the trust situation, with due attention to the trust's objectives and the interests of the beneficiaries. This will ordinarily involve investigation appropriate to the particular action under consideration, and also obtaining relevant information about such matters as the contents and resources of the trust estate and the circumstances and requirements of the trust and its beneficiaries.

RESTATEMENT (THIRD) OF TRUSTS § 77.

A trustee has a duty to investigate the needs of the beneficiary and to make support distributions. That duty arises at the inception of the trust or when a successor trustee accepts the appointment. RESTATEMENT (THIRD) OF TRUSTS § 50; *Matter of JP Morgan Chase Bank, N.A. (Marie H.)*, 38 Misc 3d 363, 956 N.Y.S.2d 856 [Sur Ct, NY County 2012.] ("Both case law and basic principles of trust administration and fiduciary obligation requires the trustees to take appropriate steps to keep abreast of [the beneficiary's] condition, needs, and quality of life, and to utilize trust assets for his actual benefit.").

A beneficiary has a duty to provide the trustee with the information necessary to assist it in making the determination on distributions. *Keisling v. Landrum*, 218 S.W.3d 737, 741 (Tex. App.—Fort Worth 2007, pet. denied). The court in *Kiesling* stated that only the beneficiary "has access to her periodic receipts, income, and expenses, and a trustee may require a beneficiary to provide him with information necessary to use his discretion." *Id.* at 745.

One commentator states:

[I]n order to make reasonable decisions regarding distributions, trustees must obtain reliable information from the beneficiary. Specifically, "the trustee should solicit information from the beneficiary regarding his or her financial needs, wants, resources, and standard of living." Necessary documents will vary depending on the case and situation but may include items such as: income and

cash flow information; financial statements; all trust instruments under which the beneficiary has a right to receive or request a distribution; income tax returns; tuition statements or estimates and agreements relating to the beneficiary's education; receipts or invoices as to any amounts to be reimbursed; information regarding the beneficiary's employment status and efforts to obtain employment; status of the beneficiary's housing, transportation and any other relevant information regarding support; status of the beneficiary's medical insurance and anticipated health care needs; debts of the beneficiary and status of any litigation related thereto; standing with regard to taxes, particularly where the beneficiary owes back taxes or penalties; notification of any significant changes in any beneficiary's housing, education, development or medical needs; history of assistance previously supplied by the grantor to the beneficiary.

Determining how much information and which information is an art. Trustees who collect too much information may make the beneficiary feel as if their privacy is being invaded which may lead to animosity between the trustee and

beneficiary. Trustees who collect too little information may experience the opposite result. Failure to adequately collect information may lead to beneficiaries claiming the trustee breached his or her fiduciary duty.

Christian S. Kelso, *But What's An Ascertainable Standard? Clarifying HEMS Distribution Standards And Other Fiduciary Considerations For Trustees*, 10 TEX. TECH EST PLAN COM PROP L J. 1, 40 (2017).

A trustee can generally rely on a beneficiary's documents and statements regarding their needs. RESTATEMENT (THIRD) OF TRUSTS § 50(e)(1). The Restatement provides:

The trustee has a duty to act in a reasonable manner in attempting to ascertain the beneficiary's needs and, under the usual rule of construction, other resources that may be appropriately and reasonably available for purposes relevant to the discretionary power. The trustee generally may rely on the beneficiary's representations and on readily available, minimally intrusive information requested of the beneficiary. This reliance is inappropriate, however, when the trustee has reason to suspect that the information thus supplied is inaccurate or incomplete.

*Id.*

For example, in *Sharma v. Routh*, the issue was whether a trustee's distribution of

principal to himself was effective such that income from that distribution was community property. 302 S.W.3d 355 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (Hedges, J., concurrence on op. on reh'g). One justice explained that the distributions were not proper:

The settlor to the two testamentary trusts authorized invasion of corpus only “as . . . necessary . . . to provide for [Sharma’s] health, support, and maintenance in order to maintain him . . . in accordance with the standard of living to which [he] is accustomed . . . .” Without any evidence before us showing that a corpus distribution was necessary or made for Sharma’s health, support, or maintenance, we conclude that Sharma did not meet the invasion criteria as set forth in the trust and was not entitled to trust corpus. Accordingly, principal payments made to the trusts could not properly be distributed to Sharma. Although Sharma improperly took personal possession of the funds, such physical possession without a showing of need did not give Sharma a right to the principal payments or other trust corpus. As such, the principal payments remained trust property. Because the principal payments remained trust property, Sharma had no interest in the corpus. Accordingly, the trust income arising from trust corpus, namely the interest payments,

were not community property.

*Id.*

Texas law indicates that a trustee when exercising discretion in making any decisions related to distributions the support or maintenance of a beneficiary cannot exercise that discretion without considering all of the material facts and circumstances. The trustee must consider the material facts and circumstances of the beneficiary’s position from year to year when deciding to make, or not to make, any particular distribution.

The trustee should garner all relevant information to make a sound decision. The trustee should evaluate the financial market and where it is headed. The trustee should gather information for the requesting beneficiary’s individual needs and sources of income. The trustee should seek a detailed report on all sources of funding for a beneficiary and all anticipated expenses. The trustee should also obtain the beneficiary’s balance sheet showing all assets and liabilities. The trustee should also obtain the beneficiary’s tax statements for the three previous years. The trustee should also seek information on the potential needs for other beneficiaries.

When exercising discretion in a support trust, a trustee should use this information to consider both the present and future needs of the requesting beneficiary and other beneficiaries, as well as other relevant facts and circumstances.

#### I. Right To Catch-Up Distributions

If a trustee has incorrectly withheld support distributions or calculated them wrong, then a beneficiary may be entitled to a catch-up distribution. For example, in *Keisling v.*

*Landrum*, the trust instrument indicated that distributions shall be made “if [the beneficiary’s] own income and other financial resources from sources other than from this trust are not sufficient to so maintain her in [the] standard of living” to which she was accustomed at the settlor’s death. 218 S.W.3d 737, 743–45 (Tex. App.—Fort Worth 2007, pet. denied). The court considered this language and concluded that while the beneficiary’s other means of support should be considered by the trustee, it did not require the beneficiary to exhaust outside resources before making a distribution. *Id.* at 740-43. The trustee had a responsibility to distribute the trust’s income and principal to the beneficiary to maintain her in the lavish lifestyle to which she is accustomed “after considering her lifestyle needs, age, health, income, and size of the trust estate.” *Id.* Finally, and importantly, the court also held that the trial court had a duty to go back and “determine what that standard of living was and then make trust distributions to compensate [the beneficiary] from the date of [her husband’s] death.” *Id.* at 745. So, the trustees and trial court had to make the beneficiary whole by paying her for prior years when she was not distributed appropriate amounts.

J. Distributions For A Beneficiary’s Spouse and Minor Children

Distributions made for the support of a beneficiary’s spouse and minor child can be considered a HEMS distribution for the beneficiary parent because the beneficiary parent has an obligation to support his or her spouse and minor child. The Restatement provides:

A support standard normally covers not only the beneficiary’s own support but also that of persons for whom

provision is customarily made as a part of the beneficiary’s accustomed manner of living. This generally includes the support of members of the beneficiary’s household and the costs of suitable education (infra) for the beneficiary’s children. The beneficiary is entitled also to receive reasonable amounts for the support of a current spouse, and of minor children who reside elsewhere but for whom the beneficiary either chooses or is required to provide support. Additional amounts to cover the beneficiary’s support obligation to a former spouse would normally be within the trustee’s reasonable discretion. (These matters of construction differ from but may be relevant to the question, discussed in § 60, whether a beneficiary’s discretionary interest may be reached in satisfaction of claims for spousal or child support.)

RESTATEMENT (THIRD) OF TRUSTS § 50.

Another commentator provides:

A trust to support the beneficiary’s family obviously entitles the trustee to expend money for the benefit of the beneficiary’s spouse and dependent children, and may include a subsequent spouse and children. Whether the settlor



intends to include members of the family as beneficiaries only as long as they live with the head of the family is a question of fact which must be decided in the light of all the circumstances. Such a trust has been held to extend to children of the marriage after the divorce of the parents, but there has been a disposition to include wives only so long as they remain undivorced and live with their husbands. Even if a wife and children are to receive benefits after a separation from the husband, it may well be that the trustee should make the payments to the husband and permit the latter to make a distribution.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, § 811.

For example, in *First Nat'l Bank of Beaumont v. Howard*, HEMS distributions to a parent beneficiary was held to include the educational expenses of the beneficiary's dependents. 229 S.W.2d 781 (Tex. 1950). The Texas Supreme Court held that the fact that the settlor had paid for his daughters' college education indicated that he considered the expense of a college education for a dependent a "necessary" expenditure. *Id.*

In this regard, most of the case law deals with a related, but distinct question of whether funds of a discretionary trust may be reached by a former spouse for either the purposes of support for the non-beneficiary former spouse (alimony) or support for a non-beneficiary minor child. The majority view is that discretionary trust income may

be accessed for support of a minor child (though not necessarily for the support of a non-beneficiary former spouse). Indeed, Texas has codified this in the Family Code, providing that a court may order a trustee of a discretionary trust to pay child support out of the trust income. *See* Tex. Fam. Code § 154.005. Texas law provides that parents are legally obliged to provide their children with certain basic necessities like food, clothing, housing and medical care. *See* Tex. Fam. Code § 151.001. This duty of support, owed by a beneficiary to his or her minor children, must be considered when making distributions from a trust. *See Gray v. Bush*, 430 S.W.2d 258 (Tex. Civ. App.—Fort Worth 1968, ref. n.r.e.) (stating in the absence of financial necessity to do so, mother was not authorized to invade funds provided by trust that was separate estate of children and was created for purpose of prescribed support payments).

Texas law provides that a trustee subject to a HEMS distribution standard may be required to make distributions for the support of the beneficiary's child. *See* Tex. Fam. Code § 154.005 ("The court may order the trustees of a spendthrift or other trust to make disbursements for the support of a child to the extent the trustees are required to make payments to a beneficiary who is required to make child support payments as provided by this chapter."). Specifically, "[a] trustee of a purely discretionary trust may only be ordered to make child support payments for the benefit of the child from income but not principal." *See id.* ("If disbursement of the assets of the trust is discretionary, the court may order child support payments from the income of the trust but not from the principal."). A condition precedent to such an obligation, however, is that the beneficiary has been ordered to pay child support. *See Kolpack v.*

*Torres*, 829 S.W.2d 913 (Tex. Civ. App.—Corpus Christi 1992, writ denied); *see also Matter of Marriage of Long*, 542 S.W.2d 712 (Tex. Civ. App.—Texarkana 1976, no writ) (ordering trustees to pay to wife a certain sum per month for benefit of child was error; instead trial court should order trust-beneficiary parent to make the child support payment, after which it may then order the trustees to make disbursement for the support of the child).

In a more general sense, courts have held that consideration of a beneficiary’s familial obligations falls within a trustee’s discretion when determining what constitutes a proper distribution for the beneficiary’s “support.” *Estate of Stevens*, 617 S.E.2d 736, 739 (S.C. Ct. App. 2005). *See also First Nat’l Bank of Beaumont*, 229 S.W.2d 781, 785-86 (Tex. 1950) (holding that beneficiaries’ children were absolutely barred under the terms of the trust from claiming through the trust because they were not beneficiaries; however, consideration of their educational needs was within trustee discretion in determining the propriety of distributions to the beneficiaries [the parents]); *Robison v. Elston Bank & Trust Co.*, 48 N.E.2d 181, 189 (Ind. App. 1943) (“[t]he needs of a married man include not only needs personal to him, but also the needs of his family living with him and entitled to his support.”). This reasoning has been applied under circumstances where the beneficiary’s minor child does not reside with him or her. *See Matthews v. Matthews*, 450 N.E.2d 278, 281 (Ohio Ct. App. 1981) (concluding that “reasonable support” includes payment of all of the beneficiary’s normal, expected and legal responsibilities, including support of one’s child, and finding no reason why “reasonable support” should have any different application simply because the beneficiary lived apart from his child). The

Restatement specifically provides that the beneficiary may receive reasonable amounts for minor children who reside elsewhere “but for whom the beneficiary either chooses or is required to provide support.” RESTATEMENT (THIRD) OF TRUSTS § 266.

Generally, a trustee may make direct distributions to the non-beneficiary parent for the benefit of the minor beneficiary. The common issue becomes whether the distributions will fall into “support and maintenance,” and whether resources of the non-beneficiary parent must be considered in determining the beneficiary’s needs. In making this determination, the trustee must first look to the trust instrument and the intent of the settlor. *See* 2 AUSTIN W. SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 13.2.4 (5th ed. 2006) (“With respect to a trust for the support of a minor, it is a question of the settlor’s intention whether the beneficiary is entitled to support from the trust if the beneficiary’s parents are able to support him or her.”). As the Restatement notes:

It is important to ascertain whether a trustee, in determining the distributions to be made to a beneficiary under an objective standard (such as a support standard), (i) is *required* to take account of the beneficiary’s other resources, (ii) is *prohibited* from doing so, or (iii) is to consider the other resources but *has some discretion* in the matter. If the trust provisions do not address the question, the general rule of construction presumes the last of these.

RESTATEMENT (THIRD) OF TRUSTS § 50, Comment e. With regard to other (non-beneficiaries') duty of support, the Restatement indicates that there is a presumption that a trustee *is* to take account of a parental duty to support a minor beneficiary under state law. *Id.* § 50, Comment e(3). The Restatement goes further and explains that “the trustee’s discretionary authority normally should be exercised only to provide types of support or other benefits that fall beyond the parental obligation.” *Id.*

Where the trust instrument is silent Texas case law is somewhat mixed as to whether other sources of income must be considered in determining a beneficiary’s “needs” for purposes of a HEMS distribution. For example, in *Penix v. First National Bank*, the trust instrument provided that “During the pendency of the trust all net rents and revenues shall be used for [the beneficiary’s] support, maintenance, and schooling.” 260 S.W.2d 63, 64 (Tex. Civ. App.—Texarkana 1953, writ ref’d). Interpreting this language, the court considered whether the trustee’s decision to withhold trust income above the beneficiary’s current needs constituted an abuse of discretion. *Id.* The minor beneficiary’s parents argued that all income must be paid out for the benefit of the beneficiary, and that the trustee’s failure to do so was an abuse of discretion. *Id.* at 64-65. The court noted the broad discretion granted to the trustee, as the will creating the trust provided that the trustee “shall be free in the carrying out of such trusts from any supervision by the probate or other courts.” *Id.* at 66. The court further noted that “to pay such funds wholly to the natural and legal guardians of the minor would be to substitute the judgment and discretion of the guardians for that of the duly appointed trustee in expenditure of money . . . .” *Id.* The court held:

[W]e think the better rule is that the trustee has the duty to exercise reasonable discretion and judgment in determining the amounts reasonably and properly to be paid for the support, maintenance and education of the beneficiary in such case as this, and that he has the right to withhold surplus income for future emergencies and contingencies. In the exercise of a sound discretion the trustee should consider the beneficiary’s station and condition in life, and we think that is broadly comprehended in the trial court’s judgment.

*Id.* at 68. The court further affirmed the trial court’s holding, which concluded:

[I]t is the duty of the trustee to make use of all sources of information, including the parents of [the minor beneficiary], for the ascertainment of her needs and the sums of money necessary and reasonable for her support, maintenance and schooling; to exercise discretion in determining the sums and amounts reasonably necessary for such purposes without taking into consideration the financial ability of her parents to support, maintain and educate her; and to make all expenditures out of the revenue and income from property bequeathed to her and in trust for her as are

reasonably necessary for her support, maintenance and education.

*Id.* at 64. Thus, the trustee had the duty to independently assess the needs of the minor beneficiary, and to make distributions in its discretion considering those needs. The non-beneficiary parents' financial ability was not to be considered, though information from the parents considering the minor's needs could (and should), among other sources of information, be considered. *Id.*

Further, the court in *Penix* affirmed the trial court's holding that the financial ability of the non-beneficiary parents need not be considered in determining the beneficiary's needs for purposes of distributions to be made for her support. *Id.* at 67. *But see Deweese v. Crawford*, 520 S.W.2d 522, 526 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.). In *Deweese* the court found that the non-beneficiary parents were required to show that they were unable to properly support and maintain the beneficiary children before *Crawford* was required to pay certain sums out of the Social Security benefits which he received as Trustee for the children. *Id.* at 526. Commentators have noted that *Deweese* supports the contention that a trustee may refuse to make distributions for minors until the parents were unable to provide for them. However, *Deweese* dealt with Social Security benefits rather than a traditional trust, and, as the court itself noted "[c]omplaints as to [the trustee's] abuse of discretion or failure to pay over benefits is a question of federal law for which there is a federal administrative and judicial remedy." *Id.* Therefore, *Deweese* is likely distinguishable on the facts and of limited utility when considering distributions from a discretionary trust. The court's holding in

this regard is somewhat notable, as it is clear that distributions to a minor beneficiary for the purpose of support inevitably result in incidental benefit to non-beneficiary parents. The court did not express any concern for this issue in affirming the trial court's finding, demonstrating that incidental benefits to non-beneficiary family members resulting from HEMS distributions for a beneficiary need not be considered, so long as the trustee is acting based on the needs of the beneficiary. The interests of the non-beneficiary parent must be excluded from the trustee's consideration in administering the trust solely for the benefit of the beneficiary. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 543, at 218 (2d ed. Revised 1993).

However, the court in *First Nat'l Bank of Beaumont v. Howard*, when faced with the question of whether the trustee was required to invade the corpus of the trust to provide for the beneficiaries' needs, reached a slightly different conclusion. *First Nat'l Bank v. Howard*, 149 Tex. 130, 138, 229 S.W.2d 781 (1950). In this context, where the trust document was silent, the court found that the trustee was required to consider income from any source, including the beneficiary's family. It held that the trustee must "consider all income enjoyed by the beneficiaries from any and all sources, all income enjoyed by their husbands from whatever source so long as it is available for support of the beneficiaries and their sons," and income received by the sons from any source. *Id.* at 786. Unlike in *Penix*, however, the trust instrument in *Howard* specified that the trustee make such distributions as, in the trustee's sole discretion, it determined to be "necessary or advisable." *Id.* at 783. Thus, this holding evidences the rationale that to determine

what amount of support is *necessary*, the trustee must consider the beneficiary's circumstances and determine *need*.

Of course, the trust instrument is not always silent, and often the settlor specifies what the trustee should consider regarding outside support. *Keisling v. Landrum*, 218 S.W.3d 737, 743–45 (Tex. App.—Fort Worth 2007, pet. denied). For example, in *Keisling v. Landrum*, the trust instrument indicated that distributions shall be made “if [the beneficiary’s] own income and other financial resources from sources other than from this trust are not sufficient to so maintain her in [the] standard of living” to which she was accustomed at the settlor’s death. *Id.* at 740. The court considered this language, and concluded that while the beneficiary’s other means of support should be considered by the trustee, it did not require the beneficiary to exhaust outside resources before making a distribution. *Id.* at 739–45 (explaining that beneficiaries need not exhaust all of their financial assets or resources).

## IX. FIDUCIARY DUTY ISSUES INVOLVED IN DISTRIBUTIONS

### A. Duty To Disclose Distributions

A trustee has a duty to disclose to a beneficiary. A trustee also has a duty of full disclosure of all material facts known to it that might affect the beneficiaries’ rights. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). Further, a trustee has a duty of candor. *Welder v. Green*, 985 S.W.2d 170, 175 (Tex. App.—Corpus Christi 1998, pet. denied). Regardless of the circumstances, the law provides that beneficiaries are entitled to rely on a trustee to fully disclose all relevant information. *See generally Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 788 (1938). In fact, a

trustee has a duty to account to the beneficiaries for all trust transactions, including transactions, profits, and mistakes. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996); *see also Montgomery*, 669 S.W.2d at 313. A trustee’s fiduciary duty even includes the disclosure of any matters that could possibly influence the fiduciary to act in a manner prejudicial to the principal. *Western Reserve Life Assur. Co. v. Graben*, 233 S.W.3d 360, 374 (Tex. App.—Fort Worth 2007, no pet.). The duty to disclose reflects the information a trustee is duty-bound to maintain, as he or she is required to keep records of trust property and his or her actions. *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref’d n.r.e.).

The Restatement provides:

[B]efore taking contemplated action, a trustee may wish to consult or to inform and invite comment from one or more of the beneficiaries. In doing so, except as otherwise authorized or directed by the terms of the trust, the trustee should select beneficiaries who appear reasonably to reflect the diverse beneficial interests that are likely to be affected and should avoid arbitrary discrimination among persons similarly situated with respect to the matter involved.

