INJUNCTIVE RELIEF:
THE LETHAL PREEMPTIVE STRIKE IN PROBATE, TRUST AND GUARDIANSHIP LITIGATION

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CHAPTER 22

Mark R. Caldwell

Shareholder

Mark R. Caldwell was born on June 29, 1979 at Beaufort Naval Hospital in Beaufort, South Carolina where his father flew F-4 Phantoms at the nearby Marine Corps air station (although his mother had the more difficult job of raising three children). After having lived on the East Coast, West Coast and in Hawaii, he attended Eastfield Community College in Mesquite, Texas before transferring to Southern Methodist University, where he earned a full academic scholarship. One year later, he attended the London School of Economics as a General Course Student. Mark earned his law degree from New England School of Law in Boston, Massachusetts, in 2005. He entered private practice as a litigator in a boutique probate and trust firm, representing executors, guardians, and beneficiaries in complex estate and trust litigation. He has also represented fiduciaries in all phases of estate, trust, and guardianship administration. Mark enjoys the investigatory aspects of estate and trust litigation, including reviewing and analyzing medical, financial, and suspicious property records and transactions. Mark is committed to developing and maintaining strong, personal relationships with his clients. He endeavors to offer smart, pragmatic and cost-effective legal advice. Mark believes that the strongest winning position is one that is simple, direct, and understandable and he realizes that estate and guardianship litigation often involves substantial damage to family relationships. While he strives to advocate strong, aggressive positions for clients, Mark also strives to resolve disputes in an ethical and reasonable manner that, if desired, does not preclude the opportunity for reconciliation.

Mark is married and has three children. He enjoys living an active lifestyle, traveling, and spending time with his family.

Public Speaking & Publications

- Co-Author/Speaker: State Bar of Texas: "Elder Exploitation" – Advanced Guardianship Law (2015).
- Co-Author/Speaker: Travis County Bar Association: "Winning the Battle & the War: A Remedies–Centered Approach to Litigation Involving Durable Powers of Attorney" (2015).
- Co-authored, Properly Performing Annual Accounts in Guardianships and Management Trusts Where One or Both Spouses are Incompetent, Real Estate, Probate, & Trust Law Reporter, Volume 52, No. 4 (2014).
- Served as Moderator for the Guardianship and Ad Litem Attorney Certification Course, sponsored by the Dallas Bar Association Probate, Trusts & Estate Section, Dallas County Probate Courts and the Dallas Volunteer Attorney Program to train lawyers in the representation of guardians of indigent wards, and the role and responsibilities of the Attorney Ad Litem (2014).
- Winning the Battle and the War; A Remedies—Centered Approach to Litigation Involving Durable Powers of Attorney; 64 Bay. L. Rev. 435 (Spring 2012).
- Author/Speaker: "An Introduction to Guardianships" – Texas Department of Assistive & Rehabilitative Services (DARS), Dallas, Texas (Fall 2010; Spring 2011).
- Co-authored and presented article, "Proof of Facts and Common Evidentiary Problems Encountered in Contested Probate Proceedings," at the Seventh Probate Litigation Seminar, sponsored by the Tarrant County Probate Bar Association (September 2010).
- Author, A Good Deed Repaid: Awarding Attorney's Fees in Contested Guardianship Proceedings; 51 S. Tex. L. Rev. 439 (Winter 2009).

Community and Bar Association Involvement

- Dallas Bar Association; Probate and Trust Section; Council Member
- Dallas Bar Association; Probate and Trust Section Member; Trial Skills Section Member
- Dallas Association of Young Lawyers; Elder Law Section Member

- Board of Directors, St. Thomas More Society
- Dallas Bar Mentor Program; Participated as Mentee; Mentor, Edward V. Smith III
- Organized and leads an ongoing monthly probate study group featuring prominent guest speakers and court staff
- Board of Directors and Vice President, City of Sachse Economic Development Corporation (2010-2014)
- Member, Charter Review Commission, City of Sachse (2012-2013)

Certification, Awards and Recognition

- Board Certified Estate Planning and Probate Law – Texas Board of Legal Specialization (2015)
- Named Rising Star by the Texas Super Lawyers (2014-2015)

Education

- General Course, The London School of Economics, London, United Kingdom (2001-2002)
- B.A., *magna cum laude,* Southern Methodist University, Dallas, Texas (2002)
- J.D., New England Law | Boston, Boston, Massachusetts (2005)

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INJUNCTIVE RELIEF: THE LETHAL PREEMPTIVE STRIKE IN PROBATE, TRUST AND GUARDIANSHIP LITIGATION

I. INTRODUCTION

Injunctive relief is a product of the English courts of chancery; it works to fulfill the equitable maxim that "no right shall be left without a remedy."[1] Injunctions are not intended to grant relief for past actionable wrongs or to prevent the commission of wrongs not imminently threatened.[2] The purpose of injunctive relief is to "halt wrongful acts that are either threatened or in the course of accomplishment."[3]

Halting wrongful acts is at the very core of probate, trust, and guardianship litigation. While the Texas Supreme Court has explained that a temporary injunction is an extraordinary remedy, which should not issue as a matter of right[4], it is nonetheless an underutilized remedy in many probate proceedings. While temporary injunctive relief is most often sought in connection with a temporary guardianship or temporary administration, many lawyers omit this form of relief from their applications. The irony is that, by and large, probate courts are *more* likely to grant temporary injunctive relief than to establish temporary guardianships or temporary administrations. More importantly, temporary injunctive relief is punishable by contempt, which means the party in contempt may be fined or jailed.

In many cases, a request for temporary injunctive relief provides the applicant with the tactical advantage of presenting his or her case to the court first. Significant evidence can be gathered quickly, without affording the other side the opportunity to engage in thorough preparation. Such evidence often changes the course of the litigation.

Therefore, it is critical to know the legal requirements necessary to obtain such relief. The goal of this paper is to assist the probate lawyer in making it "easy" for the trial court to grant temporary injunctive relief. If properly drafted, an application for temporary injunctive relief can present the trial court with an opportunity to follow the path of least resistance and reduce the likelihood that something bad will happen during the pendency of the litigation. Probate courts are inclined to protect their jurisdiction by entering "do not steal" orders.

The preemptive advantage of injunctive relief can be found in being able to direct litigation from its inception. Success depends on knowing the battlefield, familiarizing yourself with the available weapons, as well as knowing how they work. When appropriately employed, injunctive relief as a first strike can also be the last strike in what might otherwise be expensive and divisive litigation that depletes the same assets you are fighting to protect.

A. Various Types of Injunctive Relief

When lawyers use the broad phrase "injunction," it is sometimes unclear as to which type they are referring. Injunctions essentially come in three different flavors: a temporary restraining order, or TRO (which usually lasts only fourteen days)[5], a temporary injunction (which may last all the way until a trial on the merits)[6], and a permanent injunction (which is, of course, permanent).

In most cases, a request for injunctive relief begins with a request for a TRO, which is then followed by a request for a temporary injunction.[7] Any request for permanent injunctive relief is generally awarded as a part of the final judgment in the case.[8] While a TRO may be issued with or without notice to an opposing party, a temporary injunction is issued after an evidentiary hearing that essentially amounts to a mini-trial of the case.[9] Typically, a temporary injunction will remain in effect until the entry of a final judgment or the agreement of the parties.

There are basically two general types of injunctive relief: prohibitive and mandatory. A prohibitive injunction forbids conduct, while a mandatory injunction requires it.[10] The vast majority of temporary injunctions issued in probate proceedings are of the prohibitive variety. Mandatory injunctions, however, have been issued to require parties to perform

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[1] Gave T. Vick, *Temporary Restraining Orders and Temporary* Injunctions, 64 The Advoc. (Texas) 55, 55; citing *Kuechler v. Wright*, 40 Tex. 600, 633 (1874).

[2] *Wiese v. Heathlake Cmty. Ass'n, Inc.*, 384 S.W.3d 395, 399 (Tex. App.—Houston [14th Dist.] 2012, no pet.)(citing *Tex. Emp't Comm'n v. Martinez,* 545 S.W.2d 876, 877 (Tex. Civ. App.–El Paso 1976, no writ).

[3] *Id.*

[4] *Walling v. Metcalfe*, 863 S.W.2d 56, 57-58 (Tex. 1993)

[5] *See* TEX. R. CIV. P. 680.

[6] *See* TEX. R. CIV. P. 683.

[7] *See A Primer on Injunctive Relief in Federal and State* Court, William Frank Carroll and Richard M. Hunt, The Advoc. (Texas, Fall 2005) 34, 38-39.

[8] *Id.*

[9] *Id.*

[10] *RP&R, Inc. v. Territo*, 32 S.W.3d 396, 400 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *See also In re Estate of Skinner*, 417 S.W.3d 639, 640 (Tex. App.—Houston [14th Dist.] 2013, no pet.)(Order requiring party to deposit two checks into the registry of the court was considered a temporary injunction which was void because it did not set the case for trial on the merits or set a bond).

accountings and provide other related documents,[11] so their use in probate proceedings should not be overlooked.

B. Statutory Authority

In the probate, trust, or guardianship context, there are three main sources of authority for injunction relief: the Texas Rules of Civil Procedure; the Texas Civil Practices and Remedies Code; and various "remedial" statutes.

1. Texas Rules of Civil Procedure

Any attorney seeking a TRO and/or temporary injunction must be intimately familiar with Texas Rules of Civil Procedure 680-693. Do not read one rule and think you have understood all the requirements for the particular topic of that rule. Many requirements are spread out over multiple rules and thus one rule may have to be read in connection with other rules. For purposes of this article, only the most commonly encountered rules are discussed.

a. Rule 680

Rule 680 governs TROs. It contains several key concepts that are important to remember:

- You must plead specific facts that show your client will suffer immediate, irreparable harm before you can give the other party notice and before you can conduct a hearing.
- The facts plead must be supported by an affidavit or the petition must be verified.
- The TRO must include the date and hour it was signed.
- The TRO must define the injury and state why it is irreparable and why the order was issued without notice.
- The TRO must state it expires on a date not to exceed 14 days.
- The TRO can last for more than 14 days if, and only if, (1) within the original 14 day period and for *good cause* shown, it is extended for another "like period" (*i.e.*, the period of the original TRO) or (2) the party against whom it operates consents to extend it for a longer period. (The most frequent examples of "good cause" for purposes of extending the TRO are: (1) the party obtaining the TRO is having trouble serving the defendant; and (2) the party seeking the temporary injunction needs additional time to gather evidence for the temporary injunction hearing.)
- No more than one extension can be granted unless later extensions are unopposed.
- The reasons for the extension must be entered of record, which essentially means that they should be stated in the *written* order extending the TRO.
- The TRO must include language setting the hearing on the temporary injunction.
- If you obtain a TRO and do not proceed with your application for a temporary injunction, the court must dissolve the TRO.
- A party against whom the TRO operates may move to dissolve it, but must normally give the party who obtained the TRO at least 2 days notice unless the court prescribes a shorter notice period.

The vast majority of cases where TROs are successfully dissolved involve situations where a party ignores the detailed and fundamental requirements contained in Rule 680 and/or Rule 683 (discussed below).

b. Rules 681-682.

Rules 681 and 682 apply to temporary injunctions. It should be noted out the outset that there is an apparent inconsistency between Rule 680 and Rule 682 regarding the form of each respective application, which inevitably affects the drafting of the application and supporting documents.

While Rule 680 uses the phrase "by affidavit or by the verified complaint," Rule 682 requires an applicant seeking a "writ of injunction" to present his petition "verified by his affidavit". Many practitioners believe this rule to mean that while an application for a TRO can be supported by an affidavit or verified complaint, a verified complaint alone (without a supporting affidavit) is insufficient to obtain a temporary injunction.

Texas Government Code Section 312.011 defines "affidavit" as "a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office."[12] Black's Law Dictionary defines "verification" as "(1) [a] formal declaration made in the presence of an authorized officer, such as a notary public...; whereby one swears to the truth of the statements in the document [or]; (2) [a]n oath or affirmation that an authorized officer administers to an affiant or deponent."[13] Black's Law Dictionary separately defines "verify" as: "(1) [t]o prove to be true; to confirm or

[11] *See e.g. In re Aspen Exploration, Inc.*, 05-08-00145-CV, 2008 WL 519276, at *1 (Tex. App.—Dallas Feb. 28, 2008, no pet.).

[12] TEX. GOV'T CODE § 312.011(1); *In re K.M.L.*, 443 S.W.3d 101, 109 (Tex. 2014).

[13] Black's Law Dictionary 1793 (10th ed.2009); *In re K.M.L.*, 443 S.W.3d 101, 109 (Tex. 2014).

establish the truth or truthfulness of; to authenticate; [or] (2) [t]o confirm or substantiate by oath or affidavit; to swear to the truth of."[14] The Texas Supreme Court has noted that, from a practical standpoint, there is no meaningful difference between the terms "verify" and "verification," as many of the Texas Rules of Civil Procedure require court documents to be "verified," without using the noun form of the word—"verification."[15] Texas courts that have discussed the verification requirement in other contexts (*i.e.*, Rule 165a and Rule 93) have held that no particular form of verification is required so long as the affiant swears to the truth of the contents and that the affidavit is based on personal knowledge.[16]

Ultimately, Rule 680 and Rule 682's "verified complaint" compared to "verified by affidavit" may be a distinction without a difference. In fact, when it comes to temporary injunctions, any defect regarding the verification is usually not material "since [the] petitioning party is required to present evidence supporting temporary injunctive relief" at a hearing.[17]

Unlike a TRO, Rule 681 states that no temporary injunction can be issued without notice. When a full evidentiary hearing on evidence independent of the petition has been held, a verified petition for injunctive relief is not required to grant a temporary injunction.[18] Finally, the failure to object before the trial court to non-verified or defectively verified pleadings waives the right to complain on appeal.[19]

From a practical standpoint, the rule regarding verification is enforced primarily with regard to ex parte TROs.[20]

Many lawyers will draft a detailed TRO application and then rely on the verification without attaching supporting affidavits. In this author's opinion, the better practice is to: (1) plead sufficient, but general facts in the application; (2) verify it; and (3) attach supporting affidavits detailing the general factual allegations. Pleading the facts generally in this fashion should suffice, as Rule 682 requires the petition/application to include a plain and intelligible statement of the grounds for relief.

One advantage of having the affidavits is that, in certain situations (for example, if no one appears at the temporary injunction hearing to contest the request for injunctive relief), you can offer the affidavits into evidence to support the temporary injunction. A trial court may issue a temporary injunction based on affidavit testimony *admitted into evidence* at the hearing thereon.[21]

c. Rule 683.

Rule 683 prescribes the form and scope of an injunction or TRO. When seeking a TRO, it is imperative that Rule 683 be read with Rule 680, since both rules contain requirements for a TRO. Rule 680 requires every TRO or temporary injunction to:

- Set forth the reasons for its issuance;
- Be specific in its terms;
- Describe in reasonable detail (and not by reference to the complaint or other document), the act or acts to be restrained; and
- Include an order (or language in the temporary injunction) setting the cause for trial on the merits with respect to the ultimate relief sought.

Moreover, Rule 683 reminds us that a TRO or temporary injunction is only binding upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

One Texas court has upheld a finding of contempt where "inadequate notice" was alleged – despite the relator not being present and receiving only oral notice of the injunction through the movant's attorney.[22] The

[14] *In re K.M.L.*, 443 S.W.3d 101, 109 (Tex. 2014)("Any difference between 'verified' and 'verification' is merely a matter of semantics.").

[15] *Id.* (discussing issue in the context of examining the validity of an affidavit of voluntary relinquishment of parental rights).

[16] *Id.* citing *Andrews v. Stanton,* 198 S.W.3d 4, 7–8 (Tex. App.–El Paso 2006, no pet.); *Cantu v. Holiday Inns, Inc.,* 910 S.W.2d 113, 116 (Tex. App.–Corpus Christi 1995, no pet.); *Brown Found. Repair & Consulting, Inc. v. Friendly Chevrolet Co.,* 715 S.W.2d 115, 117 (Tex. App.–Dallas 1986, writ ref'd n.r.e.); *Durrett v. Boger,* 234 S.W.2d 898, 900 (Tex. Civ. App.–Texarkana 1950, no writ).

[17] Bob E. Shannon Charles F. J., *Temporary Restraining Orders and Temporary Injunctions in Texas-A Ten Year Survey, 1975-1985*, 17 St. Mary's L.J. 689, 723-24 (1986); (citing See *White v. Corpus Christi Little Misses Kickball Ass'n,* 526 S.W.2d 766, 770 (Tex. Civ. App.–Corpus Christi 1975, no writ).

[18] *Mattox v. Jackson*, 336 S.W.3d 759, 763 (Tex. App.–Houston [1st Dist.] 2011, no pet.)(citing *Georgiades v. Di Ferrante,* 871 S.W.2d 878, 882 (Tex. App.–Houston [14th Dist.] 1994, writ denied).

[19] *Id.* citing *Jones v. Garcia*, 538 S.W.2d 492, 495 (Tex. Civ. App.–San Antonio 1976, no writ).

[20] *Id.*

[21] *Pierce v. State*, 184 S.W.3d 303, 307 (Tex. App.–Dallas 2005, no pet.).

[22] *Ex parte Jackman*, 663 S.W.2d 520, 523 (Tex. App.—Dallas 1983, no writ)("[M]ovant's attorney notified

best practice, however, is to personally serve the defendant with notice of the TRO or temporary injunction to make the order or injunction "binding" on the enjoined party.

d. Rule 684.

Rule 684 requires an applicant to post a bond. The rule provides for a personal surety bond, as it requires an applicant to execute and file a bond to the adverse party, with two or more good and sufficient sureties, to be approved by the clerk, in the sum fixed by the trial court, conditioned that the applicant will abide the decision which may be made in the cause, and that he will pay all sums of money and costs that may be adjudged against him if the temporary injunction is dissolved.[23] Anytime a surety bond is required, however, a party may instead deposit cash in lieu of filing the bond.[24] Parties have unsuccessfully attempted to argue that a cash deposit must nevertheless comply with the "conditioned" provisions of Rule 684 and Rule 14c.[25] Rule 14c automatically incorporates with a cash deposit all the necessary statutory conditions for a proper surety bond.[26] Thus, a cash deposit constitutes a proper bond under Rules 684 and 14c. In essence, the amount of the bond is intended to compensate the enjoined party from the inconvenience of being enjoined – in probate cases, this means – from managing someone else's money. In this author's experience, courts typically require a $500.00 – $750.00 bond in a typical probate case. Cash bonds are preferred.

Finally, keep in the mind that the bond for a TRO does not continue on, and act as security for, a temporary injunction unless expressly authorized by the trial court.[27] For example, a bond filed for a TRO will continue in full force and effect as the bond for a temporary injunction where the order granting the temporary injunction provides that "the bond heretofore filed with the Clerk upon issuance of the restraining order herein be, and is hereby continued in full force and effect as a temporary injunction bond".[28]

e. Rules 686–689.

Rule 686 is often confused with Rules 687, 688, and 689. Rule 686 pertains to "citation," while Rules 687, 688, and 689 relate to the "writ of injunction." They are distinct concepts.

Under Rule 686, when the request for injunctive relief is included in a "brand new lawsuit," the clerk issues citation as in other civil cases, which shall be served and returned in the same manner as ordinary citations.[29] But, when an applicant obtains a TRO at the same time the lawsuit is filed, only one citation is needed when the TRO and underlying lawsuit are served together ("it shall be sufficient for the citation to refer to plaintiff's claim as set forth in a true copy of plaintiff's petition which accompanies the TRO").[30]

In other words, the party who obtains and serves an ex-parte TRO is not required to obtain an additional citation for the lawsuit ("it shall not be necessary for the citation in the original suit to be accompanied with a copy of the plaintiff's petition, nor contain a statement of the nature of plaintiff's demand").[31]

Once a defendant is properly before the trial court – for example, because he or she was formerly served with citation, a copy of the petition, a copy of the TRO, and a writ of injunction – the applicant does not have to provide *additional* citation and formal service of process before the hearing on the temporary injunction. Rule 681 only states that "no temporary injunction shall be issued without *notice* to the adverse party."[32] In fact, it is common for parties to request temporary injunctive relief in the middle of a lawsuit, after new facts are revealed during discovery that warrant immediately preserving the status quo.

Texas courts have gone even further, however, and have held that, although a trial on a petition for a permanent injunction requires citation to be served and returned as ordinary citations, such a process is not

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relator of the contents of the order the same day it was issued. The rules of civil procedure require only that the parties receive *actual notice* of the order by personal service or *otherwise.* Tex .R. Civ. P. 683. Relator never contended that he did not receive oral notification of the terms of the injunction, but only that the notice received was insufficient to satisfy rule 683. We find no authority to support relator's position.").

[23] *See Adobe Oilfield Services, Ltd. v. Trilogy Operating, Inc.*, 305 S.W.3d 402, 404 (Tex. App.—Eastland 2010, no pet.).

[24] *Id.* (citing TEX. R. CIV. P. 14c).

[25] *Id.* (Cash that party seeking injunction deposited with the trial clerk court insured that party would abide by the decision in this cause and would pay all sums of money and costs adjudged against it if the temporary injunction were to be dissolved and was held to be proper).

[26] *Id.* (citing *Seib v. American Savings & Loan Ass'n of Brazoria County,* No. 05–89–01231–CV, 1991 WL 218642 (Tex. App.–Dallas 1991, no writ) (not designated for publication).

[27] *Bay Fin. Sav. Bank, FSB v. Brown*, 142 S.W.3d 586, 591 (Tex. App.—Texarkana 2004, no pet.).

[28] *Id. See Ex parte Coffee,* 160 Tex. 224, 328 S.W.2d 283, 285, 291–92 (1959).

[29] TEX. R. CIV. P. 686.

[30] *Id*.

[31] *Id.*

[32] *Rapid Settlements, Ltd. v. Settlement Funding, LLC*, 358 S.W.3d 777, 788 (Tex. App.—Houston [14th Dist.] 2012, no pet.)

necessary on an application for a temporary injunction.[33] An application for a temporary injunction may be heard "at such time and upon such *reasonable notice* given in such manner as the court may direct."[34] Moreover, where a defendant actually receives notice, files an answer, and personally appears at a hearing on an application for temporary injunctive relief, the necessity for service and any defects in citation are waived.[35]

Every TRO or temporary injunction must be accompanied by a "writ of injunction," which is a document prepared by the clerk.[36] Many lawyers mistakenly believe they can serve the TRO or temporary injunction without the writ.

When Rule 688 refers to the "clerk" issuing the "TRO or temporary injunction," it refers to the "writ of injunction." A lawyer prepares the actual TRO or temporary injunction order. The term "writ of injunction" includes TROs.[37] In other words, a party who obtains a TRO or temporary injunction must also obtain – from the clerk – the writ of injunction.

The writ of injunction essentially repeats the contents of the order signed by the judge.[38] The only real difference between the order and the writ is the writ does not have to include the various findings justifying issuance of the injunction that must be in the order.[39] Under Rule 687, a writ of injunction is sufficient if it contains substantially the following requisites: (1) it is styled "The State of Texas;" (2) it is directed to the person or persons enjoined; (3) it states the names of the parties to the proceedings, plaintiff and defendant, and the nature of the plaintiff's application, with the action of the judge on the application; (4) it commands the person or persons to whom it is directed to desist and refrain from the commission or continuance of the act enjoined, or to obey and execute the judge's orders; (5) if it is a TRO, it states the day and time set for hearing on the application for temporary injunction, which must be within 14 days from the date of the court's order granting such TRO; (6) it is dated and signed by the clerk officially, and is attested with the clerk's seal of office; and (7) the date of its issuance is indorsed on the writ.[40]

Rule 689 pertains to serving the writ of injunction. It provides that when the officer receives the writ of injunction, he or she is required to endorse the date of receipt on the actual writ and then serve it and file a return in accordance with Texas Rule of Civil Procedure 107.

f. Rule 690.

Rule 690 relates to the form of answer the Defendant is required to file. Essentially, the Rule mandates that if a defendant denies the material allegations in the plaintiff's petition, the defendant's answer must be verified. In fact, no injunction can be dissolved unless the answer denying the material allegations in the plaintiff's petition is verified.

g. Rule 692.

Rule 692 gives injunctions their teeth. It provides that disobedience of an injunction may be punished as contempt. In case of such disobedience, the complainant, his agent or attorney, may file an affidavit stating what person is guilty of such disobedience and describing the acts constituting the same.[41] The court is then required to issue a writ of attachment for such person, directed to the sheriff or any constable of any county, and requiring such officer to arrest the person therein named if found within his county and have him before the court or judge at the time and place named in such writ. Alternatively, the court may issue a show cause order directing and requiring such person to appear on such date as may be designated and show cause why he should not be adjudged in contempt of court. Of the two options – the writ of attachment and the show cause order – the second option is probably more widely used in probate courts.

On return of such attachment or show cause order, the court shall proceed to hear evidence and if satisfied that such person has disobeyed the injunction, either directly or indirectly, the court may commit such person to jail without bail until he purges himself of such contempt, in such manner and form as the court may direct.[42]

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[33] *Rapid Settlements, Ltd. v. Settlement Funding, LLC*, 358 S.W.3d 777, 788 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *See Long v. State,* 423 S.W.2d 604, 605 (Tex. Civ. App.–Houston [14th Dist.] 1968, writ ref'd n.r.e.)(holding that the hearing on an application for temporary injunction did not require formal citation and service. When a defendant has notice of a hearing on temporary injunction, if he needs time to prepare to answer or defend against the pleading, then he must seek a continuance before he may be heard to complain on appeal).

[34] TEX. R. CIV. P. 686.

[35] *Parr v. First State Bank of San Diego*, 507 S.W.2d 579 (Tex. Civ. App.—San Antonio 1974, no writ).

[36] TEX. R. CIV. P. 688, 689.

[37] *Ex parte Coffee*, 160 Tex. 224, 232, 328 S.W.2d 283, 290 (1959).

[38] *A Primer on Injunctive Relief in Federal and State* Court, William Frank Carroll & Richard M. Hunt, 32 The Advoc. (Texas) 34, 41 (2005).

[39] *Id.*

[40] TEX. R. CIV. P. 687.

[41] TEX. R. CIV. P. 692.

[42] TEX. R. CIV. P. 692.

h. Rule 693.

Rule 693 is an important rule that emphasizes the applicability of injunctive relief in litigation involving fiduciaries. Rule 693 states that the principles, practice, and procedure governing courts of equity shall govern proceedings in injunctions when the same are not in conflict with these rules or the provisions of the statutes.[43] It is well settled law in Texas that equitable remedies, such as temporary injunctions,[44]are available for breach of fiduciary duty.[45] This only makes sense, as fiduciary duties are equitable in nature.[46]

2. Texas Civil Practices and Remedies Code

Texas Civil Practices and Remedies Code Sections 65.001 through 65.045 set forth the general statutory authority for trial courts to grant injunctive relief. Texas Civil Practices & Remedies Code §65.011 provides that a writ of injunction may be granted if:

(1) the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant;
(2) a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual;
(3) the applicant is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions;
(4) a cloud would be placed on the title of real property being sold under an execution against a party having no interest in the real property subject to execution at the time of sale, irrespective of any remedy at law; or
(5) irreparable injury to real or personal property is threatened, irrespective of any remedy at law.[47]

Although by using the phrase "irrespective of any remedy at law," Texas Civil Practices and Remedies Code Section 65.011(5) seems to suggest that a party does not have to prove an inadequate remedy at law to be entitled to injunctive relief, Texas courts have held otherwise.[48] As the *Graff* court explained, "The Texas Supreme Court has held Section 65.011(5) requires both irreparable injury and an inadequate legal remedy. The Texas Supreme Court reasoned that the intention of the Legislature was not to provide a choice of remedies, but rather, was merely 'to provide a remedy to cover those injuries for which there was not a clear, full, and adequate remedy at law.'"[49]

3. Other Statutes Which Authorize Injunctive Relief

a. The Texas Trust Code

The Texas Trust Code states that, to remedy a breach of trust that has occurred or might occur, the court may enjoin the trustee from committing a breach of trust.[50] A mandatory injunction ordering the trustee to redress a breach of trust, including compelling the trustee to pay money or to restore property and ordering the trustee to perform an accounting also appear proper.[51]

b. Texas Civil Practices and Remedies Code §37.005

Texas Civil Practice & Remedies Code Section 37.005 also allows an interested person to request the court to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity.

c. Texas Guardianship Code

Texas Estates Code §1251.051 gives the court the ability, *on the court's own motion* or on the motion of any interested party, to appoint a temporary guardian or grant a TRO under Rule 680, Texas Rules of Civil Procedure, or both, without issuing additional citation if: (1) an application for a temporary guardianship, for the conversion of a temporary guardianship to a permanent guardianship, or for a permanent

[43] TEX. R. CIV. P. 693.

[44] *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 477-78 (Tex. App.—Dallas 2010, no pet.).

[45] *See e.g. Garcia v. Garza*, 311 S.W.3d 28, 40 (Tex. App.—San Antonio 2010, pet. denied)(citing *Int'l Bankers Life Ins. Co. v. Holloway,* 368 S.W.2d 567, 584 (Tex.1963).

[46] *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 702 (Tex. 2007).

[47] TEX. CIV. PRAC. & REM. CODE §65.011.

[48] *Graff v. Berry*, 06-06-00065-CV, 2006 WL 2805555, at *2 (Tex. App.—Texarkana Oct. 3, 2006, no pet.)(affirming trial court's denial of temporary injunction to prevent party from making improvements to a road crossing)(citing *Storey v. Cent. Hide & Rendering Co.,* 148 Tex. 509, 226 S.W.2d 615, 619 (1950) for the proposition that it construed predecessor to Section 65.011(5) to still require showing of inadequate remedy at law as it authorized an injunction when "irreparable injury to real estate or personal property is threatened, irrespective of any legal remedy at law") and *Cardinal Health Staffing Network, Inc. v. Bowen,* 106 S.W.3d 230, 234 (Tex. App–Houston [1st Dist.] 2003, no pet.)(holding "the Supreme Court has construed subsections (1) and (5) [of Tex. Civ. Prac. & Rem. Code Ann. § 65.011] to include the equitable requirement of irreparable injury and inadequate legal remedy").

[49] *Id.* citing *Storey,* 226 S.W.2d at 619.

[50] TEX. TRUST CODE §114.008(a)(2).

[51] TEX. TRUST CODE §114.008(a)(3)(4).

guardianship is challenged or contested; and (2) the court finds that the appointment or the issuance of the order is necessary to protect the proposed ward or the proposed ward's estate.[52]

C. Equitable Nature of Remedy

A temporary injunction is an equitable remedy.[53] Generally speaking, the principles governing courts of equity govern injunction proceedings unless superseded by a specific statutory mandate.[54] Consequently, the trial court weighs the respective conveniences and hardships of the parties and balances the equities.[55] Some courts have remarked this "balancing of the equities" requires the trial court to "weigh the harm or injury to the applicant if the injunctive relief is withheld against the harm or injury to the respondent if the relief is granted."[56]

D. In Personam Nature of Remedy

Generally, the remedy of an injunction acts, not in rem, but in personam.[57] This means that, under the right circumstances, a Texas court can enjoin someone from taking action with respect to property located outside the state of Texas. Normally, a Texas court would lack jurisdiction to determine and redress injuries "done to land situated beyond the boundaries of this State, when no part of the act resulting in injury was performed or committed within this State."[58]

However, an exception to this rule exists if "the crux of the action does not hinge on resolution of issues specific to land, but upon the conduct of the person," and in that case an injunction may be considered in personam and transitory.[59] An action in personam is one that has for its object a judgment against the person, as distinguished from a judgment against the property.[60] For example, a temporary guardian or temporary administrator could pursue a claim to impose a constructive trust over real property in another state, the remedy of which would be an order compelling a defendant to convey property back to the proposed ward or estate. It is well settled law that suits for injunctive relief act in personam and not in rem.[61] In addition, generally, equitable remedies act in personam.[62]

The fact that an equitable decree (like an injunction) will indirectly affect title to or an interest in land does not preclude characterizing the action as one in personam, especially where the remedy will be enforced against the person.[63] For transitory in personam actions, a court can enjoin activities of an individual wherever he or she may be found.[64] So long as the court issuing the injunction has in personam jurisdiction over the entity or individual, the power of the injunction is not restricted to the issuing state.[65]

E. Appellate Review

1. TRO vs. Temporary Injunction

When discussing appealing temporary injunctive relief it is important to distinguish between "TROs" and "temporary injunctions." Generally, a TRO is not appealable.[66] A temporary injunction, however, is an appealable interlocutory order.[67]

Texas Civil Practices and Remedies Code Section 51.014 states in relevant part that a person may appeal from an interlocutory order of a district court, county court at law, statutory probate court, or county court that:

- Grants or refuses a temporary injunction; or

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[52] TEX. EST. CODE §1251.051.

[53] *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 477-78 (Tex. App.—Dallas 2010, no pet.); *See also* TEX. R. CIV. P. 693 (stating the principles, practice, and procedure governing courts of equity shall govern proceedings in injunctions when they are not in conflict with rules or statutes).

[54] *Seaborg Jackson Partners v. Beverly Hills Sav.*, 753 S.W.2d 242, 245 (Tex. App.—Dallas 1988, no writ); *See* TEX. CIV. PRAC. & REM. CODE §65.001.

[55] *Computek Computer & Office Supplies, Inc. v. Walton,* 156 S.W.3d 217, 220 (Tex. App.–Dallas 2005, no pet.).

[56] *Id.*

[57] *Ex parte Davis*, 470 S.W.2d 647, 649 (Tex. 1971).

[58] *See Greenpeace, Inc. v. Exxon Mobil Corp.*, 133 S.W.3d 804, 809 (Tex. App.—Dallas 2004, pet. denied).

[59] *Id.*

[60] *Id.* citing *Green Oaks Apartments, Ltd. v. Cannan,* 696 S.W.2d 415, 418 (Tex. App.–San Antonio 1985, writ denied).

[61] *Id.* citing *Green Oaks Apartments, Ltd. v. Cannan,* 696 S.W.2d 415, 418 (Tex. App.–San Antonio 1985, writ denied).

[62] *Id.*

[63] *Id.* citing *Green Oaks Apartments, Ltd. v. Cannan,* 696 S.W.2d 415, 419 (Tex. App.–San Antonio 1985, writ denied).

[64] *Id.*

[65] *Id.* at 810.

[66] *In re Texas Natural Res. Conservation Com'n*, 85 S.W.3d 201, 205 (Tex. 2002)(citing *Del Valle Indep. Sch. Dist. v. Lopez,* 845 S.W.2d 808, 809 (Tex.1992).

[67] *Id.* citing TEX. CIV. PRAC. & REM. CODE §51.014(4)("A person may appeal from an interlocutory order of a district court, county court at law, statutory probate court, or county court that: . . . grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65.")

- Grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65.

The Texas Supreme Court has stated that the mere fact that an order is denominated as a "TRO" does not control whether the order is appealable.[68] Whether an order is a non-appealable TRO or an appealable temporary injunction depends on the order's characteristics and function, not its title.[69] The Texas Supreme Court has explained the roles the different orders serve:

> A temporary restraining order is one entered as part of a motion for a temporary injunction, by which a party is restrained pending the hearing of the motion. A temporary injunction is one which operates until dissolved by an interlocutory order or until the final hearing.

2. Timetable for Appeal

The timetable for appealing a temporary injunction is much shorter than those applicable to normal appeals because appealing a temporary injunction is considered an "accelerated appeal."[70]

Moreover, the Rules are clear that appealing a temporary injunction will not delay the trial on the merits.[71] Because temporary injunctions are expressly excluded from the automatic stay provisions of Texas Civil Practice and Remedies Code Section 51.014,[72] from a pragmatic standpoint, Texas appellate courts have consistently noted that the "fastest way to cure the hardship of an unfavorable preliminary order is to try the case on the merits."[73]

Requesting that a trial court abate the underlying proceeding while the court of appeals considers an interlocutory appeal only increases delay and expense.[74] The Dallas Court of Appeals recently admonished the parties (and a trial court) for abating a proceeding pending the interlocutory appeal of a temporary injunction and commanded them "to proceed expeditiously to a full consideration of the merits of this case."[75] The court reasoned that parties are not supposed to use the trial court's ruling on the temporary injunction to get an advance ruling on the merits.[76] Resolving the merits of the case must await an appeal from a final judgment in the underlying suit.[77] The only "question to be decided on appeal is whether the trial court abused its discretion in granting or denying the temporary injunction."[78]

3. Standard of Review

From a practical standpoint, it can be very difficult to overturn a trial court's grant of a temporary injunction. In reviewing a temporary injunction, appellate courts zero in on the only real issue before the trial court, which is whether the applicant is entitled to preserve the status quo of the suit's subject matter pending trial on the merits.[79] The decision to grant or deny a temporary injunction lies in the sound discretion of the trial court.[80] Accordingly, a trial court's order granting or denying a temporary injunction will not be overturned absent an abuse of discretion.[81]

In reviewing the grant or denial of a temporary injunction, the appellate court must not substitute its judgment for the trial court's judgment unless the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion.[82] In an interlocutory appeal of an order granting a temporary injunction, the appellate court does not reach the merits of the dispute, but determines only whether the record supports the trial court's exercise of discretion.[83]

Consequently, it is important to understand what constitutes an abuse of discretion and what does not. A trial court abuses its discretion:

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[68] *In re Texas Natural Res. Conservation Com'n*, 85 S.W.3d 201, 205 (Tex. 2002).

[69] *Id.* citing *Qwest Communications Corp. v. AT & T Corp.,* 24 S.W.3d 334, 336 (Tex.2000); *Del Valle Indep. Sch. Dist. v. Lopez,* 845 S.W.2d 808, 809 (Tex.1992).

[70] *In re Gorman*, 1 S.W.3d 894, 895 (Tex. App.—Fort Worth 1999, no pet.); *See also* TEX. R. APP. P. 28.1.

[71] *See* TEX. R. CIV. P. 683 (stating that the appeal of a temporary injunction should not be cause for delay).

[72] *See* TEX. CIV. PRAC. & REM. CODE §51.014.