In matters that can be expected to affect the trust beneficiaries generally, such as decisions establishing or altering investment policy, impartiality may call for trustees to communicate--if they do so at all--with both

the trust's current beneficiary (or beneficiaries) and its primary future-interest beneficiaries. Thus, it would be ill-advised, and perhaps a breach of trust, if a trustee were to follow a regular practice of informing and consulting with the life beneficiary to the exclusion of readily available persons whose concerns and views could be fairly expected to reflect the general concerns of remainder beneficiaries.

RESTATEMENT (THIRD) OF TRUSTS, § 79.

For example, in *Shannon v. Frost Nat'l Bank*, a court of appeals found that there was a fact issue on whether a trustee breached duties by failing to inform a beneficiary that she was entitled to distributions of trust assets instead of loans from the trustee, individually, to the trust. 533 S.W.2d 389 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.). The court stated:

Here, the result of the initial failure to make a full disclosure resulted in a series of loans by Bank, as a lending institution, to itself, as trustee, with both principal and interest to be paid out of funds of the trust estate. The net result, a benefit to Bank in its role as a lending institution. Stated differently, the situation is one in which the fiduciary suggested that the trust borrow from the fiduciary, and, in making such suggestion, withheld facts of which the beneficiary was ignorant. It cannot be

said that, as a matter of law, under the facts and circumstances of this case as reflected in plaintiff's testimony, Bank did not breach its duty to deal fairly with plaintiff and to communicate to her all material facts in connection with the loan transactions which Bank, as trustee, knew.

*Id.* at 393. See also *Benedict v. Amaducci*, No. 92 Civ. 5239 (KMW), 1993 U.S. Dist. LEXIS 3556, 1993 WL 87937, at \*9 n. 10 (S.D.N.Y. Mar. 22, 1993) (trustee has duty of full disclosure regarding loan transactions).

However, the general duty to disclose to some beneficiaries may conflict with a trustee's duty of loyalty to other beneficiaries. The duty of loyalty includes a duty to maintain the confidentiality of a beneficiary's information. The Restatement provides:

The trustee is under a duty to the beneficiary not to disclose to a third person information which he has acquired as trustee where he should know that the effect of such disclosure would be detrimental to the interest of the beneficiary.

RESTATEMENT (SECOND) OF TRUSTS § 170.

The Restatement addresses the conflicting position that a trustee is in when a duty to maintain the confidentiality of a beneficiary's information abuts a duty to disclose to other beneficiaries:

Incident to the duty of loyalty, but necessarily more flexible in its application, is the trustee's duty to preserve the confidentiality and privacy of trust information from disclosure to third persons, except as required by law (e.g., rules of regulatory, supervisory, or taxing authorities) or as necessary or appropriate to proper administration of the trust. Thus, the trustee's duty of loyalty carries with it a related duty to avoid unwarranted disclosure of information acquired as trustee whenever the trustee should know that the effect of disclosure would be detrimental to possible transactions involving the trust estate or otherwise to the interests of the beneficiaries.

This duty of confidentiality ordinarily does not apply to the disclosure of trust information to beneficiaries or their authorized representatives (see duties to inform and report, §§ 82 and 83) or, in the interest of one or more trust beneficiaries, to the trustees of other trusts or the fiduciaries of fiduciary estates in which a beneficiary has an interest. Even in providing information to or on behalf of beneficiaries, however, the trustee has a duty to act with sensitivity and, insofar as practical, with due regard for considerations of relevancy and sound

administration, and for the personal concerns and privacy of the trust beneficiaries.

RESTATEMENT (THIRD) OF TRUSTS § 78.

Specifically, with regard to the duty to disclose the basis for distributions, the Restatement provides:

Conversely, the trustee's duty to keep beneficiaries reasonably informed (§ 82), together with the trustee's duty of impartiality (§ 79), entitles the beneficiaries to disclosure of the bases upon which the trustee's discretionary decisions concerning distributions have been or will be made. See Comment b. Appropriate disclosure can usually be provided in general terms that allow reasonable protection for confidential, private, or sensitive information.

RESTATEMENT (THIRD) OF TRUSTS § 50(e)(1).

When a beneficiary's information does not affect a co-beneficiary's rights, the trustee should generally maintain the information in confidence and not disclose it. However, where a beneficiary's information does impact a co-beneficiary's interest in the trust, a trustee may be in a position where a duty of loyalty requires disclosure. For example, a loan to a beneficiary may risk the loss of trust assets. Such a transaction would implicate the co-beneficiaries' rights to trust assets. In these instances, if a co-beneficiary knew of the facts, he or she would certainly have standing to seek judicial assistance in limiting the risk, i.e., forcing the trustee to

not allow the loan from trust assets. So, as a general rule, a trustee should disclose distributions to beneficiaries to other beneficiaries who have an interest in the trust. This, of course, may be altered by trust language, whether the trust is a revocable trust, etc.

Regarding the power to adjust, another commentator advises trustees as follows:

The trustee has a duty to be informed of circumstances affecting the trust. The trustee should frequently communicate with the beneficiaries about individual circumstances and the general administration of the trust. Administrative decisions regarding the availability and application of the adjustment power are key issues, and the communication with the beneficiaries should be accurate, complete, timely, and in writing.

Many states that have adopted the Uniform Principal and Income Act have also adopted a provision that requires the trustee to give notice to any beneficiaries of the proposed adjustment and then provides for a limited time in which to object. The Texas Legislature decided not to include such a provision because statutory and common law already provide adequate notice protection for beneficiaries.

Despite the fact that there is no separate statutory

mandate, trustees should educate beneficiaries about this tool and its application to their trust. Trustees should give the beneficiaries information about the process they utilize to make these discretionary decisions. Given the technical nature of discretionary decisions, trustees should use non-technical language, when possible, and they should encourage questions, so beneficiaries understand the terms and administration of their trust. Additionally, trustees should document the process.

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 204 (2014).

There is a debate in Texas regarding whether a trustee has a passive duty to disclose or an affirmative duty to disclose. In other words, does a trustee have a duty to disclose certain information only where a beneficiary asks for the information (passive duty) or a duty to affirmatively disclose certain information even if the beneficiary does not ask (affirmative duty). In 2005, the Texas Legislature codifies a provision (Texas Property Code Section 113.060) that would require some reasonable disclosure requirements, that that provision was later repealed in 2007. The 2007 legislature attempted to resurrect the common law duty to keep a beneficiary informed that existed prior to January, 1, 2006. One commentator discusses the common-law disclosure debate as follows:

Proponents of imposing an affirmative duty of disclosure



contend that Texas Supreme Court cases *Montgomery v. Kennedy* and *Huie v. DeShazo* both suggest that the Texas common law requires the affirmative duty of disclosure. However, unlike the UTC, Texas does not employ any limiting language (e.g. qualified beneficiary) in its code; therefore, trustees would be faced with the formidable task of disclosing information to every beneficiary, regardless of remoteness. Conversely, proponents of a passive duty of disclosure contend that *Montgomery v. Kennedy* and *Huie v. DeShazo* both suggest that the Texas common law requires the passive duty of disclosure, whereby a trustee's affirmative duty of disclosure only arises upon a request from a beneficiary. This contention is bolstered by not only the widely held view under section 173 of the Restatement (Second) of Trusts, but also by the San Antonio Court of Appeals in its *Shannon v. Frost National Bank* decision. In this decision, the court implied there was not a duty to disclose by stating that: “[I]t is well settled that a trustee owes a duty to give to the beneficiary upon request complete and accurate information as to the administration of the trust. Here, there was no specific request for information by

plaintiff concerning the nature of the investment of the trust funds made by Bank.” Proponents of the passive duty assert that *Shannon* clearly indicates a trustee is under no duty to disclose information to the beneficiary unless a request is made.

Frank T. Messina, *To Affirmatively Disclose Or To Passively Disclose, That Is The Texas Trustee's Question: What Duty Of Disclosure Does A Texas Trustee Owe To A Beneficiary?* 1 TEX. TECH. EST. PLAN. COM. PROP. LJ 237 (2008). See also Glenn M. Karisch, *2007 Legislative Update: Summary of Changes Affecting Probate, Guardianship and Trust Law* 8-12 (2007); William D. Pargaman, *2005 Year in Review*, 69 TEX. B.J. 43, 43-45 (2006); C. Boone Schwartzel, *A Texas Trustee's New Duty to Inform: Beware of the Creeping Uniform Trust Code*, 12 ST. B. TEX. ANN. ADVANCED EST. PLAN. STRATEGIES COURSE CH. 5.4, at 7-9 (2006); Cameron McCulloch, Jr. and Laurel Smith, *The Porridge of Disclosure to Beneficiaries: Too Hot, Too Cold, or Just Right*, 13 Tex. Tech. Est. Plan. Com. Prop. LJ 207 (Fall 2020) (advocating for a duty to disclose even without a request).

A trust may impact a trustee's duty and ability to disclose information to beneficiaries. Texas Trust Code Section 111.0035(b) state that the terms of a trust prevail over any provisions in the Trust Code. However, the Code then goes on to state that

The terms of a trust may not limit any common-law duty to keep a beneficiary of an irrevocable trust who is 25 years of age or older informed at any time during

which the beneficiary: (1) is entitled or permitted to receive distributions from the trust; or (2) would receive a distribution from the trust if the trust were terminated.

Tex. Prop. Code § 111.0035(c). Accordingly, where a trust provides that a trustee does not have to (or may not) provide information about the trust or distributions to beneficiaries, that provision would be enforceable unless the beneficiary is over 25 years of age or older and could receive a distribution currently or would receive one if the trust terminated. So, trusts may limit disclosures to certain contingent remainder beneficiaries.

Finally, in Texas, absent trust language to the contrary,<sup>1</sup> all beneficiaries are entitled to request an accounting. The Trust Code states: “A beneficiary by written demand may request the trustee to deliver to each beneficiary of the trust a written statement of accounts covering all transactions since the last accounting or since the creation of the trust, whichever is later.” 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). “‘Interest’ means any interest, whether legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible.” *Id.* at § 111.004(6). So, even

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<sup>1</sup>Texas Trust Code section 111.0035 authorizes the settlor to limit a duty to disclose or provide an accounting but only if the beneficiary was either: (1) under age twenty-five or (2) not eligible for current distribution or for a distribution if the trust were to terminate now. Further, a trustee may limit a beneficiary’s right to an accounting in a revocable trust situation. Tex. Prop. Code §111.0035.

contingent remainder beneficiaries can request an accounting (absent trust limitations).

An “interested person” may also file suit to compel an accounting, which the court may grant upon certain findings. *Id.* at § 113.151(a). “‘Interested person’ means a trustee, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust. Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.” *Id.* at § 111.004(7).

Oddly, even though the Trust Code states that beneficiary or interested person may request an accounting, it does not expressly state that a trustee has to provide one. That can be fairly assumed, however. The Trust Code states that: “If the trustee fails or refuses to deliver the statement on or before the 90th day after the date the trustee receives the demand or after a longer period ordered by a court, any beneficiary of the trust may file suit to compel the trustee to deliver the statement to all beneficiaries of the trust.” *Id.* at § 113.151(a).

If the requesting party files suit to compel an accounting, the statute provides:

The court may require the trustee to deliver a written statement of account to all beneficiaries on finding that the nature of the beneficiary’s interest in the trust or the effect of the administration of the trust on the beneficiary’s interest is sufficient to require an accounting by the trustee.

Tex. Prop. Code § 113.151(a). So, a court is not required to force a trustee to prepare an accounting and has discretion even where it makes the required findings for same. For example, where a trustee has provided regular trust statements that contain all or substantially all of the information required in the statute, a court may decide that a trustee does not have to incur the expense and hassle of repackaging that same information into a new “accounting.”

A trustee is not required to prepare an accounting to the beneficiaries of a trust “more frequently than once every 12 months unless a more frequent accounting is required by the court.” *Id.* Further, a court may award “all or part of the costs of court and all of the suing beneficiary’s reasonable and necessary attorney’s fees and costs against the trustee in the trustee’s individual capacity or in the trustee’s capacity as trustee.” *Id.*

Texas Property Code Section 113.152 provides:

A written statement of accounts shall show: (1) all trust property that has come to the trustee’s knowledge or into the trustee’s possession and that has not been previously listed or inventoried as property of the trust; (2) a complete account of receipts, *disbursements*, and other *transactions* regarding the trust property for the period covered by the account, including their source and nature, with receipts of principal and income shown separately; (3) a listing of all property being administered, with an adequate description of each

asset; (4) the cash balance on hand and the name and location of the depository where the balance is kept; and (5) all known liabilities owed by the trust.

Tex. Prop. Code § 113.152 (emphasis added). “‘Transaction’ means any act performed by a settlor, trustee, or beneficiary in relation to a trust, including the creation or termination of a trust, the investment of trust property, a breach of duty, the receipt of trust property, the receipt of income or the incurring of expense, a distribution of trust property, an entry in the books and records of the trust, and an accounting by a trustee to any person entitled to receive an accounting.” *Id.* at § 111.004(16).

Because distributions of a trust are “disbursements” and “transactions” under Section 113.152, they are properly part of a trustee’s accounting. *Tex. State Bank v. Amaro*, 74 S.W.3d 392, 2002 Tex. LEXIS 37 (Tex. 2002). Therefore, beneficiaries are entitled to discovery of distributions to other beneficiaries via an accounting demand.

#### B. Statute of Limitations Implications

A trustee should disclose distributions to the other beneficiaries so that the statute of limitations starts for any claims against the trustee. Texas courts apply a four-year statute of limitations for breach of fiduciary duty claims. Tex. Civ. Prac. & Rem. Code § 16.004(a)(5). As a general rule, a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred. *Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997). A “legal injury” is “an injury giving cause of action by reason of its being an invasion of a plaintiff’s right . . . be the

damage however slight.” *Id.* Though, generally, accrual of a cause of action is a matter of law, it can be a fact question under the appropriate circumstances. *See Ward v. Stanford*, 443 S.W.3d 334 (Tex. App.—Dallas 2014, pet. denied) (accrual was a fact question on when trustees breached duties by not pursuing a claim against the settlor).

Disclosure of the trustee’s investment decisions is very important to the application of the statute of limitations defense. The discovery rule is an exception to the legal injury rule. *Murphy*, 964 S.W.2d at 270. Under the discovery rule, an action does not accrue until the plaintiff knew or in the exercise of reasonable diligence should have known of the wrongful act and resulting injury. *Id.* The discovery rule applies in cases of fraud, fraudulent concealment, and in other cases in which the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable. *Id.*

Fraudulent concealment is also an affirmative defense to the statute of limitations. *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 749 (Tex. 1999). The party asserting fraudulent concealment has the burden to come forward with evidence raising a fact issue on each element of that defense. *See id.* A party asserting fraudulent concealment must establish an underlying wrong, and that “the defendant actually knew the plaintiff was in fact wronged, and concealed that fact to deceive the plaintiff.” *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 67 (Tex. 2011) (quoting *Earle v. Ratliff*, 998 S.W.2d 882, 888 (Tex. 1999)). Fraudulent concealment only tolls the running of limitations until the beneficiary discovers the fraud or could have discovered it with reasonable diligence. *Id.* Unlike the discovery rule, the doctrine of fraudulent concealment is fact-specific. *Id.*

Therefore, a beneficiary will not have a discovery rule or fraudulent concealment defense to the statute of limitations defense if the trustee properly and timely communicates to the beneficiary the decisions that it has made concerning distributions to beneficiaries.

### C. Duty of Impartiality

#### 1. Law On Impartiality

A trustee has a duty to treat all beneficiaries with impartiality. “The duty of impartiality is an extension of the duty of loyalty to beneficiaries but involves, in typical trust situations, unavoidably and thus permissibly conflicting duties to various beneficiaries with their competing economic interests.” RESTATEMENT (THIRD) OF TRUSTS § 79, cmt. b.

Texas law has not codified a duty of impartiality with regard to distributing the trust estate generally, but provisions found in the Uniform Principal and Income Act (Chapter 116 of the Texas Property Code) and the Uniform Prudent Investor Act (Chapter 117 of the Texas Property Code) do reference the trustee’s duty to act impartially as between beneficiaries with respect to adjustments between principal and income, and with respect to investing and managing the trust assets. Specifically, Section 116.004(b) of the Texas Trust Code (Uniform Principal and Income Act) provides as follows:

In exercising the power to adjust under Section 116.005(a) or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, 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. Prop. Code § 116.003(b). Similarly, Section 117.008 of the Texas Trust Code (Uniform Prudent Investor Act), provides:

If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.

Tex. Prop. Code § 117.008. Given the statutes' incorporation of the duty of impartiality in the above-mentioned contexts, caution dictates that a trustee administering a trust pursuant to Texas law should exercise impartiality in all aspects of trust administration, including distributions.

The Texas Trust Code adopts the common law duties that trustees owe. Texas Property Code 113.051 provides: "The trustee shall administer the trust in good faith according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust the trustee shall perform all of the duties imposed on trustees by the common law." Tex. Prop. Code § 113.051.

Texas common law does provide for a general duty of impartiality by a trustee. For example, a trustee may not be able to retain unproductive assets that favor remainder beneficiaries over income beneficiaries. In *Perfect Union Lodge No. 10 of San Antonio v. Interfirst Bank of San Antonio, N.A.*, the court held that a will created a testamentary trust and that the testator's wife was an income beneficiary. 713 S.W.2d 391, 393(Tex. App.—San Antonio 1986), *aff'd*, 748 S.W.2d 218 (Tex. 1988). The trustee refused to sell underproductive property, and the trial court and court of appeals held for the income beneficiary and ruled that the trustee erred in refusing to convert the underproductive property to productive property and violated a duty of impartiality:

Since we have held that the will creates a testamentary trust, Moursund, as trustee, has the power to sell the underproductive property under the clear provisions of § 113.110 of the Texas Trust Code. We do not interpret the provisions of 113.110 as giving the trustee discretion in determining whether to dispose of underproductive property. The very nature of a trustee's duty precludes the conclusion that he may permit the continuation of a situation which defeats the intention of the settlor by denying to the beneficiary all benefits which should result from the creation of the trust. In this case the refusal of the trustee to sell deprived Mrs. Lumpkin of all benefits of the trust and would result in a situation where the decision of the trustee could benefit only the remainderman,

Perfect Union Lodge. Stated differently, the refusal to sell clearly reflects a refusal by the trustee to deal impartially with Mrs. Lumpkin and Perfect Union Lodge.

*Id.*

The duty of impartiality requires that a trustee remain neutral in disputes that affect beneficiaries differently. Generally, a trustee owes the same fiduciary duty to a contingent beneficiary as to one with a vested interest. *In re K.K.W.*, No. 05-16-00795-CV, 2018 Tex. App. LEXIS 6539, at \*27 (Tex. App.—Dallas Aug. 20, 2018, pet. denied); *Brown v. Scherck*, 393 S.W.2d 172, 181 (Tex. Civ. App.—Corpus Christi 1965, no writ) (citing 90 C.J.S. Trust 247, at 235). In *Brown*, the court stated:

It is also true that the trustees owe a duty to protect the interest of the minor contingent beneficiaries of the trusts. The general rule is stated in 90 C.J.S., Trusts, § 247, page 235, as follows:

"Where there are several beneficiaries, the trustee owes the same fiduciary duty to all of them to protect their respective interests, without partiality or favor to some beneficiaries at the expense of the others. So a trustee owes the same fiduciary duty to a contingent beneficiary in the trust property; and a trustee is bound in the trust with an eye to the remainder interest as well as to the interest of the life tenant, and he cannot slight one interest for the benefit of the other."

The trustees herein are not required to recognize an agreement of the adult appellant beneficiaries to compel termination of the trust where the result would be the destruction of the rights and interests of the contingent minor remaindermen and where such action would be contrary to the express provisions of the will. Restatement of the Law of Trusts, Second Edition, Sections 337 and 340.

*Brown v. Scherck*, 393 S.W.2d at 181. *See also Estate of Hoskins*, 501 S.W.3d 295 (Tex. App.—Corpus Christi—Edinburg 2016, no pet.) (court held that evidence of partiality supported appointment of receiver to do accounting).

However, a trust document may provide a trustee with discretion to limit a duty of impartiality. *Moody v. Pitts*, 708 S.W.2d 930, 936 (Tex. App.—Corpus Christi 1986, no writ). For example, in *Moody*, the court stated:

It is true that a life tenant (and a trustee) has a fiduciary duty to the remaindermen not to destroy their remainders except as authorized by the terms of the will. *Maxwell v. Harrell*, 183 S.W.2d 577, 579 (Tex. Civ. App. -- Austin 1944, ref'd w.m.). However, Helen Pitts, as trustee, was expressly empowered to sell the property and consume any principal necessary to maintain her in her accustomed standard of living. Appellant had the

burden to bring forth evidence that her mother exceeded her authority. This, she has failed to do. Points of error six through ten are overruled.

*Id.* at 936.