[73] *Morgan Sec. Consulting, LLC v. Kaufman County*, 397 S.W.3d 248, 250-51 (Tex. App.–Dallas 2013, no pet.); n *Hiss v. Great North American Cos.,* 871 S.W.2d 218, 219 (Tex. App.–Dallas 1993, no writ); *See also Brar v. Sedey,* 307 S.W.3d 916, 920 (Tex. App.–Dallas 2010, no pet.).

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* citing *Iranian Muslim Org. v. City of San Antonio,* 615 S.W.2d 202, 208 (Tex.1981).

[79] *Id.* citing *Hiss v. Great N. Am. Cos.,* 871 S.W.2d 218, 219 (Tex. App.–Dallas 1993, no writ); *Davis v. Huey,* 571 S.W.2d 859, 862 (Tex.1978).

[80] *Walling v. Metcalfe*, 863 S.W.2d 56, 57-58 (Tex. 1993).

[81] *Id.* at 57. *See also Karamchandani v. Ground Tech., Inc.*, 678 S.W.2d 580, 582 (Tex. App.–Houston [14th Dist.] 1984), *dismissed* (Nov. 14, 1984).

[82] *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

[83] *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 882 (Tex. App.—Dallas 2003, no pet.)

- If it acts without reference to guiding rules and principles.
- If it acts unreasonably or arbitrarily.
- If it misapplies the law to the facts before the court.[84]
- When the evidence does not reasonably support the determination of the existence of a probable right of recovery or probable injury.[85]
- If it grants an injunction in the face of an adequate remedy at law.[86]

A trial court does not abuse its discretion if:

- Its decision is based on conflicting evidence.[87]
- The applicant pleads a cause of action and presents *some* evidence *tending* to sustain that action.[88]
- In denying a temporary injunction, it bases its holding on the fact that the party failed to prove one of the requirements for a temporary injunction.[89]

Moreover, when the trial court does not issue written findings of fact and conclusions of law, an appellate court must affirm the trial court's judgment if that ruling is correct under any theory applicable to the case.[90] The appellate court views the evidence in the light most favorable to the trial court's judgment and indulges every reasonable inference in its favor.[91]

II. ELEMENTS

To successfully obtain a temporary injunction, an applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.[92] A party seeking the injunction bears the burden of proving each of these elements.[93] If a party fails to meet burden as to *any one* element, it is not entitled to injunctive relief.[94] The burden of proof is not to be taken lightly. Mere allegations are insufficient. For example, a trial court abused its discretion in granting injunctive relief in a conversion case, where the applicant, despite alleging that they were suffering losses daily from the non-possession of the property and that "the property and rights involved were unique and irreplaceable," had not introduced any evidence to support such allegations or that the defendant was insolvent.[95]

All of these elements are in many ways "terms of art" and therefore require additional explanation. Additionally, analysis of the elements is often highly factually specific. What constitutes imminent harm in one context may not establish imminent harm in another. In this regard, the trial court is given broad discretion in weighing evidence and determining whether a party has established a particular element.

A. A Cause of Action Against the Defendant

The cause of action requirement essentially requires the applicant to plead – in addition to a request for temporary injunctive relief – some other form of underlying permanent relief. The application cannot be a "naked" request for injunctive remedy without any underlying request for permanent relief (which can be only legal in nature).

In other words, there does not have to be equitable symmetry between the request for temporary injunctive relief (which is equitable in nature) and the permanent

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[84] *Still v. Eastman Chem. Co.*, 170 S.W.3d 851, 853 (Tex. App.–Texarkana 2005, no pet.)(Discussing appellate review standards where party had appealed trial court's grant of temporary injunction)(quoting *Bay Fin. Sav. Bank, FSB v. Brown,* 142 S.W.3d 586, 589 (Tex.App.–Texarkana 2004, no pet.)

[85] *Bank of Texas, N.A. v. Gaubert*, 286 S.W.3d 546, 552 (Tex. App.–Dallas 2009, pet. dism'd w.o.j.)(quoting *Bureaucracy Online, Inc. v. Schiller,* 145 S.W.3d 826, 829 (Tex. App.–Dallas, 2004, no pet.).

[86] *Id.* (citing *Harris County v. Gordon,* 616 S.W.2d 167, 168, 170 (Tex.1981); *Alert Synteks, Inc. v. Jerry Spencer, L.P.,* 151 S.W.3d 246, 254 (Tex.App.–Tyler 2004, no pet.); and *Rogers v. Daniel Oil & Royalty Co.,* 130 Tex. 386, 110 S.W.2d 891, 894 (1937) for the proposition that when "an adequate and complete remedy at law is provided, our courts, though clothed with equitable jurisdiction, will not grant equitable relief").

[87] *Id.* (citing *Bay Fin. Sav. Bank, FSB v. Brown,* 142 S.W.3d 586, 589 (Tex.App.–Texarkana 2004, no pet.)

[88] *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 478 (Tex. App.–Dallas 2010, no pet.)(citing *Davis v. Huey,* 571 S.W.2d 859, 862 (Tex.1978).

[89] *Wilson N. Jones Mem'l Hosp. v. Huff*, 188 S.W.3d 215, 218 (Tex. App.–Dallas 2003, pet. denied); citing *Tom James of Dallas, Inc. v. Cobb,* 109 S.W.3d 877, 889 (Tex. App.–Dallas 2003, no pet.).

[90] *Id. See also Davis v. Huey,* 571 S.W.2d 859, 862 (Tex.1978); *LasikPlus of Texas, P.C. v. Mattioli*, 418 S.W.3d 210, 216 (Tex. App.–Houston [14th Dist.] 2013, no pet.).

[91] *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 478 (Tex. App.–Dallas 2010, no pet.).

[92] *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

[93] *City of McAllen v. McAllen Police Officers Union*, 221 S.W.3d 885, 893 (Tex. App.–Corpus Christi 2007, pet. denied).

[94] *Dallas Anesthesiology Associates, P.A. v. Texas Anesthesia Group, P.A.*, 190 S.W.3d 891, 898 (Tex. App.–Dallas 2006, no pet.).

[95] *Id.*

cause of action. The underlying permanent cause of action can be legal in nature.[96] In *Walling v. Metcalfe*,[97] plaintiff club manager sued defendant club owner for breach of contract and sought temporary injunctive relief. The trial court issued a TRO and then a temporary injunction.[98] The court of appeals questioned whether the plaintiff's pleadings could support a temporary injunction when the pleadings did not expressly plead a cause of action for equitable relief (i.e, request specific performance).[99] The court of appeals reversed the trial court, holding the temporary injunction should not have been granted because plaintiff failed to plead a cause of action entitling him to the final relief plaintiff sought by injunction.[100] The Texas Supreme Court disagreed, noting that the test for the cause of action requirement is not whether the injunctive relief sought and the cause of action are related:

> The issue in determining whether an applicant has met the first qualification for a temporary writ of injunction is not whether the prayer seeking the writ and the ultimate cause of action are "related," but whether the applicant has a cause of action at all. [101]

The *Walling* Court went on to explain that, even though the plaintiff did not pray for specific performance, the trial court had discretion to preserve the status quo so long as the plaintiff demonstrated his probable right to recover damages and probable injury in the time before trial.[102] It made no difference that the plaintiff, asked for money damages relative his claim for breach of contract rather than the equitable remedy of specific performance.[103] The court reasoned that, simply because an applicant for a temporary injunction asks only for damages as ultimate relief, such a request does not guarantee that damages are completely adequate as a remedy.[104] Under the right factual scenario, circumstances can arise in which a temporary injunction is appropriate to preserve the status quo pending an award of damages at trial.[105]

The "cause of action" requirement is interpreted broadly. The Texas Supreme Court recently recognized that a "cause of action" has been defined "as a fact or facts entitling one to institute and maintain an action, which must be alleged and proved in order to obtain relief."[106] A "cause of action" is thus similar to a "claim," in that they both refer to a legal right that a party asserts in the suit that constitutes the action.[107] In contrast, the truncated term "action" refers to an entire lawsuit or cause or proceeding, not to discrete "claims" or "causes of action" asserted within a suit, cause, or proceeding.[108]

In the context of temporary injunctive relief, Texas courts have interpreted "cause of action" expansively as a "factual situation that entitles one person to obtain a remedy in court from another person."[109] It is sufficient if the underlying "cause of action" is a request for a permanent injunction.[110]

For example, as recently as 2013, the Austin Court of Appeals held that a party adequately met the "cause of action" requirement for seeking a temporary injunction when she sought permanent injunctive relief to prevent a party who had obtained a judgment against her husband from executing on her separate property.[111] The Court reasoned her request for relief was founded on her underlying claim of property rights in the parcel at issue. The Court emphasized that the recognition and protection of such property rights are at the core of our legal system.[112]

The most common causes of action used to support claims for temporary injunctive relief in the probate context include claims for breach of fiduciary duty, conversion, fraud and Theft Liability Act claims. A cause of action may also include a claim for declaratory relief. For example, Texas Civil Practice

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[96] *Walling v. Metcalfe*, 863 S.W.2d 56, 57-58 (Tex. 1993).
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id*. at 57.
[101] *Id.* at 58.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*

[106] *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 564 (Tex. 2014)(citing *A.H. Belo Corp. v. Blanton,* 133 Tex. 391, 129 S.W.2d 619, 621 (1939). The *Jaster* Court noted this is "the generally accepted meaning" of the term "cause of action." Citng *Loaisiga v. Cerda,* 379 S.W.3d 248, 255 (Tex. 2012).
[107] *Id.*
[108] *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 563-64 (Tex. 2014).
[109] *Seghers v. Kormanik*, 03-13-00104-CV, 2013 WL 3336845, at *4 (Tex. App.—Austin June 26, 2013, no pet.)(borrowing the definition of a "cause of action" in the context of a health care liability claim from *In re Jorden,* 249 S.W.3d 416, 421 (Tex. 2008)(defining "cause of action" as "a factual situation that entitles one person to obtain a remedy in court from another person")(citing Black's Law Dictionary (8th ed.2004))).
[110] *Seghers v. Kormanik*, 03-13-00104-CV, 2013 WL 3336845, at *4 (Tex. App.–Austin June 26, 2013, no pet.)(citing *See, e.g., Sun Oil Co. v. Whitaker,* 424 S.W.2d 216, 218 (Tex.1968)).
[111] *See Id.*
[112] *See Id.* (citing Tex. Const. art. I, § 17).

& Remedies Code section 37.005 also allows an interested person to request the court to direct executors, administrators, or trustees to do or refrain from doing any particular act in their fiduciary capacity. While sometimes confusion arises in probate proceedings concerning whether a certain application, claim, or request meets the necessary cause of action requirement for a party seeking temporary injunctive relief, *Seghers* is instructive on the variety of other property right claims that can be made in connection with probate and guardianship proceedings and support a request for temporary injunctive relief.

Injunctive relief is often used in combination with other types of typical causes of action in probate proceedings. For example, in one probate case, a temporary injunction properly issued pending a will contest to restrain a temporary administrator from making any disposition of estate assets pending the resolution of a will contest.[113] Typically, the underlying cause of action and the request for injunctive relief will be filed together in one pleading. In the context of a temporary guardianship or temporary administration, the cause of action element is satisfied by the request for a temporary guardianship or temporary administration. For example, is immaterial that a cause of action is not strictly plead against a third-party perpetrator who is allegedly exploiting the proposed ward.

B. A Probable Right to Relief

At the hearing for a temporary writ of injunction, the applicant is *not* required to establish that she will prevail on final trial – the only question before the trial court is whether the applicant is entitled to preservation of the status quo pending trial on the merits.[114] A probable right to recovery may be proven by alleging the existence of a right and presenting evidence *tending* to show that right is being denied.[115]

C. A Probable, Imminent, Irreparable Injury in the Interim

The third and final element is probably the most important of all the required elements. Most of the arguments in seeking and defending against temporary injunctive relief involve this element. Some courts refer to the third element as "probable injury." That phrase or concept includes the sub-elements of imminent harm, irreparable injury, and no adequate remedy of law.[116]

1. Probable, Imminent Harm

In most cases, past harm alone will be insufficient to support a request for injunctive relief. The element of imminent harm encompasses the notion of harm that is likely to *reoccur* in the *near* future. In other words, even if the harm *threatened* is of the kind and character to be considered irreparable, the threat must still be imminent. Injunctions are not intended to grant relief for past actionable wrongs or to prevent the commission of wrongs not imminently threatened.[117] The purpose of injunctive relief is to "halt wrongful acts that are either threatened or in the course of accomplishment."[118]

Although an injunction is preventative in nature, a temporary injunction may not issue "upon mere fear, apprehension, or possibility of injury."[119] At least one Texas court has considered the sufficiency of evidence offered to prove imminent, irreparable harm in the context of a probate proceeding.

In *Twyman v. Twyman*, 2009 Tex. App. Lexis 5552 (Tex. App.—[1st Dist.] Houston 2009), plaintiff attorney-in-fact sued defendant trustee for breach of fiduciary duty and conversion relative to her management of their mother's trust.[120] The trial court issued a temporary injunction against the defendant enjoining her from further withdrawing trust funds. Plaintiff contended that imminent, irreparable harm existed because the defendant had engaged in a pattern of misappropriating trust funds and defendant could not repay the funds either because she would spend the money or because other financial limitations would prevent her from repaying it.[121] Defendant contended that the plaintiff had an adequate remedy at law because defendant had agreed, through a promissory

[113] *Callahan v. Lipscomb*, 412 S.W.2d 346, 348 (Tex. Civ. App.–San Antonio 1967), *writ refused NRE* (June 14, 1967).

[114] *Walling v. Metcalfe*, 863 S.W.2d 56, 57-58 (Tex. 1993).

[115] *Dallas Anesthesiology Associates, P.A. v. Texas Anesthesia Group, P.A.*, 190 S.W.3d 891, 897 (Tex. App.—Dallas 2006, no pet.).

[116] *El Tacaso, Inc. v. Jireh Star, Inc.*, 356 S.W.3d 740, 743 (Tex. App.—Dallas 2011, no pet.)(citing *Univ. of Tex. Med. School v. Than,* 834 S.W.2d 425, 428 (Tex. App.–Houston [1st Dist.] 1992, no writ).

[117] *Wiese v. Heathlake Cmty. Ass'n, Inc.*, 384 S.W.3d 395, 399 (Tex. App.—Houston [14th Dist.] 2012, no pet.)(citing *Tex. Emp't Comm'n v. Martinez,* 545 S.W.2d 876, 877 (Tex. Civ. App.–El Paso 1976, no writ).

[118] *Id.*

[119] *Still v. Eastman Chem. Co.*, 170 S.W.3d 851, 853 (Tex. App.—Texarkana 2005, no pet.)(quoting *Harbor Perfusion, Inc. v. Floyd,* 45 S.W.3d 713, 716 (Tex.App.-Corpus Christi 2001, no pet.)(citing *Calvary Baptist Church at Tyler v. Adams,* 570 S.W.2d 469, 473 (Tex.Civ.App.-Tyler 1978, no writ); *Thomas v. Bunch,* 41 S.W.2d 359, 362 (Tex. Civ. App.–Fort Worth 1931), *aff'd,* 121 Tex. 225, 49 S.W.2d 421 (1932)).

[120] *Twyman*, 2009 Tex. App. Lexis 5552 at 4-5.

[121] *Id.* at 8.

note, to repay the trust and plaintiff could enforce the promissory note according to its terms.[122]

The issue was whether plaintiff proved that the trust would suffer a probable, imminent, and irreparable injury, and, if proved, whether there was an adequate remedy at law. The court of appeals held that the trial court did not err in granting the injunction. The court of appeals reasoned that the plaintiff had offered sufficient evidence to demonstrate an inadequate remedy at law:

> [Defendant's] past behavior of withdrawing money for personal use and executing a promissory note after [plaintiff's] lawyer demanded an accounting, combined with her subsequent failure to repay any of the funds withdrawn and her efforts to extend the terms of the note, demonstrates that allowing her access to the Trust funds could lead to more withdrawals that would not be repaid.[123]

Although the plaintiff waited two years to file suit after first becoming aware of the defendant's conduct, the plaintiff had taken other action in the two year period to attempt to curtail defendant's conduct. Moreover, even though the trial court issued an injunction almost two years after the date defendant last withdrew funds from the trust, there was no guarantee that defendant would not attempt to withdraw funds from the trust in the future – especially if she remained trustee during the pending litigation.[124] The evidence presented at trial supported the *implied* conclusion that defendant posed *an ongoing danger* to the trust assets.[125]

Needless to say, the analysis of imminent harm is factually intensive. Usually, the facts will not be so clear-cut to allow an applicant to argue, "He told me was taking the money to Mexico!" At best, there are only instances of past conduct from which to argue "pattern and practices." This analysis is where the court's discretion comes into play. For illustrative purposes, a chart outlining cases falling along a spectrum between imminent harm and speculative harm is attached as **Appendix 1**.

2. Irreparable Injury

Like the other required elements for injunctive relief, "irreparable injury" is a term of art. Several courts of appeals have confused the analysis of irreparable injury by treating the requirement of an inadequate remedy of law as a separate element or requirement for injunction: it is not. "Inadequate remedy of law" is part of the "irreparable injury" requirement, not a separate requirement that the Texas Supreme Court forgot to mention when it set forth the elements an applicant must plead and prove to obtain an injunction in *Butnaru*. Several courts have noted with confusion the patent redundancy between the term "adequate remedy at law" and "irreparable harm."[126] In fact, unavailability of an adequate remedy at law renders an injury "irreparable." Several courts of appeals have properly recognized that the test for determining whether an irreparable injury exists is whether the injury is such that the injured party cannot be adequately compensated in damages, or is one for which damages cannot be measured by any pecuniary standard.[127] In other words, to establish irreparable injury, the applicant has to establish that there is no adequate remedy at law.[128]

However, the variations in how that "test" is satisfied provide a lot of options for putting together proof of irreparable injury. Texas courts often set forth that the test for determining whether an existing legal remedy is adequate is whether such remedy is as complete, practical, and efficient to the ends of justice and its prompt administration as a remedy in equity.[129] The reference to a "remedy in equity" refers to the equitable nature of injunction as a remedy. Accordingly, this standard compares the adequacy of any existing legal remedy to the remedy offered by injunctive relief. Thus, "irreparable injury" is a term of art that compares whether other remedies are as "complete, practical, and efficient to the ends of justice and its prompt administration" as an injunction.

As discussed below, the exceptions to the "no adequate remedy at law" test are better viewed as specific circumstances that satisfy the test as a matter of law.

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[122] *Id*. at 12-13.
[123] *Id.* at 14.
[124] *Id.* at 15.
[125] *Id.*

[126] *Gatlin v. GXG, Inc.*, 05-93-01852-CV, 1994 WL 137233, at *7 (Tex. App.—Dallas 1994, no writ)(citing *183/620 Group Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901, 902 (Tex. App.–Austin 1989), *writ dismissed w.o.j.* (May 31, 1989).
[127] *Gatlin v. GXG, Inc.*, 05-93-01852-CV, 1994 WL 137233, at *6 (Tex. App.–Dallas Apr. 19, 1994, no writ)(citing *See Texas Industrial,* 828 S.W.2d at 533; *Chevron U.S.A. Inc. v. Stoker,* 666 S.W.2d 379, 382 (Tex. App.–Eastland 1984, writ dism'd).
[128] *Wilson N. Jones Mem'l Hosp. v. Huff*, 188 S.W.3d 215, 218 (Tex. App.—Dallas 2003, pet. denied).
[129] *Gatlin v. GXG, Inc.*, 05-93-01852-CV, 1994 WL 137233, at *6 (Tex. App.—Dallas Apr. 19, 1994, no writ)(citing *Recon Exploration, Inc. v. Hodges,* 798 S.W.2d 848 at 851 (Tex. App.–Dallas 1990, no writ); *Minexa Arizona, Inc. v. Staubach,* 667 S.W.2d 563, 567 (Tex. App.-Dallas 1984, no writ); *Brazos River Conservation & Reclamation District v. Allen*, 171 S.W.2d 847 (Tex. 1943).

a. The Traditional Test

Traditionally, an injunction will not be granted if there is an adequate and plain remedy at law.[130] For the most part, Texas courts have steadfastly enforced this requirement, remarking:

- Granting an injunction in the face of an adequate remedy at law is an erroneous abuse of the court's discretionary powers.[131]
- "[T]he inadequacies of the remedy at law [are] both the foundation of and conversely a limitation on equity jurisdiction."[132]
- When "an adequate and complete remedy at law is provided, our courts, though clothed with equitable jurisdiction, will not grant equitable relief."[133]

Some courts have gone so far as to say that a party requesting a temporary injunction has the duty to negate the existence of adequate legal remedies.[134]

An injunction will not issue if damages are adequate to compensate the plaintiff for any wrong committed by the defendant and if the damages are subject to measurement by a certain pecuniary standard.[135] Courts reason that no injury will result from denying the request for injunctive relief if damages are adequate compensation.[136]

There are several notable and somewhat fundamental exceptions to the general rule that to be entitled to the "extraordinary" equitable remedy of temporary injunctive relief, an applicant must not have an adequate legal remedy. These exceptions provide specific circumstances that satisfy the inadequate legal remedy at law test.

(1) Exception 1: Insolvency

If the defendant is going to be insolvent before trial, then the applicant does not have an adequate remedy at law.[137] But the applicant must prove the insolvency; otherwise, the writ is dissolvable.[138] Some courts have criticized "technical" arguments that insolvency insulates them from being enjoined: "The ability of the wrongdoer to respond in damages is immaterial where the wrongful acts, which are to be restrained, are recurrent or continuous, or threaten to be so . . . Wealth is not a license to inflict recurring or continuous injuries on others."[139]

(2) Exception 2: Recurrent and Continuous Acts

As recognized by the Dallas Court of Appeals as long ago as 1932, equitable principles will not require a party to bring numerous actions to redress repeated wrongs:

> As a general rule, where an injury committed by one against another *is continuous or is being constantly repeated*, so that complainant's remedy at law requires the bringing of *successive actions*, that remedy is inadequate and the injury will be prevented by injunction. The fact that an injured person has the right of successive actions for the continuance of the wrong does not make it an adequate remedy at law which bars the jurisdiction of a court of equity to grant an injunction to restrain the continuance of the injury.[140]

It at least arguably appears from such equitable principles that a party's right to injunctive relief, when

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Bank of Sw. N.A., Brownsville v. Harlingen Nat. Bank, 662 S.W.2d 113, 116 (Tex. App.—Corpus Christi 1983, no writ)

[131] *Alert Synteks, Inc. v. Jerry Spencer, L.P.*, 151 S.W.3d 246, 254 (Tex. App.—Tyler 2004, no pet.).

[132] *Cardinal Health Staffing Network, Inc. v. Bowen*, 106 S.W.3d 230, 235 (Tex. App.—Houston [1st Dist.] 2003, no pet.)(quoting *Sisco v. Hereford,* 694 S.W.2d 3, 7 (Tex. App.–San Antonio 1984, writ ref'd n.r.e.)).

[133] *Id.* (quoting *Rogers v. Daniel Oil & Royalty Co.,* 130 Tex. 386, 110 S.W.2d 891, 894 (1937)).

[134] *Minexa Arizona, Inc. v. Staubauch*, 667 S.W.2d 563, 567 (Tex. App.–Dallas 1984, no writ)(citing *Handcock v. Bradshaw,* 350 S.W.2d 955, 957 (Tex. Civ. App.–Amarillo 1961, no writ).

[135] *Minexa Arizona, Inc. v. Staubauch*, 667 S.W.2d 563, 567 (Tex. App.—Dallas 1984, no writ).

[136] *Minexa Arizona, Inc. v. Staubauch*, 667 S.W.2d 563, 567 (Tex. App.—Dallas 1984, no writ).

[137] *Id.* citing Surko Enters., Inc. v. Borg-Warner Acceptance Corp., 782 S.W.2d 223, 225 (Tex. App.—Houston [1st Dist.] 1989, no writ).

[138] *See Ballenger v. Ballenger*, 694 S.W.2d 72, 77 (Tex. App.—Corpus Christi 1985, no writ).

[139] *183/620 Group Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901, 904-05 (Tex. App.—Austin 1989), *writ dismissed w.o.j.* (May 31, 1989)(citing *Sinclair Refining Co. v. McElree,* 52 S.W.2d 679, 681 (Tex. Civ.–App.1932, no writ)("Even if recovery of damages for the alleged wrongs could be considered adequate in a legal sense, yet, the alleged injurious acts being continuous or constantly repeated, recovery of such damages as could be measured under approved rules would fall short of being full and complete relief.").

[140] *Sinclair Ref. Co. v. McElree*, 52 S.W.2d 679, 681 (Tex. Civ. App.–Dallas 1932, no writ)(citing 32 C. J. § 36, p. 56)(Affirming temporary injunction granted in favor of landlord against lessee from using property in contravention of written lease agreement under statutory *and* equitable grounds).

threatened with repeated and continuous injuries (which is often the case in fiduciary litigation), does not depend upon showing that no adequate remedy at law exists.[141]

(3) Exception 3: Damages Incapable of Calculation

For the purposes of injunctive relief, there is no adequate remedy at law if damages are incapable of calculation.[142] Damages can be incapable of calculation in a variety of circumstances.

In *Montfort v. Trek Res., Inc.*,[143] plaintiff oil and gas operator sued defendant surface owner, seeking to permanently enjoin defendant from interfering with its leasehold operations. The trial court granted a permanent injunction. The issue on appeal was whether there was sufficient evidence to support the issuance of a permanent injunction. The court of appeals found the trial court did not abuse its discretion in issuing the permanent injunction.[144] The evidence revealed that the landowner had *repeatedly* denied the oil and gas operator access to the property.[145] The landowner's interference with the property jeopardized the oil and gas operator's operation and created numerous potential dangers that the oil and gas operator could not monitor or correct.[146] The court reasoned that the oil and gas operator's potential damages relating to *future interference* by the landowner could not be measured by any certain pecuniary standard.[147]

The logic in *Trek* can be used to support an argument that party has no adequate remedy at law in a typical probate or guardianship fact pattern when someone is *repeatedly* denied access to his or her property. How would one calculate, with certainty, the potential resulting damages from being denied access to his or her property–especially where the person in control of the property has indicated an unwillingness to cease and desist from such conduct?

For example, damages could be incapable of being measured by any certain pecuniary standard when a rogue attorney-in-fact or caregiver has hijacked someone else's estate, has engaged in self-dealing, and refuses to provide them with information about their assets or give them access to their funds. Where such funds are often needed to pay legitimate bills and costs of care, such person's ongoing and *future interference* prevents damages from being measured by any certain pecuniary standard, (e.g. late fees, penalties, and other unknown potential consequential damages).

(4) Exception 4: Property of Unique Intrinsic Value

Damage to items of unique intrinsic value may also be considered irreparable.[148] In addition, Texas courts have routinely upheld injunctions on the basis of irreparable injury in cases dealing with real property, because the law recognizes that each and every piece of real estate is unique. This inherent uniqueness is certainly an element that courts must consider in deciding whether there has been irreparable damage.[149] While "the simple fact that real property is involved [does not automatically] mandate injunctive relief" without a showing of irreparable injury,[150] in cases involving elder exploitation, it is not difficult to make the argument that if a defendant were to sell or pledge real property, the proposed ward would be irreparably harmed because he or she would lose a significant asset needed to provide for his or her future costs of care.

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[141] *See Id.*

[142] *Texas Indus. Gas v. Phoenix Metallurgical Corp.*, 828 S.W.2d 529, 533 (Tex. App.—Houston [1st Dist.] 1992, no writ)(citing *Bank of Southwest v. Harlingen Nat'l Bank,* 662 S.W.2d 113, 116 (Tex. App.—Corpus Christi 1983, no writ).

[143] 198 S.W.3d 344 (Tex. App.–Eastland 2006, no pet.)

[144] *Montfort v. Trek Res., Inc.*, 198 S.W.3d 344, 348 (Tex. App.—Eastland 2006, no pet.).

[145] *Id.* at 351.

[146] *Id.* at 352.

[147] *Id.*

[148] *See Patrick v. Thomas*, 2008 Tex. App. LEXIS 3219 (Memo. Tex. App.—Fort Worth May 1, 2008)(dealing with enjoining the sale of rare horses)(citing 103 HARV. L. REV. 687, 705-06 (1990), (stating if certain goods, such as heirlooms, cannot be replaced by money, then money damages are not an adequate remedy for their loss and harm to them may be considered irreparable).

[149] *Perales v. Riviera*, 13-03-002-CV, 2003 WL 21705740, at *3 (Tex. App.—Corpus Christi July 24, 2003, no pet.)(Noting that "every piece of real estate is unique, and if foreclosure were allowed before a full determination of the underlying claims, the owners would be irreparably harmed."); *Home Sav. of Am., F.A. v. Van Cleave Dev. Co., Inc.*, 737 S.W.2d 58, 59 (Tex. App.—San Antonio 1987, no writ). *Greater Houston Bank v. Conte,* 641 S.W.2d 407 (Tex. App.—Houston [14th Dist.] 1982, no writ). Other elements which may be considered in determining the question of irreparable damages are: 1) whether there may be a loss of substantial equity in the property; 2) whether the value of the property is substantially larger than the debt owed; and 3) whether valuable improvements have been made on the property sought to be foreclosed. *Trickey v. Gumm,* 632 S.W.2d 167 (Tex. App.—Waco 1982, no writ).

[150] *See Amend v. Watson*, 333 S.W.3d 625, 629 (Tex. App.—Dallas 2009, no pet.)(Declining to hold that every trespass constitutes irreparable injury as a matter of law); *Parks v. U.S. Home Corp.,* 652 S.W.2d 479, 485 (Tex. App.–Houston [1st Dist.] 1983, writ dism'd).

b. Do You Have to Show an Inadequate Remedy at Law in a Fiduciary Case?

Fiduciary cases usually provide ample opportunities to demonstrate remedies at law are not as complete, practical, and efficient to the ends of justice and its prompt administration as is an equitable injunctive remedy. There clearly seem to be two schools of thought in Texas jurisprudence about whether a party who has alleged a breach of fiduciary duty must prove that he or she has no adequate remedy at law to be entitled to injunctive relief. While the fiduciary relationship may be an equitable one, breach of fiduciary duty is a tort.[151] Equitable remedies are clearly available in cases involving breach of fiduciary duty,[152] but so are legal remedies (i.e., monetary damages).

On the one hand, the inadequate remedy at law may only be an "ordinary requirement" and it is not universal or invariable and therefore is inapplicable in a fiduciary context.[153] On the other hand, the Texas Supreme Court "has repeatedly listed a probable, imminent, and irreparable injury as one of the specific elements an applicant for temporary injunction must prove."[154]

The idea that the third requirement to obtain injunctive relief – i.e., an inadequate remedy – may not be applicable when a party to whom fiduciary duties are owed seeks an injunction against a fiduciary is based, at least in part, on the notion that a breach of fiduciary duty claim is, by nature, an "equitable" action.[155] The argument goes, that, as long as the fiduciary relationship is still continuing, the beneficiary should be entitled to the correct performance of the relationship.[156]

According to the reasoning from the Austin Court of Appeals in *183/620 Group Joint Venture v. SPF Joint Venture* (discussed below),[157] it is meaningless to require an applicant, whose funds are being held by a fiduciary, to demonstrate that his or her remedy at law is inadequate, since courts of law do not enforce (because they do not recognize) fiduciary duties and equitable titles. In other words, "because a court of *law* cannot give a remedy in such cases, the ordinary requirement does not apply."[158] In support of that reasoning, *183/620 Group Joint Venture* cited several treatises for the following propositions:

- 4 Pomeroy, *Equity Jurisprudence* § 1339, at 937 (5th ed. 1941) (the issue of an adequate remedy at law does not even arise in such cases);
- 1 *Restatement of Trusts 2d* §§ 197–199, at 433–439 (beneficiary's remedies are exclusively equitable except where trustee is under duty to deliver money or chattels immediately and unconditionally);
- 3 *Scott on Trusts* § 199.2, at 1639 (3d ed. 1967) (where reasonable likelihood exists that trustee will commit breach of trust the beneficiary may sue in equity to enjoin breach, any adequate remedy at law being immaterial);
- Bogert, *Trusts and Trustees* § 870, at 107–08 (rev. 2d ed. 1982) (existence of adequate remedy at law has no effect on any equitable remedy available to beneficiary against defaulting trustee).

It is questionable whether Scott on Trusts supports the broad argument that an "inadequate remedy at law is immaterial" in all fiduciary cases. Section 199.2 in the fourth edition states:

> If there is a reasonable likelihood that the trustee will commit a breach of trust, the beneficiaries can maintain a suit in equity to enjoin such breach. Here again, it is immaterial whether there is any adequate remedy at law, *although* where it is sought to enjoin a *tort* the plaintiff must show the inadequacy of his legal remedies.[159] (emphasis added).

Section 199.2 also cites *Ballenger v. Ballenger*[160], for the proposition that an injunction should not be granted if damages for breach of trust are calculable and trustees can respond in damages. Curiously, the

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[151] *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co*., 150 S.W.3d 718, 734 (Tex. App.—Austin 2004, no pet.) (citing Brosseau v. Ranzau, 81 S.W.3d 381, 398 (Tex. App.—Beaumont 2002, pet. denied)); *Douglas v. Aztec Petroleum Corp*., 695 S.W.2d 312, 318 (Tex. App.—Tyler 1985, no writ).

[152] *See ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010).

[153] *183/620 Group Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901, 902 (Tex. App.–Austin 1989), *writ dismissed w.o.j.* (May 31, 1989).

[154] *Zaffirini v. Guerra*, 04-14-00436-CV, 2014 WL 6687236, at *3 (Tex. App.—San Antonio Nov. 26, 2014, no pet.)(citing *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993).

[155] *See e.g. Remedies for Breach of Fiduciary Duty*, Mary C. Burdette & Scott D. Weber, 37th Annual Advanced Estate Planning and Probate Course, June (2013), pg. 19.

[156] *See Id.*

[157] 765 S.W.2d 901, 903-04 (Tex. App.—Austin 1989), *writ dismissed w.o.j.* (May 31, 1989).

[158] *Id.*

[159] 3 *Scott on Trusts* § 199.2, at 205 (4th ed. 1988).

[160] 694 S.W.2d 72, 75 (Tex. App.—Corpus Christi 1985, no writ)(discussed *infra*)

qualification starting with "although" has been omitted from the fifth edition.[161] *Ballenger* is still cited, but so is *183/620 Group Joint Venture*.

Scott and Asher on Trusts clearly takes the view that, because a beneficiary's rights and trustee's duties are grounded in equity, the beneficiary is entitled to equitable remedies (like injunctions), which could conceivably include, at a minimum, mandatory injunctions–without having to prove an inadequate legal remedy:

> The beneficiaries of a trust can maintain a suit in equity to compel the trustee to execute the trust. Since both the beneficiaries' rights and the trustee's duties are equitable, the situation differs from that in which a plaintiff seeks specific performance of a contract or specific redress for a tort. *Ordinarily*, equity does not specifically enforce a contract or grant specific redress for a tort *when damages are adequate*. A trust beneficiary, however, is entitled to specific enforcement of the trust even if the subject matter is not unique. Normally, the beneficiary's remedies are exclusively in equity, but even if the beneficiary does have a remedy at law, the beneficiary need not pursue it. In equity, the court will not merely award damages but will compel the trustee to execute the trust. . . the trustee is under a duty to account. The court will specifically enforce this duty, compel the trustee to render a proper accounting, and thereupon award such relief as is appropriate.[162]

In discussing the inadequacy of legal remedy test in connection with whether a party is eligible to general equitable remedies, *The Handbook on the Law of Remedies* (Hornbook Series) seems to downplay the importance of requiring a party to prove an inadequate remedy at law in the context of a fiduciary relationship:

> In some of the restitution cases there is fiduciary misconduct, or there is undue influence or breach of a confidential relationship. The substantive rules governing such cases are rules developed by equity courts, or out of equity doctrines. Equity's claim to power over fiduciaries, such as trustees, is based on the substance, not the remedy. In such cases, then, we expect to see equity involved in claims against fiduciaries and persons similarly situated, without any concern for adequacy, and this is generally what we do in fact find. Thus the adequacy test is a test *to be used* where the *substantive basis of the plaintiff's claim rests at law*, and the only reason for equitable relief is the need for the extraordinary remedies available in equity.[163]

A few overriding themes or principles appear to be present in the following analysis of Texas case law and the above referenced secondary sources:

- It is difficult to draw a bright line rule from the diverse factual situations in cases involving fiduciaries where the applicability or inapplicability of the inadequate legal remedy requirement is discussed;
- In a typical probate, trust, estate, or guardianship case, it may be easier for a party to take advantage of one of the traditional exceptions to the inadequate legal remedy requirement than perhaps initially contemplated; and
- If the substantive basis of the claim is equitable (i.e., fee forfeiture, profit disgorgement, accounting, instead of sheer monetary damages, etc.), it may be easier to establish that the inadequate legal remedy test does not apply.

Key Take-Away: When seeking temporary injunctive relief against a fiduciary, do not count on being excused from proving your client has no adequate remedy at law. Instead, you should try to plead and prove that one of the traditional and accepted "exceptions" applies to your facts.

c. The Dallas Court of Appeals

(1) Minexa Arizona, Inc. v. Staubauch (1984)

In *Minexa Arizona, Inc. v. Staubauch*, plaintiffs, two German citizens filed a class action suit against an Arizona Corporation and its vice president for various types of fraud.[164] The plaintiffs paid several million dollars into a trust account maintained by the Arizona Corporation, Minexa. The plaintiffs alleged the funds were improperly dissipated when Minexa and the other defendants utilized the funds for purposes other than those listed in the prospectuses. According to the pleadings, only $120,000.00 remained of the $3 million that plaintiffs originally paid to Minexa. Plaintiffs requested that these funds of Minexa be attached and garnished. Minexa had loaned certain

[161] *4 Scott and Asher* § 24.3.2 (5th ed. 2007).

[162] *4 Scott and Asher* § 24.3.1 (5th ed. 2007)(emphasis added).

[163] *The Handbook on the Law of Remedies*, *Damages–Equity–Remedies*, Dan B. Dobbs, §2.5 (1973).