## 2. Commentators' Views Of Impartiality

Because the Texas Trust Code and common law do not discuss the duty of impartiality in any great detail, it is helpful to review commentators' thoughts on the subject. The Uniform Trust Code states: "If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests." Un. Tr. Code 803. The comments to that section state:

The duty of impartiality is an important aspect of the duty of loyalty. This section is identical to Section 6 of the Uniform Prudent Investor Act, except that this section also applies to all aspects of trust administration and to decisions by a trustee with respect to distributions. The Prudent Investor Act is limited to duties with respect to the investment and management of trust property. The differing beneficial interests for which the trustee must act impartially include those of the current beneficiaries versus those of beneficiaries holding interests in the remainder; and among those currently eligible to receive

distributions. In fulfilling the duty to act impartially, the trustee should be particularly sensitive to allocation of receipts and disbursements between income and principal and should consider, in an appropriate case, a reallocation of income to the principal account and vice versa, if allowable under local law. For an example of such authority, see Uniform Principal and Income Act Section 104 (1997). The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes and terms of the trust. A settlor who prefers that the trustee, when making decisions, generally favor the interests of one beneficiary over those of others should provide appropriate guidance in the terms of the trust. See Restatement (Second) of Section 183 cmt. a (1959).

*Id.* at cmt.

For example, Kansas has adopted this provision in its statutes. K.S.A. 58a-803. *See also Roenne v. Miller*, 58 Kan. App. 2d 836, 475 P.3d 708 (Kan. Ct. App. 2020). In *Roenne*, the trustee was also a beneficiary, and the trust gave the trustee absolute discretion in making distributions. *Id.* After the trustee distributed all of the trust assets to himself, the court held that the trustee violated the duty of impartiality:

The district court erred by focusing only on the

uncontrolled discretion language in the trust, without inquiry into whether Brad acted in good faith in the interests of the beneficiaries. The court held that the trust instrument imposed "no limitations" on the trustee's powers. Even though the trust language gave Brad "uncontrolled discretion," it did not relieve him from his fiduciary duties as a trustee to act impartially in the interests of all the beneficiaries, rather than just himself. His fiduciary duties of loyalty and impartiality were limitations on his powers as trustee.

*Id.* at 850.

A Texas commentator states:

The trustee's duty to deal impartially with multiple trust beneficiaries applies whether the beneficiaries hold simultaneous or successive interests in the trust. The terms of the instrument may, however, give the trustee discretion to favor one beneficiary over another. In such a case, the trustee's exercise of discretion is subject to review only for abuse. In the absence of any such terms, the trustee may not create or permit the continuation of a situation that operates to the detriment or discrimination of a beneficiary. For example, one court stated that the trustee's failure to dispose of

underproductive property denied the income beneficiary her rightful benefits under the trust and resulted in undue benefit to the remaindermen. Likewise, when a trustee is also the sole lifetime beneficiary, and if the trust so provides, the trustee-beneficiary may consume the corpus of the trust in spite of any detriment to the remainder interest.

4 Texas Probate, Estate and Trust Administration § 81.21.

The Restatement provides:

(1) A trustee has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust, requiring that:

(a) in investing, protecting, and distributing the trust estate, and in other administrative functions, the trustee must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust; and

(b) in consulting and otherwise communicating with beneficiaries, the trustee must proceed in a manner that fairly reflects the diversity of their concerns and beneficial interests.

(2) If a trust is created for two or more beneficiaries or purposes in succession and if



the rights of any beneficiary or the expenditures for a charitable purpose are defined with reference to trust income, the trustee's duty of impartiality includes a duty to so invest and administer the trust, or to so account for principal and income, that the trust estate will produce income that is reasonably appropriate to the purposes of the trust and to the diverse present and future interests of its beneficiaries.

RESTATEMENT (THIRD) OF TRUSTS § 79. The Restatement explains the breadth of the duty of impartiality:

The duty of impartiality is applicable to all duties of the trustee. Thus, the requirements of this Section are important: (1) in the making or retention of investments (see § 90); (2) in the management of real property or tangible personal property held in the trust; (3) in the allocation of receipts and expenditures between principal and income accounts (see Chapter 23), especially as fiduciary discretion, or the making of adjustments (Comment i), may be involved; (4) in decisions concerning discretionary distributions to one or more beneficiaries (see § 50); and (5) in controversies among beneficiaries concerning their rights and beneficial interests.

*Id.* cmt. a.

As the Restatement emphasizes, the duty of impartiality is not synonymous with "equality" of treatment and, consistent with the terms of a trust, a trustee may favor one beneficiary over another:

It would be overly simplistic, and therefore misleading, to equate impartiality with some concept of "equality" of treatment or concern that is, to assume that the interests of all beneficiaries have the same priority and are entitled to the same weight in the trustee's balancing of those interests. . . . [In] short, it is the trustee's duty, reasonably and without personal bias, to seek to ascertain and to give effect to the rights and priorities of the various beneficiaries or purposes as expressed or implied by the terms of the trust.

...

[T]he duty of impartiality does not require an equal balancing of diverse interests but a balancing of those interests in a manner that shows due regard for--i.e., is consistent with--the beneficial interests and the terms and purposes of the trust. This includes respecting any ascertainable preferences of the settlor for some beneficiaries over others, such as the priority frequently discernible from language or circumstances for a life beneficiary (e.g., a surviving spouse or a son or daughter) over that beneficiary's

descendants or other recipients of future interests.

In sum, the duty of impartiality does not mean that beneficiaries are entitled to equal distributions. Rather, the duty of impartiality means the trustee must consider, without favoring one beneficiary over another, the ability of the trust estate to provide for all of the beneficiaries and carefully weigh the distributions to beneficiaries in light of their various interests

A trustee must consider the needs of other beneficiaries and their competing economic interests. The Restatement explains the duty of impartiality as follows:

(1) A trustee has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust, requiring that: (a) in investing, protecting, and distributing the trust estate, and in other administrative functions, the trustee must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust; and (b) in consulting and otherwise communicating with beneficiaries, the trustee must proceed in a manner that fairly reflects the diversity of

their concerns and beneficial interests.

RESTATEMENT (THIRD) OF TRUSTS § 79, cmt b, c.

Impartiality does mean that the trustee should not make decisions based on favoritism: “Impartiality does mean that a trustee’s treatment of beneficiaries or conduct in administering a trust is not to be influenced by the trustee’s personal favoritism or animosity toward individual beneficiaries, even if the latter results from antagonism that sometimes arises in the course of administration.” *Id.* Further, a trustee should not ignore certain beneficiaries due to ignorance or neglect: “Nor is it permissible for a trustee to ignore the interests of some beneficiaries merely as a result of oversight or neglect, or because a particular beneficiary has more access to the trustee or is more aggressive, or simply because the trustee is unaware of the duty stated in this Section.” *Id.*

Texas Jurisprudence states:

A trustee must act for all the beneficiaries; he or she may not properly act for only some of them. The trustee owes the same fiduciary duty to all to protect their respective interests, without partiality or favor to some at the expense of others; thus, a trustee is bound, in the absence of instructions to the contrary, to administer the trust with an eye to a remainder interest, as well as to the interest of a life tenant, and he or she cannot slight one interest for the benefit of the other. Additionally, a trustee owes the same

fiduciary duty to a contingent beneficiary as to one with a vested interest, insofar as necessary for the protection of the rights of the contingent beneficiary in the trust property. This duty of impartiality has been codified in the Uniform Prudent Investor Act, which states that if a trust has two or more beneficiaries, the trustee must act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.

TEX. JUR. 3RD, TRUSTS, § 64. *See also* RESTATEMENT § 183; BOGERT §§ 541, 612; *Commercial Nat. Bank of Nacogdoches v. Hayter*, 473 S.W.2d 561 (Tex. Civ. App. 1968, writ ref'd n.r.e.).

### 3. Distributions When There Are Multiple Beneficiaries

A trustee's duty to distribute trust assets becomes more complicated when there are multiple beneficiaries of a trust, especially those consisting of different generations and family lines. RESTATEMENT (THIRD) OF TRUSTS § 50. *See* Brink, Rhonda H., Cenatiempo, Michael J., and Moorman, R. Hal, *Where the Rubber Meets the Road: How Drafting Affects Discretion in Action*, 20<sup>th</sup> Annual Estate Planning & Probate Drafting Course at 5 (2009) ("One trust officer at this bank pointed out that most beneficiaries have an idea that there is a "fairness rule" with respect to discretionary distributions. Beneficiaries especially expect such a rule with pot trusts. The trust officer tries to educate the beneficiaries that there is no fairness standard. The exercise involves determining the settlor's intent and following it. Once the intent is established,

then a discretionary effort must be exercised to determine the relative need of each beneficiary and satisfy those needs if within the settlor's intent to do so."). The Restatement recognizes that although these scenarios must be resolved case-by-case in the context of the trust instrument, certain general inferences may be used as starting points. *Id.* For example, the Restatement provides that the beneficiary at the top of a line of descendants is favored over his or her own issue. *Id.* Where there are multiple lines of descent:

[T]here is an inference of priorities per stirpes, that is, that (i) the various lines are entitled to similar, impartial [(but not necessarily equal)] treatment, with disparities to be justified on a principled basis consistent with the trust purposes, and that, (ii) the inference of favored status within a descending line begins with the person(s) at the top (e.g., the settlor's child or the children of a deceased child).

*Id.* Although the Restatement recognizes that there should be similar treatment between multiple family lines, it does not require equal distributions.

When a trust instrument clearly demonstrates that beneficiaries may receive unequal distributions, the Trustee is not required to make equal distributions among the beneficiaries. In *Paschall v. Bank of America*, the court examined the language of the trust instrument in considering the parties' arguments regarding whether the trustee was required to administer distributions in a manner that treated the settlor's grandchildren "equally" and the

settlor's remote descendants "fairly." *Paschall v. Bank of Am., N.A.*, 260 S.W.3d 707, 709 (Tex. App.—Dallas 2008, no pet.). The trust instrument contained the following language regarding distribution of income and principal:

The Trustee shall distribute from each separate trust at any time and from time to time and at such intervals as it shall determine in its sole and absolute discretion, to or for the benefit of such grandchild, or the descendants of a grandchild, for whom such trust is held, such portion of the income and/or principal of such separate trust as it shall determine to be advisable in its sole and absolute discretion, for the care, education, maintenance, family needs, and support of said grandchild or descendants, as the case may be, considering to such extent as the Trustee deems advisable in its sole and absolute discretion, resources otherwise available to said grandchild or descendants for such purposes. Such distribution need in no way be equal among descendants of a grandchild.

*Id.* at 709. The court noted that the inclusion of such language demonstrated the settlor understood the grandchildren may receive unequal distributions and that descendants of a grandchild may not necessarily be treated equally, and ultimately affirmed summary judgment in favor of the trustee. *Id.* at 713.

The Restatement provides:

Questions about the presumed meaning of standards and the significance of beneficiaries' other resources are complicated when a trust has multiple discretionary beneficiaries, whether of the same or different generations. Difficulty of generalization through rules or preferences is aggravated by the number and interrelatedness of issues and alternative meanings to be considered, and by diversity in the terms of these discretionary powers, in the purposes and size of trusts, and in the beneficiaries' circumstances and their relationships to the settlor and to one another.

Illustrative is a trust in which the income is required to be distributed to B (usually the settlor's spouse or adult child), with discretion in the trustee to invade principal for the benefit of B and others, often a class consisting of B's or the settlor's children or descendants. A wholly discretionary variation of such a trust simply provides for discretionary distributions of income as well as principal to "any one or more of a group consisting of B and my [or B's] issue." Another example is a discretionary trust for "my children and their issue" (or, more simply, for "my descendants"), or for "X, Y, and Z and their issue." (In all of the above, the provisions for different

individuals and classes may be separately stated, sometimes by generation, with the same or different standards for each.) A somewhat different prototype involves discretionary distributions among beneficiaries of one generation (e.g., “my children”), probably with contingent provision for distributions to the issue of any deceased members of that generation. A familiar version of this is the family trust providing collectively for the young children of a deceased couple (or of a deceased parent under a grandparent’s will) until some age or other condition is satisfied.

In all of these cases, the structure and terms of the interests may suggest a priority to be accorded various individuals or classes. Complex issues of management and distribution (as well as taxation) can be eliminated or simplified if the trust directs or allows either administration as separate shares or division into separate trusts, one for each member of the first beneficiary generation. This, however, is likely to be both impractical and undesirable in a trust for the support and education of orphaned children.

Most questions arising in these various situations must

be resolved through case-by-case interpretation. Nevertheless, a few appropriate inferences and constructional preferences can be identified, and can be quite useful as starting points. Structure and context often suggest that someone is the trust’s primary beneficiary or has “favored status” (see Illustration 9, *infra*), or that a particular person (e.g., an elderly in-law or collateral relative) stands lower in the settlor’s priorities, perhaps to benefit only in the event of need or hardship. In any event:

--Relationship to the settlor is relevant, leading in the most common situations to an inference that the beneficiary at the top of a line of descendants is favored over his or her own issue, with the settlor’s spouse also so favored whether or not an ancestor of the others (e.g., settlor’s issue by prior marriage).

--Among multiple lines of descent (e.g., all of the settlor’s issue) there is an inference of priorities per stirpes, that is, that (i) the various lines are entitled to similar, impartial (see § 79, but not necessarily equal) treatment, with disparities to be justified on a principled basis consistent with the trust purposes, and that (ii) the inference of favored status within a descending line

begins with the person(s) at the top (e.g., the settlor's child or the children of a deceased child).

--The preceding inference applies to the typical family trust for the support and education of minor or youthful beneficiaries following the death of one or both of their parents, with a preference for a common standard of living and similarity of opportunity to be balanced against usually modest funding and almost inevitably different beneficiary needs, capacities, and interests.

--Because these various situations do not involve "substantially separate and independent shares" for different lines of beneficiaries (see Reporter's Notes), it is presumed that differences in benefits received by remainder beneficiaries or their ancestors during the trust period are not later to be taken into account in determining shares upon subsequent distribution, or in dividing the original trust for continuation thereafter in separate shares or trusts for separate lines of issue.

...

"Favored status" (or status as a "primary" beneficiary) does not necessarily mean that W should receive principal

payments greater than--or even equal to--the distributions made to others; nor does it mean either that the trustee may not withhold principal payments to her because of her other resources or that in considering and making distributions to H's descendants T must take account of their independent resources (see Comment g). What W's favored status does mean is that, in the absence of compelling considerations, T is to give priority to providing what she needs, if anything, to continue her lifestyle and to have appropriate care and other suitable benefits.

RESTATEMENT (THIRD) OF TRUSTS § 50(f).

Another commentator provides:

Unless a document specifically directs the trustee to favor one class of beneficiaries over another, it is challenging to accommodate competing interests within the bounds of the duty of loyalty. If the trust instrument provides a standard for unequal treatment between classes and the terms of the instrument are followed, the trustee should be comfortable with disparate treatment; drafters should remember that if the grantor wants to favor one class over another, the document must say so.

Certainly, there are several examples of trust documents that present clear and easily interpreted preferences for either the income or remainder beneficiary. Some settlors provide a clear mandate or a purpose statement. However, in many cases, the articulated standard is not sufficiently clear. If the document is silent or unclear, the trustee should turn to the standards set forth in the statutes—as noted above, the trustee must provide for the administration of the trust with the same regard for the interests of all beneficiaries. In Texas, the Uniform Principal and Income Act and the Uniform Prudent Investor Act mandate consideration of the total investment strategy, stressing short-term results for the current income beneficiaries and long-term results for the future classes of beneficiaries.

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 195 (2014).

Another commentator provides:

The trust for support may be for the benefit of several beneficiaries, or of a family, and various questions of construction as to the propriety of payments or applications may arise. It becomes a question of construction of the instrument to ascertain

whether the trustee had discretion to pay the beneficiaries unequal amounts, according to their respective needs or merits, or whether absolute equality of right among the beneficiaries was expected by the settlor.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, § 811.

In *In re Estate of Bryant*, the court of appeals affirmed a trial court's decision to terminate a trust and allow the trustee to distribute all of its assets to herself, thereby extinguishing the remainder beneficiary's rights. No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131 (Tex. App.—Amarillo Mar. 11, 2020, no pet.). The court stated:

The purpose of the Jane A. Bryant Trust is to provide for Jane's "health, education and maintenance needs." The terms of the trust direct the trustee to "give primary consideration" to Jane when administering the trust. In addition, the trust gives the trustee discretion to distribute all of the income and/or principal of the trust when necessary or appropriate to provide for the beneficiary's health, education, maintenance, and support.

The trial court heard evidence that Jane has significant medical expenses totaling over \$100,000, is unemployed, and has a terminal illness that prohibits her from working. Jane testified that she doesn't have any retirement savings and

that she has outstanding legal bills incurred in this litigation. Having sold her home, she now pays monthly rent. Jane testified that she sought a distribution from her trust to assist with these obligations. Bill maintains that Jane has “current, and significant, cash resources.” Jane testified that she had “about \$350,000 worth of cash left.”

The trial court found that “Jane’s circumstances justify the distribution of the entirety of her part of the Children[’]s Trust to her.” The trial court made this finding in light of evidence of the stated purposes of the trust; Jane’s health, maintenance, and support needs; the antagonistic relationship between Bill and Jane; Bill’s improper distribution of trust funds to himself and Leslie; and Bill’s reluctance to make distributions to Jane from her trust. Under these facts, we find no abuse of discretion in the trial court’s decision.

*Id.*

D. Trustees Of Revocable Trusts Have Limited Duties

Trustees of revocable trusts have limited duties. The general rule is that: “[T]he duties of a trustee of a revocable trust are owed exclusively to the settlor . . . the rights of non-settlor beneficiaries are generally subject to the control of the settlor. Thus, as a general rule, the trustee cannot be held to account by other beneficiaries for its

administration of a revocable trust during the settlor’s lifetime.” *In re Estate of Little*, No. 05-18-00704-CV, 2019 Tex. App. LEXIS 7355 (Tex. App.—Dallas August 20, 2019, pet. denied).

For example, in *In re Estate of Little*, a settlor of a revocable trust withdrew trust assets and deposited them into an account with rights of survivorship with one child as the beneficiary. No. 05-18-00704-CV, 2019 Tex. App. LEXIS 7355 (Tex. App.—Dallas August 20, 2019, pet. denied). His other children, who were beneficiaries of the revocable trust, sued the non-settlor co-trustee for allowing that to happen. The trial court granted summary judgment for the co-trustee, and the beneficiaries appealed. The court reviewed the co-trustee’s duties:

Furthermore, Dan, as co-trustee of a revocable trust, owed his fiduciary duty to Father while Father was alive... Dan was co-trustee of the Trust during Father’s lifetime and ceased being a trustee when Father died. There is no evidence that he misappropriated or did anything with Trust property during his tenure as trustee. The uncontroverted evidence is that, while a co-trustee, Dan also made no decisions about the expenditure of funds from the survivorship account, nor did he claim entitlement to any funds in that account. Instead, he helped Father pay his living expenses from the survivorship account as Father directed. It was not until Father died and Dan was no longer a trustee that he claimed the \$216,000 in



the account for which he was the named the surviving party. Sums remaining in a survivorship account after the death of one of the parties belong to the surviving party.

*Id.* Accordingly, the court of appeals affirmed the summary judgment for the co-trustee.

In *Moon v. Lesikar*, the court of appeals affirmed the dismissal of a case brought by a co-trustee against the settlor/co-trustee based on the removal of assets from the trust. 230 S.W.3d 800 (Tex. App.—Houston [14th Dist.] July 10, 2007, pet. denied). The court held that the co-trustee had no standing to challenge the settlor’s removal of the assets. The court cited the following precedent from other jurisdictions. *In re Malasky*, 290 A.D.2d 631, 736 N.Y.S.2d 151, 152 (N.Y. App. Div. 2002); *Hoescher v. Sandage*, 462 N.W.2d 289, 291 (Iowa Ct. App. 1990).

So, a trustee can take a settlor’s directions and make distributions without fear of other beneficiaries’ claims.

#### X. ISSUES ARISING FROM A TRUSTEE ALSO BEING A BENEFICIARY

A trust where the trustee is also a beneficiary creates multiple issues.

##### A. A Settlor Can Name A Beneficiary As A Trustee

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

- (a) The trustee must have the legal capacity to take, hold, and transfer the trust

property. If the trustee is a corporation, it must have the power to act as a trustee in this state.

- (b) Except as provided by Section 112.034, the fact that the person named as trustee is also a beneficiary does not disqualify the person from acting as trustee if he is otherwise qualified.

- (c) The settlor of a trust may be the trustee of the trust.

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

The Restatement provides: “There can be a trust in which one of the beneficiaries is also one of the trustees. The trustees hold the legal title to the trust property as joint tenants, and the beneficiaries, including the beneficiary who is also a trustee, have equitable interests the extent of which is determined by the terms of the trust.” RESTATEMENT (SECOND) OF TRUSTS, §99, 115.

##### B. Tax Issues

As stated earlier, a trust that has unascertainable standards where the trustee is also a beneficiary can have adverse tax and creditor protection issues. Therefore, the Texas Trust Code has a provision to protect against this ramification. Texas Property Code Section 113.029(b)-(e) provides:

(b) Subject to Subsection (d), and unless the terms of the trust expressly indicate that a requirement provided by this subsection does not apply: (1) a person, other than a settlor, who is a beneficiary and trustee, trustee affiliate, or discretionary power holder of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's, the trustee affiliate's, or the discretionary power holder's personal benefit may exercise the power only in accordance with an ascertainable standard relating to the trustee's, the trustee affiliate's, or the discretionary power holder's individual health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1), Internal Revenue Code of 1986; and (2) a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(c) A power the exercise of which is limited or prohibited by Subsection (b) may be exercised by a majority of the remaining trustees whose exercise of the power is not limited or prohibited by Subsection (b). If the power of all trustees is limited or prohibited by Subsection (b), the court may appoint a special fiduciary with

authority to exercise the power.

(d) Subsection (b) does not apply to:

(1) a power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined by Section 2056(b)(5) or 2523(e), Internal Revenue Code of 1986, was previously allowed; (2) any trust during any period that the trust may be revoked or amended by its settlor; or (3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c), Internal Revenue Code of 1986.

(e) In this section, "discretionary power holder" means a person who has the sole power or power shared with another person to make discretionary decisions on behalf of a trustee with respect to distributions from a trust.

Tex. Prop. Code §113.029(b)-(e). *See also Faulkner v. Kornman*, No. 10-00301, 2015 Bankr. LEXIS 3595 (Bankr. S.D. Tex. Oct. 23, 2015) (court held that trusts were spendthrift trusts under Texas law as the family trustee's distributive authority was limited to the amounts required for the beneficiaries' health, support, maintenance, and education in his accustomed manner of living, and any power given to the family trustee to make distributions to himself was limited by the definition of needs; to the extent it was not, Section 114.029(b)

applied). Note that a trust may expressly reject this statutory presumption.

### C. Conflicts of Interests

A trustee who is also a beneficiary creates the potential for a number of conflict of interest situations. For example, absent express trust authorization, a trustee cannot make a loan to himself or herself:

a) Except as provided by Subsection (b) of this section, a trustee may not lend trust funds to: (1) the trustee or an affiliate; (2) a director, officer, or employee of the trustee or an affiliate; (3) a relative of the trustee; or (4) the trustee's employer, employee, partner, or other business associate.

(b) This section does not prohibit: (1) a loan by a trustee to a beneficiary of the trust if the loan is expressly authorized or directed by the instrument or transaction establishing the trust; or (2) a deposit by a corporate trustee with itself under Section 113.057 of this Act.

Tex. Prop. Code § 113.052. *See Proctor v. White*, 172 S.W.3d 649 (Tex. App.—Eastland July 7, 2005, no pet.); *Starcrest Trust v. Berry*, 926 S.W.2d 343 (Tex. App.—Austin June 26, 1996, no writ).

Regarding the trustee who is also a beneficiary, the Restatement provides:

In many modern trust situations, the trustee (or one or more co-trustees) will be a life beneficiary or perhaps a

remainder beneficiary. In a case of this type, there will inevitably be some conflicts of interest that are approved (see § 78, Comment c(2)), implicitly at least, either by the settlor (§ 37, Comment f(1)) or through an appointment process that is authorized by the terms of the trust or a statute (§ 34, Comments c and c(1)) or that is influenced (in the case of judicial appointment) by the trust provisions (§ 34, Comment f(1)). In these circumstances there is, on the one hand, some inference of a preference for or confidence in the trustee-beneficiary but, on the other hand, a general recognition that a trustee-beneficiary's conduct is to be closely scrutinized for abuse, including abuse by less than appropriate regard for the duty of impartiality.

RESTATEMENT (THIRD) OF TRUSTS, § 79(b)(1). Further, the Restatement provides:

The common situation in which one or more of a trust's beneficiaries are selected or authorized by the settlor to serve as trustee or co-trustee inevitably presents an array of conflicts between the trustee's interests as a beneficiary and the interests of other beneficiaries; the problems presented by these (usually) implicitly authorized conflicts are most appropriately dealt with as questions of impartiality under § 79 (even if the

settlor's designation of the beneficiary-trustee may, as a matter of interpretation, suggest a "tilt" in favor of the beneficiary-trustee in the balancing of divergent interests; see *id.* Comment b(1) and more generally *id.*, Comments b and c).

*Id.* at §78(c)(2).

For example, in *Dahl v. Akins*, George Dahl was both the sole trustee and one of many beneficiaries of his deceased wife's trust. 661 S.W.2d 911, 912 (Tex. 1983). The other beneficiaries were his daughter, Gloria, and his grandchildren. *Id.* The terms of the trust provided that George (as the trustee) would use it to support his lifestyle (as a beneficiary) should other income sources be insufficient to do so, with all disbursements to other beneficiaries being at George's discretion. Gloria sought George's removal as trustee, which the trial court granted upon a jury's finding that George's hostility to the other beneficiaries was such that he would "probably be influenced adversely to [their] interest. *Id.* at 912–913.

In determining whether removal was appropriate, the court of appeals stated:

It is to be remembered that, in constituting the trust and naming [George] the initial trustee, [the settlor] provided that the trustee shall not be liable for any mistake or error in judgment, and that payments to the beneficiaries were at the sole discretion of the trustee. In this cause, there has been no finding that [George's] hostility has, in fact, affected his integrity and discretion during his

trusteeship. There is no contention on appeal that [George] violated any express trust provision with a resultant loss to the trust, converted any of the trust property to his own use, impaired the assets of the trust, or acted corruptly or dishonestly in any respect in the management of the trust.

*Dahl v. Akin*, 645 S.W.2d 506, 532 (Tex. App.—Amarillo 1982, writ granted). That is not to say that George could never be removed, but the jury made no finding as to whether George's hostility actually led to mismanagement of trust assets. *Id.* The Supreme Court affirmed. 661 S.W.2d at 912. The Court adopted the court of appeal's approach and agreed no facts demonstrated trust mismanagement. George remained trustee. *Id.* at 913.

In any event, the Texas Trust Code requires that all trustees act with good faith, and that requirement cannot be eroded by any particular terms of the trust. So, there are limits on what a trustee/beneficiary can do even with favorable trust language. For example, a trustee/beneficiary should not be allowed to denude the trust of all assets to enrich his or her personal estate at the expense of a remainder beneficiary's interest.

#### XI. TRUSTEE DISCRETION IN DIVIDING TRUST PROPERTY UPON TERMINATION

A trust may specify how a trustee is to distribute property and divide same between beneficiaries. In the absence of any specific instructions, the Texas Trust Code provides the following default discretion. Texas Property Code Section 113.027 provides:

When distributing trust property or dividing or terminating a trust, a trustee may: (1) make distributions in divided or undivided interests; (2) allocate particular assets in proportionate or disproportionate shares; (3) value the trust property for the purposes of acting under Subdivision (1) or (2); and (4) adjust the distribution, division, or termination for resulting differences in valuation.

Tex. Prop. Code § 113.027.

A trustee may have discretion in how it divides and distributes property, but that does not mean that a trustee may not abuse that discretion and breach fiduciary duties.

For example, in *In re Estate of Stewart*, siblings filed claims regarding the administration of their father's estate. No. 04-20-00103-CV, 2021 Tex. App. LEXIS 3897 (Tex. App.—San Antonio May 19, 2021, no pet. history). Among other claims, a sister claimed that her brother breached fiduciary duties as executor by distributing real property to three of the siblings, but not to her. The brother claimed that he had the right to do so under the Estates Code. The jury found that the brother breached his fiduciary duties, but found that the sister had not been harmed. The brother appealed. The court of appeals first discussed an executor's fiduciary duties to the estate's beneficiaries:

“The relationship between an executor and the estate's beneficiaries is one that gives rise to a fiduciary duty as a matter of law.” “An executor's fiduciary duty to

the estate's beneficiaries arises from the executor's status as trustee of the property of the estate.” “The executor thus holds the estate in trust for the benefit of those who have acquired a vested right to the decedent's property under the will.” “The fiduciary duties owed to the beneficiaries of an estate by an independent executor include a duty of full disclosure of all material facts known to the executor that might affect the beneficiaries' rights.” “A fiduciary also ‘owes its principal a high duty of good faith, fair dealing, honest performance, and strict accountability.’” “When an independent executor takes the oath and qualifies in that capacity, he or she assumes all duties of a fiduciary as a matter of law which, in addition to other duties, includes the duty to avoid commingling of funds.”

*Id.*

Regarding the brother's claim that the Texas Estates Code allowed him to make a non-pro rata distribution of the real property, the brother cited to section 405.0015 of the Texas Estates Code, which states:

Unless the will, if any, or a court order provides otherwise, an independent executor may, in distributing property not specifically devised that the independent executor is authorized to sell: (1) make distributions in

divided or undivided interests; (2) allocate particular assets in proportionate or disproportionate shares; (3) value the estate property for the purposes of acting under Subdivision (1) or (2); and (4) adjust the distribution, division, or termination for resulting differences in valuation.

*Id.* (citing Tex. Est. Code § 405.0015). The sister claimed that even if the brother could make a non-pro rata distribution, that he still had a duty to make disclosures to her. The brother argued as follows:

Wayne further argues that Jennifer based her breach of fiduciary claims on (1) Wayne's failure to disclose his distribution plan and his decision to deed the Goliad Property to the three brothers; (2) Wayne's failure to disclose the AEP easement to her; and (3) Wayne's failure to value the Goliad Property at \$11,250.00 per acre, which is the amount AEP paid for its easement. According to Wayne, under section 405.0015 and the will, he had the authority to determine whether and how to make non-pro rata distributions of the residuary estate, and thus to exclude Jennifer from distribution of the Goliad Property. Wayne argues neither his plan nor ultimate distribution of the Goliad Property could have affected Jennifer's rights so long as she received equal value of

the residuary estate. Thus, Wayne argues the information Jennifer claims she did not receive was not material, and his failure to disclose that information, constitutes no evidence that he failed to comply with his fiduciary obligations.

*Id.* The court disagreed with the brother, and stated:

In looking at the plain meaning of section 405.0015, it clearly grants an independent executor, unless otherwise limited, authority to make distributions in divided or undivided interests; to allocate particular assets in proportionate or disproportionate share; to value the estate property; and to adjust the distribution, division or termination for resulting differences in valuation. See Tex. Est. Code § 405.0015. However, section 405.0015 states nothing about divesting an independent executor of the fiduciary duties he owes the beneficiaries of the will. We agree with Jennifer that Wayne's interpretation would lead to an absurd result. We also agree with Jennifer that it is not a coincidence section 405.0015 became effective simultaneously with the Texas Uniform Partition of Heir's Property Act (the "Heirs Partition Act"). See Tex. Prop. Code § 23A.001 (effective Sept. 1, 2017). The

Heirs Partition Act provides a streamlined process by which heirs can either force partition in kind, or alternatively effectuate the buyout, of undivided interests in inherited property. See Tex. Prop. Code §§ 23A.001-.013. We conclude section 405.0015 merely provides an independent executor with the tools necessary to make non-pro-rata distributions and avoid the common partition litigation among heirs anticipated and addressed by the Heirs Partition Act. Thus, the typical fiduciary duties of good faith, fair dealing, and full disclosure still apply to Wayne's actions notwithstanding section 405.0015.

*Id.* The court then held that there was sufficient evidence to support the jury's finding that the brother breached his fiduciary duties to the sister by failing to disclose material facts:

As noted previously, an independent executor owes a fiduciary duty to fully disclose all material facts known to him that might affect the beneficiaries' rights. "This duty exists independently of the rules of discovery, applying even if no litigious dispute exists between the trustee and beneficiaries." Further, "[t]he existence of strained relations between the parties [does] not lessen the fiduciary's duty of full and complete disclosure." Here, there was evidence at

trial that Wayne repeatedly did not disclose material facts to Jennifer about the administration of the estate. With regard to the Goliad Property, there was evidence that he did not disclose the AEP easement offer to her or to Mark Barnes, the appraiser hired to perform the valuation on the Goliad Property for the estate. The evidence shows Wayne then applied the lower valuation found by Barnes in distributing the estate's assets while, at the same time, intentionally waiting to sell the easement until after he had deeded the property to himself and his brothers, at the exclusion of Jennifer. That is, between August and December 2017, Wayne and his brother Steven negotiated the easement purchase price from the initial offer of \$7,500 per acre to \$11,250 per acre. On December 19, 2017, after agreeing to the easement price of \$11,250 per acre but before executing the easement, Wayne deeded the Goliad Property to himself and his brothers. Wayne testified he took these actions knowing he was going to receive \$73,000 from AEP that Jennifer would not. Wayne's failure to timely disclose material facts to Jennifer affected her ability to challenge valuation of the Goliad Property. In addition to the Goliad property, Wayne admittedly did not

disclose to Jennifer the nature of the securities distributed to her. Without this information, Jennifer could not establish the fairness or completeness of the distribution to her in lieu of an in-kind share in the Goliad property. We conclude there was evidence that Wayne failed to disclose to Jennifer material facts that might have affected her rights.

*Id.* The court also held that the fact that the jury found that the sister had no damages was not dispositive because the evidence showed that the brother had a benefit from his breach of fiduciary duties: “Wayne’s repeated non-disclosures to Jennifer about the material facts relevant to her interest in the Goliad Property, as well as his decision to apply a lower valuation to Jennifer’s share of the Goliad Property and exclude her from the more lucrative offer made on the AEP easement, resulted in a benefit to himself at the exclusion of Jennifer. That is, Wayne received a larger portion of the remaining residuary estate for himself because he chose to pay Jennifer thousands of dollars an acre less for her share of the Goliad property prior to negotiating a higher price for the easement he agreed to with AEP.” *Id.* Thus, the court affirmed the jury’s finding of breach of fiduciary duty as against the brother.

That affirmance was pivotal in the case, as due to the breach finding, the court of appeals affirmed: the trial court’s award of the sister’s attorney’s fees against the brother, the trial court’s refusal to allow the brother’s fees to be paid by the estate, the trial court’s order to require the brother to pay back the money from the estate used to pay his attorneys, and the trial court’s refusal to discharge the executor.

## XII. POWER TO ALLOW BENEFICIARY TO RESIDE IN TRUST PROPERTY OR PAY FUNERAL EXPENSES

The Texas Trust Code gives a trustee discretion to allow a beneficiary to reside in trust owned real property and to pay for a beneficiary’s funeral expenses. Texas Property Code Section 113.022 provides:

A trustee of a trust that is not a charitable remainder unitrust, annuity trust, or pooled income fund that is intended to qualify for a federal tax deduction under Section 664, Internal Revenue Code, after giving consideration to the probable intention of the settlor and finding that the trustee’s action would be consistent with that probable intention, may: (1) permit real estate held in trust to be occupied by a beneficiary who is currently eligible to receive distributions from the trust estate; (2) if reasonably necessary for the maintenance of a beneficiary who is currently eligible to receive distributions from the trust estate, invest trust funds in real property to be used for a home by the beneficiary; and (3) in the trustee’s discretion, pay funeral expenses of a beneficiary who at the time of the beneficiary’s death was eligible to receive distributions from the trust estate.

Tex. Prop. Code § 113.022.



The Restatement agrees with this approach and provides:

A question may arise, following the death of the beneficiary of a discretionary interest, whether a support or other standard authorizes or requires the trustee to pay the beneficiary's funeral and last-illness expenses and debts incurred by the beneficiary for support. Ultimately, the question is one of interpretation when the terms of the trust are unclear, with the presumption being that the trustee has discretion to pay these debts and expenses.

A duty to do so is presumed only to the extent that (i) probate estate, revocable trust, and other assets available for these purposes are insufficient or (ii) the trustee, during the beneficiary's lifetime, either agreed to make payment or unreasonably delayed in responding to a claim by the beneficiary for which the terms of the trust would have required payment while the beneficiary was alive. (A deceased beneficiary's estate may also recover distributions the trustee had a duty to make but did not make during the beneficiary's lifetime.)

RESTATEMENT (THIRD) OF TRUSTS, § 50.

### XIII. DISTRIBUTIONS TO MINOR OR INCAPACITATED BENEFICIARIES

The Texas Trust Code provides that a trustee has discretion on how to provide distributions for minors and incapacitated persons. Texas Property Code Section 113.021 provides:

(a) A trustee may make a distribution required or permitted to be made to any beneficiary in any of the following ways when the beneficiary is a minor or a person who in the judgment of the trustee is incapacitated by reason of legal incapacity or physical or mental illness or infirmity: (1) to the beneficiary directly; (2) to the guardian of the beneficiary's person or estate; (3) by utilizing the distribution, without the interposition of a guardian, for the health, support, maintenance, or education of the beneficiary; (4) to a custodian for the minor beneficiary under the Texas Uniform Transfers to Minors Act (Chapter 141) or a uniform gifts or transfers to minors act of another state; (5) by reimbursing the person who is actually taking care of the beneficiary, even though the person is not the legal guardian, for expenditures made by the person for the benefit of the beneficiary; or (6) by managing the distribution as a separate fund on the beneficiary's behalf, subject to the beneficiary's

continuing right to withdraw the distribution.

(b) The written receipts of persons receiving distributions under Subsection (a) of this section are full and complete acquittances to the trustee.

Tex. Prop. Code § 113.021.

#### XIV. ISSUES INVOLVING INCOME AND PRINCIPAL

Texas adopted the Uniform Principal and Income Act in 2003. Acts 2003, 78th Leg., ch. 659 (H.B. 2241), § 1, effective January 1, 2004. One aspect of this Act is to give a trustee discretion to use a power to adjust, the right to distribute principal to an income beneficiary due to the gains in value to the trust's assets. A trustee uses this discretion as a fiduciary and must be careful to do so impartially.

Section 116.004 provides:

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of Subchapters B and C, a fiduciary: (1) shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter; (2) may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different

from a result required or permitted by this chapter; (3) shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and (4) shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under Section 116.005(a) or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, 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. Prop. Code § 116.004.

Regarding a power to adjust, the Texas Trust Code provides:

a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in Section 116.004(a), that the trustee is unable to comply with Section 116.004(b). The power to adjust conferred by this subsection includes the power to allocate all or part of a capital gain to trust income.

(b) In deciding whether and to what extent to exercise the power conferred by Subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant: (1) the nature, purpose, and expected duration of the trust; (2) the intent of the settlor; (3) the identity and circumstances of the beneficiaries; (4) the needs for liquidity, regularity of income, and preservation and appreciation of capital; (5) the assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property,

or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor; (6) the net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available; (7) whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income; (8) the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and (9) the anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment: (1) that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion; (2) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets; (3) from any amount that is

permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside; (4) if possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment; (5) if possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment; (6) if the trustee is a beneficiary of the trust; or (7) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

(d) If Subsection (c)(4), (5), (6), or (7) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by Subsection (a) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in Subsections (c)(1)-(5) or Subsection (c)(7) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in Subsection (c). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by Subsection (a).

Tex. Prop. Code § 116.005.

As one commentator describes:

In simple terms, if the income component of a portfolio's total return is too small or too large because of investment decisions made by the trustee under the Prudent Investor

Rule, § 116.005 authorizes the trustee to make adjustments between principal and income that may be necessary. When the distribution standard states "distribute all income," what was previously a matter of discretion only as it related to investment decisions now requires fiduciary discretion in determining the amount of the distribution as well.

Some trustees assume that you almost never need to utilize the power; however, every trustee has an affirmative duty to administer every trust in good faith, and part of that duty is to consider whether the adjustment power will apply to a particular trust. Therefore, every irrevocable trust must be reviewed at least once to determine if the power should be used going forward. Many trusts will require annual review. This analysis may be boiled down to three basic questions: (1) Is the adjustment power available? (2) If available, should an adjustment be made to income this year? (3) What issues should the trustee consider?

*Amann*, 6 Tex. Tech. Plan. Com. Prop. LJ 181, 196.

Regarding the first question, the commentator states:

Whether the adjustment power is available is a two-

part test. First, the trustee must determine if the Uniform Principal and Income Act is the governing law of the trust. Second, the trustee must be certain the document does not specifically prohibit use of the adjustment power. Even if the Principal and Income Act applies to the trust, the trust document may contain specific language prohibiting its application; if so, that specific language will govern the trust. Or the trust could have special circumstances that prohibit the trustee from using the adjustment power. For example, even when the Uniform Principal and Income Act applies to a trust, the adjustment power will not be available if any of the following is true:

(a) Language in the trust instrument prohibits the trustee from investing assets as a prudent investor...