[164] *Minexa Arizona, Inc. v. Staubauch*, 667 S.W.2d 563, 567 (Tex. App.—Dallas 1984, no writ).

funds to a corporation controlled by Minexa's president (who was also another defendant). The stock of this corporation in turn had been transferred to a Canadian corporation, also controlled by Minexa's president and vice-president. Furthermore, Minexa's president was seeking to establish citizenship on the Isle of Man.[165] In other words, the fiduciaries were transferring funds to third parties in such a manner as to insulate them from further claims and make collecting a judgment very difficult.

The Dallas Court of Appeals upheld the injunction. The court reasoned that the legal remedy of attachment was not adequate to prevent the defendants from transferring the assets of Minexa to other corporations under their control and from placing those assets beyond the trial court's jurisdiction.[166] Garnishment was also an insufficient legal remedy, as it would not preserve assets not known by the plaintiffs.

Not only did the Dallas Court of Appeals reject the "standard" argument that the damages were readily calculable (i.e., the plaintiffs had an adequate legal remedy) the court went on to state that it did not see the applicability of this rule in the context of this case:

> The fact that damages may be subject to the most precise calculation becomes irrelevant if the defendants in a case are permitted to dissipate funds specific that would otherwise be available to pay a judgment.[167]

The court attempted to narrow the scope of its holding so as to not imply that a party may be enjoined from utilizing funds in his possession any time a suit is brought against that party. In contrast, the court reasoned that such a restraint was warranted in this case since the plaintiffs (and all of the class members) had provided all of the funds in question. Moreover, some of these funds had allegedly been dissipated by the fiduciaries holding them, "while the fiduciaries were seeking to place the remaining funds beyond the jurisdiction of the Texas court."[168]

Key Take-Away: A legal remedy may be considered inadequate when there is a danger that a defendant's funds will be reduced or diverted pending trial. The fact that damages may be subject to the most precise calculation becomes irrelevant if the defendant is permitted to dissipate funds that would otherwise be available to pay a judgment.

[165] *Id.*
[166] *Id.*
[167] *Id.* at 567-68.
[168] *Id.* at 568.

(2) Gatlin v. GXG, Inc. (1994)

In *Gatlin v. GXG, Inc.*, plaintiffs GXG, Inc., and Knox filed suit against defendants Gatlin and two related entities owned by Gatlin or his brother for numerous claims, including breach of fiduciary duty. Knox sought a temporary injunction to prevent Gatlin from (1) dissipating Gatlin's assets pending trial, and (2) destroying records relating to either Knox or GXG.[169] The trial court issued a temporary injunction in favor of Knox.

Plaintiffs relied heavily on *183/620 Group Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901 (Tex. App.–Austin 1989, writ dism'd). Plaintiffs argued that, because they had sought the equitable remedy of a constructive trust, they were not required to show the absence of an adequate legal remedy, since a court of law, by definition, is without power to award them such an equitable remedy.[170]

Gatlin contended that the temporary injunction was improper because plaintiffs did not show either that their remedy at law was inadequate or that they would suffer irreparable injury if the court did not grant injunctive relief.[171] Specifically, Gatlin pointed out that the plaintiffs requested an award of damages, which was not only available, but also easily ascertainable and subject to exact measurement.[172] Accordingly, Gatlin argued temporary injunctive relief was unnecessary in the case.[173] The court of appeals disagreed with Gatlin.

In starting its analysis, the court cited *Walling v. Metcalfe*, noting that damages do not always provide a completely adequate remedy – even if damages are the only form of ultimate relief requested.[174] In citing to *183/620 Group Joint Venture*, the court noted that other appellate courts have recognized that an applicant for temporary injunctive relief need not show the inadequacy of its remedy at law in a case where *the usages of equity require the granting of injunctive relief despite the existence of such a remedy*.[175] In addition, the court recognized that the federal courts have long recognized this same principle.[176]

[169] *Gatlin v. GXG, Inc.*, 05-93-01852-CV, 1994 WL 137233, at *2 (Tex. App.—Dallas Apr. 19, 1994, no writ).
[170] *Id.* at *6.
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.* (citing *See Walling v. Metcalfe,* 863 S.W.2d 56, 58 (Tex. 1993).
[175] *Id.* citing *183/620 Group,* 765 S.W.2d at 903.
Id. (emphasis added).
[176] *Id.* (citing *See DeBeers Consol. Mines v. United States,* 325 U.S. 212, 220 (1945)(preliminary injunction always appropriate to grant intermediate relief of same character as that which may be finally granted); *USACO*

Despite such authority, the court decided that it need not decide the general issue of whether parties suing on equitable titles or seeking purely equitable relief are absolved of their burden of establishing the inadequacy of their remedy at law because, in this case, plaintiffs have made such a showing.[177]

Following several sister courts, the court noted that a party's remedy at law is inadequate when a defendant's funds will be reduced, pending final hearing, and will not be available in their entirety in the interim.[178] The court reasoned that there was sufficient evidence to justify the trial court's conclusion that, if not restrained, Gatlin might continue to divert and conceal assets in his possession pending trial. Evidence at the hearing revealed: (1) Gatlin had a long history of transferring funds from Knox and GXG's accounts to his own personal or company accounts, and vice versa; (2) one of Gatlin's comptrollers testified that Gatlin frequently transferred large sums of money between his companies for reasons she could not explain, and that the documentation relating to these transfers, as well as to the subsidiary companies generally, were poorly maintained; (3) Gatlin had in the past generated and backdated letters to himself, and that he had been uncooperative when Knox sought the return of her records.[179]

Because there was at least some evidence from which it would be reasonable to infer that appellants' funds would be diverted or dissipated pending trial, the court held that the trial court did not abuse its discretion in finding the plaintiff's remedy at law inadequate and granting the temporary injunction.[180]

Key Take-Away: A legal remedy may be considered inadequate when the defendant is dissipating or diverting funds or concealing assets that would otherwise be available to pay a judgment.

d. The Corpus Christi Court of Appeals

(1) Ballenger v. Ballenger (1985)

In *Ballenger v. Ballenger*, a contingent remainder beneficiary sought temporary injunctive relief against several co-trustees from making certain trust distributions.[181] The trial court granted both a TRO and a temporary injunction. The co-trustees contended that even if it was ultimately determined at a trial on the merits that they were not entitled to distribute funds from the trust corpus, the remainder beneficiary's damages would be "liquidated and capable of exact calculation in terms of dollars and cents."[182] The remainder beneficiary disagreed, arguing that distributing trust corpus would reduce the amount of income that could be earned.[183]

The issue on appeal was whether the contingent beneficiary had an adequate remedy at law (i.e., damages) and whether he had properly shown any irreparable injury. The court of appeals reversed the trial court and rendered judgment that the temporary injunction be dissolved.[184]

The court noted that the remainder beneficiary had failed to show that the co-trustees were insolvent or unable to respond in damages for any wrongful distributions made (at the hearing on the temporary injunction, the co-trustees individual tax returns were introduced as well as the amount of trust income distributed over the same period).[185] In fact, the record showed that the co-trustees were solvent and capable of responding in damages.[186] In addition, the court found that any damages that might have ensued were capable of exact calculation. The court reasoned that any distribution of trust corpus involved a distribution of *cash* which could have been readily replaced with other money (plus statutory interest), should it have ultimately been determined that such distributions were unwarranted.[187] Moreover, the court noted that the conduct that the contingent beneficiary sought to enjoin did not affect property that could be characterized as unique in its nature on in the character in which it is being used, such as land, cattle, or precious jewels.[188]

In emphasizing the pecuniary nature of the alleged injury, the court commented that the injury could be adequately cured with monetary damages "regardless of the passage of time between entry of a judgment and satisfaction thereof."[189]

Key Take-Away: When attacking an isolated cash transaction made by a fiduciary, it is best to

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Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 97-98 (6th Cir. 1982)(recognizing power of court to preserve fund or property which may be subject of constructive trust).

[177] *Id.*

[178] *Id.* *8. *See 183/620 Group,* 765 S.W.2d at 904;*Baucum v. Texam Oil Corp.,* 423 S.W.2d 434, 439-41 (Tex. Civ. App.-El Paso 1967, writ ref'd n.r.e.); *see also USACO,* 689 F.2d at 98.

[179] *Id.* *7.

[180] *Id.*

[181] *Ballenger v. Ballenger*, 694 S.W.2d 72, 75 (Tex. App.—Corpus Christi 1985, no writ).

[182] *Id.* at 76.

[183] *Id.*

[184] *Id.* at 79.

[185] *Id.* at 77.

[186] *Id.*

[187] *Id.*

[188] *Id.* citing *Swanson v. Grassedonio,* 647 S.W.2d 716 (Tex. App.–Corpus Christi 1982, no writ); *Greater Houston Bank v. Conte,* 641 S.W.2d 407 (Tex. App.–Houston [14th Dist.] 1982, no writ); *Thomas v. Allis,* 389 S.W.2d 109 (Tex. Civ. App.–Tyler 1965, no writ).

[189] *Id.*

attempt to show that: (1) the fiduciary is insolvent or unable to respond in damages or (2) that the *effect* of such transaction will result in numerous damages that are difficult to measure or calculate with certainty.

e. The Austin Court of Appeals

(1) 183/620 Group Joint Venture v. SPF Joint Venture (1989)

In *183/620 Group Joint Venture v. SPF Joint Venture*, plaintiff landowners sued defendant project managers for failing to properly manage certain construction projects.[190] Landowners also alleged that the project managers had spent approximately $25,000 *in defense of the instant* suit from the sums entrusted to them by the landowners.[191]

The trial court granted the landowners' request for a temporary injunction, restraining the project managers from spending any further expenditure of monies "placed in their care and control…for any expenses related in any manner to their defense of this lawsuit, including...attorney's fees, consulting fees," and "engineering fees."[192] Of particular importance was the trial court's findings of fact and conclusions of law, which included, a finding that the sums given to the project managers were held by them as fiduciaries, to be expended according to the contracts, which did not authorize them to use the sums to defend against the landowners' claims, and that the temporary injunction was necessary to maintain the existing status of the trust funds pending a final hearing, even though there was no showing that the project managers would be unable to pay a judgment for damages that might be based on their misappropriation of the funds.[193]

The project managers contended, among other things, that the trial court erred in issuing the injunction because the landowners failed to show they did not have an adequate remedy at law.[194] The issue on appeal was whether "principles of equity" required the landowners to show they lacked an adequate remedy at law in order to be entitled to an injunction. The court of appeals held that the landowners were not required to prove they did not have an adequate legal remedy.[195]

From the outset, the court of appeals zeroed in on the trial court's finding that the project managers were fiduciaries. The court reasoned that the "inadequate remedy at law" requirement is only an ordinary requirement; it is not universal or invariable.[196] First, the court noted that courts of law do not enforce fiduciary duties and equitable titles, so it is meaningless to require an applicant to whom fiduciary duties are owed to demonstrate his or legal remedy is inadequate.[197] Hence, because a court at law cannot give a remedy in such cases, the ordinary requirement does not apply. In support of this reasoning, the court cited numerous secondary authority, which it summarized as follows:

- 4 Pomeroy, *Equity Jurisprudence* § 1339, at 937 (5th ed. 1941) (the issue of an adequate remedy at law does not even arise in such cases);
- 1 *Restatement of Trusts 2d* §§ 197–199, at 433–439 (beneficiary's remedies are exclusively equitable except where trustee is under duty to deliver money or chattels immediately and unconditionally);
- 3 *Scott on Trusts* § 199.2, at 1639 (3d ed. 1967) (where reasonable likelihood exists that trustee will *904 commit breach of trust the beneficiary may sue in equity to enjoin breach, any adequate remedy at law being immaterial); and
- Bogert, *Trusts and Trustees* § 870, at 107–08 (rev. 2d ed. 1982) (existence of adequate remedy at law has no effect on any equitable remedy available to beneficiary against defaulting trustee).[198]

Second, the court of appeals concluded that, even where the "inadequate remedy at law" requirement is mentioned, the requirement is said to be satisfied on the basis that the funds will be reduced, pending a final hearing, so "that they will not be available *in their entirety, in the interim,* for the purposes for which they were delivered to the holder in the first place."[199] The court then cited a string of cases for the proposition that the ability of the project manages to respond in damages, at the end of the litigation, is immaterial under this view.[200]

All of the cases cited by *183/620 Group Joint Venture* supporting a "traditional exception"

[190] *183/620 Group Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901, 902 (Tex. App.–Austin 1989), *writ dismissed w.o.j.* (May 31, 1989).

[191] *Id.*

[192] *Id.* at 903.

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.* at 903-04.

[199] *Id.* at 904.

[200] *Id.* citing *Minexa Arizona, Inc. v. Staubach,* 667 S.W.2d 563 (Tex. App. 1984, no writ); *see also McDonnell v. Campbell–Taggart Associated Bakeries,* 376 S.W.2d 915 (Tex.Civ.App.1964, no writ); *Weiner v. Weiner,* 245 S.W. 474 (Tex. Civ. App. 1922, writ dism'd); *cf., Sonics International, Inc. v. Dorchester Enterprises,* 593 S.W.2d 390 (Tex.Civ.App.1980, no writ); *Baucum v. Texam Oil Corp.,* 423 S.W.2d 434 (Tex.Civ.App.1967, writ ref'd n.r.e.).

emphasize, again, the multiple examples where a legal remedy may not be adequate.

The first case cited was *Minexa Arizona, Inc. v. Staubauch* (discussed above), which involved fraud by fiduciaries on an egregious scale and active steps to frustrate the collectability of any judgment.

The second case, *McDonnell v. Campbell-Taggart Associated Bakeries, Inc.*,[201] had to do with the "items of unique value" exception. That case involved a plaintiff seeking to enjoin a defendant from disposing of certain shares of stock allegedly procured by fraud. Although there was no evidence that the defendant was insolvent, the court noted that under a former (now repealed) statute, a defrauded party had the right to reclaim possession of stock where delivery or indorsement had been procedure by fraud. The court of appeals reasoned the Legislature did not intend "that the owner of corporation stock must sit by helplessly and be compelled to resign himself to the fraudulent loss and confiscation of his stock simply because the fraudulent wrongdoer is able to pay the market price of the stock as damages. Such a remedy is not adequate for a person who wants to keep his stock rather than to sell it at the market price."[202] In other words, the Court emphasized that the property had intrinsic value – it was paying dividends and its value could have increased or deceased.

The next case cited by *183/620 Group Joint Venture* was *Weiner v. Weiner*,[203] which involved the appeal of a temporary injunction that restrained an executor from disposing of or attempting to dispose of his interest in the residuary estate. The court of appeals upheld the injunction on the apparent basis that the defendant had not denied under oath, that he was insolvent - not on the basis that the party was exempt from showing she had no adequate legal remedy.

In *Weiner*, the enjoined party was *alleged to be insolvent*, without additional assets other than his interest in this estate. The party seeking the injunction alleged under oath that the defendant had, while trustee, wrongfully dissipated and failed to account for over $30,000 belonging to the estate, and that, unless restrained, he would probably place his interest beyond the reach of the court by disposing of it.

The Court reasoned that the evidence was sufficient to justify the trial court finding that there was a shortage of, or at least a failure to account for, a considerable amount of the property of the estate shown to have come into the defendant's hands in his fiduciary capacity. Perhaps importantly, the Court noted that the defendant, in his answer to the plaintiff's sworn allegations, made no detailed and verified answer, nor offered any testimony in contradiction, but contented himself with merely swearing to a general denial.[204]

Sonics Intern. Inc. v. Dorchester Enterprises, Inc., fits within the "damages cannot be calculated with certainty" exception. It involved a temporary injunction restraining the controlling stockholder of a corporation from entering a contract with the corporation by which the controlling stockholder would be paid substantial consulting fees.[205] The defendant contended that denying the injunction would not result in irreparable injury for which there would be no adequate remedy at law. The court of appeals disagreed.

Importantly, the court mentioned that the effect of payment of these fees on the financial stability of the corporation could not be determined with certainty.[206] There was evidence that the corporation was currently borrowing money at a high interest rate and one of the experts testified that reduced cash flow as a result of the fees would exacerbate any financing problems. Thus, the trial court was justified in finding that the contract in question would reduce the cash available to the corporation during the current period of high interest rates, thus causing financial, and would adversely affect its earnings during pendency of this litigation. Such an impairment of earnings would be difficult to establish precisely if compensation were sought through damages at a trial.[207]

In *Baucum v. Texam Oil Corp.*, an injunction was affirmed when the defendant officer and director had diverted funds in violation of his fiduciary duties and committed acts respecting the subject of the pending litigation that would render a judgment upon the merits ineffectual.[208]

Key Take-Away: It is difficult to derive a hard and fast rule of thumb from *183/620 Group Joint Venture v. SPF Joint Venture*, other than the reasoning and authority cited for exempting a party to whom fiduciary duties are owed from having to show an inadequate legal remedy do not appear to be strong.

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[201] *McDonnell v. Campbell-Taggart Associated Bakeries, Inc.*, 376 S.W.2d 915, 921 (Tex. Civ. App.—Dallas 1964, no writ).

[202] *Id.* at 920.

[203] *Weiner v. Weiner*, 245 S.W. 474 (Tex. Civ. App.—Galveston 1922), *writ dismissed w.o.j.* (Jan. 24, 1923).

[204] *Id.* at 475-76.

[205] *Sonics Intern., Inc. v. Dorchester Enterprises, Inc.*, 593 S.W.2d 390, 393 (Tex. Civ. App.–Dallas 1980, no writ).

[206] *Id.*

[207] *Id.*

[208] *Baucum v. Texam Oil Corp.*, 423 S.W.2d 434, 440 (Tex. Civ. App.—El Paso 1967), *writ refused NRE* (Apr. 10, 1968).

f. The San Antonio Court of Appeals

(1) Zaffirini v. Guerra (2014)

In *Zaffirini v. Guerra*,[209] plaintiff trust beneficiaries sued defendant co-executors and co-trustees (in both their fiduciary and individual capacities) for various causes of action, including breach of fiduciary duty. The trial court granted a temporary injunction in favor of the plaintiff presumably (although the opinion does not expressly state) enjoining the defendant fiduciaries from spending trust/estate funds on their defense.

Defendant fiduciaries asserted the trial court erred in granting injunctive relief because the record did not show that they would be unable to repay the attorney's fees spent defending against plaintiff's allegations, and the record affirmatively demonstrated that one of the defendants would be able to repay the fees. Accordingly, the defendant fiduciaries contended that the plaintiffs failed to negate the existence of an adequate legal remedy.[210]

Plaintiff did not challenge the defendants' assertion that she failed to negate an adequate remedy at law since she could be adequately compensated in damages for the attorneys' fees spent on the defendants' defense. The plaintiff instead contended that she was not required to prove that she lacked an adequate remedy at law, citing *183/620 Group Joint Venture v. SPF Joint Venture,* 765 S.W.3d 901 (Tex. App.–Austin 1989, writ dism'd w.o.j.) in support of her contention.[211] Specifically, plaintiff asserted that the ability of the parties to respond in damages was immaterial to the present case involving fiduciary duties.