(b) The trust describes the amount that shall or may be distributed by referring to a specific amount, and does not refer to the income of the trust...

(c) If a trust's distribution provision is a single discretionary standard that applies to both income and principal, the adjustment power does not apply, but it is important that the standards be identical. Beneficiaries with access to

both principal and income, but under different circumstances, may be eligible for adjustment...

(d) A non-independent cotrustee is required by the document to participate in the adjustment power decision because no related party, subordinate party, or beneficiary may participate in the decision. If such a cotrustee is required, the adjustment power may not be used.

(e) The trust has charitable and noncharitable beneficiaries and is taking a charitable set aside for capital gains.

Engaging in this analysis, the trustee first determines if the statute governs the trust and whether the adjustment power is available. If the governing law does not include the Uniform Principal and Income Act, or if any of the above listed circumstances exist, then the trustee's analysis is complete and the power is not available. All that remains for the trustee to do is to make certain that analysis is documented in the file and coded to the trust accounting system. If the use of the adjustment power is truly prohibited by the terms of an irrevocable document, that single review is enough. If the prohibition of use of the adjustment power is due to

other circumstances, such as identity of a cotrustee or simply that the current income beneficiary does not need or want any income, a trustee should have a mechanism to trigger a new review when circumstances change. This can be as simple as a tickler in the software system, or it may be done in conjunction with each year's annual review.

*Id.* Regarding the second question, the commentator states:

If the Uniform Principal Act is the governing law of a trust and under the current circumstances of the trust, the adjustment power is available, then the trustee is must determine whether to make an adjustment. Even in a case where the adjustment power is available to the trustee, many factors, such as the circumstances and liquidity needs of the income beneficiary, the circumstances of the remainder beneficiaries, the size of the trust, the current asset allocation, the income being produced now, and others, will influence the trustee's decision as to whether to exercise the power. The application of the Prudent Investor Rule is fundamental to the adjustment power. The trustee must follow the Prudent Investor Rule when exercising the adjustment power. For example, if, in

applying the Prudent Investor Rule standard, the trustee decides that the investment objectives of the trust can be met by an asset allocation that produces enough traditional income to provide the income beneficiary, with the level of benefit that beneficiary is entitled to under the trust, then no adjustment will need to be made. However, if the trustee applies the Prudent Investor Rule standard and decides on an investment strategy that results in traditional income that does not provide the income beneficiary with the appropriate benefit, then the trustee may make the adjustment.

*Id.* Regarding the third question, the commentator states:

Making this adjustment analysis is a valuable opportunity for the trustee to make a wholesale review of all of the circumstances of the trust. Most corporate trustees have created a form comprised of relevant questions; the trust officer completes the form and submits it to a trust committee to aid in the decision. The form's details are less important than ensuring a detailed investigation. Crucial questions to include in the investigation are:

. What is the purpose of the trust, and what is the primary

intent of the settlor? What is the expected duration of the trust? What are the names, ages, and any special circumstances of the beneficiaries?

. What are the liquidity needs? Reviewing past expenditures is important, but the trustee should also consider the foreseeable future—including education, health, age of retirement, and other assets that may be coming to the beneficiaries.

. Does the document allow a trustee to invade principal? Does the document allow for the accumulation of income?

. How are the assets invested, including non-financial assets of the trust such as oil and gas, timber, rental property, and closely held businesses?

. How will the other provisions of the Uniform Principal and Income Act affect the net amount allocated to income from oil and gas, timber, and fees?

. What effect would an adjustment to income have on the tax situation of the trust and the beneficiaries?

*Id.*

If an adjustment can be made, the commentator provides the following guidance on how much it should be:

After considering the factors discussed above, the trustee

must exercise discretion when deciding whether to adjust between principal and income. The adjustment amount, which should be reconsidered every year, will likely differ for various trusts administered by a trustee. A primary concern for the trustee will be the historical returns on the investments in this trust. After the trustee considers the actual returns and the appropriate level of beneficial enjoyment, if there is a difference between those amounts, the trustee may make an adjustment between principal and income.

....

It is important to note that there is no single solution. A prudent trustee must consider and address each set of circumstances. However, there is a constant formula for avoiding mistakes—that the trustee establishes prudent policies, follows those policies scrupulously, obtains thoughtful advice, and documents the process in every case. In a corporate trust department, the various forms that gather information specific to the particular account, calculations (some institutions have devised software to perform these), a recommendation by the trust officer, and review and approval by a trust committee usually accomplish the procedure described above.

*Id.*

Courts have some control over a trustee's discretion in using a power to adjust:

(a) The court may not order a trustee to change a decision to exercise or not to exercise a discretionary power conferred by Section 116.005 of this chapter unless the court determines that the decision was an abuse of the trustee's discretion. A trustee's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.

(b) The decisions to which Subsection (a) applies include: (1) a decision under Section 116.005(a) as to whether and to what extent an amount should be transferred from principal to income or from income to principal; and (2) a decision regarding the factors that are relevant to the trust and its beneficiaries, the extent to which the factors are relevant, and the weight, if any, to be given to those factors in deciding whether and to what extent to exercise the discretionary power conferred by Section 116.005(a).

(c) If the court determines that a trustee has abused the trustee's discretion, the court may place the income and remainder beneficiaries in the



positions they would have occupied if the discretion had not been abused, according to the following rules: (1) to the extent that the abuse of discretion has resulted in no distribution to a beneficiary or in a distribution that is too small, the court shall order the trustee to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position; (2) to the extent that the abuse of discretion has resulted in a distribution to a beneficiary which is too large, the court shall place the beneficiaries, the trust, or both, in whole or in part, in their appropriate positions by ordering the trustee to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was too large or ordering that beneficiary to return some or all of the distribution to the trust; and (3) to the extent that the court is unable, after applying Subdivisions (1) and (2), to place the beneficiaries, the trust, or both, in the positions they would have occupied if the discretion had not been abused, the court may order the trustee to pay an appropriate amount from its own funds to one or more of the beneficiaries or the trust or both.

(d) If the trustee of a trust reasonably believes that one or more beneficiaries of such trust will object to the manner in which the trustee intends to exercise or not exercise a discretionary power conferred by Section 116.005, the trustee may petition the court having jurisdiction over the trust, and the court shall determine whether the proposed exercise or nonexercise by the trustee of such discretionary power will result in an abuse of the trustee's discretion. The trustee shall state in such petition the basis for its belief that a beneficiary would object. The failure or refusal of a beneficiary to sign a waiver or release is not reasonable grounds for a trustee to believe the beneficiary will object. The court may appoint one or more guardians ad litem or attorneys ad litem pursuant to Section 115.014. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the trustee relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or

nonexercise has the burden of establishing that it will result in an abuse of discretion. The trustee shall advance from the trust principal all costs incident to the judicial determination, including the reasonable attorney's fees and costs of the trustee, any beneficiary or beneficiaries who are parties to the action and who retain counsel, any guardian ad litem, and any attorney ad litem. At the conclusion of the proceeding, the court may award costs and reasonable and necessary attorney's fees as provided in Section 114.064, including, if the court considers it appropriate, awarding part or all of such costs against the trust principal or income, awarding part or all of such costs against one or more beneficiaries or such beneficiary's or beneficiaries' share of the trust, or awarding part or all of such costs against the trustee in the trustee's individual capacity, if the court determines that the trustee's exercise or nonexercise of discretionary power would have resulted in an abuse of discretion or that the trustee did not have reasonable grounds for believing one or more beneficiaries would object to the proposed exercise or nonexercise of the discretionary power.

Tex. Prop. Code § 116.006.

#### XV. PRUDENT INVESTOR ACT ISSUES

The Texas Legislature (along with 48 other states) adopted the Uniform Prudent Investor Act effective January 1, 2004, and the Texas Trust Code. Subject to Chapter 117 (The Uniform Prudent Investor Act), a trustee may manage trust property and invest and reinvest in property of any character on the conditions and for the lengths of time as the trustee considers proper. Tex. Prop. Code Ann. § 113.006. Chapter 117 limits this rather broad grant of authority. It provides that a trustee who invests and manages trust assets owes a duty to the beneficiaries to comply with the prudent investor rule. Tex. Prop. Code Ann. § 117.003(a). A trustee should invest and manage trust assets considering, among other things, the trust's distribution requirements. *Id.* Under the statute, the prudent investor rule provides:

(a) A trustee shall 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.

(b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries: (1) general economic conditions; (2) the possible effect of inflation or deflation; (3) the expected tax consequences of investment decisions or strategies; (4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property; (5) the expected total return from income and the appreciation of capital; (6) other resources of the beneficiaries; (7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and (8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) Except as otherwise provided by and subject to this subtitle, a trustee may invest in any kind of property or type of investment consistent with the standards of this chapter.

(f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

Tex. Prop. Code Ann. § 117.004; *see also Barrientos v. Nava*, 94 S.W.3d 270, 282 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

The statute provides that a trustee has a strict duty of loyalty: "A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries." Tex. Prop. Code Ann. § 117.007. Further, the statute discusses the duty of impartiality as it applies to investing and managing assets: "If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries." *Id.* at § 117.008.

So, a trustee should consider a trust's distribution standards in deciding how to invest and manage trust's assets and should act impartially regarding same. This is particularly important for trust's that have income beneficiaries and remainder beneficiaries. A trustee should not invest in assets that do not generate any income, but generate growth, and that solely benefit the remainder beneficiaries' interests. Similarly, a trustee should not solely invest in income generating assets that favor income beneficiaries but that make the trust's assets decrease in value. Of course, as described above, where a trustee as the power to adjust, these issues may be resolved in that manner.

The trustee has a duty as soon as its takes control over the trust's assets: "Within a

reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make 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 with the requirements of this chapter.” Tex. Prop. Code Ann. § 117.006. *Langford v. Shamburger*, 417 S.W.2d 438, 444-45 (Tex. Civ. App.—Fort Worth 1967, writ ref’d n.r.e.) (the trustee should “put trust funds to productive use and the failure to do so within a reasonable period of time can render the trustee personally chargeable with interest.”). A trustee can incur liability for not timely managing assets. *See, e.g., Fifth Third Bank v. Firststar Bank, N.A.*, 2006 Ohio 4506 (Ohio App. 1st Div. 2006) (trustee’s plan to liquidate stock over twelve month period was too long); *Williams v. JPMorgan & Co. Inc.*, 199 F.Supp.2d 189 (S.D.N.Y. 2002) (trustee liquidated assets due to initial concern and invested in municipal bonds for thirty years).

“The recurring theme provided in case law is that in the absence of specific direction in the trust instrument, a trustee’s ‘reasonable determination’ depends on the actual investment plan implemented and carried out by the trustee in light of the needs of the particular beneficiaries and the particular trust portfolio involved.” Elliot & Bennett, *Closely Held Business Interests and the Trustee’s Duty To Diversify*, TRUSTS & ESTATES, trustsandestates.com (April 2009). “This requires the trustee to develop an investment strategy tailored to the factual circumstances surrounding the trust’s purpose and to evaluate the income needs of the beneficiaries. The failure to communicate with the beneficiaries or exercise any discretion at all potentially subjects the trustee to liability for failure to diversify.” *Id.* The first and most important

step is determining the needs of the beneficiaries. *See First Alabama Bank of Huntsville, N.A. v. Spragins*, 515 So.2d 962 (Ala. 1987).

The Act does not require diversification in all circumstances. Rather, “A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.” Tex. Prop. Code Ann. § 117.005. The notes to Section 117.005 of the Texas Property Code state that prudent investing ordinarily requires diversification. Tex. Prop. Code Ann. § 117.005, cmt. “Circumstances can, however, overcome the duty to diversify. For example, if a tax-sensitive trust owns an underdiversified block of low-basis securities, the tax costs of recognizing the gain may outweigh the advantages of diversifying the holding. The wish to retain a family business is another situation in which the purposes of the trust sometimes override the conventional duty to diversify.” *Id. See also In re Rowe*, 712 N.Y.S2d 662 (N.Y. App. Div. 2000) (tax consequences); RESTATEMENT (THIRD) TRUSTS, § 227 (1992). The Restatement provides similar language:

[T]he trustee’s decision to retain or dispose of certain assets may properly be influenced, even without trust terms expressly bearing on the decision, by the property’s special relationship to some objective of the settlor that may be inferred from the circumstances, or by some special interest or value the property may have as a part of the trust estate ... Examples of such property might be land used in a

family farming operation, the assets or shares of a family business, or stockholdings that represent or influence control of a closely or publically held corporation.

RESTATEMENT (THIRD) TRUSTS, § 92 (1992).

These examples are not the only circumstances and are not intended to be all-inclusive. Other circumstances may include: personal property with a special attachment by the settlor or beneficiaries; maintaining a farm or ranch property; maintaining residential or vacation property; life insurance policies; stock in a company where the settlor had long-term employment or other special relationship; commercial real property where the settlor had long-term special relationship; special purpose trusts; and assets that are difficult to sell. Trent S. Kiziah, *The Trustee's Duty to Diversify: An Examination of The Developing Caselaw*, 36 ACTEC L. J. 357, 370-78 (2010).

#### XVI. TRUST LOANS AS DISTRIBUTIONS

Because a loan to a beneficiary is inherently different from a loan to a third party, a trustee should consider whether the loan is more akin to a distribution. “In a discretionary support trust the trustee may be held to have power to borrow money and pledge the credit of the trust.” BOGERT’S THE LAW OF TRUSTS AND TRUSTEES, § 811. The Restatement provides:

Sometimes a beneficiary requests funds for a purpose that falls within the reasonable discretion of the trustee but which the applicable standard would not require the trustee to furnish. If the trustee is

reluctant for some reason to make the requested distribution, and particularly if the trustee’s concern is one of impartiality, the trustee has discretion to make a loan or advance to the beneficiary. The loan need not qualify as a prudent investment under § 90. RESTATEMENT THIRD, TRUSTS (Prudent Investor Rule) § 227. It is a form of discretionary benefit, and may be made at a market rate of interest or at low or no interest; and funds may be advanced with recourse only against the beneficiary’s interest, without personal liability. *See also* Comment f, final paragraph.

RESTATEMENT (THIRD) TRUSTS, § 50, cmt. d(6).

For example, *In re Anne Hamilton Killian Trust for Benefit of Hunter*, 519 N.W.2d 409, 411 (Iowa Ct. App. 1994), the court affirmed a trustee’s loan to a beneficiary for home repair where the trust allowed distributions for the beneficiary’s lifestyle. The court stated:

Based on the language used in the trust itself, the trustee has broad discretion in using the funds to support and maintain the beneficiaries. The intent to maintain a certain lifestyle and to provide housing is clear. We conclude from the language creating the trust the trustee could have used all of the income and whatever principal was needed for these purposes. We do not

find repairs to a beneficiary's home outside the uses for which the trustee was directed to use the trust. The trustee made the discretionary decision not to use the income and principal but rather to make the loans. This approach could accomplish both the objectives of providing for the immediate beneficiary yet preserving the trust corpus for future beneficiaries. Applying the prudent person standard to the trustee's actions, however, we agree with the district court the loans should have been secured. We affirm the court's decision requiring the trustee to secure the loans before approval is given for the annual reports. This equitable remedy meets the needs of the interested parties without being excessively burdensome.

*Id.* at 413-14.

Some statutes expressly state that trustees can make loans to beneficiaries on less than commercially reasonable terms. For example, North Carolina General Statute § 36C-8-816(18) permits a trustee to “[m]ake loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances . . . .” The comments to the statute clarify that “[t]he determination of what is fair and reasonable must be made in light of the fiduciary duties of the trustee and purposes of the trust.” *Id.* (comment to paragraphs 18 and 19). In addition, the comments recognize that “[f]requently, a trustee will make loans to a

beneficiary which might be considered less than prudent in an ordinary commercial sense although of great benefit to the beneficiary . . . .” *Id.* But, a court can still find that a trustee breaches a fiduciary duty by making an unreasonable loan to a beneficiary depending on the facts and circumstances of the case. *Ballard v. Combis*, No. 16-2057, 759 Fed. Appx. 152, 2019 U.S. App. LEXIS 526, n. 6 (4th Cir. Jan. 8, 2019).

Further, a trustee may treat a defaulted loan as a distribution if the trust language so allows. For example, in *Sommer v. Garrett*, a trustee loaned an amount from the trust to a beneficiary that equated to the beneficiary's interest in the trust. No. A-1-CA-35753, 2018 N.M. App. Unpub. LEXIS 193 (Ct. App. N.M. June 28, 2018). When the beneficiary defaulted, the trustee treated the loan as a distribution and informed the beneficiary that he no longer had any interest in the trust. Then beneficiary challenged that decision and argued that the loan was improper and that he was still a beneficiary of the trust.

The trust stated: “Trustee, in . . . Trustee's absolute discretion may supplement same out of principal of each beneficiary's Trust to such extent and in such manner as . . . Trustee deems necessary or appropriate for such purposes. Distribution of the entire principal of each beneficiary's Trust is authorized if . . . Trustee determines such distribution to be in the best interest of the beneficiary thereof in accordance with the foregoing standard.” *Id.* The court held that this provision allowed the trustee to make a loan to the beneficiary. The court also held that the Restatement did not specifically prohibit a loan from being treated as a distribution if the loan is not repaid in the manner agreed upon. *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 255). The court affirmed the trustee's actions.

Accordingly, depending on the trust language and other factors, a trustee may make a loan to a beneficiary on less than commercially reasonable terms and, if a default occurs, may treat the loan as a distribution.

Potentially, a loan to a beneficiary (as opposed to an outright distribution) may be a method to be fair to other beneficiaries. The Restatement (Third) of Trusts provides an example where a loan to a beneficiary may be a good way of ensuring impartiality between beneficiaries:

M and F died in a plane crash while returning from a business trip together. Their wills (or revocable trusts) create a single trust for the support, health, care, and education of their three children, and also for the family of any child who might thereafter die before the trust terminates; termination is to occur as soon as no living child is under the age of 24. The concept of impartiality described in the paragraph preceding these Illustrations applies. (See also Comment e on the possible relevance of a child's independent means.)

Difficult problems of judgment may be presented to the trustee in Illustration 14. These are exemplified by differences in the duration and costs of education sought by various beneficiaries; or a child may make a reasonable request for assistance in acquiring a home, or in beginning a business or

profession, while the youngest child is still under age. Although the trustee may lack authority to charge these differences in educational or other benefits against different distributive shares on termination, the trustee does have discretion—instead of possibly denying an appealing but troubling request—to make loans or advances from the trust estate for all or part of the requested amount (see final paragraph of Comment d), with a lien or right of offset against the ultimate distributive share of the beneficiary or his or her issue. The trustee may also contribute suitably to the common expenses of the family of the guardian or other person by whom the children are being raised, without itemizing or directly applying funds for the beneficiaries. To the extent safely consistent with the size of the trust fund and the probable future needs of the beneficiaries, the trustee may assist those other family members financially when to do so would be in the overall best interest of the beneficiaries. In short, in the family trust in Illustration 14, the trustee has quite flexible discretion to carry out the probable purposes of the trust within a general duty of impartiality of the type described above.

RESTATEMENT (THIRD) OF TRUSTS § 104, Comment F, Illustration 14.

## XVII. SPENDTHRIFT TRUST ISSUES

Under Texas law, spendthrift trusts are trusts with language prohibiting the voluntary or involuntary alienation of the beneficial interest. *Texas Commerce Bank Nat. Ass'n v. United States*, 908 F. Supp. 453, 457 (S.D. Tex. 1995) (applying Texas law). A spendthrift trust protects the beneficiary from his creditors by expressly forbidding alienation of the beneficiary's interest in the trust. *Id.* Spendthrift trusts are valid in Texas. Tex. Prop. Code Ann. § 112.035(a); *Texas Commerce Bank*, 908 F. Supp. at 457. "Where it appears from the terms of the instrument creating the trust that it was the donor's or testator's intention to create a trust estate immune from liability for the debts of the beneficiary and to prohibit its alienation by him during the term of the trust, a spendthrift trust is created, and the intentions of the donor or testator will be enforced by the courts of this State." *First Bank & Trust v. Goss*, 533 S.W.2d 93, 95 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); *see also Long v. Long*, 252 S.W.2d 235, 247 (Tex. Civ. App.—Texarkana, 1952, writ ref'd n.r.e.). "Spendthrift and similar protective trusts are not sustained out of consideration for the beneficiary; their justification is found in the right of the settlor to control his or her bounty and secure its application according to his or her pleasure." *Texas Commerce Bank*, 908 F. Supp. at 457; *see also Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317, 321 (Tex. App.—Dallas 1997, writ denied).

Although beneficial interests in trusts are generally assignable, attempts to assign such interests are invalid when they are subject to a spendthrift provision in the trust. *Faulkner v. Bost*, 137 S.W.3d 254, 260 (Tex. App.—

Tyler 2004, no pet.). Neither the corpus, the accrued income which has not been paid to the beneficiary or the future income to be paid to a beneficiary of a spendthrift trust are subject to the claims of the creditors of the beneficiary while those amounts are in the hands of the trustee. *First Bank & Trust v. Goss*, 533 S.W.2d 93, 95 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

For example, in *In re BancorpSouth Bank*, the court of appeals granted mandamus relief to order a trial court to reverse its order requiring a trustee to make mandatory and discretionary distributions to a beneficiary's spouse. No. 05-14-00294-CV, 2014 Tex. App. LEXIS 4052 (Tex. App.—Dallas Apr. 14, 2014, orig. proceeding). A trustee should take into consideration a beneficiary's debts when making distributions:

Another example involves the negative side of the resources issue: the liabilities of the beneficiary. Payments to an insolvent beneficiary, even if literally conforming to the language of the discretionary standard, might fail to achieve the settlor's purposes or run counter to the trustee's duty of impartiality. The trustee's duty may turn on the identity of an attaching creditor, such as whether the creditor is a person (e.g., a minor child) whose needs the settlor would normally expect to be met, albeit indirectly, by distributions to the beneficiary.

RESTATEMENT (THIRD) TRUSTS, § 50.



## XVIII. CO-TRUSTEE ISSUES

### A. Co-Trustees Should Exercise Their Duties Jointly

Co-trustees each owe fiduciary duties, but they should exercise their duties jointly, as a unit. So, one co-trustee should not take any action without the consent of the other co-trustees. *Shellberg v. Shellberg*, 459 S.W.2d 465, 470 (Civ. App.—Fort Worth 1970, ref. n.r.e.) (“The trust instrument conveyed the property to two trustees and provided that their powers were joint; the management, control and operation of the trust was to be by the joint action of the two trustees.”). For example, if a trust calls for two co-trustees, it cannot operate with just one. *Id.*

One commentator provides:

The powers of trustees of a private trust, whether they are imperative or discretionary, personal or attached to the office, are held jointly, in the absence of statute or contrary direction in the trust instrument. The trustees are regarded as a unit. They are joint tenants of realty in the usual case. They hold their powers as a group so that their authority can be exercised only by the action of all the trustees. “When the administration of a trust is vested in co-trustees, they all form but one collective trustee.”

...

If one trustee attempts to exercise a joint power, or unjustifiably refuses to join with his co-trustees in

exercising such a power, the court will often remove him. However, the court may decree that he act in a specified way and thus secure the affirmative use of the power. The powers of co-trustees are deemed to be joint and exercisable only by united action because courts believe such was the intent of the settlor. One who appoints several trustees to manage a trust is deemed to express a desire to have the benefit of the wisdom and skill of all in every act of importance under the trust. Since the rule is one based on the settlor’s intent, a provision in the instrument varying the usual result is obviously valid. A settlor may give a majority or any other fraction of the whole group power to do a given act, for example, to sell land or to make investments. The majority so empowered must act in the interests of all the beneficiaries or be subject to control of the court at the instance of the minority.

BOGERT’S THE LAW OF TRUSTS AND TRUSTEES, TRUSTEE’S POWERS IN GENERAL, § 554. *See also id.* at § 744 (“In the absence of provision otherwise made by court order, statute or settlor, the powers of the trustee are joint and must be exercised as a group. The power to make a contract of sale and a deed of trust property, therefore, must be employed by the trustees acting together.”).

For example, in *Conte v. Conte*, the court of appeals affirmed a trial court’s order denying a co-trustee’s request for reimbursement for attorney’s fees expended

in connection with a declaratory judgment action brought by another co-trustee. 56 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The court noted that the trust expressly provided that “any decision acted upon shall require unanimous support by all co-trustees then serving,” and “[c]learly, Joseph Jr.’s decision to employ counsel to defend against his co-trustee’s declaratory judgment action was not the subject of unanimous support by all co-trustees.” *Id.* Thus, he was not entitled to reimbursement from the trust for his attorneys’ fees, despite the trust’s provision that “[e]very trustee shall be reimbursed from the trust for the reasonable costs and expenses incurred in connection with such trustee’s duties.” *Id.* In a footnote, the court also noted that the other co-trustee had paid for her attorneys from the trust without the consent of the other co-trustee and noted that this was an issue that the successor trustee or beneficiary could raise in a later proceeding. *Id.* See also *Stone v. King*, No. 13-98-022-CV, 2000 Tex. App. LEXIS 8070, 2000 WL 35729200 (Tex. App.—Corpus Christi 2000, pet. denied) (co-trustee had no authority to pay funds to third party without consent of co-trustee or to pay his attorneys for defense of claims).

## B. TRUST MANAGEMENT BY CO-TRUSTEES

### 1. Decisions By Co-Trustees

Co-trustees are obligated to manage the trust together. At common-law, the co-trustees had to act with unanimity: “The traditional rule, in the case of private trusts, was that if there were two or more trustees, all had to concur in the exercise of their powers.” SCOTT AND ASCHER ON TRUSTS, WHEN POWERS ARE EXERCISABLE BY SEVERAL TRUSTEES, § 18.3.

The Texas Property Code provides that, in the absence of trust direction, co-trustees

generally act by majority decision. Tex. Prop. Code § 113.085(a); *Berry v. Berry*, no. 13-18-00169-CV, 2020 Tex. App. LEXIS 1884 (Tex. App.—Corpus Christi March 5, 2020, no pet.). See also RESTATEMENT (THIRD) OF TRUSTS, § 39.

For example, *Duncan v. O’Shea*, the court affirmed a trial court’s ruling that a trust could sell real estate where the majority of co-trustees voted for that action and over the objection of a dissenting co-trustee. No. 07-19-00085-CV, 2020 Tex. App. LEXIS 6564 (Tex. App.—Amarillo August 17, 2020, no pet. history). The court held that the trustees had the power to make the sell, but that there was still an issue as to whether the action was a breach of duty. *Id.* The court stated:

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

particular declaratory judgment sought, Appellant has not raised a genuine issue of material fact precluding summary judgment in this matter.

*Id.*

In another case, the court held that a co-trustee did not have authority to sue a third party on behalf of the trust where he was in the minority. *Berry v. Berry*, no. 13-18-00169-CV, 2020 Tex. App. LEXIS 1884 (Tex. App.—Corpus Christi March 5, 2020, no pet.). His remedy was to sue his co-trustees. *Id.*

There are circumstance when less than a majority of co-trustees can act for the trust. If a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust. Tex. Prop. Code § 113.085(b). If a co-trustee is unavailable to participate and prompt action is necessary to achieve the efficient administration or purposes of the trust or to avoid injury to the trust property or a beneficiary, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust. *Id.* § 113.085(d). Otherwise, an act by less than a majority of the co-trustees (absent trust document approval) is not valid, may result in liability to the improperly acting co-trustee, and may be voided depending on the innocence of the third party.

## 2. Right And Duty To Manage Trust

The Texas Property Code provides that a co-trustee has a duty to participate in the performance of a trustee's function. Tex. Prop. Code § 113.085(c). So, generally, a co-trustee must participate in the management of a trust. *Id.* There are two

exceptions to a co-trustee's duty to participate, which are if the co-trustee:

(1) is unavailable to perform the function because of absence, illness, suspension under this code or other law, disqualification, if any, under this code, disqualification under other law, or other temporary incapacity; or

(2) has delegated the performance of the function to another trustee in accordance with the terms of the trust or applicable law, has communicated the delegation to all other co-trustees, and has filed the delegation in the records of the trust.

Tex. Prop. Code § 113.085(c). If a co-trustee is unavailable to participate and prompt action is necessary to achieve the efficient administration or purposes of the trust or to avoid injury to the trust property or a beneficiary, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust. *Id.* § 113.085(d).

The Restatement (Third) of Trusts provides: "If a trust has more than one trustee, except as otherwise provided by the terms of the trust, each trustee has a duty and the right to participate in the administration of the trust." RESTATEMENT (THIRD) OF TRUSTS, § 81. Furthermore, "each co-trustee has a duty, and also the right, of active, prudent participation in the performance of all aspects of the trust's administration. Implicit in this requirement of prudent participation is a duty of reasonable cooperation among the trustees." *Id.* cmt. c.

### C. Co-Trustees Duty To Cooperate

At common law, “co-trustees owe to each other, as well as to the beneficiaries . . . , the duty and obligation to so conduct themselves as to foster a spirit of mutual trust, confidence, and cooperation to the extent possible.” *Ball v. Mills*, 376 So.2d 1174, 1182 (Fla. App. 1979). One commentator states: “Co-trustees owe to each other, as well as to the beneficiaries of the trust, the duty and obligation to so conduct themselves as to foster a spirit of mutual trust, confidence, and cooperation to the extent possible; at the same time, the trustees should maintain an attitude of vigilant concern for the proper administration or protection of the trust business and affairs.” 76 AM. JUR. 2D, TRUSTS, §321. *See also* BOGERT’S THE LAW OF TRUSTS AND TRUSTEES, GROUNDS FOR REMOVAL, § 527.

While the ill will or hostility of a trustee is generally insufficient cause, it becomes so if it is determined that the “hostility, ill will, or other factors have affected the trustee so that he cannot properly serve in his capacity.” *Akin v. Dahl*, 661 S.W.2d 911, 913-14 (Tex. 1983); *Lee v. Lee*, 47 S.W.3d 767, 792 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). In other words, if the evidence illustrates that the hostility “does or will affect” the trustee’s performance of his duties, then cause exists for his removal. *Id.* Hostility is not limited only to situations wherein the trustee’s performance is affected and also includes those wherein it impedes the proper performance of the trust, especially if the trustee made the subject matter of the suit is at fault. *Bergman v. Bergman-Davison-Webster Charitable Trust*, No. 07-02-0460-CV, 2004 Tex. App. LEXIS 1 (Tex. App.—Amarillo Jan. 2, 2004, no pet.) (citing RESTATEMENT (THIRD) OF THE LAW OF TRUSTS, § 37, comment e(1) (2003); A. SCOTT & W. FRATCHER, THE

LAW OF TRUSTS § 107, p. 111 (4th ed. 1987)). If a co-trustee refuses to cooperate and is hostile such that it impacts the administration of the trust, a court may remove that co-trustee. *Ramirez v. Rodriguez*, No. 04-19-00618-CV, 2020 Tex. App. LEXIS 1340 (Tex. App.—San Antonio Feb. 19, 2020, no pet.); *Bergman v. Bergman-Davison-Webster Charitable Trust*, No. 07-02-0460-CV, 2004 Tex. App. LEXIS 1 (Tex. App.—Amarillo Jan. 2, 2004, no pet.).

### D. Delegation Of Duties

#### 1. Delegation By Co-Trustee

At common law, a co-trustee could not delegate the administration of the trust to a single trustee. 76 AM. JUR. 2D, TRUSTS, §322. However, in Texas the Texas Trust Code provides that a co-trustee may delegate to another the performance of a function unless the settlor specifically directs that the co-trustees jointly perform the function. Tex. Prop. Code § 113.085(e). “Unless a co-trustee’s delegation under this subsection is irrevocable, the co-trustee making the delegation may revoke the delegation.” *Id.* So, a co-trustee can opt out of participation in a management decision if the co-trustee is unavailable. Further, a co-trustee may delegate a function to a co-trustee, which may generally be revoked. The statute does not state that any particular function cannot be delegated. *See also* Tex. Prop. Code § 117.011 (delegation of investment and management functions); *Aubrey v. Aubrey*, 523 S.W.3d 299, 314 (Tex. App.—Dallas 2017, no pet.) (plaintiff could not raise claim that trustee did not personally perform certain functions where statute allowed delegation).

However, delegation is limited to actions that the settlor would have contemplated being performed by one trustee. Under

Uniform Trust Code § 703(e): “A trustee may not delegate to a co-trustee the performance of a function the settlor reasonably expected the trustees to perform jointly. . . .” UTC § 703(e).

2. Direction By Settlor/Trustor

If a trust instrument grants any person, including the trustor, an advisory or investment committee, or one or more co-trustees, authority to direct the making or retention of an investment or to perform any other act of management or administration of the trust to the exclusion of the other co-trustees, the excluded co-trustees are not liable for a loss resulting from the exercise of that authority. Tex. Prop. Code § 114.0031. The Texas Property Code provides:

If the terms of a trust give a person the authority to direct, consent to, or disapprove a trustee’s actual or proposed investment decisions, distribution decisions, or other decisions, the person is an advisor...

A trustee who acts in accordance with the direction of an advisor, as prescribed by the trust terms, is not liable, except in cases of willful misconduct on the part of the trustee so directed, for any loss resulting directly or indirectly from that act.

If the trust terms provide that a trustee must make decisions with the consent of an advisor, the trustee is not liable, except in cases of willful misconduct or gross

negligence on the part of the trustee, for any loss resulting directly or indirectly from any act taken or not taken as a result of the advisor’s failure to provide the required consent after having been requested to do so by the trustee.

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

Absent clear and convincing evidence to the contrary, the actions of a trustee pertaining to matters within the scope of the advisor’s authority, such as confirming that the advisor’s directions have been carried out and recording and reporting actions taken at the advisor’s direction, are presumed to be

administrative actions taken by the trustee solely to allow the trustee to perform those duties assigned to the trustee under the trust terms, and such administrative actions are not considered to constitute an undertaking by the trustee to monitor the advisor or otherwise participate in actions within the scope of the advisor's authority.

Tex. Prop. Code § 114.0031.

E. A Co-Trustee May Have To Sue Its Co-Trustee

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

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

court finds other cause for removal.

(b) A beneficiary, co-trustee, or successor trustee may treat a violation resulting in removal as a breach of trust.

Tex. Prop. Code § 113.082. *See also Ramirez v. Rodriguez*, No. 04-19-00618-CV, 2020 Tex. App. LEXIS 1340 (Tex. App.—San Antonio February 19, 2020, no pet.); *Aubrey v. Aubrey*, 523 S.W.3d 299 (Tex. App.—Dallas 2017, no pet.).

XIX. EXCULPATORY CLAUSES

It is common for settlors to execute trust documents that contain exculpatory clauses. An exculpatory clause is one that forgives the co-trustees for some action or inaction. Generally, these types of clauses are enforceable in Texas and can effectively limit a co-trustee's duty. *Dolan v. Dolan*, No. 01-07-00694-CV, 2009 Tex. App. LEXIS 4487 (Tex. App.—Houston [1st Dist.] June 18, 2009, pet. denied). For example, in *Goughnour v. Patterson*, a court of appeals recently affirmed a summary judgment for a trustee arising from a beneficiary's claim that the trustee breached fiduciary duties by investing trust assets in a self-interested transaction. No. 12-17-00234-CV, 2019 Tex. App. LEXIS 1665 (Tex. App.—Tyler March 5, 2019, pet. denied). Among several defenses, the court held that the trustee proved that an exculpatory clause applied because the trustee did not act with gross negligence. *Id.*

In Texas, exculpatory clauses are strictly construed, and a trustee is relieved of liability only to the extent to which it is clearly provided that it will be excused. *Jewett v. Capital Nat. Bank of Austin*, 618 S.W.2d 109, 112 (Tex. App.—Waco 1981, writ ref'd n.r.e.); *Martin v. Martin*, 363

S.W.3d 221, 230 (Tex. App.—Texarkana 2012, pet. dismissed by agreement). See also *Price v. Johnston*, 638 S.W.2d 1, 4 (Tex. App.—Corpus Christi 1982, no writ) (“When a derogation of the [Texas Trust] Act hangs in the balance, a trust instrument should be strictly construed in favor of the beneficiaries”). For example, a court held that a clause that relieved a trustee from liability for “any honest mistake in judgment” did not forgive the trustee’s acts of self-dealing. *Burnett v. First Nat. Bank of Waco*, 567 S.W.2d 873, 876 (Civ. App.—Tyler 1978, ref. n.r.e.).

There are also important statutory limitations on the effectiveness of exculpatory clauses. Texas Property Code Section 111.0035 provides that the terms of a trust may not limit a trustee’s duty to act in good faith. Tex. Prop. Code Ann. § 111.035(b)(4). Additionally, Texas Property Code Section 114.007 provides that an exculpatory clause is unenforceable to the extent that it relieves a trustee of liability for breaches done with bad faith, intent, or with reckless indifference to the interests of a beneficiary or for any profit derived by the trustee from a breach of trust. Tex. Prop. Code Ann. § 114.007.

Specifically, regarding exculpatory clauses, the Texas Trust Code provides:

(a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that the term relieves a trustee of liability for: (1) a breach of trust committed: (A) in bad faith; (B) intentionally; or (C) with reckless indifference to the interest of a beneficiary; or (2) any profit derived by the trustee from a breach of trust.

...

(c) This section applies only to a term of a trust that may otherwise relieve a trustee from liability for a breach of trust. Except as provided in Section 111.0035, this section does not prohibit the settlor, by the terms of the trust, from expressly: (1) relieving the trustee from a duty or restriction imposed by this subtitle or by common law; or (2) directing or permitting the trustee to do or not to do an action that would otherwise violate a duty or restriction imposed by this subtitle or by common law.

Tex. Prop. Code Ann § 114.007. See *Benge v. Roberts*, No. 03-19-00719-CV, 2020 Tex. App. LEXIS 6335 (Tex. App.—Austin Aug. 12, 2020, no pet. history).

Therefore, a trust document may relieve a trustee from liability for negligent acts regarding distributions that do not result in a trustee deriving a profit from its breach. A trust document may also relieve a trustee from a duty concerning distributions, i.e., impartiality, and the only limitation would be a trustee acting in good faith.

## XX. DIVESTING OF A BENEFICIARY’S RIGHT TO DISTRIBUTIONS

### A. Introduction

A settlor may want to condition a beneficiary’s status as such on the occurrence or non-occurrence of some event or condition. Similarly, a settlor may want to extinguish a beneficiary’s status on the occurrence or non-occurrence of some event

or condition. For example, a settlor may desire that his or her children will be beneficiaries of a trust only if the children have no criminal record or do not abuse illegal drugs. Similarly, a settlor may to empower a trustee to terminate a child/beneficiary's right to be a beneficiary if he or she is ever convicted of a crime or uses illegal drugs. Under some circumstances, this type of provision is enforceable.

B. Condition Precedent Versus Condition Subsequent

There is a difference between a condition precedent and a condition subsequent. One Texas treatise states:

A beneficiary's interest in a trust may be conditioned on the occurrence or nonoccurrence of an event. Thus, a beneficiary may have a future interest in trust property (Prop. C. § 111.004(2), (4)), which is created when the trustor intends to create an existing interest in the trust property that is not to be enjoyed until a future time. A future interest may be either defeasible or indefeasible and either vested or contingent. Prop. C. § 111.004(6). For example, a beneficiary's interest in trust property is defeasible if it will fail as a result of certain events occurring at a specific time in the future and becomes indefeasible if none of the events occurs at that time. Similarly, if a beneficiary's interest is subject to the fulfillment of certain

conditions at a specific time, such as the death of the trustor, the beneficiary has a contingent interest in the trust property. The beneficiary's interest becomes vested if the conditions are satisfied at the specified time.

1 Texas Estate Planning § 32.03 (internal citations omitted). For example, in *Cisneros v. San Miguel*, the trial court and court of appeals held that a document created a valid inter vivos trust whereby a beneficiary had a contingent interest in the trust property. 640 S.W.2d 327, 329–330 (Civ. App.—San Antonio 1982, ref. n.r.e.). The court stated:

The trust agreement clearly specifies that San Miguel is a residuary beneficiary subject to three conditions. First, San Miguel's interest could be divested if the trustor revoked the trust. Second, San Miguel's interest under the trust would be divested if the trustor dies testate. Third, San Miguel's interest would be defeated if no residue existed at the time the residuary clause became effective, pursuant to the provisions of Article V of the trust agreement. Thus, it is readily apparent that San Miguel's interest under the trust agreement is a defeasible interest. See BLACK'S LAW DICTIONARY 506 (4th ed. revised 1968). San Miguel's defeasible interest is the same type of interest contemplated by the supreme court in *Huckaby*. As the supreme court noted:



Professor Bogert expresses the view that a majority of the cases now upholds the validity of an *intervivos* trust even though the settlor reserves a life estate combined with many powers of management, and that the settlor may retain the powers to alter, revoke and take capital as well as the powers to direct and manage. According to Bogert, the beneficiary receives a defeasible interest at the time of the execution of the instrument; the accumulation of reserved powers only subjects the interest of the beneficiary to a greater possibility of defeasance. G. BOGERT, TRUSTS AND TRUSTEES § 104 at 536-542 (2d ed. 1965). See *Schmidt v. Schmidt*, 261 S.W.2d 892 (Tex. Civ. App. 1953, writ ref.).