The San Antonio Court of Appeals reversed the trial court and entered judgment dissolving the temporary injunction, holding the trial court erred in applying *183/620 Group Joint Venture v. SPF Joint Venture,* 765 S.W.3d 901 (Tex. App.–Austin 1989, writ dism'd w.o.j.) to excuse the plaintiff from proving she had no adequate remedy at law.[212] The court attempted to distinguish the facts of the instant case from *183/620 Group Joint Venture* by noting, among other differences, that the trial court had made no finding the defendants were prohibited by the various instruments in question from expending sums for their legal defense (unlike *183/620 Group Joint Venture*, where the contracts in question did not authorize using the funds for a legal defense). In addition, unlike in *Minexa Ariz. v. Staubauch*, where the defendant fiduciaries were dissipating funds that would otherwise be available to pay a judgment, there was no indication that sums paid on attorney's fees would not be available to pay a judgment.[213]

Ultimately, in the absence of Texas Supreme Court precedent establishing an exception to the inadequate legal remedy requirement for obtaining a temporary injunction under the circumstances of this case, the court declined to adopt any broad exception in cases involving a breach of fiduciary duty.[214]

Key Take-Away: When seeking temporary injunctive relief against a fiduciary, don't count on being excused from proving your client has no adequate remedy at law.

g. Conclusion

In analyzing Texas cases where temporary injunctive relief is sought against a fiduciary, it appears highly likely the party seeking injunctive relief will be required to prove an inadequate remedy at law. *Ballenger* stands for the proposition that one alleged wrongful transaction by a fiduciary will not support finding a beneficiary has an inadequate remedy at law. The applicant seeking injunctive relief against a fiduciary should attempt to establish one of the traditional exceptions. In other words, an applicant should be prepared to show the defendant fiduciary is insolvent, is engaging in ongoing and continuous wrongful conduct, or is inflicting injuries that are difficult to calculate in damages. *183/620 Group Joint Venture v. SPF Joint Venture* appears to be an aberration. Perhaps noteworthy, the court cited and acknowledged in its opinion that a traditional "exception" to the inadequate remedy at law test applied.

III. GATHERING INFORMATION

Gathering sufficient information to support a request for injunctive relief can be tricky and challenging for two main reasons: one, injunctive relief is usually sought "under the gun" on extremely short notice; and two, the party who wants assets frozen usually do so because he or she doesn't have enough information about their status.

The sheer speed at which the typical client demands relief can make the information gathering and review process even more tense. It is not enough to review any documents for their substance. Potential evidentiary issues must be solved and solved quickly. We must ask questions such as: "Who can authenticate this document?" and "Is there a hearsay exception for

[209] *Zaffirini v. Guerra* 04-14-00436-CV, 2014 WL 6687236, at *1 (Tex. App.—San Antonio Nov. 26, 2014, no pet.).
[210] *Id.* at 2.
[211] *Id.*
[212] *Id.* at 3.
[213] *Id.*
[214] *Id.*

this?" It is imperative that counsel scrutinize the prospective applicant's belief that "something must be done *now*" by probing and testing whether facts exist that support the prospective applicant's conclusion.

Unfortunately, in the probate context, the typical applicant has only partial information about the status of certain assets which forms the basis for their heightened suspicions. Additional information often cannot be sought from the best sources for fear of alerting the perpetrator against whom the element of surprise must be preserved.

A. Requests for Information

At a minimum, when seeking temporary injunctive relief against a party in a probate context, it is helpful to take the following steps to quickly get a grasp on potential evidence:

- Identify and summarize the communication history between the applicant (and, if relevant, others) and the defendant for the relevant period;
- Identify and summarize the transaction history for the relevant period in connection with the assets in question;
- Identify and locate any persons who may have personal knowledge of key facts and be potential witnesses (especially those that can substantiate the defendant's insolvency); and
- Identify harm that is likely to occur if the status quo is not preserved and any proof that can be used to support such a conclusion.

B. Key Documents

When it comes to documents, probate litigation is no different from any other area of litigation. They can often be a treasure trove. At a minimum, it is helpful to try and gather the following documentary evidence:

- If writings exist relative to any communication history between the applicant and the defendant (such as text messages and emails), copies must be obtained where possible;
- If bank statements, checks, or deeds exist relative to any suspicious transactions, copies must be obtained where possible (if you are concerned with authentication issues, you should subpoena a bank employee to appear and testify at the temporary injunction hearing);
- Copies of key governing instruments, such as trusts, amendments, wills, codicils, powers of attorney should be obtained and analyzed;
- If possible, it is helpful to run an asset search for any potential defendant for purposes of establishing insolvency; and
- Don't forget to check Facebook and/or social media for information that may help establish recent large unexplained purchases or otherwise establish financial exploitation, etc.

IV. DRAFTING A PROPER APPLICATION

Typically, a request for temporary injunctive relief will be included in a separate section within an original petition or an application for temporary administration or temporary guardianship. Because the rules are so technical and the pleadings are prepared on short notice, it is essential to consult a checklist to confirm that you have all of your ducks in a row. An example checklist is attached as **APPENDIX 2**. It's helpful to make the following recitations right at the beginning of the section, such as:

> XIII. APPLICATION FOR TEMPORARY EX-PARTE TEMPORARY RESTRAINING ORDER AND TEMPORARY AND PERMANENT INJUNCTIONS
>
> 41. Plaintiff incorporates by reference all preceding paragraphs.
>
> 42. Plaintiff requests the Court issue an ex parte temporary restraining order, temporary injunction and thereafter a permanent injunction against Defendant, individually and in his capacity as Trustee of the Trust, restraining him from the conduct set forth below.
>
> 43. The facts alleged in this verified petition are supported by Plaintiff's affidavit and the affidavit of _____, which are incorporated herein by reference.
>
> 44. In addition to the Texas Trust Code Section 114.008(a)(2), which allows a trial court to enjoin a trustee, injunctive relief is also proper under the rules of equity.[215]
>
> 45. Plaintiff is entitled to temporary injunctive relief against Defendant because Plaintiff has demonstrated: (1) Defendant has engaged in numerous wrongful acts and omissions providing Plaintiff with a cause of action; (2) a probable right to relief; and (3) probable, imminent, and irreparable injury in the interim for which there is no adequate remedy at law.[216]

[215] TEX. R. CIV. P. 693; *See also* TEX. CIV. PRAC. & REM. CODE §65.011.

[216] *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

After these basic introductory paragraphs are set forth, the elements can be laid out in subsections, with the relevant law and argument as suggested below.

A. Identify Your Cause of Action and Explain Your Probable Right to Relief

A. A Cause of Action

46. As show above, Defendant has engaged in numerous wrongful acts and omissions providing Plaintiff with various causes of action as plead herein which support Plaintiff's request for temporary and permanent injunctive relief.

B. Probable Right to Relief

47. Plaintiff is entitled to injunctive relief because he can show a probable right to relief upon a final trial.[217] To demonstrate a probable right to relief, Plaintiff need only show "a probable right and a probable injury; he is not required to establish that he will finally prevail in the litigation."[218] In fact, Plaintiff is only required to offer evidence that *tends* to support the right to recover on the merits.[219] Texas law does not require Plaintiff to show he will prevail at the final trial because the ultimate merits of the case are not before the trial court.[220] The only question before the trial court is whether Plaintiff is entitled to preservation of the status quo pending trial on the merits,[221] which is defined as, "the last, actual, peaceable, non-contested status which preceded the pending controversy."[222]

48. Defendant breached his fiduciary duties to Plaintiff by engaging in unauthorized, undisclosed, and improper self-dealing as set forth in this Petition. Specifically, Defendant _____. Texas law clearly places the burden to prove the fairness of all self-dealing transactions on Defendant.[223] Consequently, Defendant bears the burden to appear before this Court to justify his actions as Plaintiff's fiduciary. Accordingly, the facts set forth herein establish a probable right to relief against Defendant.

B. Identify the Probable, Imminent, and Irreparable Injury

The "probable, imminent and irreparable injury in the interim" element can be set forth by using subheadings for its component parts as suggested below:

(1) Probable, Imminent Harm

49. Temporary injunctive relief is proper when the harm sought to be prevented is imminent or immediate.[224]

50. Without any restrictions on Defendant's ability to act as Trustee, Defendant's past actions show that he poses an imminent and on-going danger of loss to the Trust's fund.[225]

(2) Irreparable Injury

51. The legal test for determining whether an irreparable injury exists is whether the injury is such that the injured party cannot be adequately

[217] *Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex. 1968).

[218] *Keystone Life Ins. Co. v. Mktg. Mgmt., Inc.*, 687 S.W.2d 89, 92 (Tex. App.—Dallas 1985, no writ).

[219] *Dallas Anesthesiology Associates, P.A. v. Texas Anesthesia Group, P.A.*, 190 S.W.3d 891, 896-97 (Tex. App.—Dallas 2006, no pet.).

[220] *Id.* (citing *Walling v. Metcalfe,* 863 S.W.2d 56, 58 (Tex. 1993) (per curiam); *Tom James of Dallas, Inc. v. Cobb,* 109 S.W.3d 877, 884 (Tex. App.–Dallas 2003, no pet.).

[221] *Walling v. Metcalfe*, 863 S.W.2d 56, 57-58 (Tex. 1993).

[222] *Dallas Anesthesiology Associates, P.A. v. Texas Anesthesia Group, P.A.*, 190 S.W.3d 891, 897 (Tex. App.—Dallas 2006, no pet.)(citing *Pierce v. State,* 184 S.W.3d 303, 308 (Tex. App.–Dallas 2005, no pet. h.)(quoting *In re Newton,* 146 S.W.3d 648, 651 (Tex.2004) (orig. proceeding)).

[223] *Lee v. Hasson*, 286 S.W.3d 1, 21 (Tex. App.—Houston [14th Dist.] 2007, pet. denied)("Texas courts apply a presumption of unfairness to transactions between a fiduciary and a party to whom he owes a duty of disclosure."); *See also Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984)(Trustees owe beneficiaries a fiduciary duty of full disclosure of all material facts known to them that might affect the beneficiary's rights. The existence of strained relations between the parties did not lessen the fiduciary's duty of full and complete disclosure.)(citing *Texas Bank & Trust Co. v. Moore,* 595 S.W.2d 502, 508–09 (Tex.1980).

[224] *Crawford Energy, Inc. v. Texas Indus., Inc.*, 541 S.W.2d 463, 467 (Tex. Civ. App.—Dallas 1976, no writ).

[225] *See e.g. Twyman v. Twyman*, 01-08-00904-CV, 2009 WL 2050979, at 5 (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet.).

compensated in damages, or is one for which damages cannot be measured by any pecuniary standard.[226] It is not so much the magnitude of the harm suffered, but its irreparability that matters for purposes of a temporary injunction.[227]

52. Damages here are incapable of calculation because _____. [Consider using on of the four circumstances that satisfy the inadequate remedy at law test].

53. Defendant's past behavior of withdrawing money for her own personal use and benefit, combined with her subsequent failure to account or disclose material information affecting the beneficiaries' rights, demonstrates that allowing her continued access to the Trust funds could lead to more withdrawals, transfers, or other self-dealing activity that would not be repaid.[228]

54. There is no legal remedy that is as complete, practical, and efficient to the ends of justice and its prompt administration as injunctive relief.[229]

C. Identify the People You Want to Restrain

Make sure to request that the defendant be restrained in all his or her relevant capacities, and set forth any pseudonyms, aliases, and nicknames.

1. Restraining Third Parties

Texas Rule of Civil Procedure 683 states that "Every order granting an injunction and every restraining order is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. Notice or knowledge of the order of which one is charged with violating is a jurisdictional prerequisite to the validity of a contempt order.[230]

In re Edward D. Jones & Co. provides an interesting example where a party sought to hold a financial institution in contempt for paying checks after the date it received notice of a temporary restraining order.[231] There, the trial court held that Edward Jones (a named party) violated the temporary restraining order by paying two checks, one that occurred after receiving notice of the TRO, and another after the TRO was *orally* extended.[232] Edward Jones contended the trial court abused its discretion in holding them in contempt because (1) the temporary restraining order expired before October 14, 1997, when it cashed the second $20,000 check; and (2) as for the first check, the restraining order was not specific enough to support a contempt judgment.[233]

The court of appeals agreed with Edward Jones and noted that temporary restraining orders cannot be extended orally.[234] Therefore, Edward Jones could not be held in contempt for the paying the first check. As for the second check, the court of appeals held that Edward Jones could not be held in contempt because the "underlying decree [did not] set forth the terms of compliance in clear, specific and unambiguous terms so that the person charged with obeying the decree will readily know exactly what duties and obligations are imposed upon him."[235] In other words, the TRO at issue was subject to reasonable alternative constructions and was not sufficiently specific to support a judgment of contempt.[236]

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[226] *Gatlin v. GXG, Inc.*, 05-93-01852-CV, 1994 WL 137233, at 6 (Tex. App.–Dallas Apr. 19, 1994, no writ)(citing *See Texas Industrial,* 828 S.W.2d at 533; *Chevron U.S.A. Inc. v. Stoker,* 666 S.W.2d 379, 382 (Tex. App.–Eastland 1984, writ dism'd).

[227] *Gatlin v. GXG, Inc.*, 05-93-01852-CV, 1994 WL 137233, at *6 (Tex. App.—Dallas Apr. 19, 1994, no writ).

[228] *See e.g. Twyman v. Twyman*, 01-08-00904-CV, 2009 WL 2050979, at 5 (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet.).

[229] *Gatlin v. GXG, Inc.*, 05-93-01852-CV, 1994 WL 137233, at 6 (Tex. App.—Dallas Apr. 19, 1994, no writ).

[230] *Ex parte Conway*, 419 S.W.2d 827, 828 (Tex. 1967).

[231] *In re Edward D. Jones & Co.*, 03-98-00545-CV, 1999 WL 92287, at *1 (Tex. App.—Austin Feb. 25, 1999, no pet.).

[232] *In re Edward D. Jones & Co.*, 03-98-00545-CV, 1999 WL 92287, at *2 (Tex. App.—Austin Feb. 25, 1999, no pet.)

[233] *In re Edward D. Jones & Co.*, 03-98-00545-CV, 1999 WL 92287, at *2 (Tex. App.—Austin Feb. 25, 1999, no pet.)

[234] *Id.* ("Absent some special statutory authority, a party may not be held in contempt of a temporary restraining order that has been *orally* extended.") Citing *Ex parte Lesikar,* 899 S.W.2d 654 (Tex.1995)("An oral extension of a [temporary restraining order] is ineffective, and the contemnor must have notice of the actual *written* extension before he can be charged with contempt." *Id.* (citing *Ex parte Conway,* 419 S.W.2d 827, 828 (Tex.1967)) (emphasis added).

[235] *Id.* at *4.

[236] *Id.* ("The order restrained Edward Jones "from transferring the cash proceeds of the FNMA certificates or its cash equivalent to [defendant], *or otherwise disposing of the same."* The order then continued and stated that "*if the cash or the cash equivalent have already been transferred to* [defendant] then [defendant] is restrained from further transferring or disposing of said cash or its cash equivalent..." This language could be interpreted by a reasonable person to mean that once Edward Jones

Interestingly, the court of appeals set aside the trial court's order that Edward Jones pay the plaintiff's attorney's fees, noting that, even upon a proper finding of contempt, attorney's fees are not recoverable in a contempt action because no statutory authority exists allowing such an award.[237]

2. Dealing with Financial Institutions

From a practical standpoint, in a typical probate or guardianship case, where the applicant is seeking to use injunctive relief to protect funds on deposit at a financial institution, it is far easier to send notice of the TRO or temporary injunction to the financial institution *after* the orders have been signed than it is to try and make the financial institution a party. In other words, unless you have a valid independent cause of action against the financial institution itself, they are not parties to the action in the strict sense of the term. They simply need to be notified that the accounts should be frozen immediately. While a crook may not be deterred by a piece of paper, most financial institutions *will* be deterred for fear of incurring liability once they have been given notice of the TRO or temporary injunction. Additionally, if the financial institution is made a party, a demand for attorney's fees from them can be expected.

D. Define the Conduct or Acts You Want to Restrain

Most lawyers will attempt to cover: (1) as many different types of transactions or activity with respect to the assets in danger; and (2) cover the material records about such assets. In some ways, it's a "verb" game (and this author puts his verbs in alphabetical order!).

> 55. Plaintiff requests that the Court immediately issue its temporary injunction and order the Defendant, in his individual capacity and his capacity as trustee of the Trust, in addition to his officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, to cease, desist, and refrain from:
>
> Alienating, assigning, conveying, destroying, dissipating, encumbering, expending, gifting, investing, paying, pledging, secreting, selling, spending, or otherwise transferring or disposing in any manner whatsoever of any of _____'s assets or property, real or personal, including but not limited to:
>
> [Enumerate specific accounts/assets]; and
>
> Any income from any of _____'s assets or properties.
>
> Altering, concealing, deleting, destroying, moving, transferring, secreting, or otherwise disposing in any manner whatsoever any documents, books and records belonging to _____ or containing information about _____'s assets or property, real or personal, whether such documents are printed on paper or in electronic form.

E. If Ex Parte Relief is Sought, Explain Why It is Necessary

If a TRO is needed immediately, the application should explain the factual basis for why the TRO must issue immediately without giving advanced notice to the defendant. Usually, this section of the application identifies and explains what bad things will happen if the defendant is given advance notice.

> 56. [**If ex parte relief is appropriate**] It is essential that this Court act immediately, before notifying Defendant about the hearing on Plaintiff's Application for Ex Parte Temporary Restraining Order because if he receives notice the Defendant will conceal, divert, dissipate, remove, and/or sequester assets pending trial, thereby denying Plaintiff his rights therein in the interim, making any judgment difficult to collect and unnecessarily and unreasonably escalating the costs of this proceeding.
>
> 57. To preserve the status quo, specifically Plaintiff's interest in the Trust, a temporary restraining order should issue, and the Defendant should be cited to appear and show cause why he should not be temporarily enjoined during the pendency of this lawsuit, and thereafter, permanently, from the conduct set forth above.

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transferred the proceeds to [defendant], which it did on September 18 or 19, it was not subject to the order. Alternatively, it could be construed to mean that Edward Jones would violate the order if it transferred any cash proceeds from the FNMA certificates out of any account.")

[237] *Id.* (citing *Equitable Trust Co. v. Lyle,* 627 S.W.2d 824, 826 (Tex. App.–San Antonio 1982, writ ref'd n.r.e.) (citing *Marriage of Neidert,* 583 S.W.2d 461, 462 (Tex.Civ.App.-Amarillo 1979, no writ)).

F. Sworn Petition or Affidavit

When it comes to drafting affidavits and verifications, do not try and "reinvent the wheel." Color inside the lines and use tried and true language. Despite well-settled law about what constitutes a proper affidavit, many affidavits used to support injunctive relief are deficient. Generally speaking, an affidavit must be: (1) based on personal knowledge;[238] (2) unequivocal;[239] and (3) should not include factual or legal conclusions.[240] In other words, the affidavit should explain what the affiant knows and how they know it.

Rule 680 requires that requests for TROs be made "by affidavit or by the verified complaint," while Rule 682 requires an applicant seeking a "writ of injunction" to present his petition "verified by his affidavit". Petitions are often "sworn to" through the use of "verifications." The typical verification is included just after the lawyer's signature block and reads as follows:

> Verification
>
> State of Texas §
> County of ___ §
>
> Before me, the undersigned notary, on this day personally appeared (name of affiant), whose identity is known to me. After I administered an oath, [affiant] testified as follows:
>
> "My name is (name of affiant). I am capable of making this verification. I have read Plaintiff's Original Petition and Request for Injunctive Relief. The facts stated in paragraphs 12-24 are within my personal knowledge and are true and correct."
>
> _____
> (signature of affiant)
>
> Sworn to and subscribed before me by _____ on _____, 20_____.
>
> _____
> (signature of notary)[241]

Many lawyers underestimate how difficult it can be to draft a proper affidavit – especially on short notice. Careful attention must be paid to the form of the affidavit, which if done incorrectly, can render the entire affidavit insufficient. Any insufficiency can potentially result in the dissolution of a TRO obtained as a result of such defective affidavit. Frequently, mistakes concerning the form of the affidavit occur when corners are cut as a result of the scramble to prepare all of the injunction documents on only a few days' notice.

The Texas Government Code defines "affidavit" as a statement:

> (1) in writing of a fact or facts;
> (2) signed by the party making it;
> (3) sworn to before an officer authorized to administer oaths; and
> (4) officially certified to by the officer under his seal of office."[242]

The Texas Supreme Court has stated that the Government Code's definition contains the "statutory requirements" for an affidavit.[243]

A jurat is a certification by an authorized officer, stating that the writing was sworn to before the officer.[244] While a jurat is not technically required, usually an affidavit will include a jurat to prove that the written statement was made under oath before an authorized officer.[245] Consequently, an acknowledgment alone is insufficient.[246] An affidavit will routinely include a place for the affiant to sign at the end of his or her testimony, under which the following jurat appears:

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[238] *Humphreys v. Caldwell*, 888 S.W.2d 469, 470 (Tex. 1994); Tex. R. Evid. 608.

[239] For example, in a summary judgment context, Texas Rule of Civil Procedure 166a(f) requires an affiant to "positively and unqualifiedly represent that the 'facts' disclosed [in an affidavit] are true." *See also Ryland Grp., Inc. v. Hood,* 924 S.W.2d 120, 122 (Tex.1996) (per curiam).

[240] *See Rockwall Commons Associates, Ltd. v. MRC Mortg. Grantor Trust I*, 331 S.W.3d 500, 512 (Tex. App.—El Paso 2010, no pet.)("A conclusory statement is one that does not provide the underlying facts to support the conclusion and, therefore, is not proper summary-judgment proof."); *See also Ellis v. Jansing*, 620 S.W.2d 569, 571 (Tex. 1981)(testimony that a party held "adverse possession" to real property was insufficient).

[241] *See* O'Connor's Texas Civil Forms (2014); Form 1B:6 Verification.

[242] TEX. GOV'T CODE §312.011(1).

[243] *Mansions in the Forest, L.P. v. Montgomery County*, 365 S.W.3d 314, 316 (Tex. 2012).

[244] *Id.* (citing *Perkins v. Crittenden,* 462 S.W.2d 565, 568 (Tex.1970).

[245] *Id.*

[246] *Lawyers Sur. Corp. v. Sevier*, 342 S.W.2d 604, 607 (Tex. Civ. App.—Dallas 1961, no writ).

> Sworn to and subscribed before me by _____ (name of the affiant) on this the _____ day of _____, 20____.

The notary will then sign under the jurat and place his or her notarial stamp next to his or her signature. When a purported affidavit lacks a jurat, other evidence must show that it was sworn to before an authorized officer and thus satisfies the Government Code's definition of "affidavit."[247]

In addition to mistakes related to the form of an affidavit, other deficiencies may exist. For example, the affidavit may fail to show how it is based on the affiant's personal knowledge. Proper affidavits typically take a common form and will contain an introductory clause such as:

> Before me, the undersigned authority, on this day personally appeared, ____, who being by me duly sworn on his oath deposed and said:
>
> "My name is _____ and I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.[248]

Such a recitation, however, does not, in and of itself, establish that the affiant is competent to make the affidavit.[249] In other words, it may be necessary to include additional facts that explain how the affiant gained his or her personal knowledge.

V. DRAFTING A PROPER TEMPORARY RESTRAINING ORDER AND INJUNCTION

Texas Rule of Civil Procedure 683 sets forth the requirements for a proper restraining order and injunction. Texas Rule of Civil Procedure 680 also provides additional requirements or items that must be included in the TRO. It cannot be emphasized enough that these rules must be reviewed very carefully so as to not draft a voidable TRO or temporary injunction. Again, use a checklist.

A. Key Requirements

1. The Order Must State the Reasons for its Issuance

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance.[250] For example, in a guardianship case, language similar to the following could be included in the TRO to describe the reasons for its issuance:

> The Court FINDS that there is evidence that:
>
> 1. Applicant and her property are threatened with imminent, irreparable harm.
>
> 2. The Defendant: (1) has engaged in continuous and *prima facie* self-dealing transactions with the Proposed Ward's property, including repeatedly spending and transferring the Proposed Ward's assets in a manner that does not appear to benefit the Proposed Ward; (2) is refusing to provide information about the Proposed Ward's property to her; (3) is denying the Proposed Ward the use of, or access to, her property; and (4) is refusing to agree to stop using the power of attorney granted to him by the Proposed Ward. This Court further finds that such actions are likely to continue to the detriment to the Proposed Ward.
>
> 3. Such injuries would be irreparable, because, without access to her property, the Proposed Ward's cost of care and other monthly expenses cannot be adequately paid which could result in numerous incalculable damages. Consequently, the Proposed Ward cannot be adequately compensated in damages.
>
> 4. The foregoing conduct demonstrates that unless the Court issues this TRO immediately and without notice to Defendant, and thereafter a temporary injunction, it is reasonably foreseeable that Defendant will attempt and perhaps succeed in dissipating and depleting substantial amounts of the Proposed Ward's assets and deny the Proposed Ward the use and benefit of her property and/or its proceeds, which are needed for her costs of care.

2. The Order Must Be Specific in its Terms

Rule 683 requires every order granting an injunction to be specific in its terms.

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[247] *Mansions in the Forest, L.P. v. Montgomery County*, 365 S.W.3d 314, 316-17 (Tex. 2012).

[248] *See* O'Connor's Texas Civil Forms (2014); Form 1B:7 Affidavit.

[249] *See e.g. Miller v. Raytheon Aircraft Co*., 229 S.W.3d 358, 365 to 366 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

[250] TEX. R. CIV. P. 683.

3. The Order Must Describe the Acts Sought to be Restrained

The language in the petition or application for injunctive relief describing the acts to be restrained should mirror what is in the actual TRO and/or injunction.

4. The Order Must Include a Bond

Rule 684 specifically states, "*In the order* granting any TRO or temporary injunction, the court shall fix the amount of security to be given by the applicant." The bond must be filed and approved by the clerk before the TRO or temporary injunction issues.[251]

> Bond is hereby set in the amount of $_____, which may be satisfied by applicant depositing with the county clerk such amount in the form of an attorney's check or cashier's check.

5. The Order Must Set the Cause for Trial

Every restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought.[252] The same rule applies to temporary injunction, in that a trial date must be included in the order granting a temporary injunction.[253]

> The Clerk of this Court shall issue notice to _____ named above that the hearing on Applicant's Application for Temporary Injunction is set for _____ ____, 20___, at _____ a.m./p.m. The purpose of this hearing shall be to determine whether this TRO should be made a temporary injunction pending a final trial on the merits.

6. Ex Parte TRO Must Include Date and Hour of Issuance

Every TRO granted without notice shall be endorsed with the date and hour of issuance.[254]

> SIGNED on this the _____ day of _____, 20____ at _____a.m./p.m.

7. Ex Parte TRO Must Define Injury, Explain Why it is Irreparable and Explain Why it was Issued Without Notice

Every TRO granted without notice shall define the injury and state why it is irreparable and why the order was granted without notice.

8. Every TRO Must Expire By its Terms within 14 days

Every TRO granted without notice shall expire *by its terms* within such time after signing, not to exceed fourteen days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

> This TRO expires on Friday, April 1, 2015, such date being less than 14 days from the date of this TRO.

B. Dissolving a Defective Temporary Restraining Order or Injunction

The proper method for dissolving a temporary injunction is to file a motion to dissolve. A party opposing a TRO may appear and move its dissolution or modification on two days' notice to the party who obtained the TRO without notice or on such shorter notice to that party as the court may prescribe.[255] In such situations, the court is required to proceed to hear and determine such motion as expeditiously as the ends of justice require.[256]

The defendant to an injunction proceeding may answer as in other civil actions, but no injunction shall be dissolved before final hearing because of the denial of the material allegations of the plaintiff's petition, unless the answer denying the same is verified by the oath of the defendant.[257]

Similar to granting an injunction, a determination of whether to dissolve an injunction lies within the sound discretion of the trial court, and its determination will not be overruled absent a clear abuse of discretion.[258] Typically, a trial court may modify an injunction because of fundamental error or changed circumstances, "but has no duty to reconsider the grant

[251] TEX. R. CIV. P. 684 (emphasis added).
[252] TEX. R. CIV. P. 680 and 683.
[253] TEX. R. CIV. P. 683.
[254] TEX. R. CIV. P. 680.
[255] TEX. R. Civ. P. 680.
[256] *Id.*
[257] TEX. R. CIV. P. 690.
[258] *In re Guardianship of Stokley*, 05-10-01660-CV, 2011 WL 4600428, at *3 (Tex. App.—Dallas Oct. 6, 2011, no pet.)(citing *Universal Health Servs. v. Thompson,* 24 S.W.3d 570, 580 (Tex. App.–Austin 2000, no pet.).

of an injunction if the movant fails to present *new* evidence showing fundamental error or changed conditions."[259] As the Dallas Court of Appeals noted, "The purpose of a motion to dissolve is 'to provide a means to show changed circumstances or changes in the law that require modification or dissolution of the injunction; the purpose is not to give an unsuccessful party an opportunity to relitigate the propriety of the original grant.'"[260] In other words, "a trial court generally has no duty to dissolve an injunction unless fundamental error has occurred or conditions have changed."[261]

Fundamental error exists "in those rare circumstances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas."[262] Texas courts have explained that "changed circumstances are conditions that altered the status quo existing after the injunction was granted or that made the injunction unnecessary or improper."[263] Keep in mind, that "changed circumstances may include an agreement of the parties, newly revealed facts, or a change in the law that make the temporary injunction unnecessary or improper."[264]

Again, the procedural requirements of Rule 683 are mandatory and must be strictly followed.[265] Texas courts scrutinize orders granting temporary injunctive relief in determining whether they comply with the Texas Rules of Civil Procedure. In fact, failure of an order granting temporary injunctive relief to meet the requirements of rule 683 renders the order fatally defective and void, whether specifically raised by point of error or not.[266]

In a hearing to dissolve a temporary injunction, the moving party assumes the burden of negating facts supporting the issuance of the injunction.[267]

1. The Most Common Grounds for Dissolution

While there may be numerous reasons to seek to dissolve a temporary injunction, there are several common defects that, despite a plethora of case law, continue to crop up.

a. Failure to Set Trial Date

All orders that grant a temporary injunction are required to include an order setting the cause for trial on the merits.[268] Dissolution is mandated in cases were a temporary injunction order does not include a date for trial on the merits with respect to the ultimate relief sought.[269] The reason for requiring that an injunction order include a trial date is to prevent the temporary injunction from effectively becoming permanent.[270] Moreover, the rules of procedure "are not to be ignored by agreements of courts and counsel to operate contrary thereto and in violation thereof."[271] Thus, even agreed temporary injunctions must set a final trial date on the merits of the underlying lawsuit.[272]

b. Failure to Require Bond

Texas Rule of Civil Procedure 684 specifically requires the applicant to post an injunction bond before

[259] *Id.* (quoting *Universal Health Servs.,* 24 S.W.3d at 580 (emphasis in original) (citing *Henke v. Peoples State Bank,* 6 S.W.3d 717, 721 (Tex. App.-Corpus Christi 1999, pet. dism'd w.o.j.)).

[260] *Id.* quoting *Kassim v. Carlisle Interests, Inc.,* 308 S.W.3d 537, 540 (Tex. App.–Dallas 2010, no pet.) (quoting *Tober v. Turner of Texas, Inc.,* 668 S.W.2d 831, at 836 (Tex. App.–Austin 1984, no writ).

[261] *Id.* quoting *Kassim,* 308 S.W.3d at 540.

[262] *Id.* citing *Pirtle v. Gregory,* 629 S.W.2d 919, 920 (Tex.1982); *see also In re C.O.S.,* 988 S.W.2d 760, 765 (Tex.1999); *Universal Health Servs.,* 24 S.W.3d at 580.

[263] *Id. See Universal Health Servs.,* 24 S.W.3d at 580; *City of San Antonio v. Singleton,* 858 S.W.2d 411, 412 (Tex.1993) (citing *Henke,* 6 S.W.3d at 721).

[264] *Id. Murphy v. McDaniel*, 20 S.W.3d 873, 877 (Tex. App.–Dallas 2000, no pet.).

[265] *Conway v. Shelby*, 432 S.W.3d 377, 380 (Tex. App.—Texarkana 2014, no pet.)(citing *Qwest Commc'ns Corp. v. AT & T Corp.,* 24 S.W.3d 334, 337 (Tex. 2000) (per curiam); *InterFirst Bank San Felipe, N.A. v. Paz Constr. Co.,* 715 S.W.2d 640, 641 (Tex. 1986) (per curiam)(temporary injunction void because the order did not set the cause for trial on the merits).

[266] *Leighton v. Rebeles*, 343 S.W.3d 270, 273 (Tex. App.—Dallas 2011, no pet.)(citing *See Indep. Capital Mgmt., L.L.C. v. Collins,* 261 S.W.3d 792, 795 (Tex. App.–Dallas 2008, no pet.); *EOG Resources, Inc. v. Gutierrez,* 75 S.W.3d 50, 53 (Tex. App.–San Antonio 2002, no pet.).

[267] *Calvary Temple v. Taylor,* 288 S.W.2d 868 (Tex. Civ. App.—Galveston 1956, no writ); *Crystal Media, Inc. v. HCI Acquisition Corp.*, 773 S.W.2d 732, 734 (Tex. App.—San Antonio 1989, no writ).

[268] Tex. R. Civ. P. 683.

[269] *Leighton v. Rebeles*, 343 S.W.3d 270, 273 (Tex. App.—Dallas 2011, no pet.)

[270] *Leighton v. Rebeles*, 343 S.W.3d 270, 273 (Tex. App.—Dallas 2011, no pet.).

[271] *Lyle v. Hart*, 05-93-00447-CV, 1993 WL 319415, at *6 (Tex. App.—Dallas Aug. 16, 1993), *writ dismissed by agreement* (Sept. 22, 1994)(quoting *Missouri Pacific Railroad Co. v. Cross,* 501 S.W.2d 868, 872 (Tex. 1973)).

[272] *Lyle v. Hart*, 05-93-00447-CV, 1993 WL 319415, at *6 (Tex. App.—Dallas Aug. 16, 1993), *writ dismissed by agreement* (Sept. 22, 1994)("Nowhere in this record did the parties agree not to have a final trial on the merits or to make the injunction permanent. Failure to include a trial date in the Agreed Order voids that order as a temporary injunction. Consequently, the trial court abused its discretion in refusing to dissolve the Agreed Order.").

the injunction is issued. Texas courts have held that temporary injunctions were void when they failed to require the party obtaining the injunction to post bond.[273] If, on its face, an order granting a temporary injunction does not require a bond, the order is void ab initio.[274]

c. Failure to State the Reasons for its Issuance

The Texas Supreme Court has announced that under Rule 683, the reason for granting a temporary injunction must be stated in the order. The trial court is not required to explain its reasons for believing that the applicant has shown a probable right to final relief, but it is necessary to give the reasons why injury will be suffered if the interlocutory relief is not ordered.[275]

As the El Paso Court of Appeals explained, "[B]ecause probable injury subsumes the elements of irreparable injury and no adequate remedy at law, a valid injunction must articulate the reasons why the identified probable injury is an irreparable one for which [applicants] have no adequate legal remedy."[276]

Consequently, an injunction that fails to identify the harm that will be suffered if it does not issue must be declared void and be dissolved.[277] This rule will invalidate an injunction even when the complaining party fails to bring the error to the trial court's attention.[278] Moreover, the temporary injunction order is invalid if it does not explain why injury will be suffered if the temporary injunction is not ordered.[279] In the words, the temporary injunction should: (1) identify the harm that will be suffered if it is not granted; and (2) explain why the harm will result if it is not granted.

Remember that the reasons a trial court gives for granting a temporary injunction must be specific and legally sufficient, and not mere conclusory statements.[280] Consequently, the specificity required by Rule 683 is not satisfied by "the mere recital of 'no adequate remedy at law' and 'irreparable harm.'"[281]

C. Writ of Injunction

Rule 687 governs the contents of the writ of injunction, while Rules 688 and 689 govern who is supposed to prepare and serve the writ. Rule 687 applies to both temporary injunctions and TROs. For example, Texas courts have stated that a temporary restraining order is a writ of injunction within the meaning of Rule 682 of the Texas Rules of Civil Procedure.[282]

As stated previously, it is not enough to serve the defendant with a citation, a copy of the petition, and a copy of the TRO. Rule 688 requires that the *writ of injunction* – which is a legal document prepared by the

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[273] *Lancaster v. Lancaster*, 155 Tex. 528, 536, 291 S.W.2d 303, 308 (1956); *In re McCray*, 05-13-01195-CV, 2013 WL 5969581, at *2 (Tex. App.—Dallas Nov. 7, 2013, no pet.) ("Because the temporary injunction in this case neither sets a bond nor states that it is dispensing with the necessity of one, we conclude the temporary injunction is void.").

[274] *Cornelison v. Offshore Entm't Corp.*, 13-02-00452-CV, 2002 WL 34231619, at *1 (Tex. App.—Corpus Christi Dec. 5, 2002, no pet.)(citing *Smith v. Ticor Title Ins. Co.,* 692 S.W.2d 531, 532 (Tex. App.—El Paso 1985, no writ).

[275] *State v. Cook United, Inc.*, 464 S.W.2d 105, 106 (Tex. 1971).

[276] *Fasken v. Darby*, 901 S.W.2d 591, 593 (Tex. App.–El Paso 1995, no writ)(holding injunction did not comply with Rule 683 because it does not identify the harm that surface owner would have suffered if it had not issued).

[277] *Fasken v. Darby*, 901 S.W.2d 591, 593 (Tex. App.—El Paso 1995, no writ)(citing *Moreno v. Baker Tools,* 808 S.W.2d 208, at 210 (Tex. App.–Houston [1st. Dist.] 1992, no writ); *Hermann Hosp. v. Thu Nga Thi Tran,* 730 S.W.2d 56, 58 (Tex. App–Houston [14th Dist.] 1987, no writ).