*Westerfeld v. Huckaby*, 474 S.W.2d 189, 193 (Tex. 1971); *Vela v. GRC Land Holdings, Ltd.*, 383 S.W.3d 248 (Tex. App.—San Antonio 2012, no pet.) (revocable trusts create defeasible interests subject to settlor's actions).

The Texas Commentator further discusses the concept of conditions precedent versus conditions subsequent and provides:

A testator is free to dispose of his or her estate on whatever conditions he or she establishes, as long as the conditions are not prohibited by law and do not violate public policy. A devise that is dependent upon the occurrence of an uncertain event is known as a contingent gift. A contingent gift may be dependent on a condition that either gives the gift effect or defeats it. A condition that must occur before a devise takes effect is a condition precedent. A condition that will operate to defeat a devise after it takes effect is a condition subsequent. For example, a provision in a will stating that a beneficiary may take a devise only if the beneficiary takes care of the testator for at least one year immediately preceding the testator's death is a condition precedent. A provision in a will granting land to a city on the condition that the land be used as a park and, if that condition should fail, granting the land to the humane society, is an example of a condition subsequent. Conditions subsequent that tend to defeat vested estates are very strictly construed and are enforced only if the testator's intention to create the condition is clearly expressed in the will.

1 Texas Estate Planning § 12.05 (internal citations omitted).

This concept is further explained by the Restatement (Third) of Trusts which provides:

The interest of a beneficiary may be a present or future interest; and an interest may or may not be subject to conditions with respect to the recipients or the extent of the interest. Furthermore, an interest may be subject to the discretionary decisions of a trustee or another (see § 50), or subject to a power of appointment or a power of revocation or amendment. In fact, there is practically no limit to the variety of interests a settlor may create.

RESTATEMENT (THIRD) OF TRUSTS § 49; *see also North Carolina Dept. of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213, 204 L. Ed. 2d 621, 625 (2019) (“depending on the trust agreement, a beneficiary may have only a ‘future interest,’ an interest that is ‘subject to conditions,’ or an interest that is controlled by a trustee’s discretionary decisions.”). The Restatement goes on to state that conditions are generally enforceable: “f. Conditions. Sometimes the terms of a trust provide that a beneficiary is to take an interest in income or principal only on the happening of a designated event, or that the beneficiary’s interest in income is to terminate on the happening of a designated event. Unless contrary to public policy, such a condition is valid.” *Id.*

C. Conditions Are Generally Enforceable Unless They Are Against Public Policy

The Restatement (Second) of Trusts provides:

The interest of a beneficiary may be subject to a condition precedent or a condition subsequent; that is to say, it may be provided by the terms of the trust that a beneficiary is to take an interest in income or principal only on the happening of a designated event, or that his interest in the income or principal shall cease on the happening of a designated event. As to the factors determining whether a condition precedent or a condition subsequent relating to the behavior of the beneficiary or of another person is imposed, see Restatement of Property, § 275. Where a condition subsequent is illegal, the interest of the beneficiary is not terminated, whether or not the condition is performed, unless the settlor has manifested a contrary intention.

RESTATEMENT (SECOND) OF TRUSTS § 128(k). The Restatement of Trusts references the Restatement (First) of Property, which provides:

When a limitation, purporting to create a remainder or an executory interest, subjects the interest so limited to either a condition precedent or a defeasibility involving a specified volitional behavior of the intended taker of such interest or of some other designated person... (b) the following factors tend to establish that the absence of such volitional behavior is a

basis for the defeasance of the interest: ... (iv) the restriction upon the interest limited is designed to penalize the intended taker of the interest limited, for a future disregard of the expressed wishes of the conveyor.

RESTATEMENT (FIRST) OF PROPERTY § 275.

The notes to that section provide:

Limitations of the type described in Clause (b), Subclause (iv), include such behavior of the intended taker as the following: the joining of a particular order within a church, as, for example, becoming a priest or nun; the changing of the name of the intended taker; the beginning of any practice or habit believed by the conveyor to be harmful, as, for example, drinking, smoking, using drugs, or cohabiting with a person other than the spouse of the intended taker. As to the effect of the illegality of the attempted requirement, see Comment f.

*Id.* cmt. p. Regarding illegality, the section provides:

Illegality of attempted condition precedent or defeasibility. A limitation which specifies volitional behavior of the intended taker, or of some other designated person, as either a condition precedent or a defeasibility of the interest limited, can fail to have the

effect intended by the conveyor, because of the illegality of the attempted condition or defeasibility. Such illegality may invalidate the entire limitation so that no interest is created thereby, or it may invalidate a part only of the limitation as, for example, the defeasibility of the created interest. In determining the effect of illegality, the probable intent of the conveyor, had he known that the stated behavior could not lawfully be required, is a relevant and substantial factor (see § 228, Comment a). The rules determining what constitutes illegality and the effect of illegality, when found, are stated in Division IV (Social Restrictions Imposed upon the Creation of Property Interests). See also Restatement of Contracts, Chapter 18 (§§ 512-609) as to illegal bargains.

*Id.* cmt. f. The Restatement (Second) of Trusts also discusses the fact that impossibility of performance may excuse a condition subsequent. See Restatement (Second) of Trusts §65A(c) (“Thus, if it is provided by the terms of the trust that the interest of a beneficiary shall be divested if he does not perform a specified act, and it is impossible for him to perform the act, his interest will not terminate because of the non-performance of the act, unless the settlor manifested a contrary intention.”).

If a condition is illegal or against public policy, a court may not enforce that provision. “Ordinarily, if a beneficial interest in a trust is to be conferred or is to

terminate upon an invalid condition (whether, in form, precedent or subsequent), the interest becomes effective or continues as if the condition had not been imposed, or as if the settlor's requirements or restrictions were satisfied." RESTATEMENT (THIRD) OF TRUSTS §29(i); RESTATEMENT (SECOND) OF TRUSTS § 65; *Home For Incurables of Baltimore v. University of Maryland Medical System Corp.*, 369 Md. 67, 797 A.2d 746, 751 (2002) ("This court has long held that where a . . . condition is invalid on the ground of public policy . . . , the condition will not be enforced by awarding the bequest to an alternative beneficiary; instead, the illegal condition will be excised."). The Restatement (Third) of Trusts provides:

The simplest examples of trusts or provisions that offend public policy are those that tend to encourage criminal or tortious conduct on the part of beneficiaries. (Compare Comment c, on provisions that involve the trustee in such conduct.) Thus, if certain persons are likely to engage in the commission of certain types of crimes, a trust to pay the fines of any of them who may be convicted of committing such acts is invalid; the payment of fines is not illegal, but the direct tendency of the trust is to undermine the deterrent effect of the fines imposed by the law. Similarly invalid would be a trust to pay someone's liabilities for operating a nuisance. Less objective is the possibility that a trust provision may be invalid because of a tendency

to encourage immorality, or because of the array of more common inducements described hereafter and considered more specifically in Comments j through l.

Policies concerned with deadhand control limit the use of trusts in ways that do not apply to living individuals in the direct disposition of their property. Thus, a policy of fostering free family interaction or privacy between individuals, or simply society's tolerance of human frailty, traditionally exempts acts of property owners (and even their outright dispositions by will) from restrictions that would apply to personally intrusive or socially dubious conditions in the distributive provisions of irrevocable trusts. Furthermore, the "rigor mortis" of deadhand control is not present while a property owner is able to respond to persuasion and evolving circumstances.

Thus, although one is free to give property to another or to withhold it, it does not follow that one may give in trust with whatever terms or conditions one may wish to attach. This is particularly so of provisions that the law views as exerting a socially undesirable influence on the exercise or nonexercise of fundamental rights that significantly affect the

personal lives of beneficiaries and often of others as well.

In cases of the types considered in the Comments that follow, simple and precise rules of validity or invalidity frequently cannot be stated. This is particularly so because of the need to weigh the often worthy concerns and objectives of settlors against the objectionable effects or tendencies of conditions attached to beneficial interests, each of which involves specific terms and personal and overall estate-planning contexts that may vary subtly but significantly from situation to situation. Furthermore, in these various situations, remedial flexibility is required to reconcile (i) the policy objection to a provision with (ii) a motive or goal of the settlor that is legally acceptable in whole or in part as an effort to protect the beneficiary's interest or the trust property.

...

Similarly, a trust provision may not be enforced if to do so would undermine proper administration of the trust. Thus, a provision that purports to prevent a court from removing a trustee will be disregarded if removal appears appropriate to proper administration of the trust; and an arbitrary restriction on

the appointment of trustees or successor trustees may be invalid if not reasonably related to the trust purposes. A provision is also invalid to the extent it purports to relieve the trustee altogether from accountability and the duty to provide information to beneficiaries (see §§ 82, 83), or to relieve the trustee from liability even for dishonest or reckless acts

RESTATEMENT (THIRD) OF TRUSTS §29(h), (m).

However, the Restatement (Second) of Property states that: "An otherwise effective provision in a donative transfer which is designed to prevent the acquisition or retention of an interest in property on account of the transferee acquiring or persisting in specified personal habits is valid." RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §8.2. The comments provide: "The use of restraints as an inducement to the elimination of existing personal habits (Illustration 1) or as a means of assuring the continuance of the present character of the donee (Illustration 2) is not against public policy and is consequently valid under the stated rule." *Id.* at cmt. a; *see also* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §5.1 ("Unless contrary to public policy or violative of some rule of law, a provision in a donative transfer which is designed to prevent the acquisition or retention of an interest in property in the event of any failure on the part of the transferee to comply with a restraint on personal conduct is valid.").

Further, the Restatement (Second) of Property states that: "An otherwise effective provision in a will or other donative transfer, which is designed to prevent the acquisition

or retention of an interest in property in the event the propriety of the performance of the fiduciary with respect to the administration of the transferred property is questioned in a legal proceeding, is valid, unless the beneficiary had probable cause for questioning the fiduciary's performance." RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §9.2. The Restatement explains:

Having validly set forth a dispositive plan the transferor may seek to protect the executors or trustees, who have been designated by the transferor to administer the plan, from justifying in legal proceedings the performance of their administrative responsibilities. Some beneficiaries may indulge in litigation against the fiduciaries in whose judgment and integrity the transferor has expressed confidence, which serves no purpose other than to harass such fiduciaries and to dissipate the transferor's assets. The addition of a clause in the dispositive instrument making the acquisition or the retention of a gift dependent upon refraining from questioning in legal proceedings fiduciary conduct is valid as long as it is applied to situations where there is not probable cause to support misconduct charges. There is a public interest, however, in holding fiduciaries to a proper standard of performance, and if the beneficiary is successful in establishing the

misconduct of the fiduciary, the beneficiary will have established that the fiduciary has not met such a standard. Furthermore, even though the beneficiary is unsuccessful, if there was probable cause to believe the fiduciary was guilty of misconduct, it is in the public interest that the beneficiary not be deterred from bringing to light the questionable conduct. The rule of this section recognizes the qualification on the validity of a restraint on attacks on a fiduciary that is necessary to protect the public interest.

*Id.*

Thus, trust terms that create a defeasance of a beneficiary's rights is generally enforceable unless it is illegal or against public policy.

D. Trustee's Right To Exercise Clause Terminating A Beneficiary's Interest

A trustee owes a fiduciary duty to the trust's beneficiaries not to destroy their interests except as authorized by the trust's terms. *See Moody v. Pitts*, 708 S.W.2d 930, 936 (Tex. App.—Corpus Christi 1986, no writ); *Maxwell v. Harrell*, 183 S.W.2d 577, 579 (Tex. Civ. App.—Austin 1944, writ ref'd w.o.m.). The settlor of a trust may leave the trustee a wide discretion as to the mode of realizing the end sought. *Corpus Christi Bank and Trust v. Roberts*, 597 S.W.2d 752 (Tex. 1980). A court cannot substitute its discretion for that of a trustee of a discretionary trust, and can interfere with the exercise of a trustee's discretionary powers only in cases of fraud, misconduct, or clear abuse of discretion. *In re XTO Energy Inc.*,

471 S.W.3d 126 (Tex. App.—Dallas 2015, no pet.); *Di Portanova v. Monroe*, 229 S.W.3d 324 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

However, a trustee may be stripped of deference when it does not exercise its discretion honestly and fairly. *Conkright v. Frommert*, 559 U.S. 506 (2010); *Di Portanova*, 229 S.W.3d at 324. A trustee must exercise its discretion in good faith, notwithstanding the breadth of the discretion granted under the terms of the trust. Tex. Prop. Code Ann. § 113.051. By statute, notwithstanding the breadth of discretion granted to a trustee or trustees in the terms of a trust, including the use of terms such as “absolute,” “sole,” or “uncontrolled,” trustees must exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Tex. Prop. Code Ann. § 113.029(a).

Regarding the discretionary decisions of a trustee, the Restatement (Third) of Trusts provides:

A court will not interfere with a trustee’s exercise of a discretionary power when that exercise is reasonable and not based on an improper interpretation of the terms of the trust. Thus, judicial intervention is not warranted merely because the court would have differently exercised the discretion.

On the other hand, a court will not permit abuse of discretion by the trustee. What constitutes an abuse depends on the terms of the trust, as well as on basic fiduciary duties and

principles (§§ 76-83). Of particular importance are the purposes of the power and the standards, if any, applicable to its exercise (see Comments d-f) and the extent of the discretion conferred upon the trustee (Comment c). Relevant fiduciary principles include (i) the general duty to act, reasonably informed, with impartiality among the various beneficiaries and interests (§ 79) and (ii) the duty to provide the beneficiaries with information concerning the trust and its administration (§ 82). This combination of duties entitles the beneficiaries (and also the court) not only to accounting information but also to relevant, general information concerning the bases upon which the trustee’s discretionary judgments have been or will be made. See Comment e(1).

RESTATEMENT (THIRD) OF TRUSTS § 50(b).

For example, in *American Cancer Soc., St. Louis Div. v. Hammerstein*, a trustee used its discretion to terminate a trust and distribute it outright to the current beneficiary. 631 S.W.2d 858 (Mo. App. E.D. 1981). The remainder beneficiaries challenged this action, and the court of appeals affirmed:

Certainly, a grant of absolute discretion to a trustee is not a roving commission -- the trustee must be guided by the interest of the beneficiary and must further trust purposes in

the exercise of his power. *Cozart v. Green Trails Management Corp.*, 501 S.W.2d 184, 187 (Mo. App. 1973); RESTATEMENT (SECOND) OF TRUSTS § 170, Comment q (1959). But the evidence supports the conclusion that the trustee acted in the interest of the life beneficiary, even though he had an announced concern for Kohler City Supply Company, which incidentally was not inimical to that interest. He adhered to the purpose and intent of the settlor as expressed in her explicit authorization for the trustee to terminate the trust and distribute it to the life beneficiary. The settlor revealed her intent to favor the life beneficiary over remainder beneficiaries in other trust provisions—relieving the trustee of any liability to the remainder beneficiaries if he chose to terminate in favor of the life beneficiary and authorizing the trustee to encroach upon the principal for the benefit of the life beneficiary under particular circumstances. Concern that the trustee's decision to terminate the trust would favor one beneficiary to the detriment of all others is not a viable consideration. It is the prerogative of the testator to favor certain beneficiaries over others. A beneficiary takes only by benevolence of the testator, who may attach lawful

conditions to the receipt of the gift. *Gibson v. Gibson*, 280 Mo. 519, 219 S.W. 561, 565 (1920); RESTATEMENT (SECOND) OF TRUSTS §§ 128, 183, Comment a (1959).

*Id.*

For further example, in *Newlove v. Mercantile Trust Co.*, a father had willed his property to his six sons, share and share alike, on the condition that the property not be divided or sold until ten years after his death, and that, should any son contract certain enumerated bad habits before the division, his share would be forfeited. *Newlove v. Mercantile Trust Co.* (1909) 156 Cal. 657, 661, 105 P. 971. The court held that each of the sons acquired a vested interest at the time of the testator's death in the undivided share devised to him, subject to divestiture or termination on the occurrence of the subsequent act or event specified in the will. *Id.* In *In re Estate of O'Connor*, 158 Cal. App. 2d 187, 322 P.2d 616 (Cal. Ct. App. 1958), the decedent left a remainder estate to four educational institutions, on the condition that those four institutions match the bequest, but if they did not match the bequest, then the remainder would go to a hospital. *Id.* at 619. The issue was the nature of the hospital's interest. The court held that the four schools had vested interests subject to defeasance, and the hospital had an executory interest, specifically, an alienable contingent future interest in the form of an executory interest. *Id.* at 622. Most importantly, even though the hospital's right to receive the remainder was contingent on something entirely outside its control, it was found to have been an executory interest because it was enforceable in the event the schools did not match the bequest. *Id.* at 622-23.



Accordingly, a trustee can use a discretionary trust term to terminate a beneficiary's interest where the trustee acts in good faith.

E. Forfeiture-Clause Statute

A clause allowing a trustee to terminate a beneficiary's interest in a trust may be a forfeiture clause. For example, a clause may state that a trustee can terminate a beneficiary's interest if the beneficiary ever asserts meritless claims against the trustee. Regarding forfeiture clauses, the Texas Trust Code provides:

(a) A provision in a trust that would cause a forfeiture of or void an interest for bringing any court action, including contesting a trust, is enforceable unless in a court action determining whether the forfeiture clause should be enforced, the person who brought the action contrary to the forfeiture clause establishes by a preponderance of the evidence that: (1) just cause existed for bringing the action; and (2) the action was brought and maintained in good faith.

(b) This section is not intended to and does not repeal any law, recognizing that forfeiture clauses generally will not be construed to prevent a beneficiary from seeking to compel a fiduciary to perform the fiduciary's duties, seeking redress against a fiduciary for a breach of the fiduciary's

duties, or seeking a judicial construction of a will or trust.

Tex. Prop. Code Ann § 112.038. Where a party violates a forfeiture clause without good faith, a trustee can terminate his or her interest in the trust. *Id.*; *Gunter v. Pogue*, 672 S.W.2d 840 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (the beneficiaries were found to have forfeited their bequests pursuant to in terrorem clauses where they were not brought in good faith); *Hammer v. Powers*, 819 S.W.2d 669 (Tex. App.—Fort Worth 1991, no writ) (same). However, courts are reluctant to find a forfeiture. *See Di Portanova v. Monroe*, 402 S.W.3d 711, 715 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (construing no contest clause to avoid forfeiture in trust dispute); *Conte v. Conte*, 56 S.W.3d 830, 833 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (suit to remove a trustee did not fall within the scope of a forfeiture clause where the clause simply stated that a beneficiary or remainderman is prohibited from “contesting or challenging this trust or any of its provisions.”); *see also Gerry W. Beyer, Rob G. Dickenson & Kenneth L. Wake, The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 SMU L. REV. 225, 255-58 (1998).

XXI. PROVING GOOD FAITH/ADVICE OF COUNSEL

When a trustee faces the difficult situations described above, the trustee should retain counsel to provide advice. Advice of counsel will provide protection that the trustee is complying with all legal requirements to avoid conflicts with governmental authorities. Further, advice of counsel may be a defense in any claim raised by a beneficiary. *In re Estate of Boylan*, No. 02-14-00170-CV, 2015 Tex. App. LEXIS 1427, 2015 WL 598531 (Tex.

App.—Fort Worth Feb. 12, 2015, no pet.).  
The Restatement provides:

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

RESTATEMENT (THIRD) OF TRUSTS § 77 cmt. b(2), c. Therefore, following the advice of counsel can be evidence to show that a trustee acted prudently, though it, by itself, does not show prudence as a matter of law. To obtain the "silver bullet" defense, a trustee should seek instructions from a court. *Id.* § 93 cmt. c.

It should be noted that if a trustee asserts an advice of counsel defense, the trustee would likely waive any right to maintain privilege for those communications. If a party introduces any significant part of an otherwise privileged matter, that party waives the privilege. *See* Tex. R. Evid. 511. *See also Mennen v. Wilmington Trust Co.*, 2013 Del. Ch. LEXIS 238, 2013 WL 5288900 (Del. Ch. Sept. 18, 2013). For example, in *Mennen*, a trustee was sued for breach of fiduciary duty. *Mennen*, at \*3. One of the trustee's defenses was that he received legal advice from counsel. *See id.* at \*5. The trustee attempted to block production of the alleged bad advice from counsel, citing attorney-client privilege. *See id.* The court was unpersuaded by the trustee's invocation of privilege, stating that "a party's decision to rely on advice of counsel as a defense in litigation is a conscious decision to inject privileged communications into the litigation." *Id.* at \*18 (citing *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3rd Cir. 1995)).