[278] *Id.* citing *Hopper v. Safeguard Business Systems,* 787 S.W.2d 624, 626 (Tex. App.—San Antonio 1990, no writ); *Courtlandt Place Historical Foundation v. Doerner,* 768 S.W.2d 924, 926 (Tex. App.—Houston [1st Dist.] 1989, no writ) (citing *Interfirst Bank San Felipe v. Paz Const.,* 715 S.W.2d 640, 641 (Tex.1986) (holding that "requirements of Rule 683 are mandatory and must be strictly followed")); *See also Hopper v. Safeguard Business Systems,* 787 S.W.2d 624, 626 (Tex. App.—San Antonio 1990, no writ); *Courtlandt Place Historical Foundation v. Doerner,* 768 S.W.2d 924, 926 (Tex. App.—Houston [1st Dist.] 1989, no writ) (citing *Interfirst Bank San Felipe v. Paz Const.,* 715 S.W.2d 640, 641 (Tex.1986) (holding that "requirements of Rule 683 are mandatory and must be strictly followed")).

[279] *Int'l Broth. of Elec. Workers Local Union 479 v. Becon Const. Co., Inc.*, 104 S.W.3d 239, 243 (Tex. App.—Beaumont 2003, no pet.)(citing *Moreno v. Baker Tools, Inc.,* 808 S.W.2d 208, 210 (Tex. App.–Houston [1st Dist.] 1991, no writ)).

[280] *Int'l Broth. of Elec. Workers Local Union 479 v. Becon Const. Co., Inc.*, 104 S.W.3d 239, 244 (Tex. App.—Beaumont 2003, no pet.)(Temporary injunction which read: "[T]he Court finds that the Defendants have and continue to violate the provisions of Texas Labor Code § 101.152 causing irreparable harm to Becon Construction Company" did not constitute a reason why injury will be suffered if the interlocutory relief was not ordered, did not identify the probable interim injury that would be suffered if it did not issue, and did not articulate why the injury (were it identified) was an irreparable one for which party seeking injunction has no adequate legal remedy, and, consequently it failed to meet the requirements of Rule 683); Citing *University Interscholastic League v. Torres,* 616 S.W.2d 355, 358 (Tex. Civ. App.–San Antonio 1981, no writ).

[281] *Id.* quoting *Torres,* 616 S.W.2d at 358.

[282] *Ex parte Coffee*, 160 Tex. 224, 328 S.W.2d 283, 290 (Tex. 1959) (orig. proceeding); *Ex parte Rodriguez*, 568 S.W.2d 894, 897 (Tex. Civ. App.–Fort Worth 1978, orig. proceeding).

clerk – must be served on the defendant. It is critical for applicant's counsel to personally review the writ of injunction and check it against Rule 687 before it is served. Note that Rule 687(e) contains different notice and return deadlines for TROs and temporary injunctions. If it is a TRO, it shall state the day and time set for hearing, which shall not exceed fourteen days from the date of the court's order granting such TRO; but if it is a temporary injunction, issued after notice, it shall be made returnable at or before ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of service thereof, as in the case of ordinary citations.[283]

Making sure the writ of injunction is properly prepared and served can be critical, as failure to do so, may render the TRO or temporary injunction void.[284]

D. Citation

Under Rule 686, when the request for injunctive relief is included in a brand new lawsuit, the clerk issues citation as in other civil cases, which shall be served and returned in the same manner as ordinary citations.[285] But, when an applicant obtains a TRO at the same time the lawsuit is filed, only one citation is needed when the TRO and underlying lawsuit are served together ("it shall be sufficient for the citation to refer to plaintiff's claim as set forth in a true copy of plaintiff's petition which accompanies the TRO").[286]

VI. OBTAINING AN EX-PARTE TEMPORARY RESTRAINING ORDER

Aside from thoroughly checking your court's local rules to confirm you have met any notice and/or conference requirements before attempting to "walk through" an ex-parte TRO, it is important to have a sense of the judge's schedule. As a practical matter, you should generally not attempt to get a TRO signed late in the afternoon – especially Friday afternoon.

When meeting with the judge, you should convey to him or her what conduct your client is seeking to restrain and what is going to happen if nothing is done.

Beyond the rigors and formalities of all of the associated rules and procedures, the credibility of counsel seeking injunctive relief can never be overstated. When asked, most judges would likely admit that the primary factor that they weigh when considering an ex parte TRO is the credibility of the attorney asking for relief. Since only a single side of the story is presented in this context, nothing serves an applicant better than a lawyer that the courts can trust.

Judicial currency, as at least one jurist puts it, is invaluable in the world of injunctive relief. This credibility is typically gained the hard way, by showing the courts time and again that your harm is real, your relief appropriate and your facts accurate. Conversely, we lose judicial currency quite easily. Overstated injuries, broad-form relief and stretching the truth will diminish an attorney's ability to persuade the courts for ex parte relief – even when no opposing counsel is arguing against the attorney.

VII. SERVING THE TEMPORARY RESTRAINING ORDER

Due to the very nature of emergency temporary injunctive relief, it is critical that the defendant and any relevant third parties be served immediately. In fact, if priority must be given between financial institutions and the defendant, it is probably better to serve the financial institutions first. If you attempt to serve the defendant, he or she may not be persuaded by a piece of paper and, at that point, it's a race between your process server and the defendant to the banks.

In advance of walking a TRO down for approval, this author will prepare letters transmitting the TRO to the financial institutions where critical funds are on deposit so that the financial institutions can freeze or lock up the accounts. If you cannot get good contact information for the financial institution's writ and levy department, then simply address the letters to the president of a local branch, with a copy to the financial institutions registered agent. This author's practice is to have a process server on standby at the courthouse so the TRO "package" can be served immediately, as soon as the clerk prepares the required citation and writ of injunction. Upon receiving confirmation that the financial institutions have been served, service on the defendant should be authorized and effected. A sample letter transmitting the writ of injunction and TRO to a third party financial institution is attached as **APPENDIX 3**.

It will often be the case that the plaintiff who has successfully obtained a TRO – or a defendant against whom a TRO has been issued – will want to obtain discovery before the temporary injunction hearing 14 or 28 days later (if the TRO is extended). Because these dates will not allow for the normal discovery periods, such discovery will need to be expedited by court order. A court may issue a discovery control plan "tailored to the circumstances of the specific suit" under Texas Rule of Civil Procedure 190.4(a).

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[283] TEX. R. CIV. P. 687.

[284] *See e.g. Schliemann v. Garcia*, 685 S.W.2d 690, 693 (Tex. App.—San Antonio 1984, no writ)("The required filing, docketing, and citation procedures were not complied with [citing TEX. R. CIV. P. 685, 686] . . . The writ of injunction did not comply with the requisites of TEX. R. CIV. P. 687 [and] [t]he injunction was not properly issued or served [citing TEX. R. CIV. P. 688, 689].").

[285] TEX. R. CIV. P. 686.

[286] *Id*.

Also, the court may modify a discovery control plan at any time and "must do so when the interest of justice requires."[287] Frequently, the expedited discovery deadlines are contained in the TRO order or may be contained in a separate order specifically controlling discovery.

VIII. THE TEMPORARY INJUNCTION HEARING

A. The Hearing

1. Develop a Theme and Go for the Jugular.

The Court has limited time to review your case. The facts and law should be developed in a concise manner to make the Court comfortable that your position is on solid ground. Make sure that you develop a theme that goes for the jugular to compel the Court to join your position.

2. Select an Appropriate Spokesperson Witness.

One of the most important decisions is to select an appropriate witness to articulate the theme to the Court. It is essential that this person be knowledgeable, reliable, credible, and convincing. This person will typically work most closely with the lawyers to educate them in the early stages of the case and will become the person who sits at counsel table in the courtroom to provide support to counsel, to humanize the plaintiff (or defendant, as these considerations are equally applicable to both sides), and to be available to take the witness stand when needed.

3. Make Sure that the Facts Support Your Legal Contentions with Admissible Evidence.

Judges detest long fights over the admissibility of evidence. This puts a premium on the party seeking injunctive relief being prepared to offer evidence in admissible form. The evidence accompanying the motion for TRO or preliminary injunction should provide enough factual basis to back up the contentions. For each item of documentary evidence, either have it proved up by affidavit or have a sponsoring witness ready to lay the foundation for its admissibility.[288]

4. Tell the Court Why the Temporary Injunction is Needed Now.

Obviously, if the matter has been in dispute for a lengthy period of time, there is some question as to whether a temporary injunction is warranted or not. However, there may be situations even where there has been a lengthy delay where a change of circumstances may suddenly warrant the request for temporary injunction. Typical examples may be a significant decrease in the cognitive functioning of a proposed ward combined with erratic spending or atypical or unnatural gifting. Other examples may be sudden suspicious transactions combined with the refusal to provide disclosure. These facts need to be brought to the attention of the Court.

B. Other Considerations

1. Be Prepared for an Agreed TRO or Injunction.

If you are the plaintiff, from the first contact with your adversary, you should consider the possibility that your adversary may be willing to enter into an agreed TRO or temporary injunction. Some defendants, particularly those who either are caught off guard by the expedited proceedings or lack the resources to fight at full force, may be willing to consider such an arrangement. The beauty of an agreed TRO or temporary injunction, from a plaintiff's perspective, is that an agreed TRO or temporary injunction is not appealable unless its terms provide otherwise.

IX. ENFORCING TEMPORARY INJUNCTIONS BY CONTEMPT

Violations of all court orders, including TROs and temporary injunctions, can be punishable by contempt. Section 21.002(a) of the Texas Government Code provides courts with the authority to punish for contempt. Contempt is a "broad and inherent power of a court."[289] Contempt of court is broadly defined as "disobedience to or disrespect of a court by acting in opposition to its authority."[290] "Generally speaking, he whose conduct tends to bring the authority and administration of the law into disrespect or disregard, interferes with or prejudices parties or their witnesses during litigation, or otherwise tends to impede, embarrasses or obstruct the court in discharge of its duties is guilty of contempt."[291]

A. Criminal or Civil Contempt?

Contempt can be classified as either civil contempt or criminal contempt.[292] The question in differentiating between civil and criminal contempt is, "Why was the offending party held in contempt? Was

[287] TEX. R. CIV. P. 190.5.

[288] *See e.g. Perez v. Gil*, 04-03-00037-CV, 2003 WL 21011139, at *2 (Tex. App.—San Antonio May 7, 2003, no pet.)(Granting temporary injunctive relief without "a shred of supporting evidence" constitutes an abuse of discretion).

[289] *In re Reece*, 341 S.W. 3d 360, 362 (Tex. 2011).

[290] *Reece*, supra at 364, citing *Ex Parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995) (orig. proceeding).

[291] *Ex Parte Norton*, 191 S.W.2d 713, 714 (Tex. 1946).

[292] *Ex parte Krupps*, 712 S.W.2d 144, 149 (Tex. Crim. App. 1986): *Reece*, supra at 365.

it because he refused to comply with a court order, or is he being punished for some completed act which affronted the dignity of the court?" Civil contempt is "remedial and coercive in nature" and seeks to "persuade the contemnor to obey some order of the court," while criminal contempt is "punitive in nature."[293] In criminal contempt, "the contemnor is being punished for some completed act that affronted the dignity and authority of the court."[294] The distinction between the two is also important to determine what rights are afforded to the accused. In a criminal contempt case, the accused may exercise his or her constitutional right against self-incrimination.[295]

B. Direct or Constructive Contempt?

Whether the contemptuous behavior was direct or constructive has a major impact on the procedural requirements to impose sanctions. Direct contempt occurs within the presence of the court.[296] Constructive contempt occurs outside the court's presence.[297] In most cases, a court maintains authority to immediately address and punish direct contemptuous conduct.[298] This authority is based upon the premise that the court has direct knowledge of the contemptuous conduct and must expeditiously quash any disruption and maintain the order of the court; however, there is no requirement that a judge summarily punish such direct contemptuous conduct. The analysis is based upon exigency and "when the immediate need to maintain decorum in the courtroom dissipates, so too dissipates the judge's power to punish the contemptuous conduct without first affording the contemnor notice and an opportunity to be heard."[299] Most contempt in the context of violating a TRO or temporary injunction will be constructive.

In a constructive contempt situation, a court may not summarily punish based upon alleged contemptuous conduct, as there is no immediate need to quell the disruption.[300] Due Process requires that the accused party receive notice of the allegations and an opportunity to prepare a defense.[301] As a notice requirement, the court must issue a valid show cause order or some equivalent legal process that provides the alleged contemnor with notice of the allegations and provides him with an opportunity to prepare a defense.[302]

[293] *Ex Parte Werblud*, 536 S.W. 2d 542, 545 (Tex. 1976)
[294] *In re Reece*, 341 S.W. 3d 360, 365 (Tex. 2011)
[295] *Ex parte Werblud*, 536 S.W. 2d 542, 547 (Tex. 1976).
[296] *Ex parte Gordon*, 584 S.W. 2d 686, 688 (Tex. 1995); see also *Ex parte Krupps*, 712 S.W.2d 144 (Tex. Crim. App. 1986).
[297] *Gordon*, supra at 688, see also *Ex parte Chambers*, 898 S.W. 2d 257, 259 (Tex. 1995); *Ex parte Werblud*, 536 S.W. 2d 542, 546 (Tex. 1976); *Ex parte Krupps*, 712 S.W.2d 144 (Tex. Crim. App. 1986).
[298] *Reece*, supra at 364.
[299] *Ex parte Knable*, 818 S.W.2d 811, 813, 811 (Tex. Crim. App. 1991)
[300] *Reece*, supra at 365
[301] *Id*.
[302] *Ex parte Gordon*, 584 S.W. 2d 686, 688 (Tex. 1995).

Spectrum of Cases Dealing with Imminence of Harm

Harm is Imminent → **Harm is Speculative**

Citation	*Terrell v. Terrell*, 279 A.D.2d 301, 301, 719 N.Y.S.2d 41, 42 (2001).	*Twyman v. Twyman*, 2009 Tex. App. Lexis 5552 (Tex. App.-[1st Dist.] Houston 2009).	*Callahan v. Lipscomb*, 412 S.W.2d 346 (Tex. Civ. App. 1967), writ refused NRE (June 14, 1967).	*In re Estate of Merkel*, No. 05-06-00045-CV, 2006 WL 3505238 (Tex. App. Dec. 6, 2006).	*In re Estate of Yerex,* 651 So. 2d 220, 221 (Fla. Dist. Ct. App. 1995).	*Benson v. Benson*, 573 S.W.2d 272 (Tex. Civ. App. 1978).
Facts	Plaintiff, son of decedent, moved for a preliminary injunction preventing defendant, granddaughter of decedent, from evicting plaintiff from a house possibly owned by the estate during pendency of actions to determine ownership of the house.	Attorney-in-fact sought temporary injunction restraining trustee from further withdrawing trust funds.	Temporary administrator moved for temporary injunction restraining beneficiaries estate from disposing of property belonging to a corporation in which estate allegedly had a property interest, selling or transferring stock of corporation, and disposing of real and personal property at certain address.	Alleged surviving spouse moved for temporary injunction restraining independent executor from selling, encumbering, or affecting value of alleged marital residence, and from obtaining, forwarding, or submitting any document signed by alleged surviving spouse requesting pay off of federal tax liens.	Personal representative sought injunctive relief to enjoin surviving wife from transferring or dissipating decedent's property interests without court order.	Principal beneficiaries of holographic will sought temporary injunction against independent executor of formal will previously admitted to probate, restraining executor from encumbering, concealing, or harming estate property, incurring indebtedness, and spending cash from the estate.
Trial Court Result	Denied	Granted	Granted	Denied	Denied	Denied
Appellate Court Result	Reversed	Affirmed	Affirmed	Affirmed	Affirmed	Affirmed
Reasoning	Denial of injunction would cause imminent harm given that plaintiff was physically disabled, financially constrained, had lived in the house for the past 8 years, and had no other place to live.	Trustee's *past behavior* of withdrawing trust funds for personal use, combined with failure to repay the funds demonstrated that primary beneficiary would suffer imminent, irreparable harm if trustee was not enjoined from disbursing money from trust.	Denial of preliminary injunction *might cause* imminent harm because conflicting evidence suggested the estate might own an interest in the corporation, and beneficiaries were authorized to draw on bank account of corporation, which could cause irreparable injury to the estate.	Alleged surviving spouse failed to prove imminent harm because he presented no evidence that the sale of the house was imminent, and because he himself had placed a lis pendens on the property.	Imminent harm not shown because personal representative failed to identify any particular asset that was threatened, or how surviving wife was likely to threaten the assets. *Past conduct alone was insufficient to show imminent harm.*	Imminent harm not shown because beneficiaries *failed to show any conduct, past or present*, which had or would injury the estate. The injunction sought was so broad as to prevent the independent executor from properly administering the estate.

APPENDIX 1

Temporary Restraining Order (TRO) / Temporary Injunction (TI) Checklist

- ☐ I have everything I need to take to the courthouse:
  - My petition (with copies to file, provide to the Judge, and serve);
  - My proposed order;
  - My check for the bond and my check for citation/service; and
  - Contact information for third parties, my process server and:
    - For a TRO, my calendar showing my availability and my client's availability the next 14 days; and
    - For a TI, my calendar showing my availability and my client's availability for a trial on the merits.

- ☐ My underlying cause of action supports injunctive relief.

- ☐ My pleadings are sufficient.
  - A person with personal knowledge of the facts verified each factual allegation or signed a supporting affidavit.
  - I identified a probable right to relief.
  - I sufficiently identified and described:
    - Imminent harm and irreparable injury;
    - The inadequacy of other legal remedies;
    - The persons(s) that I want restrained; and
    - The act(s) or conduct that I want restrained.
  - If I am requesting a temporary restraining order, I have also pled for temporary injunctive relief during the pendency of the case.

- ☐ If I want an ex parte order, I have explained why this extraordinary relief is necessary and why the order should issue immediately, without notice to another person.

- ☐ My proposed orders are specific and enforceable.
  - My proposed TRO / TI clearly states the reasons for its issuance;
  - My proposed ex parte TRO clearly identifies and defines the injury, why it is irreparable and explains why it was issued without notice to another party;
  - My proposed TRO/TI clearly identifies the person(s) that I want restrained;
  - My proposed TRO/TI clearly identifies the act(s) or conduct that I want restrained;
  - My proposed TRO/TI clearly identifies the Bond that my client will post;
  - My proposed TRO clearly includes a blank for the Court to fill in a hearing date on my application for a TI;
  - My proposed TI clearly includes a blank for the Court to fill in a hearing date for a trial on the merits; and
  - My proposed ex parte TRO includes a blank for the Court to fill in the date and hour of its issuance.

- ☐ The Clerk has prepared, and I have reviewed, the writ of injunction.

- ☐ The Clerk has prepared, and I have reviewed, the citation.

- ☐ I am prepared to send notice of the TRO to any third-party in possession of the subject property that I want to protect and preserve.

- ☐ I have arranged for service upon the person(s) that I want to restrain and/or enjoin.

APPENDIX 2

Firm Letter Head

Date

Bank **Via Hand Delivery**
Address

Re: **URGENT ACTION REQUIRED: Notice of Temporary Restraining Order**

To Whom It May Concern:

Enclosed are copies of a *Writ of Injunction* and a *Temporary Restraining Order and Order Setting Hearing for Temporary Injunction* (the "Order"). Please immediately freeze all accounts referenced in the Order, do not allow any further transactions on such accounts without further court order and do not cooperate with _____ in any attempt he may make to thwart or violate the language of the Order.

If you have any questions, please feel free to contact me at _____.

Sincerely,

Attorney

Enclosures

Cc: Client (by email)

Registered Agent
Address
(by Hand Delivery)

APPENDIX 3