#### XXII. TRUSTEE'S LIABILITY FOR FAILING TO KNOW OF FACTS RELEVANT TO DISTRIBUTIONS

A trustee has a duty to act prudently in managing, investing, and distributing trust assets. It has a duty to properly manage, supervise, and safeguard trust assets. *Hoenig v. Texas Commerce Bank*, 939 S.W.2d 656, 661 (Tex. App.—San Antonio 1996, no writ). The proper standard against which a trustee is measured is that of an ordinary person in the conduct of his own affairs. *Stone v. King*, No. 13-98-022-CV, 2 000 Tex. App. LEXIS 8070, 2000 WL 35729200 (Tex. App.—Corpus Christi 2000, pet. denied) (not designated for publication) (citing *Hoenig v. Texas Commerce Bank, N.A.*, 939 S.W.2d 656, 661 (Tex. App.—San Antonio 1996, no writ)). However, the

Texas Uniform Prudent Investor Act provides that in a trustee's management of assets: "A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise." Tex. Prop. Code § 117.004(f). It further states that a trustee will use "reasonable effort to verify facts relevant to the investment and management of trust assets." *Id.* at § 117.004(d).

The Restatement (Third) of Trusts provides:

In matters relating to the administration of the trust, the trustee has a duty to exercise prudence--that is, to act with care, skill, and caution... The prudence of a trustee's conduct is to be judged on the basis of circumstances at the time of that conduct, not with the benefit of hindsight or by taking account of developments that occur after the time of the action or decision.

...

The duty of care requires the trustee to exercise reasonable effort and diligence in planning the administration of the trust, in making and implementing administrative decisions, and in monitoring the trust situation, with due attention to the trust's objectives and the interests of the beneficiaries. This will ordinarily involve investigation appropriate to

the particular action under consideration, and also obtaining relevant information about such matters as the contents and resources of the trust estate and the circumstances and requirements of the trust and its beneficiaries.

...

What constitutes due diligence, satisfying the duty of prudence, is inevitably affected by the nature of the transaction or activity and the market(s) involved.

RESTATEMENT (THIRD) OF TRUSTS, §76.

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

However, Restatement (Second) of Trusts provides: "The trustee is liable although he makes the payment or conveyance under a reasonable mistake of law or of fact. If he is in doubt as to the proper person to whom a payment or conveyance should be made, he can apply to the court for instructions and will be protected by the order of the court against claims of all persons who were made parties to the proceeding. The trustee is liable although he reasonably believes that

the person to whom he pays or conveys is the beneficiary or that the payment or conveyance is authorized or directed by the beneficiary or by the terms of the trust.” RESTATEMENT (SECOND) OF TRUSTS, §226. *See also* 2 A. W. SCOTT, THE LAW OF TRUSTS § 226, at 1647-48 (2d ed. 1956).

Another commentator provides:

It is generally held that a trustee is under an unqualified and absolute duty to make payments and distributions to the beneficiaries entitled thereto, rather than merely to use the care and judgment of a person of reasonable prudence in distributing the trust property. The trustee’s equitable obligation is deemed to be like that of a contract debtor who is not absolved by showing that they tried in good faith and with the ability of an ordinarily prudent person to make payment. By accepting the trust the trustee is considered as having assumed an unconditional obligation to follow the applicable provisions regarding payments and distributions. This seems to be a reasonable view.

...

However in some cases there has appeared a tendency to qualify and limit the duty of the trustee so that the trustee will not be under liability for a wrongful payment if the

trustee acted honestly and with the skill and diligence of a reasonably prudent person. Doubtless the heavy burden which the older rule places upon the trustee has been considered excessive, involving as it does the necessity to keep records as to births, deaths, marriages, and similar vital statistics, and the task of making constant investigations as to the status of beneficiaries or other circumstances. Yet it may be argued that the standard of reasonable prudence is applied to the trustee’s conduct generally and that there is no basis for an exception in the case of payments or distributions. Thus if a trustee made an improper payment and was guilty of negligence in doing so, clearly the trustee should be held liable.

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

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

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

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

The will contained no exculpatory clause protecting the bank from liability for this type of error. As noted by Professor Scott, some States have provided protection for trustees in these circumstances: “In a few states it is provided by statute that when the

happening of any event, including marriage, divorce, attainment of a certain age, performance of educational requirements, death, or any other event, affects the distribution of the income or principal of trust estates, the trustees shall not be liable for mistakes of fact made prior to the actual knowledge or written notice of such fact: Oklahoma: Stats. Ann., tit. 60, § 175.24 (I) (4). Texas: Civ. Stat. Ann., art. 7425b-25 (I) (4). Washington: R.C., § 30.99.090, as inserted by Laws 1959, c. 124.” 3 A. Scott, Trusts § 226 at 1799 n.7 (3d ed. 1967). Massachusetts thus far has chosen not to provide trustees with this type of statutory protection.

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

There are a few commentators that address Texas’s statute, but do not add much past the actual language of the statute. In 2 Texas Estate Planning § 170.05, the treatise provides the following sample trust language: “Written Notice to Trustee. Until the trustee receives written notice of any death or other event upon which the right to payments from any trust may depend, the trustee shall incur no liability for disbursements made in good faith to persons whose interests may have been affected by that event.” It then provide the following explanation: “Frequently, the right to an interest in a trust depends on the occurrence of an event, such as the birth, death or

remarriage of a beneficiary, or the assignment of an interest in the trust. A provision included in the document specifies that if the trustee does not receive written notice of such event, the trustee will incur no liability for making distributions [see Texas Property Code § 114.004 for statutory provision to the same effect].” 9 Texas Transaction Guide--Legal Forms § 50C.24 provides: “A trustee is not liable for a mistake of fact made before the trustee has actual knowledge or receives written notice of the happening of any event that determines or affects the distribution of the income or principal of the trust. Marriage, divorce, attainment of a certain age, performance of education requirements, and death are some of the types of events that may affect distribution [Tex. Prop. Code § 114.004].” 72 Tex Jur Trusts § 165 provides: “A trustee is not liable for a mistake of fact made before the trustee has actual knowledge or receives written notice of the happening of any event that determines or affects the distribution of the income or principal of the trust, including marriage, divorce, attainment of a certain age, performance of education requirements, or death.”

### XXIII. CLAIMS RELATED TO OVERDISTRIBUTIONS

If the beneficiary obtains an inappropriate benefit from a trust, a trustee may have a claim against the beneficiary. Texas Property Code Section 114.031 provides:

A beneficiary is liable for loss to the trust if the beneficiary has: (1) misappropriated or otherwise wrongfully dealt with the trust property; (2) expressly consented to, participated in, or agreed with the trustee to be liable for a breach of trust

committed by the trustee; (3) failed to repay an advance or loan of trust funds; (4) failed to repay a distribution or disbursement from the trust in excess of that to which the beneficiary is entitled; or (5) breached a contract to pay money or deliver property to the trustee to be held by the trustee as part of the trust.

Tex. Prop. Code § 114.031(a). So, if a beneficiary has received an excessive distribution, a trustee has a claim against the beneficiary, who is liable for the loss. *Id.*

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

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

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

debts to implement a testamentary plan to treat each beneficiary equally”).

The Restatement (Third) of Trusts provides:

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

(2) If a beneficiary is personally liable to the trust, the trust is entitled to a charge against the beneficiary’s interest in the trust to secure the payment of the liability.

RESTATEMENT (THIRD) OF TRUSTS, § 104.  
The comments state:

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

*Id.* cmt. (d). It further provides:

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

*Id.* cmt. (h).

Similarly, Scott on Trusts provides:

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

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

If the trustee makes a loan of trust money to one of the beneficiaries, not only is the beneficiary personally liable to repay the amount of the loan to the trust, but his interest is subject to a charge for the amount lent. The rule is the same where the trustee makes an advance out of the

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

*Id.* § 255.

Furthermore, the fact that a trust may be a spendthrift trust does not protect a beneficiary from a trustee offsetting future distributions by what is owed. *See Bruce G. Robert QTIP Marital Trust v. Grasso*, 332 S.W.3d 248 (Ct. App. Mo. December 28, 2010) (citing RESTATEMENT (SECOND) TRUSTS, §225(f): “Spendthrift trust.

Although the interest of the beneficiary is not transferable by him or subject to the claims of his creditors, his interest is subject to a charge for advances made to him out of the trust property unless the settlor has manifested a different intention.”); *Danning v. Lederer*, 232 F.2d 610, 614 (7th Cir. 1956) (the existence of a provision allowing the beneficiary to receive loans from the trust does not to invalidate the spendthrift clause).

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

#### XXIV. BENEFICIARIES’ CLAIMS

The Texas Trust Code has express remedies available to a beneficiary for a trustee’s breach of fiduciary duty related to distribution issues. Texas Trust Code section 114.008 allows a court to compel a trustee to act, enjoin a trustee from breaching a duty, compel a trustee to redress a prior breach, order a trustee to account, appoint a receiver, suspend the trustee, remove the trustee, reduce or deny compensation, void an act of the trustee, impose a lien or a constructive trust, or order any other appropriate relief. Tex. Prop. Code Ann. § 114.008. Court may reduce or deny a trustee compensation for breaches of duty. *Id.* §§ 114.008, 114.061. A plaintiff only needs to prove a breach (and not causation or damages) when she seeks to forfeit some portion of trustee compensation. *Longaker v. Evans*, 32 S.W.3d 725, 733 n.2 (Tex. App.—San Antonio 2000, pet. withdrawn). Texas Trust Code section 114.064 provides: “In any proceeding under this code the court



may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." *Id.* § 114.064. Therefore, if a beneficiary sues for removal and/or breach of a duty, a court may order the trustee, individually, to pay the beneficiary's attorney's fees. In addition to statutory remedies, a beneficiary may sue a trustee for breaching fiduciary duties and obtain legal remedies such damages, lost profits, etc.

Trust Code Section 113.082 provides that a court may remove a trustee if: the trustee materially violated a term of the trust or attempted to do so and that resulted in a material financial loss to the trust; the trustee fails to make an accounting that is required by law or by the terms of the trust; or the court finds other cause for removal. *Id.* § 113.082. Multiple courts have held that a beneficiary can potentially remove a trustee due to distribution issues. In *Doherty v. JPMorgan Chase Bank, N.A.*, a court of appeals held that a trial court erred in awarding summary judgment to a trustee in a beneficiary's action for a declaration that, in light of the trustee's refusal to act, the beneficiary was permitted to appoint a successor trustee because the trustee's duty to make distributions when the beneficiary requested funds to remodel a bathroom to make it handicap-accessible was absolute and nondelegable. No. 01-08-00682-CV, 2010 Tex. App. LEXIS 2185 (Tex. App.—Houston [1st Dist.] Mar. 11, 2010). In *In re Estate of Bryant*, a court of appeals affirmed a trial court's removal of a trustee in a dispute between siblings who were the trustee and beneficiary of trusts where the trial court removed the brother as trustee of the sister's trust where the parties' relationship had become acrimonious, the trust was for the sister's maintenance, and she had need of the funds due to a terminal illness. No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131 (Tex. App.—Amarillo

Mar. 11, 2020); *see also Dildine v. Bonham*, No. 03-07-00631-CV, 2009 Tex. App. LEXIS 1752 (Tex. App.—Austin Mar. 12, 2009) (court of appeals affirmed removal where trustee made distributions to some beneficiaries abut not others). Further, it should be noted that there is no statute of limitations defense for a suit to remove a trustee. *Ditta v. Conte*, 298 S.W.3d 187 (Tex. 2009).

## XXV. NO-CONTEST CLAUSE

If a beneficiary sues a trustee regarding distributions, that act could trigger a no-contest clause or forfeiture clause. The Texas Property Code Section 112.038 provides:

(a) A provision in a trust that would cause a forfeiture of or void an interest for bringing any court action, including contesting a trust, is enforceable unless in a court action determining whether the forfeiture clause should be enforced, the person who brought the action contrary to the forfeiture clause establishes by a preponderance of the evidence that: (1) just cause existed for bringing the action; and (2) the action was brought and maintained in good faith.

(b) This section is not intended to and does not repeal any law, recognizing that forfeiture clauses generally will not be construed to prevent a beneficiary from seeking to compel a fiduciary to perform the fiduciary's duties, seeking

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

Tex. Prop. Code § 112.038; *Di Portanova v. Monroe*, 402 S.W.3d 711, 715 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (construing no contest clause to avoid forfeiture in trust dispute); *Conte v. Conte*, 56 S.W.3d 830, 833 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (suit to remove a trustee did not fall within the scope of a forfeiture clause where the clause simply stated that a beneficiary or remainderman is prohibited from “contesting or challenging this trust or any of its provisions.”). See also *Gerry W. Beyer, Rob G. Dickenson & Kenneth L. Wake, The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 SMU L. REV. 225, 255-58 (1998).

## XXVI. METHODS TO PROTECT TRUSTEES REGARDING DISTRIBUTION DECISIONS

### A. Beneficiaries' Consent And Release

Trustees and beneficiaries can enter into private agreements that provide protection for a trustee. A trustee and beneficiary may want to enter into a release agreement regarding distributions from the trust. A release is a contractual clause that states that one party is relieving the other party from liability associated with certain conduct. For a revocable trust, a settlor may revoke, modify, or amend the trust at any time before the settlor's death or incapacity. Tex. Prop. Code § 112.051. Accordingly, in a revocable trust situation, a settlor may modify or amend a trust to specifically release co-trustees from almost any duty or conduct. See *Puhl v. U.S. Bank, N.A.*, 34 N.E.3d 530 (Ohio Ct. App. 2015) (court held that in a revocable trust, during her

lifetime, the settlor had the authority to instruct the trustee to retain stocks, and the trustee had the duty to follow those instructions regardless of the risk presented by the nondiversification).

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

Further, writings between the trustee and beneficiary, including releases, consents, or other agreements relating to the trustee's duties, powers, responsibilities, restrictions, or liabilities, can be final and binding on the beneficiary if they are in writing, signed by the beneficiary, and the beneficiary has legal capacity and full knowledge of the relevant facts. Tex. Prop. Code § 114.032. Minors are bound if a parent signs, there are no conflicts between the minor and the parent, and there is no guardian for the minor. *Id.*

Once again, both of the Texas Trust Code provisions set forth above require that the beneficiary act “on full information” and full knowledge of the relevant facts. Tex. Prop. Code §§ 114.005, 114.032. This is important because releases can be voided on grounds of fraud, like any other contract. *Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990). So, fiduciaries should be very careful to provide full disclosures to beneficiaries before execution of a release regarding all material

facts concerning the released matter. The trustee should offer to provide access to its books and records and require the beneficiary to confirm that they had access to that information. *See Le Tulle v. McDonald*, 444 S.W.2d 794 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.) (court reversed summary judgment based on release of trustee where disclosure was not adequate).

#### B. Beneficiary's Ratification

Consents, in a perfect world, exist before a trustee begins managing an asset. If the trustee wants protection after it has been managing an asset for a while, a trustee may want to seek a ratification in addition to a consent and release. A beneficiary's knowledge and acquiescence in a trustee's failure to diversify may not be any protection for the trustee. A beneficiary's knowledge of a trustee's failure to invest trust funds does not, by itself, relieve the trustee from liability. *Landford v. Shamburger*, 417 S.W.2d 438, 445 (Tex. App.—Fort Worth 1967, writ ref'd n.r.e.), *disapproved on other grounds, Texas Commerce Bank v. Grizzle*, 96 S.W.3d 240, 251 (Tex. 2002). However, beneficiaries may be able to ratify a trustee's actions. *See Burnett v First Nat'l Bank of Waco*, 536 S.W.2d 600 (Tex. Civ. App.—Eastland, writ ref'd n.r.e.). Rather, the trustee should seek a written consent and release based on full information. If there are several beneficiaries, all of them must consent before the trustee is safe from liability. *See* RESTATEMENT (SECOND) OF TRUSTS § 216 cmt. g (1959). For the ratification to be valid, the ratifying beneficiaries should be aware of all material facts involved in the acts they ratify and of their rights in the matter, and must not be prevented from exercising those rights. *See e.g., Marcucci v. Hardy*, 65 F.3d 986 (1st Cir. 1995); *In re*

*Estate of Lange*, 383 A.2d 1130, 1137-38 (N.J. 1978).

#### C. Judicial Modification Of Trust

If a trust document limits the trustee's ability to make loans or is silent on loans, the parties may seek a modification of the trust to accomplish that goal. A settlor of a revocable trust can amend the trust without judicial intervention. Tex. Prop. Code §112.051(a) ("A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it."); *Snyder v. Cowell*, No. 08-01-00444-CV, 2003 Tex. App. LEXIS 3139 (Tex. App.—El Paso Apr. 10, 2003, no pet.).

In Texas, on the petition of a trustee or a beneficiary, a court may modify an irrevocable trust and allow a trustee to do things that are not authorized or that are forbidden by the trust document if: (1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill; (2) because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust; (3) modification of the administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or avoid impairment of the trust's administration; or (4) the order is necessary or appropriate to achieve the settlor's tax objectives and is not contrary to the settlor's intentions. Tex. Prop. Code Ann. § 112.054. The first three grounds do not require the agreement of all interested parties; whereas, the fourth ground does require that all beneficiaries agree. Additionally, if all beneficiaries consent, a court may enter an order that is not inconsistent with a material purpose of the trust. *Id.* Therefore, if all beneficiaries agree, it should be relatively easy to modify a trust document to insert appropriate language allowing loans to beneficiaries and

limiting claims against a trustee for making those loans. The settlor and all beneficiaries may consent to modify a trust. *Musick v. Reynolds*, 798 S.W.2d 626, 629 (Tex. App.—Eastland 1990, writ denied). This requires that all parties have capacity to consent. *Id.* Even if all beneficiaries do not agree, it is still possible to do so, though it may be more difficult.

The most applicable provision is Section 112.054(a)(2), providing that a court may modify a trust if circumstances not known to or anticipated by the settlor will further the purposes of the trust. Tex. Prop. Code §112.054(A)(2). However, under this provision, a trial court cannot modify a trust solely on its own discretion; rather, it must consider the settlor’s intent. For example, a court of appeals held that a trial court abused its discretion in modifying the terms of a trust and appointing a successor trustee because, while modification was necessary, the trial court erred by not exercising its discretion in a manner that conformed to the settlor’s intent. *Conte v. Ditta*, 312 S.W.3d 951 (Tex. App.—Houston [1st Dist.] Mar. 11, 2010, no pet.). A trustee may have a difficult time establishing a settlor’s intent where the settlor is no longer alive.

#### D. Judicial Approval

In addition to, or instead of, consents/releases/indemnities, a trustee or a beneficiary may seek court approval of a loan to a beneficiary. The Texas Trust Code allows for advance judicial approval. Tex. Prop. Code Ann. §115.001. The Texas Civil Practice and Remedies Code also allows a court to declare the rights or legal relations regarding a trust and to direct a trustee to do or abstain from doing particular acts or to determine any question arising from the administration of a trust. Tex. Civ. Prac. & Rem. Code Ann. § 37.005; *Cogdell v. Fort Worth Nat’l Bank*, 544 S.W.2d 825, 829

(Tex. Civ. App.—Eastland 1977, writ ref’d n.r.e.) (the trustee settled claims and sought judicial approval of the settlement agreement).

Even where all parties consent and may agree to release the trustee, a trustee may still want a court order allowing the trustee to make a loan to a beneficiary. That is certainly the safest, most conservative approach. *In re Estate of Boylan*, No. 02-14-00170-CV, 2015 Tex. App. LEXIS 1427 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.) (“A breach of trust may be found even though the trustee acted reasonably and in good faith, perhaps even in reliance on advice of counsel.”).

## XXVII. PRESERVING EVIDENCE

One of the issues facing parties in trust litigation is that decisions may be challenged years after they were made. The statute of limitations for breach of fiduciary duty is four years in Texas. This period may be extended by the discovery rule. It may be difficult to put the puzzle together to determine why a decision was made or not made, especially if the relevant trust administrator has already moved to his or her new firm. Trustees should do as much as possible to document the file regarding what issue was raised, what decision was made, why it was made, what due diligence was done, the various trust committees that reviewed the decision, and communications and disclosures about the decision. As one commentator states:

When the trustee makes the decision to not pay a requested distribution, it is important to properly document the reasons for declining in the file and to then convey the decision to the appropriate parties

quickly. Documenting discretionary action is essential and should include payment of expenses, distributions to beneficiaries, and decisions regarding investments or the use of the adjustment power. If a dispute between the beneficiary and trustee requires a determination of reasonableness, the proof required will be that which would be required to make the same determination by decree. File documentation could become courtroom evidence.

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 204-05 (2014).

## XXVIII. CONCLUSION

One of the most important aspects of trusts relates to a trustee's duty and power to make distributions. There are many different types of standards for distributions and there are many different types of conflicts that can arise regarding distributions. This paper has attempted to address many, but not all, of the standards and conflicts.